



ClientAlert

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Introduction

Dear Reader,

This month saw a handful of new regulations that affect business in Vietnam. We've briefed them and outlined the most important changes from each new regulation. They cover numerous topics including public investment and the use of public assets, digital technology, construction definitions and supervision, and digital technology enterprises.

As always, we hope you find this month's Client Alert helpful and hope you have been able to find an appropriate mask to avoid the dreaded Covid-19. We look forward to working with you.

Kind regards,
Indochine Counsel

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Use of public assets for payment of Build-Transfer Contracts

After struggling with regulations regarding land-use payment to investors under build-transfer projects (“**BT Project**”) provided by the 2017 Law on Management and Use of Public Assets, the long-awaited Decree No. 69/2019/ND-CP (“**Decree 69**”) was officially issued by the Government on 15 August 2019.

Decree 69 is built on the platform of a handful of regulations relating to sectors of investment, public investment, land, tendering, construction, state budget, and public assets management and use. Decree 69 regulates the use of public assets in order to make payment to an investor implementing an investment project for construction of works in the form of a build-transfer contract (hereinafter preferred to as “**BT Project Investor**”).

Types of public assets used for payment of a BT Project

According to Article 1.2 of Decree 69, public assets used for making payment to a BT Project Investor comprise:

- (a) Land fund;
- (b) Land, housing and other assets on land (collectively “working office”) of State agencies, organizations and units;
- (c) Infrastructure assets serving the national interest and the public interest;
- (d) Other types of public assets in accordance with the Law on Management and Use of Public Assets.

Principles for payment of a BT Project by public assets

As provided by Article 3 of Decree 69, the use of public assets to make payment to a BT Project Investor must comply with the following principles:

- (a) The use of public assets to make payment to an investor must ensure:
 - (i) its compliance with provisions of relevant laws;
 - (ii) investors must be chosen by open tendering; and
 - (iii) public assets are only used upon receipt of permission from the competent State agency.
- (b) The use of public assets to make payment to a BT Project Investor are implemented on the principle of *same price*, with the value of the BT Project to correspond to the value of the public assets used for payment.
- (c) The use of public assets to make payment for a BT Project must be collated and set out in the State budget in accordance with the Law on State Budget.

- (d) The time for payment for the BT Project is triggered upon the issuance of a decision allocating or leasing the land (in case payment is made by a land fund or by a working office) or a decision assigning assets (in case payment is made by infrastructure assets or others) to the investor;
- (e) Loan interest in the financial plan of the BT contract as regards that part of the value of the BT Project works completed on schedule, terminates as from the time when the competent State agency issues the relevant decision.
- (f) Assignment of public assets takes place after completion of the BT Project or takes place at the same time as a corresponding volume of the construction works are completed on schedule as confirmed by the competent State agency.
- (g) The principle of same price shall be determined as follows:
 - (i) the value of public assets is determined at market price in accordance with provisions of law as at the time of payment; and
 - (ii) the value of the BT Project is determined in accordance with the tendering results and is not permitted to change as from the date of signing the BT contract, unless the competent state agency permits adjustments as prescribed in Article 4.2 of Decree 69.

More specifically, with respect to payment of using land fund, if the value of such land fund is larger than the value of the BT Project, the investor must pay the difference in cash to the State budget. In contrast, if the land value is smaller, the State will pay the difference to investors in cash or land fund at the time of accounting finalization of the completed project.

Transition provisions

With respect to BT contracts for which payment is to be made in the form of a land fund or working office signed correctly in accordance with law prior to 1 January 2018 but for which payment to the investor has not yet been finalized, then payment shall continue to be made in accordance with the contents of the signed BT contract.

With respect to BT contracts signed between 1 January 2018 and 31 August 2019 which contain conditions on using public assets for payment, such contracts must be implemented in accordance with the following laws, namely the 2013 Law on Land, the 2014 Law on Investment, the 2014 Law on Construction, the 2015 Law on State Budget, the 2017 Law on Management and Use of Public Assets and other relevant laws.

Decree 69 took effect on 1 October 2019. It replaces Decision No. 23/2015/QD-TTg of the Prime Minister prescribing the State mechanism of payment by land fund to investors when implementing the investment construction project in the form of BT.

Land Use Ownership Certificates for Non-House Construction

On 14 February 2020, the Ministry of Natural Resources and Environment (“**MONRE**”) issued Official Letter No. 703/BTNMT-TCQLDD (“**OL 703**”), in which it provides guidelines to provincial Departments of Natural Resources and Environment (“**DONRE**”) on the land use regime and certification of ownership of construction works other than houses, including condotels and resort villas.

Land use regime

Under OL 703, condotels and resort villas are listed as tourist accommodation facilities pursuant to Article 48 of the 2017 Law on Tourism and the business of accommodation service at condotels and resort villas shall fall into the tourism service business line provided in Decision No. 27/2018/QD-TTg dated 6 July 2018 on issuance of the system of business lines.

As a service business, the land used for condotels and resort villas shall be considered as commercial, service land with land use regime provided by Article 153 of the 2013 Land Law (“**Land Law**”).

Land use period

As commercial, service land the leasing or allocation of land used for condotels and resort villas shall not exceed 50 years, or 70 years in case large investment capital but a slow capital recovery rate, and investment projects in areas with difficult or especially difficult socio-economic conditions which require a longer period to recoup the investment.

Certification of ownership

Certification of ownership for condotels or resort villas is one of the most repeated questions to be clarified by the MONRE. However, OL 703 continues to obfuscate the certificate of ownership to be granted for condotels or resort villas.

OL 703 only provides general provisions that if the condotel or resort villa in the project satisfies transfer conditions provided by the 2014 Law on Real Estate Business, the ownership certificate shall be granted to the transferred party in accordance with certification ownership regulations and procedure regulated by Decree No. 43/2014/ND-CP of the Government on guidance of Land Law; Decree No. 01/2017/ND-CP on amendment and supplement of Decree 43; Circular No. 24/2014/TT-BTNMT of MONRE on cadastral file; Circular No. 33/2017/TT-BTNMT of MONRE on guidance of Decree 01. However, it is noted that the aforesaid legal documents are unclear whether the ownership certificate will be granted to the investor of condotel or resort villa projects or the owner of condotels or resort villas in such projects.

The MONRE also requires DONREs to review approved investment projects and the lease or allocation of land for each project in order to determine the proper land use purpose and land use term.

Although providing clarification for several issues concerning investors of condotels and villas, OL 703 is simply an internal guideline from the MONRE to DONREs. It is not a binding legal document. OL 703 fails to clarify many issues, especially the certification of ownership of condotels and resort villas.

Promoting development of Digital Technology Enterprises

On 14 January 2020, the Prime Minister promulgated Instruction No. 01/CT-TTG dated 14 January 2020 on promoting the development of Vietnam's digital technology enterprises ("**Instruction 01**"). To achieve the target of 100,000 digital technology enterprises established, and other targets, the Prime Minister requested ministries and local authorities to implement the following solutions:

1. To develop a National Strategy for developing Vietnam's digital technology enterprises with the vision to 2030 and submit to the Prime Minister to promulgate such Strategy in 2020.
2. To plan the development of Vietnam's digital technology enterprises in each economic sector and each locality.
3. To establish one focal agency at the Government and one focal agency in each locality in order to consolidate, coordinate and organize the consultancy and support activities for digital technology enterprises.
4. To develop a controlled framework test policy for new products, services and business models applying digital technology in Vietnam and submit to competent authority to promulgate such policy in the period of 2020 – 2021.
5. To formulate policies and market creation solutions for digital technology enterprises in Vietnam.
6. To reform regulations regarding the Science and Technology Development Fund of Enterprises to allow investment in innovative startups and technology startups, to evaluate based on total capital with the cycle period from 3 to 5 years. Such regulations will be completed in 2021.
7. To simplify the procedures for management and use of Science and Technology Development Fund of Enterprises.

8. To research and propose the establishment of Vietnam's Digital Technology Enterprise Development Fund with its capital mobilized from the society and report to the Prime Minister on such proposal in 2020.
9. To guide and support at least 5 to 10 Vietnam digital technology enterprises in developing several key national digital products to become the core of Vietnam's digital enterprise ecosystem.
10. To develop at least 5 to 10 shared digital platforms to promote the application of digital technology, to promote the development of digital products in socio-economic fields in order to put into operation before 2025.
11. To periodically organize the National Forum on development of digital technology enterprises in Vietnam.
12. To honor digital technology enterprises on performing the “Made in Vietnam” policy and to conduct investment promotion, trade promotion, domestic consumption promotion and to support for the export of products, services, solutions and business models developed by digital technology businesses in Vietnam.

In addition to the above policies, the Prime Minister suggests large corporations, ministries and technology enterprises to conduct various activities to implement the policies provided by Instruction 01.

New Law on Public Investment

The Law on Public Investment No. 39/2019/QH14 (“**PIL 2019**”) was ratified by the National Assembly of Vietnam on 13 June 2019 and took effect on 1 January 2020. In comparison with the expired Law on Public Investment No. 49/2014/QH13 (“**PIL 2014**”), PIL 2019 contains several changes to facilitate the public investment environment in Vietnam.

The PIL 2019 provides for the state management of public investment and the management and use of public investment funds. The scope of public investment objects is for the first time prescribed, in particular:

- (a) projects for socio-economic infrastructure;
 - (b) investment serving the activities of state authorities, public service units, political organizations and socio-political organizations;
 - (c) investment in and support for the provision of public utility and social welfare activities;
 - (d) state’s investment in projects to be implemented in the form of public-private partnership;
 - (e) investment serving the formulation, evaluation, approval and modification of master plans;
- and

- (f) allocation of preferential loan interest rate subsidies and management expenses; allocation of charter capital for policy banks and off-budget state financial funds; and investment support for other policy beneficiaries in accordance with the prime minister's decisions.

Below are some remarkable changes in the PIL 2019, with specific regards to public investment procedures:

1. The PIL 2019 provides a strong hierarchy of authority for investment policy approval. In particular, the provincial-level People's Council is competent to approve the investment policy of A-group projects managed by localities, except for some projects under the authority of the prime minister. Meanwhile under the PIL 2014, the Prime Minister shall approve the investment policy of all A-group projects. A strong hierarchy of authority is also regulated in respect of evaluation capital sources and capacity of capital balance under the PIL 2019. Evaluation capital sources and capacity of capital balance no longer falls under the sole and absolute authority of the Ministry of Planning and Investment, but is decentralized to various state agencies including all levels of People's Committees.
2. The PIL 2019 provides that some tasks and projects (e.g. urgent public investment projects, projects belonging to national target programs, etc) do not need to go through the procedure for investment policy approval, in order to remove the formalistic mechanism and aim for the simplification of administrative procedures, and accordingly, may save time and cost for project preparation.
3. The PIL 2019 also overcomes one of the most substantial shortcomings of the PIL 2014. According to state authorities, a vicious circle has existed in terms of implementation of the PIL 2014. While the competent agencies need to determine the capital and the ability of capital balance in order to approve the investment policy for a project, they have to base such on an existing project so as to determine the capital and the ability of capital balance. Understanding the utmost need for a more effective resolution, the PIL 2019 clearly stipulates that expected capital plans and estimated ability of capital balance are to be submitted before the approval for investment policy will be issued.
4. The PIL 2019 supplements an efficient regulation (Article 43.5) related to the adjustment of investment policy which is a condition before making the corresponding adjustment to the project. This new content provides a legal basis in case there is any modification resulting in an increase in the registered and approved [gross] investment capital.
5. The PIL 2019 supplements a new regulation on communication systems and national databases with regard to public investment activities in order to apply the information technology in public investment management and aim for the enhancement of supervision, publicity and transparency, and may prevent loss and waste.

Guidelines on Quality Control and Maintenance of Construction

On 16 August 2019, the Ministry of Construction issued Circular No. 04/2019/TT-BTX (“**Circular 04**”) amending Circular No. 26/2016/TT-BTX (“**Circular 26**”) of the Ministry of Construction guiding on quality control and maintenance of construction works.

Below are key highlights of the Circular 04:

Clearly stipulate the responsibilities of chief supervisor and supervisor

The powers and responsibilities of organizations and individuals performing construction supervision, particularly chief supervisor and supervisor, have been detailed in Circular 04. The reporting mechanism of supervisory work was also extended, including

- (i) reports on periodic basis or upon each construction phase; and
- (ii) reports upon the completion of a phase, tender package, item of work or construction of work.

Investors can sign the minutes of check and acceptance with each main contractor

With regard to the minutes of check and acceptance of completed items of works or completed construction works, Circular 04 provides that investors can carry out the check and acceptance with each main contractor in case there are many main contractors participating in the construction.

Management of on-site experiment during the building of construction works

Article 15a of Circular 04 sets out separate responsibilities of investors, contractor/experiment contractor and the investors’ supervision team for the implementation of on-site experiments before and during the building of construction works.

Monitoring of works or parts of works during the building of construction works

Monitoring of works or parts of works during their building process shall be carried out in the following events:

- (i) subject to the approved construction design, technical specifications or building method;
- (ii) the work has abnormal signs (e.g. falling, sinking, inclining, cracking, etc.) which are in need of monitoring to detect the causes, thereby seeking measures for remedy or prevention of possible incidents during the building process.

The investor may select a contractor independent from the building contractor to carry out monitoring.

About Indochine Counsel

Established in October 2006, Indochine Counsel is one of the leading business law firms in Vietnam. The firm provides professional legal services for corporate clients making investments and doing business in Vietnam. The legal practitioners at Indochine Counsel are well qualified and possess substantial experience from both international law firms and domestic law firms. The firm boasts more than 45 legal professionals working at the main office in Ho Chi Minh City and a branch office in Hanoi.

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

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