

# ClientAlert

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## 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 public private partnerships to derivative securities and cross border provision of public information to employment rules.

We also discuss some of the major changes that Vietnam is making to appease Western economies and to enter the global environment as a full member.

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

Sincerely,

Dang The Duc  
Managing Partner

## Executive Summary

The Ministry of Labour, War Invalids and Social Affairs has issued new guidelines recruitment and management of Vietnamese employees working for foreign organizations and individuals in Vietnam. There are only minor changes to the current guidelines but we felt it important to raise the issue. See [A BIT ON EMPLOYMENT](#).

The Government is moving forward with efforts to increase the profitability of the stock exchange. They have issued a new decree to govern the issuance, sale, and purchase of derivative securities. The new decree covers everything from the trading procedures to the resale of derivatives. See [DERIVATIVE SECURITIES](#).

On the tail of Vietnam's recent internet law, the Ministries are drafting a new circular that would provide further information on how the law governing activities of cross border provision of public information is to be enforced. Namely, they are looking to enforce Vietnamese control over foreign websites doing a considerable business in Vietnam by requiring them to have a representative in the country. See [CROSS BORDER PROVISION OF PUBLIC INFORMATION](#).

Another clarification has hit the books as the Government has issued a new decree outlining the rules for advance payments for construction projects. This primarily applies to construction projects invested by the State agency and State-owned enterprises or financed by the State as to 30% or more of the total investment capital, or less than 30% but more than VND500 billion. See [CONSTRUCTION ADVANCES OUTLINED](#).

Public Private Partnership mechanisms have also been something for which the Government has long sought a reasonable and workable means of enactment. Here again they sport an attempt to spell out the rules for tendering on public projects by private developers. Whether it works will yet be seen. See [TENDERING FOR SELECTION OF INVESTORS](#).

And finally, in a fit of nostalgia, we look at some of the recent advances Vietnam has made to bring itself into the Western World and to satisfy some of the more liberal countries who insist on lumping Vietnam with other Communist/socialist countries in the region. See [ALL YOU NEED IS LOVE](#). |

## Briefs A Bit on Employment

On 22 April 2015 the Ministry of Labor, War Invalids and Social Affairs enacted Circular No. 16/2015/TT-BLDTBXH providing guidance on a number of articles of Decree No. 75/2014/ND-CP, dated 28 July 2014, by the Government detailing the implementation of a number of articles of the Labor Code on recruitment and management of Vietnamese employees working for foreign organizations and individuals in Vietnam ("**Circular 16**"). Circular 16 took effect on 6 June 2015 and replaces Circular No. 09/1999/TT-BLDTBXH, dated 15 March 1999, by the Ministry of Labor, War Invalids and Social Affairs.

Circular 16 has the following crucial points:

- Prior to June 10th and December 10th, foreign employers shall make a biannual report and an annual report on the recruitment and use of Vietnamese employees working for foreign employers to the organizations assigned or authorized by the Ministry of Foreign Affairs or the Employment Center as regulated in Circular 16;

- In addition, Circular 16 also stipulates in details that an Application form for recruitment must include the basic information of the applicants such as name, the ID number, address, expertise level, language, education background and work experience... |

## Derivative Securities

On 5 May 2015 the Government enacted Decree No. 42/2015/ND-CP (“**Decree 42**”) on derivative securities (the “**Derivatives**”) and the derivative securities market (the “**Derivatives market**”), which is applicable to both Vietnamese and foreign organizations and individuals investing in or involved in the Derivatives and conducting or involved in the activities on the Derivatives market in Vietnam.

According to Decree 42, the Derivatives are securities prescribed in the amended Law on Securities, which means evidence from an issuing organization (i.e., organization conducting a securities offer) certifying the lawful rights and interests of an owner with respect to an asset or capital portion and may take the form of certificates, book entries or electronic data. Derivatives include several types such as future contract, purchase/sale option, forward contract and other Derivatives in accordance with guidelines of the Ministry of Finance.

### **Investment in Derivatives**

Derivatives investment means buying and/or selling listed Derivatives or reaching agreements to trade derivatives contracts on the Derivatives market.

According to Decree 42, organizations and individuals are permitted to freely invest in Derivatives on the Derivatives market, except for certain organizations, where their investment is subject to specific conditions as provided by laws, such as securities companies, fund management companies, credit institutions or foreign bank branches, foreign insurers or branches of a foreign insurer and State owned organizations.

### **Derivatives trading**

Decree 42 stipulates the following conditions applicable to the *Derivatives Business Organizations*, which wish to conduct one or more Derivatives trading activities including Derivatives brokerage, Derivatives self – trading and Derivatives investment consultancy, for being issued the *Certificate of satisfaction of conditions for Derivatives trading* as a requirement for obtaining the permission to conduct such Derivatives trading activities:

- be licensed for all securities professional business activities in accordance with the Law on Securities;
- satisfy the financial conditions regarding charter capital [and/or] equity;
- satisfy the conditions prescribed in guidelines of the Ministry of Finance on business results, ratios of available capital and professional rules;
- must have director/general director and deputy director/deputy general director in charge of professional activities and at least 05 staffs for each Derivatives trading activity holding securities practicing certificates as well as certificates of expertise in Derivatives and Derivatives market; and
- not be in the process of consolidation, merger or dissolution, or be under control or under special control, or be subject to suspension or temporary suspension pursuant to decision of competent authority.

The Stock Exchange is responsible to arrange and operate the Derivatives market and is the only entity being permitted to arrange trading of the listed Derivatives prescribed in Decree 42.

#### ***Derivatives clearing and payment services***

Securities company, commercial bank or foreign bank branch must be granted the *Certificate for Derivatives clearance and payment services*, in order to provide Derivatives clearing and payment services, with the following required conditions:

- be a depository member of the Vietnam Securities Depository (“VSD”);
- must have written permission of the State Bank of Vietnam in case of a commercial bank or foreign bank branch and must have been issued with a Certificate for derivatives brokerage in case of a securities company;
- satisfy the financial conditions regarding charter capital [and/or] equity;
- satisfy the conditions on business results and ratios of available capital in case of a securities company and satisfy the conditions on prudential ratios and in the case of a branch on issued capital in case of a commercial bank or foreign bank branch;
- have rules on the professional activity of clearing and making payment for derivatives transactions in accordance with guidelines of the Ministry of Finance; and
- not be in the process of consolidation, merger or dissolution, or be under control or under special control, or be subject to suspension or temporary suspension pursuant to decision of competent authority.

The activity of clearing and making payment for Derivatives transactions by the central counterparty clearing mechanism may only be implemented on VSD whereby VSD is one party and the clearing member is the other party to the transaction, including transactions implemented by third parties.

Decree 42 is of full force and effect as from 1 July 2015. |

## Cross Border Provision of Public Information

To implement Article 22 of Decree 72/2013/ND-CP, dated 15 July 2013, on management, provision and use of internet services and online information (“**Decree 72**”), the Ministry of Information and Communication (“**MIC**”) is drafting a circular (the “**draft Circular**”) regulating details for activities of cross-border provision of public information, involving users in or visits from Vietnam. The draft Circular would apply to domestic and foreign entities directly performing or in association with the management, provision and use of public information provided across border.

As specified in the draft Circular as published on the MIC’s website for collecting public comment, the cross-border provision of public information means foreign entities establishing systems overseas or hiring hosting space overseas for providing public information to users in Vietnam or with accession from Vietnam in one of the following forms: (i) information websites; (ii) social networks; (iii) search engines; (iv) internet applications and other similar forms for providing public information accessible or downloadable by users.

Regarding the forms of information websites and search engines for providing public information, the draft Circular provides that the service provider of a website or search engine which provides collective information about politics, economy, culture, society, entertainment in Vietnamese or with a million or more visits from Vietnam within a month must have a legal representative in Vietnam for the purpose of cooperation with the competent authorities when necessary, and shall notify the MIC of the identification and contact information of the entities and their legal representative in Vietnam. In addition, such foreign service providers must not provide illegal information, and shall cooperate with the Vietnam authorities in removing illegal information, if any, from their public information provision system.

Meanwhile, the service provider of a social network with five thousand or more users in Vietnam is, in addition to the said requirements in respect of the forms of websites and search engines, required to make warnings to users in Vietnam on the risks, rights and obligations in association with their posting, exchanging and sharing information before using the provider's services, and to ensure the user's rights in allowing other persons to use their personal information as well as the rights to absolutely removing their private information from the database of the service provider. The service provider is also required to provide the competent authorities of Vietnam, at their request, with relating users' information serving the prevention of terrorism, or investigation of crimes.

Regarding notification obligation of required information to the MIC by service providers, the MIC will identify, based on their statistics data with reference to the relevant figures of certain prestigious organizations, and regularly publish on their website at <http://www.mic.gov.vn> lists of foreign service providers which are subject to the said notification obligation on 15 January and 15 June every year, and the service providers to be listed shall have 90 days as from the publication date of the list to perform their notification obligation in accordance with the regulations. Otherwise, the MIC will send official request to such service providers.

In respect of removing illegal information from the public information provision system, a service provider in question is required to verify and remove such illegal information once after receiving a relevant request from the MIC, or shall have response to the MIC's request within 7 days of the date of receiving the MIC's request.

For services providers providing illegal information or not cooperating with the state authorities in the removal of illegal information from their public information provision systems, the state competent authorities will perform necessary technical measures in order to ensure the implementation of state online information management policy. |

## Construction Advances Outlined

The Government issued Decree No. 37/2015/ND-CP, dated 22 April 2014, detailing construction contracts for construction projects primarily invested by the State agency and State-owned enterprises or financed by the State as to 30% or more of the total investment capital, or less than 30% but more than VND500 billion. According to the new decree, advances of such contracts are not permitted to exceed 50% of the contract value at the signing date.

In special circumstances, permission to proceed with construction is required from the person having discretion on the decision of investment. If the person having discretion on the decision of investment is the Prime Minister, then the approval from the Chairman of Provincial People's Committee, the Chairman of Members' Council or the Chairman of Board Management of the Corporation is mandated.

Additionally, the level of advance of the consultation contract must be at least 15% the value of

the contract if such contract's value is less than VND10 billion, and 20% if such contract's value is more than VND10 billion.

The advance will be restored through installments, the restoration level of each time will be agreed in the contracts by parties, but the advance must be restored entirely when the value of disbursement accounts for 80% of the value of the contract signed.

In respect of the guarantee for the contract's advance, if the contract has an advance value of more than VND1 billion, the contractor shall submit the guarantee for the contract's advance equivalent to an advance of the contract to the employer. The guarantee for the contract advance is not mandated if construction contracts have the value of advance less than or equal to VND1 billion or if the contracts is for self-implementation.

This Decree takes effect on 15 June 2015.

## Tendering for Selection of Investors

On 17 March 2015 the Government enacted Decree No. 30/2015/ND-CP providing detailed regulations for implementation of the law on tendering regarding selection of investor ("**Decree 30**"). Decree 30 is applicable to select investors for the investment projects in the form of public private partnership ("**PPP**") and the investment projects using land zones and/or land funds with a high commercial value to construct urban works, a new urban zone, commercial housing, commercial and services works, or a multi-purpose conglomerate as proposed by the competent agencies.

Other than the organizations and individuals participating or involved in the selection activities of investors for the above investment projects, Decree 30 may also be applicable to other organizations and individuals choosing to apply and comply with the provisions of Decree 30.

The investor participating in tendering ("**Investor**") shall be assessed as legally and financially independent of the relevant consultants and of the competent State authority or the party calling for tenders when satisfying the following conditions:

- The Investor does not belong to an agency or organization which directly manages the professional entity [being any of the relevant consultants];
- The Investor and a competent State authority or the party calling for tenders do not have shareholding or capital contribution in each other above thirty per cent (30%); and
- The Investor and the relevant consultants do not have shareholding or capital contribution in each other, and do not have twenty per cent (20%) or more shareholding held by or capital contribution made by some other one organization or individual.

For the project that is prepared by an entity itself, the Investor is still allowed to participate in and also must satisfy the independence as above, except for the independence with consultant contractor preparing the feasibility study report (or the project proposal in the case of a Group C PPP projects).

Besides the expenses during selection of Investor, Decree 30 also regulates the time-limits during the process of selection of Investor in details from the stage of announcing information about a PPP project and the list of investment projects using land to the stage negotiation and finalization of the contract after the approval of results of selection of Investor.

There are three Investor-selection forms including direct appointment of the Investor to

implement a project (with several conditions required for the selected Investor); international open tendering which shall be applied to selection of the Investor for PPP projects and for investment projects using land; and domestic open tendering which shall be applied to the following cases:

- Investment sectors for which the law of Vietnam or an international treaty of which Vietnam is a member contains provisions restricting participation by foreign Investors;
- Foreign Investors did not participate in or pass international pre-qualification;
- Group C PPP projects. If it is necessary to use progressive technology and techniques and/or international managerial experience, then a domestic tenderer shall enter into a partnership with a foreign tenderer or employ [use] a foreign contractor to place a tender and implement the project; and
- Investment projects using land for which preliminary estimated total expenses for project implementation (excluding costs of paying compensation and of conducting site clearance) are below VND120 billion.

Decree 30 took effect from 5 May 2015. |

## All You Need is Love

When I first came to Vietnam—way back in 2003—I felt it was a very conservative place. Social norms seemed restrictive and anyone who was different sat at the tail end of ridicule and persecution. It was not a place I thought of as progressive or liberal.

All that changed earlier this year when Vietnam decriminalized same sex marriage. (I'm not going to devote the entire article to the issue, but I do want to raise it.) Beating the United States and several other developed countries to the punch, Vietnam began to allow same sex marriages with the stroke of a pen. What kind of world is it when Vietnam—one of the few Communist/Socialist economies left in the world—allows same sex marriage before the likes of the United States or Australia or other liberalized countries?

This I thought, and pondered. Vietnam is indeed a curiosity. Cambodia, Laos, Thailand, Malaysia, Singapore, the Philippines, nor Indonesia allow same sex marriage. But Vietnam, that country who once defeated the Chinese, the French, the United States...a country thought to be oppressive and aggressive when it came to human rights...that country allowed same sex marriage.

Awesome.

Vietnam has been pursuing other advances as well. Just this week the Government released a list of industries in which it would allow foreign ownership beyond the previous limit of 49% in public companies not operated in conditional business sectors. This list goes a long way towards setting regulation for the eventual privatization of government owned industries as well as allowing foreigners the opportunity to come in to major industries that have previously been controlled by domestic investors—opening the economy a great deal to capitalist tendencies and answering many of the foreign criticisms that have plagued Vietnam's economic policies.

Vietnam is aware of its status in world perception. For some time now it has challenged the West's classification of the country as a non-capitalist economy. It argues that the regular trade that has developed between it and numerous trading partners makes it a capitalist economy.

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Many western countries resist this classification, but the fact that Vietnam is trying—and aware of the labels—is encouraging. It is trying.

The United States is somewhat to blame for this continued Communist label. They have repeatedly lumped Vietnam with China without making any distinction between the two economies. This has led to increased challenges against Vietnamese subsidies and challenges to Vietnam's economic policies when it comes to trade with the United States. This is egregious indeed when considering that the classification is unilateral, made by the United States, and for little to no reason.

Despite arbitrary policies imposed by classic enemies from the Cold War Era, Vietnam has indeed improved not only its human rights policies but its economic policies as well. It is working in cooperation with the IMF and the World Bank to equalize balance of trade payments and to settle other macro-economic issues that have threatened to destabilize the country's economy.

One example of this is the property development bubble. It boomed for years, pushing property prices above all rightful pricing and set off a series of investments that have left the country—not with ghost buildings like Thailand—with development slowdowns and multiple rounds of financing for projects that should be paid for and prospering. The bubble has recovered somewhat—with Vietnam's macroeconomic policies—but there are still issues. Recently the Government opened apartment ownership to foreigners in the hopes of opening the industry to further investment. Whether this will work remains to be seen, but there is hope on many levels that Vietnam is going in the right direction.]

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"Cross Border Provision of Public Information"

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"Construction Advances Outlined"

By Pham Van Loi, Legal Assistant

"Tendering for Selection of Investors"

By Nguyen Kim Trang, Legal Assistant

"All You Need is Love"

By Steven Jacob, Editor

## About Indochine Counsel

Established in October 2006, Indochine Counsel is one of the leading commercial 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.

Indochine Counsel advises clients in the following areas:

- |                          |                           |
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| ❖ Intellectual Property  | ❖ Technology & Media      |
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| ❖ International Trade    | ❖ Mining & Energy         |
| ❖ Banking & Finance      | ❖ Property & Construction |

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