



ClientAlert

Issue 6.10 | November 2015

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Introduction

Dear Reader,

This month saw a handful of new regulations that affect business in Vietnam. We've briefed them and outlined the most important changes from each new regulation. They cover topics ranging from administrative sanctions to minimum wage to guidance on the new laws promulgated during the most recent National Assembly.

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

Kind regards,
Indochine Counsel

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Stricter Sanctions for Some Administrative Violations

On 19 November 2015 the Government issued Decree No. 124/2015/ND-CP (“**Decree 124**”) amending and supplementing Decree No. 185/2013/ND-CP, dated 15 November 2013 (“**Decree 185**”), on sanctioning of administrative violations in commerce, manufacturing and trading of counterfeit goods or banned goods, and protection of consumer rights.

Decree 124, in comparison with Decree 185, changes the penalties in several articles and clearly classifies the competent authorities for dealing with each violation.

Some of the significant points provided in Decree 124 are as follows:

1. The fines against acts relating to illicit tobacco trade (trading, transporting, stockpiling, shipping and receiving) will be increased. Specifically, those who trade illicit cigarettes to fewer than 500 packs (as 1 pack is equal to 20 cigarettes, for other forms of illegally-imported finished tobacco being converted as 20gr = 1 pack), will be subject to a monetary fine from VND0.5 million - VND70 million (approx. US\$23 – US\$3,180) which is twice as cumbersome as Decree 185. Noteworthy, for the act of trading from 500 packs or more, it could be considered for criminal prosecution. In case the competent authority decides not to initiate a criminal case, the violator will face a penalty from VND70 million - VND100 million (approx. US\$3,180 - US\$4,545).
2. Heavier fines applicable to violation of e-commerce websites along with regulations on establishing enterprises initiating e-commerce applications on mobile foundations (“**Mobile Application**”) for provision of online sale of goods or e-commerce services. A fine of VND1 million – VND5 million will be imposed on those who fail to make registration or notification to the Ministry of Industry and Trade; disclosure of proper enterprise’ information; or protect customer information in e-commerce. Meanwhile, in case of customer swindling; illegally raising capital from traders, organizations, individuals under the name of e-commerce trading; or organizing, marketing online business networks for participants to be their ‘centipede legs’, they shall be imposed a fine of up to VND50 million. The violators are also obliged to withdraw the domain or remove such Mobile Application out of the application store and / or to be suspended from e-commerce activities for 6 to 12 months.
3. Decree 124 has shown a significant reduction on the penalties against the violations of business activities in the Business registration certificate as follows: VND1 million – VND2 million for the business activities not taken in the registered place, head office set out in the Business registration certificate; and up to the cap of 10 million (was VND15 million in Decree 185) for the acts of continuing business when declared ceased or having withdrawn the Business registration certificate.
4. The recently given term “goods of unknown origin” forms the basis of the penalty imposed on violators stipulated in Article 21 of Decree 185 which has been renamed to “*Violated acts in*

goods expiration, goods of unknown origin and other violations". Goods of unknown origin, whereby, is interpreted as the goods circulating on the market which is unable to identify its manufacturing origin or its sources.

Decree 124 comes into force on 5 January 2016.

Notable Guidance on Management of Apartment Buildings

On 20 October 2015 the Government issued Decree No. 99/2015/ND-CP guiding the 2014 Law on Housing ("**Decree 99**"). Apart from several significant points evaluated as coherent corridor for real estate market, Decree 99 also provides notable guidance on management of apartment buildings.

Decree 99 provides seven (7) prohibited acts in management and use of apartment buildings. Accordingly, Decree 99 lists out all specific prohibited acts that could cause harm to the safety of owners in apartment buildings or surrounding areas. Apart from such harmful acts, the use of the management and operation charges and the maintenance fee of commonly-owned areas not in compliance with official regulations on housing issued by competent authorities will be banned. Also, according to the 2014 Law on Housing, apartments in buildings are not allowed to be used as business locations. Therefore, according to Decree 99, in case a business registration certificate issued by competent authority indicates that an apartment is used as a business location before 1 July 2015, the organization, household, or individual obtaining such business registration certificate must move the business to another location other than an apartment within 6 months from 10 December 2015. Past this deadline, organizations, individuals and households are not allowed to conduct business in apartments.

With regard to maintenance fees of commonly-owned areas, Decree 99 details clear provisions for hand-over. Particularly, developers shall open a term deposit account ("**Maintenance Account**") at a credit institution operating in Vietnam to receive maintenance fees from purchasers/ tenants following the compulsory procedure stipulated in Decree 99. Before apartment hand-over, the purchasers/tenants must pay at the rate 2% of the maintenance fee and transfer such fee to the Maintenance Account. In the event of not collecting, the developer shall bear this fee. After establishment of the management board of the apartment building, the developer shall transfer the maintenance fees in accordance with regulations of the Law on Housing to the management board by wire transfer and submit a report to the local Department of Construction.

In addition, where developers do not transfer the maintenance fees or do not transfer to the management board sufficiently or on schedule, the People's Committee of the province where the apartment building is located ("**PC**") shall conduct enforcement procedures to ensure the maintenance fee hand-over upon the request of the management board. Accordingly, the enforcement of transferring maintenance fees to the management board shall be carried out within 30 days from the day on which the decision on enforcement is issued. The fees to be transfer will include

the principal and interest of the maintenance fees according to the figures stated by the parties or written in the decision on enforcement issued by the PC. This is a necessary provision to ensure the lawful interests of purchasers/ tenants. However, such regulation is still quite inadequate. In fact, maintenance fees are collected from purchasers and tenants, but managed by developers without any supervision. In the event of withdrawing all money in the Maintenance Account before the establishment of a management board, the developer does not have other resources or assets to compensate at the time of enforcement, so the enforcement procedure conducted by the PC becomes useless and meaningless. Furthermore, in the case of buildings with less than 20 apartments, it is not required to establish the management board according to the laws of Vietnam. Therefore, the use of a Maintenance Account by developers could not be supervised by any party and there is also no basis for hand-over or forcible transfer of the maintenance fees to the management board.

In respect of ownership by foreigners, Decree 99 stipulates that foreigners may be entitled to own up to 30% of the total number of apartments in an apartment building.

Decree 99 shall come into force from 10 December 2015 and replace several former Decrees including Decree No. 51/2009/NĐ-CP, Decree No. 71/2010/ND-CP, Decree No. 34/2013/ND-CP and Decree No. 84/2013/ND-CP.

Guidance on the 2014 Investment Law on Investment Overseas

Being consistent with the spirit shown through the new provisions of the Investment Law in 2014 (“**Investment Law**”) on investment overseas, the Government of Vietnam issued Decree No. 83/2015/ND-CP detailing this content on the date of 25 September 2015 (“**Decree 83**”). Some highlights of Decree 83 are referred to below:

Preparation of investment project

For the purpose of facilitating an investor to form an investment project overseas, Article 19.2 of Decree 83 is interpreted that before obtaining Investment Registration Certificate Overseas (“**IRCO**”), the investor may transfer part of the investment capital in the form of foreign currency, machinery, goods abroad, wherein the currency transferred is not allowed to exceed 5% of the total investment capital abroad nor to exceed US\$300,000 (*three hundred thousand US dollars*) that will be later accumulated in the total investment capital abroad. Such preliminary activities forming investment projects overseas as provided at Article 19.2 above are: market research, materials and investment information research; collection of documents, information relating to project decisions; field surveys; workshops, scientific reports; set-up of liaison offices abroad concerning the formation of investment projects; participation in international bidding, deposits and funds; participation in mergers and acquisitions of companies; contract negotiations; purchase or rent of properties supporting the establishment of the project.

IRCO in Vietnam of investment project

After the activities for preparation as above-mentioned end, and the investor is required to obtain the IRCO from the Ministry of Planning and Investment of Vietnam (“**MPI**”) – a State investment management authority - for his investment project abroad, there are three categories of projects.

For investment projects abroad that must be approved in principle by the National Assembly in accordance with Article 54.1 of the 2014 Investment Law, the MPI shall issue a new or an amended IRCO after the National Assembly’s approval. Details of the orders and procedures thereof will be specified in a separate instrument by the Government as stipulated at Article 13 of Decree 83.

For investment projects abroad that must be approved by the Prime Minister as stipulated in Article 54.2 of the 2014 Investment Law, the investor will have to prepare and submit 8 sets of application dossiers including 1 original to the MPI and a new or an amended IRCO will be issued by this authority within 45 days of receiving the acceptable application dossier. For this category, the MPI shall have to send the application dossiers for comments in writing to the Ministry of Finance (“**MOF**”), the Ministry of Labor, Invalids and Social Affairs (“**MOLISA**”), the State Bank of Vietnam (“**SBV**”), specialized ministries and People’s Committees at which the investor’s office is located, and then set up an evaluation board and submit an evaluation report to the Prime Minister.

For those projects not subject to the ratification of the National Assembly or the Prime Minister, as stipulated in Articles 14 and 15 of Decree 83, the investor must prepare and submit 3 sets of application dossiers including 1 original to the MPI, a new or an amended IRCO will be issued within 15 days of receiving the acceptable application dossier. Especially, for those projects having foreign currency of from VND20 billion to remit abroad, the MPI will have to send the application dossier to the SBV for comments. The deadline for the SBV’s comments back to the MPI is seven working days from the date of receipt of the application dossier from the MPI.

For the investor’s notes when registering or adjusting investment projects abroad, as defined in Article 18 of Decree 83, the investor, 15 days before an official submission of the application dossier to the MPI, must declare online information about his project on the National Information System on Investment (“**NISI**”). The investor will receive a temporary account to track the examination progress of the MPI and after the issuance of the IRCO, the investor will also be granted an account to access the NISI for his report on the implementation of investment project directly via this account.

In addition, for an investment project abroad in the fields of energy; cultivating, fishing, processing agricultural, forestry, fishery products; construction of establishments for manufacture, processing, creating; real estate construction and business, infrastructure; mineral survey, exploration, mining and processing, it is required to supplement the proof on the location for implementing the investment project as prescribed in Article 8.2 of Decree 83.

Implementation of investment project

Apart from the financial obligations to the State of Vietnam, during the time implementing the project in the investment-receiving country, as defined in Article 72 of the 2014 Investment Law and Article 20 of Decree 83, the investor has obligations to send periodic or extraordinary reports on the implementation of the project to the MPI, SBV and Vietnam's representative office in the receiving country for which the time intervals are within 60 days after the approval of the investment project by the investment-receiving country, quarterly, annually, six months after the tax settlement report. These electronic and hard reports with the same content shall be sent to the account provided in the NISI and the addressees of the above referred authorities, respectively.

Termination of investment project

Before the investor implements procedures for termination of an investment project in the circumstances as stipulated in Article 62.1 of the 2014 Investment Law, they must complete project liquidation procedures as prescribed in Article 24, Decree 83. Within 15 days of receipt of the acceptable application dossier for invalidation of the IRCO, the MPI will issue a decision on invalidation and withdraw the investor's IRCO.

Decree 83 took effect on 25 September 2015.

New Guidance on Minimum Wages

On last 14 November 2015 the Government promulgated Decree No. 122/2015/ND-CP ("**Decree 122**") which will be effective from 1 January 2016 and replace Decree No. 103/2014/ND-CP ("**Decree 103**") regulating identical content of region-based minimum wages for employees working for companies, cooperative unions, cooperatives, cooperative groups, farms, households, individuals and organizations hiring employees under labor contracts.

The minimum wage is the first and foremost remarkable point of Decree 122. Under this decree, minimum wages will be increased as follows:

- (i) Region I: VND3,500,000/month (increased from VND3,100,000/month);
- (ii) Region II: VND3,100,000/month (increased from VND2,750,000/month);
- (iii) Region III: VND2,750,000/month (increased from VND2,400,000/month);
- (iv) Region IV: VND2,400,000/month (increased from VND2,150,000/month);

Other notable points:

- (i) The regions are defined in the Appendix to Decree 122. There are some upgrades made to the regional classifications in comparison with Decree 104, e.g. Chau Doc is now upgraded from Region IV to Region II.
- (ii) Foreign-owned companies that are not required to re-register or transform pursuant to Point a, Item 2 and Item 3, Article 170 of the previous out-of-date Law on Enterprise 2005 were no longer listed in subjects of application.
- (iii) To the extent of Application Principles under Article 4, Decree 122, applying the highest minimum wage rate in case the enterprise straddles in adjacent areas with different applicable minimum wages was eliminated in comparison with the same article of Decree 103.
- (iv) Economic zones and High-tech zones were added in the group of Industrial zones and Export Processing zones where enterprises are located within areas with different applicable minimum wages.

New Decree Guiding the Implementation of the 2014 Investment Law

Decree No. 118/2015/ND-CP, detailing and guiding the implementation of a number of articles of the 2014 Investment Law, was issued by the Government on 12 November 2015 (“**Decree 118**”). Decree 118 shall come into force from 27 December 2015, in replacement of Decree No. 108/2006/ND-CP dated 22 September 2006 (“**Decree 108**”). Some important points of Decree 118 are noted as follows:

First of all, Decree 118 sets out a number of rules for the investment procedure which can be summarized as follows: (i) it is the responsibility of the Investment Registration Office (“**IRO**”) to check the validity of the investment registration application (“**Application**”); (ii) the IRO must not require the investors to submit any documents in the Application other than those stipulated under the 2014 Investment Law; (iii) in case of amendment, supplementation of the Application, the IRO shall notify the investors all of the amendment, supplementation one (1) time only; and (iv) in case the IRO requires any approval from the relevant authorities and the time spent for that exceeds the time required by the 2014 Investment Law and Decree 118, it is to assume that the IRO approves the content of that investment project.

Secondly, instead of stipulating generally about the business lines prohibited as of Decree 108, Decree 118 regulates in details the list of business lines prohibited to trade and guides the implementation of those prohibited business lines (Article 8 of the Decree 118).

Regarding the rules applied to foreign investors, the IRO gets the approval from the competent Ministries in three circumstances only: (i) their business line has not yet been committed under the commitment schedule Vietnam made upon its accession to the WTO or any other international agreements; or (ii) there is no stipulation under the laws of Vietnam about the investment conditions for foreign investors; or (iii) the business lines which the foreign investors wish to trade have neither been granted licenses nor published on the National Investment Registration Portal yet.

Another noteworthy point is that investors can submit both the business registration application and the investment registration application at the IRO. This is an innovative point of Decree 118 which is certainly time-saving and cost-effective for both the investors and the relevant authorities.

In addition, when the foreign investors or business organizations that are (partly or wholly) owned by foreign investors purchase shares or make capital contribution to a business organization, they shall not be required to obtain an Investment Registration Certificate unless: (i) that business organization is trading under conditional business lines with foreign investors; or (ii) that shares purchase or capital contribution of foreign investors result in their ownership of equivalent to or above 51% of capital charter of that business organization under two circumstances stipulated under Article 46 of Decree 118.

Policies for Female Employees

On 1 October 2015 the Government enacted Decree No. 85/2015/ND-CP detailing a number of articles of the Labour Code regarding policies applicable to the female employees (“**Decree 85**”). Particularly, Decree 85 has clarified several significant working policies in favor of women in terms of equality with men; working conditions and health care; right to unilaterally terminate or postpone performance of pregnant employees; and other policies on crèches or kindergartens for the children of female employees.

Accordingly, the pregnant employees shall have right to unilaterally terminate or postpone implementation of her labour contract in case of having a certificate of a competent medical establishment certifying that continued employment would adversely affect her fetus, provided that she provides an advance notice within a time-limit as designated by such medical establishment to the employer.

The duration of postponement of performing labour contracts shall be as agreed between the employer and female employee, but shall at least equal the period of time for which the medical establishment recommends rest.

Regarding the health care, besides the specialized gynecological examination given to the female employee during the periodical health check, female employees are also entitled to break **thirty (30) minutes each day** on a minimum of three days per month during her menstruation and to break **sixty (60) minutes each day** in order to feed the baby and store breast milk during the period she

nurses a child under 12 months. During such breaks, female employees shall still receive the full wage pursuant to her labour contract.

Depending on specific conditions, an employer shall formulate plans on assisting and providing support for construction of a crèche or kindergarten or to provide in cash or in kind a part of the expenses incurred by female employees for their children in crèches and kindergartens. The employer and the representative of the female employees shall reach agreement on the specific level and duration of such assistance.

Additionally, an employer, **who employs many female employees**, shall be entitled to receive the assistance of the State as follows:

- (i) Entitlement to a reduction of corporate income tax in accordance with the law; and
- (ii) Additional expenses paid to female employees are permitted to be included in deductible expenses when determining taxable income for corporate income tax purposes in accordance with regulations of the Ministry of Finance.

Decree 85 took effect on 15 November 2015 and replaces Decree No. 23/CP dated 18 April 1996 of the Government detailing and guiding the implementation of a number of articles of the Labour Code regarding particular regulations on female employees.

New Guidance on Management and Use of Internet Resources

Circular No. 24/2015/TT-BTTTT on management and use of Internet resources (“**Circular 24**”) was issued on 15 August 2015 and supersedes Circular No. 9/2008/TT-BTTTT, dated 24 December 2008 as amended in 2011 (“**Circular 9**”), Circular 19/2014/TT-BTTTT, dated 5 December 2014, on the same matter and Circular 10/2008/TT-BTTTT, dated 24 December 2008, on resolving “.vn” domain name disputes (“**Circular 10**”).

In comparison with Circular 9, provisions relating to the registration of domain names containing sequences of characters or characters being trademarks, brand names, copyright and work titles in order to get the protection of such objects on the internet have been removed from Circular 24. This may be because of the fact that disputes over domain names which are identical or similar to registered trademarks happen more and more as unavoidable trends in the development of internet resources. The Government and Ministries need to consider and issue consolidated provisions for effectively handling such kind of domain names in case of disputes.

Under Circular 24, the priority time for a claimant to register the domain name in a resolved dispute is increased from 10 consecutive days as regulated in Circular 10 to 15 working days as from the date of the relevant decision. Meanwhile, regarding the maintenance of validity of a domain name

registration, the maintenance fee shall be paid within five days as from the expiration date thereof. Otherwise, the validity of the domain name registration will be temporarily suspended. Then, the domain name will be revoked if the maintenance fee is not settled within 30 days from the temporary suspension date.

Regarding the transfer of “.vn” domain names, conditions required under Circular 24 are more flexible in comparison with ones required under Circular 9. In particular, the “.vn” domain names can be transferred at any time as agreed by the current registrar and potential registrar, but it is not required to wait for the expiry or termination of service contracts between a domain name registrant and current registrar for conducting such transfer as regulated in Circular 9.

Registration and use of New Top Level Domains (“**New TLD**”) in Vietnam is provided for the first time in Circular 24. The registration of New TLD comprises following mandatory steps: (i) submitting a request for using New TLD to Ministry of Information and Communication (“**MIC**”); (ii) examining the plan of using New TLD and technical conditions by the MIC, and If no written opinion is issued by the MIC within 30 working days from the receiving date of the request, the applicant is automatically allowed to work with the Internet Corporation for Assigned Names and Numbers (“**ICANN**”) on registration of the New TLD; (iii) notifying the MIC of the transferring the New TLD by ICANN within five days from the date of transfer.

Circular 24 took effect on 10 October 2015.

About Indochine Counsel

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

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

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- Dispute Resolution

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