



ClientAlert

Issue No. 8.3 & 8.4 | August & September 2017

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Introduction

Dear Reader,

This month saw a handful of new regulations that affect business in Vietnam. We've briefed them and outlined the most important changes from each new regulation. They cover topics ranging from corporate governance to electricity operation licenses and online work permits to asset auction rules.

As always we hope you find this month's Client Alert helpful and wish you prosperity in the coming holiday season. We look forward to working with you.

Kind regards,
Indochine Counsel

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Corporate governance applicable to public companies

On 6 June 2017 the Government issued Decree No. 71/2017/ND-CP (“**Decree 71**”) on guiding corporate governance of public companies. Decree 71 replaces Circular No. 121/2012/TT-BTC on corporate governance of public companies (“**Circular 121**”) from 1 August 2017. The key points of Decree 71 are as follows:

1. In comparison with Circular 121, the organizational structure and operation of a Board of Management (“**BOM**”) under Decree 71 are different. In particular, Article 12.2 of Decree 71 provides that the Chairman of the BOM shall not concurrently hold the position of Director / General Director) in a public company. Further, the Members of the BOM of any public company cannot concurrently be Members of the BOM of more than five other companies under Article 12.3. However, the above regulations shall not take effect at the same time with the effective date of Decree 71 (i.e. 1 August 2017). Instead, Article 12.2 will take effect three years after the effective date of Decree 71 and Article 12.3 shall take effect two years after the effective date of Decree 71.

In addition, the internal rules of a company can no longer be drafted and issued by a BOM as provided under Circular 121 but it must be formulated by the BOM and then submitted to the General Meeting of Shareholders the (“**GMS**”) to approve.

2. Decree 71 provides for a new corporate position, “person in charge of corporate governance”, who is appointed by the BOM and must not concurrently work for the independent auditing company which audits the financial statements of the company. The person in charge of corporate governance has the right to advise and assist the BOM and other bodies of the company in corporate governance, such as preparation of meetings of the BOM, of the inspection committee and of the GMS as requested by the BOM or inspection committee; advice on meeting procedures; etc.
3. The regulations on transactions with shareholders and enterprise managers and their related persons is explicated in detail. Under Article 26.2, a public company is permitted to grant loans or guarantees to shareholders or to their related persons, except in some specific cases. For instance, if a public company is a credit institution, it is allowed to grant loans or guarantees to shareholders being organizations or to their related persons being individuals. By contrast, this regulation differs from Article 24.3 of Circular 121 where loans and guarantees granted by a public company are strictly prohibited for shareholders and their related person.

In addition, the scope of transactions that can be approved by the BOM is expanded. As prescribed by Article 26.5, the BOM can approve contracts and transactions for which the value is less than 35% of the total value of assets recorded in the most recent financial statements or at a smaller percentage as prescribed in the charter with the following entities:
(i) members of the BOM, an inspector, the Director / the General Director or other manager

and any related person of such entities; (ii) shareholders or an authorized representative of a shareholder owning more than 10% of the total ordinary share capital of the company and any related person of such entities; (iii) enterprises related to the entities prescribed in Article 159.2 of the Law on Enterprises.

4. Criteria and conditions for an inspector of the inspection committee have been changed. Under Circular 121, an inspection committee must include at least one member who is the accountant or the auditor. Under Decree 71, the head of the inspection committee must be an accountant or auditor. Moreover, the member who acts as the head of the inspection committee must work full-time for the company.
5. Decree 71 also provides for provisions on obligations of report and disclosure of information, supervision and dealing with breaches, etc.

Duties of the world heritage management organization

On 21 September 2017 the Government issued Decree No. 109/2017/ND-CP on the protection and management of the World Cultural and Natural Heritage in Vietnam (“**Decree 109**”)

Some of the highlighted regulations

The management and use of the world heritage organization is responsible for sale of tickets, collecting the entrance fees as well as providing guidance and explanation for visitors who visit the heritage site. World cultural heritages should be periodically supervised to timely prevent acts of infringement through the application of science and technology in the preservation of geological values and aesthetic values.

Financial resources for the protection and management of world heritage sites includes:

- (a) State budget;
- (b) Charges for visiting fees which shall comply with the laws on charges and fees belonging to the State budget;
- (c) Amounts collected from service activities at the World Heritage sites;
- (d) Donations and contributions of organizations and individuals inside and outside of Vietnam; and
- (e) Other legal financial sources.

The authorities defined below shall prepare, appraise and approve the World Heritage Management Plan:

- (a) In cases where the world heritage sites are distributed in one province or central city, the Head of the People's Committees of the provinces and central cities (hereinafter collectively

referred to as the provincial-level People's Committees) or the heads of the ministries and branches assigned directly to manage the world heritage sites shall have to organize the preparation and approve the international World Heritage Management Plans under their respective authorities. The Ministry of Culture, Sports and Tourism shall take the lead in the appraisal of the management of the World Heritage Management Plans.

- (b) In cases where the world heritage sites fall under the management authorities of the provincial-level People's Committees and are distributed in two or more provinces, the Ministry of Culture, Sports and Tourism shall decide to select the Head of the Provincial People's Committee that is responsible for organizing the World Heritage Management Plans. The Head of the relevant Provincial People's Committees are responsible for coordinating the World Heritage Management Plans. After reaching approval on the contents of the World Heritage Management Plans, the Head of the provincial People's Committee shall take the lead in the preparation of the World Heritage Management Plans. Concurrently, the Head of the provincial People's Committee must request that the Ministry of Culture, Sports and Tourism appraise and approve the World Heritage Management Plans. The Ministry of Culture, Sports and Tourism shall therefore take the lead in the appraisal and approval of the World Heritage Management Plans.

The Decree also specifies the responsibilities of the Ministry of Culture, Sports and Tourism, other relevant ministries, ministerial-level agencies, provincial people's committees and the National Council for Cultural Heritage.

Decree 109 took effect on 10 November 2017.

Management and development of industrial clusters

On 31 August 2017 the Ministry of Industry and Trade issued Circular No. 15/2017/TT-BCT ("**Circular 15**") on regulating and guiding the implementation of Decree 68/2017/ND-CP ("**Decree 68**") of the Government, dated 25 May 2017, on the management and development of industrial clusters.

According to Circular 15, a master plan on the development of industrial clusters within any one province (hereinafter referred to as "**a master plan**") belongs to the production infrastructure planning group; and shall be prepared for each 10 year period with the outlook for the next 10-year period.

The Department of Industry and Trade ("**DOIT**") shall preside over co-ordination with relevant Departments and branches and the People's Committee of Districts to prepare a master plan dossier which shall comprise the following documents:

- (i) Draft submission of the DOIT requesting approval of the master plan;
- (ii) Draft decision approving the master plan;
- (iii) Reports on finalization of the master plan after having obtained opinions from relevant

- agencies (comprising a general report and a summary report);
- (iv) General report on receiving and explaining opinions of Departments, branches, the People's Committee of Districts, organizations and individuals concerned;
 - (v) Written opinions of Departments, branches, the People's Committee of District, organizations and individuals concerned;
 - (vi) Decision approving the outline and estimated budget; and
 - (vii) Other documents and data (if any).

Another remarkable point of Circular 15 is the regulation on responsibilities of the Local Industry and Trade Agency. Particularly, the Local Industry and Trade Agency is the co-ordination agency which assists the Minister of Industry and Trade to exercise state administration of industrial clusters throughout the entire country as prescribed in Article 35 of Decree 68 as well as responsibilities for providing guidelines and resolving any issue arising during the process of implementation of this Circular.

Circular 15 took effect on 16 October 2017 and replaces Circular 39/2009/TT-BCT of the Ministry of Industry and Trade dated 28 December 2009 regulating implementation of the regulations on management of industrial clusters issued with Decision 105/2009/QĐ-TTg of the Prime Minister dated 19 August 2009.

Detailed regulations on implementation of the law on asset auction

Some new regulations on property auction activities

On 16 May 2017 the Government promulgated Decree No. 62/2017/ND-CP (“**Decree 62**”) providing details for some articles and measures to implement the Law on Property Auction. The governing scope of Decree 62 includes issuing and revoking auctioneer’s cards; online auctions; operational registration of the property auction enterprises which are established before the effective date of the Law on Property Auction.

According to Decree 62, the provincial level Department of Justice is the agency carrying out the procedures for granting and retracting auctioneer's cards. Auctioneer’s cards are only valid when the auctioneers are in organizations practicing auctions and will be rescinded if their auction practice certificates are revoked. As specified under Decree 62, a person having been granted an auctioneers card must not be concurrently working as a notary or bailiff.

For a property auction enterprise established before 1 July 2017 (i.e. the effective date of the Law on Property Auction) in need of conversion into a type of property auction enterprise prescribed in Article 23 of the Law on Property Auction shall, by hand or by post or by other appropriate form of submission, submit a request dossier (comprising types of documents specified in Article 25 of the Law on Property Auction) to the provincial level Department of Justice where the enterprise locates its

headquarters. The property auction enterprise that obtains a Certificate of Operation Registration from the provincial level Department of Justice shall inherit all legal rights and interests as well as obligations towards auctions operations of the property auction enterprise established before 1 July 2017.

For a property auction enterprise established before the effective date of the Law on Property Auction, and wishing to continue to operate in the property auction together with other business lines, must establish a new property auction enterprise under regulations in Article 25 of the Law on Property Auction. Then, the newly established property auction enterprise will succeed to all the legal rights and interests as well as obligations in the property auction activities of property auction enterprises set up before 1 July 2017.

In addition, Decree 62 also regulates the conditions and appraisals to hold the online auctions and the sequence and procedures for the organization of online auctions, including procedures such as publicizing the online auctions, granting access to account to the participants, the bidding methods, and how it determines winners and announce the results online.

Decree 62 took effect on 1 July 2017 and replaced Decree 17/2010/ND-CP dated 04/3/2010 of the Government on property auction.

Online issuance of work permits to foreign employees

On 15 August 2017 the Ministry of Labor, War Invalids and Social Affairs (MOLISA) issued Circular No. 23/2017/TT-BLĐTBXH (“**Circular 23**”) detailing online issuance of work permits to foreign employees working in Vietnam which comes into effect from 02 August 2017. Circular 23 provides for the online application process of the following procedures: (i) approval of the demand for employment of foreign workers (the “**Approval**”); (ii) issuance or re-issuance of work permits for foreign workers (the “**Work Permit**”); and (iii) certification of exemption of certain foreign workers from work permit requirements (the “**Exemption Certificate**”).

Online applications for the above procedures can be made at <http://dvc.vieclamvietnam.gov.vn>, a website managed by the MOLISA.

For the Approval:

At least 20 days before a foreign worker commences work, the employer (except for contractors) must declare the information in the declaration and upload the application dossier for the Approval through the website. In case of any change to the employment demand, at least 10 days before the planned date of employing foreign workers, the employer must send a report on any changes through the website. The application package will then be assessed by the relevant Department of Labor, Invalids and Social Affairs (DOLISA) of the province where the foreign employee will work. Within 12 days, the DOLISA will give a response by sending an email to the employer. If the report on demand

for employment does not comply with the laws, the DOLISA shall send an email stating reasons to the employer.

After receiving a response indicating that the employer's explanation or report on change in demand for employment is in compliance with the laws the employer shall, by hand or by post, submit the original explanation and/or report to the DOLISA. If an application dossier is deemed complete and no further supporting documents are required, the DOLISA will issue the Approval within 8 working hours.

For the Work Permit:

At least 7 working days before a foreign worker commences work, the employer must declare the information in the declaration and upload the application dossier for the Work Permit through the website. It will take around 5 working days (in case of issuance of the Work Permit) and 3 working days (in case of re-issuance of the Work Permit) for the DOLISA to respond via email on the validity of the application dossier so that the employer can by hand or by post submit the original dossier to the DOLISA accordingly. If an application dossier is deemed complete and no further supporting documents are required, the DOLISA will then issue the Work Permit within 8 working hours.

For the Exemption Certificate:

The same procedures as stated above for the Work Permit also applies to the Exemption Certificate for foreign workers who are exempt from local work permit requirements (such as the capital contributing member or owner of a limited liability company in Vietnam, the member of the board of management of a shareholding company in Vietnam, the head of a representative office or project of a non-governmental organization in Vietnam or in accordance with the provisions of an international treaty to which Vietnam is a member).

In general, the online application process will save time for the employer when conducting procedures for obtaining work permits for foreign workers. Circular 23 also introduces online communication between the relevant DOLISA and employers, allowing employers to be informed, in a short period of time after submission of application documents, if an application has been accepted or if further supporting documents are required.

On the other hand, the processes under Circular 23 are not entirely electronic and still require a hard-copy application dossier following any online application. Further, the website is only available in Vietnamese, even though the website is easy to use, foreign owned companies or representative offices of foreign companies in Vietnam must continue to rely on local staff or a locally-based representative in order to upload application documents and manage electronic communications with the DOLISA.

Procedures for electricity operation licenses

On 31 July 2017 the Ministry of Industry and Trade issued Circular No. 12/2017/TT-BCT (“**Circular 12**”) providing the order and procedures for issuance and revocation of electricity operation licenses (“**EOL**”) for the following sectors: consultancy specialized in electricity sector, electricity generation, electricity transmission, electricity distribution, electricity wholesale, electricity retail, and electricity import/export.

Under Circular 12, the cases of exemption from EOL include: conducting electricity generation for persona; use without selling electricity to any other organizations or individuals; conducting electricity generation with installed capacity below 1MW for selling electricity to other organizations or individuals; conducting electricity business in rural, mountainous, offshore island areas purchasing electricity with an output below 50kVA from an electricity distribution grid in order to sell directly to customers using electricity in rural, mountainous and offshore island areas; and dispatching load of the national electricity system and managing trading on the electricity market.

The principles on issuance of the EOL under Circular 12 are: (i) the EOL for electricity retail operations is issued concurrently with electricity distribution operations; and (ii) the electricity generation license is issued to organizations conducting electricity generation for each electricity plant.

Thirdly, Circular 12 provides that the maximum term of the EOL issued to any unit operating in the electricity sector shall be as follows:

- (a) 05 years for consultancy specialized in electricity sector;
- (b) 10 years for (i) electricity generation plants not in the list of large electricity plants of particular socio-economic importance and of significance in terms of national defense and security approved by the Prime Minister, (ii) electricity distribution operations, (iii) electricity wholesale and retail operations, and (iv) electricity import/export operations;
- (c) 20 years for (i) electricity generation plants in the list of large electricity plants of particular socio-economic importance and of significance in terms of national defense and security in the list approved by the Prime Minister and (ii) electricity transmission operations.

In the case where organizations or individuals request the term of the EOL be less than the maximum term, then the EOL shall be issued with the term requested.

Finally, the EOL shall be revoked in the following circumstances: (i) failure to commence operations after 6 months have expired from the date of issuance of the EOL; (ii) failure to satisfy the conditions for the electricity operation under the Law on Electricity; (iii) failure to implement correctly the contents stipulated in the EOL; (iv) leasing out, lending out, amending arbitrarily the EOL; (v) having the

intention to stop its operation or to transfer the licensed operation to another entity; (vi) being requested by competent authority as a result of the licensed entity breaching relevant laws; (vii) failure to implement the requirement under Article 16.7 of Circular 12 and (viii) breaching regulations under Article 16.9 (a).

Circular 12 took effect from 14 September 2017 and replaced Circular No. 10/2015/TT-BCT.

A note on corporate governance

Without officially searching the internet for a definition of Corporate Governance, I will say that it is the governing principles which guide the relationship between ownership and management. This is important because ownership and management often have differing agendas when it comes to interest in the company.

Ownership is often limited in its interest, seeking profit from the company. Sometimes ownership is interested in other aspects of corporate affairs, such as community relationships and corporate responsibility. Most often, though, ownership cares about the regular income provided by dividends and increased share value.

Management, on the other hand, is often interested in self aggrandizement, whether through power games or monetary enrichment. This can take the form of the Board of Management voting in cliques on matters of management remuneration or tenure. Take, for instance, the remuneration of the CEO of a company. If the Board of Management votes for the CEO to remain the same at a certain pay level, then the CEO can in turn see that the Board of Management is amply rewarded with stock or with cash for their efforts of monitoring the management of the company. This is why some advanced jurisdictions require outside members on the Board of Management, to ensure that entrenched management does not create incentives for tenure.

I bring this up because of the first article in this month's Client Alert. The new Corporate Governance provisions are important to further protect shareholders and other stakeholders from corrupt or beholden management. It's a struggle. Each country must come up with its own balance between oversight and laissez faire operations. Vietnam has struggled to advance its corporate governance as many corporations in a developing country like Vietnam come from family owned businesses, and these businesses have maintained little to no records that could confirm corporate governance practices.

Lack of evidence of good corporate governance is a two edged sword. While investors are interested in such companies—because implementation of corporate governance is a cheap and easy way to raise the value of an enterprise—there are also some investors who shy away from companies who have no corporate governance history because they themselves are beholden to shareholders or investors who do not want to take that kind of a risk in frontier investing.

In general, the more corporate governance history a business has, the better its valuation. As M&A becomes a major form of exit by investors once more, it is important to understand how corporate governance works. It is defined, to a certain extent in the Law on Corporations, and the Law on Corporate Governance—and the Decree discussed above. Otherwise, a company itself is in need of outlining protections against corrupt management.

About Indochine Counsel

Established in October 2006, Indochine Counsel is one of the leading business law firms in Vietnam. The firm provides professional legal services for corporate clients making investments and doing business in Vietnam. The legal practitioners at Indochine Counsel are well qualified and possess substantial experience from both international law firms and domestic law firms. The firm boasts more than 35 legal professionals working at the main office in Ho Chi Minh City and a branch office in Hanoi.

Indochine Counsel's objective is to provide quality legal services and add value to clients through effective customized legal solutions that work specifically for the client. The firm represents local, regional and international clients in a broad range of matters including transactional work and cross-border transactions. The firm's clients are diverse, ranging from multinational corporations, foreign investors, banks and financial institutions, securities firms, funds and asset management companies, international organizations, law firms to private companies, SMEs and start-up firms in Vietnam.

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