CHAPTER 5 **COMMERCIAL MEDIATION**

OVERVIEW

Commercial mediation has been used as a mean of commercial disputes settlement in which at least one party has commercial activities or disputes between parties arising from commercial activities[1] with the assistance of a commercial mediator acting as an intermediary.[2]

Definition of commercial mediation under the laws of Vietnam is corresponding to the definition of UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation 2018. In these agreements mediation is defined as a process, whether referred to by the expression mediation, conciliation or an expression of similar import, whereby parties request a third person or persons (the mediator) to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The mediator does not have the authority to impose a solution to the dispute upon the parties involved.[3]

Commercial mediation is one of the methods of disputes settlement besides the other means like commercial arbitration and court proceedings. In Vietnam, mediation definition also exists in commercial arbitration and court proceedings. Therefore, this session introduces the commercial mediation and it is necessary to distinguish the commercial mediation under the Decree 22/2017/ND-CP on 24 February 2017 of the Government on commercial mediation (Decree 22) from other mediation forms which appear in the previous Vietnamese regulations and the practice.

Issue description

Relevant authorities: Ministry of Justice (MOJ), Vietnamese courts

Distinguish commercial mediation from other mediation activities in other means of commercial dispute settlements.

Commercial mediation is stipulated in Decree 22. This is regulatory mediation in which an independent, impartial third party is chosen by the parties in dispute to assist the parties to go through the mediation process with the hope of reaching a reasonable agreement for the parties. Please find more details in the potential gains/concerns for Vietnam section below.

There is also the so-called "mediation" in commercial arbitration proceedings regulated in the previous regulations like Law on Commercial Arbitration 2010[4] or the "mediation" in civil mediation procedures regulated by Code of Civil Procedure 2015[5]. These are not the commercial mediation form but are just a practical part of the procedures in the arbitration or court proceedings.

The mediation in the proceedings at court is a mandatory process, performed proactively by the entities conducting proceedings according to the order and procedures of the Civil Procedure Code, except for civil cases that are not mediated or cannot be mediated.[6] While the method of mediation in commercial arbitration proceedings and commercial mediation are proactively implemented by the disputing parties, as agreed by the parties.[7] In addition, the scope of mediation at court is wider than that of commercial mediation, commercial arbitration i.e. in all areas governed by the Civil Procedure Code and the Administrative Procedure Law. The successful mediation

1 Article 2, Decree 22.
2 Article 3.1, Decree 22.
3 Article 1.3, Section 1, Annex II, UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation, 2002).
4 Law 54/2010/QH12 dated 17 June, 2010 of the National Assembly on commercial arbitration.
5 Law 92/2015/QH13 issued by the National Assembly dated 25th November, 2015 on civil procedure.
6 Article 10, Civil Procedure Code.
7 Article 9, Law on Commercial Arbitration 2010 and Article 6 of Decree 22.

results of mediation activities under the proceedings at a court are recorded in the decision to recognise the agreement of the involved parties issued by court, which takes effect immediately after being issued and not being appealed or protested according to appellate procedure.

In commercial arbitration proceedings, where the parties reach an agreement on the settlement of a dispute, the Arbitration Council shall make a record of successful mediation signed by the parties. The Arbitration Council issues a decision recognising the agreement of the parties. This decision is final and valid as an arbitral award.[8]

In commercial mediation, when the parties achieve successful mediation result, the mediator shall prepare a written record on the results of successful mediation to be signed by parties. The record on successful mediation results for the parties should then be submitted to be recognised by the court under the regulations of the Civil Procedure Code.[9]

For mediation at the Mediation and Dialogue Center at court, the written record of successful mediation result is recognised by the court and will be enforced by civil judgment enforcement agencies under the law on enforcement. It is important to note that the court-annexed mediation at Mediation and Dialogue Center at court had been set up and run as a pilot project from March 2018 to August 2018 in Hai Phong province and after that applied to other 15 provinces from January 2019 to October 2019. Most of the "mediators" in this model would conduct the mediation like a part of procedures in court where the materials of the case are read and examined by the mediators during the "mediation" process. The draft Law on Mediation, dialogue at court has been published since 1 October, 2018 for public opinions. This kind of mediation aims to assist the disputing parties to find a possible resolution while the party or parties bring their petitions before the competent court to resolve the dispute. In addition, this model is to contribute to the timely and correct handling of disputes, grievances and mitigate work for Vietnamese court. The draft law was introduced to the National Assembly last November for comment and, therefore, the details of the law will be updated in the coming publication promptly.

In summary, in contrast to mediation activities according to the court proceedings and commercial arbitration proceedings where successful mediation results shall be enforced under the laws on civil enforcement upon the judgments/decisions/awards issued by court/commercial arbitrator, mediated settlement agreements of commercial mediation and court-annexed mediation need to be recognised by the court according to the legal proceedings prescribed at the Civil Procedure Code before enforcement.

Potential gains/concerns for Vietnam

In general, the application of the commercial mediation method helps commercial business organizations and individuals resolve disputes quickly and effectively due to the flexibility in finding a solution to the dispute based on mutual parties' interest, rather than solely on legal rights, save legal costs, and maintain cooperative relations between the parties. Dispute settlement procedures by commercial mediation are simple and flexible, and the disputing parties have the right to choose the order, procedures, time, venue, and professional quality of the mediator participating in the mediation. [10] In addition, one advantage of this method is that the information on the dispute and the business secrets of the parties are kept confidential, which is extremely important in the context of the current economy when business secrets are the key factor in the survival of a business.[11]

Commercial mediation has been expected to become a trend of dispute settlement in the near future in Vietnam which provides an opportunity for parties to avoid complicated legal procedures, help maintain long-lasting cooperation between the parties, and help them find common ground more quickly and develop an agreement with a "win-win" approach and avoid costly and time extension for a more formal settlement in court or commercial arbitration.

In the spirit of the Resolution 49-NQ/TW issued by the Politburo on the "Judicial Reform Strategy to 2020", the mission of encouraging the settlement of a number of disputes through negotiation, mediation and arbitration has been proposed. This is a very strong message of the Government in encouraging out-of-court dispute

8 Article 58, Law on Commercial Arbitration 2010.
9 Article 16, Decree 22.
10 Article 12.1, Article 14.1, Article 14.2, Article 14.3, Decree 22.
11 Article 4.2, Article 9.2.(c), Decree 22.

settlement mechanisms to enhance Vietnam's national competitiveness index. It could be said that the issuance of Decree 22 has created a clearer legal ground for the parties to apply an alternative dispute resolution. However, the use of commercial mediation method depends on the awareness and confidence of the business community and the support of the legal community. Apparently, the method of dispute settlement by commercial mediation is new and has not been widely applied in Vietnam.

Under the laws of Vietnam, a commercial mediation organization could be a Commercial Mediation Center which is established and operates in accordance with Decree 22; and Arbitration Center established and operated under the law on commercial arbitration that conducts commercial mediation activities in accordance with Decree 22. In addition, Vietnam law allows foreign commercial mediation to establish and operate in Vietnam, under the form of a branch or a representative office of a foreign commercial mediation organization in Vietnam.

In Vietnam the ad-hoc commercial mediation and mediator are also recognised by Decree 22. Immediately after Decree 22 came into effect, many experts in many fields registered as ad-hoc commercial mediators at Departments of Justice, especially in Hanoi and Ho Chi Minh City. At the same time, commercial mediation centres have been also established.[12] Until August 2019, in Vietnam, there are 07 commercial mediation centres licensed by the Ministry of Justice with a team of domestic and international certified mediators who could contribute to resolving disputes in international commercial contracts. Besides, at present, Vietnam has some arbitration centres offering commercial mediation services, while the number of disputes they have settled remains modest but the value of the disputes can be seen quite large.[13] For instance, one of the first professional commercial mediation centres, setting up in July 2018, is Vietnam Mediation Centre (VMC), belonging to the Vietnam International Arbitration Centre (VIAC) with 51 listed mediators (including 13 foreign and 38 Vietnamese mediators). VMC has now resolved 4 out of 5 cases brought to the centre with the total value of the disputes up to VND 935 billions (equals to USD 40.6 millions).[14]

Mediation in the view of the EU-Vietnam Free Trade Agreement

On the 30th of June, 2019 the European Commission (EC) and Vietnam signed the EU-Vietnam Free Trade Agreement (EVFTA) and Investment Protection Agreement (EVIPA) and on the 12th of February the European Parliament voted to give its consent to the ratification of the EVFTA and EVIPA. These are the largest trade and investment agreements which Vietnam signed which reaches 28 economies European countries,[15] marking a long development step in the cooperative economic relationship between Vietnam and EU countries. EVFTA and EVIPA both regulates commercial dispute settlement by mediation among the Parties (the EU and Vietnam). It shows the increasingly important role of the mediation mechanism in dispute settlement in order to resolve conflicts between the disputing parties and help maintain long-term economic cooperation between the parties. EVFTA encourages the parties to choose one of the most friendly forms of dispute settlement such as negotiation, mediation or consultation. EVIPA's consultation and negotiation rules are very detailed, specific and extended even to dispute between investors and the Parties.

Under the EVFTA and EVIPA, consultations are not required before initiating the mediation procedure. However, a Party should avail itself of the other relevant cooperation or consultation provisions in the EVFTA and EVIPA before initiating the mediation procedure.

The mediator may not serve as an arbitrator or panellist in dispute settlement proceedings under these Agreements or under the WTO Agreement involving the same matter for which he or she has been a mediator. He or she may decide on the most appropriate way of bringing clarity to the measure concerned and its possible trade effects. In particular, the mediator may organise meetings between the Parties, consult the Parties jointly or individually, seek the assistance of, or consult with relevant experts and stakeholders and provide any additional support requested by the Parties. Before seeking the assistance of, or consulting with, relevant experts and stakeholders, the mediator

12 "Commercial mediation, kill two birds with one stone", *Saigon Times,* 26/06/2019. Available at: <https://www.thesaigontimes.vn/290264/Hoa-giai-thuong-mai-nhat-cu-luong-tien.html>, last accessed dated 8th December, 2019.

13 "First commercial mediation center launched in Vietnam amid rising trade deals", *Hanoi Times*, 15/07/2019. Available at: <http://hanoitimes.vn/first-commercial-mediation-center-launched-in-vietnam-amid-rising-trade-deals-46388.html>, last accessed on 8 December 2019.

14 "Vietnam Mediation Center (VMC) has resolved 5 commercial disputes, worth nearly VND 935 billion", *Securities Investment*., 25/05/2019 Available at: <https://tinnhanhchungkhoan.vn/phap-luat/trung-tam-hoa-giai-vmc-da-xu-ly-5-vu-tranh-chap-thuong-mai-voi-gia-tri-gan-935-ty-dong-266972.html> last accessed on 8 December 2019

15 27 economies after 31 December 2020.

shall consult with the Parties.

The mediator may offer advice and propose a solution for the consideration of the Parties which may accept or reject the proposed solution or may agree on a different solution. The mediator shall not advise or give comments on the consistency of the measure at issue. However, the solution may be adopted by means of a decision of the Trade Committee and mutually agreed solutions shall be made publicly available and the version disclosed to the public may not contain any information that a Party has designated as confidential.

In future, this mechanism could well lead to an instrument on the enforcement of international commercial settlement agreements resulting from mediation. The result could have an effect similar to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[16] Through the EVFTA and EVIPA, Vietnamese legislators will be provided with a sound legal framework to develop commercial mediation and investment mediation.

The Singapore Convention on Mediation

In November 2019, 51 countries including China, India, Singapore, South Korea and the United States signed the United Nations Convention on International Settlement Agreements Resulting from Mediation[17], also known as the "Singapore Convention on Mediation". The Convention makes mediated settlement agreements enforceable by the courts of all members. The Convention does not apply to settlement agreements that: (i) have been approved by a court or have been concluded in the course of court proceedings; (ii) are enforceable as a judgment in the state of that court; or (iii) have been recorded and are enforceable as an arbitral award.

Vietnam is not one of the signatories to the Singapore Convention on Mediation yet. Specifically for Vietnam, its's participation in the Singapore Convention on Mediation would strengthen the country's stature in the international community. The participation in the Convention will then become a viable option for mediation of cross-border dispute cases.

Recent developments in Vietnam have shown that mediation training and international accreditation are supported. In 2018, with funding from the International Finance Corporation (IFC) of the World Bank Group (WBG) trained and certified commercial mediators according to international standards. Through this program, there are nearly 100 experts in many fields who have been trained in knowledge and skills in a professional manner to meet the development needs of the mediation service industry.[18]

The vast majority of commercial contracts lack mediation clauses that will automatically be in effect should a dispute arise. Future lawyers should be trained to draft such clauses in both international commercial contracts. In addition, professional development programs in drafting contracts should be promoted through the Vietnamese Bar Association and related law associations. The International Chamber of Commerce (ICC) issued 'Mediation Guidance Notes' for use by parties, whether or not they are members of the ICC.

Recommendations/guide for implementation

It is recommended that established policies should be developed for individual stakeholders to initiate particular measures to develop mediation and implement measures to increase the awareness of mediation, especially the mediation under Decree 22. Moreover, the regulations, both developed under Decree 22 and other previous laws and in practice, shall be made more unified and consistent to simplify and provide a viable option for the law practitioners, business community and academics.

It is also recommended that more awareness be raised about the text of the EVFTA and EVIPA and the implementation on mediation in order to help Vietnam reach its fulfillment of commitments in international

16 Convention on the Recognition and Enforcement of Foreign Arbitral Awards of the United Nations Commission on International Trade Law (New York, 1958).

17 United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018)

18 op.cit.10.

agreements. More attention should be paid to commercial contracts which should include a mediation clause to avoid court disputes. Enhancing capacity building and training for the law practitioners on mediation should be also made in order to prepare Vietnam for future demand.

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CHAPTER 6 **EU-VIETNAM FREE TRADE AGREEMENT AND INVESTMENT PROTECTION AGREEMENT**

OVERVIEW

On the 2nd of December 2015, after almost three years and 14 rounds of negotiation, President Donald Tusk, President Jean-Claude Juncker and Prime Minister of Vietnam Nguyen Tan Dung announced the conclusion of the negotiations on the EU-Vietnam Free Trade Agreement (EVFTA). The EVFTA is a new-generation free trade agreement between Vietnam and the EU. On the 26th of June 2018, the EVFTA was split into two separate agreements: the Free Trade Agreement (EVFTA) and the Investment Protection Agreement (EVIPA). In August 2018, the EU and Vietnam completed the legal review of the EVFTA and the EVIPA. The EVFTA requires ratification by the European Council as well as the consent of the European Parliament, while the EVIPA requires additional ratification by parliaments of each individual EU Member State.

On the 30th of June 2019, EU Commissioner for Trade Mrs. Cecilia Malmstrom, together with the Romanian Minister for Business Mr. Stefan-Radu Oprea, representing the EU, signed the EVFTA and EVIPA in Hanoi, together with H.E. Prime Minister Nguyen Xuan Phuc and Vietnamese Government leaders. The Prime Minister expressed his belief that the European Parliament, parliaments of EU Member States, and the Vietnamese National Assembly will soon ratify the EVFTA and EVIPA. Both Trade and Investment agreements were endorsed by the European Parliament on the 12th of February. The implementation of the EVFTA is, therefore, imminent if the Vietnamese National Assembly gives its approval at its June session, meaning that an entry into force during the second half of 2020 is possible for the EVFTA. It will take more time for the IPA to enter into force because this agreement is subject to the endorsement of the Member States' parliaments.

Both agreements are expected to bring significant advantages for enterprises, employees, and consumers in both the EU and Vietnam. Vietnam's GDP is set to increase by 10-15 per cent while exports are predicted to rise by 30-40 per cent over the next 10 years. Meanwhile, the real wages of skilled labourers could rise by up to 12 per cent, with salaries of common workers increasing by 13 per cent.[1] Once the EVFTA has entered into force, and once Government policies and institutional reforms begin to take effect, Vietnam's business activities will boom. However, challenges still remain. In this chapter, EuroCham's Legal Sector Committee will raise the issues relevant to their particular industries, and make specific recommendations in order to address these concerns.

1. LEGAL ENVIRONMENT

1. General market access for goods and services

The EVFTA is the most comprehensive and ambitious trade and investment agreement that the EU has ever concluded with a developing country in Asia. It is the second agreement in the ASEAN region, after Singapore, and it will intensify bilateral relations between Vietnam and the EU. Vietnam will have access to a potential market of approximately 446 million people and a total GDP of US$13,918 billion.[2] Meanwhile, exporters and investors from the EU will have further opportunities to access one of the largest and fastest-growing countries in the region. According to a report released in early 2017 covering 134 cities worldwide,[3] Hanoi and Ho Chi Minh City are ranked among the top 10 most dynamic cities due to their low costs, rapid consumer market expansion, strong population growth and transition towards activities attracting significant amounts of FDI. According to the World Bank, Vietnam has one of the fastest-growing economies in the world — 7.1% GDP growth in 2018, and 6.7% at

1 The European Trade Policy and Investment Support Project (MUTRAP), Report on Sustainable Impact of the EU-Vietnam FTA, 2014.
2 "EU population up to almost 512 million at 1 January 2017", *EuroStat*, 10 July 2017. Available at: <http://ec.europa.eu/eurostat/documents/2995521/8102195/3-10072017-AP-EN.pdf/a61ce1ca-1efd-41df-86a2-bb495daabdab> last accessed on 8 December 2019.
3 "JLL City Momentum Index", *Jones Lang LaSalle*. Available at: <http://www.jll.com/cities-research/City-Momentum> last accessed on 8 December 2019.

the mid-point of 2019.[4] To put that in perspective: Vietnam's GDP is growing at almost twice the rate of the USA.

In addition, Vietnam has the fastest-growing middle class in the region. It is predicted to almost double in size between 2014 and 2020 (from 12 million to 33 million people).[5] Vietnam's super-rich population[6] is also growing faster than anywhere else, and there is no doubt that it will continue to rise over the next ten years.

Market access for goods

Nearly all customs duties – over 99 per cent of the tariff lines – will be eliminated. The small remaining number will be partially liberalised through duty-free quotas. As Vietnam is a developing country, it will liberalise 65 per cent of the value of EU exports to Vietnam, representing around half of the tariff lines, at entry into force. The remaining duties will be eliminated over the next ten years. This is an unprecedented, far-reaching tariff elimination for a country like Vietnam, proving its aspiration for deeper integration and trading relations with the EU.

Meanwhile, the EU agreed to eliminate duties for 84 per cent of the tariff lines and 71 per cent of its trade value for goods imported from Vietnam immediately at the entry into force of the FTA. Within 7 years from the effective date of the FTA, more than 99 per cent of the tariff lines will have been eliminated for Vietnam. This is a wider reduction compared with the 95 per cent of the tariff lines that the former TPP countries offer to Vietnamese imports. In the ASEAN region, Vietnam is the top country exporting goods to the EU. However, the market share of Vietnam's products in the EU is still small. As a result of the EVFTA, the sectors set to benefit most are main export sectors that used to be subject to high tariffs from the EU including textiles, footwear, and agricultural products. The EU is also a good point for Vietnam to reach other further markets.

Vietnam will benefit more from the EVFTA compared with other such agreements, since Vietnam and the EU are considered to be two supporting and complementary markets. In other words, Vietnam exports goods that the EU cannot or does not produce itself (i.e. fishery products, tropical fruits, etc.) while the products imported from the EU are also those Vietnam does not produce domestically, including machinery, aircraft and high-quality pharmaceutical products.

With better market access for goods from the EU, Vietnamese enterprises could source EU materials, technology, and equipment at a better quality and price. This, in turn, will improve their own product quality and ease Vietnam's burden of over-reliance on its other main trading partners.

The EVFTA is considered as a template for the EU to further conclude FTAs with different countries in the ASEAN region with the aim of concluding a region-to-region FTA once there is a sufficient critical mass of FTAs with individual ASEAN countries.[7] This process could take about 10-15 years. Thus, Vietnam should take advantage of this window of opportunity before FTAs with others in the region are concluded and take effect to become a regional hub.

Market access for EU service providers: Although Vietnam's WTO commitments are used as a basis for the services commitments in the EVFTA, Vietnam has not only opened additional (sub)sectors for EU service providers, but also made commitments deeper than those outlined in the WTO, offering the EU the best possible access to Vietnam's market. (Sub)sectors that are not committed under the WTO, but under which Vietnam has made commitments, include: Interdisciplinary Research & Develospment (R&D) services; nursing services, physiotherapists and para-medical personnel; packaging services; trade fairs and exhibitions services and building-cleaning services.

When these services reach international standards, Vietnam has a chance to export high-quality services, resulting in not only an increase in export value but also export efficiency, thus helping to improve the trade balance.

4 *World Bank*, Available at: <https://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG?locations=VN>, last accessed on 8 December 2019.

5 "Vietnam and Myanmar: Southeast Asia's New Growth Frontiers", *The Boston Consulting Group*. Available at: <https://www.bcg.com/publications/2013/globalization-vietnam-myanmar-southeast-asia-new-growth-frontiers.aspx> last accessed on 8 December 2019.

6 Super-rich population is Ultra-High Net-Worth Individual, defined as those with $30m or more in net worth. For more information, please see "World Ultra Wealth Report 2019", *Wealth-X*. Available at: https://www.wealthx.com/report/world-ultra-wealth-report-2019, last accessed on 8 December 2019.

7 EU negotiations and agreements. Available at: <http://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/>, last accessed on 8 December 2019.

Government procurement

Vietnam has one of the highest ratios of public investment-to-GDP in the world (39 per cent annually from 1995). However, until now, Vietnam has not agreed to its Government procurement being covered by the Government Procurement Agreement (GPA) of the WTO. Now, for the first time, Vietnam has undertaken to do so in the EVFTA.

The FTA commitments on Government procurement mainly deal with the requirement to treat EU bidders, or domestic bidders with EU investment capital, equally with Vietnamese bidders when the Government purchases goods or requests a service worth over the specified threshold. Vietnam undertakes to follow the general principles of National Treatment and Non-discrimination. It will publish information on intended procurement and post-award information in Bao Dau Thau – Public Procurement Newspaper – and information on the procurement system at muasamcong.mpi.gov.vn and the official gazette in a timely manner. It will also allow sufficient time for suppliers to prepare and submit requests for participation and responsive tenders and maintain the confidentiality of tenders.[8] The FTA also requires its Parties to assess bids based on fair and objective principles, evaluate and award bids only based on criteria set out in notices and tender documentation and create an effective regime for complaints and settling disputes.[9] These rules require Parties to ensure that their bidding procedures match the commitments and protect their own interests, thus helping Vietnam to solve its problem of bids being won by cheap but low-quality service providers.

Government procurement of goods or services, or any combination thereof, that satisfy the following criteria falls within the scope of the FTA Government Procurement rules:

Table 1: Government Procurement Rules under the EVFTA

Criteria	FTA
Monetary values that determine whether procurement by central Government is covered under an agreement	130,000 Special Drawing Rights (SDRs) (US$191,000) after 15 years from the entry into force of the agreement Initial transitional threshold: 1.5 million SDRs (US$2.23 million)
Procurement of construction services by central Government entities	Initial threshold: 40 million SDRs (US$58.77 million) After 15 years, 5 million SDRs (US$7.35 million)
Entities covered	22 central Government bodies 42 other entities (including 2 utility-related state-owned enterprises, 2 universities, 2 research institutes and 34 public hospitals under the control of the Ministry of Health) Sub-central Government coverage: including Hanoi and Ho Chi Minh City
Exclusion of preferences for SMEs	Broad exclusion
Application of offsets	Based on the value of a contract

8 EVFTA text as of September 2018, Chapter 9 on Public Procurement. Available at: <http://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157364.pdf>, last accessed on 8 December 2019.

9 EVFTA text as of September 2018, Chapter 9 on Public Procurement, available at: <http://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157364.pdf>, last accessed on 8 December 2019

Investment Dispute Settlement

This is now covered in the EVIPA. In disputes regarding investment (for example, expropriation without compensation or discrimination of investment), an investor is allowed to bring the dispute to the Investment Tribunal for settlement. To ensure the fairness and independence of the dispute settlement, a permanent Tribunal will be comprised of 9 members: 3 nationals each appointed from the EU and Vietnam, together with 3 nationals appointed from third countries. Cases will be heard by a 3-member Tribunal selected by the Chairman of the Tribunal in a random way. This is also to ensure consistent rulings in similar cases, thus making the dispute settlement more predictable. The EVIPA also allows a sole Tribunal member where the claimant is a small or medium-sized enterprise or the compensation of damaged claims is relatively low. This is a flexible approach considering that Vietnam is still a developing country.

In case either of the disputing parties disagrees with the decision of the Tribunal, it can appeal it to the Appeal Tribunal. While this is different from the common arbitration proceeding, it is quite similar to the 2-level dispute settlement mechanism in the WTO (Panel and Appellate Body). We believe that this mechanism could save time and cost for the whole proceedings.

The final settlement is binding and enforceable from the local courts regarding its validity, except for a five-year period following the entry into force of the EVIPA (please refer to further comments in the Legal Sector Committee's chapter on Judicial Recourse).

Conclusion

The EVFTA, once ratified by Vietnam, will create sustainable growth, mutual benefits in several sectors and be an effective tool to balance trade relations between the EU and Vietnam. Vietnam is making continuous efforts and progress to meet the high standards set out in the FTA, and is currently offering greater opportunities for foreign businesses in preparation for the FTA's finalisation. It is now time for foreign investors to start their business plans and grasp the upcoming clear opportunities.

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CHAPTER 7 **JUDICIAL AND ARBITRAL RECOURSE**

OVERVIEW

EuroCham members seek an efficient and transparent justice system when conducting business with Vietnamese partners and when investing in Vietnam. We want to ensure that business commitments will be performed as agreed and that proper recourse will be available in the event of any breach or dispute.

However, our members regularly report serious obstacles in trying to ensure their rights in Vietnam. We would like to highlight in this chapter on judicial and arbitral recourse some of these issues with respect to the following topics: Vietnamese courts, arbitration in Vietnam and the recognition and enforcement of foreign arbitral awards in Vietnam.

I. THE VIETNAMESE COURTS

Relevant authorities: Ministry of Justice (MOJ), Supreme People's Court, Supreme People's Procuracy, National Assembly (Legal/Judicial Economic Committees), Ministry of Industry and Trade (MOIT), Vietnam Competition Authority (VCA)

Issue description

In the World Economic Forum's Annual Global Competitiveness Report[1], Vietnam consistently ranks low (with limited progress) on both judicial independence and on the efficiency of the legal framework in settling disputes. In the 2019 edition of this comparative study, Vietnam ranks 89 out of 141 participating countries in the 'institutions' category, which includes, among other things: (intellectual) property rights, judicial independence, burden of Government regulation, efficiency of the legal framework in settling disputes and in challenging regulations and future orientation of Government.[2]

One of the reasons that may explain this perception of the Vietnamese judiciary is the need for substantial improvement in transparency. Vietnamese courts have only recently started to publish judgments[3] and many remain unpublished. As a result, there is a lack of a well-established and reliable body of precedents and case-law that could provide guidance and predictability on the likely outcome of individual disputes.

Our members also face this issue in implementing the Law on Competition when dealing with the Vietnam Competition Authority (VCA) and the Vietnam Competition Council (VCC), as the decisions of these authorities are generally not made public. Our members note that the new Law on Competition which came into effect on the 1st of July 2019 provides for the establishment of a new administrative authority (the National Competition Commission) whose main decisions on competition shall be made public.

Furthermore, the permitted scope of legal services for foreign law firms remains uncertain, in particular, since the adoption of Decree 123[4] and Decree 137,[5] and the Law on Lawyers still prevents a fully qualified Vietnamese lawyer from representing clients before Vietnamese courts if he or she is working for a foreign law firm.[6]

Finally, our members also report issues in relation to the pilot programme on court-annexed mediation which was launched in November 2018 by the Vietnamese Supreme People's Court in 16 provinces and cities under

1 'The Global Competitiveness Report 2018', *World Economic Forum*. Available at:, < http://reports.weforum.org/global-competitiveness-report-2018/> last accessed on 8 December 2019.
2 K. Schwab, 'The Global Competitiveness Report 2019', *World Economic Forum*. Available at: <https://www.weforum.org/reports/how-to-end-a-decade-of-lost-productivity-growth> last accessed on 8 December 2019.
3 The Supreme Court has launched two websites: https://congbobanan.toaan.gov.vn/ and https://anle.toaan.gov.vn/webcenter/portal/anle/home.
4 Decree 123/2013/ND-CP of the Government dated 14 October 2013 guiding the Law 65/2006/QH11 of the National Assembly dated 29 June 2006 on Lawyers.
5 Decree 137/2018/ND-CP of the Government dated 8 October 2018 amending and supplementing Decree 123/2013/ND-CP.
6 Law 65/2006/QH11 of the National Assembly dated 29 June 2006 on Lawyers.

central authority.[7] This pilot programme provides that any dispute shall be first transferred to a mediation centre annexed to the court to attempt to mediate the dispute; it is only if the mediation attempt has failed that the court is allowed to enrol the case.[8] Although the new pilot programme on court-annexed mediation may achieve its objective to resolve disputes amicably, our members report a lack of transparency in its implementation; for example, the parties are not aware of the time-frame and their rights and obligations. In addition, this preliminary mediation procedure overlaps with the compulsory mediation at court for some disputes (such as individual labour disputes) which leads to unnecessarily lengthy judicial procedures.

Potential gains/concerns for Vietnam

When planning to invest abroad, the availability of an efficient and transparent judicial system is one of the key factors that foreign investors take into account. We, therefore, believe that further judicial reform in Vietnam will lead to increased confidence among investors which will, in turn, boost Vietnam's economy.

Recommendations:

- EuroCham members are following with great interest the current process of publicising judgements of Vietnamese courts, including recognition of precedents as one of the sources of law in accordance with the Civil Code[9] on two websites managed by the People's Supreme Court.[10] We encourage the publication of the judgments of all court levels without further delay;
- EuroCham members will also follow with great interest the implementation of the Law on Competition with respect to the requirement to make public the main decisions of the National Competition Council. We encourage the promulgation of the implementing decrees without delay;
- The Law on Lawyers should be amended to allow fully qualified Vietnamese lawyers to represent clients before Vietnamese courts, even if she or he is working for a foreign law firm. EuroCham members have advocated for this development in previous editions of the WhiteBook; and
- The Law on Mediation and Dialogue at court should be drafted in a manner that minimises the time for dispute settlement, provides appropriate mechanisms for handling court fees, and avoids the overlap between conciliation procedures at mediation centers and at the courts.

II. ARBITRATION IN VIETNAM

Relevant authorities: Ministry of Justice (MOJ), Supreme People's Court, Supreme People's Procuracy, National Assembly (Economic Committee)

Issue description

According to the 2019 Annual Report of the Vietnam International Arbitration Centre (VIAC), 274 new cases have been filed at VIAC in 2019 with a total value in dispute of VND 6.7 trillion (approximately US$ 289 million) and the largest value in dispute in one case was approximately US$ 128.8 million.[11]

Unfortunately, the reasons for the increased popularity of VIAC may have more to do with the disadvantages of other dispute settlement mechanisms in Vietnam, such as the Vietnamese courts (see Section I above) or international arbitration, rather than the effectiveness of arbitration at VIAC itself.

7 Plan No. 301/KH-TANDTC of Vietnamese Supreme People's Court dated 1 October 2018.

8 The Supreme People's Court is also collecting public comments to the Draft Law on Mediation and Dialogue at court which is expected to be adopted at the 9th National Assembly session - Session XIV: Draft law on court-annexed mediation and dialogue is in the process of comment gathering and is available at: <http://duthaoonline.quochoi.vn/DuThao/Lists/DT_DUTHAO_LUAT/View_Detail.aspx?ItemID=1708&TabIndex=0>, last accessed on .8 December 2019.

9 Article 6, the Civil Code 91/2015/QH13 of the National Assembly dated 24 November 2015.

10 In accordance with the Resolution 03/2017/NQ-HDTP of the Judicial Council of the Supreme People's Court on the publication of judicial judgments and decisions dated 16 March 2017.

11 "Annual report 2019", *Vietnam International Arbitration Centre*, 2019. Available at: < http://www.viac.vn/en/annual-report.html > last accessed on 21 February 2020.

The main concern relates to the intervention of the Vietnamese courts not only before a final award is issued (which results in the lack of jurisdiction of the VIAC tribunal and the termination of the arbitration proceedings) but also by setting aside the final award once it has been issued by a VIAC tribunal. For example, our members report several cases where a final VIAC award was issued by the VIAC tribunal and the court reconsidered the merits of the case and finally set aside the award by concluding that the arbitral award was contrary to the 'fundamental principles of Vietnamese law'.

We are also aware of cases where the respondent in VIAC proceedings raised an unfounded objection to the jurisdiction of the VIAC tribunal. When the tribunal issued a decision to confirm its jurisdiction, the respondent successfully applied to a Vietnamese court to have the decision overturned. Since the decision of the Vietnamese court on this issue is final and binding, and since there is no right of appeal against the court's decision, the court decision resulted in the termination of the VIAC proceedings.

Furthermore, the absence of a right to appeal a decision to set aside an arbitral award continues to be a major obstacle for foreign investors who are seeking the fair and transparent resolution of their claims in Vietnam.

Potential gains/concerns for Vietnam

An efficient and reliable legal framework for arbitration is a key asset for the development of a favourable environment for investment.

Recommendations

- The Supreme People's Court and the Chief Justice could provide more and stricter instructions to lower-level courts to consistently limit court interventions during arbitration proceedings; and
- The introduction of a right of appeal against first instance court decisions on jurisdiction or on the validity of an arbitral award could further contribute to making dispute settlement through arbitration in Vietnam more transparent and independent and therefore more popular on its own merits.

III. RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Relevant authorities: Ministry of Justice (MOJ), Supreme People's Court, Supreme People's Procuracy, National Assembly's Economic Committee

Issue description

Foreign investors in Vietnam generally choose dispute resolution by international arbitration where the value of the contract is substantial. Although international arbitration is often costly and time consuming, an international arbitral award is generally enforceable in most jurisdictions around the world under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards[12] (NYC), of which Vietnam is a party.

However, our members have found that it is extremely difficult in practice to achieve the recognition and enforcement of foreign arbitral awards through the Vietnamese courts.

One of the main difficulties encountered is the reversal of the burden of proof. Under the provisions of the NYC, if the award debtor raises any objection to the enforcement of a foreign arbitral award, then the award debtor is required to provide evidence to prove its objection. However, in practice the Vietnamese courts reverse the burden of proof and require the award creditor to prove that any objections raised by the award debtor are invalid or not applicable. This practice encourages award debtors to raise as many objections as possible, sometimes frivolously, which the award creditor is required to disprove. This imposes a significant cost and time burden on the award creditor and obstructs the award creditor in enforcing its legitimate rights. On the 27th of November 2015, the National Assembly passed Law 92/2015/QH13 promulgating the new Civil Procedure Code[13] (the Civil

12 Convention on the Recognition and Enforcement of Foreign Arbitral Awards dated 1958 of The United Nations Commission on International Trade Law.
13 Code of Civil Procedure 92/2015/QH13 dated 25 November 2015 of the National Assembly.

Procedure Code). The Code contains a specific provision on the burden of proof which makes clear that the award debtor shall bear the burden of proof. Our members welcome this positive step and will closely follow its application by the Vietnamese courts.

Another difficulty is the rejection of applications by the Vietnamese courts for reasons that are not consistent with the NYC. Indeed, in many cases, the Vietnamese courts have determined that the foreign party to the arbitration agreement lacked the capacity to sign a contract by wrongly referring to the Vietnamese law instead of applying the relevant law governing the foreign party. This ground is repeatedly relied on by the courts despite the clear provisions of Vietnamese law which require that the court can only determine that one of the parties to the arbitration agreement did not have the capacity to sign the agreement by reference to the law applicable to that party – not by reference to Vietnamese law. In other cases, the Vietnamese courts have determined that notices were not properly served on the respondent by wrongly applying Vietnamese law and not referring to the rules of arbitration governing the proceedings and the governing law of the arbitration agreement.

Our members have noted with interest that the Supreme People's Court is gathering comments on a draft Resolution of the Court's Council of Justice to provide guidelines for a number of provisions of the Civil Procedure Code on processing requests for recognition and enforcement of foreign arbitral awards in Vietnam. Our members are closely following the process of drafting and providing comments to the draft Resolution in order to follow international best practice with regard to this matter.

Potential gains/concerns for Vietnam

The vast majority of state parties to the NYC properly apply the provisions of the NYC in practice and duly recognise and enforce foreign arbitral awards within their own jurisdictions. The accession to, and implementation of, the NYC is widely seen as a key factor for the integration of a national economy into global trade.

Recommendations:

- The implementation of the Civil Procedure Code should provide for the strict application of the provisions of the NYC including the confirmation that the burden of proof falls on the award debtor if it claims that a valid objection to enforcement exists; that the award creditor is only required to provide to the court the valid award and the valid arbitration agreement in support of its application; that the Vietnamese court can only reject applications on grounds consistent with the NYC and the Civil Procedure Code and that the Vietnamese court is strictly prohibited from re-opening the merits of the case;
- Introduce the automatic referral to the relevant Superior People's Courts of all cases where an application has been rejected by the Courts of First Instance to encourage the recognition and enforcement of foreign arbitral awards in Vietnam; and
- More seminars and training courses could be organised by the Supreme People's Court for all judges of the provincial People's Courts and the Superior People's Courts to ensure that judges are properly trained to deal with applications for recognition and enforcement of foreign arbitral awards in accordance with Vietnamese law and the NYC.

We hope that the Legal Sector Committee's concerns and recommendations as mentioned in this chapter will be taken into account by the Vietnamese Government and relevant authorities. At the same time, we will continue to offer expert support and cooperation in order to find solutions to these issues and to improve the system of judicial recourse in Vietnam.

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CHAPTER 8 **MERGERS AND ACQUISITIONS**

OVERVIEW

The Mergers and Acquisitions (M&A) market in Vietnam is strong and vibrant. M&A transactions are widely considered to be one of the most effective means for market entry and business expansion in Vietnam. Numbers and value of completed M&A transactions in Vietnam have grown steadily during recent years, and are expected to grow further during 2020 (particularly given that the EVFTA has been approved for ratification by the European Parliament).

According to the Ministry of Planning and Investment (MPI):

- In 2018 the total value of M&A deals in Vietnam amounted to approximately US$ 10.1 billion, increasing by 60 per cent compared to the same period in 2017; and
- In 2019, the total value of M&A deals in Vietnam reached approximately US$ 15.6 billion, increasing by 54 per cent compared to the same period in 2018.

The two sectors in which M&A activity was strongest in 2018 and 2019 were consumer goods manufacturing and real estate.[1] Other key sectors included consumer finance, retail, fisheries, logistics, and education. Investors from Japan, Korea and Singapore played a crucial role in the M&A scene in Vietnam during 2018 and 2019, with impressive transaction completion volumes having been achieved.[2] These figures are expected to increase further during 2020, as many foreign investors try to position themselves in Vietnam in order to benefit fully from the free trade agreements expected to enter into force during the next few years, including the recently ratified EVFTA.

Vietnam's Law on Investment 2014[3] (LOI) and Law on Enterprises 2014[4] (LOE) represented significant milestones in the development of the legal framework for M&A activities in Vietnam. The implementing legislation issued pursuant to these laws has also contributed to the simplification and streamlining of relevant administrative and regulatory procedures in Vietnam. At the same time, a number of key issues under the LOI and LOE and their implementing legislation remain unresolved and in need of further clarification by relevant State authorities. In order to address some of these outstanding issues, the MPI published for public comment several successive drafts of a proposed new Law on Amendment of some articles of the LOI and LOE, which is expected to be passed by the National Assembly (NA) in 2020.[5]

Set out below is a brief overview of some of the main legal impediments to effective M&A in Vietnam, presented in the form of our recommendations to the Government as to how to address these issues. We welcome the opportunity to work alongside regulators to facilitate growth and efficiency in the M&A market.

The following is our summary of the key impediments and our recommendations as to how to overcome them:

- Continue to reduce the number of 'conditional' business sectors and define more clearly what sectors do and do not constitute 'conditional' sectors for the purposes of the various legislative instruments in which this concept is legislated;
- Abolish altogether the Economic Needs Test (ENT) requirement for the establishment by foreign-invested retail distributors of new retail outlets (noting that the EVFTA provides for the ENT to cease applying in relation to foreign investors from EU member states five years after the EVFTA enters into force);

1 "Vietnam M&A Forum in 2019: Going for breakthrough", *Vietnam Investment Review Newspaper under the Ministry of Planning and Investment*, 23 July 2019. Available at <https://www.vir.com.vn/ma-vietnam-forum-2019-going-for-breakthrough-69447.html> last accessed on 8 December 2019.
2 Ibid.
3 Law 67/2014/QH13 dated 26 November 2014 of the National Assembly on investment.
4 Law 68/2014/QH13 dated 26 November 2014 of the National Assembly on enterprises.
5 "Linklaters Insights: Vietnam year in review 2019 and year to come 2020", *Allens*. Available at: <https://www.allens.com.au/insights-news/insights/2019/12/linklaters-insights-vietnam-year-in-review-2019-and-year-to-come-2020/#proposed_amendments> last accessed on 8 December 2019.

- Remove the requirement for foreign investors to obtain an 'M&A Approval' before implementing any private M&A transaction;
- Reduce the degree of discretion wielded by the local licensing authorities in relation to the review and revisiting of the commercial terms of M&A transactions;
- Improve the clarity and consistency of the procedures applicable to M&A transactions;
- Reduce the overall degree of State control over flows of foreign currency into and out of Vietnam, including the clear abolition of any requirements to use on-shore direct investment capital accounts and indirect investment capital accounts in connection with M&A transactions;
- Ensure faster and smoother processing of the tax clearance procedures necessary for implementing M&A transactions and the transfer of purchase consideration; and
- Re-visit the merger control notification threshold tests set out in the Law on Competition and its implementing legislation, in order to minimise the number of M&A transactions which require notification to the National Competition Commission (NCC).

I. MARKET ACCESS AND LICENSING PROCESS

Relevant authorities: Ministry of Planning and Investment (MPI)

Issue Description

Conditional business sectors and other restrictions to market access

Market access remains subject to heavy limitations (for example, the existence of over two hundred 'conditional' business sectors, wide-ranging foreign ownership caps, the 'economic needs test' for opening retail outlets, etc.) The rules governing the acquisition by foreign investors of equity interests in domestic Vietnamese entities have liberalised significantly in recent years, but require further liberalisation in order to stimulate a more developed and sophisticated M&A market in Vietnam.

We welcome the dialogue between the relevant State authorities (e.g. MPI and provincial People's Committees) and the investment community which have occurred recently, with a view to eliciting public comments on draft amendments to the LOI and LOE. We also appreciate the efforts of the Government in endeavouring to reduce further some of the key restrictions as well as the disparity of treatment between Vietnamese and foreign investors.

We appreciate the issuance of Law 03/2016/QH14 passed by the National Assembly on 22 November 2016 amending and supplementing Article 6 and Schedule 4 regarding the list of conditional business sectors under the Law on Investment, under which the number of 'conditional' business sectors has been reduced from 267 to 243, and the draft of the Law amending the Law on Investment to be submitted to the National Assembly for approval in 2020 which proposes only 236 'conditional' business sectors. [6]

We also welcome the move of the Ministry of Industry and Trade (MOIT) in issuing Decision 3720[7], which provides a plan to cut and simplify a number of business and investment conditions during 2019 to 2020. Specifically, in eight areas, this Decision proposes to eliminate a total of 111 business and investment conditions, simplify 60 business and investment conditions and shift 31 business and investment conditions from the pre-licensing inspection to post-licensing inspection mode, thus leaving 178 conditions remaining under the authority of MOIT. Decision 3720 represents a further significant reduction of investment conditions after the elimination of 675 business and investment conditions under Decision 3610A[8] which provided the plan on removal and simplification of business conditions for 2017-2018. Many observers expect that this MOIT Decision will give rise to a significantly improved

6 The fourth draft of the Law amending the Law on Investment. Available at: <http://duthaoonline.quochoi.vn/DuThao/Lists/DT_DUTHAO_LUAT/View_Detail.aspx?ItemID=1777&LanID=1833&TabIndex=1> last accessed on 29 May 2020.

7 Decision 3720/QD-BCT dated 11 October 2018 of the Ministry of Industry and Trade issuing the solution to reduce and simplify business and investment conditions subject to the management of MOIT for 2019-2020 period.

8 Decision 3610A/QD-BCT dated 20 September 2017 of the Ministry of Industry and Trade issuing the solution to reduce and simplify business and investment conditions subject to the management of MOIT for 2017-2018 period.

business and investment landscape for the entirety of Vietnam.

We understand that MPI continues to coordinate with the National Assembly Committees, Ministries, related agencies, and the community of enterprises to review and propose the abolition of additional 'conditional' business sectors, based on the following criteria, to submit to the Government and the National Assembly for consideration:

- The relevant business sector is not directly related to or cannot be proved to have a direct impact on national defence, national security, social order and safety, social ethics, or public health;
- The relevant business sector has been managed by technical regulations and standards;
- The output quality of such a business sector is selected, screened and decided by the market and customers, and does not need to be managed by conditions on business investment; and
- The relevant business sector can be controlled through bidding and State orders if it provides public products and services.

Despite the above, in our view, it would be very much in Vietnam's best interests to continue to minimise the number of 'conditional' sectors and to implement tight controls over the creation of any new 'conditional' sectors, in order to enhance Vietnam's status as a desirable foreign investment destination of choice. In addition, we respectfully consider that the ENT places an undue and unfair burden on foreign-invested players in the retail distribution sector and that its abolition would be of great benefit in enhancing Vietnam's desirability as a destination for foreign investment. We do, of course, acknowledge and commend the provisions of the EVFTA which provide for the ENT to cease to apply in respect of foreign investors from EU member states following the entry into force of the EVFTA.

M&A approval

Specific considerations apply in the context of M&A deals targeting private companies. For these deals the purchaser or investor is now required, in a number of circumstances, to obtain from the relevant provincial or municipal Department of Planning and Investment (DPI) the issuance of a specific 'M&A Approval' as a condition precedent to any M&A transaction involving a foreign purchaser or investor. This requirement is burdensome, having regard to standard practice worldwide, which in most cases requires M&A transactions only to be registered with – rather than pre-approved by – the relevant governmental authorities.

The requirement to obtain 'M&A Approvals' once again increases the degree of discretionary scrutiny which State authorities exercise over private M&A transactions, thereby making the M&A process more uncertain, more risky, and less appealing from the perspective of the foreign investors involved. In addition, the various DPIs (on a province-by-province or city-by-city basis) apply the 'M&A Approval' requirement in an inconsistent manner, thereby making this process non-uniform, unpredictable, and confusing for foreign investors.

While we appreciate that the current draft Law amending some articles of the LOI and LOE provides for clearer guidelines on the requirement for foreign investors to obtain an 'M&A Approval', the reality is that before taking the responsibility of issuing an 'M&A Approval', local DPIs usually consult with a number of relevant Ministries at central level with respect to the specific proposed M&A transaction, resulting in the 'M&A Approval' process in many cases being excessively lengthy (weeks or even months) and ultimately uncertain (in circumstances where M&A transactions entered into by foreign investors in most cases require speed and certainty).

Potential gains/concerns for Vietnam

Other countries in the region with similar advantages to Vietnam, such as young and educated labour forces, are competing for investors. It is, therefore, important that Vietnam remains attractive by offering a clear, simple, and efficient licensing process. This would help to boost the M&A market and consequently attract capital inflows. It would also serve to reduce the administrative burden on enterprises and licensing authorities alike.

Recommendations:

Our specific recommendations are:

- Continue to reduce the number of 'conditional' business sectors; and
- Abolish the Economic Needs Test in its entirety, for all foreign-invested enterprises, regardless of the jurisdiction of domicile of their investors; and
- Remove the requirement for foreign investors to obtain an 'M&A Approval' before implementing any private M&A transaction.

II. PAYMENT OF THE PURCHASE PRICE IN M&A TRANSACTIONS

Relevant authorities: Ministry of Finance (MOF), Ministry of Planning and Investment (MPI), and the State Bank of Vietnam (SBV)

Issue description

Documentation issues

Pursuant to Decree 78[9], in many cases, the parties to an M&A transaction are required to provide the relevant local licensing authority with 'documents proving completion of the transfer' in order to obtain an amended ERC and/or IRC (where applicable) and to complete the transaction. The current provisions, however, do not specify what documents qualify as 'documents proving completion of the transfer'. Therefore, while some local licensing authorities accept documents executed by the parties self-certifying that the transaction has been completed, other local licensing authorities interpret the requirements differently and require an official document issued by a bank, evidencing that the purchase price was in fact paid and received. This latter interpretation is particularly inconvenient when it arises in complex M&A deals where, as a practical matter, the parties normally wish to apply specifically-negotiated arrangements for the payment (for example, with the use of staggered instalments, retention amounts, and/or escrow accounts).

Payment issues

Pursuant to the applicable regulations, the purchase price payable in an M&A transaction involving a foreign investor is, in many cases, required to be transferred through a specific on-shore bank account which, depending on the circumstances, must be either a "direct" (DICA) or "indirect" (IICA) investment capital account. Although the State Bank of Vietnam (SBV) in 2019 introduced a new Circular in an endeavour to clarify the rules relating to the use of a DICA or an IICA in relation to M&A transactions, those rules remain insufficiently clear and banks continue to apply conflicting interpretations as to the applicable DICA or IICA requirements. In addition, this SBV Circular, in providing that non-resident buyers are permitted to pay non-resident seller's directly and in foreign currency outside of Vietnam appears to conflict with the LOI (and any buyers who make such foreign currency payments directly and outside of Vietnam remain exposed to foreign currency repatriation risks arising from banks applying strict requirements for them to prove that they have duly and properly implemented a capital investment in Vietnam).

These and other foreign exchange control regulations make the transfer of purchase prices a cumbersome, time-consuming, and uncertain process which often gives rise to material delays in transaction implementation timetables. The recent SBV regulations and guidelines (contained in Circular 06/2019/TT-NHNN), while helpful, fail to address the core of the problem.

In our view, the distinction between "direct investment" and "indirect investment" transactions and bank accounts is unnecessary, gives rise to confusion, and should be abolished, as should the necessity to route purchase prices through any particular type of legislated on-shore bank account. In particular, foreign buyers should be free to

9 Decree 78/2015/ND-CP dated 14 September 2015 of the Government on enterprise registration.

pay M&A purchase prices to foreign sellers outside of Vietnam (perhaps necessitating an amendment to the LOI in this regard) and should have the benefit of clarity as to precisely what evidence they need to obtain and produce in order to prove in the future that they have duly and properly implemented a capital investment in Vietnam.

Indeed, it would be hugely advantageous for Vietnam, in order to enhance its desirability as a foreign investment destination, if the overall degree of State control over the movement of foreign currency into and out of Vietnam was to be materially reduced. The degree of scrutiny which is placed on all foreign currency in-flows and out-flows into and out of Vietnam makes banking in Vietnam difficult, inefficient, burdensome, and undesirable for foreign investors.

Tax declaration issues

In addition, the tax clearance procedures necessary for implementing M&A transactions and transferring purchase prices are in many cases very slow and often delay the completion of M&A transactions to a problematic extent.

For example, in relation to M&A transactions, the current legislation requires that, "the tax declaration must be submitted within 10 days from the day on which the relevant authority 'approves' the capital transfer or the transfer date agreed by all parties in the transfer contract (if the transfer is not subject to approval)."[10] The legislation, however, does not clearly define what constitutes a relevant 'approval' in a private M&A transaction (not involving acquisition of State-owned enterprises), and, in practice, the tax authorities often adopt the view that the declaration and payment of the relevant capital gains tax must be undertaken within 10 days as from the date of the signing the relevant transfer contract.

This interpretation is particularly inconvenient with respect to complex M&A deals where, as a practical matter, the completion of the M&A transaction can only take place several weeks after the signing of the transfer contract (i.e. completion usually takes place only at a later stage, once all the conditions precedent agreed by the parties are satisfied). In practice, therefore, sellers in an M&A transaction would not receive the purchase price (and thus any income to be subject to capital gains tax) until the completion where payment by the buyer is paid. It is, therefore, unrealistic to require the relevant parties to declare and pay tax within 10 days as from the date of signing the relevant transfer contract.

In addition, the risks and uncertainties associated with "indirect" capital transfer tax (which is sometimes imposed by Vietnamese tax authorities on transfers of shares in offshore companies where the seller's capital gain is deemed to constitute income primarily derived from Vietnam) are highly undesirable for foreign investors wishing to invest in Vietnam and to deploy lawful tax minimisation structuring. It is highly unusual worldwide for tax authorities to purport to tax in their own jurisdiction capital gains realised by sellers of shares in companies domiciled in foreign jurisdictions. In our respectful submission, it would be highly advantageous in enhancing Vietnam's desirability as a foreign investment destination of choice if capital transfer tax was imposed only on intra-Vietnam share or charter capital transfer transactions.

Potential gains/concerns for Vietnam

A clear and transparent regulatory framework is essential for planning and implementing M&A transactions. The excessive level of discretion enjoyed and applied by local licensing authorities to question and require changes to the commercial aspects of M&A transactions plays a significant role in the continuing existence of uncertainty and procedural inconvenience in relation to Vietnam-based M&A transactions.

Recommendations:

We recommend the Government:

- Reduce the degree of discretion wielded by the local licensing authorities in relation to the review and revisiting of the commercial terms of M&A transactions (in particular in relation to business sectors which are not specifically provided for in Vietnam's commitments to the WTO upon accession);

10 Article 12.8(b) of Circular No. 156/2013/TT-BTC dated 6 November 2013 of the Ministry of Finance providing guidance on a number of articles of the Law on Tax Management, the Law on the amendments to the Law on Tax Management and the Decree 83/2013/ND-CP dated 22 July 2013 of the Government implementing a number of articles of the law on Tax Management and the Law on the amendments to the Law on Tax Management.

- Improve the clarity and consistency of the procedures applicable to M&A transactions;
- Abolish the distinction between "direct investment" and "indirect investment" transactions and the corresponding special-purpose on-shore bank accounts;
- Liberalise Vietnam foreign exchange control regulations, in order to facilitate more easy and efficient transfers of foreign currency into and out of Vietnam, including in the context of M&A transactions;
- Amend the deadline for submitting the tax declaration as well as tax payment for M&A transactions to "10 days from the day on which the registration of the capital transfer with the licensing authorities has been completed in accordance with the relevant law"; and
- Ensure faster and smoother processing of the tax clearance procedures necessary for implementing M&A transactions and the transfer of purchase prices.

III. ANTI-TRUST RESTRICTIONS

Relevant authorities: Ministry of Industry and Trade (MOIT), Ministry of Planning and Investment (MPI)

Issue description

When structuring an M&A deal it is often necessary for the parties to consider the applicable provisions of Vietnamese competition legislation.

In particular, pursuant to the Vietnamese competition legislation, an M&A transaction may require specific approval or may be prohibited, if certain degrees of 'economic concentration' will result from the transaction. Relevant for this purpose is the new Law on Competition[11] (New Law on Competition), which came into force on 1 July 2019 and replaced the former Law on Competition 2004 which had been in place for almost 14 years.

The New Law on Competition amends and re-states the former "combined market share" thresholds applicable under the previous legislation, and adopts a stricter and more comprehensive approach which prohibits merger transactions which "cause or are capable of causing a significant impact in restraint of competition in the Vietnam market". Merger control determinations are to be made by the NCC under the MOIT, taking into account a number of criteria such as:

- total assets in the Vietnamese market of the enterprises participating in the 'economic concentration';
- total turnover in the Vietnamese market of the enterprises participating in the 'economic concentration';
- transaction value of the 'economic concentration'; or (iv) combined market share in the relevant market of the enterprises participating in the 'economic concentration'.

On 24 March 2020, the Government promulgated Decree 35,[12] providing details for implementation of a number of articles of the Law on Competition (Decree 35). Decree 35 has significantly enhanced the degree of clarity which parties to 'economic concentration' transactions enjoy in determining whether or not their proposed transaction requires notification to the NCC (most importantly, by setting out a specific list of threshold criteria which, if met, will give rise to notification obligations).

Although Decree 35 does provide an enhanced degree of clarity in relation to a number of key concepts, the NCC retains significant power to interpret and apply on a discretionary basis the key concept of "...significant impact in restraint of competition...". This discretionary decision-making power at the NCC level is likely to give rise to uncertainty amongst M&A transaction parties and delays in the making of determinations by the NCC.

11 Law 23/2018/QH14 dated 12 June 2018 of National Assembly on Competition.
12 Decree 35/2020/ND-CP dated March 24, 2020 of the Government elaborating on several articles of the Law on Competition.

In addition, we note that the tests set out in Decree 35 for notification thresholds in relation to 'economic concentration' transactions are very broad in their coverage, meaning that many more M&A transactions are likely to require notification to the NCC (as opposed to the number of notifications required under the former Law on Competition and its implementing legislation).

Potential gains/concerns for Vietnam

The merger control notification process is a cumbersome and time-consuming process which often gives rise to material delays in transaction implementation timetables. The inevitable increase in the number of notifications required under the current legislation is likely to give rise to higher numbers of transactions being materially delayed, which is likely to have a detrimental effect on Vietnam's M&A market in the medium-to-long term.

Recommendations:

It is critical that the implementing legislation of the New Law on Competition provides clearer and more precise guidance on precisely how to determine whether or not an 'economic concentration' is to occur, calculate 'market share' (for the purposes of 'combined market share' analyses), and determine precisely what are the 'relevant market(s)' which must be analysed from a New Law on Competition perspective. Furthermore, the review process applied by the NCC should be streamlined, in order to avoid unnecessary delays in achieving the timely and orderly completion of M&A transactions.

Specifically, we recommend the following:

- To revisit the tests set out in Decree 35, in order to streamline the notification thresholds and reduce the number of M&A transactions that will require notification to the NCC; and
- To ensure that the NCC is held to account and required to adhere strictly to the notification processing timelines set out in the New Law on Competition and Decree 35.

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CHAPTER 9 **PUBLIC-PRIVATE PARTNERSHIPS**

OVERVIEW

Modern, efficient infrastructure is vital to continued economic growth and lowering the cost of doing business for investors in Vietnam. Rapid economic growth and urbanisation is driving high demands for roads, electricity, ports, waste and waste-water treatment, hospitals and other public infrastructure for goods and services. However, Vietnam's infrastructure development needs have been estimated at US$ 605 billion in the period to 2040 and, on current trends, the infrastructure investment gap (from both public and private sources of funding) is estimated to be US$ 102 billion over that period.[1]

While there has been significant spending on infrastructure projects in Vietnam over the past 20 years, the vast majority of the funding has been supported by Official Development Aid (ODA), the State budget and State guarantees of external debt provided by the Ministry of Finance (MOF). This is recognised as not being sustainable in the mid- to long term, particularly as Vietnam achieves middle-income status with the consequent reduction of available ODA funding. In addition, the Government of Vietnam is intent on reducing its exposure to foreign creditors under MOF guarantees, which results in a further tightening of amounts of external credit available for financing infrastructure.

Although local Vietnamese banks are increasingly funding infrastructure at relatively high cost and, in recent years, there has been a trend for real estate developers to diversify into infrastructure, the liquidity in the domestic market is not sufficient to cover the massive finance requirements in this sector. The balance of funding for these requirements, therefore, needs to be accessed from external sources, willing to offer attractive terms and eager to participate in the Vietnamese market. These funding sources, however, require structured solutions in terms of risk allocation, such as those that can be derived from private investments in the form of Public-Private Partnerships (PPPs), and certainty in relation to Government policy.

Over the past decade, the Government has conducted a continuous legal reform process aimed at increasing foreign and private investment. Most recently, the Government issued Decree 63/2018/ND-CP on Public Private Partnerships (Decree 63 or the PPP Decree) which took effect on the 19th of June 2018 as the principal currently effective regulation on PPP projects in Vietnam, and replaced Decree 15/2015/ND-CP.[2] Decree 63 co-exists with Decree 30/2015/ND-CP,[3] which regulates investor selection under the Law on Tendering,[4] and is now to be replaced as from 20 April 2020 by Decree 25/2020/ND-CP, recently issued on 28 February 2020.[5]

In November 2017, the Ministry of Planning and Investment (MPI)'s Public Procurement Department announced a proposal for a new Law on Public and Private Partnership (the Proposed Law on PPP) to replace the current PPP Decree and other ancillary regulations. A draft of the Proposed Law on PPP has been made available to stakeholders for review[6] and was to be submitted to the National Assembly for approval in its ninth plenary session taking place in May and June 2020.[7] The on-going lack of certainty about the permanence of the legal framework for PPPs – as well as the identified gaps in the framework (discussed later) – has resulted in little progress being made in furthering concrete projects with foreign participation. The cancellation by the Ministry of Transport (MOT) of international bidding for the planned North-South Expressway has also led to questioning in the international community in relation to the Government's intention to raise international funding through implementing PPP contracts.

1 Investment forecasts for Vietnam, published by the Global Infrastructure Hub. Available at: <https://outlook.gihub.org/countries/Vietnam> last accessed on 8 December 2019.
2 Decree 15/2015/ND-CP of the Government dated 14 February 2015 on investment in the form of public-private partnership (Decree 15).
3 Decree 30/2015/ND-CP of the Government dated 17 March 2015 on implementing the Law on Tendering regarding investors selection (Decree 30).
4 Law 43/2013/QH13 on Tendering dated 26 November 2013.
5 Decree 25/2020/ND-CP dated 28 February 2020 of the Government implementing the Law on Tendering (Decree 25).
6 The latest draft is dated May 2020 and is discussed in more detail in Section III below.
7 "National Assembly's Standing Committee discusses draft PPP law", *Vietnam Law & Legal Forum,* 19 September 2019. Available at: <http://vietnamlawmagazine.vn/na-standing-committee-discusses-draft-ppp-law-16846.html>, last accessed on 8 December 2019.

Over the past 20 years, outside the handful of successful foreign invested large scale Build-Operate-Transfer (BOT) thermal power plants,[8] successful private investment in the public infrastructure sector has been the exception rather than the rule, particularly in the case of private investment in PPP form. The few reported cases of such BOT or PPP investments are usually implemented under relatively basic project contracts and arrangements with the State which, while acceptable to the local market, are insufficient in terms of risk allocation and legal protection to form the basis of significant foreign cross-border investment and financing.

Until now, due to difficulties with the existing PPP regime, investors, and particularly foreign private investors, have, in several cases, simply either (i) relied on constituting an investment project under the Law on Investment or (ii) implemented Build–Transfer (BT) projects, whereby the construction of public infrastructure, most often expressways, is rewarded by the State granting the investor rights to implement a private project, usually for urban development or real estate development.[9]

Although the PPP Decree, Decree 30, its replacement Decree 25, and the implementing regulations constitute important legal developments – and it is hoped that the existing draft of the Proposed Law on PPP will evolve to build on these developments as set out in Section III – this will not by itself translate into a series of successful privately invested infrastructure projects. In this chapter, we will discuss recommendations to promote the PPP program in Vietnam which can be broadly categorised as follows:

- Developing a pipeline of visible projects;
- Improving the capacity and coordination among relevant Government agencies; and
- Streamlining, and, where necessary, moving towards the practical implementation of a comprehensive regulatory framework for PPP projects in Vietnam.

I. DEVELOPING A PIPELINE OF VISIBLE PROJECTS

Relevant authorities: Ministry of Planning and Investment (MPI), authorised State bodies, and other related authorities.

Issue description

As has been highlighted previously,[10] the success of the PPP legislative framework largely depends on the Government's willingness and ability to bring about and promote viable projects, and there has only been limited progress in this regard.

Clarifying prioritised projects for a PPP project pipeline

Decision 631/QD-TTg of the Prime Minister dated 29 April 2014 (Decision 631), which lists 127 national projects seeking foreign investment including around 35 to be developed under the PPP regime, has not been amended in more than five years to include an updated list of PPP projects based on further developed investment criteria. While certain important projects or categories of projects do feature in sectoral master plans, such as the Power Development Master Plan issued in March 2016,[11] and a number of provinces have stated their intention to publish lists of projects calling for PPP investment, a comprehensive list of national and regional projects inviting foreign

8 Examples include Mong Duong 2 which reached financial close in 2011, Nghi Son 2 which began construction in 2018, or more recent projects such as Van Phong 1 which reached financial close in 2019 and Vung Ang 2 which is expected to reach financial close in 2020.

9 Examples: (i) the project to construct the Pham Van Dong Road in Ho Chi Minh City connecting Tan Son Nhat airport to industrial zones in Binh Duong and Dong Nai, in which the Government entered into an agreement with the investor (GS Engineering & Construction) in which the investor finances and develops the infrastructure in exchange for the development rights and land use rights of certain lots of land in Districts 2, 9 and 10 for real estate developments, or (ii) the project in which the investor (Gamuda International) constructed Yen So sewage treatment plant in Hanoi in exchange for a lot of land for real estate development in the city.

10 The White Book, EuroCham, 2018 and 2019, Chapter 9: Public Private Partnerships.

11 Decision 428/QD-TTg dated 18 March 2016 of the Prime Minister approving master plan on the national electricity development in the period of 2011 to 2020 with vision to 2030. A replacement plan is currently being formulated: see Decision 1264/QD-TTg by the Prime Minister approving the formulation of National Power Development Master Plan for 2021-2030 with vision to 2045; the replacement plan itself is expected to be submitted to the Prime Minister for approval later this year.

investment and including details such as the proposed form of the project, the amount and form of the State's contribution, and any other incentives available to investors, would shed some light on the Government's priorities. Although the MPI, through its Public Procurement Agency, as well as the MOT, and certain local authorities such as Ho Chi Minh City's Department of Planning and Investment, publish certain information about potential projects online[12], the information is not always comprehensive and the disparate sources of information introduce the potential for conflicts between them as well as with statutory sources such as Decision 631 and relevant master plans, which can cause confusion for prospective investors.

Clear and practical guidance from a single, centralised source about which national-level projects will be prioritised as a "first in type" in which sectors and the support available from the Government (such as assurances regarding revenue streams and incentives) will be critical in attracting cross-border funding. This may require a sector-oriented approach including sector-specific regulations.

Unsolicited proposals

Unsolicited projects are permitted by the Vietnamese tendering regulations, but to date no such projects have been publicly reported as having been accepted and the legal aspects of the process are still largely untested. Pending the development of a pipeline of projects to be tendered, the clarification of the rules applicable to unsolicited projects could be a helpful tool to get projects "off the ground" and help develop institutional PPP capacity.

Currently, unsolicited project proposals must be approved by the relevant authorised State agency, following which the project proponent must carry out the feasibility study. The project must be put to tender based on the feasibility study prepared by the project proponent, who will be entitled to bidding incentives, including an increase of the price proposed by other bidders by an additional 5 per cent when evaluated against that of the project proponent. This has historically not been enough of an incentive for investors to propose projects in view of the risk that an investor who develops and proposes an unsolicited project may not be selected as the ultimate investor.

In addition, unsolicited projects cannot benefit from the Project Development Facility (described in more detail below) and are only entitled to State capital investment if such State capital is funded by ODA or preferential loans of foreign donors, which is another disincentive for potential project proponents. It also appears that projects included in Decision 631 cannot qualify for being proposed on an unsolicited basis, although the regulations are not entirely clear.

While a move away from direct appointment is welcomed, objective criteria where this might be permitted would be helpful if it can launch a first in kind pilot project with sophisticated foreign debt and equity investors off the ground pending the development of more refined regulations of PPP and tendering and the furtherance of capacity building (see Section II below).

Conversion of existing State funded projects to PPP form

Clarifications are also needed in relation to the regime for converting State-funded projects into PPP form, if existing brownfield State-run projects are to attract outside investment, liberating funds for the State to undertake new greenfield investments. While the process for conversion has broadly been set out in Decree 63 and Circular 88/2018/TT-BTC,[13] these provisions remain new and untested. In particular, the application of Decree 63 relates to "projects currently being invested by funds sourced from State capital", however the scope of this requirement is unclear, as the definition does not explicitly include projects where construction has not commenced. Clarifications are therefore necessary if investors are to have visibility of the State-funded projects that are eligible for investment under this regime and it would be helpful to see this potential mechanism actually implemented through one or more test projects.

12 See websites: <http://muasamcong.mpi.gov.vn>and <http://ppp.mt.gov.vn/pppunit/trangchu> and <https://ppp.tphcm.gov.vn/en/du-an-dang-keu-goi-dau-tu.html> respectively, last accessed on 8 December 2019.

13 Circular 88/2018/TT-BTC of the Ministry of Finance dated 28 September 2018 on the financial management of PPP projects.

The Project Development Facility (PDF)

The Project Development Facility (PDF), a facility sponsored by the Asian Development Bank and Agence Française de Développement to assist the authorised State bodies in preparing and assessing potential PPPs, was designed to help address these issues. The intention was for the PDF to be administered by MPI in cooperation with MOF. Selected investors in a PPP project would be required to refund the preparation costs for their projects to the State, who would repay them to the PDF. However, to date there is no detailed guidance on the management and eligibility of the PDF. In addition, the current draft of the Proposed Law on PPP makes no reference to the PDF. The conditions for accessing the PDF therefore remain undeveloped and it is still unclear whether and how the PDF will be launched whether locally or nationally in the near future.

Potential gains/concerns for Vietnam

Having tangible projects identified and announcing them to the market (whether they are greenfield or brownfield) continues to be of the highest priority to kick-start Vietnam's PPP program. It is critical that the existing regulations be tested by implementing PPP projects which, in turn, should develop the capacity of relevant Government bodies and increase the confidence of investors; gaps in the legislative framework may also be clearly identified and corrected by further legislation if necessary.

Recommendations

- We continue to recommend updating Decision 631 with a new list of key national and regional projects, particularly in sectors which have a good track record in other jurisdictions with well-trodden models and which are highly sought after by foreign investors such as transportation, prioritising economically viable projects as those slated to be implemented as PPPs;
- Clarify the bidding process for unsolicited projects and the process for converting State-funded projects into PPP format, and submit selected projects to a competitive, transparent tender as contemplated under Decree 30 and its replacement Decree 25, and consider allowing projects to be developed by leading global sponsors on the basis of unsolicited proposals/direct appointment as pilot projects in specified high priority sectors in order to develop a baseline standard of documentation and risk allocation which would be bankable in the international markets;
- Implement the PDF and put potential projects through a rigorous assessment (with the help of international technical and financial consultants) involving homogenous international standard screening procedures; and
- Provide incentives and attractive measures for sectors struggling to attract PPP investment.

II. IMPROVE CAPACITY AND COORDINATION AMONGST GOVERNMENT AGENCIES

Relevant authorities: Ministry of Planning and Investment (MPI), authorised State bodies, and other related authorities.

Issue description

The lack of institutional and practical capacity, coordination and the lack of unified approach among public authorities continue to be issues frequently cited by potential international project investors and sponsors as major difficulties for carrying out projects, including PPP projects, in Vietnam.

Gap in the approach between Government authorities and foreign parties

This issue is compounded by the fact that although BOT, BT and Build-Transfer-Operate (BTO) regimes have been in place for more than 20 years, the legal framework for carrying out PPP projects in sectors other than conventional power is still evolving and not yet fully developed. The PPP Decree, in particular, does not fully address a number of key risk allocation and commercial issues, resulting in uncertainty for the implementing authorities and, in turn,

delays to project contract conclusion and practical project implementation – and a number of these issues remain unaddressed in the current draft of the Proposed Law on PPP as highlighted in Section III below.

There are also only very limited precedents of financed and completed privately invested projects. The Government authorities, therefore, often do not have sufficient legal and practical guidance to smoothly manage the implementation of projects, particularly outside the conventional power sector.

Lack of coordination among related authorities

Finally, the lack of coordination by Government and among related authorities has also caused confusion for investors. The institutional structure and the roles of various Government authorities in the PPP legal framework are set out in the PPP Decree and the current draft of the Proposed Law on PPP. The PPP Decree contemplates a centrally planned and monitored program for managing PPP projects, centred on the Inter-Ministerial Steering Committee for PPP investments,[14] currently led by Deputy Prime Minister Trinh Dinh Dung, which acts as a coordinator among the various Ministries and provincial People's Committees involved in PPP projects. The Minister of Planning and Investment is the Deputy Head of the Steering Committee, and the MPI also hosts its standing office. However, the current text of the Proposed Law on PPP omits references to the Steering Committee and sets out provisions to establish centralised "Appraisal Councils" to evaluate PPP projects with different constituents depending on the size and approval level of the project.[15] It is not clear if Appraisal Councils are to co-exist with the Steering Committee. While efforts to improve coordination between governmental authorities are to be welcomed, it is important for the responsibilities of these bodies to be set out and demarcated clearly, as any duplication or uncertainty could be counter-productive.

In practice, foreign investors have observed that the practice of central and provincial Government authorities is not unified and different branches may take different views on the key issues relating to the investability of a project. Provincial authorities, especially in more remote provinces, continue to be left outside the reform process.

Potential gains/concerns for Vietnam

The institutional and practical capacity and coordination issue will, in our view, outside the commercial and economic realities of individual PPP projects, continue to be the one of the most important factors reducing the competitiveness of Vietnam's PPP program. It will continue to cause delay and it will increase costs for projects when compared with projects in other jurisdictions, including in the Association of Southeast Asian Nations (ASEAN), potentially resulting in a loss of investor patience and interest in the Vietnamese PPP program. Given the robust PPP program in some other markets in Southeast Asia (such as Thailand in particular at the current time), failing to address this issue in a timely manner will make it even more difficult for Vietnam to develop a competitive and visible project pipeline, particularly when interest in other jurisdictions which have been less active in the recent years is revived, which is expected in the near future. We understand, however, that work is being undertaken on some of these aspects with some of Vietnam's development institutions and this is encouraging.

Recommendations

- Continue to organise regular and quality workshops and capacity building sessions for relevant Government authorities, especially officials at provincial levels. The Government should organise capacity building sessions centered around the new legislation at an appropriate time to ensure that it is implemented by authorities in a cohesive manner;
- Continue to develop implementing regulations as well as project manuals to assist the authorised State bodies in carrying out projects;
- Develop (with the help of international consultants with experience in other markets) sets of approved bidding documents, including project contracts containing internationally acceptable risk allocation models as a basis for bidding to reduce the potential for delay;

14 The Steering Committee was formed by Decision 1624/QD-TTg dated 29 October 2012 of the Prime Minister and its functions are now primarily governed by Decision 2048/QD-TTg dated 27 October 2016 of the Prime Minister (which has replaced Decision 1624); however, its inclusion in the PPP Decree has brought the Steering Committee into the broader regulatory framework of Vietnam's PPP regime.

15 These consist of a "State Appraisal Council" and an "Inter-sectoral Appraisal Council" for projects whose investment policy approvals fall within the authority of the National Assembly and the Prime Minister respectively. Internal Appraisal Councils are also to be established within the relevant governmental authorities or agencies where investment policy approval of a project is done at a lower level.

- Bring in tangible projects in line with international best practice to provide the authorised State bodies with hands-on experience; and
- Require a joint implementing process with involvement of all key Ministries and authorities for a unified practice in developing projects, potentially leveraging those individuals who have gained experience of bankability and financeability issues in the context of successful power projects.

III. RATIONALISING DETAILED IMPLEMENTING REGULATIONS

Relevant authorities: Ministry of Planning and Investment (MPI), authorised State bodies, and other related authorities.

Issue description

The Government's recent efforts in rationalising the PPP framework have generally brought further consistency and improved investment conditions.

Notwithstanding these improvements, the overlap and the gaps in the existing regulations remain a major obstacle to the sound development of PPP projects – which ideally should be addressed in the Proposed Law on PPP. However, based on the current draft dated May 2020, it appears that certain key issues could remain after it is enacted which may continue to frustrate the financing and development of major infrastructure projects in Vietnam.

Foreign investors in PPP projects need to comply with a large set of regulations, including the Law on the State Budget,[16] the Law on Public Investment,[17] the Law on Enterprises,[18] the Law on Land,[19] the Law on Construction,[20] and the Law on Tendering, along with their guiding Decrees and Circulars, and cross references between these pieces of legislation are bound to induce inconsistencies. While the MPI had previously indicated informally that the Proposed Law on PPP would remove irrelevant and unnecessary references to Law on Public Investment, the current text does not appear to do this comprehensively. Ideally, the Law on Public Investment (and related legislation such as the Law on the State Budget) should only be activated where strictly necessary to assess State capital contributions for a given project, for instance at the in-principle approval stage, and otherwise the Proposed Law on PPP should contain a comprehensive and independent framework for the administration of PPP projects to avoid potential conflicts with other investment regimes.

The draft also appears to contain amendments to the Law on Tendering to remove certain references in it to the PPP regime. As Decree 25, enacted only in February this year, refers to the "law on PPP investment" as well as to the Law on Tendering it appears that elements of the Law on Tendering remain relevant to PPP investor selection, but three texts must now be reviewed in this context, as the Proposed Law on PPP also contains applicable provisions. As previously mentioned, the ideal would be to have all investor selection processes and criteria applicable to the PPP contract in the one place.

Furthermore, current provisions under the PPP Decree and the current text of the Proposed Law on PPP still do not fully address the key host country issues identified in developing and financing infrastructure projects in Vietnam, and there remain gaps which need to be filled. We list some examples below:

Security over land and assets attached to the land

The current regulations are ambiguous as to the right to mortgage land use rights in the case of an investor having benefited from exemptions of land use fees or rent (as one of the incentives available to investors in PPP projects). Under the Law on Land and its implementing regulations, land use rights can only be mortgaged if the rent or

16 Law 83/2015/QH13 on the State Budget dated 15 June 2015.
17 Law 39/2019/QH14 on Public Investment dated 13 June 2019.
18 Law 68/2014/QH13 on Enterprises dated 26 November 2014.
19 Law 45/2013/QH13 on Land dated 29 November 2013.
20 Law 50/2014/QH13 on Construction dated 18 June 2014.

fees have been fully paid by the investor (and this position is not varied by the PPP Decree), meaning that an investor having benefited from an exemption of the land use or rental fees may not be entitled to mortgage the exempted land. This inability to mortgage project land unfortunately undermines the land use incentives set out in the PPP Decree and limits the bankability of PPP projects, rendering the PPP framework less efficient. Thus, the inconsistency between the PPP Decree and the Law on Land remains an important obstacle to lenders supplying PPP investors with loans. As for the Proposed Law on PPP, the current text simply states that project land may be used as collateral in accordance with Vietnamese "laws on land and civil laws" – which therefore does not go beyond the existing regulations.[21]

Foreign exchange

Foreign exchange considerations also continue to affect the attractiveness of PPP projects in Vietnam from the perspective of investors relying on foreign lending. The Government guarantee of foreign exchange rates is a central issue for investors (and their foreign lenders) seeking to remit capital overseas. Regarding BOT thermal power projects, the Prime Minister's Letter 1604/TTg-KTN dated 12 September 2011 (which is still effective) contains assurances regarding the investment climate generally and specifically the availability of Government guarantees in relation to the pricing of power in U.S. dollars, even if it is payable in Vietnamese dong. Importantly, this text also contains the provision specifying that the Government shall guarantee the conversion into U.S. dollars of 30 per cent of the revenue of the project from Vietnamese Dong after deducting expenditures in Vietnamese dong. Similar provisions to guarantee a maximum of 30 per cent of the VND revenue for PPP projects whose investment policy approvals fall within the authority of the National Assembly or the Prime Minister are now set out in the current text of the Proposed Law on PPP, which provides regulatory certainty, although the sufficiency of this threshold remains to be tested outside the conventional power sector.

Viability Gap Funding (VGF), minimum revenue guarantees and risk sharing

Another key area affecting the future development of PPP projects is the absence of any guidance and practice relating to Viability Gap Funding (VGF). References to the possibility of VGF under Decree 15 and Decree 63 in connection with proposed pilot projects marked an encouraging step forward for foreign participants in the PPP market however, detailed guidance on the management of and eligibility for VGF has yet to be issued. Without detailed guidelines in place regarding the quantification of the state investment capital in a given PPP project, it has not been possible to implement a project with VGF terms.

Similarly, the absence of any framework for developing State support in the form of minimum revenue guarantees, which could ensure the financeability of otherwise unviable economic projects in the long-term, has been a major structural hurdle and one that the international community hopes will be resolved in forthcoming legislative developments.

The current draft of the Proposed Law on PPP does appear to envisage the possible availability of VGF at a high level in very general terms, providing that State capital may be used to "provide support" to a project during the construction phase, although few details have been provided and the Government is directed to "provide guidance" in due course.[22]

The draft also introduces a risk sharing mechanism whereby the Government would bear 50 per cent of the deficit between the actual revenue and the "committed revenue" for the project in certain circumstances, and would also benefit from 50 per cent of the surplus between the actual revenue and the committed revenue. While risk sharing mechanisms are generally to be welcomed as a possible form of support to enhance the viability of projects that might require this, the current drafting is concerning for several reasons:

- It is not clear whether the mechanism is optional for a given project or if it is to apply to all projects (when specified conditions are met), and the drafting should be clarified in this respect.
- The revenue decrease share is subject to several conditions that do not apply where the revenue of a project exceeds projections – in particular, the Government would only bear its share of the deficit for projects implemented in a State proposed BOT, BTO or Build-Own-Operate (BOO) forms where the deficit is due to

21 Article 82.4 of the draft of the Proposed Law on PPP dated May 2020.

22 See Articles 71 and 72 of the draft of the Proposed Law on PPP dated May 2020.

"change in plans, policies, relevant laws" – which appears to restrict the Government's risk of share deficits significantly. Moreover, unsolicited projects as well as projects that benefit from VGF appear to be ineligible for deficit sharing (but not surplus sharing).

- Furthermore, when the conditions for revenue sharing are met, the draft indicates that the term of the PPP contract is to be adjusted accordingly and it is not clear how resulting changes to overall revenue over the life of the project would then affect the revenue sharing provisions that are set out in the draft.
- As for the details of the sharing mechanism, a project's committed revenue is to be determined based on its "financial plan",[23] but it is not clear at what stage the financial plan will be fixed for these purposes, and whether any revisions or corrections will be permitted from time to time. The draft also contains an alternative proposal for sharing of profit and loss, as opposed to revenue. However, this is a departure from international norms and it is unclear how this would be preferable to more usual revenue sharing models.

As a result, the incentives in the proposal seem mis-aligned, and may be unattractive to investors as the Government would appear to benefit from more upside than downside.

Ideally, the Proposed Law on PPP should avoid being over-prescriptive at this very early stage in the evolution of practical PPP project implementation in Vietnam and would make available a range of funding support and credit enhancement measures, including as VGF, minimum revenue guarantees and risk-sharing provisions, to maximise flexibility across the wide range of projects that can be implemented in PPP form and to enable appropriate support to be selected based on the needs of a given project.

Governing law

The Proposed Law on PPP would also require that PPP contracts be governed by Vietnamese law.[24] This differs from the current regime under which PPP contracts may be governed by foreign law in certain circumstances envisaged by the Vietnamese Civil Code, broadly, where the contract has a "foreign element", including where one of the parties is an overseas entity. The application of international, neutral and well developed bodies of laws (usually English law) to BOT project contracts has and continues to be an absolutely critical bankability issue to mobilise to quantum of funds required for large scale PPP projects. While the draft provisions indicate that "issues not yet regulated by Vietnamese law" may be set out in the PPP contract so long as they are not contrary to "the fundamental principles of Vietnamese law", this is too vague to be of sufficient comfort to international investors and their lenders. The investor community is concerned to see this provision amended in the final enacted new law, as this will certainly act as a block to catalysing much needed funding in view of the scale and amounts required. This is in contrast to, for instance, the renewables sector, where projects have been relatively small, but where the same issue will arise in connection with mobilising funding for more ambitious and large scale wind and solar development.

Timing to Financial Close:

The current draft of the Proposed Law on PPP introduces a requirement for the sponsors and the project company to achieve financial close within 18 months from signature of a project agreement for projects approved by the National Assembly or the Prime Minister, or 12 months from signature of a project agreement for other projects.[25] The draft provides that the PPP contract will be ineffective until financing is secured, however the consequences of failing to meet the statutory deadlines on the effectiveness of the PPP contract (such as whether it would be void, voidable or unenforceable unless otherwise agreed) are not clear. The draft text does contemplate the development of standard forms of PPP contract however,[26] and it is possible that this issue will be clarified at that stage.

Based on the experience of foreign lenders to large scale projects in Vietnam, these timelines will be viewed as extremely ambitious and may be a deterrent to investment in view of the lack of certainty. While a speedy

23 Specifically, committed revenue for these purposes revenue may not exceed a specified percentage of revenue projected under the financial plan, being 125% for revenue increases and 75% for deficits.
24 Article 58 of the draft of the Proposed Law on PPP dated May 2020.
25 Article 78 of the draft of the Proposed Law on PPP dated May 2020.
26 Article 47.2 of the Proposed Law on PPP dated May 2020.

resolution to closing financing documents is of course desirable, the recommendation is that this should be promoted through the creation of a well-developed and smooth enabling environment for concluding PPP projects, rather than through unnecessarily rigid statutory requirements.

Potential gains/concerns for Vietnam

Providing a balanced and practical legal framework around the bigger-picture issues relating to the financial viability of infrastructure projects to be assisted through the public part of the "public-private partnership" should also be a focus of the legislative exercise. Issues persist which limit the attractiveness of PPP projects to foreign investors, including a lack of clarity of existing regulations, conflict with other legislative regimes that serve to undermine incentives for PPP investors and key structural gaps relating to State support. The Proposed Law on PPP should aim to address these issues. Care should also be taken to avoid introducing further conditions or limitations that may affect foreign investors' appetite, such as potentially, the application of Vietnamese law to key project contracts, unbalanced revenue sharing mechanisms and overly ambitious deadlines to financial close. Cohesive and tested laws and regulations that comply with international norms would lay a solid framework upon which to convert foreign interest in PPP projects to a steady stream of investment in the coming years, which may prove to be more economically challenging than those recently past.

Recommendations

- Take advantage of legislative momentum behind the Proposed Law on PPP in order to clarify and complete existing regulations to an international standard so as to increase the attractiveness of Vietnamese PPP projects to foreign investors, in particular by providing a clear and cohesive framework for PPPs to benefit from VGF, minimum revenue guarantees and risk-sharing measures;
- Continue to streamline the policies and guidelines related to PPPs, including implementing regulations that will most likely follow the enactment of the Proposed Law on PPP to attract foreign investors looking to invest in infrastructure in the country, focusing on certain key elements such as the availability and disbursement of such funding and credit support measures; and
- Test these regulations with actual projects so that investors can get comfortable with how they will be interpreted in the context of developing a PPP.

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CHAPTER 10 **REAL ESTATE**

OVERVIEW

As a result of encouraging investment policies and the increased participation of new investors, the Vietnamese real estate market has been rising over the last four years. Vietnam finds itself in a favourable position to improve its infrastructure and economic competitiveness, with free trade agreements such as the EU-Vietnam Free Trade Agreement (EVFTA) and the EU-Vietnam Investment Protection Agreement (EVIPA). These agreements have recently been ratified by the European Parliament on February 12 2020, and are set to be ratified later this year by Vietnam's National Assembly. In addition, the real estate market has also been stimulated by important laws passed recently, such as the Law on Construction 2014[1] (LOC), the Law on Housing 2014[2] (LOH), and the Law on Real Estate Business 2014[3] (LOREB). Nonetheless, if more administrative reforms and transparent procedures are not put in place, it is likely that capital flow will move to neighbouring countries. We believe that there are some regulatory barriers hindering the sustainable operation and development of the real estate market which should be considered, and we wish to share our concerns with the Government in order to maximise the favourable climate in which Vietnam finds itself.

First, it is necessary to establish a legal framework for new hybrid types of property in real estate projects, such as "condotel", "hometel" and "officetel", which have attracted more investment capital. Currently, there are conflicting interpretations from house buyers, real estate developers and regulatory authorities. Therefore, establishing a legal background to systematically regulate these new types of property is essential for dealing with all related legal issues in a timely manner, to develop the real estate market, and also to attract foreign investment capital.

Secondly, protecting buyers of housing projects from cases of insolvency or bankruptcy of real estate developers is vital because when developers become insolvent or bankrupt, there are many legal risks for house buyers who are the ultimate victims.

In addition, the delay in issuing Land Use Rights Certificates (LURC) for foreigners by the relevant authorities due to the current lack of a list of commercial housing projects where foreign ownership of residential housing is prohibited (Foreign Ownership Prohibited Projects List) seriously affects foreign buyers' rights and brings a number of legal risks. Also, the LOH sets forth that construction management authorities (Department of Construction, DOC) are required to set up a comprehensive residential housing information system[4] for public convenience, including a list of residential housing projects which are qualified for sale to homebuyers. However, in reality, there has been no such system after five years of the LOH being in force. This has resulted in a lack of information for homebuyers, and may have partly contributed to scams and swindles of customers by some developers.

Although improvements have been seen in the legal system and administrative reforms made to previous legislation, several inadequacies in regulations for real estate projects still remain. Therefore, EuroCham members would like to highlight certain legal shortcomings and provide some recommendations. We welcome the opportunity to cooperate with legislators to facilitate the growth and efficiency of the real estate market.

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1 Law on Construction 50/2014/QH13 dated 18 June, 2014 of the National Assembly.
2 Law on Housing 65/2014/QH13 dated 25 November, 2014 of the National Assembly.
3 Law on Real Estate Business 66/2014/QH13 dated 25 November, 2014 of the National Assembly.
4 Law on Housing 2014, Chapter X.

I. "CONDOTEL", "HOMETEL" AND "OFFICETEL" AND INVESTMENT APPROVALS

Relevant authorities: Ministry of Construction (MOC), Ministry of Planning and Investment (MPI)

Issue description

At present, new hybrid types of property in real estate projects have arisen in the real estate market, which include the building of "condotels", "hometels" and "officetels". However, there are a lack of provisions in Vietnam's legal framework to regulate such types of real estate projects. "Condotel", "hometel" and "officetel" are very popular as they meet customer demand. "Condotel" (a combination of "condominium" and "hotel") is a term that is understood as a type of hotel-apartment. Owners of a "condotel" have the right to temporarily reside, sell or rent. A "condotel's" main function is that of a hotel (short-stay and not forming a unit of residence) so it is usually located near a beach or in a tourist resort. "Hometel" (a combination of "home" and hotel") is understood as a type of luxury house catering for a long-term residence. A "hometel" inherits all the services and facilities of a five-star hotel, ensuring a comfortable living environment for homeowners as well as for renters. A "hometel" is located in a big city and usually built in the form of adjacent villas. "Officetel" (a combination of an "office" and "hotel") is understood as a type of office with the function of accommodation.

Therefore, "condotel", "hometel" and "officetel" are apartments which combine many different functions with a living environment. Article 3.4 of Decree 43[5] regulates that, in case of land on which a condominium for mixed purposes is built before July 1, 2014, with the floor area partly used as offices, commercial space or for services, the main use purpose shall be determined as residential. However, "condotel", "hometel" and "officetel" combine many functions in each apartment's area without having the separate parts of the apartment building's area purpose prescribed by the law.[6]

Under Article 5.1 of the LOI, investors are entitled to make investments in business lines that are not banned under the law. These new hybrid types of property in real estate projects such as "condotel", "hometel" and "officetel" are not regulated by laws. This creates confusion among the competent authorities in the management of construction investment, and use of these property types of real estate. Thus, there are many legal risks for investors who invest in new real estate projects, which have such hybrid property types, especially in the issuance of LURCs, ownership of houses and other assets attached to the land.

Under the LOH, approval of residential housing construction projects might be subject to either (i) an in-principle decision on investment according to the LOI, or (ii) an in-principle consent to investment, where projects are not subject to an in-principle decision on investment under the LOI.[7] However, pursuant to Article 20 of Decree 11/2013/ND-CP,[8] an urban zone project investor must prepare and submit a dossier to competent authorities for a decision on investment approval. This has led to various interpretations as to whether an urban zone project investor will have to apply for all of the above decisions. As a result, administrative procedures for approval of urban zone construction projects could become cumbersome and prolonged. This would adversely affect the investment and business environment in Vietnam.[9]

In addition, under Article 126 of the LOL, a residential apartment has a long and stable land-use term, but a land-use term for an apartment which is used for trading and services shall not exceed 50 years. Therefore, there is a gap

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5 Decree 43/2014/ND-CP dated 15 May 2014 of the Government detailing a number of articles of the Law on Land.

6 Ministry of Environment and Natural Resources has issued Official Letter 703/BTNMT-TCQLDD dated 14 February, 2020 providing guidelines for this matter (OL 703). The provision of accommodation services in the condotels and tourist villas are a model of tourism services and listed under accommodation and food service category specified in the Vietnam Standard Industrial Classifications attached to Decision 27/2018/QD-TTg dated 6 July , 2018. Therefore, the use of land for trading condotels and tourist villas will be determined as the land for commercial and services specified in Article 153 of LOL.

7 Article 170.2 of the Law on Housings

8 Decree 11/2013/ND-CP of the Government dated 14 January 2013 on investment management of urban development.

9 To overcome this matter, under the Draft Law amending, supplementing a number of articles of the LOI, such three concepts will be consolidated into only one concept: in-principle consent to investment. This Draft Law is currently under review by the National Assembly. Available at: <http://duthaoonline.quochoi.vn/DuThao/Lists/DT_DUTHAO_LUAT/View_Detail.aspx?ItemID=1777&LanID=1810&TabIndex=1>, last accessed on April 28, 2020.

between using land, and use of residential, trading and services apartments. It is, thus, unclear if the "condotel", "hometel" and "officetel" should have a long and stable land-use term, or one which does not exceed 50 years.[10]

Given the "hotel" characteristics of "condotels", "officetels" and "hometels", these hybrid property types are sometimes referred to as tourism accommodation establishments under tourism regulations. In particular, Article 48 of the Law on Tourism 2017 (LOT) prescribes eight kinds of accommodation establishments, of which, "condotels" are called tourist apartments.[11] However, this definition is unclear, as both "officetel" and "hometel" are not explained by the regulations. The Ho Chi Minh City DOC, Department of Natural Resources and Environment, Real Estate Association, and People's Committee have reported to the Ministry of Construction (MOC) and the Prime Minister about requiring regulations on "officetels". According to the Department of Housing and Real Estate Management, MOC, by the end of 2018/early 2019, there were to be some clarifications on these types of property.[12] Nevertheless, at the time of writing, the MOC has not yet issued such long-awaited clarifications[13]. In practice, no LURC, ownership of houses and other assets attached to the land has been issued to "officetel" owners, pending the MOC's specified instructions on this matter. EuroCham members believe that establishing a legal framework for new hybrid property types is important not only for the development and demands of the real estate market, but also for attracting and protecting the legitimate rights and benefits of investors in line with Vietnamese laws.

Potential gains/concerns for Vietnam

Without such legal provisions, there might be negative impacts on the housing project investors' investment decisions. "Officetels", "hometels" and "condotels" can encourage more investment projects and, therefore, protection of the rights and benefits of the investors is necessary.

For the Vietnamese people, an increase of real estate investment projects will create more revenue, jobs and economic benefits for the property market and, therefore, contribute to the general long-term sustainability of social security in Vietnam.

Recommendations

- We recommend promulgating legal provisions with specific standards and guidance for "condotels", "hometels" and "officetels"; clearly regulating the land-use term; amending legal provisions on the classification and mechanism of using land of mixed-used apartments; and granting certificates of land-use right and ownership of houses and other assets attached to land for "condotels", "hometels" and "officetels".
- Furthermore, the draft Law amending and supplementing the Law on Investment should be approved soon, in order to simplify the investment approval procedures into only one concept: "in-principle consent to investment".

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10 Recently, the draft Law amending and supplementing LOL submitted by the Ministry of Natural Resources and Environment to the Government has just been released to "rescue" "condotel", "officetel" and "hometel". The draft Law has come up with two solutions relating to the land-use term:
(i) If "condotel', "hometel", "officetel" have a residential function, it shall be determined to be residential land, with the project's land-use term of 50-70 years as prescribed by the LOL. The owners are allowed to use land for a long, stable term.
(ii) Determining as land used for trading and services with the project's land-use term of 50-70 years as prescribed by LOL. The owners are allowed to use the land during the duration of the project. "Proposal to amend the Law to rescue condotel, officetel", VnExpress, 27/12/2018. Available at: <https://vnexpress.net/kinh-doanh/de-xuat-sua-luat-de-giai-cuu-condotel-officetel-3688373.html>, last accessed on 8 December, 2019.
Furthermore, under Official Letter 703, the land use term for condotels and tourist villas is determined as the land use term for commercial and services land. Accordingly, such land use terms shall be considered and decided based on investment projects without exceeding 50 years or 70 years in case of projects with large investment capital and slow capital recovery, investment projects in areas with socio-economic hardships, etc. However, OL 703 does not provide clear guidelines for officetels and hometels.

11 According to Mr. Nguyen Manh Khoi, Deputy Director of Department of Housing and Real Estate Market Management, Ministry of Construction, "Condotels certainly have a certificate, but must wait", *Ninh Viet*, 15 May 2019. Available at: <https://bds.tinnhanhchungkhoan.vn/bds-phap-luat/condotel-chac-chan-co-so-do-nhung-phai-cho-211901.html>; last accessed on 8 December 2019.

12 According to Mr. Nguyen Manh Khoi, Deputy Director of Department of Housing and Real Estate Market Management, Ministry of Construction, "Some regulations for condotel will be available at the end of 2018", *Cafef,* 15 August 2018. Available at: <http://cafef.vn/cuoi-2018-se-co-mot-so-van-ban-phap-ly-cho-condotel-20180805181042815.chn>, last accessed on 8 December 2019.

13 Recently, there have been three relevant regulations issued regarding these matters: Circular 21/2019/TT-BXD of the Ministry of Construction dated December 31, 2019 on national technical regulations on apartment buildings and Official Letter 703/BTNMT-TCQLDD dated February 2020 of the MONRE and Decision 3720/QD-BVHTTDL of the Ministry of Culture, Sports and Tourism of October 2018, 2019. However, there are still a lack of legal bases regulating condotels, officetels in Vietnam. Especially, the Official Letter 703/BTNMT-TCQLDD and Decision 3720/QD-BVHTTDL, which are not prescribed as legislative documents under Vietnamese laws.

II. PROTECTING PROJECT HOUSING CLIENTS IN CASE OF INSOLVENCY OR BANKRUPTCY OF REAL ESTATE DEVELOPERS

Relevant authorities: Ministry of Construction (MOC), Ministry of Planning and Investment (MPI), State Bank of Vietnam

Issue description

On the 24th of February 2017, the People's Court of Ho Chi Minh City granted a Decision on the initiation of bankruptcy proceedings for PVC Land, which is the real estate developer of the PetroVietnam Landmark project.[14] If PVC Land was declared bankrupt by the People's Court of HCMC, the reasonable rights of buyers of this apartment project would seriously be affected.

On the 13th of March 2017, PVC Land submitted the entire amount of 2.327 billion VND, including interest, for the delayed execution of the project to the Civil Judgment Enforcement Authority of District 2 of HCMC. The People's Court of HCMC cancelled the decision on the initiation of bankruptcy proceedings for PVC Land, according to the request of the high-level People's Procuracy of HCMC.

In reality, when buying a real estate project apartment, the house buyer must pay at least 90 per cent to 95 per cent of the transaction price before the project is completed, then a certificate of land use right ownership of houses and other assets attached to land for the apartment is granted. In many cases, the real estate developers prolong the length of time for ownership of apartments or delay construction due to financial losses, and the buyer is likely to be unable to lawfully receive the apartment and lose money. The project apartments are the off-plan property under Article 108.2 of the Civil Code. Thus, under Article 4.4[15] of the LOB, if the real estate developers are declared insolvent or bankrupt, the project housing buyers will be creditors of unsecured debts, because the project housing buyers are paying for their future apartments and these are used as secured assets which the real estate developers use to secure their financing of the project.

Under Article 54[16] of the LOB, project housing clients are the last in line for redistribution of assets. In such cases, if the value of assets is not enough for payment, each object of the same sequence of redistribution of assets shall be paid according to the percentage corresponding to the debt amount. In case of the lack of real estate developers' assets for payment, the project apartment owners will be paid an amount in accordance with the percentage corresponding to the money which such project housing buyers paid for their apartments. The buyers will have no chance to own their apartments which were paid for.

Article 56.1 of the LOREB requires real estate developers to acquire bank guarantee contracts before pre-selling apartments. If the real estate developers fail to transfer the apartment buildings on schedule as committed to the project housing buyers, the commercial bank of the bank guarantee contract[17] will perform the financial obligations on behalf of such developers by refunding the money received from the customers under the previously signed future sales apartment contracts. This is one solution to protect the benefits of project housing buyers. However, the LOREB does not clearly state that real estate developers cannot sell future apartments if they do not have bank guarantee contracts in effect. Obtaining such bank guarantee contracts may cause the cost of the future apartments to rise by up to 2 or 3 per cent, so it reduces the competitiveness of these projects in the real

14 "Journey to sue PVC Land bankruptcy Term II: HCMC Judgment Execution Department is wrong?", *Enterprise News*, 12 July 2017. Available at: <http://enternews.vn/hanh-trinh-khoi-kien-pvc-land-pha-san-ky-ii-cuc-thi-hanh-an-tp-hcm-lieu-co-sai-113788.html>, last accessed on 8 December 2019.

15 Article 4.4 of the Law on Bankruptcy 2014: "A creditor of unsecured debts (hereinafter referred to as unsecured creditor) is an individual, an agency or an organization entitled to request the debtor to pay the debts that are not secured against assets of the debtor or a third party."

16 Article 54.1 of the Law on Bankruptcy 2014: "When the judge gives the Decision on the declaration of bankruptcy, the assets of the insolvent entity shall be redistributed in the following sequence:
a) Cost of bankruptcy;
b) The unpaid salaries, severance pay, social insurance and medical insurance to employees, other benefits according to the labour contracts and collective bargaining agreements;
c) Debts incurred after the initiation of bankruptcy which are used for resuming the business operation;
d) Financial obligations to the Government; unsecured debts payable to the creditors on the list of creditors; secured debts which are not paid because the value of collateral is not enough to cover such debts."

17 The commercial bank must meet all the conditions prescribed in Article 1.3 of Circular 13/2017/TT-NHNN dated 29 September 2017 of the State Bank of Vietnam amending and supplementing a number of articles of Circular 07/2015/TT-NHNN dated June 25 2015 ("Circular 13") in order to enter into a guarantee contract with the real estate developers.

estate market.[18] As a result, many real estate developers refuse to sign bank guarantee contracts with commercial banks. If the real estate developer becomes insolvent or bankrupt and does not have an executed bank guarantee contract, project housing buyers will lose their payments and have no resources to own their intended project apartments.

Furthermore, Circular 13 also requires that where a bank guarantee is provided to real estate developers, the commercial bank must give a guarantee commitment in the form of a 'guarantee letter' to the project housing buyers[19]. Although such guarantee letters must include the required content, such as: Applicable regulations; obligations; issuing fee; dispute settlement; etc.[20], in some projects where bank guarantees were not issued to off-plan apartment buyers or issued documents were called "bank guarantee", but such issued documents may be questioned as a legitimate and effective guarantee letter issued in favour of the housing buyers. Thus, the lack of a standard form for such guarantee letters can lead to off-plan apartment buyers potentially not being fully protected if the real estate developers fail to fulfil their agreed-upon obligations to the housing buyers.

Potential gains/concerns for Vietnam

Under Article 4.1 of the LOB, after three months of non-payment, the creditor shall have the right to request bankruptcy. This regulation is mechanical, easily turning debt disputes into bankruptcy requests. If a precedent is set that real estate developers can declare bankruptcy, the numbers doing so will rise and, as a result, a huge number of project apartment owners will be seriously affected.

Article 56.1 of the LOREB requires real estate developers to acquire bank guarantee contracts before pre-selling the apartments for project house buyers. This might be a good solution to protect such buyers if a real estate developer with a bank guarantee contract becomes insolvent or bankrupt.

Recommendations

We recommend that, when a credit institution provides a bank guarantee to real estate developers, it should be more tightly supervised and inspected in order to fully protect housing buyers. In addition, the State Bank of Vietnam should issue a standard form of a guarantee letter which a commercial bank issues to the housing buyers to avoid situations where such buyers are unable to receive an effective bank guarantee and without being refunded or insufficiently refunded their advance payment for a house.

III. DELAYS IN ISSUING LAND USE RIGHT CERTIFICATES (LURC) FOR FOREIGNERS

Relevant authorities: Ministry of Construction (MOC), Ministry of Public Security (MPS), Ministry of National Defense (MOND), Ministry of Planning and Investment (MPI), Provincial People's Committees

Issue description

Decree 99[21] regulates that foreigners and foreign entities may only own houses (including apartments and detached houses) in commercial housing construction projects, except for those with national defence requirements in security areas prescribed by Vietnam's laws and regulations specified under Article 75.1. Furthermore, pursuant to Article 75.2 of Decree 99, the MOND and MPS are responsible for specifying areas with national defence and security requirements in each province and sending a written notification to the relevant People's Committee as the basis for the provincial DOC to compile a list of commercial housing construction projects where houses must not be owned by foreigners or foreign entities. The MOC, MOND and MPS have sent official dispatches to the People's Committees of provinces and municipalities to identify the areas requiring national security and defence

18 "Why does the business avoid bank guarantee for the project?", *Cafef,* 22 October 2017. Available at: <http://cafef.vn/vi-sao-doanh-nghiep-ne-bao-lanh-ngan-hang-cho-du-an-20171022220090377.chn> last accessed on 8 December 2018.

19 Article 1.3 of the Circular 13.

20 Article 15.1 of the Circular 07/2015/TT-NHNN dated June 25, 2015 stipulating the bank guarantee.

21 Decree 99/2015/ND-CP dated 20 October 2015 of the Government on guidelines for the Law on Housing 2014.

and the list of projects where the competent authorities must not allow foreign entities and individuals to own houses.[22]

However, as of December 2019, the Foreign Ownership Prohibited Projects List (FOPPL) has not been issued from the provincial DOC's side. Some provincial DOCs, such as Ha Noi and Da Nang DOCs, have tried to issue a list of projects eligible for foreign ownership to attract more foreign investment in the local real estate market. However, there is no such list in Ho Chi Minh City. Therefore, the HCMC Land Registration Office (LRO) has stopped issuing certificates of land use rights, house ownership and other assets attached to land for foreigners who have signed house purchase contracts after December 10, 2015.[23]

Potential gains/concerns for Vietnam

This long delay in the issuance of the LURC for foreigners by the relevant authorities significantly affects the ownership of housing rights of foreigners because those who bought residential houses without the LURC could become victims if disputes arise between them and the sellers who have the LURC.

In addition, the current delay in the issuance of the LURC for foreigners could also make foreign investors who are interested in buying houses in Vietnam hesitate to invest in the real estate market. This causes a number of risks for foreign investors who need to obtain the LURC and protect their legal rights and benefits. After investing money into the real estate market by buying houses, if the foreign investors do not have the LURC, they will not have any evidence to prove their house ownership right. Therefore, they will not have the right to sell their houses to other buyers. That leads to the return or non-use of the investment capital and any profits earned of the foreign investor if cancelled or delayed.

In addition, without the FOPPL, the competent authorities may be confused about or delay issuing the LURC for foreigners. The FOPPL needs to be issued in accordance with the instruction of the provincial People's Committee because this is the final step in the issuance of the LURC for foreigners by the competent authorities.

Recommendations:

- Our Sector Committee recommends issuing the FOPPL to enable the LURC to be issued for foreigners who have bought residential houses in Vietnam.
- Our Sector Committee also recommends that the FOPPL is issued in accordance with the instructions of the provincial People's Committee.

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22 Document No. 10328/BQP-TM dated 19th October of the Ministry of Defense, 2016 and Document No. 786/BCA-TCAN dated 19 April, 2017 of the Ministry of Public Security.

23 "Ho Chi Minh City urges to issue a certificate of ownership to foreigners to buy houses", Vietnamnet, 26 July 2017. Available at: <http://vietnamnet.vn/vn/bat-dong-san/thi-truong/tp-hcm-doc-thuc-cap-giay-chu-quyen-cho-nguoi-nuoc-ngoai-mua-nha-386368.html> last accessed on 8 December 2018.