Indochine Counsel

NAVIGATING VIETNAMESE BUSINESS LAW: INSIGHTS AND REFLECTIONS

STEVEN JACOB

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Foreword

Steven Jacob was a long-standing colleague and a friend of mine, whose memory we honor through the pages of this book. His intellectual journey through the complex corridors of Vietnamese business law was profound and influential, characterized by an unyielding pursuit of clarity and understanding.

To have worked alongside Steve was to witness a mind constantly in motion, always searching for the next challenge, the next puzzle to solve. His passing left a void in our firm and in the hearts of those who knew him, but his legacy endures in his written work, which continues to guide and enlighten.

This book is more than a collection of blog posts; it is a mosaic of a career spent in the service of law and justice. It is a privilege to present "Navigating Vietnamese Business Law: Insights and Reflections" to both those who knew Steve and those who will come to know him through his enduring work.

As you turn these pages, may you gain not only knowledge but also an appreciation for the man who saw beauty in the law and wisdom in its application.

Ho Chi Minh City, 30 September 2024
Dang The Duc
Managing Partner, Indochine Counsel

Introduction

This book is a collection of edited posts from the Vietnamese Law Blog, sponsored by Indochine Counsel and administered by the late Steven Jacob. These posts contain insights, experiences, and analyses that delve into various aspects of Vietnamese business law.

This book offers not only legal analysis but also reflects the dynamic changes in Vietnamese law and the author's decade-long journey in Vietnam. **As Vietnamese law evolves rapidly, the contents of many articles collected herein might no longer be up-to-date.**

Readers will find that this book represents not just a collection of legal insights but also the personal journey of an American lawyer in Vietnam. The author, navigating personal challenges and professional milestones, witnessed firsthand the dynamic transformation of Vietnam's legal system. This included the integration of Civil and Common Law principles and Vietnam's emergence as a major global economic player. His writings are thus not only a testament to his legal acumen but also a reflection of the profound changes in Vietnamese business law over the past decade.

In these pages, you will find more than legal analysis; you will discover a narrative interwoven with personal anecdotes, a deep understanding of the Vietnamese legal system, and a unique perspective shaped by a decade of change and growth. This book is a tribute to the resilience and adaptability of the author and a valuable guide through the intricacies of Vietnamese business law.

This book stands as a tribute to the author, Steven Jacob. It is the collaborative effort of the editorial team at Indochine Counsel, who meticulously compiled and edited the posts from the Vietnamese Law Blog to create this valuable resource.

Ho Chi Minh City, 30 August 2024
The Editorial Team, Indochine Counsel

CHAPTER 1

Banking & Finance

New Regulations on Minimum Capital Adequacy Ratios for Banks and Foreign Bank Branches in Vietnam *(3 May 2018)*

The State Bank of Vietnam ("**SBV**") recently released Circular No. 41/2016/TT-NHNN, dated 30 December 2016, effective from 1 January 2020 on minimum capital adequacy ratio ("**CAR**") for banks and foreign bank branches in Vietnam ("**Circular 41**"). Under Circular 41, the banks and foreign bank branches in Vietnam shall maintain the minimum CAR of 8% from 2020.

Circular 41 is oriented towards Basel II standards, including many changes compared to Circular No. 13/2010/TT-NHNN, dated 20 May 2010 on adequacy ratios of credit institutions. Under the Basel II standards, the minimum CAR of the banks is required at 8%, the same ratio required under Basel I. However, the CAR under Basel II is calculated under a new formula which is also applied by Circular 41.

Presently, the minimum CAR required for banks in Vietnam is 9% (i.e. higher than the CAR of 8% under Circular 41). According to bank experts, the current CAR of some largest banks in Vietnam stands at about 9%, however their CAR will be reduced sharply if applying the Basel II standards. Under Circular 41, the minimum CAR of 8% required for the banks in Vietnam shall be defined by the following formula:

Specifically:

- ✓ C: The banks capital (equity)
- ✓ RWA: Risk weighted assets
- ✓ KOR: The capital requirements for operational risk
- ✓ KMR: The capital requirements for market risk

Following Circular 41, CAR is calculated more rigidly to meet Basel II standards. Accordingly, CAR 8% of the Basel II is an increase of the current application of 9% by Vietnamese banks.

The application of Circular 41 will help the banks:

- To plan its business operations and strategy more safely;
- To operate with less risk because risk management is strengthened, while funds are managed more eciently;
- To attract more foreign investors because the banks operate in an environment of international standards.

However, Circular 41 also has negative impacts on the banking system, particularly when applying the Basel II standard, in which a higher rate of capital and control of liquidity shall affect loan interest rates. This increases

the capital costs and as a result, the net profit of banks shall decrease. At the same time, Vietnam's banks would face such challenges as:

- A need to improve risk management;
- The requirement of reliable data systems of high precision;
- A demand to meet the huge deployment costs.

The Basel II application in Vietnam would be a challenge for local banks, however it is expected to make Vietnamese banks healthier.

Cashless Payments Improve

(15 July 2019)

In the article on Vietnam Investment Review, here, news of Vietnam's increasing independence from cash and gold is welcome. I'll let you read the article, but much of the information contained therein is to boast of the boost in mobile payments and ATM transactions.

Mobile payments are cashless payments made using a mobile device, usually a cell phone, rather than the traditional credit card or cash. This means that Vietnamese are taking part in hundreds of billions of **dollars worth** of worldwide transactions. This means that Vietnam is coming into its own.

Particularly, the most telling numbers come at the end. While only 40 percent of the country has bank accounts, there are 120 million mobile accounts. That's nearly one and a half phones per person. Wow.

This means a great deal for Vietnam. I remember when I first came to Vietnam in 2003, it was a cash only society. Only a few select places, primarily the Sheraton, five-star hotels, and other high-end retail accepted even credit cards. To contrast this with the numbers of ATM transactions and mobile transactions reported in the VIR article is an impressive change.

Not only is the change impressive, but it presages a new age for Vietnam. With the increase in cryptocurrencies and blockchain technology, and the likelihood of Vietnam becoming a haven for startups, there is a need for this advancement. That it is happening is even better.

Welcome to the new world Vietnam. Welcome and may you find prosperity therein.

How to Secure Loans in Vietnam

(14 August 2020)

Most people are familiar with secured transactions, though they may not know them by that name. When a person buys a house, or a car using a loan–whether through the seller or a third-party lender–they sign a contract offering their purchase as security. This means that, if the borrower defaults on his loan, the lender can seize the purchase–car or house–that was used as collateral and sell it on to third parties in order to recoup the losses incurred by the borrower's default. This is a secured transaction.

In Vietnam, secured transactions are limited and not terribly well legislated with only a Decree offering guidance on how they should be handled and registered. There are two types of security registration: required and optional. Security registration is required for mortgages of land use rights and assets attached to land and mortgages of aircraft or ships. Other security arrangements may be, but are not required to be, registered. They include mortgages over movable assets, mortgage of assets attached to land that are formed in the future, and reservations of interest in assets over which mortgages are required to be registered.

Mortgages are registered with various databases in Vietnam. For land and land use rights, the cadastral register must be consulted, and the land use right registered therein. Other asset types have their own databases with relevant, and specifically identified, agencies.

When registering a security transaction, lenders are very much concerned with the rules regarding the point in time when such registration is deemed effective regarding third party lenders so as to secure their loan in priority to all other lenders. In Vietnam, security transactions are deemed registered when the registering agency actually registers the security in their database. This is important to understand as, when submitting a registration request, the authorities simply issue a receipt and create an appointment for registration rather than actually registering the security at that time. The party requesting security registration needs to make sure that they attend the registration appointment to ensure that the security is registered and to obtain evidence of the fact and the time and date of the registration. Only in this way will they be able to confidently fend off third party attempts to prioritize the secured assets.

While this process of receipt and appointment may seem onerous, the registering authority is obligated to register security interests on the same day they receive valid registration requests, so long as the request is received prior to 3pm. Any requests received after that time will be processed on the subsequent business day. This required alacrity does serve to minimize the burden on parties requesting registration of security interests, though the question remains as to priority of treatment of security interests submitted for registration in the same business day.

Furthermore, once the security is registered, it remains effective until such time as the security is deregistered. Unfortunately, though it may be assumed that deregistration may be

implemented only by the lender, such case is not specifically regulated. It appears, however, that deregistration may be initiated by both the lender and the borrower. The specifics are hazy. There are enumerated events that can trigger the right to deregistration.

Parties eligible to request deregistration may do so if one of the following events occur:

a) The secured obligation is terminated;
b) The registered security measure is cancelled or replaced by other security;
c) All [the entire] security assets are replaced/ substituted with others;
d) On complete realization of all these security assets;
e) The security assets are destroyed or lost entirely; the security being assets attached to land are dismantled or confiscated in accordance with a decision of a competent State agency;
f) There is a judgment or decision of a court or arbitrator which has taken legal effect and which cancels the security measure or declares it invalid;
g) On unilateral termination of the security measure or on declaration of termination of the security measure in another case as stipulated by law;
h) On deregistration of the mortgage of an asset right arising from a contract for the purchase and sale of a residential house, in a case of transition to registration of the mortgage in accordance with law;
i) A civil judgment enforcement office or bailiffs office has attached and finalized realization of the security asset;
j) In other cases as agreed by the parties.

If the assets are registered as security for multiple mortgages, then the security will not be deregistered but remain effective until such time as all the secured parties are satisfied.

There are different procedures for registration of security transactions depending on the type of asset: aircraft, ship, land-use right, movable asset.

Interest Rates for P2P Lending in Vietnam

(17 May 2021)

As a relative newcomer to fintech, and with limited experience working with peer-to-peer lending ("**P2P Lending**"), I thought that the scope of such lending was similar to crowdfunding. Individuals could go to a P2P Lending website, lodge a request for loans, and be matched with individual lenders. I didn't realize that the concept of P2P Lending is considerably broader than simply crowdfunding.

According to Wikipedia, in addition to crowdfunding, P2P Lending includes student loans, commercial and real estate loans, payday loans, as well as secured business loans, leasing, and factoring. This makes sense when you consider P2P Lending to be the process of lending outside the purview of a credit institution. This would establish "peers" as any entity or individual that is not a bank or other registered credit institution (and excluding governments).

One of the significant models we have seen for P2P Lending in Vietnam is the partnership between a capital source and a pawn shop for the purposes of extending loans to customers. Pawn shops are governed by specific laws but ultimately by the Civil Code and their right to lend to customers is limited to short term issues. Foreign investors who wish to provide loans at interest without obtaining a license to be a credit institution must find ways to provide their capital to customers and often they partner with existing pawn brokers who already have a pawn license to provide short term loans to customers.

The relationship between the foreign investor and the pawn broker would be governed by contract without necessarily forming a new entity. The pawn brokerage firm would act for the foreign investor in identifying customers, extending loans, and servicing those loans and would share in the interest collected.

A major issue facing this, and most other P2P Lending models in Vietnam is the collection of interest on the loan, and what, exactly is considered interest.

Recent cases in the news here in Vietnam have given rise to the authorities' concern over excessive interest rates. As I mentioned, pawn broker loans are considered civil contracts and subject to the maximum annual interest rate under the Civil Code, which is twenty percent. Any interest charged beyond that cap is considered a violation of the law and, in addition to forfeiting the amount in question, the broker who charges such interest may be subject to additional disciplinary actions.

It should be a simple matter to distinguish the stated interest rate charged on a short-term loan. However, there are traps which the police and other authorities have laid for pawn brokers and, thus, P2P lenders. Specifically, the police have begun to view certain fees charged on the servicing of a pawn broker's loan as interest.

Normally, when granting a loan, there may be a service fee, an origination fee and depending on the nature of the introduction a consultancy fee or other costs levied on the borrower. These

fees are not technically against the law. But the police have proven they are willing to view these fees, especially if they are excessive, as de facto interest and an attempt by the lender to circumvent the interest rate caps. Taking this view, they then institute action against the lender. While the lender may eventually win in court, the negative publicity and temporary cessation of activities present major obstacles to the smooth operation of business.

As such, we have begun recommending that all service fees remain reasonable, to minimize the possibility that the police will view them as de facto interest charges. We also suggest that local staff develop a relationship with the local police to help foster outreach and education of the authorities. It is easier to help them understand that fees are for specific purposes and should not be seen as interest before the fact than it is to argue that fees are not interest after an arrest or seizure of computers and accounts.

This is a problem unique to P2P Lending as properly licensed credit institutions are allowed a different interest rate cap and fees of this nature are assumed as part of the loan process. Before getting into the business of P2P Lending, then, it is important to plan for the proper fees charges and to make sure that they are not only distinguished from interest but that the purpose of the fees is traceable to specific activities separate from the profit of the lenders.

Debt Recovery in Vietnam

(31 May 2021)

I wrote a couple weeks ago about the interest rate cap on loans as applicable to P2P lending in Vietnam (see Interest Rates for P2P Lending in Vietnam) in which I discussed the problem we've seen with P2P lenders being accused of criminally exceeding that cap through the application of fees on loans. Another problem that is very much extant at the moment is how some of these P2P lenders have serviced the loans they've granted.

Last year a P2P lender based on the pawnshop model that I have discussed previously was raided by the police after a report in a local paper. The paper reported some heinous activity on the part of the lender, citing examples of harassment and abuse by the collection agents. The expose in the paper explained some of the most egregious examples and led to the police raid. Though the raid itself was launched not because of the collection activities of the lender but because they were deemed to be charging too much interest on their loans.

We have also been approached by various Chinese companies seeking to enter into a P2P lending model that would involve a mechanism for collection activities and see a great amount of interest out of that country for lending in Vietnam. What we have had to explain to them, especially as they've come to us this year, is that debt collection activities are no longer allowed as a business investment activity.

The new investment law passed last year and effective at the beginning of this year set out a short list of absolutely prohibited sectors for investment activities. That list included:

i. Business in drugs;
ii. Business in prohibited chemicals and minerals;
iii. Business in specimens of wild fauna and ora exploited from nature and wild forest animals and certain plants;
iv. Business in prostitution;
v. Human tracking; trading tissues, corpses, human organs or fetuses;
vi. Business activities relating to asexual human reproduction;
vii. Trading firecrackers; and
viii. Debt recovery business services.

That's it. Only eight sectors are absolutely prohibited for investment in Vietnam. And as you can see most of them are obviously bad and it is interesting that debt recovery businesses are included in this list. I don't know the National Assembly's motivations for this inclusion. Perhaps it is because the bulk of debt collection agencies then in existence were backed by Chinese investors or because they were deemed as abusive and deleterious to the good cultures and stability of society. Whatever the reason, they decided to include debt recovery business on the very short list of prohibited business sectors.

Ultimately, this may be in an effort to avoid the problems that plague the lower class in countries like the United States where payday loans and other short-term loan companies offer small amounts to the working class at

exorbitant interest rates and then pursue them relentlessly when they don't pay. Perhaps the view of the National Assembly is that if you allow for the collection of debt in this manner you are encouraging the practice of abusive loan making.

But the prohibition has not stopped everyone completely. There remains some ambiguity around the transition between investment law regimes as the new law came into effect. Some companies involved in debt collection before January 1 have tried to remain in operation while others have sought to register adjacent or similar business lines with the local department of planning and investment in order to fudge the boundaries of the prohibition. This has proven an ineffective method for obtaining the desired ends and these enterprises are in danger of being prosecuted for a fraudulent investment registration as their activities are different from those activities which they have obtained permission to pursue.

The only legal method to collect debt at this point is to go through a law firm and have them sue the borrower for breach of contract and seek damages. This can be expensive, however, and as such it is only attractive when the amounts in question are reasonably large. This, too, supports my hypothesis that the National Assembly wants to prevent small loans and abusive lending practices that they have seen in other countries.

This prohibition against debt collection activities has also had a knock-on effect of damping the interest in P2P lending, at least those methods that involve small loans with the intention of collecting lots of interest. It does have one effect, though, in that it demonstrates a degree of sophistication on the part of the country's legislators. That rather than prohibiting the loans themselves they prohibit the activity which enables the loans. In that way, there remain some means for pursuing P2P loans through legitimate channels and with the due diligence and credit analysis necessary to properly contract a loan.

Digital Banking in Vietnam

(17 January 2022)

Banking is a big business in Vietnam with 4 state-owned commercial banks, 31 joint-stock commercial banks, 2 joint-venture banks, 52 branch offices of foreign banks, 60 representative offices, 16 financial companies and 9 foreign banks.[1] According to an Austrade Report (2020), 78 banks offer internet payment solutions. Mobile payment is available at 47 banks, and 29 banks accept QR code payment.[2] These numbers have surely grown since then. A McKinsey report issued last year suggested that Vietnam has exceeded the APAC average for digital banking adoption from the years 2017 to 2021, marking a 41% gain against an average of 33% over the same period. Additional services such as fintech and e-wallets have reached 56% penetration in Vietnam, an increase of over 40% since 2017. Seventy-three percent of consumers in Vietnam are multi-channel banking users which mean they use a combination of traditional and digital banks.[3]

This trend towards the use of digital banking by Vietnamese consumers has led, as of the end of 2019, over 60% of banks to initiate digital banking solutions.[4] While there are digitalization options for both front and back of house services, the most relevant issues facing banks in countries like Vietnam are the front-end services such as innovation in mobile banking, e-know your customer (eKYC), QR code payment, virtual assistants/chatbots and 24/7 call centers. At the same time, banks such as TPBank, Vietcombank and Techcombank have spent a large amount of time and money digitizing the data of their users and developing the ability to utilize that data to offer customers more personalized and relevant products.[5]

Digital banking is a form of banking in which all banking operations are digitalized and provided by electronic means and the physical presence of traditional banks can be substituted with an online presence. Vietnam's first all-digital bank, TNEX, began operations within the last year and has received a certain level of international recognition as it is considered a groundbreaking endeavor. Unfortunately, Vietnam lacks a consolidated legal document regulating digital banking. Banks are currently operating digital banking activities in compliance with the credit institution law, the anti-money laundering law, the counter financing of terrorism laws, regulations on e-transactions under the electronic transaction law, and their guiding documents. Some of the major regulations are requirements on information safety and security in banking activities and provision of banking services on the internet as stipulated in Decree 35-2007-ND-CP, Decree 85-2016-ND-CP, Circular 35-2016-TT-NHNN and Circular 09-2020-TT-NHNN.

On 11 May 2021, the State Bank of Vietnam,

1 https://bit.ly/3mqwpBg

2 Digital Banking in Vietnam: A Guide to Market, Austrade, 2020.

3 https://en.vietnamplus.vn/vietnams-digital-banking-adoption-catches-up-with-developed-markets/209039.vnp

4 Digital Banking in Vietnam, Austrade.

5 Digital Banking in Vietnam, Austrade.

adopted Decision 810 approving the plan for the digital transformation of the banking sector by 2025 with orientations towards 2030, which outlined the specific goals on digital transformation rates for the operations of credit institutions, together with nine main solutions to achieve those goals, namely:

1. Mindset change, promotion of communications activities and enrichment of knowledge about digital transformation in banking sector;
2. Formulation and completion of legal frameworks facilitating digital transformation in the banking sector;
3. Digital infrastructure development;
4. Establishment and ecient operation of e-Government at the SBV;
5. Establishment and development of digital banking models at CIs;
6. Development and ecient use of digital data;
7. Cyber safety and security assurance;
8. Human resource development; and
9. Other solutions and tasks (e.g., enhance cooperation and exchange and sharing of experience concerning digital transformation of the banking sector with foreign partners, etc.).

While the concept of digital banking has grown apace in Vietnam, the legislation to govern the sector remains limited, as e-payments regulations have floundered due to the glacial pace of the National Assembly's response to technological advancements digital currencies remain prohibited. There have been some movements, however, as a recent pilot program has allowed for mobile money to be used for the non-banked users in remote and rural areas (see Mobile Money Pilot Program in Vietnam), and as the prime minister gave his approval in-principal for the fintech regulatory sandbox to move forward.[6] Digital banking, and the technologies and regulations required for its development and operation are clearly in high demand, Vietnam still lags in its regulatory framework. Existing banking regulations rarely take into account the technical aspects of bringing digitalization of banking products to the consumers.

It wasn't until 2016 that the first digital lifestyle bank was launched when Timo[7] began offering banking services on mobile applications and remote requests for debit cards. Timo developed a precursor to this year's eKYC legislation by offering Know Your Client "hangouts" that allowed for greater flexibility for customers than having to go to a local branch. In 2017, TPBank has launched LiveBank, which is a system of interfaces across Vietnam that offer not only traditional ATM services but also eKYC and thumbprint scanning and opening of accounts via the terminal. BIDV and countless others have also taken steps to digitize their banking facilities and add value to their consumers through the use of big data.[8]

Of course, all of these changes and developments must be understood against the backdrop of a country that is over 60% unbanked.[9] Vietnam has one of the highest percentages of unbanked citizens, and the large majority of those who have bank accounts are located in urban centers. Digitization efforts, such as TNEX and the Mobile Money Pilot offer opportunities to expand the services of banks to the millions of adults in Vietnam who do not currently have access. Digitalization of

6 Decision 316.

7 The first digital bank developed on internet-based platform to operate via both mobile banking and internet banking. Timo is ensured and co-developed by Viet Capital Bank.

8 Digital Banking in Vietnam, Austrade.

9 https://en.vietnamplus.vn/vietnams-digital-banking-adoption-catches-up-with-developed-markets/209039.vnp

banking products, and the centralization of data surrounding their creation, access, and use will offer these unbanked citizens more opportunities to use digital resources as they strive to manage their livelihoods and prepare for an uncertain future.

Digital lending activities have also been enhanced in conjunction with the development of digital banking in general. Primarily, digital lending activities are provided by banks, which operate under an operation license issued by the state bank of Vietnam to credit institutions. In order to promote consumer loans, many banks have diversified their offered lending products, including loans which can be registered online and managed via mobile application (Techcombank)[10]; and online non-collateral loans which can be disbursed within 30 minutes (with up-to-36-month load period and offered interest rate from 1.6%).[11] These products of digital lending, as part of banking operations, fall under the ambit of credit institutions laws and regulations on the banking sector in general.

Apart from credit institutions in general, and banks in particular, many fintech companies are showing interest in the field of digital lending. However, due to certain obstacles in obtaining an operation license for conducting lending activities, fintech companies tend to cooperate with credit institutions in offering lending activities. In addition, another common form of lending-related activities offered by fintech companies is P2P lending, which has been adopted by some entities in Vietnam, namely, Fiin Credit, Tima, etc. These entities, however, usually, offer a platform for connecting lenders and borrowers, but not direct lending activity itself.

10 https://www.techcombank.com.vn/dang-ky-vay-von-truc-tuyen.

11 https://tpb.vn/vay-tieu-dung-tra-gop-tin-chap.

Credit Information in Vietnam

(24 January 2022)

Credit information is defined as "*related data, figures, datum of borrowers in the participating organizations of a credit information company*", and credit information services provision refers to the provision of credit information products by credit information companies to its users on the basis of collecting, processing, and storing credit information. Credit information products are created by credit information companies in the form of reports, publications or other forms

Credit information services are a conditional business which requires a certificate of eligibility for providing credit information services, an **Eligibility Certificate**, from the SBV.

There are six main requirements to obtain an Eligibility Certificate:

1. Information infrastructure;
2. Minimum charter capital of VND30 billion;
3. Managers and members of the inspector committee;
4. Business plans to ensure not to operate business lines other than the provision of credit information;
5. The minimum of participating organizations; and
6. Written agreement on provision of credit information and credit information products with fundamental contents as required in Decree 58.

A credit information company must have at least 15 participating organizations being credit institutions and foreign branches (other than policy banks, co-operative banks, people's credit funds and micro-financial institution).

Credit information companies are allowed to exchange credit information with other credit information companies for the purpose of provision of credit information service. Participating organizations are only permitted to provide information of a customer to any other organization or individual (*including other participating organizations*) upon request of competent State authorities in accordance with the laws, or consent of the customer. Participating organizations of a credit information company are not allowed to provide their credit information for another credit information company except for the CIC.

Collection and storage of credit information

There are four main sources for collection of credit information, comprising of:

1. Participating organizations in accordance with undertaking or agreement of provision of credit information;
2. Other credit information companies under an agreement;
3. State authority; and
4. Other legitimate sources as regulated by the laws.

Credit information allowed to be collected includes:

- Identification information of borrowers

and related persons of the borrower in accordance with the laws;
- Information on the history of credit extension, property rental, purchase in installment and pawning;
- Information on the history of debt repayment, due and undue debt, payment deadline, credit limit, debt group, debt sale, off-balance commitment and ranking scores of borrowers;
- Information on security for performance of repayment obligations of the borrower; and
- Other relevant information which does not violate customers legitimate rights, exclusive of customer information categorized as State secrets.

Credit information must be stored for a period of at least **five years** from the date of collection by credit information companies. Such storage must comply with the requirements on safety, confidentiality and avoidance of possible accidents, disasters and prevention of illegal external access.

Processing and correction of credit information

Credit information collected must be examined, analyzed, evaluated, consolidated and updated in order to create credit information products on the basis of not distorting the nature and contents of credit information. Of note, negative information of borrowers is only utilized for the creation of credit information products within the period of five years from the date on which such negative information is concluded unless otherwise stipulated by the laws.

A credit information company is liable for correcting credit information within a mandatory period upon finding incorrect information or at the request of participating organizations or borrowers. In case the borrower fails to receive or does not agree with a written response by the credit information company regarding the borrower's request for correction, the borrower has the right to demand a settlement or initiate procedures for filing a lawsuit.

Provision of credit information products

A user, based on an agreement entered into with a credit information company, will be provided with credit information products as processed by the credit information company, but not the original information. Customers can be participating organizations, borrowers, other credit information companies, competent State authorities or organizations or individuals for their legitimate purposes in accordance with the applicable laws. Credit information products cannot be modified, provided or shared to any other third party, except for the case that users being borrowers are provided with credit information products regarding themselves for their own legal purposes. In addition, copying and using credit information products internally by users being organizations must be in line with an agreement as signed with the credit information company. Failure of compliance with such regulations shall cause an administrative fine up to VND40 million applied to individuals and VND80 million applied to organizations.

National Credit Information Center of Vietnam (CIC)

In terms of the State management of credit information, provision of credit information of the State bank of Vietnam is conducted by the Credit Information Center as the focal point for the main purpose of creation of a national database on credit information.

The scope of credit information which is provided to the CIC is broader than that allowed to be collected by credit information companies. The credit information is provided

to the CIC by credit institutions and branches of foreign banks in the form of electronic data within a required time and is categorized in accordance with the following criteria:

- Customer identification information;
- Credit agreement information;
- Credit relationship information;
- Information on the status of credit card account;
- Information on loan security;
- Annual financial information of borrowers being enterprises, including balance sheets, income statements, cash flow statements as regulated by the MOF; and
- Information regarding investment in form of bond into the borrower being an enterprise.

Based on the information received, the CIC uses technological and professional solutions in order to process credit information data including receipt, standardization, cleaning, combination and updating into the national database on credit information. Processing and storage of credit information data must ensure integrity, sufficiency, without errors in the information during processing and storing, and can be extracted upon required.

CHAPTER 2 Constitutional

Happy Independence Day *(4 September 2018)*

As Monday was a holiday, Vietnam's Independence Day, I thought I would take a moment, or a blog, and remind everyone how liberal the original document written and read by Ho Chi Minh in 1945 actually was. You can read the declaration in English at the following site.

http://historymatters.gmu.edu/d/5139/

That is all. Happy Independence Day.

What's the Law of Vietnam

(1 April 2019)

I am going to take a step back this week and speak basics. I was asked by a young lawyer what the difference between law in the West and Vietnam is. So, I figured if a lawyer has that question, there might be others as well.

The law of Vietnam is a civil law system built on top of ancient imperial systems that were borrowed largely from China. This means that there is a bit of a hodgepodge of law.

Regardless, the law in Vietnam comes from the law giver, or the National Assembly and the Government in the form of decrees, laws, etc. These laws are the be-all-and-end-all of the law. There is no other way of interpreting the law besides what is written in the official proclamations, though administrative agencies take their own interpretations and sometimes do so consistently.

This causes a deal of confusion, at least at the whim of the administrative, because one law can be interpreted differently by different entities and there is no supreme law interpreter. This is a problem across the civil law world and one that Vietnam is actually seeking to amend.

A year or so ago, and this is unconfirmed, but I read that the Supreme Court is taking steps to make its own decisions precedential. In other words, they will have the power to interpret the law, and that interpretation will be binding to the lower courts. This is a hybrid system and I'm not sure whether it's been implemented or not, but it is interesting.

Without that interpretation, the laws stand on their own.

In the West, at least in Common Law countries, much of the law is made by interpretation because the law makers take an inordinate amount of time to add additional laws to make clear what was hazy to begin with.

That's the basic difference, the interpreter of the law. The law giver remains the same, and the enforcer the same, but the interpreter, and the powers of the interpreter are different, though that may be changing in Vietnam, time will tell.

Vietnam's Independence Day Remembered

(29 August 2022)

This week marks the 67th anniversary of Vietnam's Declaration of Independence. On 2 September 1945, Ho Chi Minh stood in Ba Dinh Square, Hanoi, and read the declaration to over a million people in Hanoi, and also gathered in Saigon. He based his declaration on that of the United States. In honor of that anniversary, I thought it appropriate to take a moment and review that declaration, a document that foresaw more than thirty years of war to realize the dream marked on that day. (**In addition, our offices will be closed on 1-2 September to commemorate this holiday.**)

All men are created equal. They are endowed by their Creator with certain inalienable Rights; among these are Life, Liberty, and the pursuit of Happiness."

This immortal statement was made in the Declaration of Independence of the United States of America in 1776. In a broader sense, this means: All the peoples on the earth are equal from birth, all the peoples have a right to live and to be happy and free.

The Declaration of the Rights of Man and the Citizen, made at the time of the French Revolution, in 1791, also states: "All men are born free and with equal rights, and must always remain free and have equal rights."

Those are undeniable truths.

Nevertheless, for more than eighty years, the French imperialists, abusing the standard of Liberty, Equality, and Fraternity, have violated our Fatherland and oppressed our fellow-citizens. They have acted contrary to the ideals of humanity and justice.

Politically, they have deprived our people of every democratic liberty.

They have enforced inhuman laws; they have set up three distinct political regimes in the North, the Centre and the South of Viet Nam in order to wreck our country's oneness and prevent our people from being united.

They have built more prisons than schools. They have mercilessly massacred our patriots. They have drowned our uprisings in seas of blood.

They have fettered public opinion and practised obscurantism.

They have weakened our race with opium and alcohol.

In the field of economics, they have sucked us dry, driven our people to destitution and devastated our land.

They have robbed us of our ricefields, our mines, our forests and our raw materials. They have monopolised the issuing of banknotes and the import and export trade.

They have invented numerous unjustifiable taxes and reduced our people, especially our peasantry, to extreme poverty.

They have made it impossible for our national

bourgeoisie to prosper; they have mercilessly exploited our workers.

In the autumn of 1940, when the Japanese fascists invaded Indochina to establish new bases against the Allies, the French colonialists went down on their bended knees and opened the doors of our country to welcome the Japanese in.

Thus, from that date, our people were subjected to the double yoke of the French and the Japanese. Their sufferings and miseries increased. The result was that towards the end of last year and the beginning of this year, from Quang Tri province to the North of Vietnam, more than two million of our fellow-citizens died from starvation.

On the 9th of March this year, the French troops were disarmed by the Japanese. The French colonialists either fled or surrendered, showing that not only were they incapable of "protecting" us, but that, in a period of five years, they had twice sold our country to the Japanese.

Before the 9th of March, how often the Viet Minh had urged the French to ally themselves with it against the Japanese! But instead of agreeing to this proposal, the French colonialists only intensified their terrorist activities against the Viet Minh. After their defeat and before fleeing, they massacred the political prisoners detained at Yen Bai and Cao Bang.

In spite of all this, our fellow-citizens have always manifested a lenient and humane attitude towards the French. After the Japanese putsch of March 9, 1945, the Viet Minh helped many Frenchmen to cross the frontier, rescued others from Japanese jails, and protected French lives and property. In fact, since the autumn of 1940, our country had ceased to be a French colony and had become a Japanese possession.

When the Japanese surrendered to the Allies, our entire people rose to gain power and founded the Democratic Republic of Vietnam.

The truth is that we have wrested our independence from the Japanese, not from the French.

The French have fled, the Japanese have capitulated, Emperor Bao Dai has abdicated. Our people have broken the chains which have fettered them for nearly a century and have won independence for Viet Nam. At the same time they have overthrown the centuries-old monarchic regime and established a democratic republican regime.

We, the Provisional Government of the new Viet Nam, representing the entire Vietnamese people, hereby declare that from now on we break off all relations of a colonial character with France; cancel all treaties signed by France on Viet Nam, and abolish all privileges held by France in our country.

The entire Vietnamese people are of one mind in their determination to oppose all wicked schemes by the French colonialists.

We are convinced that the Allies, which at the Teheran and San Francisco Conferences upheld the principle of equality among the nations, cannot fail to recognize the right of the Vietnamese people to independence.

A people who have courageously opposed French enslavement for more than eight years, a people who have resolutely sided with the Allies against the fascists during these last years, such a people must be free, such a people must be independent.

For these reasons, we, the Provisional Government of the Democratic Republic of Viet Nam, solemnly make this declaration to the world:
Viet Nam has the right to enjoy freedom and independence and in fact has become a free and independent country. The entire Vietnamese people are determined to mobilize all their physical and mental strength, to sacrifice their lives and property in order to safeguard their freedom and independence.

CHAPTER 3 Contract Law

INDOCHINE COUNSEL
Business Law Practitioners

Indochine Counsel Announces Publication of the Law Firm Network's Cross-Border Contract Guide

(3 May 2018)

Indochine Counsel is excited to announce the publication of the Law Firm Network's Cross-Border Contract Guide. Authored by Managing Director Dang The Duc and Associate Le Hong Bao Chuong, the Vietnam chapter reviews some of the recent changes in Vietnam's international contract law, specifically the adoption of the United Nations Convention on Contracts for the International Sale of Goods, or CISG.

The Guide offers insight into 27 different countries and how they deal with cross-border contracts. The Law Firm Network, founded nearly 30 years ago in 1989, is a strong non-exclusive association of independent law firms from around the world whose principal lawyers have close personal and professional relationships. The Network has members in approximately 50 countries and we have an extended global network with quality law firms in over approximately 80 additional countries.

Indochine Counsel is one of the largest Vietnamese business law firms in the country. Last year they celebrated their tenth anniversary and their success in providing excellent work for international contracts, M&A, technology and IP, real estate, and a variety of other practices. Indochine Counsel is proud of its participation in the Law Firm Network Guide, and looks forward to helping readers with their legal needs.

You can download the Guide at the link: pdf version

Obligation and Citizen's Rights in Contract

(7 May 2018)

Hello again. In this the first instructive blog post for the Vietnamese Law Blog I want to discuss the derivation of one of a foreign investors strongest tools in ensuring his or her rights in Vietnam: the contract.

Later posts will discuss the niceties of contract, but first I wanted to acknowledge that the contract is defined in the Civil Code but is also rooted very centrally in the Constitution of Vietnam. To begin the analysis,

- A contract means "*an agreement between parties in relation to the establishment, modication or termination of civil rights and obligations*".

This is the beginning of contract…though there is much more to discuss. For most lawyers, law is simply the dissection of language into pieces that can be defined either by law of, in common law countries, by judicial practice. In Vietnam, a civil law country, this language is further defined by legislation from the National Assembly and lesser legislative bodies throughout the country. So, to understand exactly what a contract is, we need to look to further legislation. In this instance we look at the Civil Code.

In order to keep this discussion less discursive, I want to focus on the basis of contract, or the "establishment, modification or termination of civil rights and obligations." In essence, what are civil rights and obligations? We will look later at how they are established, modified, or terminated, but for now I want to discuss the what of it.

- Obligations means acts whereby one or more subjects (hereinafter referred to as obligors) must transfer objects, transfer rights, pay money or provide valuable papers, perform acts or refrain from performing certain acts in the interests of one or more other subjects (hereinafter referred to as obligees).

Obligations, then, are objects, rights, money, valuable papers, acts or non-acts that arise between two parties. Thus, it is the primary object of contracts and is distinct from the subject matter of civil rights. Obligations arise from contract and other forms of agreement between parties. While some of the obligations may be the performance of constitutionally protected rights, mostly they are separate.

Civil rights, unfortunately, are not as easy to pin down, and do not arise from civil contract. Instead, civil rights are those rights which are guaranteed by the Constitution of Vietnam, and are inherently adopted to each citizen of Vietnam by their inclusion within the Constitution. In fact, they are so vitally linked to citizenship that they are called "Citizens' rights" rather than civil rights.

While Citizens' rights and obligations are closely linked, "The rights of citizens are inseparable from their obligations" but only insofar as they are in relationship to other citizens' rights. Thus, "everyone has the obligation to respect others' rights," and must

fulfill their obligations to the state and society. The rights are considered limited only by the ability of a party to contract them away, and insofar as their exercise does not impeded upon the "legitimate rights and interests of other people." But what, then are citizens' rights?

The Constitution gives a formidable list. I have included a handful of the rights below. The list is not comprehensive, only exemplary. It is simply to provide you, the reader, with an idea of what kind of rights may be affected by contract.

- Right to live (Article 19)
- Right to physical inviolability, Right not to be arrested, and Right to donate human body organs (Article 20)
- Right to privacy and confidentiality of information (Article 21)
- Right to legal residence (Article 22)
- Right to freedom of movement (Article 23)
- Right to freedom of belief and religion (Article 24)
- Right to freedom of speech, freedom of the press, right to access information, and right of assembly, association and demonstration (Article 25)
- Male and female equality (Article 26)
- Right to vote and stand for election (Article 27)
- Right to lodge complaints and denunciations (Article 30)
- Right to ownership of assets (Article 32)
- Right to conduct business (Article 33)
- Right to assurance of social security (Article 34)
- Right to work (Article 35)
- Right to marry (Article 36)

These rights are the same rights that are affected by contract according to the Civil Code. So, in essence, they are the rights that can be adjusted, amended, effected and terminated by contract. How the law effects these changed under contract will be addressed next week. For now, understand that obligations and citizens' rights arise as a matter of law, and that they are constitutionally linked, and therefore essential to the progress of investors through a country with rule of law. But that's for another day.

Contract and Civil Rights

(28 May 2018)

A few weeks ago I posted the beginning of a discussion on the basic infrastructure of contract in Vietnam. I got sidetracked by a couple of things, but now I'm going to continue to discuss some of the very basal elements.

First off, we discussed the nature of civil rights or obligations. These are the objects of contract. Meaning, that the actor, or subject, acts upon the objects. The subject of a contract is defined as a "party".

In Vietnam's Civil Law the ability to become a "party" has a myriad of requirements. Essentially the right of civil action, or civil capacity, must be established to determine whether an individual, or company, is capable of acting on the object of a contract. I won't go into those details here, as they are rather basic and not entirely apropos of our discussion this afternoon. Plus, I don't want to give away the farm by revealing all of our magic tricks.

But, assuming that the parties have capacity to enter into contract, we can now turn to the question of what they can do to the object of contract, or the "civil rights or obligations" of a party.

To return to the definition of contract:

A contract means an agreement between parties in relation to the establishment, modification or termination of civil rights and obligations.

Turning to the establishment, modification or termination of civil rights we find there are actually discreet situations for which parties can establish rights.

Civil rights are established on the following bases:

1. Contracts.
2. Unilateral legal acts.
3. Decisions of a court or other competent State agency in accordance with law.
4. Results of labour, production or business; results of activities which create the subject of intellectual property rights.
5. Possession of property.
6. Use of or deriving benefits from property without legal grounds.
7. Suffering loss or damage due to an illegal act.
8. Unauthorized performance of work.
9. Other bases prescribed by law.

These are the ways in which civil rights arise. It's a bit more tricky when it comes to modification.

The problem is, the original Vietnamese term for modification is "thay doi", which according to my digital dictionary means "to change," but which is translated in the Code as "modification." However, in other sections of the code, the term used is "thuc hien," which again, means to "realize or carry out," and is translated as "performance."

This means that we must search for definitions of thay doi, rather than thuc hien, because thay doi is the term used in the definition of contract that is posted above. Unfortunately, while thay

doi is used in other places in the Civil Code, it is not defined. This leaves us to look to customary practice. In other words, absent a major investigation into anthropological norms, we should thus look at the dictionary.

I do not have access to a Viet-Vietnamese dictionary which would give us the actual definition which we should use, and as this is not a court case in front of us, and thus there is no need for an immaculately detailed narrative, I will use the dictionary definition of "modification."

Looking to dictionary.com, we find the most appropriate definition of "modification" is "limitation or qualification." We will operate with that definition with which we learn that: "Civil rights may be restricted only in accordance with law in necessary cases for the reason of national defence, national security, social order and safety, social morals, or community health." Thus, modification can be seen as the limiting of civil rights for the above cited reasons.

"Termination" of civil rights remains.

Again we run into a bit of a quandary. While termination is defined for obligations, it is not defined for civil rights. However, there are a few restrictions on the termination of civil rights and it may be possible to approach a definition through negative examinations.

First off, "the establishment, performance and termination of civil rights and obligations may not infringe upon national or ethnic interest, public interest, or legitimate rights and interest of other people." This is a good step. It allows us to understand that the manipulation of civil rights, whether establishment, performance (thuc hien) and termination must not infringe upon others rights.

This principle is repeated shortly thereafter as it becomes a responsibility of the State to monitor the manipulation of civil rights. Specifically, the State "must ensure preservation of ethnic identity and shall respect and promote the good customs, practices and traditions, solidarity, mutual support, [the tradition of] each person for the community and the community for each person, and the high moral values of the various ethnic groups living together in Vietnam."

This means that in essence, civil rights may be established for several reasons, and limited in very few cases, mostly in relation to national interests of the State. Termination, then, as all the other means of manipulating civil rights maintain, must not infringe on the rights of individuals, minorities, or the State.

I am not going to address the establishment, modification or termination of obligations at this juncture as this blog is already bloated. Until next time.

Relationships and Contract

(4 June 2018)

I want to chat a little bit about relationships, the true under-girding of contract.

Yes, that means a small break from examining the mechanics of contract and obligations in Vietnam, but it is important to understand the relationships that make up the contract.

Relationship in Vietnam, like in China and other Asian countries, is often much more important than the contract that is a result of that relationship. True, the M&A path usually involves finding a target company and bidding for that company. Sometimes there is more effort spent on developing a relationship, others its simply a business deal.

For those in Vietnam, who have a background in Confucius philosophy, the relationship is very important. I remember my first M&A deal. It was in the pharma space and the foreign buyer proclaimed a great relationship with the target, a company through which they'd been working in Vietnam for some time. Despite better recommendations by their lawyers, they decided to postpone the due diligence until after the purchase, inserting clauses to back out should the due diligence be unproductive.

This was not the way to move forward, except, both sides of the deal seemed satisfied with the relationship. Sure, there was a bit of urgency due to a change in law that was going into effect, but even then, it was bass-ackwards according to my Western training.

But the thing that this illustrated, was the manner in which the parties were in a relationship long before they decided to proceed with an M&A exercise... and that's the key: relationships.

I since learned that a long term relationship is, in Vietnam and SE Asia, a beginning and was not something that could be bought. I have since dealt with companies that tried to develop a relationship through cash, through bargains and deals. Some of them have succeeded, but others have ended in tragedy.

Thus it is important to understand the true nature of doing business in Vietnam.

I remember in law school, I took a class on Chinese law. One of the conversations held during the class was the question of relationships over money. Now, this is a narrow razor edge to discuss this, but often, relationships trump money. Especially if there is the possibility of more money on the table.

Now, I brought this up at a recent meeting and it was mooted that relationships are falling into disfavour, that money is more important, that the only things that really matter are calculated on the accounting books. This is an unfortunate development, and one that I would argue is inaccurate as it reflects the preferences of business parties in Asia.

Relationships are important. As far as I know, that first M&A deal has continued to be a success for the parties, while other relationships were sacrificed on the altar of making more money. Those ended in armed dispossession and the loss of investments. Just because SE Asia is seen as frontier investing, that doesn't mean that sharp practices or bribes are enough to move a partner. No. It's the relationship.

Commercial Law v. Civil Law

(22 October 2018)

One of the major issues of law for any jurisdiction is determining the applicable law. There are many laws, commercial, civil, banking, sports, telecoms and it is sometimes difficult to determine when and where that law should apply. In Vietnam, there is particular ambiguity when it comes to the governing of contracts by two laws, the Civil Law and the Commercial Law. In this blog post I want to look at the applicability of the Commercial Law.

To state it simply, the Commercial Law applies to "Commercial activities." But what are commercial activities? According to the definitions in the Commercial Law, they are activities "for profit-making purposes, comprising purchase and sale of goods, provision of services, investment, commercial enhancement, and other activities for profit-making purposes."

Not all of these are defined by law, but it is important to understand those that are. Profit making activities is not defined and is left to the basic understanding of the dictionary definition. One would assume, then, that profit making activities are those activities which are conducted for the intent of making money more than that invested as capital in the pursuit of those activities.

Purchase and sale of goods, however, is defined. Purchase and sale of goods means, "a commercial activity whereby the seller is obliged to deliver goods, to transfer ownership in the goods to the purchaser and to receive payment; and whereby the purchaser is obliged to pay the seller and to receive delivery of and ownership in the goods in accordance with an agreement."

Before moving on, it is important to understand what goods are. These are defined in the law. They mean all types of moveable assets, including moveable assets to be formed in the future. It also means those objects attached to land. Only transactions that fit these definitions will be included in the definition of Purchase and sale of goods for the purpose of finding jurisdiction of the Commercial Law.

Provision of services is another term which is defined. It means "a commercial activity whereby one party is obliged to provide services to another party and receives payment; and whereby the party using the services is obliged to pay the service provider and to use the services in accordance with an agreement." This is directed primarily to the payment of services, the definition concerned with whether the service is for payment and the payment is due from the client.

Investment is not defined by the Commercial Law. However, it is defined in the Law on Investment. Investment "means the use of capital in the form of tangible or intangible assets for the purpose of forming assets by investors to carry out investment activities in accordance with the provisions of this Law and other relevant provisions of law."

Finally, Commercial-Enhancement also has a definition. It means, "activities of promoting

and seeking opportunities for the purchase and sale of goods and for the provision of services, comprising promotional activities, commercial advertising, displays and introductions of goods and services, and trade fairs and exhibitions."

To conclude, there are two regimes for contract regulation, the Civil Law and the Commercial Law. In this blog post we have examined the application of the Commercial Law. There are several types of activities which are governed by the Commercial Law and they are controlled by the definitions provided above.

Place of Delivery of Goods Under the Commercial Law

(29 October 2018)

Last week we discussed the application of the Commercial Law. This week, I want to dig further into the Commercial Law and discuss the question of place of delivery of goods.

To begin, goods are delivered according to the contract between the seller and the buyer. If there is no specific clause in the contract governing delivery, then delivery is conducted according to the law. This is stated in the Commercial Law when it says that "A seller must deliver goods to the place as agreed."

If there is no agreement, then the clauses of the Commercial Law take over.

If the goods are attached to land, then they are to be delivered at the location of the land. "Where the contract contains a clause on transportation of the goods, the seller must deliver the goods to the initial carrier."

I'm going to jump a bit here. Transportation is not discussed much in the Commercial Law, though it is understood that treaties to which Vietnam is a party, and which affect the matters concerned in the Commercial Law, then the treaty applies. That is important to know because there are some treaties that affect the shipping of goods across international borders.

One of those treaties is the UN Convention on Contracts for the International Sale of Goods, or CISG. There are many clauses in CISG that discuss the obligations of delivery and acceptance. I won't go into them now, but be aware that they do exist and that they are important, especially if the parties to the contract selected CISG as a governing law.

There is another set of terms that is also important to understand, and these are the INCOTERMS. While not a treaty, the INCOTERMS are a recognized standardization of a bunch of different shipping terms. They cover time and place of delivery, method of transportation, who pays for the transportation, the insurance, who obtains the insurance, and a few other important aspects of international delivery. Again, I won't go into further detail on them here, but know they exist and that they are important to understand if you are dealing with international shipping into or out of Vietnam.

Returning to the Commercial Law, it is important to understand that the parties knowledge is vital to the determination of location of delivery. If there is no clause in the contract on transportation, and the parties knew where the goods were stored, loaded, manufactured or produced, then the seller must deliver the goods at that location.

Otherwise, if there is a business location of the seller, or if not, then a residence that is known to the parties at the time of entering into the contract for the purchase and sale of goods, then that business location or residence is the place of delivery.

There are other elements of delivery, some of which I will go into at a later date, but for now, this is the main gist of the Commercial Law when it comes to Place of Delivery.

Passing of Risk in Vietnam's Commercial Law

(19 November 2018)

What is passing the risk? It means that the risk of destruction or damage passes from the seller to the buyer at a certain time. When this time is, is determined by the Commercial Law. In Vietnam there are a handful of rules that govern this specific incident. It is also covered in the INCO Terms, which I discussed previously.

The first, and simplest, of the rules is that the passing of risk occurs upon delivery of the goods to the purchaser. At least this is the case when the contract specifies the place of delivery. Once the purchaser accepts delivery of the goods at the specified place of delivery, the risk is passed.

The second rule, and more complex, covers the situation where the place of delivery is not specified in the contract, but that requires transportation in the delivery. Failing some other agreement, the passing of risk occurs once the seller has delivered the goods to the initial carrier. In other words, if there is a seller in Hanoi, and transportation of the goods runs through sea shipment to Ho Chi Minh City, and then by lorry to Thu Duc, though there is not a specific location in Thu Duc specified in the contract, then the risk is passed at the point where the seller delivers the goods for shipment. It is unclear exactly at what point the initial carrier takes possession of the goods. Whether it occurs at the point when the carrier receives the goods in its warehouse, or whether the goods must pass the rail of the ship, or if there is some other formulation.

Sometimes, there is a third party not involved with transportation who takes possession of the goods between the seller and the purchaser. This third party can be referred to as the bailee. If the bailee possesses the goods then there are two instances in which delivery and the passage of risk are contemplated by the law. First, risk passes when the purchaser accepts the vouchers from the bailee that testify to the purchaser's ownership. Second, risk passes when the bailee acknowledges that the purchaser has taken possession of the goods. This last does not necessarily mean that the bailee has delivered the goods, only that he testifies that the goods are in the purchaser's possession. This is unclear and requires specification.

There is another instance contemplated by the law. Sometimes contracts are entered into when the goods are already in transport, as when corn is originally sold to a vendor in Da Nang, but is then sold on to a vendor in Cam Ranh. At the point where the contract is made for the sale, the passage of risk occurs at the time the contract is entered into.

Finally, the passage of risk occurs when there is no other agreement, and the right of control is in the purchaser. This means that the purchaser has enough control of the goods in question so as to be able to determine what to do with them. This risk only passes if there is some clearly identifiable means of establishing that the goods are indeed those goods which were bargained for.

In all, the passage of risk is under defined in Vietnamese law. There are questions left which are unanswered by the law, and which control the passage of risk between parties.

Don't Trust NYC Lawyer to Draft Vietnamese Contract

(26 November 2018)

Now, I'm going to discuss something that I'm borrowing from Dan Harris over at Chinalawblog, even though I haven't actually read the article. I'm going off of the headline and regardless of what Dan Harris said, I can come up with my own reasons for this distinction.

First, don't let a foreign lawyer draft your contract because they aren't qualified. Each jurisdiction has different rules, and although the common law and civil law countries may have similarities, there are enough differences that a foreign lawyer isn't going to know all the rules.

Take for instance, the concept of non-competition clauses in employment contracts. This is something that is common throughout the western world. They like to see them, and they like to include them in contracts. A non-competition clause is a clause in a contract that prevents an employee from competing in the same field and the same region for a specified period of time after the employment relationship ends.

For a NY qualified attorney, this would be par for the course. In Vietnam, non-competition clauses aren't enforceable. There are provisions of the employment law and Civil Code that prevent a contract from containing anything that limits a person's opportunity to work, and the courts have interpreted this to mean that non-competition clauses are unenforceable.

Now, this NY attorney will not know this. Also, he will not know that including a non-competition clause is generally part of negotiations. It is included as a moral deterrent rather than as an enforceable clause and most lawyers in Vietnam will include them knowing full well that they are not enforceable.

You may be saying, what's the difference? But there is a huge difference in expectation. If you, as an employer, use a NY qualified attorney to draft your non-competition clause you may be expecting that the clause will be enforceable and when the employee starts his own business in the same field as your own, in the same city, you want to go to court to enforce the non-competition clause. You can't, because it's non-enforceable. You would have known this if you had worked with a Vietnamese qualified attorney because they would have told you that it was unenforceable. But now you're left with an expectation that's wrong, and you're at a loss.

When I was in Laos I worked with an attorney from NY that insisted on using the same language that he used in NYC in contracts in Laos. Not only was this dangerous, but it was silly as well. Why would someone put a clause about estoppel in a contract in Laos, when estoppel is not a Laos legal concept, hell, it's not even a civil law concept, and expect the courts to interpret it to mean the next best thing in the Laos law. That was his attitude. Just because the concept has a different name, doesn't mean

I have to use the Laos name. I can use the NY name and the court's will interpret it as they should. This is a wrongheaded attitude. Laos courts, and Vietnamese courts, and Cambodian courts are all staffed with underpaid civil servants who are not necessarily educated in international law. They may not understand the legal concepts from NY that are integral to a contract drafted by a lawyer out of NY.

So don't trust your NY lawyer to draft a Vietnamese contract. They don't know the law, and even though they may have the same concept, they may use a different name, and that's dangerous because the courts can't understand the difference. You'll be left with a contract that's filled with unenforceable clauses and useless agreements.

Snow and Force Majeure

(12 December 2018)

Snow. For the last two days I've been snowbound in my house, unable to go anywhere on the roads, and without my computer. To me, at least at first glance, this appears to be a case of force majeure, an instance where I can claim a lack of liability for breach of contract in writing this blog.

Usually I post this blog on Sunday, but late Saturday night, early Sunday morning, my home received nearly five inches of snow, which made it impossible to go outside. I spent the last two days huddling in bed trying to stay warm and haven't been able to get to my computer, which was outside in the car.

Now, is this really force majeure?

Not really. Because I had an iPad which I have used successfully before in posting blog posts. But it was too cold, I say. too cold. But is this really an excuse?

There is no actual definition of force majeure in the Vietnamese Commercial Law, but there is more in the Civil Code.

"An event of force majeure is an event which occurs in an objective manner which is not able to be foreseen and which is not able to be remedied by all possible necessary and admissible measures being taken".

This means that objectively, there can't be anything for me to do to overcome the unforeseen event that interfered with performance. In my case, there is no excuse. I knew that the storm was coming. Everyone knew. It was forecast days in advance. There was no excuse for me to leave my computer in the car. Plus, the iPad issue. I could have written the blog post on my iPad and published it from there, which I did have inside my house. As far as the huddling cold and damp, trying to stay warm, well, that's not something terribly difficult to foresee either.

In the case of this blog post, no force majeure applies.

Contractually Limiting Liability in Vietnam Law

(6 January 2020)

Under Vietnam law, there are three methods for determining compensation. First, the total damage calculation. This is the most damaging to the breaching party. Second, limitation by law. Third, agreement by the parties.

Total damages for breach of contract include physical damage, spiritual damage, the benefits that would have been enjoyed by the non-breaching party if the contract had not been breached, and the non-redundant costs of putting the non-breaching party in the same position as if the contract had been performed.

Physical damage is "those actual physical losses, comprising loss of property, reasonable expenses to prevent, mitigate or restore damage, and the actual loss or reduction of income." Spiritual damage is losses related to life, health, honor, dignity or reputation and other personal benefits of an entity."

This total damage liability may potentially be immense and completely out of proportion to the expected costs and values of the original contract. It would make sense for there to be ways for the parties to contract away from this liability. And there are.

The parties to a contract, then, can anticipate the possibility of breach and define the damages for which a breaching party will be liable. In most contracts, except for those formed due to unilateral intention, there is an exchange of acts. Whether the payment of money or the provision of goods or services, there is usually a back and forth between the parties to the contract. This is called a consideration.

In general, a party would seek to limit his liability to the reasonable value of his consideration. But sometimes there may be major consequences for failure to perform that party's consideration. Consider, for example, a party contracted to provide concrete to pour foundations for a large shopping mall. There are many ways in which this contract may be breached, but to keep it simple the party fails to pour the concrete. This creates a major delay in the construction process and causes the shopping mall to open two months late. During those two months it is estimated that the mall would have made a million dollars. The cost of pouring the concrete was 10,000 USD.

If the provider of the concrete failed to limit his liability under the contract, he may be responsible for a million dollars plus the cost of paying to have someone else pour the concrete. It is in the interest of the provider of concrete to limit his liability in the contract. Instead of paying a million dollars he can agree to a lesser amount, something specific, that he will pay if he fails to pour the concrete on time. An example of such a limitation would be for the cost of the contract, the costs incurred by the mall in having someone else pour the concrete, and a fixed fine. So, say, a total of 20,000 USD.

This amount is beneficial to the pourer of concrete because if limits his liability in that he would not be liable in the amount of a million dollars. It is also beneficial to the mall in that it provides a specific and actual amount to discourage the pourer of concrete from defaulting or breaching his contract to pour the foundations.

This type of agreement is called a limitation of liability and can be–and generally should be–included in a contract before either party begins performance of its obligations under that contract.

How to Successfully Use a Non-Compete Clause in Vietnam

(25 March 2020)

Not too long ago I was looking at some labor law issues and tangentially saw a reference to a court case in Vietnam that addressed the issue of non-compete agreements. This intrigued me because the last time I looked into the issue there had been no real developments in the area and the consensus amongst lawyers in Vietnam was that non-competes were a "nice to have" clause in contracts with employees but that there was no provision for them in law.

A non-compete clause is an employer preferred clause in an agreement with an employee–usually highly skilled or executive level–that prohibits the employee from working for a competitor of the employer after finishing her term of employment. In Common Law countries this concept has been chiseled and limited so that there must be reasonable temporal and geographical limitations set on any non-compete agreement for it to be sustained by a court.

Vietnam has done little to address this issue despite the fact that most international investors come into the country and include it in their labor contracts. The National Assembly has yet to provide for them in the labor law or civil code and the Government has yet to issue any guidance to its ministries in how to enforce or obviate them. Nor have the courts, until recently, provided any real input on the issue. It is as if Vietnam doesn't want to face the inevitable fact that a common clause in international employment contracts might just be unsupportable within its legal regime.

In fact, there are several clauses in the labor law that mitigate against non-compete agreements.

First, the labor code itself only governed the "labor relationship" and within the law, it was allowed that employers could protect business or technology secrets. It was assumed because it named those issues that the fact of its silence on non-compete agreements was deliberate and, therefore, non-compete was not included in the labor law.

Second, the labor law does positively ensure the rights of workers to freely choose their jobs and workplaces. A non-compete clause was seen by most Vietnamese lawyers as a restriction on this freedom and thus in violation of the labor law. This was coupled with the fact that the labor relationship defined in the labor law ended at the termination of the labor contract. As a non-compete clause is intended to survive beyond such termination, it is unclear whether its inclusion would be deemed to survive by a court.

Questions gathered. Because the labor law allows for more than one employment contract at a time, would a non-compete be permitted during the term of employment? What if the non-compete was included in a separate contract that wasn't part of the labor contract?

Were there certain limitations that might be applied to make the non-compete more palatable to the courts and thus enforceable? What about the freedom of contract espoused in the civil code? Are there Constitutional issues?

None of these had been addressed until nearly two years ago when, on 12 June 2018, the Ho Chi Minh City People's Court took up case number 55/2018/QĐ-PQTT, a petition by Ms. Do Thi Mai T., an employee of Company X, for the court to cancel an arbitration award that upheld a non-compete clause between her and Company X included in an NDA she signed separately from her labor contract.

The language of the non-compete clause was included in the judgment of the court and reads as follows:

In the process of the employee being recruited or working with Company X and in the time of twelve months after termination of recruitment or cessation of employment with Company X, regardless of the cause of the termination of recruitment or cessation of employment, the employee agrees not to, directly or indirectly and in the totality of the territory, conduct work similar to or work with similar characteristics for any business in competition with Lazada.vn (…), that now or in the future will compete with the business of Lazada.vn, Recess and/or the related parties and principals of Company X.

In addition, the judgment of the People's Court spells out the dates of the agreements, including the labor contract and the separate NDA. Unfortunately, the facts of the violation of the non-compete clause are not included, simply that, according to Company X, she violated it.

If this were a court in a Common Law jurisdiction, they would have the opportunity to examine the issue on multiple levels and to put forth some jurisprudence, but, as I examined a little bit here the job of the courts in Vietnam is not to interpret the law. And though I'm not sure what they are in fact supposed to do– we're still researching this issue–they seem to apply the law and act simply as a means for enforcement rather than for interpretation. Whatever their ultimate responsibility (a case for another blog article) the People's Court in this instance did not examine any of the potentialities but instead chose to ignore the labor law completely.

In essence, the court chose to treat the NDA as a contract not associated with the Labor contract and rather than examining the legality of a non-compete clause in the labor law context chose to apply the civil code to what it deemed to be a civil contract. It did not address timelines, freedom of choosing a workplace, or the limitations on the application of the labor contract. It simply cited the freedom of contract clause of the civil code and, finding that the contract between Ms. T and Company X was entered into without violating any of the laws regarding contract, the non-compete clause was enforceable.

At first blush, I must say I was disappointed in this judgment. When I learned that the court had addressed the issue of non-compete clauses, I was excited. I thought there would be some jurisprudential reasoning to understand how they related to the labor law. But that's my Common Law training coming into the fore. Vietnam's courts don't do that, with the slight exception of the Supreme People's Court, and they can't be expected to commit complicated reasoning to a simple trial where less than US$10,000 was at issue.

Upon further examination, however, I am impressed by what the court was able to do in the simplicity of its application of the law. It suggested that while non-compete clauses may

or may not be effective in a labor contract, it would accept them as enforceable in a civil contract between employer and employee. This means that, so long as the employer does not rely on the labor contract to define its rights against the employee, non-compete agreements can be enforced–at least in Ho Chi Minh City.

This case also shows the importance that the court gives to the freedom of contract principles in the civil code. So long as the civil code applies–and the contract clause in question is not found to be governed by the commercial code or another branch law–the Ho Chi Minh City court is willing to recognize contractual clauses providing for concepts that aren't contemplated by legislation from the National Assembly or by administrative guidance from the Government. That is big.

What To Do After Force Majeure in Vietnam

(6 May 2020)

While Vietnam is coming out of the Covid-19 epidemic, force majeure in Vietnam and elsewhere remains a major issue for investors both domestic and international. Cross-border flows of goods and people remain restricted, but internally, Vietnam is resuming business as usual to the extent possible.

As the world locked down over the last few months, many firms cited the force majeure clause in their contracts to escape performance when it seemed impossible to provide promised goods and services. Countless articles discussed the implications of force majeure clauses and how they might affect businesses, deliverables, and services.

But what happens next?

This article will discuss force majeure, what it is, the law in Vietnam, and the consequences of triggering it, but it will also discuss what happens when the force majeure event is over and the parties to a contract look at their relationship moving forward.

What Is Force Majeure?

According to Wikipedia,

*"**Force majeure** is a common clause in contracts that essentially frees both parties from liability or obligation when an extraordinary event or circumstance beyond the control of the parties, such as a war, strike, riot, crime, epidemic or an event described by the legal term act of God, prevents one or both parties from fulfilling their obligations under the contract".*

In essence, then, force majeure is a pre-arranged agreement between two parties to a contract, the purchaser and the provider, to suspend or annul a contract in case something so big and so unforeseen happens as to interrupt either party's ability to perform their duties under the contract.

Force majeure is the backstop against which performance is played (to use a baseball metaphor). It originated in the Napoleonic Code back in the early Nineteenth Century and is common in former French colonies who adopted in large measure the legal system from their colonizer. It has been largely adopted in international trade, especially in shipping and logistics, and has even been adapted into common law countries.

I remember reading one article on the subject early in the Western exposure to Covid-19 that referred to force majeure as an esoteric clause rarely used. This is certainly not the case. Force majeure is a common and important element of contracts and should be understood by businesses and investors who wish to protect themselves against non-performance due to extreme events.

I was first exposed to the concept of force majeure in International Trade Law, a class I took in law school. It was explained in the shipping context. One party buys a shipload of coal from the coal-mining regions of Virginia to be delivered to the Sudan in North Africa. The agreement is signed, and shipment initiated.

But a hurricane prevents the ship from traveling directly across the Atlantic and is unable to deliver the goods according to the agreed upon delivery schedule. The failure to perform according to the contract, however, is not the fault of either party. It was an act of God that caused the delay, therefore the delay in delivery triggers an examination of the force majeure clause of the contract.

There are two sides to this story and each side will argue its rights. The shipping company will argue that the hurricane was an act of God and unforeseeable, that it could not have avoided it and that it should not be held responsible for the delay in delivery. The purchaser, however, who relied upon the delivery date in selling the coal to consumers, is at a loss, and does not want the force majeure clause to apply. He therefore argues that hurricane season happens every year and that it is foreseeable that there may be a delay or the need to reroute around the storm. He argues that the hurricane was foreseeable and therefore not an event of force majeure.

I won't go into the international decisions because I'm not well versed in them, but to make the point, events of force majeure are arguable and may or may not, in fact, trigger a contract clause sufficient to cancel performance.

Force Majeure In Vietnam Generally

To begin, Vietnam was colonized by France and though there has been over sixty-five years passed since France lost its control over the country, its law remains largely influenced by the Civil Law system of the Napoleonic Code. It has a legislatively defined concept of force majeure which allows for the escape from the performance of certain responsibilities.

Under the Civil Code 2015, an event of force majeure prevents a party who would have a right to take civil action against a non-performing party unable to do so. It invalidates the right and prevents civil actions–from terminating a contract to seeking damages. An event of force majeure is defined as:

"an event which occurs in an objective manner which is not able to be foreseen and which is not able to be remedied by all possible necessary and admissible measures being taken".

There are a few things to unpack here. First, the event must occur in "*an objective manner.*" That means that it must "*not be able to be remedied*" objectively. One party cannot simply claim an event of force majeure without proving it objectively. Second, it must not be foreseen. See the above discussion of hurricanes. Also consider acts of war.

During the 1970s when the United States was going hog wild in the Middle East for oil, there was increasing turmoil in Iran. The current leader was fighting revolution and uprisings, there were noises that major upheavals were about to take place. Despite these warnings several companies continued to contract for oil fields and oil exploitation. When the revolution eventually came, it was deemed an event of force majeure by the companies who were out their oil, but it could also be argued that such an event was foreseeable and thus not force majeure. Reasonable minds may disagree.

Third, the definition requires that the event cannot be remedied. This is easier to prove. It is simply necessary to show that because of the event in question, there is no way for the party to fulfil its obligations under the contract. The hurricane prevented the ship from proceeding upon its direct route and thus–ignoring the foreseeable issue–there was no way it could have arrived on time. The oil in Iran was no longer accessible by the local contract parties and thus unavailable to the purchasers. Because of the politics of the time, there was no way for

them to deliver the oil. Thus, it was unable to be remedied.

Fourth, one must consider the efforts made by the excused party in remedying the consequences of an event of force majeure. Did they take "all possible necessary and admissible measures"? In Vietnam these terms are undefined, but it can be reasoned that a court, in applying the law of force majeure to a situation, would look to see whether the party seeking to escape performance tried to remedy the situation. Did the ship steer as close to the hurricane as possible to limit the delay? Were there alternative sources of oil available? Could the contracts be reassigned to new political parties?

All four of these elements must be satisfied before an event will be considered force majeure in Vietnam.

Force Majeure In Vietnam Contractually

The above discussion is from the legislation. As most lawyers will tell you, in general, legislation is the default. You can contract stricter or different terms between the parties. The courts, even in Vietnam, tend to uphold the concept of freedom of contract and thus it is definitely in the parties' interests to negotiate their force majeure clause.

As a brief example, let's look at the force majeure clause from my consulting contract with Indochine Counsel.

*"Neither Party shall be liable to the other for any delay or failure in the performance of its obligations under this Agreement if any to the extent such delay or failure in performance arises from any cause or causes beyond the reasonable control of the Party affected (the "**Force Majeure**"), including, but not limited to, act of God, acts of government authorities, compliance with law, regulation or orders, fire, storm, flood or earthquake, rebellion, revolution, riots, strike or lockouts".*

At first glance there are some differences here. I am less familiar with Common Law force majeure, but I suspect that this clause was lifted from a Common Law contract. It does not reflect Vietnam's legislated force majeure very well and isn't very good. It sacrifices the foreseeability requirement of the Vietnamese concept and provides an illustrative list of specific events that are considered force majeure. It muddies the waters even further by adding the Common Law concept of "reasonableness."

Here is an admission. Most lawyers, at least in Vietnam–I have seen this from several firms–treat the force majeure clause as simply boiler plate language. Rarely do they modify their clauses and rarely do they adapt them appropriately for the actual relationship between the parties. There is also a tendency–and this is true across several different areas of contract–for Vietnamese lawyers to pick up language from Common Law lawyers under whom they've worked despite the fact that such language is not contemplated under Vietnamese law.

You can see that in this example. It is, therefore, important generally to ask two questions of your lawyer when considering force majeure: 1. Is this compliant with Vietnam's legal code? and 2. Is this appropriate to my needs?

Consequences of Force Majeure

Now that we understand what force majeure is, and more specifically what it is in Vietnam and that it can be modified by contract to meet the anticipated needs of either party, what happens when a force majeure clause is triggered?

In general, the party claiming force majeure as an excuse for non-performance will notify the

other party to the contract that they are unable to perform and such inability triggers force majeure. Depending on the circumstances–and the specific contract language–the non-performing party has the option to accept such notice and live with the likely losses that will accrue because of the non-performance or challenge the other party's interpretation of the event in question as force majeure.

Such a challenge would normally take the form of a lawsuit filed by the disadvantaged party. The courts would then be responsible for determining whether the event was truly an event of force majeure and rule in favor of one party or the other. If the event was deemed to be one of force majeure, then the court will apply the language of the contract. If not, the court will award the disadvantaged party remedies of either forced performance or damages in the form of compensation for the non-performance.

In general, unless the event of force majeure continues for an extended period of time, force majeure clauses do not terminate the contract but only excuse performance for the duration of the event of force majeure. This is most recently demonstrated by Covid-19 and the supply chain.

Many foreign companies have manufacturing facilities in Vietnam. Raw materials are sometimes shipped from other countries into Vietnam, assembled or modified, and then shipped again to another country for sale to consumers. When Covid-19 began to spread, the government took several actions to minimize the spread of the virus and to prevent a major catastrophe within Vietnam's borders. They stopped international travel, closed non-necessary activities–often including manufacturing–and limited cross-border shipments of goods. This resulted in an interruption of the supply chain. Raw materials from China couldn't cross the border into Vietnam, thus stockpiles were depleted and manufacturing unable to continue. The factories in Vietnam, therefore, couldn't manufacture goods and couldn't ship them out of Vietnam to the foreign consumers.

Most people–except for United States President Trump–would agree that Covid-19 is possibly an act of God. While "pandemics" may or may not be included in the language of a contract, it was unforeseen and because of external factors outside the control of manufacturers, unable to be remedied. The factories had to claim force majeure events and plead out of their contractual obligations of performance.

In another example, businesses affected by Covid-19 often sought reductions or forgiveness of rent because they were not making any money during the lockdown. They had no revenue coming in and couldn't afford to pay rent. This, too, they considered the consequence of a force majeure event.

In both cases, the event of force majeure acts to temporarily affect performance. Once the supply chain is restored, once restaurants and bars open up again, the inputs necessary for performance will resume and the parties will be able to continue performance. Thus, the cessation is generally temporary, and the parties remain in a continuing contractual relationship. This brings us to the question of what happens after a force majeure event is ended.

After Force Majeure

When a force majeure event ends, when the hurricane passes, when the government stabilizes, when the pandemic is over, the parties are left to pick up the pieces. What are they allowed to do to recover their losses or to resume operations to hopefully begin to rebuild their relationship?

Contractually, a lot depends on the language of the clause in question. As an example, look at the second part of the force majeure clause in my consulting contract.

The Party affected by Force Majeure as mentioned above shall declare the Force Majeure by notifying in writing of the circumstances within seven (7) days of becoming aware thereof. If the circumstances constituting Force Majeure continue for a period longer than thirty (30) days, either Party may terminate this Agreement upon ten (10) days prior written notice to the other Party.

This contract, then, allows only for a temporary cessation of performance. If, after thirty days of declaring a force majeure event, the event itself has not ended, then the contract may be terminated. In the case of Covid-19, had one of us notified the other of non-performance because of the pandemic, the contract may be terminated now that more than 30 days have passed. Luckily, neither of us was forced to cease performance–though there were some adjustments made–and neither party claimed force majeure.

In Vietnam, the law does not provide for automatic termination because of force majeure. That has to be negotiated and included in the contract. The parties, then, are normally considered to remain in their contract and must continue to perform despite the temporary cessation of performance caused by the event of force majeure.

As discussed above, the buyer can choose to take the seller to court and argue that the event was not an event of force majeure. This will result in either a decision upholding the force majeure interpretation of the seller, or in damages to the buyer. If the court deems the event force majeure, then the parties will–unless termination is provided in the contract–remain in cooperation with each other. If the court deems the event not to have been one of force majeure, then the buyer could claim non-performance by the seller and terminate the contract.

If the event of force majeure lasts too long or the court denies the claim of force majeure then the parties may part ways, but if the court upholds the claim of an event of force majeure as excuse for non-performance and the contract does not allow for termination of the contract, the parties are forced to continue working together.

Now what?

After an event of force majeure clause is triggered, inevitably one of the parties is left in a bad way. The coal buyer was out the coal and thus lost profits from re-sale in Sudan. The American oil companies were out the oil from Iran and thus unable to sell the oil to consumers around the world and subsequently lost millions of dollars in profits. Nike is unable to receive finished shoes from its factories in Vietnam and thus unable to meet demand for sneakers in California, profits plummet. The buyer is usually the party left at a loss, and the party with the most power to affect the relationship moving forward.

The first, and most obvious, possibility is to restart the clock and act as if, otherwise, the event of force majeure never happened. This means that the buyer must swallow any loss caused by the non-performance that arose. Sure, both parties may have suspended performance, thus the buyer didn't have to pay for the goods or services during the event of force majeure, but as already noted, there are knock-on effects that cause losses beyond the basic exchange of cash for goods.

Here is where the objected malleability of contracts in Asia, and in Vietnam specifically, is an advantage.

Vietnam is a country where Face is important. It is a place where staying true to one's word and helping those in trouble is important to maintain one's reputation. It is a place where a relationship is more important sometimes than a disadvantage. This means that oftentimes, to preserve a relationship, Vietnamese will enter into accommodations to ensure that they retain the goodwill of their counterparty.

While not 100% assured, this is a point at which a buyer may be able to negotiate a change in a contract to compensate for the event of force majeure. To come to some new arrangement that allows for both parties to ease into a post-event normal. Here in Vietnam the economy runs in large measure through foreign investment. The leverage of South Korea, or Japanese, or American, or European money is large and to ease the flow of such monies into the country, Vietnamese will often seek to ameliorate conflict, or losses, and seek out new terms more beneficial to both parties.

Vietnam After Covid-19

Vietnam has so far weathered Covid-19 admirably and is poised to stand among the leaders of the region and the world economically coming out of the pandemic. This gives the Vietnamese leverage in dealing with Covid-19 as a force majeure event, because they know they did well and that they are attractive to investors. Despite the amiableness of the people, they are also justifiably proud. Do not assume that they will bow to unilateral requests but know that they will be willing to work with respect towards a mutually beneficial solution.

Covid-19 has caused uncountable interruptions in the global economy. Vietnam has posted one of the few positive GDP numbers in Q1 2020. The country is ready to resume its race forward to grow and to expand. It is ready for resuming and increasing its role as an alternative to China and to attract investors from around the world. It is a prime destination for investors with a long history of legislation allowing for the excuse of performance for events of force majeure.

Take Covid-19 as a lesson, then, and be aware of force majeure moving forward. The possibility for catastrophic and unforeseen events remains. China is pushing its claims in the East Sea (or as China calls it, the South China Sea), sea-level rising is seriously affecting the Mekong Delta, China's dams on the Mekong are stealing water, and who knows what else might cause a future event that could interfere with the performance of a contract.

Ask the right questions of your lawyers and insist that the language of your contract reflect not only the legislation of Vietnam but the needs of your investment. Take the time to discuss the clause with your lawyers and figure out how best to draft it to ensure continuity of performance or, in the case of necessity, termination when it makes sense. Ultimately, while events of force majeure are unforeseeable, the possibility for their occurrence is foreseeable and you should be ready with a properly negotiated and drafted force majeure clause.

Issues of Technology Transfer Contracts in Vietnam

(6 August 2020)

Introduction

Hello all. This week we're exploring issues with technology transfer in Vietnam. Just in case you're not familiar with the term, technology transfer refers to the process of conveying results stemming from scientific and technological research to the market place and to wider society, along with associated skills and procedures.

This can come in the form of transfers from inventors to companies who mass produce, market, and sell their invention or it could be a cross-border transfer of technology from a manufacturer in the United States necessary to build and operate a manufacturing plant in Vietnam. There are many possible permutations of technology transfer possible and in Vietnam, the National Assembly has issued laws relevant to the contracting and registration of such transfers.

As I am a corporate and commercial specialist, technology transfer issues are somewhat outside of my area of expertise. As such I turned to our TMT lawyers and found Mr. Ly Nghia Dzung willing to assist me in exploring the most relevant legal issues in this field. The rest of this blog consists of his experience and his analysis of the 2017 technology transfer laws exploring the most relevant developments from that legislation.

Enjoy.

Issues of technology transfer contracts in Vietnam

My Experience

As per my experience in registering technology transfer agreements since 2015 under the 2006 Technology Transfer Law and the amendment thereof in July 2019 (the effective date of the 2017 Technology Transfer Law) I dealt primarily with the Long An province authorities. The Department of Science and Technology at the Long An province mainly examined the contents of the technology transfer agreement for consistency with the required contents in accordance with the laws, and I was not required to amend any content of the filed technology transfer agreement during such registration procedure, therefore, it was unclear if the Departments of Science and Technology at other provinces or the Ministry of Science and Technology made any different or stricter requirements on the contents of the technology transfer agreement.

The 2017 law

There are some major changes in the required contents of the technology transfer agreement between the 2017 Technology Transfer Law and the 2006 Technology Transfer Law.

Registration of transfer

An independent technology transfer agreement or a technology transfer section in

an investment project, capital contribution in the form of technology, franchise, transfer of IP rights, or purchase and sale of machinery and equipment which are attached to the transferred technology in any one of the following cases (i) technology transfer from abroad into Vietnam, (ii) offshore technology transfer, or (iii) domestic technology transfer using State-owned capital or State budget, except for cases where a certificate of registration on results of scientific and technological tasks has been granted is **subject to technology transfer registration.** This is complicated, however, as it is not compulsory to register under Article 6.1 of Decree No. 133/2008/ND-CP. As the law is still relatively new to enforcement we aren't sure yet how this contradiction will be played out by the authorities. For surety, we recommend registering the transfer if there is any question as to whether it falls under the above categories.

Language of transfer contracts

The contractual parties in a technology transfer agreement can freely agree to the language used in the agreement according to Article 22 of the 2017 Technology Transfer Law, specifically, it is not required to have a technology transfer agreement in Vietnamese in addition to other language versions as previously prescribed under the 2006 Technology Transfer Law. This does not obviate the need to translate the agreement into Vietnamese, however, as the application dossier for registration of technology transfer requires a certified Vietnamese translation of the technology transfer agreement where there is no written agreement in Vietnamese.

Identifying the relevant authority for registration

The relevant authority over the registration of a specific technology transfer is determined by the case of independent technology transfer and other forms under the laws or the case of technology transfer through an investment project, i.e.:

- For technology transfers attached to an investment project that must be authorized by the National Assembly, the Prime minister, or a central ministry or agency, the Ministry of Science and Technology will grant the certificate of registration on technology transfer, and the Department of Science and Technology at the province level will grant the certificate of registration on technology transfers for investment projects within the other cases.

- For technology transfer independent of investment projects and other forms under the law, the Department of Science and Technology at the province level will handle the domestic technology transfer which uses State-owned capital or State budget and those transfers that are registered voluntarily. Other cases will be handled by the Ministry of Science and Technology.

Although the Ministry of Science and Technology allows application for registration of technology transfer in person, by post, or via online portal at the Public Service Portal it remains quite inconvenient for local traders to carry out registration procedures at the Ministry of Science and Technology.

Effective date of transfer contracts

The effective date of a technology transfer agreement where the technology transfer is subject to registration is set from the issuance date of a certificate of registration on technology transfer, not the effective date as may agreed by the contractual parties or the signing date of a technology transfer agreement. Similarly, the effective date in case of extension, modification, or

supplementation is valid from the issuance date of the certificate of registration on extension, modification, or supplementation of the contents of a technology transfer. This provision seems to violate the principle of freedom of contract between the parties. It is an irrational interference of the State agencies into commercial transactions of traders which may cause risks for the contractual parties in relation to the conclusion and performance of such an agreement.

Miscellaneous

In comparison to the 2006 Technology Transfer Law, the 2017 Technology Transfer Law has (i) clearer provisions, (ii) mechanisms to manage and limit the transfer price in performance of a technology transfer agreement by asking the technology transfer price to be audited and implemented in accordance with the laws of taxation and price for:

1. technology transfer between the parties with which one or more parties have State-owned capital,
2. technology transfer between the parent company and its subsidiary,
3. technology transfer between the related parties in accordance with laws of taxation, and

(iii) more specific provisions on the technologies encouraged, limited, and prohibited for transfer to promote the transfer of advanced and high-tech technologies from abroad into Vietnam and prevent or eliminate the transfer of obsolete technologies or technologies that adversely affect socio-economic, national defense, security, environment, and human health.

Conclusion

For many instances of technology transfer in Vietnam, then, the issue of registration is vital. The government, apparently, wants to monitor the movement of ideas and technologies within its territory–thus the registration requirements–despite the fact that registration adds an extra step in the investment process. A point worth noting for anyone seeking to conduct investment activities in the country.

This registration requirement is especially tricky for acquiring parties as technology transfer may not necessarily come up under the IP due diligence. To ensure proper closing of any M&A deal, it is necessary to ensure that any technology transfer requirements are satisfied. Thus, registration should be added to deal to-do lists.

Luckily, for Vietnamese inventors, scientists, and developers the domestic transfer of technology between Vietnamese citizens and Vietnamese companies does not require registration. Only cross-border transfers and those involving State assets must be registered. Why the government feels it has to monitor such transactions evades me, but they do, and thus investors and businesses moving technology and know-how in Vietnam must be wary of the registration requirement.

[This article was written with contribution from Ly Nghia Dzung.]

Freedom of Contract in Vietnam

(14 September 2020)

According to Wikipedia, freedom of contract is the process in which individuals and groups form contracts without government regulations. This is opposed to contract matters that are regulated by government such as minimum wage regulations, discrimination prohibitions, and–in Vietnam–restrictions regarding land transfer. In most legal systems there is a degree of freedom of contract that allows parties to a civil transaction–or ultimately a contract–to decide the terms and conditions of that contract free of government interference.

Vietnam's constitution sets out this principle in Article 14:

"Citizens' rights shall only be restricted when prescribed by law in imperative circumstances for the reasons of national defense, national security, social order and security, social morality and community well-being".

Otherwise, though unstated, citizens are free to exercise their rights–including the right to enter into civil transactions–in any way they wish. Thus, so long as the term of a contract does not violate the restrictions proscribed by the constitution through subsequently published laws and legislation the term will be allowed.

This concept is further explained in the introductory articles of the Civil Code–the law which governs all civil transactions in Vietnam.

Each commitment or agreement that does not violate regulations of law and is not contrary to social ethics shall be bound by contracting parties and must be respected by other entities.

Here, though, the restriction of law is added explicitly, thus, civil transactions (including contracts) are restricted only by the law and social ethics–a term that can be considered to include the elements listed in the constitution. Outside the bounds of the law and social ethics, then, citizens are allowed to exercise their freedom of contract to affect their civil rights however they choose.

The ultimate expression of this freedom is in the same article of the Civil Code:

"Each person establishes, exercises/fulfills and terminates his/her civil rights and obligations on the basis of freely and voluntarily entering into commitments and/or agreements".

And this brings us to the formulation of principle that I have heard multiple times throughout my career as a lawyer in SE Asia. Unless the law says otherwise, the people may do whatever they like.

Why Is Freedom of Contract Important in Vietnam?

Freedom of contract is vital to parties seeking to enter into civil transactions (contracts) in Vietnam. Whether that party is a natural or legal person, a citizen or a foreign person. Freedom of contract allows a party to a contract to decide, unless the law otherwise requires, what they want to include in the contract and how they expect and perform their obligations in that contract. More importantly, freedom of

contract prevents the courts and government agencies from interfering in the performance of a contract unless they have been given explicit power to do so in a properly approved and promulgated legal regulation.

The law of Vietnam contains many restrictions. That's why you need a lawyer familiar with local law to help prepare contracts governed by Vietnamese law. Otherwise, a contract may include conditions that are not allowed by law or are in violation of stated restrictions. In such cases, the freedom of contract does not apply–as the specific issue was legislated–and the courts have every right to interfere. To avoid the interference of the courts and to increase the likelihood of a positive and complete conclusion to a civil transaction, it is important to know what contractual matters are regulated and what matters fall under the freedom of contract.

For example, in drafting the constitutional documents of an enterprise the law requires certain aspects of the governance of such company be set forth. It is necessary for the charter of the company to include those aspects at a minimum in order to meet the requirements of law. However, beyond those regulated elements, the founders of a company may act within their freedom of contract to include additional elements in that charter.

Drilling down, many components of a company charter are required, but each individual element is allowed to be developed according to the freedom of contract of the parties. Only the inclusion of that component is required. Take, for instance, the idea of classes of shares in a joint stock company. The law requires that the charter of a company detail the types of classes of shares to be issued by the company and then sets out four classes of shares defined by law. The company, however, is not required to include all four classes and may define additional classes if they so choose. It is only required that they list their final decision in the confines of the charter which will be submitted to the regulatory authorities prior to issuance of the enterprise registration certificate.

Freedom of contract, then, allows the parties to a civil transaction great latitude when negotiating the terms and conditions of their transaction. Without this freedom, a contract would essentially be determined by the government through legislation and the parties would lose their ability to self-determine their contractual behaviors.

Freedom Of Contract and Third Parties in Vietnam

I have already mentioned the courts and freedom of contract, but what about third parties?

To quote the Civil Code again:

"Each commitment or agreement that does not violate regulations of law and is not contrary to social ethics shall be bound by contracting parties and ***must be respected by other entities****".*

Note the bolded and italicized phrase "must be respected by other entities." This is the key. For not only is the government bound by the freedom of contract between entities with civil rights, but other entities are legally bound to abide by such freedom.

This means I can enter into a contract with Acme Vietnam, a builder of widgets, for the delivery of three containers of their product. Because the contract does not involve land, or other restricted matters, the parties use their freedom of contract to decide that the contract will be governed not by Vietnamese law but by the relatively recently (2015) adopted UN Convention on Contracts for the International Sale of Goods, or CISG. CISG is

an internationally recognized contract law that governs the sale and purchase of goods across country borders. What's important, here, is that in any relationship based on our contract, the parties must use CISG, not Vietnamese law. Thus, when a dispute arises and the case is brought to arbitration per the dispute resolution clauses, the arbitration tribunal will apply CISG, not Vietnamese law because the parties chose CISG to govern the contract and the application of CISG was not prohibited by Vietnamese law.

Third parties, the courts and the government, and the contracting parties themselves are all bound by the decisions of the contracting parties as made under their freedom of contract. This broad ranging authority to decide for themselves what should be included in their own contract gives to parties the ability to dictate their own, and as agreed upon, their counterparty's behaviors. Power, therefore, lies in the hands of the contractor, not in the government.

Choice of Law Rules for Contracts in Vietnam

(28 September 2020)

When I first started practicing in Vietnam over ten years ago, it was assumed that the law governing the contract would–if at all possible–be foreign law. Vietnamese law was little developed, then, and foreign law was deemed more likely to contemplate potential issues arising. This, of course, neglected issues of dispute resolution and enforcement which would have to happen through the courts of Vietnam, courts that were–and still are–woefully incapable of applying foreign law.

Today, Vietnam is no longer considered a frontier market and has a legal system that is fairly well developed, enough so as to be able to deal with most commercial issues. That said, however, many foreign investors remain insistent on applying foreign law to contracts in Vietnam if at all possible. And in some instances, like contracts for the international sale of goods which I [once] discussed an alternative law is automatically applied to govern a contract.

And though it is important to understand that choice of foreign law may create a clearer framework for enforcement in theory, as I mentioned, if a party to the contract is resident in Vietnam, at some point the Vietnamese courts will have to get involved. And they are notoriously good at ignoring foreign law. In general, therefore, unless there is a specific reason to apply a foreign law besides the fact that the foreign party is more "comfortable" with it, I would suggest the application of Vietnamese law.

That said, the rest of this article will examine the choice of law rules for contracts in Vietnam and set out the limits of the parties autonomy in selecting the choice of law for contracts in Vietnam.

Party Autonomy

The first choice of law rule for contracts in Vietnam is that the parties to a contract are free to choose the law that governs the contract except for in certain enumerated cases. So long as the contract includes an article which states, unequivocally, that the parties to the contract select a certain law, and so long as that law is not prohibited by those enumerated exceptions, then the courts in Vietnam or elsewhere (depending on the forum for dispute resolution) should theoretically apply that choice. Again, I caution the use of Vietnamese law unless there is a specific reason to do otherwise as there have been instances of the first instance courts in Vietnam ignoring choice of law provisions and applying Vietnamese law. While this may be remedied at the appellate level, you don't want to take the risk.

Enumerated Exceptions

The first exception to the broad autonomy granted to the parties involves immovable property, but only in three aspects. One, if the contract is related to the transfer of ownership rights or other property related rights. Two, if the contract is related to the lease of immovable property. And three, if the contract is for the use of immovable property as a guarantee in a separate matter. While allowing that a contract in Vietnam may relate to immovable property

in another country, the law simply states that the law where such immovable property is located will apply to such transactions.

The second exception relates to labor contracts. For contracts dealing with labor that "*affects adversely the minimum interests of employees*" under the laws of Vietnam, Vietnamese law will apply. What "*minimum interests*" or "*affects adversely*" actually mean is unclear as undefined, but given the plain meaning of the words, and according to some experts, foreign law may be applied so long as the contract is at least as advantageous to the employee as if it were written under Vietnamese law. Therefore, a foreign law that adds protections and benefits for the employees above and beyond what Vietnamese law provides would theoretically be allowed to govern a labor contract in Vietnam.

The third exception relates to consumer contracts. Again, we see the "*affects adversely the minimum interests*" qualification. Thus, in contracts with consumers in Vietnam, if the foreign law provides greater benefit than Vietnamese law, it will be allowed to apply. Otherwise, Vietnamese law will be required in application.

Changing the Choice of Law

If, after the initial choice of law is made in the contract, the parties can change their minds and wish to designate a different choice of law, they may so long as such a change does not adversely affect the rights of third parties. If the change does so, they may still move forward in making such a change so long as they obtain the permission of the adversely affected third parties.

This is a difficult provision to consider as identifying relevant third parties at any given time may be difficult and there is no guidance or limitation on how far reaching the adverse effect is considered. Again, another reason to take the time and consider carefully the applicable law before signing the contract so as to avoid the potentially significant burdens of identifying and contracting third parties.

When the Contract is Silent on Choice of Law

So far, the rules discussed have assumed that the parties made a choice and made that choice plain on the face of their contract. But, and unfortunately, many times parties fail to make such a choice and leave the choice of law to the forum for dispute resolution. It is worth looking at those rules briefly as a warning. If you don't decide and state your choice of law in your contract, this is how the courts in Vietnam will go about decided that, ultimately, Vietnamese law applies.

While these rules are written in such a way as to allow for the possibility of another country's law applying, one can assume that they will be used by Vietnamese courts to apply Vietnamese law to a contract under dispute and thus I am going to operate with that assumption moving forward.

- The law of Vietnam will apply for sales contracts where the seller, a natural person, resides in Vietnam or where the seller, an enterprise, is established in Vietnam.
- The law of Vietnam will apply for service contracts where the provider, a natural person, resides in Vietnam or where the provider, an enterprise, is established in Vietnam.
- The law of Vietnam will apply for contracts transferring use rights or intellectual property rights where the transferee resides or is established in Vietnam.
- The law of Vietnam will apply to labor contracts if the employee "*frequently*

performs work" in Vietnam. If the employee performs work in multiple countries or if the country of performance is unidentifiable, then the law of Vietnam will apply if the employer resides or is established in Vietnam.

- The law of Vietnam will apply to consumer contracts if the consumer resides in Vietnam.

Remember, these rules only apply in the instance where the contract is silent on the matter of choice of law. Remember, too, that other areas of law provide for different provisions. In the instance of cross-border sales contracts, where Vietnamese law applies the Vietnamese law will apply the Vienna Convention on Contracts for the International Sale of Goods. Maritime laws have their own rules, as do Vietnamese arbitration centers. But in all cases, the way forward is to make a choice and clearly state it in the contract.

Conclusion

While the choice of law rules for contracts in Vietnam are fairly straightforward, they lead inexorably to Vietnamese law. Whether the law, or even the contract, provides for the application of foreign law, the courts–at least at first instance–tend to apply Vietnamese law regardless. Thus, unless you have a specific reason for choosing a foreign law over Vietnamese law, and your contract is related to Vietnam, then choose Vietnamese law. It's simply simpler.

Contractual Remedies for Breach in Vietnam Contracts

(4 April 2022)

One of the major issues we face as lawyers in Vietnam is protecting our clients in drafted contracts. There are numerous elements that go into such drafting, but one major element is the inclusion of penalties for breaches of the contract. While Vietnam does not recognize liquidated damages, there are a number of other penalties that can be included in a contract to ensure that the parties perform in accordance with their commitments. This blog post looks at six statutorily provided remedies available to drafters in planning contract agreements.

Six Regulatory Remedies

According to the Commercial Law 2005, there are six regulatory remedies that an aggrieved party may impose to protect their legal rights and interests in case of a breach of contract by a defaulting party, including:

Specific performance (a right to force the party in breach to perform the relevant obligation)

- The aggrieved party can request the defaulting party to (i) properly implement obligations as stated in the contract; or (ii) take other measures to cause such obligations to be performed. Any costs arising due to utilization of other measures shall be borne by the defaulting party.
- A right of claim for specific performance is a statutory right that does not require the parties to make a prior agreement under the contract.

Penalty for breach

- The aggrieved party can require the defaulting party to pay a penalty for a specific breach of contract provided that such agreement is regulated under the contract.
- The parties are allowed to agree on the level of penalty for a particular breach of contractual obligation or the total amount of penalty for multiple breaches, provided that it does not exceed eight percent (8%) of the value of the breached obligation.
- Legal grounds for claims relying on the remedy of penalty for breach include (i) occurrence of an act in breach of the contract; and (ii) existence of a penalty agreement in the contract for such breach of the contract.

Compensation for damages (a right to compensation)

- Compensation for damages is a remedy where the defaulting party is responsible for making compensation for actual damages/losses directly arising from its breach of a contractual obligation to the aggrieved party.
- The value of compensation includes the value of (i) the direct and actual damages/losses borne by the aggrieved party due to the breach of contractual obligation of the defaulting party, and (ii) the profits which the aggrieved party would have earned in

the absence of such breach.

- Legal grounds for the claim based on the remedy of compensation for damages includes (i) occurrence of an act in breach of the contract; (ii) occurrence of actual loss; or (iii) the act in breach of the contract is the direct cause of the loss.
- A right of claim for compensation for damages is a statutory right that does not require the parties to make a prior agreement under the contract.

Temporary cessation of performance of contract

- Temporary cessation of performance of a contract is a remedy whereby a party has the right to pause the implementation of its contractual obligation upon (i) occurrence of a breach of contract by the defaulting party which is agreed in the contract as a ground for cessation of performing the contract; or (ii) occurrence of a fundamental breach of contract.
- Save for fundamental breaches, an agreement on breaches deemed to be a condition for applying the remedy of temporary cessation of performance must be contained in the contract prior to exercising this remedy.
- The validity of the contract remains unchanged when the aggrieved party applies the remedy of temporary cessation of performance of contract.

Termination of performance of contract (a right to end the contract)

- Termination of performance of contract is a remedy whereby a party has the right to stop the implementation of its contractual obligation upon (i) occurrence of a breach of contract by the defaulting party which is agreed in the contract as grounds for termination; or (ii) a fundamental breach of contract.
- Similar to the condition applicable to temporary cessation of performance of contract, the requirement of having an agreement on breach as grounds for termination of performance in the contract is only applied to non-fundamental breaches.
- The validity of the contract is terminated upon a notification of termination by the innocent party.

Rescission of contract

- Recission of a contract is a remedy whereby a party has the right to (i) rescind a part of the contract (annulment of the performance of a part of the contractual obligation / numerous contractual obligations), or (ii) rescind the entire contract (annulment of the performance of all contractual obligations).
- The requirement for using the remedy of rescission is equivalent to the two previously mentioned remedies, particularly, in terms of non-fundamental breaches, there must be an agreement on specific breaches deemed to be a condition for rescission of the contract.
- The validity of the contract is considered as non-effective as from the time that the contract is entered into by the parties. It is further noted that the remaining part of the contract still remains valid for the scenario of recission of part of the contract.

Other remedies as agreed by involved parties

In addition to the aforementioned regulatory remedies, the laws also recognize other agreed remedies of the parties provided that such agreed remedies are not contrary to (i) the fundamental principles of the local law; (ii) international treaties of which Vietnam is a member; or (iii) international commercial

practice. However, it is extremely rare that the competent courts acknowledge agreed remedies between the parties.

Conclusion

These remedies are available in the contracting phase and should be included in the language of an agreement if the parties so desire. It is important to provide for penalties for breach as, in Vietnam, the damages that may be imposed on a breaching party are limited and do not include a wide range of damages that may be available in other countries. As such, the parties should do everything within their power to dissuade breach of performance.

This article is an excerpt from a larger piece prepared by Indochine Counsel lawyers for the Asian Business Law Institute based in Singapore.

CHAPTER 4

Corporate and Commercial

INDOCHINE COUNSEL
Business Law Practitioners

New Penal Code and Corporate Criminal Liabilities

(3 May 2018)

The National Assembly of Vietnam passed Penal Code No. 100/2015/QH13 (the "**New Penal Code**") on 27 November 2015. However, due to technicalities and modifications by the issuance of Law No. 12/2017/QH14 on amendments to the Penal Code on 20 June 2017, the New Penal Code came into effect on 1 January 2018. Among the other changes, the New Penal Code introduced new provisions on crimes of commercial legal entities. This is a new concept of corporate criminal liability besides individual criminal liability. The New Penal Code repeals the current Penal Code, which was issued in 1999 and amended in 2009.

Identification of commercial legal entities

The New Penal Code does not provide a definition of a commercial legal entity. It is however defined under the current 2015 Civil Code as follows:

- Commercial legal entities are legal entities whose main purpose is to seek profits that shall be distributed to its members.
- Commercial legal entities include enterprises and other business entities.
- The establishment, operation and termination of commercial legal entities shall comply with the regulations of the Civil Code, Enterprises Law and other relevant laws.

Noncommercial legal entities, such as state agencies, army units, political organizations, socio-political organizations, political-socio-professional organizations, social organizations, socio-professional organizations, social funds and other non-commercial organizations, are excluded from criminal liability.

Types of criminal offenses

There are seven main offenses for which a commercial legal entity may be criminally liable:

- Counterfeiting and related crimes: (i) smuggling (Article 188); (ii) illegal tracking of goods or money across the border (Article 189); (iii) manufacture or trading of banned commodities (Article 190); (iv) storage or transport of banned commodities (Article 191); (v) manufacture or trading of counterfeit goods (Article 192); (vi) manufacture or trading of counterfeit foods, foodstuff or food additives (Article 193); (vii) manufacture or trading of counterfeit medicines for treatment or prevention of diseases (Article 194); (viii) manufacture or trading of counterfeit animal feeds, fertilizers, veterinary medicine, pesticides, plant varieties, animal breeds (Article 195); (ix) hoarding (Article 196); (x) tax evasion (Article 200); and (xi) illegal printing, distribution and trading of invoices and receipts (Article 203);

- Intellectual properties crimes: (i) infringement of copyrights and relevant rights (Article 225); and (ii) infringement of industrial property rights (Article 226);
- Competition crimes: violations against regulations on competition (Article 217);
- Insurance crimes: (i) fraudulence in insurance business (Article 213); and (ii) evasion of social insurance, health insurance, and unemployed insurance payment for employees (Article 216);
- Securities crimes: (i) deliberate publishing of false information or concealment of information in securities activities (Article 209); (ii) use of internal information to deal in securities (Article 210); and (iii) crimes cornering the stock market (Article 211);
- Environmental crimes: (i) violations against regulations on survey, exploration and extraction of natural resources (Article 227); (ii) violations against regulations on forest extraction and protection (Article 232); (iii) violations against regulations on management and protection of wild animals (Article 234); (iv) causing environmental pollution (Article 235); (v) violations against regulations on environmental emergency prevention, response and relief (Article 237); (vi) violations against regulations on protection of irrigation works, embankments and works for protection against natural disasters; violations against regulations on the protection of river banks (Article 238); (vii) importation of wastes into Vietnams territory (Article 239); (viii) destruction of aquatic resources (Article 242); (ix) forest destruction (Article 243); (x) violations against regulations on management and protection of endangered, rare animals (Article 244); (xi) violations against regulations on management of wildlife sanctuaries (Article 245); and (xii) importation and spread of invasive alien species
- Other crimes: terrorism financing (Article 300); and money laundering (Article 324).

Applicable sanctions and other remedies

If a commercial legal entity is found committing any of the above criminal offenses, the courts may apply the following penalties:

- Restraining measures: suspension of operation for a period ranging from six months to three years of the corporate legal entity's activities (Article 78); permanent shutdown or termination of the corporate legal entity's activities (Article 79); prohibition of operation in certain fields for a period ranging from one to three years from the effective date of the judgment (Article 80); prohibition on capital raising in certain fields for a period ranging from one to three years from the effective date of the judgment

- Pecuniary fines: A fine is imposed as a primary punishment or additional punishment against corporate legal entities committing crimes provided that the fine must not fall under VND 50 million

- Judicial measures: The courts may decide to take judicial measures against a corporate legal entity committing criminal offenses in order to remedy damages or to increase the punishment imposed against the offenders, such as confiscation of property and money directly related to the crime committed; return of property, repair or compensation for damages, or compensation in the form of public apology; compulsory dismantlement of works or parts of works constructed without a permit or at variance with the permit; compulsory

relief of environmental pollution or spread of diseases; removal of infringing products and goods being circulated on the market; etc.

The courts may apply other interim measures including cease and desist orders and bans and confiscatory measures under the 2015 Criminal Proceedings Code.

New Law Supports Start-up Firms and SMEs in Vietnam

(3 May 2018)

On 12 June 2017 the National Assembly of Vietnam issued Law No. 04/2017/QH14 on supporting small and medium-sized enterprises (the "**SME Support Law**") which took effect on 1 January 2018.

Criteria for identification of a small and medium-sized enterprise (the "SME")

According to the SME Support Law, the SME includes micro-enterprises, small enterprises and medium-sized enterprises with an annual average number of employees participating in social insurance not exceeding two hundred (200), and which satisfy one of the following criteria:

- Total capital is not greater than VND100 billion; or
- Total turnover of the immediately preceding year does not exceed VND300 billion.

General supports for SMEs

In each period, the Government will decide the policies on supporting financial institutions to increase the outstanding loan balance to the SME. In addition, the SME shall be granted credit guarantee from the Credit Guarantee Fund which is a non-budget State financial fund and is established by provincial People's Committees. This guarantee for the SME shall be based on the security assets or the feasible business plan or credit ratings of the SME.

Furthermore, the SME shall be granted a preferential tax rate for a definite duration which is lower than the normal tax rate applicable to enterprises. With respect to legal assistance, the ministries shall establish the network supplying the SME consultancy services and the fee shall be exempted or reduced for the SME.

Beside the general support discussed above, the SME Support Law also provides for other supports to the SME on accounting regimes; ground spaces for production; technology, incubators, technical facilities and co-working spaces; information access; etc.

Support for the SMEs in conversion from business households

The SME which converts from a business household shall be supported for free consultancy and direction for establishment of enterprises. The SME shall further be exempted from enterprise registration fees and other fees. For the purpose of receiving such support, the SME converted from business household must satisfy the following conditions:

- The business household is legally registered and operated before the conversion; and
- The household business has been operating continuously for at least one

(01) year by the day on which the first Enterprise Registration Certificate (ERC) is issued.

Support for the Start-up SMEs

The Start-up SME which has operated for less than five (05) years as from the date of issuance of its first ERC, and has not made any public offer in the case of joint stock companies shall be supported by the Government in terms of technology (i.e. technology application and transfer, use of equipment at a technical facility; co-working space participation support; etc.), training (i.e. in-depth practical training on product construction and development; investment attraction; etc.) and other supports.

The SME Support Law provides the legal framework for investment in Start-up SMEs. The investor in a Start-up SME includes Venture Capital Funds and domestic and foreign organizations and individuals. Such investors shall be exempt from corporate income tax for a limited period of time. However, the investment in a Start-up SME is limited to not more than fifty per cent (50%) of charter capital.

Supporting the SMEs in participating in industry clusters and value chains

Under the SME Support Law, the contents of support for the SME in industry clusters and value chains shall comprise in-depth training in production technology and techniques; information on the need for connection, production and business of the SME; support for brand development and for expansion; etc. The SME shall be entitled to support on satisfaction of either the following conditions:

- Creating products with competitive advantages in terms of quality and prime cost; and
- Creative innovation in technological processes, materials, components, machinery and equipment.

As SMEs have long been a factor in regions with good records of investment, we are hopeful that these new supports from SMEs will offer the chance to open Vietnam to Fund and Company investment. While there is a long way to go before Vietnam can challenge Silicon Valley, this is an early step in the right direction.

New Decree on Casino Business

(3 May 2018)

On 16 January 2017, the Government issued Decree No. 03/2017/ND-CP on casino business operations ("**Decree 03**"). Below are the salient points of Decree 03:

1. Permission for Vietnamese citizens to game at casinos in Vietnam

As a 3–year pilot scheme, Decree 03 allows Vietnamese citizens residing in Vietnam who: (i) are 21 or older, (ii) have a regular income of at least VND10 million per month, and (iii) who receive no objections in writing from siblings, spouses and/or biological and adopted parents– to access and game at Vietnam-based casinos.

In order to access and game in a casino in Vietnam, Vietnamese players must buy an entrance ticket at a cost of VND1 million per 24 consecutive hours, or VND25 million per month. The proceeds from these tickets will be contributed to the local state budget.

Any company desiring to operate a casino ("**Casino**") must issue an electronic card to every Vietnamese player to track their identities and any activities they undertake. Specifically, the card must record information about: (i) the player's code number, (ii) full name, (iii) ID/ Passport number, (iv) identification photo; (v) times of entry/exit from the casino, and (vii) the amount of money used for playing and the amount of prize money for each occasion of playing at the business location of the Casino.

2. Conditions and licenses for casino business activities

According to Decree 03, a casino is a conditional business, and can only be conducted as an ancillary business in association with the main business (e.g. regarding tourism, a hotel, a resort or a complex entertainment activity) ("**Project**"). The Casino, if invested by foreign investors, must apply for the following main licenses: (i) investment in-principle approval of the Prime Minister for the Project ("**Prime Minister's Approval**"); (ii) Investment Registration Certificate for the Project ("**IRC**") (in case the Project is invested by local investor, this IRC shall not be required), and (iii) a certificate of satisfaction of conditions applicable to casino business activities ("**SC**") in order to legally operate the casino business.

Under the Law on Investment, the IRC is issued by the provincial People's Committee based on the Prime Minister's Approval. In terms of minimum capital requirements, the Project must have a total capital investment of at least USD2 billion.

The SC is granted by the Ministry of Finance after the Casino, in addition to satisfying other technical requirements, has contributed at least 50 per cent of the total registered investment capital of the Project. The SC's term of validity shall be subject to the term of the Project, however, must not exceed a period of 20 years from the effective date of the IRC or the Prime Minister's Approval. With respect to an existing and operating casino project, the Casino may apply for an SC with a maximum term equivalent to the remaining term of its existing IRC.

A Casino that has obtained an IRC and has operated a casino before the effective date of Decree 03 is not required to obtain an SC and can continue to operate based on its existing license. In such cases, the number of permitted electronic gaming slots and gaming tables of the Casino, as well as the location of the casino and its operations, must be in compliance with its issued IRC. If a Casino that has undertaking casino activities would like to increase its number of gaming slots and gaming tables, then such Casino may apply for an SC provided that the requested number of slots and tables does not exceed the total amount which has been approved under the issued IRC. For a Casino that has obtained an IRC but has not undertaken any casino activities, obtaining an SC is mandated.

Where a casino undertakes any foreign currency activities (e.g. exchanges or payments), the Casino must obtain a relevant license from the State Bank of Vietnam.

3. Number of electronic gaming slots and gaming tables

The quota on electronic gaming slots and gaming tables for any Project is to be decided by the Prime Minister on the basis of the total investment capital registered by the Casino. As such, the Casino may have 10 electronic gaming slots and 1 gaming table for every USD10 million of contributed investment capital. This provision is applied to both a newly invested Project and an expanded Project.

According to Decree 03, the number of slots and tables a Casino may have at a specific point in time is subject to the amount of contributed investment capital. Thus, the more capital it has paid, the more electronic gaming slots and gaming tables the Casino may be allowed to put into operation. In addition, any increase in the number of permitted gaming slots and gaming tables for operation would require an amendment to the SC, which can only be made if the total investment capital contributed at the time of applying for the amendment is at least USD100 million greater than the investment capital contributed at the last issuance of the SC.

Decree 03 took effect on 15 March 2017.

New Regulations on Liquor Trading

(3 May 2018)

On 14 September 2017, the Government promulgated Decree No. 105/2017/ND-CP on liquor trading ("**Decree 105**") which will take effect as of 1 November 2017 and supersede Decree No. 94/2012/ND-CP dated 12 November 2012 on liquor production and liquor trading ("**Decree 94**").

Decree 105 provides for the production, import, distribution, wholesale and retail of liquor; and on-the-spot sales of liquor for consumption. Also, it is stated that the governing scope of Decree 105 is exclusive of: (i) export, temporary import for re-export, temporary export for re-import, and transit of liquor; (ii) import of liquor for trading at duty-free shops; (iii) import of liquor from overseas into non-tariff zones, and the purchase and sale of liquor as between non-tariff zones; liquor trading at non-tariff zones, and delivery of liquor into bonded warehouses; (iv) imported liquor in luggage or in assets in transit, as a gift, or as samples within the limits for which the law exempts taxation or stipulates that liquor is non-taxable.

Liquor, as defined under Decree 105, is a beverage containing ethanol which is produced from the fermentation process (distilled or non-distilled) from starch of various types of cereals and from sweet wort from plants and fruits or which is prepared from ethanol, which does not include any type of beer, or fermented fruit juice with alcohol content below 5% by volume. This definition of liquor under Decree 105 is clearer and states that trading liquor is one of the industries and trades in which business investment is conditional. In particular, entities or individuals engaging in industrial production of liquor, entities engaged in small-scale production of liquor for commercial purposes, liquor distributors, liquor wholesalers, liquor retailers and on-the-spot sellers of liquor for consumption must have a license in accordance with the provisions of Decree 105. The small-scale producers selling liquor for further processing to enterprises licensed for industrial liquor production must register with the People's Committee at the commune level.

Decree 105 specifies in detail the conditions for various industries of liquor trading, i.e. (i) conditions for industrial production of liquor; (ii) conditions for small-scale production of liquor for commercial purposes; (iii) conditions for small-scale production of liquor for sale for further processing to enterprises licensed for industrial production; (iv) conditions for liquor distribution; (v) conditions for liquor wholesaling; (vi) conditions for liquor retailing and (vii) conditions for on-the-spot liquor sale for consumption. In comparison with Decree 94, the conditions on location for trading, transportation means and financial capacity have been removed.

For the matter of goods quality and food safety, Decree 105 regulates that the liquor produced under existing technical regulations must have a declaration of conformity with such technical regulations and the declaration must be registered with the competent State authority before circulation of such liquor on the market. In case the liquor is produced without any existing technical regulations must

have a declaration of conformity with food safety regulations and the declaration must be registered with the competent State authority prior to circulation of such liquor on the market until the corresponding technical regulations are issued and take effect.

In addition, Decree 105 specifies the breaches of regulations on liquor trading, including (i) trading liquor without a license or incorrectly in terms of the provisions of the license as stipulated in Decree 105; (ii) using alcoholic foodstuffs which fail to satisfy the regulations, or industrial alcohol or other prohibited raw materials in order to produce or prepare liquor; (iii) leasing out or lending a license for liquor trading; (iv) exhibiting, purchasing, selling, circulating or consuming any type of liquor without a stamp or label as required by law, or liquor which fails to satisfy the standards, quality and food safety or liquor which does not have a clear origin; (v) selling liquor to people under 18 years, selling liquor with an alcohol content of 15% or more via the internet, or selling liquor in vending machines; (vi) conducting liquor advertising or liquor promotions contrary to the laws.

Vehicle Import Business License Required in Vietnam

(3 May 2018)

Being one of the most noticeable legal documents issued by Vietnam's government at the end of 2017, Decree No. 116/2017 ND-CP dated 17 October 2017 regulates the statutory conditions of vehicle manufacture, assembly, import and warranty & maintenance services ("**Decree 116**"). These regulations only apply to companies operating in automobile manufacture, assembly, import, warranty, and maintenance services in Vietnam, and for related authorities, organizations and individuals.

In the whole, Decree 116 provides regulations on responsibilities along with statutory conditions for (i) the manufacture / assembly of vehicles; (ii) importation of vehicles; and (iii) vehicle warranty and maintenance services. This article will focus on key points relating to vehicle import.

Requirement of Import License

Unlike expired Circular No. 20/2011/TT-BCT, dated 12 May 2011, which stipulates additional procedures for imported cars from nine seats or less, Decree 116 requires that, as of 1 January 2018, all types of automobile vehicles being passenger cars, buses, trucks, and specialized use vehicles defined in Vietnamese standards TCVN6211 and TCVN7271 shall only be imported into Vietnam by enterprises which have already been granted a Vehicle Import Business License (the "**Import License**").

Compulsory conditions applicable to vehicle importers comprise the following: (i) operation or rental of a vehicle warranty and maintenance facility or such facility belonging to the importer's authorized dealer system and satisfying the provisions in this Decree; and (ii) having a written certificate or document proving that they are authorized to represent offshore vehicle manufacturers / assemblers to recall vehicles imported into Vietnam.

The Ministry of Industry and Trade is the agency authorized to issue the Import License. Approval should be received within 10 business days after the receipt of a complete and valid application dossier, or no more than 20 business days if it is necessary to conduct a check of the accuracy of the mentioned conditions.

When granted an Import License, the importers must maintain business conditions and assure their fulfillment of liabilities relating to warranty, maintenance, and recall of imported cars in line with Decree 116. Unless such Import License shall be incurred with a suspension of validity or revocation.

Responsibility of importers

For the sake of consumer protection, importers must discharge their responsibility to the vehicles' warranty and maintenance. For imported unused vehicles, the minimum term

of a warranty shall be 3 years or 100,000 km for passenger cars, 2 years or 50,000 km for buses / coaches, and 1 year or 30,000 km for the remaining types of vehicle, whichever comes first. Imported used vehicles must have a warranty term of at least 2 years or 50,000 km for passenger cars, and at least 1 year or 20,000 km for the remaining types of vehicle, depending on whichever comes first.

Notably, technical safety quality and environmental protection are closely managed by competent authorities. Accordingly, besides the set of documents issued by foreign authorities / entities (i.e. copy of Quality certificate; Original ex-factory quality inspection slip; valid Certificate of registration of circulation of the used vehicle; etc.) that are required to be submitted to the quality control agency, importers must conduct a quality inspection on every batch of imported unused vehicles or each imported used vehicle.

The Decree comes into effect immediately, but also provides some grace periods for compliance. Particularly, vehicle importers established prior to the issue date of Decree 116 may continue their operation until 31 December 2017, but are only permitted to import vehicle after obtaining an Import License from 1 January 2018 onwards in line with this Decree.

The validity of Decree 116 looks to cause drastic changes to the vehicle import market in Vietnam beginning from early 2018. Despite the current decrease of imported automobiles into the country, there is hope that these new regulations will benefit consumers to secure product quality as well as better warranty & maintenance services from trustworthy vehicle importers.

Vietnam's Corporate Governance Tested

(11 July 2019)

Bui Quang Huy is in trouble. The former CEO of tech company Nhat Cuong General Technical Services is wanted by police for smuggling and now money laundering. He apparently invested money earned from the smuggling of electronics across the border into a subsidiary company and used that to hide the fact that he was syphoning funds.

The story, here, tells of a corrupt and ambitious gathering of like minds. Eight arrests have been made so far, though the take is in the hundreds of millions of dollars, there seems to be a fervor for his arrest. He's been missing since May.

This is unfortunate. Vietnam's tech industry is booming. From fintech to cell-phone manufacturing to online payments, the place is on fire. There are currently half-a-dozen fintech investments alone in the country, with more on the way. Tech is huge in Vietnam, and its nascent startup sector is growing to. For there to be a major scandal like this in the tech industry is unfortunate in the extreme.

Though it's less a story about tech than it is about corporate governance. The people in place to monitor the general director/CEO position were apparently some of those who have been arrested, including the CFO. That means that the monitoring system required by Vietnamese law, the board and the investigation committee, failed in their job. Or were party to the crimes.

What it means, unfortunately, to use that word again, is that corporate governance is not infallible. While Vietnam has gone a long way in improving its governance structures, and reporting requirements, if the people in the system aren't doing their duty, then there will be problems.

And in Nhat Cuong, they weren't doing their duty. Bui apparently kept dual ledgers to hide the funneling of trillions of dong through the companies he oversaw. That means the reporting oversight of the government, in the form of tax monitors and other financial watchdogs were unable to access the truth about revenue and cashflow. What the instigating incident that alerted authorities is, I don't know, but it raises a question for Vietnamese governance. Is there enough? Is there a way to better monitor the situation? What duties were violated and is there a way to enforce their compliance?

Surely this will lead to issues taken up by the National Assembly and the stock markets.

Don't Trust a BCC

(7 October 2019)

A while ago I was working with another lawyer on an M&A deal. The target company was a Vietnamese entity that operated in a restricted sector. This meant that foreign ownership was limited. Our client was a foreign entity that had a Business Cooperation Contract with the Vietnamese entity that stated that the foreign entity would benefit when the Vietnamese entity was sold. As part of this BCC, the foreign entity had invested heavily in the Vietnamese entity.

Now, come time to sell the Vietnamese entity, the question arises as to whether the BCC is enforceable.

I remember standing outside the conference room where we had just met with the client–the owner of the foreign entity–and discussing the transaction. This foreign lawyer turned to me and essentially said: "If you have any ideas, we need to make sure the BCC is enforced." In other words, she wasn't sure the courts would accept the BCC as something legitimate.

According to Vietnamese law, a BCC should be something that is enforceable and acceptable to the courts; however, the courts have little experience in interpreting and enforcing BCCs. They look at them askance, and wonder whether they should be allowing their use. This is because the BCC operates, in many aspects, as a substitute for a joint venture. At least, that's the stated purpose in the Law on Enterprises.

The idea is that enterprises–particularly infrastructure investors–be able to invest in projects that are capital intensive without having to form an entity in Vietnam. The problem is that they are not necessarily the safest way to invest in the country. The allure, though, is that they offer a cheap alternative to entity formation and allow for cooperation between foreign investors and domestic entities.

This is not enough to risk your money on. If the courts don't understand them, and the laws don't explicate them, which is the case, then there is no reason for foreign investors to trust them. Take the time, and spend the little extra money, to form a joint venture. It's safer, the courts understand it, and the laws governing it are well developed.

Be smart, do it right.

Selling Alcohol in Vietnam

(12 October 2020)

As a resident in Vietnam, I have the occasion to meet with numerous proprietors, owners of restaurants, bars, or clubs that traffic in alcohol. While no one has asked me yet about the relevant laws, I thought it might be worthwhile to review some of the basic regulations governing the sale of alcohol at the retail level.

Who can sell alcohol in Vietnam

There are few restrictions on who can sell alcohol in Vietnam, however, individuals who have yet to register as an enterprise in some form may not sell alcohol. This is practically the only positive restriction for selling alcohol, that the seller be a registered enterprise and that they have registered with the relevant government authorities that one of their business activities is the sale of alcohol. (These activities are divided between the sale of alcohol of 5.5% alcohol/volume or less and the sale of alcohol of more than 5.5% alcohol/volume.) They must also have put in place proper mechanisms for handling cash sales and for preventing the purchase of alcoholic beverages by individuals under 18 years of age. In all other respects, the seller of alcohol must abide by additional regulations of the government that have yet to be promulgated.

Restrictions on selling alcohol in Vietnam

While most enterprises can sell alcohol once properly registered, there are some restrictions on where and to whom they can sell alcohol. First off, alcohol–and beer–cannot be sold to individuals under 18 years old. The addition of beer to this prohibition is recent, but it seems that the government is serious in its intent to prevent underage drinking. In addition to this limitation, the sale of alcohol is limited by location. It may not be sold in the following places:

- Medical facilities;
- Education facilities;
- Place of entertainment or socialization or development of youth under 18 years old;
- Reformatories, prisons, and other locations involved with compulsory education or reform;
- Places society patronized (this seems broad, but the translation is so);
- Workplaces of the government, political, socio-political, social-industrial, etc., organizations.

Otherwise, there are several restrictions on who and how a proprietor can sell alcohol. In addition to not selling alcohol to anyone under 18 years of age, an enterprise selling alcohol cannot use anyone under 18 years of age to sell it nor encourage anyone under 18 years of age to consume it. (It is important to note that the law imposes the duty of determining whether a person is 18 years old on the proprietor. They are responsible for checking identifications if there is any doubt.) They cannot advertise the sale of liquor of more than 15% alcohol/volume. They cannot provide information that is misleading or untruthful regarding the effects of alcohol on health. And they cannot promote alcohol over 15% alcohol/volume in the activities

of the enterprise. (This post won't examine the rules regarding advertising alcohol in detail as they are quite detailed and won't apply to most mom-and-pop restaurants or bars.)

Penalties for violating the rules of selling alcohol in Vietnam

The penalty for failure to obtain the proper registration when first obtaining the enterprise licensing, or for violating the boundaries of the license, ranges from 3 to 20 million VND per violation for normal enterprises but double that for enterprises selling alcohol.

Furthermore, an enterprise in violation of activities stipulated in its license can have their operating license suspended from one to three months. It is important, therefore, if you intend to sell alcohol, that you register that intent in the sectors in which your enterprise will be active.

For enterprises registered to sell alcohol of 5.5% alcohol/volume or less, if they sell a higher percentage they are liable to fines of from 500,000 to 1 million VND per violation. The same fines apply per each violation of the prohibition against the sale of alcohol to minors.

Fines of from three to five million VND apply for individuals who sell alcohol without registering as an enterprise and for enterprises who use laborers under 18 years old to directly sell alcohol to customers.

These seem to be the main penalties that would apply to a simple enterprise involved with retail sales of alcohol. As mentioned above, other restrictions apply to larger sellers and advertisers, but this post won't get into them.

Quorum Requirements in Vietnam

(28 October 2019)

Quorums. I'm currently researching an instance in the Cherokee Nation, a Native-American tribe in the United States, where a question of the quorum requirement for the legislative branch created a constitutional crisis that put the entire Cherokee government into paralysis.

When I was in-house counsel in Lao, we made some major changes without the minority shareholders simply because we could, because the quorum requirement was stated in such a way as to allow for the majority shareholders to satisfy it, and to conduct the business of the company without the participation of those controlling less than 51% of the shares.

Quorum requirements can be a major boon for majority investors, as they obviously control sufficient voting rights to fulfill the default quorum requirements to convene a general meeting of shareholders ("**GMS**") in Vietnam. However, for plurality shareholders who do not hold a simple majority of shares, there are problems posed by the current Enterprise Law.

The law requires that a GMS be convened with a quorum of at least 51% of the voting slips issued present at the time and place of the meeting. Voting slips are issued in the invitations to attend the GMS sent to shareholders based on their shareholding ratio. The slips are counted either through the physical presence of the shareholder, through proxy, electronic attendance, or through the mail.

If the quorum requirement is not met at the appointed time and place pursuant to the invitations sent to shareholders by the Board, then a second attempt may be made to fulfill a reduced quorum requirement of only 33% of the voting slips in attendance. This second attempt must occur within 30 days of the first attempt.

If this second attempt fails, then a third attempt may be made within 20 days of the second attempt. At this third attempt there is no requirement for voting slips in attendance to form a quorum.

Now, a quick analysis. The time limits for each of these attempts may be stipulated in the charter of the company. However, the percentage of voting slips in attendance may only be amended by charter for the first two attempts. There is no allowance for changing the quorum requirement at the third attempt. That means that regardless of how many people show up at the third try, the business of the company may be conducted.

This sudden death approach to quorum requirements in shareholder meetings is dangerous. It is a roundabout, and somewhat cumbersome, means of providing the minority shareholders with the ability to override the decisions of the majority shareholders or, as is often the case, of the foreign investor. At least in sectors that aren't restricted to foreign ownership.

For investors with a 51% control of the enterprise, there should be no problem as they can provide a quorum at the first instance.

However, if there is a plurality of ownership, and no one controls more than 33% of the shares of the company, even if there are other shareholder protections outlined in the shareholders agreement, then a decision on business may be taken by a minority shareholder on the third instance.

This creates additional danger for preference shareholders who do not have a preferential voting right. Especially as there is no separate voting mechanism for different classes of shares in Vietnam.

Perhaps the best way to protect against this is the voting preference share. This allows a plurality shareholder with less than 33% of the shares of the company to obtain more than 33% of the voting slips and thus fulfill quorum requirements by the second attempt at a GMS.

Another solution lies in the charter of the company. The quorum requirement for the second attempt at a GMS is fungible according to the charter. For plurality shareholders who happen to have more shares than anyone else, but who still possess fewer than 33% of the total issued shares, an amendment of the charter at formation can be beneficial. In essence, they can insist that the quorum requirement for the second attempt be lowered to allow for a unilateral fulfillment. This solution requires some foresight on the part of the plurality investor to ensure that the quorum requirement is less than their ownership share but greater than the ownership share of any other single shareholder.

Even then, this solution requires finesse to meet demands of going public or other exit on the part of any of the shareholders as shareholding ratios are apt to change in these scenarios.

Ultimately, the goal is to circumvent or obviate the third attempt at convening a GMS. If the plurality shareholder can either change the quorum requirement or their own percentage of voting slips, then they can fulfill the requirement on either the first or second attempt, and avoid the third attempt where any shareholder can form a quorum and conduct business of the company without the plurality shareholder.

Voting Preference Shares in Vietnam

(4 November 2019)

For those familiar with shareholding companies where venture capital (VC) is better established than in Vietnam, the concept of voting preference shares is familiar.

I remember in law school discussing the differences in classes of shares for startups and shareholding companies, and the idea that classes of shares are treated differently from each other. That much is true here in Vietnam, but there are differences.

In California, where I studied law, classes of shares are allowed to vote for changes to their own rights according to class. That means that the A-round shares can only vote to change the rights and obligations of the A-round shares but not the B or C round shares, and vice versa.

That concept remains different from what exists here in Vietnam. While ordinary shares can be divided into classes other than those listed in the law (voting, dividend, and redemption) the rights and obligations of those classes of shares remain dictated by the law and charter.

There is no contemplation of instilling in each class of shares the sole right to amend the rights and obligations of that class. Only through legislation or amendment of the governing documents of the company can a change to the rights and obligations of shares be changed. And then, only the ordinary share rights and obligations can be changed.

This means that voting preference shares, dividend preference shares, and redemption preference shares–though they may be separate classes–are only allowed certain rights and obligations in addition to ordinary shares, and those rights and obligations are fixed by law. They cannot be changed by a vote of the class of preference shares or even by vote of the majority of shareholders in general.

Preference shares, except those prescribed by the charter–are thus severely restricted by the law of Vietnam, and though one might think that voting preference shares would allow for a greater ability to affect the rights and obligations of themselves, you would be wrong.

Voting preference shares are granted with more rights than ordinary shareholders, but are also restricted. Voting preference shares are treated nearly identically to ordinary shares with a few distinct differences.

First, they are granted more than one vote per share. The actual number of votes each share enjoys is governed by the charter of the company of which the shareholder of voting preference shares is an owner. But once that number is defined, only a change of the charter, which must be done by majority, or super-majority, of the shareholders can change it. Voting preference shareholders cannot change that number on their own.

Second, voting preference share holders cannot alienate their voting preference rights. That means that, while voting preference shares can be sold by the company to certain individuals (we'll get to that in a moment) those individuals

cannot resale those shares to a third party. It is currently unclear whether those voting preference shares can be converted into ordinary shares and then sold, but according to law, the owner of voting preference shares is left with an asset that he can't exit.

Otherwise, voting preference shares' rights and obligations remain the same as ordinary shareholders.

Now to the tricky part: who can own voting preference shares?

The law dictates that voting preference shares can only be owned by two categories of people: founders and organizations that are approved by the government.

For founders, the voting preference share is limited. After three years from the date of issuance of the enterprise registration certificate, those voting preference shares are automatically converted into ordinary shares, leaving the founders with no more rights than any other ordinary shareholder. This is a major drawback as often, founders–especially of a startup–may remain in control of a company and wish to maintain a greater influence on its decisions than is allowed by an ordinary share voting ratio. It also means that the founders of a startup are time limited if they want to exercise additional rights of voting during funding rounds with VCs, or to anticipate second or third round funding, or event exit.

Once the three years from issuance of the ERC passes, however, the founding shareholders lose their voting preferences. They are left with ordinary shares and any preference shares of other classes which they may own. Only the organizations which are authorized by the government remain.

Now, this part is troubling.

First, only organizations can be authorized to own voting preference shares. That means that individual VCs can't own voting preference shares, individual shareholders other than the founders can't own voting preference shares, and non-authorized organizations can't own preference shares.

Second, how does the government authorize organizations to hold voting preference shares?

One could assume that the government is able to approve such situations when they approve, regulatorily, M&A transactions. But this is not the case. Regulators don't look at preference shares. They look at foreign ownership ratios, they look at amendments to the charter that are required under law, and they look at market share. Only in the charter of the company is there a requirement for identification of the preference share classes, and that is limited to the total number of each type of shares and the value of each class of shares. There is no requirement for listing the actual shareholders of each class of preference shares.

There is no other mechanism for the government to authorize voting preference shareholders. This creates a major problem as voting preference shares are, in practice, purchased by many foreign investors without specific authorization of the government. Previously–in the 2005 enterprise law–a list of shareholders was required to change the share ownership. That is no longer the case, and the many voting preference shareholders that are individuals or that are organizations who believe they are holding voting preference shares in full right of the law may be in for a surprise.

The enforcement of this right as against other shareholders and the company is limited. This is a tricky requirement and I only found it in the law recently. It's well disguised, like Army

camouflage in the forest, and hard to spot. That means that most companies and business probably aren't familiar with this requirement. That means that a holder of voting preference shares can enforce his rights through self-help without much protest. But take it to court...

Enforcement in the courts, or even arbitration, will run across this requirement and unless the organization holding voting preference shares is authorized to do so by the government, then– in addition to the fact of their shareholding of voting preference shares–any decisions made as a result of their preference shareholding can be declared void.

This is a big problem that has been looming since before the 2005 Enterprise Law, and, so far, has yet to be addressed in the draft Enterprise Law coming up before the National Assembly in the next session. The People's Supreme Court has yet to address the issue. All that is left is an appeal to the administrative offices of the relevant government organs.

Failing a resolution by law, then one must wonder how to deal with the many instances where individuals, or non-authorized organizations, control voting preference shares.

Perhaps the answer lies in the provision that allows other classes of shares to be defined in the charter of the company. The relevant ministries have yet to issue governing documents concerning the provision of additional classes of shares. As long as that class is provided for in the charter, and that charter is approved during the enterprise registration procedures–or amendments–then the government has approved the class of shares, at least hypothetically.

It's either define your own class or figure out how the courts will interpret the requirement for government authorization.

Amendment 13 November 2019

While, in general, the rules I discussed in the above article apply, I had not taken into account Decree 78/2015/ND-CP issued by the National Assembly less than a year after the Law on Enterprises 2014 was passed. It does not affect the full scope of my argument, however, there is a mechanism for government approval of foreign ownership of preference shares in private joint-stock companies.

According to Article 52, when the foreign holding percentage changes, the company must register with the DPI the new ownership share. This notification must include a listing of the foreign owners, the number of shares they hold, and the type of shares they hold. This means that for foreign owners of private companies, there could be, in a way, a method for government authorization of voting preference share ownership for foreign shareholders.

However, this method for government authorization does not apply to domestic investors, and only applies when the foreign shareholding percentages are changed. This does not demonstrate a completely fool-proof method for approving voting share ownership, particularly as the business registration office only has a three-day turnaround to approve the change in the business registration information and issue a new license.

The argument remains intact, by and large, and I simply include this amendment to address information new to me. I apologize if there was any confusion because of my lack.

Vietnam's "Business Judgment Rule"

(18 November 2019)

In the United States and, with some adaptation, in most common law countries, a member of the board of directors has a three-fold fiduciary duty to shareholders. First, he must show good faith in completing his responsibilities. The duty of good faith is a general presumption that the parties to a contract will deal with each other honestly and fairly. Managers assume this contractual duty towards the company and, thus, towards shareholders. Second, he must show loyalty towards the company in making his decisions. This addresses the relationship of the manager to a transaction with the company. If he is in, or related to, a party entering into a transaction that affects the decisions of the board, or must be approved by the board, then he is violating the duty of loyalty. Finally, he must exercise the duty of due care. This means that a director must exercise good business judgment and use ordinary care and prudence in the operation of the business.

These three duties are considered sacrosanct and, so long as the directors reasonably perform these duties, they protect the directors from attack by shareholders. However, should these duties be violated, should the directors act in such a way that violates the duty of good faith, loyalty, or due care, then they can be held liable for their actions by the shareholders. Even then the courts tend to protect the directors from shareholders and require stringent standards of proof. It is difficult for shareholders to sue members of management in companies in the west. And as this principle, called the Business Judgment Rule, is derived from case-law precedent, it rarely exists in civil law countries.

Vietnam is an exception to this, though, and has developed, since the ideas first introduction in the 2005 Enterprise Law, a more sophisticated and permissive definition of exactly what duties management must violate before they may be held accountable by the shareholders. There are four duties imposed on management by the Law on Enterprises, and a violation of these duties in the exercise of responsibilities outlined by law, the charter of the company, or the general meeting of shareholders (GMS) will open that manager to liability.

The first duty is the duty of strict performance. This duty requires the manager to exercise his delegated powers and perform his obligations "strictly in accordance" with the law, the charter, or the resolutions of the GMS. It could be considered similar to a statutory liability in common law countries where any breach of the rule, no matter its intent, is considered a violation, think of statutory rape. This is a broad power granted to the shareholders and could be abused. So far it hasn't been abused, as there have been very few cases brought before the courts, but it could be interpreted so as to hold management to such a level of obedience that any failure to perform according to set standards would be cause for liability. This grants shareholders an almost dictatorial power over managers and might best be revisited in the upcoming amendments scheduled for next year.

The second duty is the duty of honesty and prudence. In performing a manager's powers or obligations, she must act "honestly and

prudently" to their "best ability" to ensure the "maximum legitimate interests" of the company. This duty is three pronged: 1. Act honestly and prudently, 2. To their best ability, and 3. For the maximum legitimate interest of the company. These three prongs are all very subjective and based on common law legal tests. There is no provision under Vietnamese code to measure whether these standards have been met. And while precedent has been allowed as law, there has yet to be a case examining these standards. They remain ambiguous and ill-defined and more rightly belonging to a system where the courts can easily test the meanings of legislation.

The third duty is the duty of loyalty. This duty is owed to both the company and the shareholders. It requires the manager not to use information, know-how, business opportunities of the company, not to abuse his powers nor to use assets of the company for his own personal benefit or for the benefit of other organizations or individuals. This duty has long been a part of Vietnamese law and is fairly well understood by lawyers in the country. It is a simple test and objectively determinable.

The fourth duty is a branch of the common-law duty of loyalty. It could be referred to as the duty of notice. The manager is required to fully, accurately, and timely, inform the company which he manages of any interest he holds– or a related person to the manager holds–in any enterprise. Again, this duty is also easy to understand and apply. There should be no difficulty for managers in its performance.

This, then, is the Vietnamese Business Judgment Rule. It is wide ranging and ambiguous and offers little guidance, or security, to managers seeking to avoid liability for their actions. Let this be a warning to management of privately held companies, therefore, to beware of their duties lest they fall prey violations of this rule. This is made even more threatening by the simplicity with which shareholders can bring suit against management. The Law on Enterprise 2014 liberalizes this procedure far beyond what is allowed in common-law countries or even continental Europe.

The ease of bringing suit, and the broad liability potentially imposed, need to be limited by Vietnamese legislatures before a slew of cases are filed in the courts. Under the law, managers are treated with very little trust, unlike in the west where they are venerated, but in Vietnam, the preference swings the other way. Beware, therefore, and make sure to take out business insurance.

Who is a Minority Shareholder in Vietnam?

(25 November 2019)

While I have been examining minority shareholder rights in privately held corporations in Vietnam, I have failed to handle a vital piece of business regarding such. I have failed to discuss who, exactly, is a minority shareholder.

According to Merriam-Webster's Dictionary, a minority shareholder is "a shareholder whose proportion of shares is too small to confer any power to exert control or influence over corporate action." A minority shareholder in Vietnam, then, would be one who does not control enough shares to pass a vote in the general meeting of shareholders.

This seems clear, but the waters are muddied by the law on enterprises which sets out certain voting thresholds for different subject matters brought before the GMS. While most decisions of the GMS will pass with a simple majority of 50% plus one, and thus a minority shareholder would be a shareholder owning less than 50% of the shares of the company, the law provides for two different ratios: a supermajority and cumulative voting.

In the United States a supermajority is defined by charter, not law, but in Vietnam there are five specific instances where a supermajority of 65% of the "voting slips of all attending shareholders" is required to pass a resolution.

Before I go into the five instances, I want to address a point which affects both the simple majority and the supermajority votes. Unless a vote is taken by written submission (which requires an absolute ratio to form a majority) the ratios are established according to the number of votes represented at the GMS. And a GMS can be held with less than 100% of the votes represented in attendance.

I won't go into discussions of quorum requirements to hold a legitimate GMS (see "Quorum Requirements in Vietnam"), but suffice it to say that there is potential for very minimal attendance at a GMS and thus a resolution may be passed with only a few shares represented.

While the quorum allowances may create a situation in which a minority shareholder is no longer a minority shareholder for the duration of a single meeting, that does not change the legal definition. The supermajority is still required for specific decisions, and for those specific decisions, a shareholder is a minority if he holds less than 65% of the shares of the company.

Those specific decisions which require a supermajority ratio of shares represented at a GMS include those relating to:

(1) Classes of shares and the total number of shares of each class;
(2) Change of lines of business and business sectors;
(3) Change of the organizational and managerial structure of the company;
(4) Investment projects or sale of assets valued at equal to or more than 35% of the total value of assets recorded in the most recent

financial statement of the company, or a smaller percentage or value as stipulated in the charter of the company; and

(5) Re-organization or dissolution of the company.

In addition to these five decisions, the law allows the founders, or subsequent majority shareholders who can amend the charter, to include other decisions as they deem fit.

The other instance in which the definition of a minority shareholder changes from less than 50% of the shares of the company, is cumulative voting. This is used when electing individuals to the board of management or the inspection committee of the company.

Cumulative voting originated in Europe and England in the last half of the Nineteenth Century where the problem of corporate governance initially developed. It was adopted in the United States a few decades later and has spread throughout countries–primarily common law–throughout the globe. In Vietnam, the concept was adopted at least by 2005 as it exists in that year's version of the law on enterprises. The current iteration of the law is more detailed.

"*Each shareholder shall have as its total number of votes the total number of shares it owns multiplied by the number of members to be elected to the Board of Management or the Inspection Committee, and each shareholder has the right to accumulate all or part of its total votes for one or more candidates*."

The persons receiving the highest number of votes, in descending order, are considered elected until the number of open positions are filled. Cumulative voting is a requirement of law, there is no allowance for a change in voting method provided by the charter.

This voting technique provides shareholders who would be considered in the minority for other decisions to bring to bear greater influence in determining the management of the company. While it does blur the meaning of minority for this specific decision type, it does not affect the overall definition. A shareholder is still a minority shareholder if he cannot "exert control or influence over corporate action," and although cumulative voting enhances his rights, he is still likely to be unable to influence the election of a majority of members of the board or inspection committees.

Who is a minority shareholder, then? A minority shareholder, in most instances, is someone who holds less than 50% of the shares of the company. This definition can change, though, if an investor manages to supplement the charter with additional decisions that require a supermajority. For while most decisions require a simple majority, and the few exceptions don't untowardly shift the balance, if the list requiring a supermajority becomes too long, a minority may become anyone who holds less than 65% of the shares of the company.

How a Company Can Be Held Criminally Liable in Vietnam

(2 December 2019)

Criminal liability accrues to a commercial legal person if the violating act was performed (1) in the name of the legal person, (2) for the benefit of the legal person, (3) under the direction, management or approval of the legal person, and (4) the relevant statute of limitations has not expired. Criminal prosecution of a legal person does not exclude the possibility of individual criminal liability for acts committed.[1]

Unfortunately, the penal code does not define many of these terms, and as they call up imagery from the civil code, we must turn there for an understanding of how a "commercial legal person" can act criminally. This is vital to understand exactly who can act criminally for a commercial legal person and thus understand what safeguards might be implemented to protect a commercial legal person and its owners from liability under the penal code.

The first criteria for criminal liability is that the illegal act must be done "in the name" of the legal person. I will take this in connection with the second criteria, which is that the act must be done "for the benefit" of the legal person. I do this because the civil code defines representation as the act of a person, or representative, "acting in the name and for the benefit of another person," or the principal, to enter into or perform "a civil transaction within the scope of representation."[2]

This means that the first two criteria define representation. Criminal liability of a legal person, therefore, can only be imputed where Representation of a legal person exists. Representation can only exist between a legal person and a Representative through written authorization, decision of a competent authority, a charter or as prescribed by law.[3]

Representatives, then, must have some form of authorization from the legal person before they can enter into or perform civil transactions in the name or for the benefit of the legal person. This would suggest that the legal person can control who may act on its behalf. The charter of a legal person must specify the individual(s) who may act as legal representatives of the legal person.[4] The law on enterprises states that a commercial legal person may have one or more legal representatives but invariably the legal representative is a member of management.[5] This means that management of a legal person can represent the legal person sufficiently to give rise to criminal liability. But what about an employee?

1 Penal Code, Article 75.

2 Civil Code, Article 134.1.

3 Civil Code, Article 135.

4 Civil Code, Article 77.

5 Law on Enterprises, Article 134.2.

An employee is defined as "under the management and control" of their employer,[6] though they are only to comply with the "lawful" orders of the employer.[7] An employer is defined as the entity, or legal person, who hires or employs a worker,[8] and the employer-employee relationship is governed by a written contract.[9] This means that an employee has a direct relationship with the company and may be "authorized" in writing, according to the civil code, to act as Representatives of their employer.

To give rise to criminal liability, the act under investigation must be illegal, and Representatives are bound by the scope of their representation.[10] That scope is limited by legality. If the principal demands an illegal act by the Representative, that act is deemed to be outside the scope of representation. Therefore any illegal act performed by the Representative on behalf of the Principal is outside the scope of the representation and cannot, in general, be imputed to the Principal.

This returns us to the third criteria for criminal liability of legal persons, the requirement that the act be done "under the direction, management, or approval" of the legal person. The first two are dispensed quickly. The word for "direction" used by the penal code is chỉ đạo. This does not appear a single time in the civil code and the only time it appears in the penal code is in the instance cited above. We are then left to look to Merriam Webster, which defines "direction" as "guidance or supervision of action or conduct." This implies that the legal person gave an order for the illegal action.

The term "management" is used throughout the civil code to refer to the management structure of a legal person. While somewhat circular, this suggests that a Representative must be acting under the guidance of management of a legal person and thus "authorized" to act. Because of its relation to the actual management structure, it is easy to consider "management," as used by the penal code, to suggest that the illegal act occurred within the ambit of the management personnel of the legal person.

Finally, approval of the acts of a Representative may be considered obtained under defined circumstances. Namely, if the legal person recognized the transaction, if the legal person knew about it and didn't object, or if it is the legal person's "fault that the other party does not know or is not able to know" that the person with whom they enter a civil transaction is not authorized by the legal person so to do.[11]

All of this means that anyone from management to frontline employees of a legal person can be deemed a Representative of the legal person. And even though criminal liability invariably arises outside the scope of representation, the legal person can still be held liable if it can be shown to have recognized, known about and failed to repute, or through its own fault caused a third party to think it recognized or knew about the illegal transaction.

All of that's great, but who is ultimately responsible for the legal person? In the end, who has to be shown to have acknowledged, somehow, the act giving rise to criminal

6 2012 Labor Law, Article 3.

7 2012 Labor Law, Article 3.

8 2012 Labor Law, Article 3.

9 2012 Labor Law, Article 15.

10 2012 Labor Law, Article 15.

11 Civil Code, Article 142.

liability? Here, too, we must look to the civil code. Legal persons are represented by Legal Representatives who are authorized according to the charter of the legal person.[12] Thus, the Legal Representative of the legal person is the final arbiter of what the legal person recognized, knew, or caused to be expected. If it can be shown that the Legal Representative did any of these three things, regardless of any additional culpability by positive, criminal acts on the part of the Legal Representative, then the legal person is considered criminally liable. It should be made clear, at this point, that Legal Representatives are generally not held criminally liable for the acts of the legal person unless they themselves can be imputed in those illegal acts.

While doing nothing may seem like the ideal solution for the Legal Representative of a legal person, there are consequences, particularly if the legal person in question is a corporation. Legal Representatives are legally obliged to act under certain duties, and if they don't fulfill those duties then they will be held personally liable for damage caused to the company.[13] Perhaps foremost among those duties is the duty of honesty and prudence. That duty requires the Legal Representative to fulfill his responsibilities to the company, such as management activities, to the best of his ability.[14] This suggests that a blissful ignorance of what the employees of the company are doing, and a decision to pretend as if he didn't "know" about any illegal act, would in turn be a deliberate violation of this duty and open the Legal Representative to broad and potentially crippling civil liability.

It behooves the Legal Representative, then, to "honestly and prudently" go about "knowing" the acts, legal and illegal, of the Representatives of the company. Accountability tracking can be put in place by human resources–a topic I won't address as I know nothing about it–and other solutions may present themselves as Vietnam's corporate capabilities improve. I don't know all the answers, but it is necessary to have some form of accountability to the Legal Representative of the company. There is no guidance on what degree of accountability will satisfy the "honest and prudent" standard in the law. But should an employee expose the company to criminal liability, it is in the Legal Representative's best interests to have already established reporting mechanisms.

12 Civil Code, Article 77, 85.

13 Law on Enterprises, Article 14.2.

14 Law on Enterprises, Article 14.1.a.

A Warning to Management in Vietnam Companies

(10 February 2020)

Manager liability. It's a major issue for boards of directors and executives in companies throughout the globe. Insurance companies offer a specific product to protect against costs for such liability. In many jurisdictions, the legislatures and courts have created major obstacles to finding management liable and find that there is a preference to defend management against attacks by shareholders and other stakeholders. The rich–and often that includes management of companies–fund politicians campaigns after all.

But in Vietnam the law is sneaky. There are liabilities that many may not realize and that can create a major hazard for management. The risks here are real, and the law allows for management to be held liable for even minor infractions. I seriously doubt that D&O insurance providers in the country even fully realize the legal risks.

In general, managers in Vietnam owe a series of duties to the company in carrying out their responsibilities. Loyalty, honesty, prudence. For most of these duties there is little different from common law countries where the law governing managers is well developed and in favor of management. There is one duty, however, that creates a whopping hole in the protections offered to management.

And that is, as I like to call it, the undefined duty of strict compliance.

Managers have, according to the Law on Enterprises, the following duty:

To exercise his or her delegated powers and perform his or her delegated obligations strictly in accordance with this Law, in relevant laws, the charter of the company, and the resolutions of the General Meeting of Shareholders.

Why is this a problem? Shouldn't management be held liable for following the strictures of the law, the governing documents of the company, and the guidance of the shareholders? Of course, they should. The problem comes in the word "strictly" which I italicized in the above. Strictly, in Vietnamese law, is not defined.

In Vietnamese, the word here is "theo dung". To follow correctly. There is no definition of this phrase in the Law on Enterprises. Not in the Civil Law. Not in any clarifying legislation or administrative decrees. The law simply says that management has the duty to "follow correctly" the rules. Without definition, this seeming strict liability could be devastating. But before I get into the implications, I want to cite one more clause from the Law on Enterprises.

According to the next article, in defining for what violations shareholders can sue management on their own, on on the company's, behalf, if the members of management:

(b) *Fail to implement correctly their assigned rights and obligations; or fail to implement or fail to implement completely and promptly resolutions of the Board of Management;*
(c) *Implement their assigned rights and obligations contrary to the provisions of law,*

the charter of the company or resolutions of the General Meeting of Shareholders;

These allowances are in addition to a violation of the above quoted duty of strict compliance and expand the liability of management immensely. In the first provision, the word "correctly" is translated from "thuc hien dung" in Vietnamese, or to accomplish correctly. Again, this is a concept which is not defined by law. And "contrary" is translated from the word "trai" which is correctly translated as contrary. But is there a definition of this term in the law? No, there is not.

Strictly, correctly, and contrary. These terms might seem innocuous at first blush, but they create enormous uncertainty and potential liability for management of companies in Vietnam.

Without legislative definition, as Vietnam is more of a civil than common law country, the interpretation of these terms is left to the courts. And the courts can interpret these terms however they want. The guidelines offered for statutory construction in Vietnam are limited and illusory.

This means that a court, can impose liability on management, for the slightest infraction. A failure to "strictly" comply with the law, the charter or the general meeting of shareholders could signal a hefty court judgment leveled against the infringing management. This could impose a strict liability standard on management that allows for no wiggle room and no business judgment whatsoever.

"Correctly" and "contrary" create similar hazards. Undefined by law, the courts are allowed to interpret them as they may. "Contrary" is particularly dangerous as a decision may be in actual compliance though it may be accomplished in a way different from that expected by the shareholders.

For example, consider a shareholder instruction to hire a provider that is the "largest" in Vietnam. The general meeting of shareholders gives no guidance as to how to determine the largest. The general manager decides to follow one set of criteria in making his decision. A shareholder disagrees with his decision and thinks that there should have been another method used in determining the "largest" provider. The shareholders may view the decision of the manager "contrary" to the directions of the general meeting and sue the manager. While this may be disposed of by the courts, the costs of litigation mount and the premiums for D&O insurance rise, creating a situation in which it becomes prohibitive to serve as a manager in Vietnam.

Fortunately–and this is a bright spot for management in the country–the courts have yet to truly use this discretion to hold management liable. We can only find one case in which a shareholder sued management and the grounds did not test these particular questions. The hope is that the foreignness of shareholder derivative suits prevents a large-scale attack on management by ownership.

But the risk remains. A savvy shareholder who is disgruntled with management could easily bring suit for any number of reasons. It is a danger that can accrue to management and create vast liabilities. While likely not to happen, the threat is real, and management should be wary in entering into contracts to perform leadership of a company in Vietnam. The law is murky, and the possibility exists for large scale evisceration of management's discretion.

Be warned, therefore, and tread carefully.

Anti-Corruption Law in Vietnam for Investors *(14 May 2020)*

Why Worry About Anti-Corruption Laws In Vietnam?

At certain points of my career the question of corruption became relevant. Not only was there corruption in the government as they seized assets and claimed taxes–which they had already signed off as having received–weren't paid, but there was the question of what we, as a company seeking to influence the government, could do. How far could we go and what precautions should we take to make sure that our executives didn't violate the law and the company was protected from accusations of corruption.

Corruption is very much a front-of-mind element when dealing with government officials in developing countries. Though Vietnam falls roughly in the middle of Transparancy.org's most recent Corruption Perception Index, approximately 61% of public service users were estimated to have paid a bribe in the previous 12 months. That means that over half of constituents in Vietnam are estimated to have paid a bribe. Sure, most of those are probably to traffic cops or to ward presidents, but the numbers are high enough that they should concern investors coming into the country.

At the very least, someone coming into Vietnam to do business–in whatever form–should make themselves aware of the law concerning corruption so as to avoid stepping across the line and finding themselves in a Vietnamese prison for anywhere from six months to 20 years.

To that end, this article will address the aspects of Vietnam's anti-corruption law that are relevant to an investor–foreign or domestic–and what they as a businessperson in Vietnam need to know in order to avoid the fines and jail times associated with corruption. This article will not address international anti-corruption laws such as FCPA in the USA or the PCA in Singapore but will focus solely on Vietnam's laws. The law on anti-corruption is 40 pages long and supplemented with an additional decree from the Government and covers everything from what government officials must do when they receive a bribe to what an enterprise's responsibilities are for preventing bribes to who's in charge of investigating. This article will only focus on the parts of the law relevant to investors. What they need to avoid and what they need to do within their organizations to avoid the wrath of an anti-corruption investigation.

What Is Corruption?

Under the law in Vietnam, corruption is defined as "an office holder's abuse of his/her official capacity for personal gain." Office holders include:

- Offcials and public employees;
- Commissioned offciers, career military personnel, national defense workers and public employees of the People's Army units; commissioned officers, non-commissioned officers and workers of the People's Police units;
- Representatives of state investment in

enterprises;
- Holders of managerial positions in organizations;
- Other persons assigned certain duties and authority to perform such duties.

Personal gain is a "benefit or advantage" obtained in exchange for abuse of an office holder's official capacity.

One more definition is required to fully understand the applicability of the anti-corruption law in Vietnam. The definition of organizations. As you surely noted in the list of "*office holders*" above, included are "*holders of managerial positions in organizations.*" The rest of the list is straight forward and limits itself to public persons, but this item could–depending on the definition of "*organizations*"–could imply something much broader. And looking further it does just that. While "*organizations*" are not defined as an umbrella term, state and non-state organizations are included as "organizations." Most important, then, is the definition of non-state organizations. And the definition given is that non-state organizations are any enterprise or organization that is not a state organization.

This means that the anti-corruption law of Vietnam imposes strictures on the behavior of management of enterprises, who often are or represent foreign investors. Luckily, these enterprise office holders are exempted from many of the potential hazards of state officials. They are only liable for embezzlement, taking bribes, or "*bribing or brokering bribery for taking advantage of one's influence over the operation of the enterprise or organization, or for personal gain.*"

How Can I Influence Officials?

For some investors, particularly from the United States, familiarity with the exception for expediting in the FCPA is comforting. In Vietnam, gifts were allowed of up to 500,000VND in value, but with the promulgation of Decree 59 which implements the most recent iteration of the law on anti-corruption, that exception was removed. Ultimately, a state office holder must report any gift given by a party that "is relevant to the tasks they are performing or under their management." This has been interpreted to include gifts for Tet, birthdays, or weddings if the state office holder has competency over a matter involving the gift giver.

This prohibition, of a sort, is extended to his interests. A strict conflict of interest rule is in place that prohibits state office holders from acting on matters in which they "or their relative" has an interest that is "*likely to have an influence on performance of the office holder's duties.*" This also covers information disclosure so that prime pieces of intelligence that might influence a stock price, or the value of a piece of land could be considered as corruption.

Investors, therefore, are left with legitimate means of influence. Argument, evidence, benefit. While this may be difficult for many to swallow–particularly given the 61% statistic cited earlier–knowing that the other side is likely involved in corruption of some kind, it is very important to avoid corrupt practices as an investor. For, like many developing countries, enforcement of the anti-corruption laws are spotty and depend largely on who needs to varnish their CV in the public eye or on who has offended the powers that be. It is better not to take the risk of investigation, prosecution, and jail than to get an advantage of a few dollars.

What Does My Organization Have To Do?

Every non-state organization has the responsibility to implement measures for prevention of corruption; discover and report any act of corruption that occurs

within their organization to competent authorities, and cooperate with competent authorities in taking actions in accordance with its rules and regulations; and to promptly provide information about acts of corruption committed by office holders and cooperate with competent authorities in prevention and taking actions against such acts of corruption.

In addition to this rather ambiguous responsibility, enterprises are encouraged to develop and issue internally a declaration of professional and business ethics that should be seen to govern the behavior of employees. More onerous, a code of conduct must be developed and issues regarding anti-corruption actions and, most onerous of all, an enterprise must implement a "*control mechanism for prevention of conflict of interest, inhibition of corrupt activities.*" Other rules additionally apply to credit institutions, public companies, and fundraising charities (I won't go into those at this juncture, though if you're interested we can prepare something for you, at exorbitant law firm rates of course).

But what is this "control mechanism" of which the law speaks?

When I was working in Laos we were advised by a major American law firm that, for purposes of the FCPA, we should implement not only a code of conduct–which outlined the rules for interactions with office holders–but also keep track of all expenditures on office holders to include meals, drinks, entertainment, gifts, etc. This monitoring was to demonstrate that we were seeking to oblige the FCPA and to limit expenses paid to or on public officials.

What wasn't clear was how effective such an accounting would be should we actually be investigated by the American authorities. And that, unfortunately, is the case here. Neither the National Assembly nor the Government of Vietnam have issued guidelines on what is expected of this "control mechanism." It could range anywhere from a question included on the agenda of the Board of Supervisor's meeting to an actual accounting item like I discussed above. The new anti-corruption law in Vietnam is relatively new and there has been little opportunity to develop it in application or legislation.

Therefore, as a prudent person, I would recommend that you implement some form of mechanism that is sufficient to satisfy evidentiary requirements. In essence, you write something down. The exact extent of your control mechanism will be determined by the extent to which your enterprise interacts with office holders. It should be more than the required corporate governance under the law on enterprises and should demonstrate that your enterprise is serious in "combating" corruption. Work with your accountants and lawyers to develop a minimally costed mechanism that satisfies the published laws. Your accountant may already be monitoring this, it can't hurt to ask, but even then, it would be wise to mark in corporate governance documents like a meeting minutes that you are exploring and developing a control mechanism for anti-corruption purposes.

This implementation is important, as enterprises are liable to inspection by the authorities on this very issue. If you are eager to protect yourself, we can arrange to inquire with the authorities on your behalf as to what such a control mechanism might look like in your geographical area, but pending further guidance, much of what we can tell you is exhortatory, not binding.

What If I Want To Report Corruption?

Citizens and organizations who discover corruption are supposed to promptly report it. There is an outlined procedure for reporting corruption–reporting up the chain of command–for individual office holders who are suspected of corruption. There does not seem to be a centralized repository for reports of suspected corruption.

And while whistleblowers of corruption, like all denunciators, are protected from retaliation under the law, the effectiveness and implementation of such protections are limited and frequently criticized by international observers. One who seeks to report corruption to the officials should be wary and consider the potential repercussions from the individual or organization you are reporting.

Before making such a report, too, one should consider the potential influence your action might have on relationships with authorities moving forward. Assume that the fact of your whistleblowing will become known in the locality, assume that leaks will happen. Will the whistleblowing chill your relationship with other office holders necessary for operations or approvals you anticipate needing?

I don't want to discourage civic duty, but I long ago learned that as a foreigner you don't get involved with the locals when something goes wrong or you're liable to be blamed for it yourself. Whether an accident victim you want to help or a fight you think of interfering with or a corrupt act you want to report, be cautious, you might get burned in ways you didn't anticipate.

Punishment For Violations Of Anti-Corruption Laws In Vietnam

There are numerous laws punishing corruption, most importantly, non-state organizations or individuals–the category in which most investors will fall–are liable only for bribes (giving and receiving) and embezzlement. But violations can be costly. There are civil and criminal repercussions for corruption in Vietnam and in many instances the individual managers who knew about corrupt acts of the enterprise will be held accountable before the law for the acts of the enterprise.

Civil fines have yet to be set for the new law, but criminal offenses for bribery conform with those set out in the 2015 penal code (as amended in 2017). The recommended sentences are as follows for receiving a bribe:

- From 2 to 7 years, for bribes with value from VND2,000,000 to less than VND100,000,000.
- From 7 to 15 years, for bribes with value from VND100,000,000 to less than VND500,000,000.
- From 15 to 20 years, for bribes with value from VND500,000,000 to less than VND1,000,000,000.
- From 20 years to life or sentenced to death, for bribes with value from VND1,000,000,000.

And for giving a bribe:

- From 6 months to 3 years, for bribes from VND2,000,000 to less than VND100,000,000.
- From 2 to 7 years, for bribes from VND100,000,000 to less than VND500,000,000
- From 7 to 12 years, for bribes from VND500,000,000 to less than VND1,000,000,000.
- From 12 to 20 years, for bribes from VND1,000,000,000.

One thing to note, and I just now caught it, an office holder receiving a bribe–and there is nothing I can see that distinguishes between state and non-state here–may be sentenced with death if the bribe is big enough. Reason enough to avoid taking bribes. Know, too, that other sentences for corrupt acts are equally stringent and undesirable. If there is a question of whether an anticipated act will be corrupt under Vietnam's law then it is wisest to avoid it.

Derivative Suits Against Management in Vietnam

(21 May 2020)

A derivative suit in Vietnam, as in most jurisdictions in which it is allowed, is a civil action brought by a shareholder of a company against a third party in the name of the company. Often this third party is a member of management.[1] This is a powerful tool for minority shareholders to influence the decision-making of management and to hold management responsible for its actions. Because it promotes the interests of minority shareholders, however, most governments disapprove of the derivative suit and seek to limit its application. Vietnam has evolved in its use of the derivative suit and now offers a very liberal process that has even been successfully applied by the courts.

Procedure of derivative suits

Derivative Suits Internationally

In order to file a derivative suit in the United States the shareholders must first prove they are eligible to file. The requirements for shareholding percentage and period of ownership vary by jurisdiction but tend to be onerous. Once this eligibility has been proven, in the majority of major jurisdictions, the shareholders must first appeal to the Board of Directors. Only when the BOD rejects or fails to act on such a request may the shareholder proceed to qualify to file suit. There are additional requirements imposed.[2]

In England the derivative suit is not to protect shareholders, but the corporation itself. Shareholders desiring to file suit against management must apply to the court for permission. They must prove a prima facie case demonstrating that, on first impression, the accused violated their duties. Only then will the court approve the suit and allow the shareholders to proceed.[3] Most civil law countries, which includes most of Europe and Indochina, rarely provide derivative suits. As the purpose of the derivative suit is to offer smaller shareholders protection against management–there not being another way for the minority shareholder to influence decision making–and as Europe does not allow small shareholders–only large ones–to sue in the name of the company, there are very few derivative lawsuits in continental Europe.[4]

History of Derivative Suits in Vietnam

In Vietnam, the 2005 Enterprise Law allowed shareholders, or groups of shareholders holding more than 10% of the issued shares of a company, or less if so specified in the charter, and holding those shares for at least six consecutive months, to request the board of

1 Derivative Suit (Revised 26 January 2019), https://en.wikipedia.org/wiki/Derivative_suit#cite_note-1. (Last visited 13 November 2019).

2 Ibid.

3 Companies Act 2006, Article 261 (United Kingdom).

4 Ibid.

supervision to inspect the "specific problem[s] in relation to the management and operation of the company if necessary[5]." The same class could also request the convocation of a general meeting of shareholders if the Board of Management "seriously violates the rights of shareholders, duties of managers or makes decisions beyond its power[6]."That meeting would then have the power to investigate breaches committed by management which caused damage to the company and its shareholders [7]. There was no provision for shareholders to bring a lawsuit and there was, essentially, no enforcement mechanism. This situation left shareholders without recourse should management decide to act against the company's, and by extension their interests.

This situation changed slightly in 2010 when the National Assembly issued a decree addressing what it considered to be shortcomings in the current Law on Enterprises. This new decree provided that shareholders, or groups of shareholders, holding at least one percent of the issue ordinary shares of a company for at least six months continuously could request the Board of Supervisors to instigate litigation for liability against the management in certain cases[8]. The Board of Supervisors of the company had 15 days to acknowledge and instigate a lawsuit against the accused member(s) of management[9]. If they didn't take action, the shareholder or group of shareholders who originally made the request were allowed to file suit directly against the accused[10]. The Decree at least provided a procedure that minority shareholders could follow to discipline wayward managers. It wouldn't be until four years later that the provisions for a derivative suit would be amended and included in the new Law on

In 2014 the National Assembly passed a new version of the Law on Enterprises. The new law allowed individual shareholders or groups of shareholders who held at least one percent of the issued ordinary shares for six consecutive months, to initiate a civil suit against management[11]. The new procedure was streamlined and did not require the participation of the Board of Supervisors, which some considered a part of management. It allowed shareholders to act directly in the interests of the company and to sue management for specifically enumerated violations. Vietnam, by removing the requirement of going through a supervisory board before launching suit, liberalized its policy beyond what even the most progressive jurisdictions in the United States allowed. But how is the derivative suit applied in reality?

Nguyen Van H. v. Kakazu S.

In 2016, Nguyen Van H., a member of the Board of Management of Saigon Tourist Travel Company and representative of 21% of the issued stock of the company, sued Kakazu S. in the Ho Chi Minh City People's Court. Kakazu S. was the Vice-chairman of the Board of Management and the CEO of the company. Nguyen Van H. accused Kakazu S. of violating the law, the charter, and decisions of the general meeting of shareholders. He further claimed

5 Law on Enterprises 2005, Article 79.2.d (Vietnam).

6 ibid., Article 79.3.a.

7 ibid., Article 79.3.h.

8 Decree 102/2010/NĐ-CP, Article 25.1 (Vietnam).

9 ibid., Article 25.2.

10 ibid., Article 25.3.

11 Law on Enterprises 2014, Article 161 (Vietnam).

that the violations "caused damage to STT company." The court of first instance found for the plaintiff and fined Kakazu S. 1,483,954,720 VND (approximately 64,000 USD).[12]

A week later Kakazu S. filed a petition of appeal to the High Court of Ho Chi Minh City. The High Court found that Nguyen Van H. suit against Kakazu S. was not only "a dispute about civil liabilities of the management of a company," but satisfied the requirements of Article 161 of the Law on Enterprise 2014.[13] The case was appealed to the Supreme Court but was denied a hearing while being sent back to the court of first instance for a retrial.[14]

Neither court went into much detail concerning the application of the derivative suit provisions. And even though Nguyen Van H. did not necessarily own shares himself, he represented 21% of the issued shares of the company. One can assume that this is an interpretation of the "group of shareholders" provision. One could wish for more discussion on the topic as it is an important protection for minority shareholders, but it is enough to see that–at least when the plaintiff is Vietnamese, and the defendant is not–the court will allow derivative suits.

Substance of derivative suits

Internationally

In the United States, a member of the board of directors has a two-fold fiduciary duty to shareholders. First, he must exercise due care in completing his responsibilities. "This generally requires that a director pay attention, ask questions and act diligently in order to become and remain fully informed and to bring relevant information to the attention of other directors."[15] They are also constrained by the duty of loyalty that "generally requires that a director make decisions based on the corporation's best interest, and not on any personal interest." [16]

In the United Kingdom, there have developed a series of rules that have been codified in the Companies Act 2006. They include: the duty to act within powers, or to abide by the constitutional documents of the company[17]; the duty to promote the success of the company[18]; the duty to exercise independent judgment, or to act unimpeded in making decisions, though this does not exclude restrictions by agreement of the shareholders[19]; the duty to exercise reasonable care, skill and diligence[20]; the duty to avoid conflicts of interest[21]; the duty to not

12 Decision of the High Court of Ho Chi Minh City 29/2017/KDTM-PT, 14 August 2017 (Vietnam).

13 ibid.

14 Trang, Bui. "Từ vụ Món Huế, nhìn về việc khởi kiện người quản lý doanh nghiệp tại Việt Nam" (Published on 4 November 2019). https://tinnhanhchungkhoan.vn/phap-luat/tu-vu-mon-hue-nhin-ve-viec-khoi-kien-nguoi-quan-ly-doanh-nghiep-tai-viet-nam-302107.html (Last visited 18 November 2019).

15 Giove, Stephen and Robert Treuhold. Corporate governance and directors duties in the United States: overview. Thomson Reuters Practical Law, UK. https://uk.practicallaw.thomsonreuters.com/9-502-3346?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1 (Last visited 28 November 2019).

16 ibid.

17 Companies Act 2006, Article 171 (United Kingdom).

18 Ibid., article 172.

19 Ibid., article 173.

20 Ibid., article 174.

21 Ibid., article 175.

accept benefits from third parties, or to avoid the appearance of undue influence through gifts affecting her decisions on behalf of the company[22]; and the duty to declare interest in proposed transaction or arrangement[23]. These seven duties comprise the U.K. director's fiduciary duties. They set out the responsibilities of the director's if they wish to avoid civil liability to shareholders.

Unlike the fiduciary duties in the U.S. that impose an extremely limited number of responsibilities on directors, the U.K. has decided to expand these responsibilities and hold directors increasingly liable for their decisions[24].

In Vietnam

History

The idea of fiduciary duties was first introduced in the 1999 Law on Enterprises. At that time, the fiduciary duty–there was only one–or "obligations of managers of the company" required them to perform their powers "honestly and diligently" in the "interests of the company and of shareholders."[25] There were further admonitions not to abuse their power, not to misuse funds, and to properly notify creditors in the case of insolvency, but these were not codified as "duties" and were treated more as concrete regulations.

The 2005 Enterprise Law provided a more sophisticated definition of exactly what duties management must violate before they may be held accountable by the shareholders. First, they were required to strictly comply with the law, the company charter, and decisions of the general meeting of shareholders. Second, they were to exercise their powers in a "fiduciary, diligent and optimal manner for the purpose of maximizing legitimate benefit of the company and its shareholders." Third, they owed a "duty of loyalty" to the company that required them not to abuse their power or use assets of the company for their own benefit. Finally, there existed a duty of notification of ownership or interest in third party corporations.[26]

Current Law

The Law on Enterprises 2014 has updated these basic fiduciary duties, violation of which must occur before a shareholder can file a derivative suit against management. They consist of essentially the same duties as explicated in the 2005 law. They are expanded, however, and now provide duties slightly more in line with common law jurisdictions.

The first duty is the duty of strict performance. This duty requires the manager to exercise his delegated powers and perform his obligations "strictly in accordance" with the law, the charter, or the resolutions of the GMS. The second duty is the duty of honesty and prudence. In performing a manager's powers or obligations, she must act "honestly and prudently" to her "best ability" to ensure the "maximum legitimate interests" of the company. The third duty is the duty of loyalty. This duty is owed to both the company and the shareholders. It requires the manager not to use information, know-how, business opportunities of the

22 Ibid., article 176.

23 Ibid., article 177.

24 Kean, Francis. "Guest Post: The Truth about Directors' Duties in the UK and the Business Judgment Rule." The D&O Diary 20 December 2018. https://www.dandodiary.com/2018/12/articles/director-and-officer-liability/guest-post- truth-directors-duties-uk-business-judgment-rule/ (Accessed 27 November 2019).

25 Law on Enterprises 1999, Article 86 (Vietnam).

26 Law on Enterprises 2005, Article 119.1 (Vietnam).

company, not to abuse his powers nor to use assets of the company for his own personal benefit or for the benefit of other organizations or individuals. The fourth duty is a branch of the common-law duty of loyalty. It could be referred to as the duty of notice. The manager is required to fully, accurately, and timely, inform the company which he manages of any interest he holds–or a related person to the manager holds–in any enterprise. In addition, there may be additional duties imposed by law or by the charter of the company.[27]

Conclusion

The derivative suit is a protection for minority shareholders allowing them to discipline management when they act in violation of the minority's interests. They are not popular globally, but in Vietnam the law has evolved to allow for a liberal use of the suit by shareholders against management. While still relatively untested, the one instance of use demonstrates that the courts seem to understand the concept and are willing to allow its use. This is a boon to investors who are among minority owners of a privately held company in Vietnam. Its permissiveness sets Vietnam apart and shows that Vietnam is willing, more so than even liberal democracies like the United States and England, to protect all shareholders.

27 Law on Enterprises 2014, Article 160 (Vietnam).

New Legal Developments for Ride Hailing in Vietnam

(14 December 2020)

Last week Grab drivers in Hanoi went on strike, shutting off their Grab accounts and refusing to respond to requests for rides or deliveries. Dressed in the now familiar green and white jackets and helmets they wear to identify them as Grab drivers, they gathered outside the company's local offices to voice their displeasure over a change in the fee scheme that resulted in a reduction of the drivers' share of fees collected from customers. The change came from a decree on tax that went into effect on December 5 and imposed VAT taxes on the entire fee collected from passengers rather than just the portion of the fee collected by the ride hailing company.

The new tax rules come as the most recent move in the Vietnamese Government's relationship with Grab and other ride hailing firms and marks the culmination of a years long debate as to the exact nature of ride hailing.

In America, where the concept of ride hailing first emerged, the debate about regulation of the firms involved centers mainly on the relationship of the drivers with the company. Are they employees or freelancers and what obligations does the company have towards the drivers? In Vietnam, however, the debate so far has focused on the nature of the company itself. Is a ride hailing company a technology company or a transportation company and how should it be taxed?

What is Ride Hailing?

Ride hailing is a service that connects passengers with drivers for the purposes of transportation by contract. Ride hailing companies provide apps and software that allows passengers to input a fixed point of origin and destination and connect with a driver who owns and operates his own vehicle and who can transport them according to their request. Ride hailing drivers are not specially licensed and cannot pick up passengers on the street like taxis.

Passengers, especially in Vietnam, pay either using an e-wallet connected to the ride hailing app (which is then split and paid to the company and the driver) or with cash. According to Tech in Asia (see article here) ride hailing firm Grab:

"generally receives a fee from drivers across its various services, such as GrabTaxi, GrabCar, and GrabBike. Drivers deposit credits into an account with GrabTaxi, and the corresponding amount is deducted for every booking they complete."

It is unclear, especially through legislation in Vietnam, whether these methods of payment create a relationship between the passenger and the driver or the passenger and the ride hailing company or both. Unfortunately, the history of legislating ride hailing in Vietnam has failed to

clarify the situation, though the arguments exist for both possibilities and the guidelines passed earlier this year suggest that the Government is now treating ride hailing services in Vietnam as a contract between the passenger and the company with a separate contract between the company and the driver.

The Beginnings of Ride Hailing in Vietnam

Ride-hailing first came to Vietnam in 2014 through the auspices of the Singapore company Grab. It first introduced GrabTaxi which provided customers with cars owned and operated by individual drivers and then later that same year added GrabBike which offered similar services but with motorbikes.

Shortly thereafter American company Uber made a foray into Southeast Asia, including Vietnam, and had some success, but in 2018 sold its Southeast Asian subsidiaries to Grab. Indonesian company Go-Jek, in Vietnam Go Viet until this year, also joined the competition for the ride hailing market. Several other smaller companies and startups entered the sector including Aber, FastGo, VATO, MyGo, and Be Group JSC. In 2020, the estimated revenue in the ride hailing sector is expected to exceed two billion USD.

The Legislative History of Ride Hailing in Vietnam

Ride Hailing Under Existing Legislation

When Grab and Uber first entered the Vietnamese market, the prevailing legislation that seemed to govern their activities defined "transportation services by car" as the act of using cars to transport goods, passengers on streets for the purpose of obtaining profit; and includes transportation businesses that collect money direction and transportation business that don't collect money directly.

Arguing against inclusion of Grab under this definition, lawyer Phan Manh Thang (see his article on the issue in Vietnamese here) reasoned that ride hailing companies don't own the cars that are used to transport goods and passengers, they does not actually "use cars" to conduct such activities. The drivers are the ones who own the vehicles and they are the ones who provide the service and are paid by the passengers. In other words, ride hailing companies have no contractual privity with passengers. They are not, therefore, transportation services.

Additionally, Grab is not the manager of the vehicles. It has no employer/employee relationship with drivers. It does not have labor contracts nor pay salaries to drivers. Drivers are not bound to perform services during set times nor even for a minimum amount of time. They are free agents and thus Grab does not have a supervisory relationship with them. For these reasons Grab does not fall under the definitions of a transportation service.

The legislation provided an additional definition, however, that of the "business of transporting passengers according to contract." This is defined as the business of transportation according to a fixed route and accomplished by a transportation contract in writing between the transportation business unit and the person using the transportation.

According to Thang even this definition does not apply to Grab as there is no contract, especially written, between the passenger and Grab. Any contract that exists is between the driver and the passenger. In addition, the contract is electronic, or digital, and may not even meet the requirement of being a written contract. Therefore, Grab is not in the business of transporting passengers according to contract, let alone the business of providing transportation services.
These arguments provided the main points

against categorizing Grab and Uber and other ride hailing companies as transportation services under the law existing in 2014. But the application of the law in 2014 came under question with the initiation in July of 2015 of a ride hailing pilot program that would allow Grab and, later, Uber to participate as users of "science and technology for the transportation sector."

The Ride Hailing Pilot Program

The pilot program allowed Grab and Uber to operate without specific legislation governing their operation as "science and technology" companies and to be regulated and taxed–at least for the duration of the pilot program–as such, rather than complying with the more onerous requirements in the transportation industry. This allowed the two ride hailing firms to minimize regulatory compliance and pay a minimum of taxes, increased their cash on hand and made it possible for them to offer substantial discounts on ride services that arguably undercut traditional taxis.

But not everyone was satisfied with the classification of ride hailing in Vietnam as a "science and technology" service nor with the arguments behind doing so. In fact, taxi companies in Vietnam vehemently disagreed and insisted that Grab and Uber were in fact transportation companies and should be taxed accordingly to maintain a level playing field between the app based services and traditional taxis.

Vinasun Sues Grab

In 2017, traditional taxi company Vinasun sued Grab. They claimed that Grab's ability to undercut their prices caused losses in 2016 and 2017 of 40 billion VND (approximately 1.7 million USD). Grab, they argued, was really a transportation company. They provided transportation services just like Vinasun, but because they were categorized as a "science and technology" company they were only subject to three specific regulations while Vinasun was subject to dozens. One example was the ban on taxis on high traffic roads during peak hours in Hanoi and Ho Chi Minh City, a prohibition which did not apply to Grab drivers.

Additionally, Vinasun argued that because of these loopholes which opened by the Government's treatment of Grab as a "science and technology" provider, they were able to offer "rampant" promotions and deals that were a violation of competition laws and damaged the profitability of traditional taxi services. Grab, in turn, offered that disruption was the purpose of technology and that their apps were not in violation of competition laws and because of their heightened use of technology they were in "healthy" competition with traditional taxi service.

In late 2018 the Ho Chi Minh City People's Court issued a verdict partially for Vinasun and ordered Grab to pay Vinasun 4.8 billion VND (approximately 207,000 USD). Grab appealed and earlier this year the Ho Chi Minh City Appeals Court upheld the ruling. According to VN Express in their article on the ruling:

The HCMC Appeals Court ruled Tuesday said that Singapore-based Grab has operated as a transport company in Vietnam by deciding fares, managing vehicles and directly receiving money from customers.

Grab drivers have their income cut if passengers are not satisfied with their services, which means the drivers are under the company's management, just like other transport companies, the court said.

However, as Grab is only registered as a technology company in Vietnam, it does not have to bear the

same tax rate and pay drivers insurance and other fees as other taxi firms, which is not an equal situation, the court said.

Although the entrance of Grab into the market has benefited users, it was one of the main reasons that caused a decline in Vinasun's revenue, and therefore the earlier ruling is upheld, it added."

Some commentators caution that such a decision will set a bad precedent and allow other taxi companies to sue Grab and other ride hailing companies for losses that may or may not be attributable to their penetration in the market. This is a limited possibility, however, as the window during which ride hailing in Vietnam was classified as "science and technology" services was closed in April of this year when a new decree ended the pilot program and definitively categorized ride hailing in Vietnam as a transportation service.

Ride Hailing in Vietnam Legally Becomes Transportation

In a decree issued on 17 January 2020 and effective as of 1 April 2020, the Government created a new category that now includes both taxis and ride hailing services. Now, the "business of transportation by automobile" is defined as

"the act of at least one of the specific stages of transportation activities (directly managing transportation, driving or deciding the price of transportation) to transport passengers, goods on streets for the established purpose of profit."

Additional definitions provide for transportation services by taxi and transportation services by contract, both written and electronic, and seem to answer all of the arguments for classifying ride hailing in Vietnam as a "science and technology" service. Specific regulations were imposed on ride hailing drivers and companies and, in general, served to do much to level the playing field between traditional taxi and ride hailing services. (For a complete brief on the regulations included in the decree see our special alert here.) Ride hailing in Vietnam, now, is legally a transportation service.

This piece of legislation did not come a surprise, though, and looking at the legislation implementing the pilot program it is clear that the possibility existed even in 2015. According to that document, some of the main purposes of the pilot program were to determine how ride hailing services should interact with the Government and the community and, specifically, how they would pay taxes.

What's Next for Ride Hailing in Vietnam?

Now the Government has imposed a new tax regime on ride hailing companies, one that continues their treatment as transportation services rather than as "science and technology" companies. Under the pilot program, the service provided was seen as the provision of the app and the company was only taxed according to the amount of fees it received for that service. Drivers were taxed separately on their portion of income as freelancers. But now that the service under contemplation is the act of transportation itself rather than just the provision of an app, the company is now liable for taxes on the entire service provided. The tax for drivers on their portion of the service remains unchanged.

Grab, at least for now, rather than dramatically increasing fees to compensate for the increased taxes, have reduced the driver's share of the fees. It is this reduction of pay that the Grab drivers were protesting in their strike last week. In an alternative strategy, Go-Jek has raised its fees to compensate for the loss of revenue payable as taxes.

With the imposition of regulations earlier this year and now the change in tax status, the Government has come to a conclusion on how it wants to treat ride hailing services. They are transportation services and not "science and technology" companies. What remains, though, is the question of how the ride hailing companies will continue their relationship with drivers. Now that the Government views drivers as assisting the companies in providing a unified service, will they continue to be classified as gig workers or will the Government make moves to consider them as employees of the ride hailing companies and impose labor regulations accordingly?

Bribery in Vietnam

(22 March 2021)

Looking at my list of potential blog topics, I found the issue of bribery remaining from a time before I began to focus primarily on tech-related issues. When I was in Laos we were very aware of this issue. As a foreign-invested endeavor, everything that might involve our home government–which would be in support of efforts to enforce contracts against the Laos government–was reliant on the fact that we weren't found guilty of bribing local officials. They didn't want to support an enterprise that was acting in violation of their own laws against corruption, let alone what might be on the books in the local country. It was vital, therefore, to understand the regulations regarding corruption, and specifically bribery, to avoid violating them and losing the support of our Western government.

The same is true in Vietnam. While European and American anti-corruption regulations apply to investors from those countries investing in foreign jurisdictions, local laws also apply. And violation of local laws is something that most Western governments frown upon. So understanding Vietnam's anti-bribery laws is important to avoid doing something that might land you, as a foreign investor, in trouble. Especially American investors who are allowed an exception for facilitation payments by the FCPA, something that is not allowed under Vietnamese laws.

Bribery Defined

Any person who benefits from their position or authority who directly or indirectly benefits from any of payments given to them by a person or organization to do or not do something for the benefit or at the request of that person or organization is guilty of receiving a bribe. The list of what counts as payment includes money, property, other material benefits from 2 to 100 million VND or less than 2 million if the act was a repeated act of corruption, and non-material benefits.

It is important to note that this definition is not limited to public officials but also includes corporate officers and anyone else who might benefit from their position or authority.

If found guilty of receiving a bribe, the punishments are severe. For the violations listed above, the punishment is imprisonment from two to seven years, and that's the base penalty. After that, the numbers only go up. Imprisonment from seven to 15 years applies for bribes that are organized, abuse position or authority, the bribe is from 100 to 500 million VND, causes damage from one to three billion VND, is the second offense, the bribe constitutes the property of the government, or involves harassment or coercion.

The punishment rises even further, from 15 to 20 years for bribes of from 500 million to one billion VND or bribes that cause from three to five billion VND worth of damage. And the ultimate punishment of from 20 years to life imprisonment, or the death penalty, for bribes above one billion VND or that cause damage of more than five billion VND. In addition, the perpetrator may be banned from office for from one to five years, fined from 30 to 100 million VND, and forced to forfeit some or all property.

The crime of giving bribes mirrors that of receiving bribes. Anyone who gives, or tries to

give, a person in a position or with authority, or another person or organization, money, property, other material benefits from two to 100 million VND, or non-material benefits in order to cause the recipient to do or not do something for the benefit or at the request of the person giving the bribe, is guilty of bribery.

The penalties for giving bribes are somewhat different and do not include the death penalty. They range from fines of from 20 to 200 million VND, non-custodial imprisonment for up to three years, or imprisonment from six months to three years for minimal offenses. Beyond that, they ratchet up in similar steps to those for receiving bribes with a maximum penalty of up to 20 years imprisonment and 50 million VND fines.

Mitigation

Parties who are coerced to give a bribe and who report the bribe will not be deemed guilty of bribery and will have their money or property returned to them. Parties who are not coerced to give a bribe but who report the bribe before they are caught will be relieved of criminal liability and have some or all of their property returned.

Gifts

Gifts are a potentially sticky subset of material benefits and are sometimes prohibited by law. A gift can be cash, 'valuable papers' (such as shares, bonds, certificate of deposits or promissory notes), goods, properties, tourism benefits, medical services, or education and training, among other things. Gifts to "staff, officials, and public officials" are prohibited if they meet the minimum criteria of giving and receiving bribes. They are also prohibited if the individual receiving the gift has power or authority over the activities of the gift giver and the gift is not otherwise justified by a clear and legitimate purpose.

There are some instances where gift-giving is allowed. Public officials may receive gifts if they are sick or on the occasion of a wedding, funeral, traditional ceremony or Lunar New Year and the value of the gift is less than 500,000 VND. Any gift in excess of 500,000 VND must be reported by a government official to his superiors. Non-public officials or staff may receive gifts unrelated to their duties without reporting them so long as they sign a receipt for the gift.

Corporations

But what about corporations? While companies can be found guilty of some crimes, bribery is not one of them. Bribery applies only to individuals. If the company is deemed to have given a bribe they may be subject to administrative penalties. Sometimes a company will put in place mechanisms for monitoring corruption and to prevent bribes. In some countries, this is seen as a defense against being found guilty for the acts of one of their employees. There is no express provision similar to this in Vietnam. Such mechanisms can be used, however, as evidence submitted for the purposes of mitigating the severity of fines and may result in a less harsh administrative penalty for a corporation found guilty of bribery.

This does not excuse individual officers and managers of a company from criminal liability for giving a bribe, however. If the CEO of a company bribes a government official, that CEO may still be held criminally liable for the bribe. Nor does this require companies from monitoring the behavior of subsidiary corporations. Under Vietnamese law, a company is only responsible for its own corporate acts and its liability as a shareholder of a subsidiary does not extend liability beyond the potential loss of its capital contributed to that subsidiary.

Conclusion

Corruption, and specifically, bribery, is one of the few instances where foreign laws and local laws both apply to foreign investors acting in a given country. In Vietnam, the local laws are clear as to the penalties for violating their provisions. By giving a bribe, an investor not only becomes subject to the local penalty of imprisonment and fines but also largely forfeits any protection or support from his home government. Neither the United States nor the European Union is going to step into pressure Vietnam's government to go lightly on one of their citizens who is guilty of giving a bribe. Quite the contrary, they are likely to wait until he has served his punishment in Vietnam and then impose their own penalties on that citizen when he returns home. It's a double whammy and getting caught giving a bribe in Vietnam has serious consequences for both parties involved. While it may be tempting to grease the wheels, the penalties are too real, don't do it.

Establishing an Offshore Holding Company for Vietnamese Startups

(15 November 2021)

A few weeks ago I wrote about Vietnam's Outward Investment Problem. This was in relation to Axies Infinity which is an increasingly successful NFT based online game that is owned and operated by Vietnamese founders through a Singapore holding company. The problem, as I stated, is that Vietnam has rules for its citizens to invest overseas. I've looked at this before in my article How to Make an Outward Investment as a Vietnamese Citizen, but that was under the old Investment Law and without context. This week, I want to look at the legally promulgated process for a Vietnamese startup to setup an offshore holding company with a Vietnamese subsidiary and the possibility for additional subsidiaries in other jurisdictions.

There are four forms of outward investment for which Vietnamese citizens (including corporations) can invest:

1. Establishment of an economic organization in accordance with the law of the investment recipient country;
2. Investment on the basis of an offshore contract;
3. Capital contribution, purchase of shares or purchase of a capital contribution portion in an offshore economic organization to participate in management of such economic organization;
4. Purchase or sale of securities or other valuable papers or investment via securities investment funds or other intermediary financial institutions in a foreign country.

Within these four forms, Vietnamese citizens are further proscribed in that they cannot invest in any sectors which are prohibited to Vietnamese investors in the Investment Law or in an international treaty (basically illegal sectors). But they are also prohibited from investing in sectors for which the technology or products are prohibited from being exported. They may invest in such sectors as banking, insurance, securities, media, and real estate business if they satisfy the Vietnamese state's conditions.

A major issue facing Vietnamese investors who are interested in investing offshore is the question of foreign currency. While they may be responsible for providing the capital necessary to conduct the investment, they are also responsible for purchasing the foreign exchange necessary to make the investment, and if they obtain any loans from foreign banks or entities to conduct the investment that fall within the medium and long-term loan definitions of the laws on banking, then they must register such loan with the state bank of Vietnam and submit regular reports on its repayment.

Just like for investment within Vietnam, there are policies for large scale projects to

be approved by the National Assembly or the Prime Minister, but the lowest value trigger for such approval is 400 billion VND and that is if the investment is in a sector with conditions.

Procedure for Obtaining Approval for Offshore Investment

As with all things Vietnamese, an application dossier is required. An investor seeking to conduct offshore investment must lodge this dossier with the ministry of planning and investment (MPI) and include data regarding the nature of the investment, the nature of the investor, the source and ability to obtain funds and foreign exchange, the authorization of the investor (or management entity if an enterprise), and written certification from the tax authority that all tax obligations have been met.

Upon receiving a valid application for an offshore investment registration certificate, the MPI will issue such certificate to the investor within 15 days. If the amount of foreign currency to be remitted overseas is equal to or greater than 20 billion VND then the MPI will obtain a written opinion from the state bank of Vietnam.

Assuming the investment project is small, which would be the case of setting up a nominally invested offshore holding company (for example $1 for a Singapore holding company), then the process should be simple and the MPI should have no complaints.

Unfortunately, the historical fact of the matter is that the MPI is extremely hesitant to issue offshore investment registration certificates and many small startups do not have the capabilities or capital to go through the process of getting official approval to setup an offshore holding company. Especially if foreign venture capital is interested in investment but insists on an offshore holding company to hold the investment. Worse, many times the investment decision is time limited and it becomes necessary to set up a holding company within a matter of days or a week. Going through the approval process with the MPI may take a considerable amount of time and make the possibility of obtaining funding from foreign Venture Capitalists difficult if not impossible.

While we do not advise our clients to circumvent these procedures, and in fact include them in our advise on structuring of corporate vehicles, we have seen many startups and other companies simply make the investment in the offshore holding company without first obtaining an offshore investment registration certificate. This happens especially when the invested capital of a company can be as little as one dollar in some jurisdictions. Many investors wonder why go through the hassle of getting approval from the MPI for one dollar?

The problem comes a few years down the road. The startup has obtained several rounds of funding into the offshore holding company, the company has expanded and has subsidiaries in several jurisdictions and the Venture Capitalists who invested are suggesting preparations for an exit strategy that involves either M&A or a public listing. In either case there will be a legal due diligence investigation and it is likely that as part of that process there will arise one specific question: did the founders have legal authorization to form the company?

The question may not arise in this exact form, it may simply fall within an area of “other concerns of a material nature”, but either way, the fact that the Vietnamese investor did not obtain official approval from the MPI for investing in an offshore company means that he was acting extra-legally and did not, in fact, have the legal authorization to form the

company. At that point, the company will be required to spend lots of money on lawyers to fix the problem and negotiate with the government to resolve the issue.

Better in all ways to avoid the problem in the first place and obtain an offshore investment registration certificate. It may not be the easiest or nicest process, and it may delay funding rounds considerably, but for a clean bill of health when it comes time for the capital to exit a startup or enterprise, it is best to abide by the law, and the law requires an MPI approval.

Data Protection in Vietnam

(21 February 2022)

Recently we prepared a memorandum for a major international organization related to data protection in Vietnam. It serves as a really good overview of the issue of how to treat data, both personal and corporate, and as such, I would like to include a version of that document here. What follows is a redacted and amended overview of data protection responsibilities for the use of personal and corporate data. This guide only covers existing legislation and does not contemplate any draft legislation that is currently being considered.

Personally identifiable information / personal information / personal data / consumer information

Personally identifable information / personal information / personal data

One of the first types of data protected in Vietnam was an individual's image. The 2005 Civil Code clearly provided the moral right of each person in respect of his/her image, and that other entities were not allowed to use a person's image without his/her consent. A person's moral right in respect of his/her image was carried down to the 2015 Civil Code, which stated that other information types attached to an individual, which are also prohibited of unauthorized use, included information on private life, personal and family secrets. In general, regulations of the 2005 Civil Code and 2015 Civil Code created a foundation for subsequent data protection regulations, forming the basic and prerequisite principle in respect of collecting, storing, processing personal data – the requirement to obtain a data subjects' prior consent before use.

The official definition of *"personal information"* was provided later as *"information which is adequate to accurately identify the identity of an individual, covering at least one of the following information: full name, date of birth, profession, title, contact address, e-mail address, telephone number, ID number and passport number. Personal secrets include medical records, tax payment dossiers, social insurance card's numbers, credit cards' numbers and other personal secrets"*. The Law on Cyber Information Safety also defines personal information as *"information attached to the identification of one person"*.

From this, *"personal information"* can be interpreted in various ways depending on the sector in question. This, coupled with the rapid deployment of information development, makes identification of which information is to be treated as personal information based on the said regulatory definitions alone difficult.

Personal information is also defined in other specialized laws for the purpose of professional management in particular sectors, e.g., information on health status and private life in the Law on Medical Examination and Treatment; information of taxpayers in the Law on Tax Management; customers' information in the Credit Institution Law; etc. However, definitions provided in the specialized laws do not exceed the scope of the aforementioned interpretations, and until present, the laws of Vietnam do not have an exhaustive definition for "personal data / personal information".

Due to the various laws governing personal information / data, private data, personal data

protection, the use of personal information / data protection must comply with the general rules stipulated in the IT Law, the Law on Cyber Security and the Law on Cyber Information Safety, or as otherwise provided in the specialized laws for the purpose of personal data protection in such respective sectors.

Processing of Personal Information

The collection, use and processing (collectively "**Processing / Process**") of personal information / data is generally based on the most fundamental principle, i.e., that of obtaining consent from the owner of such personal information/data prior to any Processing (the "**Consent Obtainment Principle**"). This principle is applied throughout all regulations related to the data protection in Vietnam. The Processing of personal information is always subject to this Consent Obtainment Principle, unless such personal information is used in one of the following purposes/cases:

- To sign, amend or perform contracts or carry out transaction for use of information, products, services on cyberspace;
- To calculate the prices, rates for using information, products, services on cyberspace; and
- To perform other obligations under the prevailing laws.

Under the general laws, those Processing personal information must, in particular:

- notify the subject of the personal information of the manner, scope, place of, and purposes for the processing of their personal data. The subsequent actual Processing of such Processed personal information must abide by the manner, scope, place and purposes as consented by the personal information subjects;
- take the necessary managerial and technical measures to ensure the Processed personal information not be lost, stolen, disclosed, changed or destroyed; and
- take measures for subjects of personal information to check, rectify or destroy their personal information at their request.

Storing, disclosing of personal information

Neither the IT Law nor the Law on Cyber Information Safety explicitly provides that the storage of personal information shall be subject to the Consent Obtainment Principle. However, storing personal information can be understood as one of the purposes of personal information Processing. As such, in order to legally store personal information, a data processor must comply with the Consent Obtainment Principle.

The unauthorized provision, sharing, and dissemination (together, the "**Disclosure/ Disclose**") of personal information to a third party is clearly prohibited unless the party making the Disclosure has the consent of the subjects of personal information or as otherwise provided by law.

In addition, the storage and/or Disclosure of personal information must also comply with the following principles:

- Personal information may only be stored for a certain definite period, which is either regulated by the law or agreed between the party storing the personal information and the subject of the personal information;
- Upon the satisfaction of the intended purposes and/or expiration of the storage period, the party storing the personal information is required to destroy such personal information, and to notify the data subjects about such destruction, unless otherwise provided by the laws; and

- When demanding the use of the collected personal information for purposes other than those consented to by the subjects of the personal information, additional consent for such specific purpose is required. The Disclosure of collected personal information to any other third party is prohibited, except when requested by the competent authorities or having the consent of the data subjects for doing the same.

Data Subjects Rights

Data subjects are also entitled to exercise certain data subject rights, particularly, a right to request to check, rectify or destroy their personal information held by a data processor. Upon such request the data processor shall either implement the same and notify the data subjects of such implementation or provide the data subjects with access to their personal information to implement the same by themselves. In case of inability to implement such request due to technical issues, appropriate measures shall be applied by the Processor in order to protect the concerned personal information.

Sensitive Data

There is currently no specific regulation protecting sensitive data, let alone conditions on collecting, using, storing and/or sharing the same. As a result, sensitive data can only be protected on the basis of the regulations applicable to the protection of personal data, if treated as personal data under the current laws, and protection of data in general. From the concept of "sensitive data" under an expired circular, it can be implied that the laws also require entities possessing this type of data to have appropriate protection measures in order to limit illegal access and exploitation of sensitive data.

"Sensitive data" is discussed in the draft personal data protection decree (see Vietnam's New Draft Data Protection Law).

Corporate Data

Public Corporate Data

Public Corporate Information can be accessed from public sources based on its transparency and for the purpose of protecting the disadvantaged side in a transaction, i.e., consumers in their relationship with enterprises. Information attached to the identification of one enterprise / company is published on open sources of State management agencies, as well as on the websites of such an enterprise / company (the "**Public Corporate Information**"). In particular, enterprise registration information (e.g., company name, active status, legal representative, tax code, etc.) are all published on the national portal. Such Public Corporate Information is allowed to be freely accessed without any consent. Some of the information is protected under the laws, namely trademarks and trade name, which are protected under the IP Law.

Non-Public Corporate Information

Besides Public Corporate Information, enterprises also have non-public information, typically such as business secrets, trade secrets, know-how, business information, corporate financial information, corporate credit information, inventory, etc. (the "**Non-Public Corporate Information**"). According to the IP Law, "*trade secrets mean information obtained from activities of financial or intellectual investment, which have not yet been disclosed and which is able to be used in business*". Business / trade secrets are protected under the IP Law if they satisfy the following conditions:

- The relevant trade secret is neither common knowledge nor easily obtainable;
- When used in business activities, the trade secret will create for its holder advantages over those who do not hold or use it; and
- The owner of the trade secret maintains its secrecy by necessary measures so that the secret will not be disclosed nor be easily accessible.

Secrets related to personal identification, State management, national defense and security, and other secrets not related to business are not qualified for protection under the IP Law.

Trade Secrets and other Non-Public Corporate Information requires the consent of the data subject prior to its Processing. The IP Law does provide for certain cases where a trade secrets owner cannot prohibit others from using / disclosing such trade secret, including, inter alia: for the purposes of community protection; if the trade secret is created independently or when the discloser does not or is not obliged to know that the concerned trade secret was obtained illegally by another person, etc.
A certain behavior is only considered an infringing act in respect of the right to the trade secret if such behavior falls in certain prescribed cases.

Prohibited / Restricted information

Prohibited information

The laws of Vietnam mainly provide regulations on prohibited information in cyberspace. According to the Law on Cyber Security, one can understand that any information infringing national security, social order and safety, or the lawful rights and interests of agencies, organizations and individuals is prohibited from being provided, uploaded or transferred.

Prohibited information may fall into the following categories:

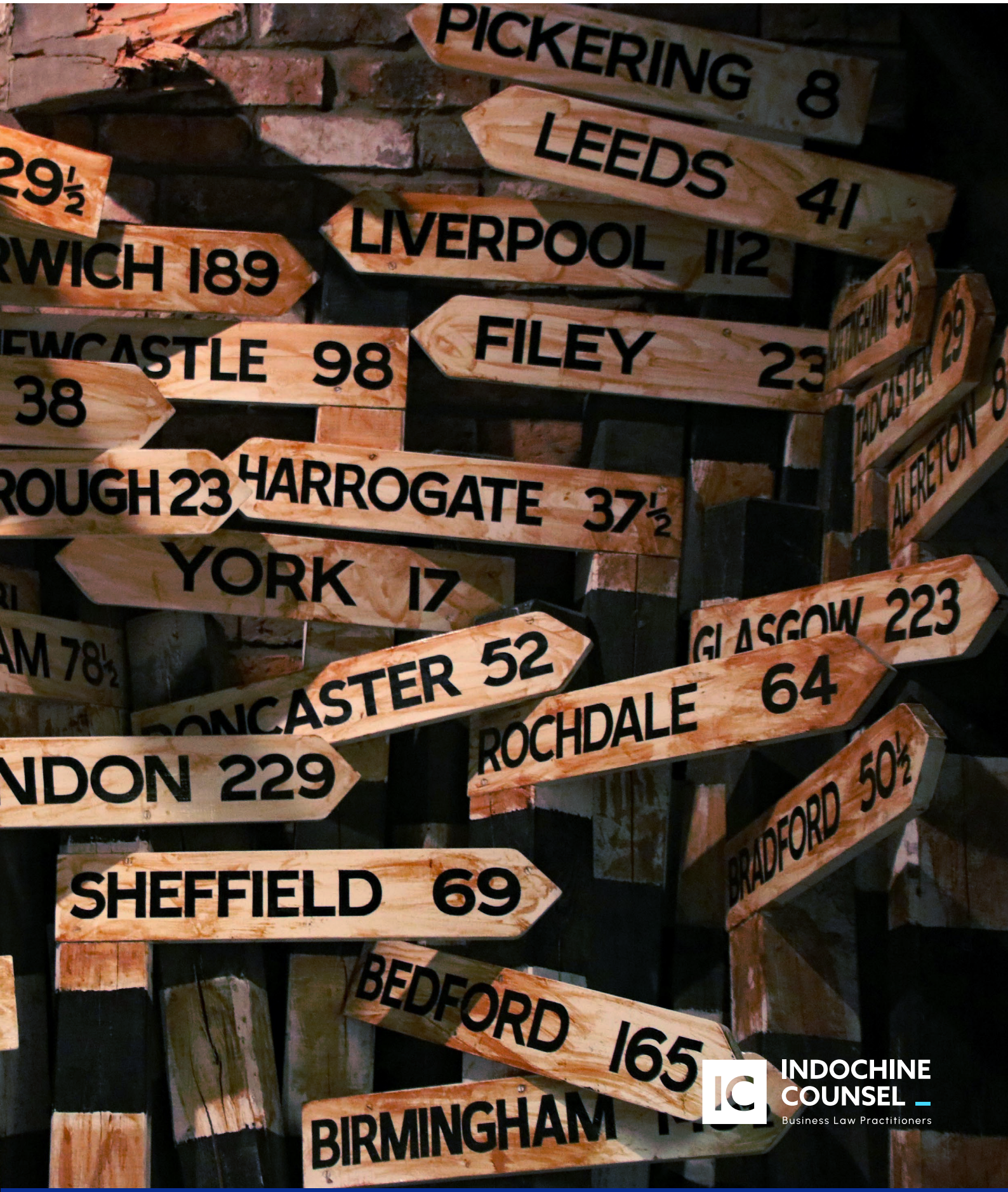
- State secrets, which means any information in the sectors of politics, national defense, security, external affairs, economy, science, technology and other sectors which are not or has not been yet publicized by the State of Vietnam. There are three levels of State secrets, each of which enjoys different levels of protection, comprising of: (1) absolute secret, (2) top secret, and (3) secret;
- Trade secrets;
- Civil cryptographic and legally encoded information of agencies, organization, or individuals, wherein, civil cryptographic means any materials, technical equipment and cryptographic skills for protecting information that is out of the state secret domain;
- Invented or untruthful information infringing the honor, reputation or dignity of any agency, organization or individual and causing confusion or causing loss and damage to their lawful rights and interests;
- Information relating to depraved lifestyle, lewd acts, criminal behaviors or unsuitable to good Vietnamese habits and traditions, social moral and health of community;
- Information advocating the bad practices, customs and superstition, or about the mysteries, causing confusion to society and community; and
- Information advertising for prohibited goods/services as prescribed by the law.

Restricted information

Restricted information is that which is restricted from disclosure to the public, i.e. is required to have relevant consent from the information owner prior to such disclosure. This type of information may comprise personal information, private information, copyrighted contents, protected copyright-related contents, and Non-Public Corporate Information which is not prohibited information, including, inter alia:

- Personal information / data;
- Non-Public Corporate Information (except for trade secrets);
- Private information;
- Commercial information in form of electronic/advertising messages. Such information cannot be sent to the email box of the recipients without his/her prior consent/request or if the recipient refuses to receive the same, unless he/she is obliged to do so under current Vietnam laws or regulations; and
- Copyrighted works: which comprises: Literary, scientific works, and other works expressed in written language or other characters; lectures, addresses and other speeches; press / musical / stage works; cinematographic works and works created by an analogous process; plastic art works and applied art works; photographic / architectural works; sketches, plans, maps and drawings related to topography or scientific works; folklore and folk art works; computer programs and data collections; and performances, audio and visual fixation, broadcasts and satellite signals carrying coded programs for protection of related rights only.

CHAPTER 5 Dispute Resolution



INDOCHINE COUNSEL
Business Law Practitioners

What Foreign Lawyers Can't Do

(25 September 2018)

There are certain limitations on foreign lawyers in Vietnam. Some of you may know this and others may not, but I think it is worthwhile letting you know exactly what you're dealing with when you see a white face and shake hands and expect your work to be done by that individual.

You see, foreign attorneys in Vietnam, technically cannot advise on Vietnamese law unless they go through the process of being certified as a Vietnamese attorney, and that takes four years to earn a bachelor, plus time as an intern and trainee, plus a test, and all kinds of other requirements. Only if these requirements are met can a white man, or foreigner of some other color, practice Vietnamese law in Vietnam.

This is supported by the Law on Lawyers which states, "Foreign lawyers practising in Vietnam may provide consultancy on foreign law and on international law, and may provide other legal services relating to foreign law, may provide consultancy on Vietnamese law if they have a bachelor's degree in Vietnamese law and satisfy all the requirements for a Vietnamese lawyer."

The law continues to prohibit foreign lawyers from participating in litigation in Vietnam. It is quite specific in its allowance of foreign lawyers to practice foreign law, and in its provisions that only domestically qualified lawyers can practice Vietnamese law. Vietnamese law is preserved to Vietnamese lawyers.

Now, there is a workaround, one that requires local lawyers to be the presenting lawyer, rather than the white one. This means that local lawyers are required to sign all advise, be in charge of all contracts, and in general be the one interacting with the client. This is rarely the case, I've discovered, and it somewhat disappoints me.

There hasn't been a test case yet, but the Vietnamese Government has passed this law, the Law on Lawyers, and has set out the requirements for participation in legal representation. This is dangerous because the Government could act to enforce this law at any time, even arbitrarily, and prohibit a foreign lawyer from practicing. At the moment this hasn't happened, but it puts your white-faced lawyer in a precarious position. I admit that I have practiced as a white-faced lawyer in Vietnam. I don't do it anymore, leaving my efforts to the digital realm of business development, but if you're dealing with a white face in your law firm, you should be wary.

Commercial Arbitration Centers in Vietnam

(8 October 2018)

It seems that recently, the Government has updated the rules for the creation of Commercial Arbitration Centers in Vietnam. While this seems like an effort to encourage dispute resolution within the country, it also creates a schism of capabilities.

Where China has one or two main centers and several ad hoc arbitrators, they do not have a plethora of centers that can divide the efforts of one or the other. Singapore has one main arbitration center as does Hong Kong and Malaysia. It is a different strategy, perhaps, that Vietnam is pursuing, but is it the right one.

Having assisted a client go through arbitration at Singapore, and then Malaysia, and then discover that there is no arbitration center in Macau, I've seen the importance of having a centralized arbitration center. Singapore has perhaps been the most aggressive with their center: Singapore International Arbitration Centre, or SIAC. I have met with SIAC arbitrators and promoters, and they seem quite keen on promoting the impartiality of their services, and the independence from the judiciary, though this is not entirely the case.

In Singapore there is quite a meddlesome system from the judiciary, on at least one occasion we were forced to go to the courts for a decision on the procedures to be followed by the arbitrators, and this took quite some time, and quite some cost. But there was no other option in Singapore, as there was no other option in many of the other countries of Asia.

Is Vietnam trying to provide a different experience? Vietnam resists court interference with arbitration procedures, waiting their turn for the time when the arbitration decision is to be enforced. At this point the courts have the right to overturn the arbitral decisions for several procedural and one or two substantive reasons. This is a different approach from the larger countrywide centers throughout the region, and one which allows for a more diverse arbitration personnel.

But is it the best thing for a country that is still a fledgling arbitrator. I know in Cambodia, when they first began to set up their arbitration system, there were several disputes between potential arbitrators and the government influenced arbitration center. I know my boss at the time, was among several arbitrators who took a test and then were told they had to take another test. They were disqualified because of their disputation with the center.

This is not the case in Vietnam, but it is a question, does the presence of, or the ability to set up, several arbitration centers create a better system for customers?

Let's look at it. It offers greater choice. If one of the problems with the centralized arbitration centers is government oversight, there is less of that over individual arbitration centers in Vietnam. As such, it offers less control by a government questioned by several international investors. That's a good thing, leaving the interference from the government to a court decision to enforce the arbitral decision,

and provides a slightly cheaper and more streamlined process to enforcement.

That's not to say that enforcement of decisions of either an arbitral panel or court of justice are quick and streamlined, but that's another story for another time.

I'll close with this. While looking at more mature markets like the United States where arbitration is a booming business and there is little regulation outside of contract, there is a tendency for big companies to impose their preferred arbitration centers on customers in contract, contract that is non-negotiable. This may eventually happen in Vietnam, and the knock on effect of this is that the preferred arbitration center sees its business grow as the large party sees more conflict. They are likely to rule in favor of the big client rather than the small individual litigant simply as a preservation of their cash flow.

In Vietnam, it's essentially too early to see.

A Guide to Practical E-discovery in Asia

(8 November 2018)

Indochine Counsel is proud to announce its contribution to A Guide to Practical E-Discovery in Asia, a multi-jurisdictional guide to E-discovery in the Asian region. Authored by Bryan Tan, Michael Lew, and Benjamin Ang the Guide covers nine jurisdictions in the region from Korea and Japan to Vietnam, Singapore, and Indonesia.

The Vietnam chapter is contributed by Dang The Duc, managing partner of Indochine Counsel, and Le Hong Bao Chuong, associate in the Ho Chi Minh City office. They have worked for years in the technology sector and are familiar with fledgling rules of E-discovery in the country.

According to Gartner's 2014 Magic Quadrant for E-discovery Software, the global E-discovery market will jump from $1.7 billion in 2013 to $2.9 billion by 2017. In addition, most of this growth will take place in international markets outside the traditional US market. There is still much to be learnt from the US experiences in E-discovery, both in techniques and best practices. As Asia's rapid digitisation gathers pace, the volume of evidence and the familiarity of the legal system with technology will demand that E-discovery be implemented to manage this process to aid the administration of justice. The Guide is an effort to begin this process of learning and implementation in the Asian region.

You can access the Guide at:

https://store.lexisnexis.com.sg/products/a-practical-guide-to-ediscovery-in-asia-skuSkusg018/details

Foreign Judgment Enforcement in Vietnam

(16 December 2019)

Indochine Counsel has recently updated its chapter in the Kluwar Online Enforcement of Foreign Judgments for 2020. You can access last year's edition here:

http://www.kluwerlawonline.com/toc.php?pubcode=efj

As I had the opportunity to work on this, I thought I would list a few highlights of the procedure using that source as a reference. Below is a discussion of some important aspects of enforcing foreign judgments in Vietnam.

Civil foreign judgments and decisions of foreign courts are defined as:

"Judgments and decisions of foreign courts relating to civil matters, marriage and family, business, commerce or labour, decisions relating to assets in criminal or administrative judgments and decisions of foreign courts and other judgments or decisions of foreign courts which are considered to be a civil judgment or decision in accordance with the laws of Vietnam".

For a foreign judgment to be enforced in Vietnam, there must be reciprocity with the country from which the judgment originates. Courts are only able to recognize judgments as reciprocal if there is a treaty, actual reciprocity meaning the source country recognizes Vietnamese judgments, or there is a legal basis for recognition.

Upon a request for enforcement being lodged with the Vietnamese courts, it may be reviewed for procedural issues and also on substantive grounds insomuch as the substance of the judgment may affect national security, public welfare or the laws of Vietnam. The local courts can review and refuse to recognize a foreign judgment if:

- The civil judgment does not satisfy any of the conditions as regulated by international conventions to which Vietnam is a member;
- The civil judgment is not yet legally enforceable in accordance with the laws of the country in which the judgment was made;
- The person against whom enforcement is sought or his/her legal representative was absent at the foreign trial due to insufficient service of process;
- The case falls under the particular jurisdiction of the court of Vietnam such as cases involving land or divorce and family law; or other civil cases where the parties have the right to select local court for dispute resolution in accordance with the laws of Vietnam or an international treaty to which Vietnam is a member, and the parties agreed to select such local court;
- The case has been resolved by a legally enforceable civil judgment or decision of the court of Vietnam or of a foreign court

which has been recognized by the court of Vietnam or before the foreign judgment was accepted by the foreign court, the court of Vietnam had already accepted jurisdiction;
- The time limit for enforcement has expired in the country of judgment;
- The recognition and enforcement in Vietnam would be contrary to the basic principles of the laws of Vietnam; or
- The civil judgment has been revoked or enforcement suspended in the country where the civil judgment has been made.

Fraud in the foreign country is reachable by the courts of Vietnam.

If the defendant instituted proceedings in Vietnam such action would preclude the enforcement of a foreign judgment on the same issues. An appeal in the foreign courts would be treated according to the laws of the foreign country. In other words, if the decision is not final in the foreign country, it will most likely not be enforceable in Vietnam.

The local courts are obliged to examine service of process according to the laws of the country in which it was initiated. If the service is insufficient for the foreign courts, or in some way contradictory, the local court can examine that process and decide not to enforce a judgment because of it. Local rules for service should not factor into the review by the local court.

The Vietnamese courts may issue preliminary injunctive relief. The foreign complainant would be required to post a bond. Such a bond must be equal to the value of goods or things to be seized.

Once the courts endorse an enforcement action it is delivered to the judgment enforcement office of the Ministry of Justice. The local judgment enforcement personnel will then notify the party against whom enforcement is granted of the enforcement decision. Such party has ten days to respond by complying voluntarily. If after that time period the party has failed to voluntarily comply with the enforcement action, the judgment enforcers will take coercive action to fulfil the court judgment.

The estimated time between lodging of a petition and enforcement, while set forth in the law, is uncertain. The local courts are underfunded and move slowly; therefore, any time estimate based on the actual law may vary widely from the actual time it can take. According to legislation, however, unopposed enforcement should take two months or if opposed from four to six months plus additional time if there are appeals.

If the judgment is enforced, it is enforced by attachment of movable property, receivables, yields, etc. Immovable property cannot be attached to satisfy a foreign judgment, but it can be auctioned. Other fines and fees may accrue to the respondent, but there are no provisions for civil imprisonment or of any action to prevent a respondent from leaving the country if he so chooses.

Vietnam does recognize foreign arbitral awards according to the New York Convention 1958. This means that an arbitral award granted by a recognized arbitration tribunal in another country which is also a member of the New York Convention will be recognized and enforced in Vietnam. Once a foreign arbitral award is recognized by the court, enforcement is the same as if it were a judgment of the court.

Judiciary's Role Under-defined in Vietnam

(19 February 2020)

I've spent the last two and a half days trying to figure out exactly what the courts do in Vietnam. I've come to the conclusion that their role is ill defined and that on purpose. I read through the Law on Promulgation of Legislative Documents, the Law on People's Courts, the Civil Procedure Code, and the Constitution. I still have to look at the more recent legislation outlining when a court case attains precedential value, but I suspect I won't find anything more useful there.

I'll start with the Constitution of Vietnam. The judiciary conducts judicial acts. It is not assigned a specific verb or given specific duties and responsibilities like the National Assembly or the Government are. It is not tasked with anything other than–at the Supreme Court level–ensuring that the judiciary "applies" the law consistently. Perhaps the largest onus placed on the judiciary in the Constitution is that the courts must "only obey the law." This language is repeated throughout other legislation. They are not assigned the task of interpretation that is given to so many other judicial branches throughout the world.

Interpretation, in fact, is reserved for the Standing Committee of the National Assembly. It is this small group of executives that are given the responsibility of interpreting the Constitution, the law, and decrees. The courts must simply "apply" it. The judicial branch is, however, given the right to question administrative rules or procedures that are seemingly contradictory to the constitution or the laws. They may not offer interpretations, however, but must refer the legislation up the chain until it reaches the Standing Committee who have a month to address the issue before their silence acts as a veto of the contradictory rule.

And that's it. I haven't been able to find any other legislation directing the judiciary on what it actually does. There may be guidance from the Supreme Court–which I have yet to consult–but something deep inside me says that even here, the courts won't be terribly specific about the verbs involved in the courts. If there isn't any legislation provided covering an issue, the courts can turn to the methods for filling in the blanks. But what they do with the additional sources of law remains a mystery.

Why is this?

I don't want to go into too much depth on this because my thoughts might land me in hot water, so I'll simply say it likely has to do with the desire for monopolizing power in the system. To spread the ability to interpret the laws and to then enforce those interpretations spreads the power out and could eventually threaten the place of those at the top. This is different from Civil Law systems–the French one being the one upon which Vietnam's laws are primarily based–who allow the courts to interpret the law, though they do not allow such interpretations to carry forward from one set of facts to the next.

But in Vietnam, the judiciary seems more akin to executive power (as it is focused on enforcement rather than interpretation), the closest thing to an actual duty being that it "applies" the law without definition or guidance as to what this entails. This could also be because of a lack of trust in the judiciary. As a developing country, Vietnam still struggles with judicial competency, the courts subject to inefficiencies, corruption, and misunderstandings. To entrust in them the ability to act more than simply as policemen, to apply the law, might be something of which the National Assembly is leery.

Finally, this continued obstinacy against providing specific tasks to the judiciary may be a stop gap against reform. While on one hand the National Assembly is busy bowing to international business lobbies like AmCham and EuroCham who continually seek reforms in legislation, they preserve the ability to interpret their reforms in the hands of a small committee who is appointed–not elected–who can give meaning to the law however they want. And by obfuscating the judiciary, they also create a system where those changes can be controlled by higher ups rather than at the grassroots level.

It's an interesting conundrum. What it means for business people investing in Vietnam is that they can't rely on the courts for yet one more reason, a lack of clarity as to responsibility. If it wasn't enough that they struggled with accountability and competence before, they also fail in the department of job descriptions. I have to continue the common recommendation, then, that foreign investors seek to apply alternative dispute resolution clauses in their contracts–if reasonable to do so–and avoid the Vietnamese courts if at all possible.

Good luck.

Vietnam Joins Hague Treaty on Evidence

(27 April 2020)

On 4 March 2020, Vietnam signed the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters. The Convention takes effect on 3 May 2020. Vietnam is the 63 country to join the Convention.

In joining the Convention, Vietnam continues its gradual accession to international judicial treaties. In 2016, Vietnam joined the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters and it has long been a member of the New York Convention on the Recognition of Foreign Arbitral Awards.

Joining the Convention was deemed judicious by the authorities in view of the increasing number of civil cases that involved foreign elements. From 2008-2011 the number of cases with foreign elements averaged around 2,000 cases a year. By 2019 that number had doubled to 4,000 a year. Vietnam found that the obligation to provide evidence to foreign courts was reasonable in light of the benefit it would face in increased evidence gathering cases in its own courts.

The Convention is straightforward. If a civil or commercial case arises in a contracting state and it becomes evident that evidence related to the matter resides in another contracting state, then the first state–the requesting state–may issue a request to the state where the evidence resides for cooperation in obtaining that evidence.

Once a request is lodged with the relevant authority of the executing state, that state may proceed to conduct procedures to obtain that evidence. Such procedures will be in accordance with its own laws of evidence. Thus, a request from the United States for certain information that might not be available under the law of Vietnam, would be disallowed under the Convention. Conversely, witnesses or organizations providing evidence in Vietnam–in such an example–are also exempt from providing evidence if they are privileged under United States law.

There are other permutations for consular and diplomatic officers to obtain evidence in the territory of a contracting state, but they are secondary to the basic understanding that the Convention allows one contracting state to engage the assistance of another contracting state in obtaining evidence for a judicial matter in its own territory.

For investors in Vietnam, this is important as they deal in cross-border issues every day. They may hold a meeting making a decision in one country and then execute that decision in another. Each action they take–whether executive or on the ground–may create evidence. And now, for citizens of 62 other nations, evidence in Vietnam is available to be reached.

While of limited effectiveness at the moment for outward evidence–as it is often difficult to agree on dispute resolution in a country other than Vietnam–it may provide opportunities to

introduce evidence into Vietnamese procedures that would not otherwise be available. This creates a broader net for evidence and forces the judicial officials to take into consideration a more international approach to the application of the law and, hopefully, force them to increase competence and capabilities in turn.

Often, too, investors in Vietnam turn to arbitration proceedings in Singapore, Malaysia, or other regional hubs. Foreign courts may be appealed to in efforts to obtain evidence or conduct other procedures in service to the arbitration. By joining the Convention, Vietnam now is liable to participate in such requests and to provide such evidence. It is a win-win situation and a positive step forward for Vietnam's participation in the global community.

CHAPTER 6 Employment

INDOCHINE COUNSEL
Business Law Practitioners

Social Security for Foreigners in Vietnam *(21 January 2019)*

Last year the government issued a decree requiring foreigners working in Vietnam to pay social security taxes and become a part of the social security scheme currently in effect in Vietnam.

This new requirement only applies to foreigners who work for firms in Vietnam on contracts of a year or more. So one way to get around the requirement is to make sure that you have a contract for 364 days instead of a year. Not that this is advisable, but there will undoubtedly be some who seek this answer. There are benefits that arise from working on a year or indefinite contract that are worth the extra amount.

Eight percent. Monthly.

That's the contribution required by foreigners working in Vietnam. There are also additional benefits which must be paid by the employer, but for those, contact your favorite Indochine Counsel attorney.

This new tax regime went into effect at the end of 2018 and should be completely applied for foreign workers in Vietnam this year. If you didn't know this yet, then you don't pay much attention to your monthly statement. If you did know this, and it came as a surprise, talk to your human resources people about their lack of communication to foreign employees.

Otherwise, hope that Vietnam quickly passes a double taxation treaty with your home country so as to allow this new social security tax, which is admittedly a major increase in taxes, to be passed through one country or the other.

Vietnam Labor Law Update

(13 January 2020)

Highlights of the Labor Code 2019

On 20 November 2019, the National Assembly of Vietnam issued a new Labor Code with the purpose of promoting the Vietnamese labor market and solving essential problems from practical implementation of the Labor Code 2012. It is intended to create a more flexible legal framework on employment and harmonize the legitimate rights and interests of employees and employers under the overall socio-economic development of Vietnam.

Below are some highlights of the notable amendments and supplements of the new Labor Code:

Labor Contract

The Labor Code 2019 redefines the labor contract as an agreement entered into between the employee and employer, regardless of the form of the contract, which mentions the scope of work, salary, work conditions and the rights and obligations of each party to the employment relationship. The Labor Code 2019 clearly provides that parties are not allowed to sign annexes to amend the duration of a labor contract.

Type of Labor Contract

The Labor Code 2019 eliminates the seasonal or specific job labor contract with a duration of less than 12 months. This leaves two types of labor contract including indefinite-term labor contract and definite-term labor contract with a maximum term not exceeding 36 months. There is no minimum threshold for labor contracts.

The Labor Code 2019 allows employers and employees to enter consecutive definite-term labor contracts if the employee is: An older employee; or A foreign employee; or A director of a state-invested enterprise; or A member of an administrative board of the representative organization of the grassroots level employees' collective.

Probation Period

The probationary period is raised, up to 180 days for managers of an enterprise pursuant to the Law on Enterprises, rather than the 60 days under the Labor Code 2012.

Termination of Labor Contract

Under Labor Code 2019, an employee may unilaterally terminate the labor contract at any time without reason but must give advance notice as prescribed per case. The Labor Code 2019 also provides that an employee may unilaterally terminate the labor contract at any time without giving prior notice in the following circumstances:

(i) He/she is not assigned to the correct job or workplace or is not ensured the working conditions agreed in the labor contract;
(ii) He/she is not paid the wages due in full or on time as agreed in the labor contract;

(iii) He/she is maltreated, sexually harassed, or is subject to labor coercion;
(iv) A female employee is pregnant and must cease working on the advice of a competent medical consultant or facility; and
(v) The employer provides dishonest information on the work to be performed, the work place, the work conditions, working hours, rest breaks, occupational safety and hygiene, rates of wages and method of payment of wages, social and medical and unemployment insurance and provisions on confidentiality of business secrets and other matters directly relevant to entering into a labor contract.

Public Holidays

The Labor Code 2019 increases the number of public holidays to 11 days because Independence Day will become a two-day holiday from 2021.

Overtime Hours

Maximum overtime hours are up to 300 hours per year in the following:

(i) Producing and processing products for export of textile, garment, leather, shoes, electrical and electronic components, processing of agricultural, forestry and aquatic products;
(ii) Production, supply of electricity, telecommunications, oil refining; water supply and drainage;
(iii) In case of handling jobs requiring highly qualified technical workers and the labor schools do not fully and promptly supply them;
(iv) Cases that must be resolved urgently, cannot be delayed, due to the seasonality and timing of raw materials and products or to solve jobs arising due to unforeseen objective factors, weather, natural disasters, enemy sabotage, fire; lack of electricity; lack of raw materials; technical problems of production lines; and
(v) Other cases prescribed by Government.

Retirement Age

The Labor Code 2019 increases the retirement age for male workers from 60 to 62 years and for female workers from 55 to 60 years old. From 1 January 2021, this change of retirement age will be phased in gradually, with the retirement age increasing by 3 months each year for male workers and 4 months each year for female workers until the new limits are reached.

Work Permit

The Labor Code 2019 amends the conditions for work permit exemption. Foreigners who are the owner or a member contributing capital of a limited liability company or chairman or member of the board of management of a joint stock company remain exempt from the work permit requirement, however, they must make a minimum capital contribution in the company.

The foreigner who marries a Vietnamese is an additional case of work permit exemption.

The work permit can be renewed only one time for an additional 2 years of employment.

Sexual Harassment

The Labor Code 2019 clearly defines sexual harassment in the workplace. It is any behavior of a sexual nature by any person to another person in the workplace which is considered as unwanted and unacceptable by the recipient. A workplace is any place where an employee works pursuant to the agreement with or

assignment by the employer. The Labor Code 2019 also provides that an employee may unilaterally terminate the labor contract immediately without giving prior notice if she/he is being sexually harassed.

The prevention of sexual harassment in the workplace is a compulsory content in internal labor rules of a company.

The Labor Code 2019 will take effect from 1 January 2021.

Selecting KPIs in Vietnam's Employment Law

(2 March 2020)

Recently, a friend of mine was pressed with a problem. He signed an employment contract that stated specific duties. He is a computer programmer and his tasks are primarily associated with developing software and related research. But the firm he works for, an international company, decided to open a new line. They have begun offering stock brokerage as a service. They feel this is more lucrative than their programming arm and have now required everyone in the company to sign up two people for stock brokerage accounts every month. If the employee fails to do this they will be docked 10% of their salary for that month. Is this legal?

I didn't know, so I did some research. The employment law sets out that the employment contract is the place to agree on the duties and responsibilities of the parties. Particularly, the duties of the employee and the expected tasks which he will perform. This is where the job description becomes key performance indicators (KPIs) and the expectations of the employee are laid out.

So far so good, but what happens if the company wants to change or add to the KPIs of an employee like the situation my friend faces?

There are a couple of options. First, and the option contemplated by the Employment Law, is an agreement between the employer and the employee. The two parties must come to a mutual understanding about the change in duties. Once that is done, they must sign an annex and append it to the labor contract. This assumes, however, an amicable relationship between management and the employees and a relatively equal power relationship–which is rarely the case.

This is good for employees because it requires their approval before changing duties or adding responsibilities. It is not so good for employers–who are Indochine Counsel's primary clients as we don't offer labor dispute services for employees–because it does not allow them to easily alter the KPIs according to the economic and commercial requirements of their business. For large businesses they must either negotiate amended KPIs for each employee or deal with the union representatives, neither option preferred.

This is where my friend comes into problems and the wise employer thinks ahead. If, in the negotiation of the original employment contract, a clause is inserted that allows for the amendment of the KPIs according to the commercial needs of the employer, the situation will most likely be much different.

Vietnamese law has a great deal of respect for contract. If the party's to an employment contract agree to something, then most likely the courts will respect that agreement. As an employer, then, it is best to ensure that such a clause is inserted into every employment contract. Thus, the software company of my friend would be allowed to change his KPIs according to agreement between the parties without having to negotiate an annex or union agreement.

But I'm from the United States and this strikes me as somewhat unreasonable. To require a computer programmer to enter the realm of the stock market–a completely unrelated field–and dock him pay if he fails to do so seems very unreasonable, almost arbitrarily punitive. It seems that there should be some way to mitigate the degree to which an employer can change the KPIs even in the face of an inserted clause in the original employment contract.

On this issue the law is silent. There is no legal guidance in this situation as to how to decide whether an unilateral change to the employee's KPIs by the employer is so extreme as to fall outside the scop eof such an inserted clause. I consulted our in-house labor law specialist, however, and she provided three criteria which may be relevant to a labor court in looking at this issue.

Such revised KPIs are reasonable if they are set in accordance with (i) the labor contract and job description and (ii) the employer's KPI's and internal appraisal performance rules are consulted with the employer's trade union and (iii) the KPIs have clear and reasonable timeframes and are achievable.

It should be noted that these criteria are not necessarily based on the law but on the long experience of a legal expert. In the law, it is likely that an employer–so long as they don't violate the union consulted agreements–will be allowed to act however they want so long as they have inserted the necessary clause in the original labor contract.

Thus it is, the wise employer will include a clause in all labor contracts–especially in those businesses that might expand into new sectors in the future–explicating their right to alter the employee's KPIs without the need to negotiate an annex.

Protections for Whistleblowers in Vietnam

(30 July 2020)

Recently, we prepared a long chapter on employment law issues in Vietnam. One of the questions we addressed involved legal protections for whistleblowers–employees or individuals who reported instances, specifically, of harassment in the workplace, but also of other legal violations committed by their employer. Vietnam's employment law does not provide for whistleblower protections and, except for the related law on denunciations, there are very limited provisions covering the issue. In general, in the corporate setting, whistleblower protections are dependent upon the incorporators of a given company setting out those protections in their governing documents.

And then, the other day, I read an article about a man–working near the poverty line–who spent years monitoring and denouncing a Chinese construction firm for shortcuts in the building of a stretch of highway that resulted in poor quality roadways. It outlined how he went from authority to authority, tried to get the local departments to do something about the shortcuts and the corruption he saw in the company, but how he was only listened to after construction was complete and the roadway began to fall apart. It outlined how, during the years of his efforts, he had been attacked, feces and blood thrown at his house, stones through his windows, and other atrocities against his person. The point of the article, though, was about how he'd devoted so many years and so much effort to preserve benefits for his fellow citizens and received a certificate of recognition in a private meeting as his only compensation. But I saw the article as a question of something more.

When someone in the corporate or public spheres decides to report wrongdoing, what protections can they receive to prevent reprisals, injuries, or other losses caused because of their whistleblowing? In the United States, there are elaborate schemes for protecting whistleblowers in the public sphere, and in publicly listed corporations levels of anonymity built into the reporting mechanisms to protect their identity and livelihoods. In Vietnam, however, it seems there are few, if any, protections.

Corporate Whistleblowers

As I mentioned, there are no provisions in the business laws (investment, enterprise, securities, etc.) nor in the labor laws to protect whistleblowers in the corporate environment. Thus, unlike in Western companies where an internal reporting organization is put in place to monitor and investigate complaints of illegal behavior within a company, Vietnamese employees are best advised not to complain within their organization. The only protection for them exist if they report outside the company to public officials.

This is an unfortunate development as it denies companies the benefit of corporate- minded employees who want only to improve their employers state of operations. Without internal

reporting regimes, companies may not know of illegal behavior by management or employees until they are approached by the authorities in an investigation. This governance failure breeds further illegality as there is a failure to punish wrongdoing, thus fostering an atmosphere of toleration. Furthermore, the company without a reporting regime loses the opportunity to fix the problem before it rises to the level of triggering an external investigation or, in a minority of cases, of self-reporting the problem to the authorities in an effort to mitigate consequences of the wrongdoing. These flaws are especially egregious in light of the criminal liabilities and the ease of bringing derivative shareholder suits against management.

A wise incorporator, then, would–according to the size and scope of the enterprise–institute a reporting regime and put in place protections for internal whistleblowing. This could extend to a separate unit within an enterprise, perhaps under the direction of the inspection committee or, at least, the board of management. Or, it could be as simple as setting up an anonymous email address to which employees could submit complaints. Regardless, the lack of legislation protecting corporate whistleblowers within their own organization potentially causes a great deal of harm to companies and puts management on a reactionary footing, unable to anticipate problems within their organization or to fix them when they become aware of them.

The wise employee, faced with illegality committed by his employer, should skip reporting up the chain of command and go directly to the authorities if they want to obtain the few protections provided by law.

Public Whistleblowers

The law on denunciations, which applies to the proper public authorities who are in receipt of a complaint or denunciation from a person, are under certain obligations to protect that person from retaliatory actions of the denounced party or affiliates. These protections comprise the only protections provided under Vietnam's law for whistleblowers in any context. But what obligations do the receiving authorities have towards the whistleblower?

First, they must protect her personal information. Her name, position, address, etc. and any information that might reveal her identity, or the identity of her immediate family. If through the action of the authority (and not in the case of the party making denunciation revealing such information) such information is released, the authority must obtain suggestions from the party making denunciation to protect them from reprisals.

Second, the receiving authority has the duty to protect the business and employment of the whistleblower within their ability so to do. Such protection should include preserving the whistleblower's current position by requesting the employer to cease retaliatory actions, restoring employment. If retaining employment with the original employer fails, then the authority will assist in finding new employment or business for the whistleblower.

Third, the police, government, and people's committees must protect the life, health, property, honor, and dignity of the whistleblower. They may use necessary resources to protect the whistleblower in place or, should the situation require, transport the whistleblower to a place of safety.

That, unfortunately, and in the space of a few articles in the law, covers the only protections available for whistleblowers in the public sphere. There are no time limits set to these protections, but there are also no requirements that they continue for a lengthy period of time. In fact, the period for resolving a denunciation

is 30 days. It is highly possible that the authority responsible for resolving the denunciation will see its duties towards the whistleblower terminated at the end of that period and thus leave the whistleblower vulnerable to retaliation after such date.

When a whistleblower's denunciation can bring administrative, civil, or even criminal penalties upon her employer's head, she is in continuing danger of retaliation concomitant with the size and degree of the illegality she reported. Longer-term protections need to be provided if called for by the situation.

Conclusion

Whistleblower protections in Vietnam are minimal. There are major deficiencies in the legal framework and no clear best practices for enterprises in developing internal mechanisms for monitoring and reporting corporate behavior. The protections provided are vague and come to an end all too soon. When a person risks their livelihood to protect the benefits of the government in preventing illegal behavior on the part of corporations, there should be some more provision for their safety and security.

Negative prescriptions aside, the government could also consider a positive inducement to successful whistleblowers. In the United States, for instance, the SEC offers a percentage of obtained damages to whistleblowers of FCPA violations. Other than a moral compass–which is skewed towards respecting management by predominant Confucian ethics–there is little to lure employees to report wayward employers. Vietnam needs to revisit this issue and provide both inducements and protections for whistleblowers if they wish to better monitor corporate behavior in the future.

Vietnam's Informal Economy Loses During Lockdown

(13 September 2021)

From the outset of the Covid-19 pandemic in the beginning of 2020, employers and workers have all be hit hard by the economic downturn that resulted. In Vietnam, with a population of nearly 100 million people, the pandemic has only recently caused a major reduction in the need for human capital. But that reduction has hit a large number of employees, specifically, employees in the informal economy.

According to WIEGO, the *informal economy* is the diversified set of economic activities, enterprises, jobs, and workers that are not regulated or protected by the state. Fullbright University estimates that the informal economy of Vietnam accounts for anywhere from 25 to 30 percent of annual GDP. If one were to spread the GDP equally over each individual within the economy, that means that 25 to 30 million people are involved in the informal economy.

Regardless of how many people are actually involved in the informal economy, they face particularly harsh conditions during lockdowns like the one we are currently in as they do not necessarily have the support of the government that is given to laborers in the formal economy.

For instance, in July, the prime minister issued Decision No. 23/2021/ND-CP which provides for policies to assist both employers and employees during the Covid lockdown. While the decision gives enterprises the ability to discount or delay their payment of social security taxes, it also gives direct payments to employees who have had their work hours reduced or who have been temporarily suspended from work. But in order to receive these benefits, they must have an employment contract and have payments to the social security funds by their employers.

Informal workers frequently meet neither requirement.

Take for instance Grab drivers. In the contract between Grab and its drivers, there is very specific language stating that Grab is not an employer and the driver is not an employee. In fact, the language is such as to state that Grab is actually providing a service to the driver by providing connections with passengers. And in the terms and conditions for using GrabBike or GrabCar by passengers, the drivers are referred to as third parties. Grab takes no responsibility for paying social security for the individual drivers that use its technology and has no labor contract in place for them. This means that Grab drivers, as an example, do not have access to the Covid-19 relief benefits from the government aimed at employees because they are not "technically" employed.

The same is true throughout the informal economy. Men and women and young adults all work without being regulated by government policies and, unless they pay their own social security taxes, they are solely dependent on the money they receive from their work. And with Covid-19 lockdown measures in place

for months in some locations, many of them are unable to work. In Ho Chi Minh City, for instance, delivery services were stopped for several weeks and Grab drivers were unable to earn any money because they could not make deliveries. Let alone the GrabBike and GrabCar drivers who have been prohibited from driving passengers for a much longer period.

According to TechinAsia.com, there are nearly 200,000 Grab drivers in Vietnam. And if Grab accounts for 75% of the ride-hailing market, that means there are nearly 270,000 ride-hailing drivers in the country, most of whom are currently limited in obtaining any income due to the lockdowns. These drivers are not eligible to receive any government Covid benefits because they are not employees nor are they making payments for their social security. They are domestic freelancers and are only subject to the payment of personal income tax.

But with the decision by the tax authorities late last year to impose tax on Grab and other ride-hailing platforms as a transport service provider rather than a technology company, the nature of Vietnam's treatment of these services changed. They are considered as giving a service and if they are the ones giving the service, then those who actually provide the service could easily be categorized as employees rather than freelancers. The courts in the United States have made some initial forays into this area and deemed ride-hailing service providers as employees. Perhaps it is time that Vietnam look at taking a similar step to protect the interests of the ride-hailing freelancers and require social security payments by Grab, Gojek, and others on behalf of their employees.

CHAPTER 7

Intellectual Property

INDOCHINE COUNSEL
Business Law Practitioners

Labelling Goods Circulated in the Vietnamese Market

(3 May 2018)

Since its promulgation in 2006, Decree No. 89/2006/ND-CP on labelling products ("**Decree 89**") is based on legal documents which so far, have been invalidated and replaced by higher level legal documents (presently, the Law on Consumer Rights Protection, dated 30 October 2010, and the Law on Products and Goods Quality, dated 21 November 2007). In addition to these changes, the application of Decree 89 for over ten years has uncovered certain limitations and inadequacies which cause State authorities difficulty in applying the Decree for State management tasks. It also poses problems for enterprises in implementation of legal provisions.

In consideration of such fact, on 14 April 2017, the Government issued Decree No. 43/2017/ NĐ-CP on Goods Labelling ("**Decree 43**") which supersedes Decree 89 from the effective date of 1 June 2017.

Remarkably, Decree 43 does not govern, among other goods, temporarily imported goods for re-exporting, or for displaying in commercial fairs/ exhibitions; certain fuels and construction materials; illegally imported goods to be confiscated and then auctioned; certain fresh foods and processed foods sold to the consumers without commercial packings; second hand goods; goods for export only.

As provided in Decree 43, product labels should be attached to the goods or commercial goods packaging at the point where people can easily find all mandatory information for a goods label without disassembly of the parts of such goods. Goods manufacturers can determine the reasonable size of a goods label as well as the text size to make it easily read by people with normal vision. In addition, the colour of the text shall be in contrast with the label ground colour and the contents of goods label shall be in Vietnamese, except for in certain prescribed cases, such as international or scientific names of the drugs for human use, name and address of the manufacturer. In case where a label of goods circulated domestically comprises contents in both Vietnamese and a foreign language, the contents in the foreign language shall correspond with Vietnamese ones and in the text font size which shall not be bigger than the size of the same in Vietnamese.

The mandatory information of a goods label comprises (i) name of goods; (ii) name and address of the entity responsible for the goods; (iii) the origin of the goods; and certain other information subject to the particular kind of goods as provided in Annex I of Decree 43, wherein the name of goods shall be in the biggest text font size in comparison with other information in the label. If labels of imported goods do not comply sufficiently with such mandatory information in Vietnamese, relevant auxiliary labels shall be added, in which Vietnamese contents shall correspond with ones in the original labels, and the lacking information shall be added. Such auxiliary label shall be attached to the goods/ commercial

goods packaging in the manner, so that the auxiliary label does not overlap the contents of the original label. Please note that auxiliary labels are required for exported goods which are returned or cannot be exported, and in addition, a bold line of "Được sản xuất tại Việt Nam" (i.e., 'Made in Vietnam') must be presented in such auxiliary labels.

In addition to the mandatory information, a goods label may comprise other information, such as barcode and certification seals. Such information shall be true and accurate, as well as comply with the regulations and laws. All goods labels shall not include signs, images, information relating to sovereignty disputes or other sensitive information.

In connection with Decree 89, Decree 43 provides transition provisions for the implementation thereof. In particular, for goods with labels which comply with Decree 89, and to be manufactured, imported, or circulated on the market before the effective date of Decree 43, such goods shall be allowed to be continuously circulated until the expiry date thereof as presented on their goods labels; and for goods labels, stamps which have been printed before the effective date of Decree 43, enterprises shall have the right to continuously use such labels, stamps for a period of 2 years from the effective date.

INTA-national

(25 May 2018)

Forgive my tardiness this week, as I like to put these up on Monday afternoon Indochina time, but I was in attendance at the 140th International Trademark Association in Seattle, Washington throughout this week. I know that's no excuse and that I should burn the midnight oil to put out product, but I am only human, and to err...as they say.

I did want to use this forum, however, to highlight an interesting perspective I was able to see during the opening ceremonies of the INTA conference. Held in the very large Washington State Convention Center and surrounds. Seattle is a gorgeous city, and surrounded by nature. One interesting fact that relates to the place and the type of people that occupy Seattle, over one small bridge, more than 4,600 bikers crossed in one day, and that day a weekday. Seattle is a unique place in good stead to discuss the present and future of trademarks.

The president of INTA, a powerful and talented person whose name I do not remember, gave a short speech about perspective and trademark. Much of what people think about when they think about trademark is the big international chains stomping on little guys. For instance, the case of McDonald's prosecuting a McDonald's restaurant in Scotland that was named after the family clan name. Luckily, McDonald's lost.

But that's the problem. In an industry that is moving extremely fast and on the edge of technological advancements, the world needs to understand the other side of trademarks, the side that protects them and their expectations. You see, trademarks are part of the brand of a business and for people to recognize a trademark is to recognize the ways in which the trademark and fuller brand offer a guarantee, of sorts, in that you can expect certain quality in the goods they purchase from the stated trademark.

The suggestion made, finally, by the president of INTA was that instead of marketing ourselves as trademark specialists, we market ourselves as brand professionals. I think this is a bit too broad, personally, as most brand professionals have a much larger PR element to their roles while trademark agents help protect the brand, rather than define it.

It's an interesting question, one that I had the opportunity to consider during the four days of INTA in downtown Seattle. A beautiful city and home to one of the most iconic brands currently in the business: AMAZON.

Because that's ultimately what a trademark is, a recognizable image, or word, or phrase that conjures a recognizable brand. So maybe, in a way, it is the work of a brand professional, but perhaps only a partial brand professional. Maybe, brand defenders, to pull a line from Disney's Marvel Netflix series...to use several brands at once.

Just make sure they're capitalized so that the brand trademark remains intact. In that, perhaps, lies the key.

Counterfeiting in Vietnam, A Report

(9 December 2019)

Last summer the International Chamber of Commerce Business Action to Stop Counterfeiting and Piracy issued a report on counterfeiting in Vietnam. The report not only reviewed the current counterfeiting schemes in Vietnam but offered recommendations for improving protection of rights of creators, inventors and owners. This blog post will review some of the report's findings as an attempt to educate readers as to Vietnam's current counterfeiting problems and the importance of intellectual property protections.

Vietnam is an attractive place for manufacturing as global trade wars create obstacles in existing supply chains. Vietnam offers a geographically close alternative to China, the primary global manufacturer, and cheaper labor. It also has an increasingly industrialized economy with a view to production over agriculture. In effect, Vietnam is a prime target for foreign manufacturing. This growth has grown in tandem with Vietnam's enforcement of intellectual property rights (IPR).

While Vietnam may have recognized a certain importance to IPR, there remains a lack as brand awareness falls behind regional values. For example, in 2015 Vietnam's top brands represented only $5.5 billion while Malaysia's Petronas alone is valued at $9.4 billion. Vietnam ranks six of seven amongst listed countries in ASEAN for brand worth. This situation is caused primarily by failure to recognize and enforce IPR.

"A broad range of counterfeit products continue to be sold in the Vietnamese market, including garments, accessories (e.g., sunglasses, handbags, etc.), food products, wines and spirits, cosmetics, pharmaceutical products, computer software, vehicle spare parts, engine lubricants, electro-mechanical products and consumer electronics."

This situation is exacerbated by an increasing value of local brands, which has seen an equal increase in counterfeit activities. In addition, Vietnam has long borders with several ASEAN countries and China. The latter being the world's largest counterfeiter. There are many cross-border issues that contribute to the illegal import and export of counterfeit goods. In addition, Vietnam relies on administrative penalties to enforce IPR rather than civil or criminal laws.

While Vietnam has a relatively good legal framework in place, as a result of WTO accession and the concomitant agreements entered to do so, enforcement remains an issue. Vietnam ranks 43 out of 45 countries on a US Chamber of Commerce ranking of physical counterfeiting and sufficiency of IPR protections. The International Property Rights Index, an international ranking, listed Vietnam as 76 of 125 globally.

In 2015, 78% of all software installed on computers in Vietnam was pirated, the second highest piracy rate in ASEAN, only falling behind Indonesia, while Singapore has a 30% piracy rate. Pirate websites in Vietnam receive 29 times more visitors than legitimate content

providers. A recent police raid in Ho Chi Minh City uncovered a production facility capable of making 15,000 CD/DVDs a day.

Twenty-three point two percent of cigarettes consumed in Vietnam are illicit causing an estimated revenue loss to the country of over $200 million. The two leading illicit brands were found to contain excessive toxic chemicals and nicotine levels above those outlined by government regulation. Vietnam may be used by organized crime internationally as a manufacturing place for illicit tobacco products.

Counterfeiting also affects books and journals, pharmaceuticals, and consumer goods. For example, 47% of condoms sold on the Vietnamese market are of "poor quality," thus increasing not only pregnancy risks, but risks of infection by STDs and HIV, and this is particularly problematic as many of these condoms are sold as counterfeits under well known international brand names.

Pesticides are a prime area for counterfeiters. With Vietnam being a major exporter of agricultural products, fake pesticides can threaten international recognition and allowances of Vietnam's exports as safe and sanitary, agricultural productivity, and farmer safety.

It is estimated that 60% of all wine imported into Vietnam bears fake stamps, while an investigation discovered that brandy sold at Lao Bao border stores was 98% fake. "Violators substitute poor-quality alcohol into used bottles of wine to trick consumers, or fake the bottle, cork, labelling and even certification stamps to sell the products."

Cosmetics counterfeits are widespread. One estimate puts the total at 50% of all cosmetics in Vietnam as counterfeits of well-known brands. Often these goods are imported from China as spare parts or components and then labeled with "Made in Vietnam" stamps and materials.

While this situation has improved in recent years, the current maximum fine remains at VND 500 million, around $20,000. Most incidents of counterfeiting are handled with administrative fines, a minimum fee with little threat to counterfeiters who then return to their illegal activities. If Vietnam wishes to improve its brand value, increase economic proportion of private enterprise, and attract foreign investment, then it must address the failures of its IPR protection regime.

You can access the full report here:

https://iccwbo.org/content/uploads/sites/3/2019/05/bascap-vietnam-country-report-translation-vietnam-eng.pdf

CHAPTER 8 International Trade

Manufacturing Bears Promise

(5 November 2018)

A couple weeks ago I read an article about the manufacturer of certain Apple products looking to move manufacturing to Vietnam. Now, this wasn't Apple's decision, this was the decision of the Chinese manufacturer. They wanted to move the plant to Vietnam. This is interesting for several reasons.

First, it is a sign that China's economy has improved dramatically over the last several decades, leading the salary of simple manufacturing jobs to rise to the point where manufacturers in China are looking to outsource their own jobs.

There is the second intriguing feature, outsourcing from China. The fact that China is outsourcing, and specifically to Vietnam, is fascinating, not only does it testify to salary differentials, but to the similarity between cultures, at least similar enough for Chinese businesses to feel comfortable in Vietnam.

Third, this means that Vietnam's manufacturing capabilities have improved to the point where the high-tech industry is looking to Vietnam for options. This is where the money is in manufacturing, and this is where the possibilities for a future economic miracle gain form. If Vietnam can successfully transition into high tech manufacturing, working on microchips and smart phones, then the technology will only continue to improve as technology transfers accelerate to allow the manufacturing processes to improve.

All of this means that Vietnam is growing and learning, and that its capabilities are improving. Vietnam may be a developing country, but this signals a way point on the road to development, a way point that could lead quickly to a country of greater wealth and greater prosperity for everyone.

INCO Terms in Vietnam

(12 November 2018)

A couple of weeks ago I mentioned the INCO Terms, a set of rules designed to regulate the international shipping of goods regardless of method of shipping. I want to talk more about these rules and how they affect shipping in Vietnam.

The INCO Terms are a set of preset rules published by the International Chamber of Commerce that discuss the different aspects of international shipping. There are eleven rules as of the last iteration which was published in 2010. These rules consist of two subgroups, one that covers all modes of shipping, and one that covers international water transport.

Perhaps it is easiest to understand the INCO Terms as simply a set of international laws that are applied at the behest of the parties to a transaction. They are referred to with simple three letter abbreviations and in their simplicity, contain rules for place of delivery, responsibility for insurance, change of ownership, and other issues which are important for shipping in all aspects. Usually the INCO Terms are cited on the Bill of Lading or other shipping documents and often contain much of the entire contract between shippers and transportation companies.

For Vietnam, the INCO Terms are important because of the role the country plays in the international supply chain. Often goods are shipped into Vietnam for processing or manufacturing and then shipped back out again. This means that there are frequently two or more shipping contracts involved with anyone manufacturing facility's tasks.

Because of this frequent shipping, it is important to understand the INCO Terms, especially for companies and lawyers. Often these terms are the only thing that govern a transport, and when the transport has an issue, as, for an example, the wheat in a ship's hold is rotten because the water content was too high, then the INCO Terms govern the dispute.

You can find the INCO Terms for purchase at the International Chamber of Commerce site here. You can also find an explanation of each of the codes on Wikipedia at the site here.

INCO Terms are important for a maritime nation like Vietnam, and they will only become more important as Vietnam moves forward with its vision of becoming a maritime center of international trade.

EVFTA Signed in Hanoi

(1 July 2019)

The Europe-Vietnam Free Trade Agreement (EVFTA) was signed by representatives of both parties on Sunday in Hanoi. While this is not the final step for execution of the agreement, this is a major milestone and will, more than likely, lead to adoption by the EU.

In this article, here, Nicolas Audier discusses the benefits of the EVFTA in much more depth than I possibly could as he has been involved with the negotiations in his role with the EUCHAM here in Vietnam.

In this article, here, the South China Morning Post announces the news.

The EVFTA is an important step for Vietnam's entry into the global economy. It has been a long time coming with negotiations initiated back in 2012. The agreement, should it be adopted by the EU later this year, will allow for the importation of many, and eventually all goods between Europe and Vietnam. There are also sections covering certain services for European investors that were not included in the WTO Agreements acceded to over ten years ago.

Most exciting, though, is perhaps the inclusion of an investor dispute resolution forum for European investors. Vietnam has not become a member of relevant treaties that allow for investors to lodge disputes against the government for takings and other interference with their investments. That the EVFTA will include such dispute resolution procedures is a first, and important, step for Vietnam in entering the international trading community.

When I was in Laos we took advantage of such treaties to lodge protests and dispute resolution procedures against the government of that country because they had, in essence, taken our investment. That dispute is still ongoing the last I checked, but it is a forum which allows investors to take action against investor host governments in such a way as to protect their investments against arbitrary takings.

This has long been a loophole in Vietnam's investment scheme and with this EVFTA, a major avenue for taking action against such takings is now in place. An important aspect of international trade and a welcome sign of Vietnam's increasing globalization.

Sharp and the Trade War

(5 August 2019)

Sharp, the Japanese electronics giant, has announced plans to build a manufacturing site here in Vietnam according to Nikkei Asia here. This is the latest news in the continuing trade war between the United States and China and provides an opportunity to examine the impacts of the trade war on a country like Vietnam.

Much has been written about the benefits brought to the country by the trade war, particularly the increase in manufacturing as international producers switch their sites from tariffed China to other countries. Vietnam has been at the forefront of this migration because of its proximity to China and its ability to share in many of the same supply chains that fuel manufacturing in China.

That said, there is still much to be considered.

According to Dan Harris of Chinalawblog.com the conflict between China and the United States is the New Normal. This is troubling in some ways because it is a threat to a geopolitical balance in the Pacific, one that has been timorously growing for several decades since the end of the Cold War and which is now on the way to complete decoupling. For Vietnam, which shares a border with China, a volatile China is a danger. Not just militarily–as the country has invaded Vietnam before–but economically.

I say this because China is one of the largest investors in Vietnam, and while that may prove beneficial for Vietnam now, there are other possibilities. Trump himself has called Vietnam the "worst abuser" and threatened tariffs. If Vietnam because the drainage ditch for Chinese manufacturing there is the threat that Vietnam will be as equally on the hook to the Trump administration as China, and that means tariffs imposed on Vietnamese goods simply because they involve Chinese supply chains.

That threat, which is small yet, is still looming. The United States has never been shy about the fact that it likes to lump Vietnam and China together as a communist bloc. They didn't even hide the fact that they considered Vietnam to be essentially China when they classified Vietnam as a non-capitalist economy for anti-dumping purposes several years ago. They simply said, because Vietnam is like China, they aren't capitalist. Not only is that offensive racially, but it's untrue economically as well.

While Vietnam has a socialist history, see Ho Chi Minh, there is also a long history of economic reform. Vietnam did not suffer the same political consequences that China did under Mao, and Vietnam has been keen on the dollar economy for decades. Yes, the Vietnamese Party is also very concerned with maintaining power, but the liberalization of the Vietnamese economy has been mostly for the good, and has done a lot to invite capital into the country, capital which acts as a liberalizing cycle.

But despite the differences, the United States views Vietnam as largely China, and that's a threat. One that is definitely concerning in light of the increased tariffs against China, and Trump's obviously antagonistic stance against Vietnam.

EU-Vietnam Take Next Step to EVFTA

(6 April 2020)

This week the European Union took the final step in its procedure for approving the EVFTA/EVIPA trade deals with Vietnam. All that is left is for Vietnam's National Assembly to give its opinion on the matter and the deal will, officially and finally, be sealed.

The EVFTA and EVIPA are the fruit of over eight years of negotiation between Vietnam and trade representatives of the European Union. The overall agreement consists of two parts, the free trade agreement (EVFTA)–which outlines the reduction of tariffs on goods and services between the two countries–and the investment protection agreement (EVIPA)–which codifies investment protections in each country and creates a dispute resolution mechanism for disputes regarding the two agreements and for investors whose rights as guaranteed by the agreements are violated by a host government–which work together to create one of the most liberal free trade agreements signed to date.

Signed last year and still in the process of receiving the final approvals from legislative bodies in the two countries, it is anticipated that the two agreements will enter into force sometime later this year. For Vietnam, these agreements mark the opening wide of an important and powerful trade partner while for the EU, this agreement–coming on the heels of their agreement with Singapore–is the next step in coming to terms with ASEAN as a whole market.

This article will examine the specifics of each agreement and outline relevant mechanisms that will affect investors and businesses across the two markets. It will first examine the EVFTA–though not looking at specific commitments in goods or services–and then the EVIPA and its mechanism for resolving investor / state disputes in relation to the two agreements.

EVFTA

The EVFTA is what it sounds like, a free trade agreement. According to the European Commission, it is the "most ambitious free trade deal ever concluded with a developing country." It covers individual tariff commitments across almost all goods and services sectors as well as other aspects important to liberalized trade.

Ultimately, the bread and butter of the agreement is the near complete removal of all tariff barriers–over 99% of customs duties–on exports to both markets to be phased in over the next decade. In addition to tariff relief, the agreement addresses non-tariff barriers to trade such as compliance with and acceptance of international standard certifications. This is especially important in the motor vehicle and pharmaceutical sectors where Vietnam has required country-specific testing.

The agreement also opens each market's government contracts to bidding by providers from the other market. Both markets will also make it easier for service suppliers to operate in the other's territory, removing barriers to registration and certification.

One of the most important aspects of the

agreement is Vietnam's commitment to comply with international standards in several sustainable development sectors. From labor law to intellectual property, Vietnam will strive to improve its enforcement and compliance in order to protect EU investments in the country.

Finally, the EVFTA will open up some previously closed sectors to investment from the EU. These sectors include the manufacture of food, tires, and construction materials. And while the EVFTA provides the bulk of line-item commitments, perhaps the most innovative part of the combined treaties lies in the EVIPA.

EVIPA

The first substantial commitment of the EVIPA is the National Treatment clause. This is a common element in trade treaties, but it also creates a major guarantee for foreign investors from each of the parties. Both the EU and Vietnam agree to grant treatment to investors of the other party "no less favourable than that it accords, in like situations, to its own investors and to their investments."

The other commitment here that harks back to the Unequal Treaty System in China is the Most Favoured Nation Treatment. This guarantees that both parties to the EVIPA will treat the investors from the other party at least as well as they treat investors from any other country. This means that if Vietnam enters into a trade treaty with, say, the United States, it cannot offer better terms than are included in the EVFTA without also granting those improved terms to investors from the EU.

Each party's government, in treating with investors from the other party, must act fairly and equitably. De facto violations of this standard include the following actions by a government against investors from the other party:

(a) A denial of justice in criminal, civil or administrative proceedings;
(b) A fundamental breach of due process in judicial and administrative proceedings;
(c) Manifest arbitrariness;
(d) Targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;
(e) Abusive treatment such as coercion, abuse of power or similar bad faith conduct;

Furthermore, the EVIPA guarantees that a party will not expropriate or nationalize an investment of an investor from the other party unless:

(a) For a public purpose;
(b) Under due process of law;
(c) On a non-discriminatory basis; and
(d) Against payment of prompt, adequate and effective compensation.

All of these elements must be met in order for the expropriation not to be in violation of the party's commitments in the EVIPA. One party's government cannot arbitrarily expropriate an investment of the other party's investors without being in violation.

Finally, the EVIPA guarantees that investors may transfer funds cross border without restriction for most any legitimate purpose, and that an investor may transfer rights assigned to it under contract to any party of its choosing and that such subrogation will be recognized by the authorities of the host party's government.

The above guarantees and commitments provide the basis upon which the dispute resolution mechanism is enforced. A violation of the above guarantees and agreements will trigger the dispute resolution mechanism and provide investors the ability to pursue reparations from the violating government.

The EVIPA provides for two types of dispute resolution. If one of the Parties violates the EVFTA the wronged party may proffer notice to the party perceived in violation and initiate consultation. Consultation may escalate to mediation. Mediation may escalate to arbitration. This is consistent with contractual relations and not terribly innovative as concerns Vietnam.

The second type of dispute resolution, however, is new to Vietnam and may prove a major driver for institutional change in the country. This mechanism is for disputes between investors and the party itself. This provides that, for example, an investor from Germany that invests in Vietnam may institute dispute resolution proceedings against the government of Vietnam for certain violations of the investment protections.

If one of the parties violates the investment protections set out in the EVIPA, then the investor may attempt negotiations with the government in violation. They are also, if the violation results in damages, to have attempted action in the courts in the territory of the violating party, however, if such a violation exists it is likely that the courts will not provide relief. Assuming such attempts at relief have been exhausted, the investor may sue for consultation with the party it deems in violation.

At any point in the process, the parties may turn to mediation. Mediation will not affect either party's legal standing to pursue any other remedy available under the EVIPA.
Failing resolution through consultation, the investor may submit a claim. Claims are brought before the ICSID under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. Using the Additional Facility Rules, an arbitration tribunal is established and procedures are followed according to UNCITRAL rules which will, eventually, lead to an arbitral award.

In order to implement this arbitration procedure, the parties equally fund the establishment of a nine-person tribunal that oversees the resolution of disputes between investors and a party. This tribunal shall be supplemented by an appeals tribunal, also set up and funded in cooperation between the parties.

This dispute resolution process creates an atmosphere to foster bilateral cooperation. It also protects foreign investors from one party investing in the other party from expropriation and other evils that have been seen commonly to occur. It is the first time that Vietnam has allowed for investor action against its government in an FTA and may well prove the beginning of a new era in FDI in Vietnam.

The Facts about CISG in Vietnam

(22 September 2020)

Last week I wrote about the freedom of contract in Vietnam (see "Freedom of Contract in Vietnam"), and only briefly touched on an important international convention which Vietnam acceded to a few years ago. The Vienna Convention for the International Sale of Goods, or CISG for short, is an important set of rules for anyone buying goods from Vietnamese producers, manufacturers, or exporters.

What Is CISG?

In the late 1960s, the international community got together and started developing a unified set of contract principles that could apply to the sale of goods across borders. At the time the world was beginning its half century road towards globalization and international shipment, and sale/purchase of goods was becoming increasingly common. With each country having its own set, and sometimes many sets, of contract rules the UN decided to promulgate rules for sales contracts that could be adopted by every country and applied by the parties to such contracts. In this way they hoped to limit disputes and legal costs for cross-border businesses as well as ease the complications for negotiations and eventual dispute resolutions that would inevitably arise.

The Convention, originally signed in 1980, has since been acceded to by 93 parties around the world. On 18 December 2015 (and having entered effect on 1 January 2017), Vietnam acceded to the convention thus allowing parties to contracts for the international sale of goods to declare such contracts governed by the set of rules enumerated in the convention. CISG has been so successful that when I went to law school, we studied it side by side with the local contract laws of California. One hundred and one articles long, CISG governs the formation of contract, the sale of goods, performance and avoidance of obligations, passage of risk and remedies for both parties. It provides an essentially comprehensive set of rules for the creation, performance, and enforcement of contracts related to the international sale of goods.

Why CISG?

There are several reasons why CISG is important and why, as a seller or buyer of goods to be shipped across Vietnam's border it is a good idea to consider CISG as an alternative to the application of local Vietnamese law. From the ease of contracting to increasing understanding between the parties to the transparency of dispute resolution application of CISG is beneficial to foreign purchasers but also to Vietnamese sellers.

According to a document prepared by the Vietnam International Arbitration Center, or VIAC, prior to Vietnam's accession to the CISG convention, the benefits for Vietnamese companies of CISG include:

- Cost savings in negotiating applicable law provisions,
- Reduction of costs and difficulties of applying foreign law to transactions as there will no longer be a need to research

foreign law in order to comply to foreign counterparties' demands,

- Elimination of the need to analyze conflict of laws at an international level during dispute resolution processes as CISG will automatically apply in most cases,
- Provision of access to modern rules drafted with modern issues in mind,
- Equalization of the playing ground as both parties have to deal with a "foreign" or international law rather than giving one party the advantage of their own jurisdiction's rules, and
- Unlike in some countries CISG was designed to balance equality and justice between the buyer and seller and thus the rules are fairer than many country's contract laws.

Many of these advantages also accrue to foreign buyers seeking to enter into contracts for sale of international goods from Vietnam. Rather than having to negotiate the application of a foreign law that might be more developed and, thus, more beneficial to a foreign purchaser they can rely on CISG as an internationally agreed set of rules to guarantee and protect their interests in a less developed market. This reduces legal fees and stress during negotiations as the set of rules governing the transaction can be assumed. In addition, CISG can be assumed to be understood by local courts should they be the venue for dispute resolution where foreign laws might be difficult to research and understand for local court officials. Thus, the entire process is simplified by having a multilaterally agreed set of rules in place before negotiations even begin.

When Does CISG Apply?

CISG has limited applications. There are some types of manufactured goods that don't fall under its scope and some other types of goods such as household goods or large machines that may also fall outside its scope. Here, I cite Professor Gizim Alper of Pace University School of Law who wrote as follows:

The "subject- matter" of the CISG is limited; it only applies to goods and excludes services. It has been stated under article 3(2) of the CISG that the CISG "does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labor or other services." (Article 3(2) of the CISG). As such, similar to the U.S. Uniform Commercial Code (UCC) Article 2, hybrid contracts that mainly consist of services as their main obligations are not governed by the provisions of the CISG.

Similarly, some quasi-goods or categories of goods have also been excluded from the subject-matter of the CISG. Accordingly, under article 3(1), if the party ordering the goods undertakes to supply a substantial part of the manufacturing material necessary to produce such goods, these contracts fall outside the scope of application of the provisions of the CISG. However, any other contract for the supply of goods which are yet to be manufactured is covered by the provisions of the CISG. In addition, it should also be noted that the CISG does not apply to personal and household goods, intangible property such as stocks and negotiable instruments and vessels such as ships and aircrafts. This has been set forth under article 2 of the CISG: Article 2 of the CISG states that the CISG does not apply to "sales: (a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use; (b) by auction; (c) on execution or otherwise by authority of law; (d) of stocks, shares, investment securities, negotiable instruments or money; (e) of ships, vessels, hovercraft or aircraft; (f) of electricity."

The application of CISG, then, is not for everything, but if the goods contemplated fall

within its scope, the next relevant question becomes:

How Does CISG Apply to My Contract?

Again, I return to paraphrase VIAC's pre-accession notes. According to that document there are four cases in which CISG will apply:

1. When both parties are located in countries that are members of CISG,
2. When according to the principles of private international law the rules of a country that is a member of CISG apply,
3. When the parties to the contract agree that CISG will apply, or
4. When the organ resolving a dispute decides to apply CISG.

These four situations are taken from CISG itself, where they are codified. Even if a contract would appear to fall within the jurisdiction of CISG, however, there is, as in Vietnam, a great deal of faith in the freedom of contract on the international stage. CISG itself states that the parties to a contract that otherwise may fall within the application of CISG may choose not to apply CISG. In article 6 of the convention is stated:

"The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions".

Article 12 refers to reservations made by countries as to the form of the contract and does not apply to Vietnam. Thus, parties to a contract for the international sale of goods with one party in Vietnam may choose not to apply CISG even if it would otherwise apply automatically, allow it to automatically apply in the case of contract with a party from another state that is a member of CISG, or choose to apply CISG with a party that is from a state that is not a member of CISG. It can act, therefore, as an optional set of rules to govern cross-border contracts for the sale of goods.

Conclusion

The use of CISG in Vietnam is beneficial for both sellers in the country and for purchasers buying from those local producers. It eliminates time, costs, and stress from the entire transaction and provides transparency and ease of communication between the parties. Not only that but it is considered the law of Vietnam and the courts are, therefore, familiar with its application. It puts Vietnam on a level playing field with foreign purchasers and in many other ways creates an environment for the easy exchange of goods across the border.

What Trump's Currency Investigation Means for Vietnam

(5 October 2020)

I was going to write about selling alcohol this week, but over the weekend broke news that the Trump administration in the US has initiated a currency manipulation investigation against Vietnam, see article here. While this isn't something about which to worry terribly much in the hands of a country determined to abide by its international commitments, the Trump administration has demonstrated it does not deem such commitments worthy of fulfillment. As such, I thought it might be worth examining Vietnam's future if the Trump administration decides that Vietnam has been manipulating its currency.

What Is Currency Manipulation?

Currency manipulation occurs when a country, usually under the aegis of a central bank, takes an action to change the value of its currency, usually to devalue it, and such devaluation creates an advantage for that country in international trade. Devaluation is purposeful when the central bank uses its own currency to buy dollars. This decreases the value of the local currency. By decreasing its value, that currency manipulation increases the price of imports and decreases the price of exports, thus making exports for sale in foreign countries, particularly the United States, cheaper and more attractive. The logic is then continued to suggest that these cheaper imports undermine the products of the importing country's own goods and thus create an imbalance in the trade relationship.

Currency manipulation usually involves United States dollars as the US dollar is considered the primary reserve currency in the world. It may be conducted using other currencies, however, if the situation is specific enough. Take the instance of Laos whose currency is pegged to the Thai Baht. It could, conceivably, use Kip to buy Baht and thus devalue its currency for exports to Thailand. This would theoretically impact Thailand's trade relationship with Laos, but would not go much beyond its borders.

Currency manipulation is not a trade offense such as dumping or subsidies giving rise to internationally recognized remedies. In fact, it is not the subject of any existing trade agreements. Currency manipulation is a distinct act and has its own distinct results.

How The U.S. Reacts To Currency Manipulation

As the United States is the largest victim of currency manipulation–because of the US dollars position globally–and because there are no international agreements governing the behaviors of sovereign banks regarding their actions in manipulating their country's currencies, it is the arbiter of its own response.

Every year the US Treasury Department conducts a review of major trading partners to examine its currency behavior. If that behavior is deemed abnormal an investigation may be triggered. The investigation will examine

the actions of that trading partner to decide whether to label that country a currency manipulator. If such label is assigned, and only if that label is assigned, the president–through treasury–may take certain actions. Those actions are limited, however, and include:

- Urging the currency manipulator to implement policies to address the causes of the undervaluation of its currency, its significant bilateral trade surplus with the United States, and its material current account surplus, including undervaluation and surpluses relating to exchange rate management;
- Express the concern of the United States with respect to the adverse trade and economic effects of that undervaluation and those surpluses;
- Advise the currency manipulator of the ability of the President to take action under subsection (c), which includes:
    - Prohibiting the United States International Development Finance Corporation from approving any new financing (including any insurance, reinsurance, or guarantee) with respect to a project located in that country on and after such date.
    - Provisionally prohibit the Federal Government from procuring, or entering into any contract for the procurement of, goods or services from that country on and after such date.
    - Instruct the United States Executive Director of the International Monetary Fund to call for additional rigorous surveillance of the macroeconomic and exchange rate policies of that country and, as appropriate, formal consultations on findings of currency manipulation.
    - Instruct the United States Trade Representative to take into account, in consultation with the Secretary, in assessing whether to enter into a bilateral or regional trade agreement with that country; and/or
- Develop a plan with specific actions to address that undervaluation and those surpluses.

These are the only actions provided under US law to the President to take against a country deemed to be a currency manipulator. Therefore, these are the only actions, in theory, that Vietnam need worry about if the United States's investigation returns such a result.

How The Trump Administration Is Manipulating The Law

Unfortunately for Vietnam, the Trump administration is not abiding by international, nor domestic law. In justifying tariffs against China over the last couple of years, the Trump administration relied on currency manipulation charges. It then turned to section 301 of the Trade Act of 1974 which allows the President to take additional action against a trading partner, regardless of the status of any trade agreement, if the US Trade Representative finds that the act harms US interests under a trade agreement.

The United States is thus required, under its own law, to find a trade agreement which is being violated and, if such violation is not remedied under subsequent agreement with the US, it may impose tariffs on that country's goods. This is the clause which the United States used to justify its trade war with China, citing violation of intellectual property agreements between the two countries. Because currency manipulation is not a violation of any existing trade agreements, that reason alone is not enough to trigger the tariffs allowed under section 301.

The worry is, though, that if the Trump

administration deems Vietnam to be a currency manipulator it will look through Vietnam's WTO agreements–the only trade agreements extant between the US and Vietnam–and find a violation upon which it can hang the advantage of the United States sufficiently to allow it to impose tariffs. This it will be able to do because Vietnam, inevitably, has violated some terms of its WTO commitments–something which became almost a game for lawyers when Vietnam first joined the WTO, to identify violations–in such a way that the United States can claim harm to its interests.

Thus, the Trump administration will label Vietnam as a currency manipulator–a label for which there is little actual consequence–but then, justify tariffs which it will publicize as because of that manipulation on a minor violation of another agreement. This is what the Trump Administration Might Do.

Vietnam's Remedies Against U.S. Actions

If the Trump administration takes such actions, Vietnam will be able to make a claim at the World Trade Organization that the United States has violated its WTO commitments. And the WTO will, in turn, agree, as they did with China recently, here. The United States will then appeal the ruling to a tribunal that is already stymied by US refusal to comply. Vietnam, again, might eventually win. If it does, however, because the United States is a 300 kilogram gorilla in a world filled with 20 kilogram test agreements, nothing of much value will happen and the United States will simply ignore the WTO ruling.

Of course, that might all change in November if the Trump administration is voted out of office. Trump's opponent in the November elections, Joe Biden, is more liberal in many ways, but he has signaled he will not necessarily revoke the tariffs imposed on China, nor many of the other policies of the Trump administration against that country. Whether that will transfer to China's neighbor is uncertain. What is certain, though, is that Biden is more likely to abide by the US's international agreements and US law and not proactively seek to impose gerrymandered sanctions on a major trading partner simply because.

Vietnam in the RCEP

(16 November 2020)

This article briefly examines some of the advantages and disadvantages for Vietnam in the RCEP, a multilateral FTA that was signed yesterday in Hanoi, Vietnam.

Yesterday, 15 November 2020, fifteen Asia-Pacific nations signed the Regional Comprehensive Economic Partnership, or RCEP, a multi-lateral free trade agreement. The signing comes as the crowning achievement of Vietnam's chairmanship of the ASEAN community and the 2020 ASEAN Summit held in Hanoi and virtually.

The RCEP includes all the members of ASEAN plus Australia, China, Japan, Korea, and New Zealand. While ASEAN has existing free trade agreements with the additional countries individually, this is the first time some of those countries will be entering into an FTA between them. The RCEP contemplates nearly a third of the global population and nearly a third of the global economy. It is the largest FTA entered into in the history of multilateral FTAs.

For Vietnam in the RCEP, one of the ASEAN members of the RCEP, there are several advantages:

- The RCEP provides for consistent rules of origin across the treaty area. This means that goods partially originating in one country can use the same rules to determine if those goods truly originate there whether they are shipping to Australia or Vietnam. This eliminates the need to consult numerous FTAs and adapt different procedures for different countries in the RCEP for the same goods. In addition to rules simplifying import/export processes and costs, the simplified rules of origin will reduce time and expenses for Vietnamese exporters, thus increasing profit margins and making Vietnamese goods more competitive in RCEP markets.
- The RCEP also standardizes rules regarding the preservation of trade competition. Provisions for anti-dumping and countervailing duties are allowed and made consistent across the region. This will supersede domestic trade remedies. Interestingly, the RCEP does not create a dispute settlement mechanism to challenge a country's imposition of trade remedies against another member state.
- The RCEP also removes certain restrictions in the telecommunications, finance, and professional service sectors, making it easier for service providers of member states to cross borders and open up shop in other member states. The addition of new tariffs on goods are prohibited and investment guarantees are codified to preserve cross-border FDI.

Unfortunately, there are also some disadvantages for Vietnam in the RCEP that were pointed out in an article posted on VN Express. Two such disadvantages include:

- In addition to opening RCEP countries to trade in services, the agreement applies national status in trade in goods for all goods allowed under Article III of GATT 1994. While this doesn't change much for inter-ASEAN trade, it does reduce tariffs of many RCEP countries for Chinese goods.

Vietnamese producers will be forced to compete, domestically, with a new range of lower cost goods from China. This will force Vietnamese producers to either reduce prices, and profits, to compete with imported goods from a supply chain that is larger and more established. Though limited, there are some industries that will be hit by this reduction in tariffs.

- Another disadvantage comes from the entry-for the first time-of Japan and China into an FTA between the two parties. By reducing tariffs and competition for Chinese goods in Japan, those goods sourced from China will enter into direct competition with Vietnamese goods exported to Japan. This means that, in one of Vietnam's largest export markets, direct competition with China will commence and cause hardship for some exporters who cannot set prices competitively with the powerhouse to the north.

Aside from these disadvantages, much of the RCEP repeats what is included in existing FTAs for regional parties. It can be seen as a China-led FTA in response to the CPTPP that had been initiated by the United States during the Obama administration but was abandoned under Trump. The RCEP serves to unify the Asian-Pacific region with China and creates a feather in that country's cap in the continuing trade conflicts with the United States.

Overall, Vietnam in the RCEP will have minimal effect, though it will experience some economic growth, the results will be less stunning compared with the EVFTA that was enacted earlier this year (for reference to that agreement see our article here). It is a sign of Vietnam's continuing emergence as a participant in globalization and world trade, however, and in that respect, Vietnam in the RCEP is a positive move for the country.

CHAPTER 9 Inward Investment

INDOCHINE COUNSEL
Business Law Practitioners

New Decree for Trading and Distribution Rights of Foreign Invested Companies in Vietnam

(3 May 2018)

On 15 January 2018, the Government has promulgated Decree No. 09/2018/ND-CP detailing the Commercial Law and the Law on Foreign Trade Management on the purchase of goods and related activities of foreign investors and foreign invested companies in Vietnam ("**Decree 09**"). This new decree took effect from the date of promulgation and replaced Decree No. 23/2007/ND-CP dated 12 February 2007 ("**Decree 23**").

Business license requirement is lifted for certain import and distribution rights

Except for cases of implementing import rights and wholesale rights of lubricating oils and greases as stipulated in point b, clause 4, Article 9 of Decree 09, foreign invested economic organizations or foreign invested enterprises (the "FIEOs") are not obligated to obtain Business Licenses when implementing the export right, the import right and the wholesale right.

Expanding scope of organizations which must apply for the Business License and license for setting up a retail outlet

Decree 09 expands the scope of organizations which may apply for Business Licenses to include foreign investors not belonging to countries, territories participating in international treaties to which Vietnam is a member; and expands the scope of goods and services subject to Business License to include the ones on which Vietnam has no commitments. The foreign investors must satisfy certain conditions corresponding to each of the aforesaid circumstances. Business duration for these cases is five (5) years.

The economic organizations having retail outlets in Vietnam, which become FIEOs or economic organizations stipulated in points b and c, clause 1, Article 23 of the 2014 Investment Law as a result of capital contribution or acquisition, must apply for a Business License and license for setting up a retail outlet (the "**Retail Outlet License**").

New restrictions of Decree 09

- Many business activities and sectors which were used to be exempt from the Business License requirements under Decree 23 are now subject to Business License requirements. These business activities and sectors include: (i) logistics services, except for certain logistics services for which Vietnam has committed to open market under an international trade agreement to which Vietnam is a party, (ii) leasing of goods, excluding finance leasing and leasing for construction equipment

with operator, (iii) commercial promotion services, excluding advertising service, (iv) commercial intermediary services, (v) e-commerce activities, and (vi) service of organizations of bidding.

- Only FIEOs which have been licensed to operate retail outlets in the form of supermarkets or convenience stores may be granted the retail right for rice, sugar, video recordings, books and magazines (for retailing in those licensed retail outlets).
- To obtain a Business License, an FIEO which has operated in Vietnam for one (1) year or longer must obtain a confirmation from the relevant tax authority that it has no outstanding tax obligations.
- Under the repealed Decree 23, an FIEO was not required to obtain a Retail Outlet License for the first retail outlet, Decree 09 now stipulates that even for the first retail outlet, the FIEO must apply for the Retail Outlet License and satisfy certain conditions. If the first retail outlet is in the same province/city with the head office, the company is entitled to apply for the Business License and the Retail Outlet License at the same time.
- For the outlets in addition to the first one, if satisfying the following conditions, these outlets shall not be subject to the economic needs test ("**ENT**"): Having an area of less than 500m2, being in shopping centers, and not being in the form of convenience stores or mini supermarkets. The definition of "additional retail outlet" also has been changed to include retail outlet(s) under the same brand operated by another FIEO. This means that if an FIEO establishes a retail outlet, which is the first one owned by such FIEO but operated under the same brand as a retail outlet owned by another FIEO, such retail outlet is still treated as an "additional retail outlet" and therefore subject to ENT requirements.
- According to Decree 09, the licensing authority is now the Department of Industry and Trade ("**DOIT**") instead of the Provincial Peoples Committees as stipulated in Decree 23. For some cases of granting the Business License, DOIT must consult the Ministry of Industry and Trade "**MOIT**") and other relevant ministries in advance.

Licensing Procedures For Foreign Investors Clarified

(3 May 2018)

The simplification of administrative procedures has now been widely acknowledged as an aim of the Vietnamese government as part of its wider plan to attract more foreign investment.

Understanding the utmost need for a more effective and simpler legal framework for foreign investors to invest in Vietnam, the Ministry of Planning and Investment ("**MPI**") has created a mechanism allowing the interconnection between the investment registration procedures and enterprise registration procedures (the "**Interconnection Mechanism**"). Such Interconnection Mechanism took effect as of 15 June 2017 by issuance of Circular No. 02/2017/TT-BKHDT guiding the mechanism for cooperation in processing applications for investment registration and enterprise registration submitted by foreign investors ("**Circular 02**").

It is expected that, with Circular 02, the investment registration procedures as well as the enterprise registration procedures shall take considerably less time and effort from the foreign investor. In brief, the Interconnection Mechanism lets the foreign investor submit one dossier for two procedures to register for its investment project, instead of two separate dossiers as before.

Principles for applying the Interconnection Mechanism

The Interconnection Mechanism does not eliminate the former procedures. In fact, the foreign investor, at its own discretion, can select to use either the Interconnection Mechanism or the separated procedures already in effect to register for investment projects in Vietnam. In other words, the choice of administrative procedure has now been given to the investor and in consideration of other factors (i.e. the complexity of the documents), the investor can itself select the most effective one.

In addition, the investor shall no longer be required to submit two copies of the same document if the Interconnection Mechanism is chosen. Before the issuance of Circular 02, the documents with regards to the investment registration procedure and enterprise registration procedure could not be submitted at the same time so the investor had to submit separate copies of documents in each procedure.

Cases in which the Interconnection Mechanism is applied

The Interconnection Mechanism applies in the following cases:

- Foreign investor or foreign invested economic organization invests in Vietnam under the form of establishment of economic organization;
- Foreign investor or foreign invested economic organization invests in Vietnam under the form of conducting acquisition;

- Foreign investor or foreign invested economic organization concurrently amends the enterprise registration content and investment registration content under Article 4.3 of Circular 02.

Considerable benefit of Interconnection Mechanism

Investment under the form of establishment of economic organization in Vietnam requires the investor to first obtain an Investment Registration Certificate (the "**IRC**") through the investment registration procedure. However, until the issuance of the Enterprise Registration Certificate (the "**ERC**") through the enterprise registration procedure, the economic organization will then be established officially and such name will be recognized by law. In practice, therefore, under some circumstances the investor was granted an IRC but rejected the ERC when conducting procedures for enterprise registration. The common reason for such rejection was that the name of the enterprise appearing in the IRC has already been registered by another entity during the processing time for issuance of the IRC. This proved problematic for investors and their advisers.

According to the Interconnection Mechanism, the dossier for obtaining an IRC as well as an ERC must be submitted at a single time, hence, the enterprise name shall be protected by the time the competent bureau announces the proper submission.

It would thus appear that the MPI is seeking to simplify the process of submitting proposals to the proper authorities to register investment projects in the country. It is hoped that this change will not only simplify, but also expedite procedures for foreign investors.

Legal Formalities in Indochina

(15 October 2019)

Formalities. Time consuming, seemingly needless, but so very important.

When I was in Laos, I worked for an investment fund that offered some private parties loans. I was in charge of securing those loans. I did my due diligence, researched the secured transaction law–which was fairly simple–and drafted sufficient contracts to protect the fund. But part of the process was notarization of the contract in order to register the security with the State.

Now, in Laos, there is only one agency which notarizes documents, and that's a ministry–I forget which one now. One loan we gave was secured by a vehicle and we successfully notarized that loan and registered the security over the car, which was a Mercedes if I remember correctly. But this loan was secured by real property.

We managed to get the borrower to sign the contract, and we managed to get one of the signatories to show up at the notary, but not the rest. We tried several times but couldn't secure the notarized signatures of all the signatories to the loan. This was important, too, because it was a relatively high risk loan.

The head boss inquired after the loan and legal told him it wasn't secured yet. But for some reason he proceeded with fulfilling the loan and paying out the rather large sum. Now, as legal, we were obsessed with finishing the formalities, so we continued to try to get the loan documents notarized by all of the borrowers. This didn't work, however, and we were left with multiple phone calls unanswered and needless trips to their address.

Lo and behold, three months later, the borrowers defaulted on the loan. We didn't have security for the loan and couldn't proceed with collection against the real property because the loan documents weren't properly notarized and the security subsequently registered over the property. We were left with self-help options that involved more phone calls and visits to the address of the borrowers.

Admittedly, the courts of Laos probably wouldn't have enforced the security anyway, considering everything we knew about them, but we didn't have the proper formalities accomplished before performing the contract, or issuing the loan. That's a big problem.

Formalities may seem needless, may seem like they are a pain in the butt, but they are very necessary and are there for a reason. The government of the local jurisdiction wants to see a certain thing happen. They've issued laws and regulations. They expect investors to follow those laws. And it behooves investors, especially those unfamiliar with Indochina who are coming into the region for the first time, to conform to those regulations.

That's why it's vital you consult with lawyers or other qualified personnel before signing and performing a contract in Indochina. You don't know the law, and you don't know what all is required of you to ensure that you can enforce the contract should the other party fail to perform its obligations under that contract. So pay heed to formalities. They are vital.

Repatriating Investment Funds from Vietnam Part I: Foreign Indirect Investment

(5 June 2020)

When a non-Vietnamese citizen wants to invest in Vietnam there are a few questions which come up at the very beginning. One of them–and I've worked on several informational memos about this–is how they repatriate their investment, and any profits, from Vietnam when they are finished with the investment. The answer to that question depends on whether they are participating in indirect investment or direct investment (I'll get to definitions of those in a moment). This post is the first of two parts covering both types of investment and how a foreigner can get his money out of Vietnam after a successful investment. Today I'll discuss repatriation of foreign indirect investments.

What is an indirect investment?

Vietnamese law separates direct and indirect investment by the amount of control obtained by the investor in the entity in which she invests. Specifically, an investment is categorized as to the investor's involvement in the management of the enterprise. If, for example, a Swedish individual buys shares in a Vietnamese enterprise but does not appoint a board member or get involved with the selection of the managing director then she is an indirect investor. The investment can be in shares, capital contribution, bonds, or even a contribution to an investment fund legally existing in Vietnam so long as the investment does not grant the investor the function of management in the enterprise.

There are, in fact, seven enumerated investments which a foreign investor can participate in and still be categorized as conducting foreign indirect investment. They include:

1. Capital contribution to, and purchase and sale of shares or capital contribution portions in enterprises not specifically established to receive foreign investments of more than 50% of the shares, or with shares not listed or registered for trading on the Stock Exchange.
2. Capital contribution to, and purchase and sale of shares or capital contribution portions by foreign investors in enterprises with shares listed or registered for trading on the Stock Exchange.
3. Purchase and sale of bonds and other types of securities on the Vietnamese securities market.
4. Purchase and sale of other valuable papers denominated in VND issued by a resident being an organization licensed to issue such valuable papers within the territory of Vietnam.
5. Entrustment of investment in VND via a fund management company, securities company or other institution licensed

to conduct the professional activity of investment entrustment by the law on securities; or entrustment of investment in VND via a credit institution or foreign bank branch licensed to conduct the professional activity of investment entrustment by State Bank regulations.

6. Capital contribution to and assignment of capital contributions by foreign investors in securities investment funds and fund management companies in accordance with the law on securities.
7. Other forms of indirect investment stipulated by law.

If a foreign investor is contemplating one of the above investments, then they are conducting foreign indirect investment. In order to protect their investment, and to reap the benefits of it, they must proceed with certain procedures in order to repatriate their investment and any revenue from that investment further down the road.

How to properly make an indirect investment

FOREX

Transactions in Vietnam are made in Vietnamese Dong (VND) and all funds invested directly or indirectly in Vietnam must be in VND. At some point, then, even for indirect investments an investor must change their domestic currency into VND. This post isn't about FOREX, but understand that in order to transfer–through the banks–funds in a foreign currency into Vietnam an investor must open a foreign currency bank account in Vietnam. Not all banks in Vietnam are approved to offer this product so an investor should check with his preferred bank to make sure they are authorized to offer foreign currency accounts.

Another hitch is the question of FOREX authorization. Again, not all banks in Vietnam are authorized to conduct FOREX. Finally, before getting into more details, know that the bank must also be authorized to offer Indirect Investment Capital Accounts.

So, before selecting a bank for making an indirect investment in Vietnam, an investor should make sure they are authorized for these three products: 1. Foreign currency accounts, 2. FOREX, and 3. Indirect Investment Capital Accounts. Knowing the requirements before selecting a bank in Vietnam, then, an investor can move forward to understanding the process of making an indirect investment.

Indirect Investment Capital Accounts

Once an investor deposits the foreign currency in his foreign currency account and exchanges the currency for VND, there remains one step before he can invest that money in his chosen indirect investment. That step is to open an indirect investment capital account. An IICA is a purpose-built account that allows a foreigner to disburse and receive funds related to indirect investments. It is different from current accounts or accounts designed for direct investment activities (which I'll discuss in the next post).

An investor may only open one IICA account at a time. If he wants to open a second IICA he must close the first account prior to opening a second. He may have both an IICA and a direct investment account at the same time if he is conducting both direct and indirect investments simultaneously, otherwise, a conversion from an IICA to a direct investment account requires that the IICA be closed. It would be helpful to enumerate the types of funds receivable into the IICA and the types of funds disbursable from it.

The following types of funds can be received into an IICA:

1. Proceeds from the sale of foreign currencies to authorized credit institutions;
2. Proceeds from transfer of capital contribution portions and shares, from the sale of securities and other valuable papers, and from receipt of dividends and interest on bonds and other valuable papers denominated in VND from foreign indirect investment activities in Vietnam;
3. Amounts transferred from payment accounts denominated in VND of foreign investors opened at an authorized bank;
4. Remittances from an account of a fund management company, securities company, credit institution or foreign bank branch licensed to conduct the professional activity of investment entrustment on behalf of the foreign investor (applicable when the foreign investor conducts indirect investment in Vietnam in the form of entrustment of investment);
5. Other lawful revenue transactions in VND of foreign investors relating to their foreign indirect investment activities in Vietnam.

And now the types of funds that can be disbursed from an IICA:

1. Disbursements in order to conduct an indirect investment activity in Vietnam in a form as outlined above;
2. Disbursements being the purchase of foreign currency at an authorized credit institution in order to remit capital, profit or other lawful income overseas;
3. Disbursements for payment of lawful expenses arising in Vietnam;
4. Amounts transferred to a payment account denominated in VND of an investor opened at an authorized bank;
5. Amounts transferred to an account of a fund management company, securities company or other institution licensed to conduct the professional activity of entrust of investment for the foreign investor (applicable when the foreign investor conducts indirect investment in Vietnam in the form of entrust of investment);
6. Other lawful disbursement transactions relating to foreign indirect investment activities in Vietnam.

That's what an investor can do with an IICA. Once they've got the money into the IICA they can make indirect investments with it and receive the profits and proceeds from the sale of those indirect investments. But what happens when an investor has received a dividend or sold his shares in an enterprise and wants to remit the funds received into his IICA to an account overseas?

How to repatriate funds

Here the investor simply reverses the process at investment, with a caveat. In general, the investor will convert the VND in the IICA to his domestic currency and transfer it into his foreign currency account. Then he will simply transfer the money from that account to his account overseas. However, if the investor is an individual and she is repatriating profits from dividends, then she must pay a five percent withholding tax.

While not a capital gains tax, per see, it acts as such and the individual investor seeking to repatriate dividends from an indirect investment must provide documentation to the bank that the enterprise issuing the dividends has withheld the five percent tax. This documentation should be available from the enterprise issuing the dividends and should be presented to the bank upon making a request to

transfer funds.

But what if the individual investor isn't in Vietnam? How do they go about presenting such evidence to the bank when they conduct their transactions online? This is a holdover from the heavy red tape that still sometimes plagues activity in Vietnam. Most banks–especially those servicing high-income clients–have an option to communicate with the bank via email or some other form of e-communication. Failing that, a law firm or business advisory firm could be approached to shuttle the proof of withholding tax to the bank. It is a relatively easy obstacle to overcome, unfortunately, it is still an obstacle and requires a bit of a think-around before it can be handled correctly.

The banking sector is one of the most heavily regulated sectors in Vietnam and, as such, there tends to be more red tape there than in many other areas.

That said, the above is what an investor needs to do if they want to invest indirectly in Vietnam and to ensure that they can, legally, repatriate their investment capital and profits overseas. Next time I'll address the more onerous requirements for repatriation of foreign direct investments. Until then...

You can read part 2 of this series, all about repatriating investments and profits from foreign direct investment.

Repatriating Investments and Profits from Vietnam Part 2: Foreign Direct Investment

(11 June 2020)

Repatriating foreign direct investments from Vietnam is a bit more complicated than repatriating foreign indirect investments (which I talked about last week in "Repatriating Investment Funds From Vietnam Part I: Foreign Indirect Investment"). This week I am going to discuss the legal process for making FOREX and repatriation happen in the case of foreign direct investment ("FDI") into Vietnam. This article should be read in tandem with last week's article for a full understanding of what must happen for a foreign investor to properly repatriate his investment in Vietnam.

What is FDI?

To distinguish an FDI from a foreign indirect investment, one must look to the Law on Investment. Foreign Direct Investment isn't itself defined in the law, but it is explicated. And in conjunction with definitions in the recent Decree outlining FOREX regulations for FDI, one can come to an understanding of what FDI really is.

FDI is a few things.

First, it is an investment project that results in an enterprise that is invested by a foreign investor. This excludes simply contributing capital, purchasing shares, or investing on the basis of a contract.

Second, FDI is an investment in enterprises of more than 50% in such a way as to not require registration of an investment project. This includes a contribution of capital or purchase of shares in an already existing enterprise in such a proportion as to raise the total number of foreign-owned shares in the enterprise above 51%. Investment through M&A or restructuring those results in foreign ownership above 51%. Or the initial founding of an enterprise in certain specific sectors according to specific branch laws.

Third, FDI is an investment by foreign investors in an investment project for the development of a Public Private Partnership project according to the law on investment.

If, as a foreign investor, one's investment falls within these categories, it is considered to be an FDI and thus subject to Decree 06/2019/TT-NHNN guiding Foreign Exchange Control of FDI Activities in Vietnam and thus the foreign investor should ensure that the requirements discussed below are met before entrusting their money to the invested project/enterprise.

What is a DICA?

As discussed last week, a foreign investor who is making an indirect investment in an enterprise in Vietnam must open an Indirect Investment

Capital Account. The requirement for FDI is different, however, and the investor is not required to open a special account to make the investment, rather, the enterprise in which the investor is investing must open the account.

From the beginning, however, a special FDI investment account isn't required. When a foreign investor, either organization or individual, decides to establish an investment project or start an enterprise in Vietnam they will outlay cash money prior to receipt of authorization from the Government to begin the project. This outlay is not required to be made with any special account. But upon receipt of a proper investment registration certificate (IRC) from the authorities, the outlay will be converted either to capital contribution or a foreign loan and treated accordingly.

Once an investment project receives an IRC from the authorities, if it is seeking foreign monies, it must open what is called a Direct Investment Capital Account (DICA). The DICA is a foreign currency or VND denominated account opened at an authorized bank through which FDI related payments and revenues are processed. FDI enterprises are required to open a DICA as are foreign investors who invest in investment projects in the form of business cooperation contracts or PPP agreements that do not necessarily result in the establishment of an enterprise.

The DICA will be used by the FDI enterprise or investor to handle all transactions related to the capital contributions of the project or to foreign loans. Unlike an IICA (discussed last week) the DICA is not the responsibility of the foreign investor but of the invested enterprise and is a means of controlling the use of FOREX by Vietnamese citizen enterprises.

Rules for a DICA

An enterprise can open two DICAs. One in a foreign currency and one in VND. They can only open each of these accounts at a single bank. The foreign currency and VND accounts do need to be at the same bank. If the enterprise takes and pays a foreign loan in a currency other than the currency of its current DICA, it can open a second DICA in that currency to settle the loan.

Foreign investors who are involved with PPP and BCC projects and open a DICA may open a separate DICA for every investment project with which they are involved. If an FDI enterprise was, through investment subsequent to establishment, or through special branch law, owned by foreign investors at greater than 51%; or the enterprise was a result of an investment in a BCC or PPP; and the foreign ownership share decreases below 51% or the enterprise lists on a stock exchange, then the foreign investors are required to open individual IICAs and conduct repatriation procedures as discussed in Part 1 last week.

All FDI related transactions of the FDI enterprise are to be handled through a DICA. From receipt of capital contribution from foreign and domestic investors to transfer of shareholdings to payment of dividends to investors. The enterprise is responsible for maintaining the DICAs.

What needs to happen to repatriate FDI?

Understanding how a DICA works differently from an IICA is important. For FDI investors, repatriation of profits and capital contributions is simpler than for those involved with indirect investment activities. The onus is on the invested enterprise. That said, as FDI investors, a foreign investor is usually involved in the management of a company and must make sure that the enterprise is in compliance with the FOREX and banking requirements including

the creation and maintenance of a DICA.

There is no need for an FDI investor to open a separate bank account in Vietnam to receive payment of dividends and repayment of capital contributions upon reduction of charter capital or changes in capitalization of the invested enterprise. These things are handled by the in-house accountants and should be included in general accounting reports to the Board of Management and/or Inspection Committee.

If the FDI enterprise lists, the foreign investor must open an IICA and conduct procedures for indirect investment as discussed last week. If the foreign ownership share of the FDI enterprise drops below 51% then the same must happen. Otherwise, the only thing the foreign investors should ensure is that the FDI enterprise has properly opened a DICA and is conducting its finances according to the local legislation.

If the FDI is through a BCC or PPP, however, then the foreign investor must open a DICA on its own account. All investments in infrastructure or projects of these types must be through a DICA established by the investor and the investor is responsible for ensuring compliance with FOREX and banking regulations.

Once a DICA is properly opened and maintained, the obstacles to the repatriation of profits and investments are few and belong to the FDI enterprise (with the exception of BCC or PPP projects). An FDI investor doesn't even have to open a foreign currency account in Vietnam, so long as the FDI enterprise has opened a foreign currency DICA capable of receipt of foreign currency investments.

This means that Decree 06, which came into effect last September, greatly simplifies the process for foreign investors involved with FDI increasing the appeal of FDI projects in Vietnam and hopefully luring further investment prospects into the country. Now, if the National Assembly would revisit the IICAs and requirements for indirect investment, it may open the nation's stock exchanges to greater capitalization from foreign investors as well.

From Offshore Holding Company to Foreign-Owned Subsidiary in Vietnam *(22 November 2021)*

Last week I wrote about the process of obtaining approval for outward investment by Vietnamese citizens (see Establishing an Offshore Holding Company for Vietnamese Startups). For many Vietnamese startups, that's only the first step in the process of reorganizing their enterprise to make it viable for foreign Venture Capitalists ("VCs") and other investors. The second step is in converting the original Vietnamese enterprise into a foreign-owned enterprise, one owned by the offshore holding company we discussed last week.

This week, with the help of one of our legal assistants, Ms. Nguyen Thi Thanh Truc, I want to go through the process that the now foreign company must go through in order to acquire the original Vietnamese startup for the purposes of becoming a foreign-owned subsidiary and improving the startup's scalability and appeal to foreign investors.

In one instance we worked on recently, the startup founder had to capitalize the offshore company in order to have the funds available to purchase the startup prior to funding from angel investors. Ideally, the purchase by the offshore company can be made using a foreign partner or investor's funds to capitalize the offshore company and thus avoid the need to obtain the outward investment approval I wrote about last week, but failing that, the offshore company will have to go through certain steps to purchase the Vietnamese startup.

In most cases that we've seen, the Vietnamese startup is originally fully locally owned (the "**LocalCo**") prior to the investment by the offshore company. More often than not, this investment converts the LocalCo into a 100% foreign-invested enterprise with the offshore company buying all the shares in the company as a single-member limited liability company or a lesser percentage with a few shareholders remaining in Vietnam (usually the founders) to meet the three-shareholder minimum for joint-stock companies.

According to Truc, the process in general for the conversion from a LocalCo into a foreign-owned subsidiary by the acquisition of all or a part of shares or charter capital in the LocalCo by the offshore company requires a few steps:

1. Step 1: Foreign Investment Registration for the acquisition of a capital portion

- Foreign investment registration approval is required if the acquisition by foreign investors ("**Foreign Investor**") leads to:
  - Increase in foreign ownership in the Target doing businesses under List of Conditional Sectors;
  - Increase in foreign ownership in the Target from less than 50% to more than 50% of its charter capital; or
  - Increase in foreign ownership in the Target where foreign ownership

already exceeds 50% of its charter capital.

- Other notes:
  - The timeline for approval is 15 days from the day the DPI receives the duly prepared dossier, excepting for the case that the LocalCo has a land use right certificate for land on an island or on a coastal or border commune, ward or town, or in another area which affects national defense and security;
  - If the DPI approves the acquisition, they will confirm the satisfaction of conditions in relation to the capital contribution or purchase of shares or purchase of capital contribution portions executed by the Foreign Investor ("M&A approval"); and
  - The responsible authority is the Department of Planning and Investment where the LocalCo is located ("DPI").

2. Step 2: Opening the investment capital account at a commercial bank in Vietnam

- The LocalCo is required to open a direct investment capital account (DICA) to receive the investment capital from the Foreign Investor/Offshore company and implement other permitted receipt-payment transactions if more than 51% of the charter capital (equity) of the LocalCo is acquired; or
- The Foreign Investor is required to open an indirect investment capital account (IICA) to transfer the investment capital and implement other permitted receipt-payment transactions if less than 51% of charter capital (equity) of the LocalCo is acquired.

3. Step 3: Amendment of enterprise registration contents

- The required procedures:
  - The amended enterprise registration certificate ("ERC") is required to record: increases of charter capital; changes of name of the LocalCo or its legal representatives;
  - Notice of change of the members / owners of the LocalCo (if it is a limited liability company) or notice of change of foreign shareholder (if it is a joint-stock company) to record the information of the Foreign Investor as member / owner / foreign shareholder of the LocalCo; and
  - Conversion of the form of LocalCo from LLC into JSC and vice versa as required by the situation.

- Other notes:
  - Timeline: three working days from the day the DPI receives a properly prepared dossier;
  - Deliverables: amended ERC and Confirmation on change of enterprise registration contents issued by the DPI; and
  - Responsible authorities: DPI.

As we have noted for several of our clients, these procedures must wait until the offshore holding company is incorporated and registered at the relevant jurisdictions' regulatory authorities. Only after the legal or authorized representative of that company has the power to enter into contracts on behalf of that company can they finalize the application for registration of their foreign investment (if required under Step 1). It is also important to note that if the offshore company is acquiring 50% or less of the shares of the Vietnamese startup, and there are no other existing foreign shareholders of that company, then they will not have to go through

Step 1 but will be subject to the requirements outlined in Steps 2 and 3 as regulated by the Enterprise Law.

This step is easier for the Vietnamese startup as foreign direct investment into Vietnamese enterprises has had an increasingly popular background since it first became an option back in the mid-1990s. So long as the offshore company satisfies all anti-money laundering requirements in setting up a company in Vietnam, and the requirements of the Investment Law and Enterprise Law, then there should be little difficulty for the offshore holding company to acquire the Vietnamese startup. And once that has done, the VC or other investor can inject capital into the offshore entity, take a shareholding in the offshore entity, and be governed by the offshore jurisdiction, effectively separating the investor from Vietnam legally. Maybe an ideal situation for the investor, but it does put all of the liability for the actions of the startup to the government of Vietnam on the shoulders of the founders. Something to think about before bowing to the demands of a foreign VC.

CHAPTER 10

Mergers and Acquisitions

INDOCHINE COUNSEL
Business Law Practitioners

Joint Ventures in Vietnam

(14 January 2019)

Joint Ventures in Vietnam have changed over the years.

When I first began working in Vietnam, the joint venture was all the rage. Not only was it a way for foreign investors to hook up with local talent and entrepreneurs, but it was also a way to appease the WTO agreements of Vietnam's accession. Most sectors required a joint venture to begin with, and were set up in such a way as to require it for several years to come, at least to a certain extent.

But the WTO agreements and the joint venture requirements have all phased out. Only a few sectors vital to government security remain with requirements for joint ventures, or at least some threshold of native ownership. Otherwise, foreign investors can work their way through their investments without a local, using a 100% foreign ownership structure that allows for complete control by the foreign investor.

However, there are still some reasons for local involvement in foreign invested companies.

First, there remain certain sectors that require local ownership. These few remaining sectors are government critical and usually require hefty investment anyway, like banking or telecoms. These are not for the light of heart. And because of the money going into the sector for investors, large amounts of due diligence are required and recommended. It better be for a strategic relationship rather than simply a desire to invest in the industry, because if problems happen, they'll be costly.

Second, joint ventures offer a native view of the land. Not only is there a reason for keeping a local on board as an investor, but they might just offer a great deal of support. Consider influence peddling, and corruption avoidance. It is much easier for a native Vietnamese to handle corrupt officials who want a part of their business than it is for a foreign investor to do so. It is also easier for an influential Vietnamese investor to navigate the government demands and this offers an opportunity for making friends and influencing people on the ground, all activities handled better by a local than a foreigner.

Finally, joint ventures offer a place for security. Unless there's a conflict between the partners in a joint venture, a Vietnamese face offers a better chance to handle disputes. Consider the historical bent of local courts in developing countries. They tend to favor locals over foreigners and if you are a 100% foreign owned company, you don't have a local face and you are a foreigner who will, most likely, lose in court. If you have a joint venture, you have a local side, and that means you have a much better chance to fare well in a court, or dispute resolution venue.

So even though the joint venture is all but obsolete, consider there remain a few reasons for using the investment form. Don't write it off as something not worth doing, or cause for too much trouble, just because it's not necessary according to WTO agreement.

Conditions Precedent *(21 October 2019)*

As this month marks the tenth anniversary of my career in Asia, I thought I would look back again on some of the interesting transactions from earlier in my time in Vietnam. In particular, I am thinking of an acquisition on which I worked that involved a rushed tax deadline, two parties who claimed they knew each other well, and an investor with a huge risk appetite.

The foreign investor had worked with the local target for some time, apparently long enough to build up a good relationship. They had done business deals together and imported restricted goods that required major dealings with the regulatory authorities. They had built up a trust that gave the foreign investor a rosy picture of the management of the target.

Now, before I move on, I want to state a piece of advice that I heard recently that originated with an investor who has worked in Indochina for decades. In essence, when looking to acquire or invest in a project in Vietnam, you do not worry about the sector, you worry about the management. If the management is with it, and enthused, and capable, then that's the indicator you use in determining whether to advance with the investment.

That in mind, I'll continue. The foreign investor, a European company, was interested in the target company because it allowed the foreign company a share of a restricted business sector, one that wasn't much regulated yet, but that was limited by Vietnam's WTO accession. So the interest existed. The foreign company would benefit from a successful acquisition in import, manufacturing, and market access. It was a no-brainer deal for the foreign company, but it also benefited the target because of the increased capital the acquisition would bring.

So they got together and developed a term sheet. That's when they came to us and when they stated something that was very much a problem. There was a new tax law coming into effect in the very near future, far too soon to complete a full M&A deal beforehand, and they wanted to close the deal before that deadline so they could avoid thousands in taxes.

Great. You can pay more for your legal counsel to work around the clock, or you can buckle down and agree to pay the taxes, at least if you want a proper transaction to occur.

This odd couple, the foreign investor and the target, decided to take a different route. Instead of doing something reasonable, they decided to skip the due diligence in favor of a timely closing. I shouldn't say skip. They postponed the due diligence. And this fell on us as lawyers. We had to draft documents that allowed for the due diligence to occur after closing, and should it result in negative feedback, include a clause which allowed that foreign investor to escape the transaction.

We very much objected to this state of affairs. Regardless of our arguments, the odd couple insisted that they continue with the acquisition and that they do so in a rapid way. They cited the trust they had built up over the last couple of years, the relationship the two CEOs maintained, the fact that they had talked about the transaction and knew what to expect from the due diligence.

And yet they proceeded to exchange millions of dollars without the security of actual investigation in order to save a haircut's worth of money on taxes.

Before I rant, I want to explain that as far as I know the acquisition was a success and the two companies remained in their cozy relationship. I don't know if it lasted, though, for sure as this was ten years ago, but I do remember reading a newspaper article that suggested they may not have been so cozy after the passage of some time.

Now to the moral of the lesson.

Do not use trust in a relationship to justify circumventing legal and financial precautions. This is simply something you don't do. Yes, if you talk to most people with experience in East Asia they'll tell you that the most important thing is the relationship, that negotiations are fluid, that prices can fluctuate but so long as the relationship is solid, then things will be okay.

This is not an acceptable reason to skip a due diligence. You can have all the trust in management of the target, but you can't risk your investment without checking the documents. Your relationship with the CEO may extend to his testimony of a perfect paper trail, the proper financials, the exact procedure for incorporation and corporate governance, but in most cases, the CEO is not an experienced corporate lawyer and accountant. He may think he's right, but in reality, he probably doesn't know. You can't trust his representations without backup, and that means fulfilling the formalities of the contract, of the proper procedure, of the due diligence.

Furthermore, in the above example, the due diligence wasn't skipped entirely, but it was postponed until after closing. This may fly in some jurisdictions, but not in Indochina. In these countries the courts are still fledgling. They are still learning how to interpret the law. These are Civil Law systems without a large base of jurisprudence and academic analysis upon which to draw. The courts don't do innovation. And trying to close and then perform a due diligence is certainly an innovation.

Without a court capable of interpreting a contract according to the demands of the parties, especially when that contract is in opposition to the common practice of M&A and the legal definitions provided by the National Assembly, then enforcement of such a deal would be practically impossible. That means that, should there be a problem with the due diligence and the target refuses to give back the money, the foreign investor is left with a millions of dollars loss and a handful of stock that is worthless. Not only can't he retrieve his investment, but once he realizes this, he no longer has a good relationship with the target's CEO and cannot enforce the original contract to perform the acquisition.

In other words, don't do what this odd couple did.

Vietnam's New Law on Investment and Its Effects on Cross-Border Deals

(23 July 2020)

On 17 June 2020, Vietnam's National Assembly passed a new law on investment. The new law offers some new approaches to investment–both domestic and foreign–in the country and broaches new territory for encouraging and regulating the sector. As I'm looking at M&A recently, I thought I would discuss two of the major developments in the new law that affect foreign investors seeking to acquire Vietnamese enterprise.

While there are changes that simplify the Government's approach to approving foreign investors in regulated sectors, and benefits enumerated for SME startups, the two major changes affecting M&A come in a change in the determination of foreign ownership ratios and the situations in which regulatory approval–separate from competition law issues–is required for an acquisition to proceed.

Change to Foreign Ownership Ratio Determinations

Under the Current Investment Law, an economic organization must satisfy the conditions and carry out investment procedures in accordance with regulations applicable to foreign investors upon investment for establishment of an economic organization; investment in the form of capital contribution or acquisition of equity in an existing economic organization; or investment on the basis of a business cooperation contract, if:

1. 51% or more of its charter capital is held by a foreign investor(s);
2. 51% or more of its charter capital is held by an economic organization(s) that has 51% or more of its charter capital held by foreign investor(s); or
3. 51% or more of its charter capital is held by a foreign investor(s) and an economic organization(s) that has 51% or more of its charter capital held by foreign investor(s).

If, therefore, capital contribution or equity investment by a foreign investor brings a domestic enterprise under the umbrella described above, then the enterprise must obtain an M&A approval and obtain an investment registration certificate.

The new law on investment doesn't significantly alter this threshold, but it does reduce the gray area between 50% and 51% where a foreign investor might own a smidgeon majority share of an enterprise without having to go through investment registration procedures. The new law reduces the foreign ownership ratio from "51% or more" to "more than 50%", thus creating a cut and dried majority threshold and disallowing foreign control of domestic enterprises. Ostensibly, this change is for the purpose of consistent with provisions of controlling interest stipulated under the new enterprise law, which was passed by the National Assembly at the same time as the law on investment.

M&A Approval Requirement Clarified

Under the Current Investment Law, a foreign investor must obtain an approval from the licensing authority before making a capital contribution, or acquiring equity, in an existing economic organization where such economic organization operates in industries or business lines in which investment is conditional to foreign investors, or capital contribution or equity acquisition results in 51% or more foreign ownership of the economic organization. However, there has been some confusion in terms of interpretation and implementation of this provision, mostly due to different legal points of view taken by licensing authorities in different provinces. This has been especially tricky when a foreign investor already controls a Vietnamese enterprise and additional foreign investment is contemplated.

The new law on investment regulates specific instances where such approval is required. Those instances include:

1. Any increase in foreign ownership in the economic organization engaging in business lines listed in the List of Restricted Sectors;
2. An increase of foreign ownership in the economic organization that is less than or equal to 50% to more than 50% of the charter capital;
3. An increase of foreign ownership in the economic organization where foreign ownership of the charter capital already exceeds 50% of the charter capital; or
4. The economic organization utilizes land located within areas having an effect on national security, such as sea-islands, borderlands and coastal areas, etc.

This means that M&A transactions that retain the same level of foreign investment, or decrease it, are not subject to obtaining regulatory investment approval from the MPI, as well as an increase in foreign investment in an enterprise that fails to raise the foreign ownership threshold in said enterprise above 50%. While not entirely simplifying the situation, this does go towards clarifying certain confusing points that prevailed under the current law on investment.

M&A in Vietnam has progressed tremendously from the initial issuance of the foreign investment law back in the nineties and with the issuance of this new law on investment the National Assembly has taken another step in clearing ground that was previously difficult for foreign investors to conduct their business in Vietnam.

Tech M&A in Vietnam, Globally Recovering

(27 October 2020)

With the effects of Covid-19 moving towards long lasting, it is important to take a look at the health of certain parts of the global economy. One major aspect of that picture is the M&A deal flow. As a firm who is centered in the growing technological sector in Vietnam, Indochine Counsel is particularly interested in the movement of deals therein. As such, it was a pleasure to be provided some information about tech M&A globally during the last nine months. This post will review some of that data and what it means for Vietnam's future. Unfortunately, the data available globally is not mirrored in Vietnam. This article, therefore, will focus on tech M&A globally so far this year with a look at M&A generally in Vietnam with a look at some relevant deals.

Tech M&A Globally in 2020

Tech M&A remained stable in the first quarter of 2020. It wasn't until Q2 that the markets truly began to see the impact of Covid and reacted negatively. Q2 saw a nearly 60% quarter-on-quarter decline in deal flow to become the lowest level of activity of tech M&A globally in over a decade. In Q1 there were US$87 billion in overall deal value compared to Q2's US$35 billion. It was the most dismal performance in tech M&A since 2009 during the great financial crisis of last decade.

Quarter 3, however, showed a huge amount of resilience despite signs that Covid-19 will continue to mark a major impact on the global economy. Q3 saw the highest quarterly volume of deals in over two decades. A rebound that, compared to the six years required to recover from the last financial crisis, marked by a huge number of deals. Over 1,000 large deals were logged for a value of US$205 billion. In one quarter, then, tech M&A globally more than recovered, it bounced to levels higher than its seen since Clinton was president of the United States.

(Statistics in this section were provided courtesy of Menalto Advisors, LLC www.menaltoadvisors.com.)

M&A in Vietnam in 2020

As I mentioned above, the statistics for Vietnam are slower in coming and don't have the specificity of sector that global numbers make available. The General Statistics Office does not make numbers of M&A available during the year, it seems, only numbers for FDI.

In H1 M&A in Vietnam was down year-on-year by 56.8%. The total deal value for all M&A conducted in Vietnam in the first half of 2020 was US$3.5 billion. There were 4,125 instances of capital contribution recorded (a number which suggests that average deal size is small). This was enough, however, to mark Vietnam as most attractive M&A market, after the USA, in the world.

Several large deals in the financial sector have driven volume this year in Vietnam. Also seeing action are healthcare and insurance sectors. Some argue that growth in these sectors comes as a result of investors looking to diversify their

portfolios into markets that have little downside from Covid-19. Vietnam surely fits that mold.

(Statistics for this section come from Vietnam Investment Review's June article on M&A in the country: https://www.vir.com.vn/ma-set-for-a-bustling-second-half-77568.html.)

Consequences for Vietnam

M&A in the tech sector globally has seen a huge increase in deals since the world came to grips with Covid-19. Rising nearly six-fold in one quarter, the deal flow has shown a great deal of resilience and presages a trend of tech deals. With Vietnam and ASEAN showing themselves attractive to investment opportunities in general, and in tech particularly, the future is bright for the region as far as potential deals are concerned. Vietnam will especially benefit as it has taken steps to deregulate certain aspects of investment with the new Securities Law and the new Investment Law.

Tech M&A, in particular, is a growth industry. Vietnam's government is actively courting the tech industry. Through recent deals with Japanese companies to develop R&D labs in the country and increasing tech manufacturing Vietnam is becoming an attractive market for international tech giants to invest. Smaller scale actions, too, bear examination. A recent initiative will endeavor to bring existing Fintech experiments that have outpaced legislation into legal recognition by a continuing workshop between entrepreneurs and legislators. Other efforts are aimed at luring in startup entrepreneurs as well as the investors to fund them. And with Vietnam likely to exceed Singapore's economy in size next year, it is well placed to stand at the fore in tech deals in the region.

That said, however, Vietnam still faces challenges. Advancements in tech infrastructure have helped, but internet provision remains dependent on a small number of undersea cables that are frequently "bitten by sharks". Concerns about technology versus government control remain very real. And the education levels of locals remain minimal compared to some advanced economies. From human resource issues to infrastructure to regulation Vietnam must exert a great deal of effort if it wishes to lure in the investment it so desperately seeks in technology FDI and, more importantly, M&A.

The Grab Gojek Merger in Vietnam

(29 December 2020)

Earlier this month in a report by Bloomberg and elsewhere the rumors seemed confirmed that Singapore's Grab and Indonesia's Gojek were in discussions anticipating a merger. While neither company is incorporated nor headquartered in Vietnam, they both have subsidiaries and substantial business in the country and their merger at an international level will have a major effect on each company's market share there.

Grab, the oldest and largest ride hailing service in Vietnam, possesses nearly 75% of the market share while Gojek competes for the leftovers with half a dozen other companies. If the merger does go ahead, the questions for Vietnam include what will happen to each company's subsidiaries and assets in the country (will Gojek dissolve and its assets be subsumed by Grab or will the two subsidiaries themselves merge or will there be some other formula agreed upon by the two headquarters), and what the Vietnamese government has to say about it?

A little over two years ago the National Assembly passed a new competition law which sets out the guidelines for obtaining approval in the case of mergers and acquisitions that occur either within the country or that affect the country. Under that second prong, Vietnam's government claims that they have the ability to approve M&A of companies outside of Vietnam if such a deal will "*have or may have a competition-restraining impact on Vietnam's market.*" As Grab has such an overwhelmingly large market share of an approximately 2 billion USD business, it is reasonable to suspect that the government and those tasked with oversight of "*economic concentrations*" will require Grab and Gojek to obtain approval from Vietnam regulators prior to closing the deal.

But what steps must the two companies take to obtain Vietnam's signature on the deal and how long can they expect it to take?

M&A Approval in Vietnam

For companies that are required to obtain regulatory approval prior to M&A activities, the application of competition law scrutiny falls theoretically under the purview of the National Competition Commission, but as that entity has yet to actually be created, the Vietnam Competition and Consumer Authority, or VCCA, is currently examining applications for economic concentrations. The VCCA was created under the old competition law and receives submissions via the Ministry of Industry and Trade, or MOIT. Regardless of what government organ performs the task, the rest of the details remain the same.

Dossier Submission Requirements

When Grab and Gojek determine the details as they concern Vietnam, they will then submit their application with supporting documentation which includes:

- An application in the form prescribed;
- Draft contents of the agreement on economic concentration, or draft contract

or memorandum of understanding on economic concentration between the enterprises;
- Valid copy of the enterprise registration certificate or equivalent document of each of the enterprises participating in the economic concentration;
- Financial statements of each enterprise participating in the economic concentration for the two consecutive years immediately preceding the year of notification certified by an auditing organization as required by law;
- List of parent companies, subsidiary companies, member companies, branches, representative offices and other subsidiary entities (if any) of each of the enterprises participating in the economic concentration;
- List of all types of goods and services in which each of the enterprises participating in the economic concentration is currently conducting business;
- Information about market share of each enterprise participating in the economic concentration in the sector in which the economic concentration is proposed to be implemented for two consecutive years immediately preceding the year of notification of the economic concentration;
- Plans for overcoming the ability to cause competition-restraining impact by the economic concentration; and
- Report on assessment of the positive impact of the economic concentration and measures for enhancing the positive impact of the economic concentration.

As you can see, then, the requirements are not particularly onerous so much as time consuming. The list is long and each item contains yet more tasks to accomplish, but much of this information should be available through a regular due diligence exercise and lacks only compilation in the proper form for submission to the VCCA. Of note, here, is that the last three items: information about market share, plans for overcoming competition restraining impact, and positive impact should be particularly well prepared. As we will see, they play the most important role in obtaining an approval from the VCCA, especially for larger M&A deals like the one contemplated in this article.

Preliminary Appraisal

Once the VCCA has received a complete and proper submission dossier from the companies intent on M&A, they will first conduct a preliminary appraisal. This process is a low level review that can often satisfy the requirements of law and, at the decision of the VCCA, approve the M&A or refer it for further review at the official appraisal level.

When conducting a preliminary appraisal, the VCCA looks at three elements of the proposed M&A:

1. Combined market share of the enterprises participating in the economic concentration in the relevant market;
2. Extent of concentration in the relevant market before and after the economic concentration; and
3. The relationship of the enterprises participating in the economic concentration in the chain of production, distribution and supply of a certain type of goods or services or whether their business lines are mutual inputs or complementary to assist each other.

While I could break out each point in more detail, as the competition law has specific criteria it looks to in determining market share and concentration. It also has some specific formulae for finding whether an M&A can be

approved with just a preliminary appraisal or whether it requires further review. Regardless of the outcome of the preliminary appraisal, the VCCA has only 30 days to make its decision. If they fail to notify the applicants of any decision, such failure may be interpreted as approval and the M&A may proceed to closing. If, however, the VCCA decides the M&A requires further examination then they will open an official appraisal of the deal.

Offcial Appraisal

This is the second level of review applied to proposed M&A in Vietnam that is too large or too complex to be approved with a simple preliminary appraisal. This process is lengthier and the VCCA is allowed up to 90 days to complete its review and, in extremely complex cases an additional 60 days on top of that. Here, the VCCA is less concerned about the basic numbers–as the deal is obviously too big or complicated to be satisfied with the formulae provided for the preliminary approval–but with the overall effect the deal will have on competition in the relevant market.

In making its decision to approve or refuse or condition a large M&A, the VCCA looks at three specific elements of the deal as follows:

1. Assessment of significant competition-restraining impact or ability to cause significant competition-restraining impact of the economic concentration, and measures for remedying competition-restraining impact;
2. Assessment of positive impact of the economic concentration in accordance and measures for enhancing positive impact of the economic concentration; and
3. Overall assessment of the ability to cause competition-restraining impact and the ability to cause positive impact of the economic concentration as the basis for consideration and decision on the economic concentration.

As you can see, this is where the last three parts of the application dossier really come in useful. Here, too, there are fewer guidelines for making such determinations as the Government deems these criteria less able of reduction to pure numbers. The pay scale of those making the official appraisal is higher and their autonomy greater. The reviewing officials with the VCCA may refer to other ministries or departments as necessary but are not required to appeal to the Prime Minister or National Assembly at any point. (It is important to note, however, that if foreign investors are involved and the M&A causes a material change in the scope or nature of the previously approved investment certificate, there may be additional steps necessary that could involve such approvals, though that is an issue for the local Department of Planning and Investment, not the MOIT or the VCCA.)

Unlike the 30 days deemed approval of the preliminary appraisal, failure of notification of a final decision by the VCCA after an official appraisal does not signify default approval, though tardiness on their part may provide the constituent parties with possible remedies. Whenever the VCCA issues its decision it will be in one of three forms: approval, denial, or conditional approval. There are four types of conditions which the VCCA can impose upon a proposed M&A deal before allowing it to proceed to closing and they include:

1. Division, separation, and/or reselling part of the capital contribution or assets of the enterprises participating in the economic concentration;
2. Controlling content related to the purchase or selling price of goods,

services or other transaction conditions in contracts of the enterprise formed after the economic concentration;
3. Other measures for overcoming the ability to cause the effect of restricting competition in the market;
4. Other measures for enhancing the positive impact of the economic concentration.

These conditions are fairly liberal in their lack of definition, and the opportunity for abuse is present, but the Government's interest in fostering economic productivity is suggestive that the conditions, in general, will not be too onerous.

Appeals

Once the decision is announced, then, the enterprises–in this case Grab and Gojek–will then be allowed to proceed to closing. But if one or both of them dispute the results of the VCCA's official appraisal, they have limited options for appeal. While not directly stated in the law, appeals to the Chairman of the VCCA are for decisions of the VCCA not appraisals per se. This may seem somewhat limited, but it does concentrate the decision making power in one individual rather than in a committee and provide some degree of separation from the original decision. Unfortunately, there is no other appeal provided unless as may be allowed under general administrative law.

Conclusion

Grab and Gojek, therefore, would be subject to this process should they decide to proceed with their reported merger talks. Vietnam will have a say in any such merger–at least as far as its effects in Vietnam are concerned–regardless of the fact that neither company is incorporated in the country. This is true of any M&A activity that has a major effect in the Vietnamese market and especially true of such major players as Grab and Gojek. Hopefully, then, these two behemoths will consider this before deciding to move too swiftly towards a desired merger.

Economic Concentration in Vietnam

(27 September 2021)

The Ministry of Industry and Trade ("**MOIT**") under the Vietnam Competition and Consumer Authority ("**VCCA**") has recently issued its report on economic concentration activities in Vietnam over the period from July 2019 to July 2021. (You can access the report in English on the MOIT's website here.) This article will briefly review some of the main findings of the report and discuss the recent developments in the laws that affect economic concentration, or Merger and Acquisition activities within Vietnam.

Report Results

The VCCA found that the 2019 and 2020 totals by the value of economic concentrations in Vietnam fell. In 2019, the total M&A value was USD 7.2 billion, down 6% from the year before. And the total M&A value of 2020 is USD 3.5 billion, almost a 50% drop in value. The report attributes this year-on-year decrease in actual economic concentrations on the Covid-19 pandemic and its effects on worldwide FDI. One thing that the report found is that the number of Vietnamese enterprises acquiring Vietnamese enterprises has increased as a proportion of total economic concentrations over time. The geographical location of M&A is also of interest. Nearly a third of reported M&A occurred outside of Vietnam's territory, though the ultimate effects of such concentration occurred in Vietnam. This is a result of relatively recent changes in the laws that require certain offshore M&A to be reported to Vietnamese authorities.

As far as the sectors involved in M&A over the two years covered by the report I'll quote directly:

"Over the past two years, economic concentration transactions in Vietnam have taken place in many sectors and fields, from manufacturing, trading of goods and services to exploitation and use of resources. In which, some sectors of goods and services with economic concentration activities took place more ebulliently with large transaction values or a large number of transactions, typically: real estate, services, manufacturing and trading in automobiles, motorbikes and their components and spare parts, construction materials, electricity, power electronics, plastics, industrial and medical equipment, food and beverage (beer, beverage), energy (traditional energy and renewable energy)."

One number of interest is that over the two-year period the VCCA reported 125 applications for assessment of which 112 transactions were approved after a preliminary assessment and 13 transactions were referred for an official assessment. The report concludes with a review of the VCCA's scope and authority and a discussion of exactly what types of economic concentrations fall within its purview.

Merger Control Rules

1. Economic concentration

For merger control purposes, the Law on Competition ("**LoC**") aims to prevent negative impacts on competition in relevant markets. To accomplish this, the VCCA applies the effects–

based approach and broad tests are applied. For example, under Art 29 of the LoC, forms of economic concentration comprise, among others (merger / consolidation / joint ventures), an acquisition of enterprise which means a direct/indirect acquisition of capital/assets, sufficient to control or influence the target or its trades/business lines (the "**Control test**"). Such control test is defined broadly, and may be met if the acquirer will hold:

- More than 50% of capital/voting rights in the target;
- Ownership/use right of over 50% of assets of all or one business lines of the target;
- One of the following control rights in the target;
- To directly or indirectly decide the appointment, removal, or dismissal of a majority or all of the members of the board of management, chairman of the members' council, director or general director of the acquired enterprise;
- To decide the amendment of or addition to the charter of the acquired enterprise;
- To decide important issues during business activities of the acquired enterprise comprising selection of the form of organization of business, selection of business lines and the geographical area and forms of business; selection to adjust the scale and the business lines; selection of the form and method of raising, allocating and utilizing business capital of such enterprise; and
- The by laws may trigger a merger filling requirement if such merger meets the control test and any of the 4 following thresholds (size tests, i.e. the size-of-transaction, market share, assets and revenue), based on the fiscal year preceding the transaction.

Threshold value

Threshold value	Insurance	Securities	Banking	Other Industries
Total assets of one of the parties (including affiliates) in Vietnam (i.e., size-of-person)	VND15,000b (US$650m)	VND15,000b	20% of total assets of all credit institutions in Vietnam	VND3,000b (US$129m)
Total sales/purchase revenue of one of the parties (including affiliates) in Vietnam (i.e., size-of-person)	VND10,000b (US$420m)	VND3,000b	20% of total sale revenue (not purchase costs) of all credit institutions.	VND3,000b
Transaction value (i.e., size of transaction), for onshore transaction only	VND3,000b	VND 3,000b	20% of total charter capital of all credit institutions	VND1,000b (US$43m)
Combined market share of the parties	20%	20%	20%	20%

2. Merger Review

There is a two-phase process by the regulator, VCCA comprising a preliminary review (30 days) and an official review (90-150 days, a complicated process, applied in certain cases, e.g. dominant position when the combined market share is 20% or more). Results may be returned from such merger review as an unconditional clearance (authorization), conditional clearance, or rejection (prohibited merger).

3. Critical risk/consequence of violations (Decree 75/2019 and Art 110 LoC)

- Fine: up to a maximum 5% of the total turnover of the violating enterprises on the relevant market in the fiscal year immediately preceding the year of violation;
- Other potential sanctions: revocation of license (ERC), confiscation of profits earned from the violation;
- Further orders may be imposed: restructure business; Remove illegal provisions from a business contract or transaction; Divide, separate or re-sell part or all of the capital contributions or assets formed further to an economic concentration; Be subject to price control measures for the contracts of the enterprise formed further to an economic concentration.

Economic concentrations, then, are a major way for enterprises and investors to add value to their investments, but as of recent years, they have come under increased scrutiny by Vietnam's regulators. Hopefully, this post has provided some background to understand the current M&A situation and some of the requirements for reporting upcoming M&As to the authorities.

CHAPTER 11

Real Estate & Construction

Delayed Projects Can Be Cancelled

(10 September 2019)

I am not going to point to specific articles, because I have not kept track of them, but lately it's becoming apparent that Vietnam is nearing a purge of projects that have failed to realize.

It has happened in the past, when a project is on the books for investment development and nothing happens, or very little happens. The government can step in and cancel the project as mere speculation. FDI is a serious business in Vietnam reaching upwards of hundreds of billions of dollars a year, and for one or two or three investors to default on their deals is not a problem, but when they do it publicly, like the Manhattan Towers in Hanoi, or the L'Avenue Crowne in Ho Chi Minh City, those projects are liable to be scrapped by the relevant agencies.

And only in the recent EVFTA has there been a mechanism put in place that allows investors to bring causes of action against the government of Vietnam for takings. This means that unless you're a European country, you probably won't get a chance to get any sunken costs back should the government cancel your project as speculation or a failed investment.

Vietnam is no longer a country where land speculation will rest. If you are looking to build, then build, if you're looking to buy, then buy, but don't diddle dawdle in the middle. The government does not like it, especially if it leaves unsightly skeletons of buildings on major golden properties in the downtown districts.

Foreign Ownership of Land in Vietnam

(2 July 2020)

It seems one of the first questions asked by foreigners coming into Vietnam, can I, as a foreign, own land in Vietnam? The answer, by and large, is no, but it is still worth a look to understand the nuances and the possibilities for a foreigner to come into the country and impose his philosophies of private land ownership on a country steeped in a history of communal land ownership. Reminiscent, really, of what the Europeans did to the Indians in America, but that's a personal pique that I won't explore here.

According to the Constitution of Vietnam, land is a "public property" that comes under the "ownership of the entire people represented and uniformly managed by the State." It's in the Constitution. Individual land ownership isn't part of the plan here, and anyone looking to come in and own their slice of the country simply has to resolve themselves to that fact. Even Vietnamese citizens don't "own" land, rather they are allowed "land use rights" which give them the right to occupy and develop the land as well as a right of inheritance that passes to their heirs. It is, in essence, fee simple though the State retains the right to repossess the land for purposes of national security, national defense, and socio-economic development so long as the repossession is done publicly, transparently, and accompanied by compensation to those who currently enjoy the land use rights.

That's the primary right, then, the land use right, which gives the holder a sort of perpetual use of the land for which she possesses such rights. She can develop and use that land for whatever legal purpose she so desires, including the lease of land to foreigners, within limits, though not the free transfer of all her land use rights. What, then, can foreigners own?

Foreigners can lease land from the Government or from individuals possessing land use rights. Such leases are limited to fifty years in duration, a term which may be renewed upon agreement, but not automatically. This is, essentially, the form taken by the home "ownership" scheme which was announced a few years ago that allows for foreigners to have a fifty-year interest in an apartment or villa. Foreign individuals cannot, in their own capacity, enjoy land use rights other than for lease.

The situation is slightly different for investors, however. For investors who are seeking to develop investment projects, the term can be extended to seventy years if their project requires a large capital investment and recoupment of which is termed slow, or the investment is in areas that have socio-economic difficulties.

Except for in cases of infrastructure development and a few other large scale development projects, most investment projects involving land use rights also involve the establishment of an enterprise of some sort. If a foreigner owns part or all of that enterprise, then the enterprise is deemed a Foreign Invested Enterprise, or FIE.

Under the old laws–revised in the last few

years–a domestic investor could contribute his or her land use rights to a company as a form of capital contribution. That contribution would then be converted into a shareholding position in the enterprise. If the enterprise is a joint venture then the enterprise will be limited in its uses.

In essence, such an enterprise would be allowed to:

1. To transfer land use rights and land-attached assets under their ownership;
2. To lease land use rights and land-attached assets under their ownership in case of being allocated with land use levy by the State and to sublease land use rights and land-attached assets under their ownership in case of being leased land with full one-of rental payment for the entire lease period by the State;
3. To donate land use rights to the State and communities for construction of facilities for common public interests of the communities and donate land- attached gratitude houses in accordance with law;
4. To mortgage with land use right and land-attached assets under their ownership at credit institutions which are licensed to operate in Vietnam; and
5. To contribute land use rights and land-attached assets under their ownership as capital for cooperation in production and business with organizations, individuals, overseas Vietnamese or foreign-invested enterprises in accordance with law.

If the enterprise becomes a 100% foreign owned enterprise through conversion by share purchase or M&A, then the rights of that enterprise will become as follows:

1. The rights to use and enjoy the land and legal obligations attached to such use;
2. To transfer land use rights and land-attached assets under their ownership during the land use term;
3. To lease and sublease land use rights and land-attached assets under their ownership within the land use term;
4. To mortgage land use rights and land-attached assets under their ownership at credit institutions which are licensed to operate in Vietnam within the land use term; and
5. To contribute land use rights and land-attached assets under their ownership as capital for cooperation in production and business within the land use term.

FIEs, then, have a limited right to control a portion of the land use rights allowable to citizens. Though previous versions of law allowed a more liberal transfer of land use rights, the current laws are clear. FIEs cannot fully control land use rights. This land control philosophy is understood if one comprehends the idea of communal land ownership. The people own the land and it is the State that manages it. Not even locals "own" land individually, and for foreigners to have the same rights as the citizens in land use would be to violate the idea that the citizens of Vietnam are the ones who actually own the land.

So, know this, neither foreign individuals nor FIEs can own land in Vietnam. That is the end all truth of the matter. They may possess many of the land use rights that citizens and domestic enterprises possess, but even in the case of a conversion from a joint venture to a 100% foreign owned enterprise, the land ownership does not fully convert in favor of the foreign owners.

Owning and Apartment or Villa as A Foreigner in Vietnam

(9 July 2020)

Last week I wrote about the rules regarding land ownership for foreigners in Vietnam (see "**Foreign Ownership of Land in Vietnam**"), this week I'm going to review the rules for owning a house or villa as a foreigner in Vietnam. These rules are different, and, in fact, ownership is a bit of a misnomer–though the law uses the term, it really isn't ownership, but we'll get to that in a minute.

There are two types of foreigners who can own either apartments or villas, housing, in Vietnam. These are organizations and individuals. The organizations include foreign-invested enterprises, branches, rep offices, foreign investment funds and foreign bank branches operating in Vietnam. In order for these organizations to purchase housing they must have a valid investment registration certificate that is effective and valid at the time of entering into the housing purchase. For foreign individuals to be eligible to buy housing, they must have a valid passport and be legally in the country with an "*entry stamp by the immigration authority.*"

Once these formalities are established the road seems clear for the foreign organization or individual to purchase housing. But that road is anything but straight, though it is narrow. Foreign organizations and individuals are not allowed to outright purchase housing. They cannot obtain what in common law countries is referred to as fee simple rights in the housing. What they are, in essence, purchasing is a long-term lease. For organizations, the term of "ownership" is limited by the operating term listed on their investment registration certificate. For individuals, the term of "ownership" is 50 years. This term can be extended upon application, but even then, it remains limited and acts to fence the rights of the "ownership" itself.

Now, what is included in this "ownership"? Not much. Foreign organizations and individuals who "own" housing in Vietnam may not use their property for business, may not bequeath their rights in the property for more a term greater than that remaining in the allowed term of 50 years, nor may they do much of anything but live in it. It is strictly a long-term lease and comes with all the limitations and provisions that a normal lease might come with, only the payment for it is in a lump sum upfront.

Foreign organizations and individuals are further limited in that they can only "purchase" housing in approved commercial housing projects. That means the project must be approved for "sale" to foreigners, and even then, foreign occupation is limited. For apartments, the rule is 30%–though this may vary somewhat by individual construction approval–and 10% for villa projects. This, of course, excludes areas preserved for national defense and security by the government.

So far, this is straightforward. A foreign organization or individual comes to Vietnam and buys an apartment. They pay a lump sum upfront for a 50-year lease. Some calculations will reveal that–though they may have a nicer location–they would spend the same amount of money by leasing the property on a month-to-month basis over those 50 years. They are allowed to sublease the property, though, so long as it is not for business purposes. That means they could fix it up, furnish it, and lease it out at a markup to make a profit over their upfront purchase. The rental market is fierce, though, and the likelihood of having a 100% occupancy rate for 50 years is limited. In fact, I spoke to one financial consultant who said that purchasing housing in Vietnam as a foreigner is a bad financial decision. But assume, for argument's sake, that the foreigner still wants to purchase housing. What happened at the end of the 50 years?

This had long been a concern of mine in examining housing ownership. Initially, it didn't seem like there was a good solution. Inquiries shortly after the decree allowing for foreign "ownership" of housing was promulgated did not reveal the right answers. I was told that at the end of the 50-year term, the "ownership would simply end" or that the right of land use would revert to the State. Now, in some instances this is the case–namely in the instance of inaction by the "owner." The foreign "owner", however, has the choice to alienate the housing to either another foreigner or to a Vietnamese citizen.

If the foreign "owner" wishes to alienate his rights in housing to another foreigner, such alienation is limited in term to the remaining time on the 50-year "ownership" right–or any extension on the initial "purchase"–and will not continue in perpetuity through renewals by a second or subsequent "owner." If the foreign "owner" wishes to actually get value for his "purchase" he can sell the housing to a Vietnamese citizen. If this happens, the Vietnamese citizen will take full land-use rights in the housing and be able to sell or dispose of the housing property as they wish.

In theory, then, a foreigner can "buy" a 50-year lease of an apartment, rent it out for marginally more than he paid for it, and then sell it again to a Vietnamese citizen. His profit, then, over a 50-year term, would be the rent received. He does not truly accrue equity. Moreover, the secondhand market for apartments in Vietnam, especially luxury apartments–which is the main form of commercial housing project in which foreigners can invest–is notoriously bad. Vietnamese don't want to buy apartments. They want to buy land–or land use rights as the case may be.

Because the Vietnamese people retain ownership of the land in common, and the government manages it, the concept of individual "ownership" of land is different than in many other countries regionally. In Thailand or Cambodia, for instance, foreigners can actually obtain a fee simple ownership of an apartment. Not in Vietnam. It is a 50-year lease that may be extended in certain cases and can only be used for residency.

Though possible, then, it is not recommended for foreigners to "purchase" housing in Vietnam. It comes with too many strings, not enough rights, and for too short a time. Unlike commercial property projects that foreign organizations might develop as an investor–with rights for resale, commercial leases, etc.–the options for returning the investment are too limited to make "purchasing" housing in Vietnam a good buy. Unless, of course, you intend to move to Vietnam for life and want to have a rent-free flat until you die. But even then, you would spend less money renting month-to-month.

CHAPTER 12

Restructuring & Insolvency

IC INDOCHINE COUNSEL
Business Law Practitioners

Restructuring Debt in Vietnam

(1 September 2020)

I'm excited. As of a couple of hours ago, Vietnam has gone over 40 hours without a new case of Covid-19. That means it took only a month for the country to effectively control a second outbreak of the virus. Here's to hoping the trend continues. But with that in mind, there is a lot of debt floating around Vietnam. Debt from banks and other credit institutions–primarily home, car, and business loans–and from private individuals or organizations–ranging from illegal credit sharking arrangements to legitimate business investments structured as debt–plagues Vietnam.

According to the World Bank, domestic credit extended to the private sector was 138% of GDP in 2019. In China the number is approximately 52% and in Singapore its in the low 60s. Now, those numbers include all credit incurred by an organization of any kind capable of imposing a repayment obligation and ranges from individual bank loans to purchases of non-stock securities in companies to even sometimes loans to public corporations. So, it's hard to understand exactly how much debt exists, but according to Fitch Ratings, in 2018, Vietnam's consumer debt per member of the work force, 83% of that individual's average annual income. That's a lot of debt.

And that was before Tet 2020, or the beginning of Covid-19's effect on Vietnam's economy. As of June 2020, Vietnam's General Statistics Office estimates that over 30 million people have lost their jobs or been forced to take reduced pay or hours. That's 30 million people who aren't able to pay their debts. Now, the 83% number above is an average and not every one of those workers who has been laid off because of Covid-19 owes money, but still, the number of credit agreements that are strained, about to default, or already defaulted is high.

A report by VN Express in April suggested that even by that time, banks were seeing anywhere from a 10% to 500% increase in overdue loans. Add this to Vietnam's already shaky banking foundation and the country is in for a precarious time financially. And then there's the report that banks are struggling to offload foreclosed properties and the banking sector is in a pinched position. All of this means that, if you have debt and are willing to pay some portion of it, you may be in a good position to negotiate a less strict repayment schedule, reduce interest owed, or some other agreement that will provide the bank with some solvency in this troubled time.

The rest of this article will examine the options for restructuring debt short of bankruptcy (next week we'll talk about that very final option) from triggering Covid-19 relief legislation to renegotiating directly between the borrower and the lender (both credit institution and otherwise) to seeking court ordered restructuring.

COVID-19 and Debt Restructuring in Vietnam

In March, the State Bank of Vietnam ("**SBV**") issued guidance for banks, credit institutions,

and non-institutional lenders that fell under the ambit of the SBV on how to address the alarming increases in late debt payments due to the economic fallout from Covid19. Loans made by subject institutions in Vietnam may be restructured upon request of the borrower if:

- The debt arose from lending or finance leasing activities;
- The obligation to repay the principal debt and/or interest arose within the period from 23 January 2020 to the day after three months have expired from the Prime Minister's declaration that the Covid-19 epidemic has ended (which hasn't happened yet); and
- The customer is incapable of making timely payment of the principal debt and/or interest under the executed loan/financial leasing agreement because the customer's turnover and income is reduced as a result of Covid-19.

A Bank may make a decision to restructure the repayment term of any debt that meets these requirements upon the request of the customer and an assessment by the Bank of the customer's ability to repay, as appropriate to the level of impact of Covid-19. However, the debt concerned must not be debt which is in breach of law and the restructuring term (in case of term extension) cannot exceed 12 months from the final date on which the customer must fully repay the total of principal and interest under the executed loan/financial leasing agreement.

Banks may exempt and reduce interest and fees in accordance with their internal rules applicable to debts arising from credit extension activities (except for purchasing and investing in corporate bonds) in cases where the obligation to repay the principal debt and/or interest is due in the period from 23 January 2020 to the day after three months from the Prime Minister's declaration that the Covid-19 epidemic has ended; and the customer is incapable of making timely payment of the principal and/or interest under the executed agreement because the customer's turnover and income is reduced as a result of Covid-19.

That means that, supposing you were a borrower and payment came due from the middle of January 2020 through probably at least the end of this year (depending on when the Prime Minister declares the pandemic in Vietnam over) you have the right to request your lender, if they fall under the supervision of the SBV, to restructure your loan payments by either delaying them or reducing/exempting fees and interest. This is a special dispensation offered because of the dire situation of Covid-19, but for 30 million workers, this may be the best option for restructuring debts that they incurred when the economy was growing and the near future looked bright.

How to Restructure Consumer Debt in Vietnam Normally

If your ability to repay your debt hasn't been affected by Covid-19, or you are looking to restructure debt without calling upon the emergency powers granted by the SBV, then you can seek to negotiate with your lender who may be either a financial institution or a private individual or enterprise. There are different rules depending on the identity of your lender.

Restructuring a privately held loan in Vietnam

Starting with the non-credit institution lender, the basic relationship between the borrower and the lender is defined as contractual. The lender lends the borrower money now in return for which the borrower agrees to repay the lender and pay interest over a sustained period of time, thus creating a profit motive for both sides. The borrower receives money in the present, when

he needs it, and the lender gets money in the long term as an option to grow his wealth. The problem is when the borrower's circumstances change so drastically as to make performance difficult or impossible to conduct.

In this situation, there are certain legal criteria which must be met by the borrower in order to legally request a renegotiation of the contract and effect a restructuring of the loan. There are five criteria that must be satisfied for the change in circumstances of the borrower to be considered "basic" enough to justify renegotiation of the contract.

1. The circumstances change due to objective reasons occurred after the conclusion of the contract;
2. At the time of concluding the contract, the parties could not foresee a change in circumstances;
3. The circumstances change such greatly that if the parties know in advance, the contract has not been concluded or are concluded, but with completely different content;
4. The continuation of the contract without the change in the contract would cause serious damage to one party; and
5. The party having interests adversely affected has adopted all the necessary measures in its ability, in accordance with the nature of the contract, cannot prevent or minimize the extent of effect.

Remember, all five of these circumstances must be met prior to requesting renegotiation. Because the law, in general, respects contractual agreements between parties, it sets stringent bars against changing those agreements. Thus, it may be easier to renegotiate a loan agreement and restructure debt with an accredited financial institution for, even if the borrower meets these criteria, the lender may still refuse to renegotiate and the borrower's only remaining option is to seek remedy at court. Something which the court will only grant a modified contract if court ordered cancellation will cause more harm than enforcement of a modified agreement.

Restructuring a loan held by a financial institution in Vietnam

Credit institutions in Vietnam have legislated options for restructuring loans when borrowers are unable to pay the borrowed amount according to contracted time periods or interest payment structures. It is within the bank's discretion, however, whether to restructure a borrower's loan in a permissible way, or to simply foreclose on the loan. As I stated above, it is in the bank's interests to obtain as much money on a defaulted loan as possible, thus if they deem it likely they can obtain more money through a restructuring than through foreclosure, then they are more than likely to pursue the former in the borrower's favor.

When a credit institution considers whether to restructure a loan they look at several factors. First, they look at the request of the borrower– that means the request must be initiated by the borrower–at the credit institutions ability to eat the changes to the loan contract, and the borrowers ultimate ability to repay the loan on any amended terms upon which the parties may agree. If they deem the borrower a good risk, they may adjust the periods for payment while not adjusting the term of the loan, or they may adjust the term of the loan. This is an important term because failure to restructure a loan term prior to the borrower failing to pay the debt on time shifts the loan from on-time to overdue and allows the credit institution to trigger collection procedures against the borrower. In order to avoid collection, it is important for a distressed borrower to request a restructuring of the loan prior to or no later than ten days after the expiration of the original

loan term.

These are the two options presented to individual borrowers if they have borrowed from a private lender or a credit institution. The same holds true, essentially, for corporate borrowers with the exception of publicly listed enterprises.

Debt Swaps by Enterprises in Vietnam

For shareholding enterprises in Vietnam, particularly publicly traded enterprises, the option of conducting a debt/equity swap with creditors is available. A debt/equity occurs when a company owes money to a creditor and, instead of repaying that money with interest, offers property such as shares in satisfaction of that debt. For publicly listed companies in Vietnam, a debt/equity swap may occur only after certain restrictions are satisfied related to shareholder approval, proper valuation, and arms-length trading requirements between the enterprise and the creditor. Non-public shareholding enterprises in Vietnam may conduct a debt/equity swap using a private placement of shares upon similar conditions, though they may also offer shares of other enterprises owned by the indebted company or its shareholders or other publicly held shares held by the same. This is a complicated process and, depending on how many company's shares are involved, may require the approval of several companies' shareholders and conceivably regulatory approval if the size of the swap is large enough in a given sector. And the efficacy of any such swap is dependent on the anticipated continuation of value on the part of the indebted company. If the creditor feels that the enterprise is insufficiently capitalized, or is in danger of insolvency in the near future, it is easier to proceed with seeking a judgment of insolvency from the courts and to then simply sell off the assets of the indebted company and satisfy senior debt in that manner. (But that's for next week's discussion.)

Restructuring Debts through the Courts in Vietnam

While it is possible to take a contractual issue to the courts as a matter of Civil Code jurisdiction, most likely, a debt will only reach the courts in the case where someone–either the creditor, the borrower, or another stakeholder (if the borrower is an enterprise)–has filed a petition to initiate bankruptcy procedures with the court. I won't go into all the details of the bankruptcy procedure here (as I intend to do that next week) but needless to say, after the court has accepted a petition to initiate bankruptcy procedures, the creditors of the potentially insolvent party come together for a creditor meeting.

During the creditor meeting, the creditors of the debtor–usually credit institutions, private lenders, suppliers, employees, etc.–will discuss the various aspects of the debtor's financial status including the business status and financial position of the insolvent enterprise, the results of the inventory of assets, list of creditors, list of debtors and other necessary contents. After reviewing this material, and discussing the debtor's options for moving into the future, the meeting of creditors can propose a couple of options. First, they can suggest that the court proceed with bankruptcy, sell off the debtor's assets, and satisfy as many creditors as possible from the proceeds. Second, and this is why I include this here, the meeting can propose a plan for solvency.

A plan for solvency is a negotiated agreement between the meeting of creditors and the debtor during which the debtor will continue to operate for a given period of time under the observation and consultation of the court, with the intention of turning their fortunes around sufficiently to then be able to satisfy the creditors and pull out of insolvency into

a profitable and debt free position. While this takes more time, usually several years, if the meeting of creditors agree, it is the best potential for them to obtain full satisfaction for their contracts with the debtor.

The most important part of this return to business activity plan is the agreed restructuring of debts with the myriad creditors. The meeting of creditors cannot simply say we will impose our accounts on the debtor with additional interest over the time it takes for him to return to solvency. Instead, they, too, have to take a haircut on their repayment options–though it usually is less of a haircut than the most senior of debt would receive in the case of a full declaration of bankruptcy. It is the last-ditch effort the court allows for restructuring and salvaging the solvency of a debtor before making the final and ultimate declaration of bankruptcy.

For even after the meeting of creditors agrees to restructure the debt and the court supervises the continued activities of the debtor, if enough conditions are not met by the end of planned period for repayment, the meeting of creditors can still ask the court to declare the debtor bankrupt and sell off his assets in hopes of recouping some of their initial investments. But more on that next week.

Conclusion

There you have it. Several methods for restructuring debt in Vietnam. As I began this article examining the dire effects of Covid-19 on a country that has fared among the least scarred by the pandemic, I want to reiterate the importance of understanding how to restructure debt. As individuals, companies, and a country Vietnam has an outsized amount of debt. While there is some good that can be done through bankruptcy and foreclosure for lender's bottom lines, the most effective way to recoup unpaid loans is through a negotiated restructuring of those loans.

Restructuring can be done for individuals and for enterprises, through contractual negotiations with private lenders or through regulated procedures through credit institutions, through debt/equity swaps for shareholding enterprises, or through more drastic bankruptcy procedures and a return to business activity supervised by the court. Regardless of how an overdue debt is restructured, the Vietnamese government has made it easier–at least for the moment–to restructure loans for those adversely affected by Covid-19.

What You Need To Know about Bankruptcy in Vietnam

(8 September 2020)

Last week, in "**Restructuring Debt in Vietnam**", I wrote about various strategies for restructuring debt. One of those–specifically for businesses–involved a court ordered restructuring as part of the bankruptcy procedures. This week I want to examine that process in more detail. Though instead of going through the entire process I'm going to highlight bits and pieces that are important to understand if you are thinking about initiating bankruptcy for yourself or for a business with which you are involved.

First, I need to clarify a confusion from last week. In discussing the concept of bankruptcy, I mistakenly imputed at least once that it was a possibility for individuals to go through this process. That is incorrect. Only enterprises or cooperatives (or groups of cooperatives) are subject to the law on bankruptcy. Individuals cannot declare bankruptcy like in some jurisdictions around the world. Any misunderstanding is my fault as I relied on research notes in drafting last week's article and didn't actually read the law. So be aware, there is no option for individuals to get out of their debt other than through means of restructuring as discussed last week.

I'm briefly going to discuss some policy issues here. The Vietnamese government has missed an opportunity to minimize bad debt on bank's books by not providing some form of bankruptcy for individuals. It has engaged the fiction of personality for enterprises and grants them the opportunity to have their assets sold off to satisfy their debts to the degree of wiping out their debt. Though, in fairness, the enterprise itself ceases to exist at the end of a bankruptcy. This option is not available for individuals who continue to live and can, conceivably, enter into future debt relationships even after a bankruptcy. Additionally, it is difficult to deter individuals from bank hopping to obtain loans even after they might go through bankruptcy–something that is not the case for enterprises who, again, cease to exist–as there is no comprehensive credit reporting agency in existence in the country. There is nothing, therefore, to prevent an individual from wiping out his debts in a theoretical bankruptcy procedure and then going to a non-involved bank and taking out another loan. Finally, the government has a desire to see that its citizens remain housed, and that land is at least roughly distributed in an equitable manner.

By allowing housing and land to be sold in a bankruptcy procedure out from under an individual and his family the government would be reallocating land used as a residence to land used as a profit-making device, thus creating inequity in the system and negating the concepts of the country's constitution. From this, banks can still foreclose on properties used as security for loans. Should a borrower use his land and house to secure a loan from a bank and then default on that loan, the bank

is allowed to foreclose on that land and house and sell it off in an attempt to recoup its losses. This problem could, conceivably, be mitigated through an individual bankruptcy program that would limit the ability of lenders to attach primary residential housing to obtain relief. As existing, the law does not protect an individual's land and housing and, thus, its citizens ability to maintain themselves in a given location. This affects livelihoods that are bound by geographical proximity to the workplace, their ability to pay taxes, and adds numbers to unemployment rolls and burdens to social security programs.

Thus, in addition to protecting the equitable distribution of land, it is also in the government's interest to protect the homes of individuals. This requires both a bankruptcy procedure for individuals, and limits on banks for their imposition of security over residential property. A third prong is the development of creditable and comprehensive credit rating agencies who can keep track of individual credit transactions, payments, and defaults. With those three in mind, the government would be able to better control the redistribution of land from citizen to credit institution protect tax rolls, prevent unemployment and preserve the fine customs and traditions of Vietnam.)

Second, an enterprise needs to be aware of the parties who can institute a bankruptcy proceeding involving the enterprise. This is a knowledge that should exist from the beginning as the treatment of relevant parties should be taken into account to prevent bankruptcy as a general rule. The parties who can file for bankruptcy in relation to a given enterprise are:

1. A creditor, unsecured or partially secured, who has remained unpaid for three months from maturity of the debt owed it by the enterprise;
2. Employees and trade unions if they have not been paid for three months;
3. The legal representative of the enterprise (here the filing is obligatory if he becomes aware that the enterprise is insolvent);
4. Chairman of the board of management or owner (depending on the type of enterprise) upon learning of the enterprises insolvency (again, this is an obligation, not an option); and
5. Shareholder(s) controlling at least 20% of the shares of the enterprise for at least six months when the enterprise becomes insolvent.

It is important to know who can and has to initiate bankruptcy in relation to an enterprise. First, it informs the enterprises behaviour towards creditors and employees, and second, it imposes obligations on the management of the enterprise for which they can be held accountable if they fail to perform. Thus, the legal representative and chairman of the board of management both have the responsibility, legally, to initiate bankruptcy upon discover of insolvency of their enterprise. Failure to do so opens them to civil and possibly criminal liability.

Third, once bankruptcy procedures have been initiated it is important to understand that the enterprise, and subsequently its management, are essentially at the whim of the judge in the case. Judges overseeing bankruptcy proceedings have a very large degree of discretion in determining each step in the legislated procedure and they are responsible for overseeing the implementation of the decisions of the meeting of creditors (the meeting held between creditors and the enterprise to determine whether to proceed with bankruptcy or to try to recover the enterprise). They are also responsible for determining what actions need to be taken by the enterprise and its

management to proceed to the finalization of bankruptcy or the resumption of business in a restructured form. Essentially, every decision of the enterprise comes under the jurisdiction of the assigned judge once a bankruptcy filing has been submitted. Beware, therefore, of trying to avoid responsibility as assigned by the judge for once the situation goes to court, management is not only subject to the penalties laid out for violations of the enterprise law, but also the civil procedures law.

Fourth, the payment of bankruptcy costs is the senior debt of the enterprise entering bankruptcy proceedings. The individual initiating the bankruptcy procedure is responsible for paying the bankruptcy fee and some initial costs, but the court has the power to sell assets of the enterprise in order to pay bankruptcy costs. These include the costs for the courts supervision of the process, notifications and public announcements, costs incurred in the hiring and operations of the asset manager who controls the enterprise and the bankruptcy investigation once bankruptcy has been initiated and before a decision as to a declaration of bankruptcy or recovery of the business is made. And other fees as may be legally incurred by the court, enforcement officers, and other administrators involved. This comes first. So depending on the size of the enterprise and the debts owed, this could eat a sizeable chunk out of the remaining assets of the company and thus make satisfaction any but the most senior debts possible. Dissatisfied shareholders who thus receive little to no value on their investments could then make life difficult for management who failed to foresee and forestall the bankruptcy in the first place. They could question management's decisions and bring derivative suit against them, thus creating a personal liability on management's part for any bad decisions that may have led to the bankruptcy.

Fifth, between the filing of a petition to initiate bankruptcy procedures and the initiation of bankruptcy procedures, the enterprise has the option to request negotiations between the creditor and the enterprise so as to avoid bankruptcy proceedings. The court will allow no more than 20 days for the enterprise to negotiate with the creditor in an attempt to come to an understanding and thus avoid bankruptcy proceedings. If the parties come to an understanding they can notify the court and the proceedings will be canceled, failure to come to an agreement within the 20 day time limit will recommence proceedings. This is the first in several opportunities throughout the bankruptcy procedures for the enterprise to negotiate with creditors. As discussed last week, a negotiated settlement is most often preferred by creditors over foreclosure or bankruptcy because they are more likely to receive a higher percentage of satisfaction for their debt that way. Management of an enterprise entering bankruptcy procedures should therefore be cognizant of those opportunities and seek every opportunity to come to a negotiated resolution so as to preserve the enterprise's assets, operations, and the goodwill of shareholders and other stakeholders. Only if the enterprise is unable to reasonably satisfy creditor demands should management go willingly into a declaration of bankruptcy.

Sixth, once bankruptcy procedures have been commenced, the enterprise will continue to operate under the supervision of the judge and the asset manager. In all likelihood the legal representative and managing director will remain the same, however, the court may replace them if they deem management incapable or likely to commit an act prohibited under bankruptcy. Once bankruptcy proceedings have been initiated, the enterprise is prohibited from the following acts:

1. To conceal, dispose of, or donate any assets;
2. To pay any unsecured debts except those arising out of the bankruptcy itself or employee wages;
3. To abandon any right to claim a debt;
4. To convert any unsecured debt into a debt secured by any asset of the enterprise.

Any of these actions after bankruptcy has been initiated will put the enterprise in violation of the law and subject management responsible to legal repercussions.

Seventh, the relationship between shareholders and management is very important during the operations of a company and comes into stark lighting during the bankruptcy process. This is emphasized by the seniority of debt to be paid by the sale of assets of the enterprise. Secured debts are settled by sale of the secured assets. Any remaining assets will go to pay creditors in the following order:

1. Bankruptcy costs;
2. Labour costs including wages and social insurance payments;
3. Debts that arose as a result of efforts to recover the business during bankruptcy proceedings;
4. Unsecured debts, government payments, secured debts that were not satisfied completely by the sale of the secured assets.
5. Shareholders of the enterprise.

As you can see, shareholders are the last to receive any payment through the bankruptcy procedures. They can be reasonably upset at this state of affairs. Management, who they may deem responsible, is vulnerable here. See the case of the Mon Hue restaurant chain who went bankrupt last year. Their management was arrested and sued by numerous stakeholders for their actions in contributing to the bankruptcy. Again, here, management must beware that it fulfils its obligations under the law lest it become liable for shareholder losses.

Eighth, enterprises who are approaching insolvency and bankruptcy proceedings may additionally be liable to third parties because of the potential invalidity of transactions conducted during the six months prior to initiation of bankruptcy. Certain transactions conducted during that time period will be declared invalid by the court in order to preserve the assets of the enterprise for the repayment of creditors. The transactions deemed to be under threat of invalidity are as follows:

1. Asset assignments not at market price;
2. Conversion of unsecured debt into debt secured by the assets of the enterprise;
3. Payment of a debt which has not yet become due, or of value greater than the amount which was due;
4. Donations of assets;
   Transactions outside the business purposes of the enterprise;
5. Other transactions for the purpose of disposing assets of the enterprise.

This list allows the court, and the asset manager, to retroactively preserve assets of the enterprise. The theory here is that management of a nearly insolvent enterprise may take actions to preserve assets from the creditors by donating, trading, or benefiting related parties over unrelated creditors. This will balance the payments across creditors by law rather than blood and creates a level playing field for all creditors of the enterprise. In addition, contracts that are currently under performance by the enterprise may be temporarily suspended by the court to prevent unnecessary loss of assets or funds.

I'll close with that. The process itself is lengthy and detailed and I won't go into it. Suffice it to say that while the court may appear to be on the side of the creditors, they are also inclined to take all reasonable measures to ensure the continuation of the enterprise as to do so is in the interest of all parties. It should not be considered a necessarily antagonistic process, therefore, but rather a legally constituted procedure for making sure everyone is dealt with fairly. Ultimately, the parties least well served are management. Their liabilities accrue, though admittedly this is likely due to bad decisions they made leading up to the bankruptcy, and they may be held responsible for their actions by shareholders or other stakeholders who feel dissatisfied with the results of any bankruptcy proceeding. Regardless of whether the business is rehabilitated or declared bankrupt, management will be held liable, and as such, needs to be aware of its duties in operating an enterprise.

Previous posts about management liability include "Derivative Suits Against Management in Vietnam", "A Warning to Management in Vietnam Companies", and "Vietnam's 'Business Judgment Rule". There are specific responsibilities that management must meet if they are to avoid facing liability with their personal time and assets and as such it is important to understand them before entering into a management position in a Vietnamese enterprise.

Vietnam's Outward Investment Problem

(18 October 2021)

Again, this week a Vietnamese e-commerce company is in the news for receiving multiple millions of dollars in funding from international Venture Capitalists. Fika, a dating app targeted at female users (see TechinAsia story here) was funded with one and a half million. The founders, while not Vietnamese, live and work in Vietnam and their staff is entirely Vietnamese. The same was true of Sky Mavis (which I discussed last week in my article NFT Gaming and Vietnam). In each case, and in multiple other instances, e-commerce companies that are founded and operated in Vietnam have a corporate structure in which a holding company is created offshore–usually in Singapore–and which is the entity that receives the bulk of foreign investment.

The Preferred Investment Structure

We recently helped a tech company that was founded in Vietnam open a Singapore company to act as the holding company of the Vietnam entity. To do this we had to not only setup the company in Singapore, but then we had to create the paperwork for the Singapore company to become the sole investor in the Vietnamese company, creating a 100% foreign owned company in Vietnam. We did this for two reasons. One, the company in question is interested in foreign expansion in the midterm and believes that having a parent company in Singapore will simplify that process. And two, the foreign investor insisted that the FDI, and their share of the ownership of the entity, happen in Singapore rather than Vietnam.

While this is a boon for lawyers and corporate service companies, it has negative implications for the international perception of Vietnam. Vietnam is seen as a difficult jurisdiction in which to do business. There is a great deal of administrative paperwork and with each administrative approval required the possibility for graft and corruption is multiplied. This has also contributed to the fact that Vietnam has yet to have a company list on a foreign stock exchange (though companies like Vinfast and a few others are pursuing reverse mergers of SPAC transactions in the near future). Vietnam is simply seen as a difficult jurisdiction in which to base internationally minded companies.

Why Vietnam Is Not a Regional Investment Hub

There are several reasons that companies choose Singapore as the central hub for their holding companies. While not a tax haven, corporate taxes are limited and setup of companies is simple. It is possible to setup a company in Singapore in a matter of days and the company has few restrictions on international operation. Singapore has access through its cultural diversity to much of the Asian region and has an infrastructure and government that is friendly to international corporates.

Easy Fixes

Vietnam, on the other hand, is in a much different situation. On average it takes one to two months to setup a company in Vietnam

and the minimal invested capital required is relatively high. In Vietnam, the initial investment capital can be a nominal $1 Sing. This discourages companies from setting up companies that may not necessarily be targeted at a Vietnamese market. The corporate governance is complex and corporate secretarial services practically non-existent. The authorities still balk at the use of virtual offices as the registered headquarters of a company in Vietnam. This makes it difficult for internationally minded firms to consider Vietnam as a corporate home.

Outward/Offshore Investment

Perhaps the biggest reason that Vietnam is not a regional hub for corporate investment, however, are the strict regulations regarding outward investment.

In order for a holding company to be able to properly hold subsidiaries in different countries it needs to be able to easily input capital from its home jurisdiction to the jurisdictions of its subsidiaries. This involves not only the input of capital to the subsidiary but also an output of capital from the parent company. While Vietnam has gone a long way towards making the input of capital for FDI purposes much easier over the last twenty years, the process for the output of capital remains extremely difficult.

Offshore investment by Vietnamese citizens (including corporations) is limited to a few specific forms. Namely,

- Establishment of an economic organization in accordance with the law of the investment recipient country;
- Investment on the basis of an offshore contract;
- Capital contribution, purchase of shares or purchase of a capital contribution portion in an offshore economic organization to participate in management of such economic organization;
- Purchase or sale of securities or other valuable papers or investment via securities investment funds or other intermediary financial institutions in a foreign country;
- Other investment forms in accordance with the law of the investment recipient country.

Restrictions exist for the raising and export of capital, the obtaining of loans by Vietnamese invested enterprises from foreign banks (which remains under the auspices of the state bank of Vietnam), and foreign exchange.

Without going into specifics, the procedure for obtaining an offshore investment registration certificate is largely similar to the procedure for obtaining an investment registration certificate for foreign investors investing in Vietnam. A properly prepared dossier must be submitted to the authorities and approval granted. Offshore invested companies must make financial and management reports to the authorities of Vietnam on a regular basis, and the injection of further capital–if it originates in Vietnam–must be approved. In general, Vietnam retains a great deal of control over outward investment.

This needs to control the outflow of capital, intellectual property, and human capital greatly hinders Vietnam's possibilities for becoming a regional corporate hub. It is also one of the primary reasons that so many Vietnamese e-commerce companies have set up a holding company in Singapore. Startups are founded with the intention to eventually scale beyond their original jurisdiction. That means that at some point they will have to create a corporate structure wherein there is a parent company and subsidiaries in different countries. If the parent company were to remain Vietnamese,

then each time they tried to set up a subsidiary in a different country in their efforts to scale their startup, they would have to go through a months-long process to seek approval. This not only deters founders from using Vietnam as their corporate home, but it deters investors from investing in Vietnamese startups and encourages the outflow of intellectual property and technical knowhow as startup founders seek other havens in which to base their companies.

While I understand that Vietnam wants to continue to monitor its citizens and has yet to completely convert from all of its pre-Doi Moi mores, it would behoove the government to eliminate the outward investment procedures. Not only would it encourage companies to remain Vietnamese owned and based, but it would have a minimal impact on Vietnam's economy. Vietnam's dollar surplus is so huge that the outflow of dollars through unregulated outward investment would be so minimal, and the inflow of profits from the same increased, that the balance of payments problem that the government may fear will occur is unlikely to happen.

Furthermore, Vietnam has expressed an intention to become a technologically developed home to startups and SMEs in the tech sector. The types of individuals who are entrepreneurial and interested in founding these companies are also interested in scaling beyond Vietnam's borders. If Vietnam truly wishes to lure the talent and the intellectual property necessary to meet its goals, it will have to make it easier for these companies to expand regionally and even globally. Until then, e-commerce companies will continue to seek out jurisdictions like Singapore to house their parent companies because Vietnam's regulatory requirements are simply too complex.

CHAPTER 13

Securities & Capital Markets

INDOCHINE COUNSEL
Business Law Practitioners

How To Make An Outward Investment As A Vietnamese Citizen

(16 July 2020)

As we have just celebrated the 25th anniversary of diplomatic relations between the United States and Vietnam, I thought it would be a good opportunity to review the procedures and requirements for Vietnamese investors seeking to invest overseas. This is more complicated than one might expect–particularly in light of the need to obtain FOREX to make such investments–and Vietnam's government seeks to at least monitor, if not control, foreign outward investment.

Managing Partner Duc Dang was kind enough to share with me a memo he prepared recently for a client on this issue. I have largely based this post on that memo though I added a few additional requirements that fell outside the original's ambit. I have also not referred to the original client.

Enjoy.

Overview of outward-investment

"Outward-investment" means a transfer of capital overseas by a resident (either individual or entity) for investment in a form stipulated by laws. Generally, outward investment activities are categorized into direct outward-investment ("**DOI**") and indirect outward-investment ("**IOI**"). The difference between these two forms is the participation of the investor in management of investment activities, which is not always clear in many cases.

DOI occurs when an investor remits capital overseas to implement investment activities and participate directly in the management of her target investment.

IOI occurs during the purchase or sale of securities, stocks and bonds, or other valuable papers or investments via securities investment funds or other intermediate financial institutions in a foreign country.

Direct Outward-Investment

Who qualifies

The following citizens in Vietnam may conduct DOI activities: (i) organization established and operating in accordance with the law of Vietnam, including enterprises, co-operatives and unions of cooperatives and other organizations conducting business investment activities; and (ii) business households and individuals of Vietnamese nationality.

DOI can be implemented by:

(i) Establishment of an economic organization in accordance with the law of the country receiving the investment;
(ii) Performance of an outward business cooperation contract;
(iii) Purchase of all or part of the charter capital of an outward economic organization to participate in management and conduct business investment activities in a foreign country;

and

(iv) Other investment forms in accordance with the law of the country receiving the investment.

Authorization Requirements

An investor seeking to conduct DOI needs to obtain an outward investment registration certificate ("**OIRC**") from the Ministry of Planning and Investment ("**MPI**"), and, depending on the scale of the project, may need to seek prior approval from the Prime Minister or the National Assembly of Vietnam if the amount of the proposed project exceeds VND20 billion or falls under certain legally defined categories.

Authorization Procedures

If the investment capital of the proposed investment is less than VND20 billion (equivalent to less than approximately USD870,000), the investment project will be subject to a registration procedure or, in other words, issuance of the OIRC. If the investment capital of the project is VND20 billion or more, the project will be subject to an evaluation procedure for issuance of the OIRC. The registration procedure is less complicated and time-consuming than the evaluation procedure.

The MPI is the licensing authority and they are responsible for reviewing application dossiers and issue OIRCs.

For projects of less than VND20 billion, the application dossier must be made in three sets. The MPI has 15 working days from the date of submission of the proper application dossier to issue an OIRC. In practice, however, this time may extend from one to one and a half months.

For projects with capital from VND20 billion and over, the MPI will seek opinions from the State Bank of Vietnam ("**SBV**") and other ministries as may be necessary, including from the National Assembly or the Prime Minister, if required. Within seven working days from receipt of a written request from the MPI, the SBV will return its opinion to the MPI. If after seven days, no opinions are provided, the application is deemed approved by the SBV with respect to issues within the competence of the State administration. In practice, the actual time for obtaining the OIRC may range from two to three months.

In addition to obtaining the OIRC, the Vietnamese investor must also open a direct investment capital account in an authorized financial institution in Vietnam through which the direct investment will be made. Finally, they must obtain must also obtain an authorization from the SBV regarding FOREX transactions for DOI.

Indirect Outward-Investment

Who qualifies

The following citizens in Vietnam may conduct IOI activities: (i) organizations established and operating in accordance with the law of Vietnam, including enterprises, co-operatives and unions of cooperatives and other organizations conducting business investment activities (after referred to as the corporate entities); and (ii) individuals of Vietnamese nationality who are eligible to participate in outward issued bonus share plans, a.k.a. employee share ownership programs ("**ESOPs**").

Corporate IOI

Forms of Corporate IOI

Certain corporate entities may make outward-investment using either "self-trading" or "entrustment" schemes. Self-trading allows a corporate entity to trade outward securities

and valuable papers for its own account or to make investments through outward securities investment funds or financial intermediaries. Only the following types of corporate entities are permitted to conduct self-trading: securities companies, fund management companies; securities investment funds via fund management companies, and securities investment companies; insurance business enterprises; commercial banks; general financial companies; and the State Capital Investment Corporation ("**SCIC**").

Otherwise, the corporate entity must "entrust" capital in foreign currency to another (onshore) corporate entity (the "**Entrusted Entity**"). The Entrusted Entity conducts outward indirect investment on behalf of the Principal through an investment trust contract. Only fund management companies or commercial banks are permitted to act as the Entrusted Entity and accept entrustments from Principals.

Procedures for Corporate IOI

Corporate entities seeking to conduct IOI through self-trading must obtain an Indirect Outward Investment Registration Certificate ("**IOIRC**") from the Ministry of Finance, the State Securities Commission, or the SBV. Once they have obtained an IOIRC, the corporate entity must open a capital account for indirect outward investment at an authorized credit institution in Vietnam. In addition, before the corporate entity can start self-trading, they must obtain a certificate outlining trading limits for the entity from the SBV. Only then are they allowed to begin IOI in foreign securities or valuable papers.

Individual IOI

Vietnamese individuals cannot engage in self-trading or entrustment. Only employees having Vietnamese nationality currently working at foreign-invested companies, representative offices and other Vietnam-based units of foreign companies in Vietnam may make IOI in the form of participation in outward ESOPs.

In order to institute an ESOP for Vietnamese employees to hold foreign securities, the corporate entity must be a foreign-invested company, representative office or other Vietnam based unit of foreign companies and must register with, and obtain approval from, the SBV for the ESOPs prior to implementation.

All transactions in relation to the registered ESOPs (e.g. overseas fund remittance or transfer of proceeds back to Vietnam) must be conducted via a bank account opened by the Vietnamese entity with a bank in Vietnam.

Private Share Placement in Vietnam

(19 October 2020)

Ever since the stock exchange opened in the late 1990s, the procedures for private share placement in Vietnam have been divided between public companies and privately held companies. For publicly held companies the process has always been somewhat onerous in an effort to dissuade them from conducting private share placements. It has always, however, been governed by the extant Securities Law and remains the same. For privately held companies the process was unlimited–other than by restrictions placed on M&A approvals–for most of their history in the country. From 2010 to 2012, however, an impressive array of restrictions were imposed on private companies private share placements in Vietnam. This was quickly seen as limiting the freedom of privately held companies to raise capital and to lure investors and, as the brief two year period tells, was repealed in 2012. There exists, now, no substantial restrictions for conducting private share placement in Vietnam, at least not for privately held companies.

While the previous Securities Law controlled private share placements for public companies under the law itself and a subsequent decree, the new Securities Law–passed last year and coming into effect from January 1, 2021–is the only issued guidance so far for the new securities regime. The old Securities Law remains in place for a few more months, therefore, this article will review the old law briefly before focusing on the new law's regulations with the anticipation of making this post slightly more evergreen than it might be otherwise.

What is a private share placement in vietnam?

A private share placement in Vietnam is, as it states, not a public share placement. To understand this, public share placements are those made through mass media, to at least 100 investors not being professional investors (see definition below). In contrast, private share placements are not made on mass media and are offered to fewer than 100 investors, not being professional investors, or only made to professional investors.

Private share placement in vietnam under the old law

Under the old law, the first requirement for making a private share placement in Vietnam is to obtain a decision of the General Meeting of Shareholders, the GMS, of the company. This decision must include a capital utilization plan which itself includes:

"specify the objective, eligible investors or the criteria for selection of eligible investors, the number of investors and the scale of the proposed offer"

The buyers of such privately placed shares must enter a one year lockup period, except for shares offered as part of a ESOP, and subsequent tranches of a share placement cannot take place sooner than six months after the last tranche was offered. Additional restrictions are imposed on foreign ownership ratios and restricted business lines. The only

restriction, other than foreign ownership limits, on who may purchase privately placed shares is a prohibition against the private placement of shares to a subsidiary company of the seller.

In addition to a regular private share placement, the current (old) law provides for private placement of shares for the purpose of making an equity/debt swap and for the exchange of shares in another company. I won't go into either of those restrictions here as they are tangential and will become obsolete in a matter of two and a half months.

Private share placement in vietnam under the new law

First off, the new law specifically states that private share placement in privately held companies is governed under the Enterprise Law and does not fall under the purview of the Security Securities Commission, the SSC. The new law divides the private placement of shares from various types of bonds, debt, and other valuable papers of public companies, securities companies, and fund management companies– all of which fall under the jurisdiction of the SSC. For now, and for comparison's sake, I'm just going to look at the private placement of shares in Vietnam by public companies.

Like the old law, the new law requires a decision of the GMS that:

"ratif[ies] the plan for issuance and the plan for use of capital generated by the private placement with speciffc criteria and quantity of investors".

Further guidelines on what this plan from the GMS must contain are forthcoming. However, it is important to note that the private share placement in Vietnam is limited to strategic investors and professional investors.

A strategic investor is an: *"investor...selected by the General Meeting of Shareholders according to their financial capacity, technological capacity and commitment to cooperate with the building work for at least 03 years".*

While a professional investor includes:

- Commercial banks, foreign branch banks, finance companies, insurers, securities companies, fund management companies, securities investment funds, international financial institutions, of-budget financial funds, state-owned financial institutions permitted to buy securities as prescribed by relevant laws;
- Any company whose contributed charter capital exceeds 100 billion VND; every listed or registered organization;
- Holders of securities professional certifications;
- Any individual holding a quantity of listed or registered securities that is worth at least 02 billion VND as confirmed by the securities company; or
- Any individual whose taxable income in the latest year is at least 01 billion according to his/her submitted tax return or tax deduction documents of his/her income payer.

By restricting private share placements to strategic and professional investors, the new securities law not only provides an innovation for Vietnam while bringing standards closer to international levels, but also provides protections for smaller investors in the country where prohibitions against over leveraged investments are not existent.

Additional restrictions include a lockup period of three years for strategic investors and one year for professional investors, though this may be escaped through judicial or arbitral order or through inheritance upon the investor's death. Tranches must be spaced at least six months

apart and stated ownership ratios, including those for foreign ownership and restricted business lines, must be respected.

Conclusion

Private share placement in Vietnam, then, is fairly straightforward. There is, as of now, no extra-company approval required other than those currently in place for the approval of M&As under the new Competition and Investment Laws. There are, however, new restrictions on who can buy private share placements without the additional protections that exist for public share purchases though official securities markets. It is possible, however, to do, and for some public companies, especially those seeking a strategic handshake with foreign investors, it is more desirable to make a private share placement than jumping through the hoops required to make a public acquisition. It is still tricky, however, and all of the rules have yet to be promulgated for the new Securities Law.

Investment in Vietnam's Tech Industry H1/2020 Report *(9 November 2020)*

A little over a month ago Vietnamese venture capital firm Do Ventures released the Vietnam Tech Investment Report 2019–H12020, a report on the state of investment in Vietnam's tech industry during the first half of 2020. This report came to my attention a couple of weeks ago, but due to other time sensitive topics I wasn't able to address this report until now. This post will review some of the high level findings of the report rather than digging into too many actual numbers. You can submit your email to receive a copy of the full report from Do Ventures on their website here.

Perhaps the most interesting finding of the report is that Covid-19 led to an actual increase in the development of Vietnam's tech industry in H12020. This was led by interest in technologies that would foster social distancing and limit face-to-face human contact. Technologies along these lines included online shopping and digital payments services. Perhaps more importantly as Vietnam has a large number of startups in the sector, cashless payments provided a boost in consumer awareness and use during H1. This is pointed up by the fact that such ecommerce transactions increased three to five times during the six month period.

Logistics and in-country shipment services have seen major developments as a result of Covid demands as well. From shipping of orders made via online shopping services such as Tiki and Sendo (both Vietnamese startups) or the increasing number of online grocery delivery services, the logistics industry is turning to technology to solve the problems caused by Covid and to continue provision of services without interruption.

These improvements do not, however, suggest that overall investment increased during the last six months. GDP growth fell from 6.7% in H12019 to 1.81% in H12020 due to the economic devastation of Covid. The report found that investment proceeds decreased by 22% year-on-year for the same period, falling from $284 to $222 million for 2019 and 2020 respectively. Additionally, deals made by foreign investors coming into Vietnam have dropped. While during 2019 investors came from Korea, Singapore, and Japan, the majority of deals made so far in 2020 have come from investors who already have a presence in Vietnam. This is seen as a result of travel restrictions and the uncertainty of how long the current lockdowns will run.

The Do Ventures report also found that H12020 has shown an increase in entry into new industries by startups in Vietnam. Technology companies have begun developing services in industries which it might not have considered before such as human resources and real estate. These new ventures expand the reach of tech startups and provide new ground for VC investment at seed funding. Furthermore, these startups enter a pipeline that will lead to additional rounds and eventual exits in the coming years, a trend that will continue to fuel investment in Vietnam's tech industry.

The final trend that the report mentions is the

decrease in exits from H12019 to H12020. There have been fewer exits this year, though the exits that have occurred have been of a larger than average size than last year. Do Ventures anticipates that the trend will be towards trade exits and secondary sales for the foreseeable future as the number of unicorns and growth companies mature enough to justify IPOs is limited.

Finally, Do Ventures conducted a survey of 50 investors over six major Southeast Asian markets and found that investment interest remains high. Of the six markets surveyed, Vietnam stands at the top of the list for desirable investment potential followed by Indonesia. From the view of Do Ventures, one of the few venture capital funds operating in Vietnam that is manned solely by Vietnamese, the future for Vietnam's tech industry is bright. If the startups can continue to develop services tailored to meet the change in needs caused by a Covid-19 reality, those startups will continue to find funding at all levels and feed the pipeline towards successful exits for investors and entrepreneurs.

SPACs in Vietnam

(21 June 2021)

Special Purpose Acquisition Companies, or SPACs, are all the rage at the moment. In 2020, SPACs raised $83 billion in proceeds from their IPOs and already in the first quarter of 2021 they raised $88 billion. This is big money and many companies, particularly offshore companies, are keen on being acquired by an SPAC as a means of raising capital and going public.

But what is an SPAC?

An SPAC is, essentially, a publicly traded holding company. It is created with the sole intention of buying other companies.

When an SPAC is born it goes through the initial public offering (IPO) process on the relevant stock exchange. Most SPACs are listed on the New York Stock Exchange and this gives them access to the largest pool of potential shareholder investors in the world. When going the IPO process, SPACs do not conduct the same level of disclosure as a traditional company because they have no existing assets or operating businesses. They are created for the sole purpose of investing in an as of yet undisclosed company or companies. This minimizes the disclosure requirements for the IPO of the SPAC and reduces legal and regulatory compliance costs for the SPAC.

Shareholders of an SPAC are, in large measure, acting as venture capitalists who invest in startups. They are investing in large measure in the reputation and capabilities of the founder/owners as the targets of the SPAC are undisclosed at the time of the IPO. Shareholders have to trust that the SPAC will invest in a company that will warrant the share price at the time of the IPO. Despite this risk, there are some protections against abuse.

When a shareholder invests in an SPAC, in addition to shares, they are given a warrant which gives them the right to sell their shares back to the SPAC at a specified price, often the original purchase price of the share. Funding raised by SPACs through an IPO is placed in an interest-bearing trust account which can only be accessed for two purposes: paying back shareholders on the exercise of their warrant, or buying a company. This prevents the management of an SPAC from spending the money frivolously or on activities that dilute the purpose of the SPAC.

After an SPAC completes its IPO and is fully funded it then will go about finding a company to buy. For example, SPAC vehicle Altimeter Growth Corp., is currently going through the process of merging with Grab Holdings Inc., the Southeast Asian e-commerce unicorn. Unfortunately, since news of the deal was announced, Altimeter Growth Corp.'s stock has tanked to near record lows. Not the best news for Grab.

Assuming that the SPAC finds a company to buy, they will go through the traditional M&A process for acquiring ownership in that company using the funds raised by it during its IPO to purchase shares in the target company. During the acquisition process, the stock exchange traditionally requires a great deal of disclosure about the target company and the intended future of the acquisition. This is nearly as exacting a process as the IPO disclosures

would be, however, because the deal is not an actual IPO, there is no underwriting required and thus the process can occur slightly more quickly than a traditional IPO.

Once the acquisition is complete, it is as if the target company went public as they are the primary asset of the SPAC and funded solely by the share sales of the SPAC. There may also be another round of shares issued once the target company has been acquired and a more concrete valuation can be assigned to the SPAC.

What does this mean for Vietnam?

Currently, there is not a single Vietnamese company listed on a foreign stock exchange. This may change soon as VinFast has announced its intentions to list in the United States. There are also several large conglomerates who have expressed interest in listing overseas, possibly using an SPAC.

Using an SPAC to go public overseas is a semi-shortcut for Vietnamese companies interested in listing on offshore exchanges. It is not, however, a great deal easier. The disclosure requirements are still onerous. While the acquired company will not be directly responsible for violations of securities rules as the SPAC is technically the reporting entity, they will be owned by the SPAC. As the main shareholder of the acquired company, the SPAC will have the authority to remove management that fails to comply with securities requirements or otherwise act in detriment to the interests of the SPAC and its shareholders. This places an onus on the acquired company little different from that required of companies going through a traditional IPO. The only real advantages of going public via an SPAC versus an IPO are the fact that an underwriter is not required for the transaction and that there is a potential time savings of a month or two to complete the process.

For Vietnamese companies considering an SPAC, they have to determine whether they want to be beholden to a single institutional investor–the SPAC–or whether they want to take a little more time and a little more care and be beholden to a diverse pool of investors who will be less likely to meddle with management and the activities of the company.

SPACs are not for every company. In fact, they are a minority of listed shares on major global stock exchanges. They also bear considerable risks as, in the instance of Grab Holdings, Inc., the loss in the value of Altimeter Growth Corp.'s stock since the announcement of the deal has already resulted in a delay of several months and may ultimately derail the deal entirely. There are also questions of control as the management of an SPAC will essentially be the sole voice governing the shareholder's meeting of the acquired company. It may be doubtful whether the few advantages of an SPAC are worth the loss of control and the risks involved. It might be better to simply list in an IPO.

Disclosure Requirements for Public Listing in Vietnam

(23 May 2022)

For a brief moment I want to discuss the capital markets of Vietnam, mainly the stock market, and what a person can expect from a company prior to listing.

The Law on Securities 2019, includes a list of certain requirements that must be met before a company can issue shares to the public. Public offerings include initial public offerings, follow-on offerings of shares or pull options, and other types of offerings.

Shares offered publicly in the territory of Vietnam must be denominated in Vietnam Dong and have a face value of 10,000VND. If the value of the securities on the trading system is lower than the face value, then the shares may be offered at that lower value. Only joint stock companies can make public issuance of shares in Vietnam.

In order to be allowed to issue shares publicly, the issuer must meet the following requirements in general:

1. Its contributed charter capital is at least 30 billion VND on the offering date according to the accounting books;
2. The company has profit over the last 02 years and has no accumulated loss on the offering date;
3. There is a plan for issuance and use of capital generated by the offering ratified by the General Meeting of Shareholders;
4. At least 15% of its voting shares have been sold to at least 100 non-major shareholders. If the issuer's charter capital is 1.000 billion VND or above, the ratio shall be 10%;
5. Before the offering date, the major shareholders have made a commitment to hold at least 20% of the issuer's charter capital for at least 01 year from the end of the offering;
6. The issuer is not undergoing criminal prosecution and does not have any unspent conviction for economic crimes;
7. The offering is consulted by a securities company, unless the issuer is already a securities company;
8. The issuer has a commitment to have its shares listed or registered on the securities trading system after the end of the offering; and
9. The issuer has an escrow account to receive payments for the offered shares.

To make a follow-on public issuance of shares, the joint stock company, which is also a public company (the issuer), must meet the additional requirements:

(i) The company has profit in the preceding year and has no accumulated loss on the offering date;
(ii) The value of the new shares does not exceed the total value of shares outstanding at their face value, unless

there is a commitment to buy all of the shares of the issuer for reselling or to buy all of the unsold shares of the issuer, shares issued to raise more capital from equity, shares issued for swapping, consolidation or acquisition of enterprises; and

(iii) If the public offering is meant to raise capital to execute a project of the issuer, at least 70% of the offered shares must be sold to the investors. The issuer shall have a plan to make up for the shortage in case the capital generated by the offering is inadequate.

Companies seeking to make a public offering must register with the State Securities Commission. An application for registration of public offering consists of:

1. The application form;
2. The prospectus;
3. The issuer's charter;
4. The decision of the General Meeting of Shareholders to ratify the plan for issuance and the plan for use of capital generated by the offering, and the commitment to have the shares listed or registered on the securities trading system;
5. The commitment to comply with the regulations in Point d and Point e Clause 1 Article 15 of the Law on Securities 2019;
6. The major shareholders' written commitment to hold at least 20% of the company's charter capital for at least 01 year from the end of the offering;
7. The contract with a securities company for public offering consulting;
8. A bank's or FBB's confirmation on opening of an escrow account to receive payments for the offered shares; and
9. The public offering underwriting agreement (if any).

I'll stop there lest I give away all of our secrets, but there are a large number of additional requirements for companies who seek to make public offerings included in this list. For instance, both the charter of the issuer and the prospectus must include certain minimum obligations on the part of the issuer, obligations which detail the corporate governance, the purpose for which the funds raised by the issuance will be used, and several other essential points.

While Vietnam has progressed considerably in its public regulation of listing companies, there remains a vast scope for increased scrutiny, especially in light of recent issues with large development companies overburdened with debt and efforts to manipulate certain stocks for the profit of a small number of investors.

It may be a few more years before we get the next installment of the securities law, there remain a great many things the SSC can do to improve its oversight of publicly listed companies and ensure the fairness of information sharing that will allow investors to understand the true issues related to a given company.

CHAPTER 14

Technology, Media & Telecoms (TMT)

INDOCHINE COUNSEL
Business Law Practitioners

An Obvious Advance of Resolving ".vn" Domain Name Disputes

(3 May 2018)

In a previous article regarding the challenges of resolving ".vn" domain name disputes in Vietnam, we mentioned the recent increase in the number of ".vn" domain names and concomitantly the increase in the number of ".vn" domain name disputes. Although there are four solutions to resolve such disputes, none of them seems good enough to meet plaintiffs' demands. Among them, administrative remedies may be better than amicable settlements, arbitration remedies or civil actions because most domain name disputes relate to similarities with IP objects such as trademarks and inspectorates especially in the domain of science and technology. However, a fundamental challenge of administrative action is the lack of enforcement when the offending parties do not voluntarily return the disputed domain names and the Vietnam Internet Network Information Center ("**VNNIC**"), the authority in charge of the management of ".vn" domain names, refuses to apply technical methods to coerce the offending parties to obey the rules.

In order to settle the above obstacle, the Ministry of Science and Technology and the Ministry of Information and Communication have cooperated to issue the joint Circular No. 14/2016/TTLT-BTTT-BKHCN on 08 June 2016 providing guidance on procedure and process of change and withdrawal of domain names violating regulations on intellectual property ("**Joint Circular 14**"). Under this Joint Circular 14, there are three types of sanctions applied for violation of the rules for ".vn" domain names:

- *Change of information of ".vn" domain names:* where an electronic information page connected with a ".vn" domain name contains advertisements, information about the sale of goods and services which are identical or similar to a registered trademark and damage goodwill, reputation or physical assets of the trademark proprietor, the competent authorities can issue an administrative sanction to request the owner of right to use such domain name to change content of the connected electronic page i.e. Removal of the advertisements, information in question.

- *Return of disputed ".vn" domain names:* where the ".vn" domain names are identical to or confusingly similar with, a registered trademark, trade name or geographical indicator and the owner of right to use such domain name has no lawful rights and interests to the said IP objects, the competent authorities can request such owner to return the disputed domain names within 30 days from effective date of related decision on administrative sanction.

- *Withdrawal of disputed ".vn" domain names:* where the owner of right to use

such domain names fails to obey one of the two above requests, the authority which issues administrative sanctions shall be responsible to request VNNIC to apply technical measures to abolish the right to use the disputed domain names of the said owner.

By this guidance, either domain name or content of electronic pages connected with a domain name can be subject to enforcement activities with the key point being a procedure of withdrawal to coerce the offending parties to obey the rules.

The issuance of Joint Circular 14 can be considered an obvious advance of resolving ".vn" domain disputes because it provides a solid legal ground to deal with different types of violations, a straightforward procedure to actively handle cases regardless of offending parties' non-cooperation and a mechanism of effective cooperation between state authorities to ignore delays in execution.

Vietnam's New Cyber Security Law

(18 June 2018)

The new Cyber Security Law was passed last week by Vietnam's National Assembly. The new law comes with a great deal of international controversy and doubts as to whether the law is actually in conformity with existing international treaties of which Vietnam is a signatory.

Three major concerns arise from a perusal of international coverage of the new law.

First, there are questions of privacy. Many observers report that Vietnam has made major strides in its efforts to improve investment and privacy for tech and social media. However, there are provisions in the new law which require internet service providers to cooperate with state authorities, giving them time limits to report to state requests. In particular, this privacy issue is brought to question because it is the Ministry of Public Security which has prepared and drafted the new Cyber Security Law. Some international organizations fear that this will open the door to ambiguous enforcement and allow the Ministry of Public Security to enforce the law according to its own fiat.

Second, there are questions of investment loss. Many of the requirements listed in the law are directed towards foreign companies that provide internet services to Vietnamese citizens. For example, both Facebook and Google, as well as an uncertain number of other digital service providers, will be required to open a physical site in Vietnam and store data gathered from Vietnam on servers located in Vietnam. They will also be coerced to cooperate with state authorities in investigations that may not be well defined.

Third, the definitions in the new law are questionably broad and may encompass more than the National Assembly originally intended. This is somewhat of a problem with much developing country law, but Vietnam has recently been fighting this tendency with more finely tuned legal documentation. Unfortunately, that is not the case with the Cyber Security Law.

Finally, the law will go into effect on 1 January 2019. There are questions as to how much this law will negatively affect both GDP and foreign investment inflows. For now, we will have to wait for implementing decrees and hope they go a long way towards defining what is undefined in the law.

Cyber-Security Law in Vietnam

(31 August 2018)

On 12 June 2018, the Cybersecurity Bill was ratified by the National Assembly of Vietnam with an approval rate of 86.86%. The Cybersecurity Law is due to take effect on 1 January 2019 and provides regulations on the protection of national security, ensuring social order and safety in cyberspace. It also covers the responsibilities of concerned agencies, organizations and individuals when creating, transmitting, collecting, processing, archiving and communicating information in cyberspace.

Unless the particular item is on the list of important information systems for the national security, a specialized agency for cybersecurity protection shall conduct cybersecurity checks on organizations and agencies' information data systems when they detect an act of violation in cybersecurity where a party is attempting to commit a crime prejudicial to State security or to cause serious harm to social order and safety; or when receiving a request from the manager of information data system if they themselves detect an act of violation against the cybersecurity law on information data system under their management. Objects for cybersecurity checks comprise of:

1. Hardware, software, digital devices used in information data systems;
2. Information archived, processed, transmitted in information data systems; and
3. Technical measures for protection of State secrets and prevention and combat from disclosing or losing State secrets.

For conducting checks, a letter of notice is required to be sent to the manager of the information data system more than 12 hours prior to conducting the cybersecurity check. The check results and the request for the manager of information data system shall be provided within 30 days as from the end of checking date if they detect any weakness or vulnerability of security of such information data system. The detailed procedure for a cybersecurity check shall be prepared and promulgated by the Government in the coming days.

The provision, posting, or transmission of the following contents by any individual, organization or agency on their website, e-portal, or social network site shall be considered as an act of violation against information security in cyberspace (the "**Violation information**"):

1. Information in cyberspace with contents that may be considered propaganda against the State of the Socialist Republic of Vietnam;
2. Information in cyberspace inciting riot, disrupting security, disturbing public order;
3. Information in cyberspace causing humiliation, slander;
4. Information in cyberspace with contents for violation of economic management order;
5. Information in cyberspace with fabricated or untruthful contents causing confusion amongst the citizens, causing loss and

damage to socio-economic activities, causing difficulties for the activities of the State agencies or officials in performing their duties, or infringing the lawful rights and interests of other agencies, organizations and individuals; and

6. Other information infringing upon State security.

Requirements for guaranteeing information security in cyberspace under the Cybersecurity Law is to set out the responsibilities for domestic and foreign companies providing services over telecom networks or the internet or value-added services in cyberspace in Vietnam comprising of:

1. Implementing management and technical measures to prevent, detect, stop and remove the Violation Information as requested by the specialized agency for cybersecurity protection when conducting cybersecurity checks;
2. Coordinating with the specialized agency for cyber security protection to deal with the Violation Information in cyberspace;
3. Authenticating information when user registers a digital account, maintaining confidential information and account of users; providing information of users for the competent agency when such information is directly used for serving an investigation on cybersecurity, and the competent agency must have a letter of notice for such request;
4. Preventing from sharing and removal of the Violation Information on services or information data systems under their direct management within 24 hours as from receipt of letter of notice from the specialized agency for cyber security protection under the Ministry of Public Security or the competent agency of the Ministry of Information and Communication, and saving the system logs within a specified period according to the regulations by the Government in order to serve investigation of and deal with an act of violation against the Cybersecurity Law;
5. Not providing or ceasing to provide services on telecom networks or the internet or value-added services for the organizations, individuals who post the Violation Information in cyberspace as requested by the specialized agency for cybersecurity protection under the Ministry of Public Security or the competent agency of the Ministry of Information and Communication;
6. Storing information data in Vietnam in a specified period according to the regulations by the Government which is created from the activities of collecting, exploiting, analyzing and processing data on personal information, data on relationships of users, and data created by such users; and
7. Setting up a branch or representative office in Vietnam is required for foreign companies in question.

For implementation of the Cybersecurity Law, there remain quite a few guiding regulations which will be issued by the Government and the relevant ministries when the Law comes into effect on 1 January 2019, such as the specified period for storing information data, procedures for cybersecurity checks, as well as requirements for storing information data in Vietnam.

P2P Lending in Vietnam (Part 1)

(11 March 2019)

A few days ago the National Bank announced that it will approve Peer to Peer Lending. This comes as little surprise since there are already 40 companies operating in the sector in Vietnam and the activity has been neither approved nor prohibited up to this time.

P2P Lending is a method of lending that skips the traditional banks. It is a way for lenders to connect directly with borrowers via an online portal such as go fund me and other sites that take money from investors and give it to entrepreneurs.

As this activity is already well advanced in Vietnam this does not mark a new turning point for technology or the regulatory atmosphere, but it does make known the attitude of the government concerning the activity of P2P lending.

This is a positive step in the right direction, though, as it comes on the heels of other, less obvious attempts to open the country to technology and commerce in a large way.

You can access the original story in Vietnamese here. Or look at Wikipedia's page on P2P lending here.

Tax Authorities On Top of Tech

(12 June 2019)

With this article in Vietnam Investment Review, here, the government proves that it is capable of keeping pace with technological advancement in at least one department, that of tax collection.

The article examines the fact that Grab, a ride hailing app company, has surpassed Vinasun in tax contributions. It outlines the concerns that were raised initially, primarily the fact that Grab may not be amenable to easy tax collection, one of the arguments raised by the taxi union to fight what has been a major blow to taxi business.

The tax department has responded with technology and advanced regulations. Instead of sitting idly by and relying on traditional tax collecting methods, the tax department has come up with a way to monitor digital transactions, something it is transitioning to other digital technology.

One thing this proves is that the government can keep up with at least the tax aspect of technological advancement, even though it may struggle with the regulation of that technology.

This is a boon for startups, including fintech outfits, that are facing regulation from Jurassic government regulators. Led by the tax department, which is ultimately the most important one, the government is going to be sensitive to the growth of lucrative sectors. This is especially true in light of their recent stated goal of 1,000,000 SMEs by 2020.

Although this means more taxes, the technology is apt to bring about eventual change in regulation to allow for the tech itself. Just because the tax department sees a way to increase tax collection. Hit them where it hurts, in the pocket book.

Call for More Technology Transfer in Vietnam

(24 July 2019)

As reprinted in Vietnam+, here, the Vietnam News Agency has called for increased technology transfer to production companies in Vietnam. The call sites dismal numbers of high tech usage by manufacturers in Vietnam stating that nearly 60% of manufacturers are using technology that is outdated while only 2% use high technology. This is disturbing, especially in light of news from Nintendo, Samsung, and other high tech industrial giants of their moving of manufacturing to Vietnam.

Will Vietnam be ready?

It's hard to tell. The pre-planning strategy of the Central Committee and the National Assembly makes it difficult to predict the correct path to advancement economically. Take for instance the recent curtailment of renewable energy in the Central plains. While nearly 4GW of power came online through new solar power facilities, the planning for the national grid called for that same amount of energy to be available from nuclear sources in several years from now. Thus, the grid is under construction to handle the new power in 2025, not today when it is needed.

Other examples abound, but the principle is sound. Pre-planning can only do so much in advance of reality.

Thus the question, will Vietnam be ready for the new influx of high tech manufacturing? Assuredly, new manufacturing sites will be constructed by the likes of Nintendo and Samsung that will include all the technology that they need, and transfer that technology to the manufacturers with whom they work, but in general, Vietnam is not ready for competition on the international manufacturing scene.

Technology transfer, as VNA quotes B.T. Tee, General Director of Informa Markets Vietnam, "*is important in improving global competitiveness for local manufacturers in Vietnam.*"

Without the technology to make Vietnam competitive on the world market–to compete with the likes of South Korea, Taiwan, and even Thailand or Indonesia–the manufacturing industry will be left catering to its domestic market, a market that is currently capped at slightly more than 96 million people. This is a disservice to the economy and to the country. Manufacturing needs to lift itself up, whether by bootstrap or government fiat, to compete on a global level. There are predicted to be 11 billion people on Earth by the end of the century, and Vietnam is one of the countries that can take advantage of that market, if it sees fit to improve its technology.

And technology transfer from overseas partners is one of the fastest ways to do so.

Cybersecurity Update *(17 September 2019)*

Recently we prepared a special alert concerning the current draft decree governing the cybersecurity law that has caused so much controversy in the interwebs. One clause, the requirement for offshore companies to establish onshore domain hosting along with a branch/ rep office is particularly controversial.

Below I quote from our security alert on this issue, as there is now new guidance in a draft decree that will govern the law on Cybersecurity. It is interesting to note that instead of all firms, there is now a requirement for previous bad behavior before making such an insistence of in-territory presence. So take a look.

As per Article 25.1 of the 2018 Draft, any enterprise, whether local or off-shore, which sufficiently meets the conditions as prescribed therein, shall conduct data storing and branch/ representative office establishment in Vietnam. This regulation on data storing and branch/ representative office establishment in Vietnam (the "**Regulation**") has raised a big concern in the community since it tends to set certain obstacles for enterprises, especially off-shore enterprises, on the way of technology integration and development.

This Regulation has been modified and clarified in the Latest 2019 Draft. Accordingly, as per Article 26.1 of the Latest 2019 Draft, the Regulation shall be applied as follows:

1. Purpose of applying the Regulation

The Regulation shall be applied in case of protecting the national security, social order and safety, social ethics and community health, not in all cases.

2. Conditions for applying the Regulation

The Regulation shall be applied when having legal basis to sufficiently determine the following 03 (three) elements:

- The enterprise provides one of the services as prescribed in Article 26.1(a) of the Latest 2019 Draft;
- The enterprise conducts activities of collecting, exploiting, analyzing and processing the prescribed types of data (as further explained in section (ii) below);
- The enterprise is warned that the services provided by it are used to commit a breach of the laws of Vietnam; and such enterprise does not take any proper measure for preventing, remedying or cooperating with competent agencies in handling such breach.

In other words, an enterprise will only be subject to the Regulation when having legal basis to determine all of the aforementioned conditions.

The Regulation, when applicable, shall be conducted only upon request decision by the Minister of MPS. The Latest 2019 Draft also sets out the period for enterprises to implement the Regulation, which is **6 (six) months** as from the date having the decision of the Minister of MPS according to Article 26.4(c) therein.

Specific Conduct To Be Taken

Instead of generally stated: "*Local and off-shore enterprises which sufficient have the following conditions shall conduct data storing and branch/ representative office establishment in Vietnam*" as prescribed in Article 25.1 of the 2018 Draft, the Latest 2019 Draft clarifies as follows, when all required conditions are met:

(i) Local enterprises are responsible for data storing; and

(ii) Off-shore enterprises are responsible for data storing and branch/representative office establishing.

Viettel Installs 5G Network in HCMC

(23 September 2019)

According to Dat Viet at VN Express International, Viettel, the military owned telecommunications company, has installed several 5G network broadcasting stations throughout Ho Chi Minh City and Hanoi.

This is a major turnaround for Vietnam as they are intent on becoming one of the first countries in the world to roll out 5G services. This is especially important as the country works on its infrastructure to handle the influx of manufacturers from the US-China Trade War.

I remember ten years ago researching VOIP regulations in Vietnam. At the time it was still illegal to broadcast Voice Over Internet Protocol from a computer in Vietnam. Not that stopped anyone from using Skype or other internet based services. Needless to say, for Vietnam to be at the forefront of 5G services globally is a huge change from ten years ago.

I have to wonder if the law is going to be kept up to handle this innovation. Not only will internet speeds increase, but the possibility of automate vehicles is even mentioned in the VN Express article. To imagine automated vehicles in Ho Chi Minh City or Hanoi is nearly impossible, but then, a hundred years ago we were barely moving with the Ford Model-T.

If Viettel can pull off this 5G coup, and it looks promising that such a miracle may occur, then Vietnam will be poised to lead SE Asia into a new era of connectivity. It will require many new laws and sophisticated legislatures and ministry personnel to understand the new technologies and allow them rather than stifle them.

For the future, look no further than the new generation of lawyers coming up in the ranks. A week and a half ago I had the opportunity to attend a training on leadership with the firm, and sat at a table with several young–early twenties–lawyers who were working to develop their leadership and legal skills. I was impressed by their ferocity of attacking problems, and their insight into the current world of work. If this is the quality of lawyers coming up in the world, then I am satisfied that things will be okay, at least in Vietnam.

Vietnam Issues Fake News Rules Amidst Covid-19 Battle

(20 April 2020)

Last Friday Indochine Counsel issued a Special Alert concerning the recent issuance of a decree guiding enforcement efforts to limit "*fake news*" in light of the Covid-19 pandemic. With some slight formatting differences, the below reproduces that alert for your reference.

On 3 February 2020, the Government of Vietnam issued Decree No. 15/2020/ND-CP on administrative sanctions in the sectors of postal, communications, radio frequency, information technology and electronic transactions ("**Decree 15**"), which came into effect on 15 April 2020 and superseded Decree No. 174/2013/ND-CP ("**Decree 174**"). Decree 15 adds remarkable regulations on administering the use of a social network platform ("**SNP**") and information transmitted thereon and clearly assigning obligations of SNP users as separate from a social network service provider ("**SNSP**").

The following are the main points of Decree 15, of which both SNP users and SNSPs should be aware:

The subjects of application

While Decree 174 did not provide an explicit scope of application, Decree 15 provides a detailed list in Article 2. Accordingly, foreign organizations and individuals operating in the specific prescribed sectors and conducting certain violations, as set out under Decree 15, shall be subject to its administrative sanctions under this new decree.

New regulations applicable to the violations of SNP users' obligations

(a) Decree 15 regulates the administrative sanctions applied to violations related to obligations of SNP users. In particular, Article 101 sets out violating conduct when using an SNP, which is subject to a monetary fine of up to VND20 million (for organizations) or VND10 million (for individuals), and additional remedial measures consisting of the compulsory removal of violating information or content.

The sanction applies to SNP users who post or share the following content on an SNP:

(i) Fake news, false information, or information that distorts, slanders or offends the reputation of other entities;
(ii) Information encouraging superstition, depravity, or that is objectionable to the fine customs and traditions of Vietnam;
(iii) Information describing gore or accidents in detail;
(iv) Fabricated information that causes panic in the community, encourages violence, crimes, social vices or gambling-related activities;
(v) Art works or publications that infringe intellectual property rights

of others, or which are not licensed or are prohibited to be publicized;

(vi) Advertising or sharing of prohibited goods or services;

(vii) Images of the map of Vietnam which do not or incorrectly express national sovereignty; and

(viii) Links to prohibited contents.

(b) The act of using an SNP to disclose national secrets or personal secrets of individuals or other secrets is subject to a monetary fine of up to VND30 million (for organizations) or VND15 million (for individuals) and additional remedial measures consisting of compulsory removal of violating information.

Increase of the fines for the violations related to the SNSP's obligations

(a) Under Article 100, the average rate of monetary sanctions is generally increased. For instance:

(i) Violations of an SNSP as to technical requirements (i.e. Not providing personal information of SNP users related to crime or terrorism, etc.) May be fined up to VND50 million instead of VND30 million;

(ii) Violations of an SNSP for proactively providing prohibited contents in accordance with the laws may be fined up to VND70 million instead of VND50 million; or

(iii) The act of using personal data of other persons on the SNP without their permission may be fined up to VND50 million instead of VND10 million. The data subjects covered by this fine has been expanded by the replacement of "social network users" with the term "other persons". This means that an SNSP must obtain permission to use the personal data of any individual referred to on the SNP, not just of SNP users.

(b) The scope of application under Article 100 has also been modified. In particular, its title is quoted as *"Article 100. Violations on obligations of organizations, enterprises establishing social network"*, while under Decree 174, the underlined phase was specified as *"organizations, enterprises providing social network service"*. Under Decree 72, organizations and/or enterprises are allowed to establish social network only when having the license issued by the Ministry of Information and Communications (the "**MIC**"). In order to obtain such a license, one of the key conditions is that the organization or enterprise in question must be duly incorporated under the laws of Vietnam, i.e. a Vietnam-based entity. Therefore, the new title of Article 100 of Decree 15 seems to limit its subject of application to onshore entities only, which is slightly contrary to the subject of application of the whole Decree 15 (as mentioned above).

During the COVID-19 pandemic, the Government has been fighting the spread of the virus alongside with the spread of fake news or rumors on SNPs. With Decree 15 coming into effect, hopefully the SNP users will be more aware of the seriousness and consequences of their acts before posting anything on a SNP.

Additionally, in the context where legal framework for personal data protection is still under development, the issuance of Decree 15 makes a great contribution in keeping a safe and secure online environment, especially on social networks, where the rights to freedom of speech are usually distorted and abused.

How to Obtain a Vietnam Branded Domain Name

(24 August 2020)

As a digital nomad of sorts–though I don't roam much–I have a focus on Southeast Asia and, specifically, Vietnam. I frequently come up with ideas for blogs or websites or various pursuits that would allow me to use my Vietnamese language skills to target the content consumption audience living in Vietnam. If I ever take one of these ideas to the next level, I would be interested in obtaining a locally branded domain name, or a domain name with the top-level domain of .vn to add legitimacy to my venture. With that thought in mind, I was curious what requirements would be imposed should I seek to register a .vn domain name.

".vn" is Vietnam's top-level domain. It is controlled by the Vietnam National Internet Center ("**VNNIC**"). They are the ones who issue permission for .vn domain names and who enforce the resolutions of disputes between potential registrants. They issue all of the rules for applications and shut down domain names in violation of national laws. But they are not the ones you contact in order to register a .vn domain name.

You can obtain a .vn domain name by registering with one of nine specified registrars in Vietnam–and a few additional service providers for international registrants. The list includes: pavietnam.vn, matbao, gmoz.com, nhanhoa.com, inet, vnpt, esc.vn, viettel, and vinahost. Additional registrars are available for applicants located outside Vietnam. You can find links to each at https://www.vnnic.vn/nhadangky/. While you can use one of these private industry registrars, there remain certain elements which must be satisfied regardless of your chosen provider.

Characteristics of a .vn Domain Name

The domain name you choose must not:

1. Include important geographical features of Vietnam such as islands, maritime features, seas, etc.;
2. Include the names of recognized UNESCO heritage sites in Vietnam;
3. Include the names of the party, organs, or elements of the politico-social structure of the country;
4. Cite things relevant to the national security, safety, and well being of the nation; or
5. Include other elements considered relevant to good morals and tradition of society.

Use of sub-domains such as .com.vn, .edu.vn, .gov.vn, etc., must be within the sectors properly represented by such sub-domains. Requested domain names must also not infer negative social, moral, or traditional implications whether in Vietnamese or another language or as pronounced in Vietnamese without tones. They must use letters and numbers, may use "-" so long as it is not the first or last character, may use Vietnamese tones if represented using ASCII characters, and must not be more than 63 characters long.

Requirements of .vn Domain Name Registrants

Individuals or organizations using .vn domain names must ensure the truthfulness and accuracy of all information included in their registration for use of the domain name and must refrain from infringing on the lawful rights and interests of other individuals or organizations in relation to such information. They must, additionally, be responsible for the management and use of their domain names in accordance with law.

If there are problems with the registration, management or use of the .vn domain name, the registrant must cooperate with the relevant authorities and provide requested information. If registration information changes, or the domain name is to change, the registrant must make such changes through the officially listed registrars (see above). They must cooperate with the VNNIC and authorities in prevention of abuse of .vn domain names for illegal activities and enact security measures to protect the .vn domain name from violations of the law and customs.

And, importantly, registrants of .vn domain names must ensure that cyber crimes are not conducted on their sites and cooperate with Vietnam authorities in preventing cyber crimes as defined by the Law on Cyber Security 2018.

Dealing with Disputes

Once you've applied, or registered your domain name, what happens if someone else has registered, or claims your domain name? Or, when you apply for your domain name you find that someone else has already registered it and you think they are committing an act of cyber squatting?

In general, the VNNIC operates on a first come, first served basis. Unfortunately, there frequently occurs the situation in which a domestic user has registered a domain name that is subsequently claimed by a well known international brand. Whether the original registration was intended to cause problems and make a profit off the well known brand or not, there can occur a dispute. In resolving disputes such as this, the parties can resort to private negotiations, arbitration, or file suit at court.

A plaintiff seeking relief, will be granted it if:

1. The domain name in dispute is identical or similar to the name, brand, or trademark of the plaintiff so as to cause confusion;
2. The defendant does not have legal rights or interests in the domain name;
3. The defendant leases a confusing domain name to the plaintiff or a competitor;
4. The defendant interferes with the plaintiff's registration of a domain name in an effort to stifle competition;
5. The defendant seeks to damage or harm the reputation or business of the plaintiff by use of the domain name; or
6. Other cases where the defendant is seen to infringe the lawful rights and interests of the plaintiff by use of the domain name.

Defendants, on the other hand, may offer the following defenses in their registration and use of the domain name:

1. That the defendant used or intended to use the domain name in a legitimate way for the sale or provision of services, goods, or products before the dispute arose;
2. The defendant is known by such domain name by the public despite the failure to register such a brand, trade name, or mark;
3. The defendant is properly using the domain name for other legitimate reasons not causing confusion with the plaintiff's identifiers; or
4. The defendant provides other proof

demonstrating the legality of the defendant's use of the domain name.

Once the conflict has been resolved and registered as a settlement, arbitral award, or court judgment the victorious party may take the minutes of such to the VNNIC and seek the appropriate action regarding the domain name in dispute.

Other Infornation of Note

One thing that I was curious about before reading through the research for this blog was the possibility that a registrant of a .vn domain name might have to land servers for their site within the territory of Vietnam. I had previously–back when the relevant regulations first came out in 2013–read the rules, but only remembered a vague requirement for housing servers in Vietnam. At the time this was a crucial and contentious point. But upon review, it is not necessary for the registrant of a .vn domain name to house servers for their site in Vietnam, that requirement applies to higher level providers such as ISPs and companies involved with information technology infrastructure.

For the specific application procedures and information necessary, please visit the site listed above to link to one of the registrars. They each have slightly different requirements and are transparent in their declaration. Importantly, if you are going to register a .vn domain name, know the rules for naming conventions and the proofs necessary to retain control of your domain name should another party dispute its use. Otherwise, good luck.

Research assistance for this post was provided by Dan Pham.

Operating e-wallets in Vietnam

(23 November 2020)

In the near future I'm looking to move into more tech involved matters. As such, I'm going to use this blog as a means to educate myself on the issues and laws related to certain matters important to the tech field.

Foremost among those is the use of digital payments. While there are issues relating to peer 2 peer and other digital lending and digital payments, one of the most advanced areas of Fintech in Vietnam seems to be the use of e-wallets.

From Moca to Momo to Payoo and others, there are over 30 e-wallet service providers in Vietnam. It is becoming a major subsector within the banking industry and deserves to be better understood.

Here, therefore, is a summary of what I've learned this week about e-wallets: what they are, what's required to use them, and what protections exist against the dissemination of data contained therein.

What is an e-wallet?

There are various understandings of what an e-wallet is floating around. According to Investopedia.com in their article on the concept here, they state that:

"A digital wallet (or e-wallet) is a software-based system that securely stores users' payment information and passwords for numerous payment methods and websites. By using a digital wallet, users can complete purchases easily and quickly with near-field communications technology. They can also create stronger passwords without worrying about whether they will be able to remember them later.

Digital wallets can be used in conjunction with mobile payment systems, which allow customers to pay for purchases with their smartphones. A digital wallet can also be used to store loyalty card information and digital coupons".

That's probably the predominating idea of the concept. That it is not a place for money itself to be held, but for the passwords and other information to make transfers from other accounts for the purposes of making or receiving payments. It's like carrying around a wallet full of credit cards. The cards themselves don't contain the money, but they give digital access to the bank accounts which do contain the money and, thus, can transfer that money pursuant to the agreement (bill, receipt) between the account holder and the provider of goods or services.

According to Vietnamese law, an e-wallet service is:

"The service providing for customers an electronic account of identifications from organizations providing intermediary payment services established via messengers (like electronic chips, mobile phone SIM cards, computers...), that allow the preservation of the value of currency as secured by the equivalent value of money that is transferred from payment accounts of the customers at banks as a security account of

the service provider in a 1:1 ration between the amount spent and the amount in the security account".

This definition is similar to the concept provided by Investopedia. The e-wallet in Vietnam does not itself contain the money. That money is held in a security account held with a bank. The e-wallet simply contains the information necessary to transfer money from that account to other accounts. Furthermore, the e-wallet is located on digital devices such as phones, chips, or computers. This definition is contained in a piece of legislation issued in 2019 so, though it doesn't specifically list internet-based e-wallets, it is easily enough assumed by the presence of ellipses in the list.

Who can be a service provider of e-wallets in Vietnam?

Before a company can become an e-wallet service provider, they must meet certain requirements. First off, commercial banks and foreign bank branches may provide e-wallet services upon approval of the State Bank of Vietnam. Non-credit institutions may also provide e-wallet services if they meet the following requirements:

1. Are a duly established company in Vietnam;
2. Have a plan set out for technical issues, legal issues, anti-money laundering, risk control, and other compliance related matters;
3. Have a minimum charter capital of 50 billion VND;
4. Meet minimum HR requirements for expertise by the management and operational staff of the company;
5. Have an appropriate technical and IT system with an equally appropriate back up to provide payment services;
6. Other transactional specific requirements relating to the access and use of multiple bank accounts and switching of account funds; and
7. Possess specific management accounting software and have in place sufficient accounting mechanisms to ensure the proper reporting of financials to relevant stakeholders.

The company wishing to become a service provider of e-wallets in Vietnam must provide proof of meeting these requirements as well as a number of other financial and enterprise matters to the State Bank of Vietnam. Once that organ approves the company in question, they will receive an operational license to provide e-wallet services for ten years.

Ownership of an e-wallet in Vietnam

Most anyone over the age of 15 who has appropriate civil act capacity can open an e-wallet in Vietnam. The information and documentation required varies whether the applicant is an individual, Vietnamese or foreigner, or an economic entity. Individuals must provide basic identification information while corporate owners must provide tax, registration, and representative information as well. This information is provided to the e-wallet service provider and then, as necessary, forwarded to the authorities.

In order for the owner of an e-wallet to actually transfer money, they must connect their bank account–or debit card–to the e-wallet. This allows the service provider to transfer money when the owner of the e-wallet makes or receives a payment. One element that is tricky, especially for foreigners seeking to utilize e-wallets in Vietnam, is the foreign currency restriction. Accounts linked to e-wallets in Vietnam must be denominated in Vietnamese Dong. I ran into this problem when I tried to open an e-wallet with MoMo. I did not have

a Vietnamese bank account at the time and it did not accept my US dollar denominated debit card. Once the owner's bank account is connected with the e-wallet, one would think payment would be straightforward, but not so much.

Settlement Security Accounts for E-wallets in Vietnam

Using an e-wallet in Vietnam doesn't mean that your money is transferred directly to Tiki.vn whenever you make a purchase using it. Rather, the law requires that the providers of e-wallet services must maintain a settlement security account to ensure the payment of all transactions conducted using e-wallets on their services.

Entities providing the service of e-wallets in Vietnam must open a settlement security account with the bank underwriting the wallets. The account must be separate from any accounts for the security of collecting and settling payments (if any) and must be of an amount no less than the amount of money of all the customers using e-wallets at any given time. This security account can only be used for the following reasons:

1. Settlement of accounts with bank settlement units;
2. Settlement of accounts with the owners of e-wallets when
   - They transfer money from the e-wallet to their bank accounts or debit cards,
   - They no longer need use of the e-wallet,
   - The entity providing the e-wallet service ceases to provide that service,
   - The entity providing the service ceases to exist, has its enterprise certificate revoked, or enters bankruptcy;
3. Settlement of accounts with third party providers; and
4. Transfer to another security account pursuant to transactions between e-wallets.

Using an e-wallet in Vietnam

It is into this account that money is transferred first when the owner of an e-wallet in Vietnam makes a purchase using his information. Simultaneously with the request of the owner of the e-wallet to make a payment, the e-wallet provider transfers money from the e-wallet owner's bank account into this settlement security account. And then, when the service provider receives a request to settle payment from the seller of the goods or services purchased, it transfers money from this settlement security account to settle the payment request. In this way it maintains the one-to-one ratio of cash in the account to payments outstanding required by law.

There are only three permissible uses of the e-wallet under law. First, the payment for goods or services. Second, the transfer from one e-wallet to another. Third, the transfer of funds through the e-wallet to the owner's bank account or debit card. In making these transactions, the amount of money allowed to travel through the e-wallet mechanism is limited to 100 million VND a month. Service providers may further limit this amount or impose other restrictions on e-wallet owners, but the law allows for transfers up to this limit.

Other restrictions on the e-wallet include the prohibition of illegal activities such as money laundering or promoting terrorism. E-wallet service providers are prohibited to provide credit to customers or to charge interest rates on amounts transferred in the e-wallet.

Data Privacy Issues with e-wallets in Vietnam

Service providers of e-wallets in Vietnam must provide certain information to the State Bank of Vietnam regarding the users of their e-wallets. They must provide totals of the numbers of accounts in their system (opened and active) and the total amount of money passing through their system at a given point in time. They must provide the account information, size, and turnover volume of their settlement security account opened at an underwriting bank. They must publish monthly information concerning:

1. The number of accounts opened, closed, and operating, the total amounts of payments, transfers, and settlements in the service providers e-wallet system;
2. The total number of transactions debited and the total value of such transactions; the total number of transactions credited and the total value of such transactions;
3. Information concerning the 10 highest value e-wallets and the 10 e-wallets with the most transactions in a given month. This information includes the amount of money at the beginning and end of the month in each e-wallet and information regarding the types and amounts of transactions conducted by these e-wallets.

The State Bank of Vietnam may request different or additional information upon request.

While e-wallet service providers are likely not considered credit institutions, they must be registered with the State Bank of Vietnam as intermediary payment providers, an easy argument can be made for the protection of customer information as required by credit institutions. In general, credit institutions "must ensure confidentiality of information about accounts, deposits, deposited assets and transactions of clients conducted." This would suggest that service providers of e-wallets in Vietnam must abide by strict confidentiality rules and may only be allowed to share analytical data with third parties without the consent of customers. This may be circumvented through contractual obligations imposed in service user agreements accepted at the time of signing up for the e-wallet service. As always, use of data and confidentiality rules are subject to the legal requests of relevant authorities.

These are the existing rules for e-wallets. In the near future there will assuredly be more. The Prime Minister has issued guidelines for a Fintech sandbox to be initiated in the next few months that will take service providers who have accelerated their offerings beyond the scope of existing legislation and bring them into a regulated space.

Review of Vietnam Fintech Report 2020

(30 November 2020)

Last week Fintech News, a digital news provider out of Singapore, launched their Vietnam Fintech Report 2020. The report examines the Fintech space in Vietnam, looking at current penetration within the country's population and the startup scene as well as pointing out specific fintech companies to watch. You can download the Vietnam Fintech Report 2020 here. Be warned, however, that the form announces that you are downloading the Fintech Vietnam Startup Map 2020. This is a mistake on their part and by filling out the form you are really downloading the report, so don't worry.

Before diving into the Fintech scene itself, the report looks at some basic financial information about Vietnam. Of the 97.4 million people living in the country, only about 30% of them are bank customers, though 45% have mobile phones and 57% have access to the internet. This means there is a huge portion of the population that is not currently using financial–let alone technological–resources.

The report did not report that the per capita GDP was only 2,700USD in 2019, an average of a little over 200 USD a month per person. Nor did it mention that nearly 70% of the wealth of Vietnam is controlled by the richest 30% of the population. While I don't know the economics or math to figure out specific numbers, this suggests that a large portion of Vietnam–much of the number of unbanked citizens–is barely making enough money to escape the international definitions of poverty. For that population the costs of accessing mobile or internet apps is such that the use of Fintech is prohibitive. With that in mind, the potential for Fintech growth may not be as large as the report makes it out to be.

Despite the deceptive optimism of the report's initial numbers, the growth of Fintech startups in the last five years has been tremendous. In 2015 there were a total of 39 startups in Vietnam. The report does not say how many of these were actually founded in 2015 or earlier. In both 2019 and 2020 to date there have been a total of 124 startups founded. The report does not provide a total for Fintech providers that includes more mature companies that have exited the startup phase.

The majority of companies in Fintech in Vietnam, however, are in the B2C payments sector. This sector accounted for 31% of all Fintech startups in 2020. The next most active sector is P2P lending with 17% of the startups. Other sectors accounted for from 2% to 13% of the startup scene in 2020. The report briefly mentions the regulatory environment for startups in Fintech, but only briefly. It is important to note that the only sector that actually has any real regulation is the payments sector–perhaps explaining the proliferation of startups there–while the remaining sectors are mainly unregulated (see the post from last week on e-wallet regulations here). The government has announced a regulatory sandbox program but it has yet to implement it and it is unclear exactly how the process of transforming from unregulated Fintech startup to regulated Fintech provider will occur (see our special alert on the regulatory sandbox here).

Funding in the Fintech space accounts for 36% of all Fintech startup funding in ASEAN. At a reported 435 million USD between 2019 and 2020, with two or three major investments accounting for most of the money, Vietnam is well placed to secure its position as second in ASEAN for securing startup funding in Fintech companies.

M&A and strategic cooperation are increasingly important in the industry. With major international acquisitions in the last two years and global banks partnering with local payments providers, Vietnam's Fintech is a major lure for foreign investment dollars. This will be further aided by the fact that the Government has likely dropped a proposal to limit foreign ownership to 49% in e-payment companies. This means that the doors are wide open for foreign dollars in at least the payments sector if not other areas of Fintech.

In addition to international banking partnerships, local banks are important partners in the payments sector. The report sites an unnamed official with the State Bank of Vietnam who said that:

"In Vietnam, 72 percent of financial technology firms choose to cooperate with banks in their business and service delivery, instead of entering a direct competition."

It is unclear whether this number includes international banks. It is possible that the other 28% are partnered with international financial institutions. This would, admittedly, put them in competition with local banks, but it does not delineate the number of startups seeking to provide independent payment services.

The report continues to examine remittances, ride-hailing, and P2P lending without actually making any important statements on those sectors. Much of the report is spent in examining the top e-wallet firms and making recommendations to watch 15 startups for the future.

In general the report is useful and provides a decent snapshot of the Fintech startup community in Vietnam. As I pointed out above, however, the potential for growth is exaggerated as isolated from other relevant economic data and the lack of analysis of mature players–there being no definition of "startups" against which to distinguish–suggests that the report isn't truly a full picture of the sector. It is also sparse on conclusions, a one page introduction providing some data that isn't contained elsewhere and drawing some inferences from the presented charts later on. Despite these shortcomings, it is a document worth looking at. Again, you can check out the full report here.

Data Localization Requirements in Vietnam *(7 December 2020)*

While this article is about data localisation requirements in Vietnam, it is the first in a long series (occasionally interrupted) of blog posts I intend to write about data privacy and cybersecurity in Vietnam. This is part of my continuing effort to inform myself (see this post on e-wallets for an introduction of my intended blog abuse to educate myself on tech law)–and you–about the legal side of tech matters in the country. Without further ado, then, let's dive in.

What is data localisation?

When a person uses the internet they create data. Whether that data is personal data that they upload through completing forms (name, birthday, ID, bank card, etc.) or simply by connecting to the internet (IP address) it can be collected by the companies that provide internet services. For Vietnamese residents, sometimes those internet services are provided by Vietnamese companies (tiki.vn, chinhphu.gov, etc.) and sometimes by offshore companies (Facebook, TikTok, etc.). Like all providers on the internet, once they collect information about a user, they process and store that information on physical servers.

Data localisation, then, is a requirement imposed by governments on the companies that process and collect the data of the residents of that government's country. Usually, the requirement is for, according to Wikipedia (here), those residents' data "to be collected, processed, and/or stored inside the country, often before being transferred internationally." This means that offshore companies providing internet services to residents of a given country must have physical servers within the territory of that country on which they collect, process, or store the data collected from their users. In some cases, all of this must be done within the territory of the given country before the data can be transferred beyond its borders–and there may be additional requirements for such transfers.

Data localisation requirements in Vietnam have evolved over the last seven years since they were first imposed on international internet service providers. The rest of this article will examine the historical, current, and proposed data localisation requirements in Vietnam.

Historical Data Localisation Requirements in Vietnam

Though the idea for the internet came into being in the mid-1960s, it was not available in Vietnam until November 1997 (see a 2017 article on the history of the internet in Vietnam, here). Even then, it took some time for the concept to develop sufficient penetration in Vietnam for the Government to begin actively regulating its use. And concerns over data ownership and protection have only recently begun to arise as mega-tech companies like Google and Facebook have groaned under increasing international regulation of their manipulation of collected data.

The first data localisation requirements in Vietnam were legislated in 2013 in a decree providing guidance on the laws on information

technology, telecommunications, and the press. That decree proclaimed that anyone setting up a general website or social network, enterprises providing internet content services on mobile networks, and electronic game service providers must:

"*have at least one server system located in Vietnam which satisfies the inspection, check, storage and provide information as required by the competent State administrative authority*."

This requirement was broad and encompassed anyone providing these services anywhere. There were no specific guidelines localising the provision of services to Vietnam. That meant, in theory, that someone in Podunk, Idaho, USA who maintained a general website about their very local dog grooming service could be subject to the requirements of this decree and made to maintain "at least one server system located in Vietnam." This was obviously unenforceable and, as a consequence, was very loosely enforced. It wasn't until 2019 that this requirement was reformed.

Current Data Localisation Requirements in Vietnam

In 2018 the National Assembly passed the controversial new law on cybersecurity that subsequently went into effect on 1 January 2019. In addition to providing rules that allowed the government to arguably censor residents who posted objectionable content on the internet, it also expanded and simultaneously solidified the data localisation requirements in Vietnam.

"Both domestic and foreign companies providing services of telecommunications, internet, and value-added services in cyberspace in Vietnam that conduct the collection, exploitation, analysis, or processing of data of individuals, data about relationships of service users, or data generated by users in Vietnam must preserve that data in Vietnam during the time period regulated by the Government."

Finally the Government provides specific requirements for what activities actually give rise to the data localisation requirements in Vietnam. Only those foreign companies providing services that access and use data of Vietnamese users must preserve that data within the territory of Vietnam. These requirements remain broad and far from concrete. Much like the GDPR in Europe, this requirement still could be interpreted to require a dog groomer in Idaho to maintain a server in Vietnam if that dog groomer collected data from an outlier Vietnamese visitor to her website. That alone prevents this requirement from being truly enforceable, but the language of the above legislation also provides a vaguely "to be defined" requirement as to the time period. Also, the preservation of "that data in Vietnam" does not specify how that data is to be preserved. Will a data cloud hosted in Vietnam be sufficient, or is the requirement of the 2013 decree requiring a physical server still in effect?

If that weren't enough, the law on cybersecurity imposes a second, more onerous and controversial requirement on these service providers. Any company that provides the services described above must additionally open either a branch or representative office in Vietnam. Some commentators saw this as an effort by the Vietnamese Government to increase the reach of its regulatory authority by making anyone who provides internet services in the country open an office in the country. Many commentators also saw this as an overreach of that authority.

In the United States, each state has its own legislator and makes its own laws. It has its own regulations and its own enforcement mechanisms. Sometimes a company or

individual in one state wants to start a company in an other state and register that business as an alien to the state in which such registration occurs. When this happens, the state wherein the company is registers requires the founders of that company to either maintain a mailing address within the state's borders or to sign an agreement that the founder will submit to that state's jurisdiction should there be a dispute or regulatory matter affecting the founded company.

While not dissimilar to Vietnam's requirements of internet service providers opening a branch or representative office within its territory, there are substantial differences. A PO Box costs a few dollars a month compared to costs ranging into thousands of dollars annually to incorporate and maintain a branch or representative office, employees must be hired and employed on an ongoing basis, taxes paid, etc. But perhaps that's the point. Perhaps Vietnam's Government is looking to do more than just impose liability on internet service providers, but to access their bank accounts for the imposition of taxes and other fees. Whatever the reasons, the requirement as currently defined remains largely ambiguous and unclear.

Proposed Data Localisation Requirements in Vietnam

But there are proposals in the works, still, to amend these requirements and to develop concrete criteria for when an internet service provider must actually maintain servers or open a branch or representative office within the territory of Vietnam.

Now in its second draft, a proposal decree detailing the application of the law on cybersecurity is currently in circulation. That said, it has been in application–in one form or another–since the law on cybersecurity was passed two years ago and there seems to be little progress in moving the proposal into actual legislation anytime soon.

The proposed decree imposes a three-pronged approach to the data localisation requirements in Vietnam. This approach applies to both the storage of data within the territory and the incorporation of a branch or representative office. According to the draft decree, an enterprise must store data and open an entity in Vietnam if it meets all of the following requirements:

- It provides services of telecom, data storage and sharing in cyberspace, supply of national or international domains to service users in Vietnam; e-commerce; online payment; intermediary payment; service of transport connections via cyberspace; social networking and social media; online electronic games; services of providing, managing or operating other information in cyberspace in the form of a message, phone call, video call, email or online chat;

- It carries out activities of collecting, exploiting, analysing and processing:
  (i) Data on personal information of service users in Vietnam;
  (ii) Data generated by service users in Vietnam, including: account name for use of services, duration of use of services, credit card information, email address, IP addresses for the latest login and logout, registered telephone number attached to the account or data relevant to personal data; or
  (iii) Data on the relationships of service users in Vietnam, including friends, and groups with which the user connects or interacts.

- It is warned that the services provided by it are used to commit a breach of the laws of Vietnam and it does not take

> any measure for avoiding, dealing with, fighting against or preventing such breach, or does not comply with a written request from the Department for Cybersecurity and Prevention of High-tech Crime under the Ministry of Public Security for coordination in investigating and dealing with a breach of law or an act of neutralizing or rendering ineffective cybersecurity protective measures.

In essence, then, before a company is required to store data and open a branch or representative office in Vietnam, they must provide certain specified internet services, collect and manipulate certain specified types of data, and such data has been implicated in a breach of the laws and, upon warning, the company failed to take action to remedy the breach.

The proposed data localisation requirements in Vietnam will only be imposed upon request. The Ministry of Public Security would be the ministry responsible for making such a request and have the option of requiring either the local storage of data, the opening of a branch or representative office, or both. Upon receipt of such a request, the service provider would have six months to comply with the request.

This proposal suggests that the purposes of the Government of Vietnam are not pecuniary, but in fact, security based. This is further supported by the preamble to the article in the proposed draft which states: "in the case of protection of national security, social order and safety, social ethics and health of the community..." The data localisation requirements in Vietnam, therefore, are for the interests of the public, not the country's coffers.

But as I mentioned above, this proposal is still in draft form. It is unclear whether it will actually remain as proposed in the final legislation and when such legislation might be adopted and promulgated for enforcement.

Conclusion

Data localisation requirements in Vietnam have undergone, and are undergoing, a gradual shift from a broad and unenforceable requirement that all service providers store data in Vietnam to a much more specific imposition of data storage and onshore representation for the purposes of law enforcement to protect service users both in Vietnam and globally. A list of specific crimes contemplated to trigger the data localisation requirement in Vietnam includes:

- Cyberattack, cyberterrorism, cyberespionage or cybercrime;
- Causing a cybersecurity incident;
- Attacking, infringing, or hijacking operational control of, or distorting, interrupting, stalling, paralyzing or destroying an information system critical for state security; and
- Resisting or obstructing the operation of network security protection forces or illegally disabling or rendering ineffective network security protection measures;
- The provision, posting, or transmission of:
  - (i) Information in cyberspace with contents that may be considered propaganda against the State of the Socialist Republic of Vietnam;
  - (ii) Information in cyberspace inciting riot, disrupting security, disturbingpublic order;
  - (iii) Information in cyberspace causing humiliation, slander;
  - (iv) Information in cyberspace with contents for violation of economic management order;
  - (v) Information in cyberspace with fabricated or untruthful contents causing confusion amongst the citizens, causing loss and damage

to socio- economic activities, causing difficulties for the activities of the State agencies or officials in performing their duties, or infringing the lawful rights and interests of other agencies, organizations and individuals; and

(vi) Other information infringing upon State security.

- Preventing the sharing with authorities or the removal of such information.

The above list is specific, for the most part, while leaving a large swath of discretion to Government authorities. The listed types of information violations that can trigger the data localisation requirements in Vietnam suggest that, more than security, the Government is concerned about its reputation. I won't get into questions of censorship and human rights, but it is easy to see that the Government is being careful to maintain its rights to enforce certain interpretations on netizens operating in such a manner as to influence residents in the country.

Data localisation requirements in Vietnam remain in flux. Perhaps in the near future they will be finalized, but in the meantime enforcement is difficult and only companies providing specific internet services targeting Vietnam as a market–who would open a branch or representative office anyway–are truly subject to their requirements. Until such time as the draft decree is adopted there remains little the Government can realistically do to impose its will on foreign service providers.

eKYC comes to Vietnam *(22 December 2020)*

In a piece of legislation passed just a couple of weeks ago, the government of Vietnam made it possible for banks to comply with a common anti-money laundering, or AML, requirement digitally. Know Your Client, or KYC, has long been an element of Vietnam's banking law and serves to supplement the global standard AML law. But for those who don't keep up on banking law in Vietnam, a brief primer is required.

What is KYC?

According to the Thales Group (here):

"*KYC or **KYC check** is the mandatory process of identifying and verifying the identity of the client when opening an account and periodically over time.*"

It is a process of checking the identification documents of applicants against public and sometimes government data sources to ensure that the identification is accurate and real and that the person applying for an account is who they say they are.

In most countries this process began as a hands-on physical process that involved checking documents against the living person who visited a bank branch before being able to open an account. But now that more and more people are looking to open accounts without actually stepping foot inside a bank branch, or through other financial institutions that may not have a physical location to allow for such face-to-face confirmation, the need for a digital method has become increasingly clear.

From 2014 onwards, the process of KYC in Vietnam required banks to physically interact with the documents, even for those applications submitted digitally, and to confirm their legitimacy by a physical inspection or, if copies, by requiring a notary seal be attached testifying that the copies were accurate per the originals. This demand for meeting with the client and then comparing documents with his avowed identity is time consuming and–in light of the difficulties of face-to-face meetings in Covid times–could be very inconvenient for the parties. Thus, eKYC.

eKYC in Vietnam

The government has been considering the introduction of satisfying the KYC requirements through digital means for some time, but it wasn't until this month, 4 December 2020, that they promulgated a Circular that modified existing rules and included a process for electronic KYC, or eKYC. This process only applies to Vietnamese citizens and enterprises applying for an individual account. It does not provide for foreigners to open bank accounts or for applications of jointly held accounts.

Before they are allowed to conduct eKYC, banks–including foreign bank branches–must establish a process and procedure for implementing the following steps according to the circular and several related laws including:

- The collection of the same documents as were required for regular KYC: an application form per the bank, a personal identification document such as a national ID or passport;
- The performance of an examination and

investigation of the documents of the applicant;

- Warn the applicant about the process of conducting kyc via electronic means and the procedures that may be different from traditional kyc;
- Announcing to the applicant the results of the ekyc investigation and open the account by providing the number and any limitations on the account to the customer;
- In developing this procedure, banks have the right to decide the method, form, and technology to be used, so long as the same meets the following minimal requirements;
- It must be sufficient to obtain information about the client and to confirm her as the client, some examples include certain immutable characteristics of the client such as her voice, her face, her fingerprints so long as they are very hard to fake and have a high degree of accuracy;
- It must contain a method for confirming the name of the client on the application form;
- It must also include a method for monitoring the identification of the client throughout the life of the account, compare that information to government watch lists, and be capable of putting a hold, seizure, or other actions on the account if necessary; and
- It must be able to maintain and secure the records of the ekyc investigation and the client's identity and application documents throughout the life of the account and as elsewhere required by law.

Accounts opened using eKYC must be limited to a transaction amount of 100 million VND per client per month except for five specific cases:

1. The confirmation of identity was conducted via a video call that must meet certain standards of quality and security;
2. The bank uses public documents to confirm the identity of the client;
3. After conducting the investigation and confirmation on the received documents, the bank meets the owner of the account face-to-face;
4. The transfer is made to another account in the same bank;
5. The customer is making a payment on a portion of a loan held by the bank at which he opened the account in question.

While much is left to the individual bank in determining the level of technology used and the specific methods of confirming a client's identity, the process is essentially in place and the allowance for banks to actually begin implementing eKYC in Vietnam is secure. Remember, though, that the same requirements of confidentiality and security remain. While a few items were additionally amended in this circular, the process for eKYC is the most notable among them. Banks will be able to implement the new laws beginning on 5 March 2021.

Individual Data Privacy Rights in Vietnam

(4 January 2021)

Continuing in my examination of data privacy and cybersecurity issues in Vietnam, this week I want to look at the issue of individual data privacy rights in Vietnam, what are a data subject's responsibilities and their rights, and what can they expect when putting their data in the wilds of the internet.

General Protections of Individual Data

Personal data, or an individual's data, is not only protected by branch laws which have been passed in the last few years, but in Vietnam's constitution as well. According to that document there are a few aspects of privacy which are guaranteed by law. They include:

- The inviolability of private life, personal secrets and family secrets;
- The security of information about private life, personal secrets or family secrets;
- The right to privacy of correspondence, telephone conversations, telegrams and other forms of private communication; and
- The prohibition of illegally breaking into, controlling or seizing another's correspondence, telephone conversations, telegrams or other forms of private communication.

These rights are reflected throughout the country's laws. While information safety and cybersecurity have both received specific treatment of late, much of the legislation covering privacy as contemplated in the constitution is spread throughout the various laws and imposes responsibilities on individuals and organizations according to their sector of activity. For example, banks are required to maintain the confidentiality of all transactions accounts and clients; and lawyers must maintain similar levels of confidentiality, refraining from disclosing personal information regarding the matters entrusted to them.

This dissemination of the right of privacy into individual laws has largely made a centralized understanding of the right difficult. For although the Civil Code provides that "*the private life, personal secrets and family secrets of a person are inviolable and protected by law*", and "*the collection, preservation, use, and publication of information about the private life of an individual must have the consent of that person*", there is little other guidance regarding the collection, analysis, storage, and propagation of personal information in an age when such data has become a commodity.

Some effort has been made to keep up with this development in the data market. In 2015, the National Assembly passed the law on network information security which applies to the collection and use of data on the internet. This went a long way towards settling the rights and duties of individuals and organizations in relation to personal data online, but did little to address other avenues for data collection such as the Internet of Things or public records. It does, however, constituted Vietnam's approach to the protection of private data, for now and as such I examine its contents as regards the protection of individual data below.

The Law on Individual Data Privacy in Vietnam

In general, individuals have a duty to protect their own data and to follow the laws of Vietnam regarding the use and protection of data. Organizations and entities collecting, storing, and analyzing that data also have duties to treat that data properly as well, but the individual must first be vigilant and aware that he is creating or disseminating data when he travels the web. The protection of individuals' data contributes to the protection and security of the nation and the order and safety of society.

Organizations collecting data from individuals can only collect that information after obtaining the agreement of the data subject regarding the scope, purpose, and use of the data collected. Any use of that data outside such an agreement may only occur after informing and obtaining the consent of the data subject of such additional use. Collected data can only be provided, shared, or propagated to a third party after receiving consent from the data subject or upon receiving a request from an authorized government agency. Government agencies that collect data from individuals have the duty to protect and preserve that data.

Individuals have the right to request that organizations collecting their data provide them their own data which has been collected. Individuals have the power to request organizations that collect their data to revise, amend, or destroy the data that they have collected or stored. They can also request the organization to cease providing their information to a third party. Immediately upon receiving such a request, the organization collecting such information must:

- Accede to the individual's request and report to, or provide advice of such to him that they have acceded and completed his request;
- Apply appropriate methods to protect the individual's data; and
- Notify the requesting individual in the case where such request remains unmet due to technology or other factors.

The organization collecting data must destroy the data of the individual upon the completion of the purpose for which it was collected or upon the expiration of storage and notify the individual of such unless the law provides otherwise.

Organizations collecting data must apply appropriate methods of management and technology to protect the data of individuals which it collects and stores and follow the standards and technology protocols for protecting information safety on the internet.

Failure on the part of the organization to comply with these rules will subject that organization to administrative penalties and the possibility of criminal liability. In addition, they will be liable for indemnifying injure parties should their violating acts cause harm.

A Bill of Rights for Individual Data Privacy in Vietnam

All of that is well and good, but what rights do individuals really have when it comes to protecting their data in cyberspace? The American Chamber of Commerce has posted a reference from Westlaw's Practical Law service all about data privacy in Vietnam (see resource here). In that document, they include a poorly worded list of the rights individuals possess when it comes to protecting their data privacy in Vietnam. With several modifications, I want to include a similar list here as it makes it plain what an individual can expect when it comes to their data.

An individual, therefore, has the following rights when protecting their individual data privacy in Vietnam:

- To protect their own personal data when using the internet;
- To give or withhold permission for the collection, processing, and storage of personal data;
- To be informed of the purpose and scope of the collection of their personal data and the use to which such personal data will be put;
- To give or withhold permission for the sharing of personal data with third parties;
- To request that the sharing of personal data with a third party cease even if they had previously provided permission for such sharing;
- To access their personal data that an organization has collected or stores;
- To update, amend, rectify, or delete the personal data that the organization has collected or stores and to receive notification from the organization when such a request is completed;
- To receive compensation for any damages caused by the organization's violation of legal obligations when processing personal data.

As you can see, the list is relatively short and the law limited. Compared to the European Union's GDPR and California's CCPA this list is minimal. However, it is also open to interpretation and many terms remain undefined leaving the courts an opportunity to impose responsibilities on organizations collecting personal data that may seem excessive. The law is over five years old now and may be subject to upcoming amendments and changes that will take into account international and technological developments in the interceding time period. In the meantime, take these rights to heart and know that individuals have the right to protect their own data when dealing online.

P2P Lending in Vietnam (Part 2)

(11 January 2021)

Like much of the Fintech space, peer-to-peer, or P2P lending in Vietnam is a relatively new and growing field. It also remains largely unregulated. In an official letter issued a year and a half ago, the state bank of Vietnam acknowledged that the space lacked regulation and warned banks and credit institutions of various dangers inherent in operating P2P lending platforms. It did not, however, offer any guidance on what it expected those same institutions to do as regards licensing, reporting, or monitoring any platforms they may decide to pursue.

This lack of regulation, however, has not stopped Vietnamese businesses from developing P2P lending platforms. The bulk of businesses operating in the sector have so far operated as technology solutions providers licensing as e-commerce sites or using existing banking infrastructure to offer a slightly different product than traditionally falls within banks' purview.

Four Models of P2P Lending in Vietnam

According to economics expert Nguyen Tri Hieu (as cited by Voice of Vietnam) there are four basic approaches to P2P lending in Vietnam. First, the company stands in the middle, using technology to connect investors and parties seeking funds. Second, companies appraise people seeking funds and introduce them to people who provide funds. Third, companies appraise rates, terms, and methods of debt repayment. And finally, companies that not only make connections but also act as a bank to mobilize capital and provide funds.

This suggests a number of potential sectoral classifications for the various P2P lending models. If providing only a marketplace for borrowers and lenders to connect without offering any appraisal services or mobilizing capital then the platform would have a strong argument that it only provides a digital solution or an e-commerce site. If the platform goes farther, however, and offers an appraisal of loan applications, rates, terms, and other aspects of the potential borrower's pitch, then they would be acting in the realm of credit rating and appraisal. Finally, if they act to mobilize and provide funds they are acting in the place of a bank and providing loans, even if as a trustee, and therefore would become a lender.

Possible Regulatory Models

P2P lending in Vietnam may be subject to regulations governing three different sectors: e-commerce (or the act of conducting transactions through electronic means), credit rating and appraisal (or the analysis, assessment, and rating of borrowers' ability to repay their debt), and lending (or the extension of credit whereby the lender delivers or undertakes to deliver to the borrower a sum of money to use for a definite purpose for a definite term as agreed, on the principle that principal and interest are fully repayable). I'll take these one at a time.

E-commerce

This one's straightforward. Companies seeking to provide e-commerce services in Vietnam must be registered to provide the proper

services with their local Department of Planning and Investment and must notify the Ministry of Industy and Trade prior to publishing an e-commerce website. They are subject to data privacy (see article on individual data privacy protections here) and cybersecurity regulations. Depending on how the funds are transferred from investor to borrower, by using an e-wallet for instance (see article on e-wallet regulations here), they may also need to register a business activity of intermediary payment services and obtain a license for thus acting from the state bank. It is also possible that, due to the fact that a P2P lending platform tends to act similarly to a social network, they may want to pursue registration of providing a social network on telecommunications as well as abiding by regulations relevant to that activity.

Credit Rating

In order to provide credit rating services, the platform will need to obtain a credit rating license from the Ministry of Finance, something that also entails consultation with the state bank and the Ministry of Planning and Investment. They must have a registered and paid-up capital of at least 15 billion VND and maintain at least five qualified credit raters on staff. They are also subject to additional requirements of prudential and fiscal responsibility. It would seem, too, that obtaining this license is difficult as it took four years from the promulgation of the law on credit rating services until the granting of the first license.

Lending

Lending activities are regulated by the state bank of Vietnam. Though a P2P lending platform may argue that they are not technically lending, if they are conducting activities that could be classified as lending on a regular basis then they must register as a relevant credit institution. The same may be true of individual lenders that use a P2P lending platform regularly as a lender (though they could argue they are an investor, at which point they may be liable to comply with the law on investment). This is where banks excel in the P2P lending space as they are already licensed to conduct lending activities and thus have no need of obtaining a new or additional license to operate P2P lending models that require acting as a lender.

Regulatory Sandbox

Regardless of what model a P2P provider uses, the Government is likely to impose regulations on the space in the relatively near future. Last year the government published a draft decree that set out the basic requirements for a Fintech regulatory sandbox. This sandbox would allow companies operating in financial activities that aren't currently regulated to participate in close cooperation with relevant ministries to bring the company into compliance with existing regulations and to assist in the development of new legislation to govern those sectors. Eligible sectors would include:

- Payment;
- Credit;
- P2P lending;
- KYC;
- Open API;
- Innovative and technology-based solutions (such as blockchain); and
- Other services supporting banking activities.

As mentioned, however, this is so far only a draft and the sandbox itself has yet to be officially sanctioned. If it does move forward it will provide the government an opportunity to catch up with several areas of innovation that it has so far failed to regulate properly.

That's it. Though P2P lending remains a minor

element in Vietnam's economy–Statista.com estimates that alternative lending only accounted for approximately 1.1 million USD in 2020–the potential for a major boom in the sector remains. Vietnam is keen on high risk/high return investments and has a history of investing in products that may not be backed by proper due diligence. This tendency to make risky decisions financially lends itself to platforms that provide limited appraisals and are largely based on the applicant's untested intellectual property.

Cryptocurrency in Vietnam

(18 January 2021)

Cryptocurrency's Rise

Cryptocurrency in Vietnam is problematic. For one thing, it's illegal. But that's not the full story nor does it promise to be the last word on the issue. Vietnam is a large market, the fifteenth-most populous country in the world, large enough to add considerable support to any product or service which it adopts. In fact, in the first few years of Bitcoin four countries in Asia: Japan, Korea, Taiwan, and Vietnam comprised 80% of all Bitcoin transactions globally. Vietnam was gungho on cryptocurrency. I remember reading article after article about different domestically developed cryptocurrencies at the time. It was the bold new frontier and the success of Bitcoin meant that everyone wanted a piece. Even the government got involved.

As Bitcoin, and cryptocurrency in general, was not defined in law it was not provided for in the tax laws. Cryptocurrency companies were operating at huge profits and paying little to no taxes as they were operating in a business line that wasn't contemplated under existing regulations. That didn't stop a tax office in Ben Tre from imposing a tax on a local cryptocurrency company. They imposed taxes of over 2.5 billion VND on one company in the province. A local court, however, ruled that the tax office's interpretation of cryptocurrency as a "good" for tax purposes was incorrect and that the legislation to tax cryptocurrency did not yet exist. The court overturned the tax bill and the company made off without the massive obligation.

In August 2017, Prime Minister Phuc issued a decision to promote the development of a legal framework for managing virtual assets, cryptocurrencies, and electronic currencies. This would not only allow the government to properly tax cryptocurrency companies and take financial advantage of the large windfalls in the industry, but to regulate the development, deployment, and use of cryptocurrencies as actual forms of payment in Vietnam. The future of cryptocurrency in Vietnam was bright.

The Fall of Cryptocurrency in Vietnam

But amidst the boom, profiteers and con men made a play. Several cryptocurrencies in Vietnam went bust and the investors lost their money and a few were outright frauds on locals designed simply to pinch funds from poor hopefuls with big dreams. It was enough that on 30 October 2017 the State Bank of Vietnam, or SBV, announced that the use of cryptocurrency in Vietnam as a form of payment would not be considered a legal form of currency.

At the time, and even now, forms of payment other than cash were defined in decree 101/2012/ND-CP. While that decree listed a number of forms of acceptable non-cash payments, it also included exclusion of all forms of payment that were not compliant with the law. Specifically:

"according to the regulations of the law as provided, Bitcoin and other similar types of cryptocurrency are not methods of payment compliant with law in Vietnam; issuing, supplying, using Bitcoin and other similar types

of cryptocurrency as forms of payment is an act prohibited in Vietnam."

The SBV further announced that issuing, providing, or using cryptocurrency would be subject to an administrative penalty of from 150 to 200 million VND and could also trigger criminal liability. According to the amended criminal code, issuance, provision, or use of cryptocurrency that causes harm to other people (including enterprises) from between 100 to 300 million VND will result in a criminal fine of between 50 to 300 million VND or imprisonment for six months to three years. This strict regime of prohibition entered effect on 1 January 2018. Cryptocurrency in Vietnam was dead.

Since then the SBV has issued a number of regulations to ensure that cryptocurrency as a form of payment does not creep back into Vietnam's economy. Most recently, the SBV issued a directive just last week to organizations issuing bank cards, intermediary payment service providers, and representative offices of foreign banks about the prevention of cryptocurrency transactions. This directive couches cryptocurrency in the language of suspicion and groups it with acts like money laundering and the funding of terrorism. It admonishes relevant organizations to inspect, supervise, and check all transactions to ensure that they are terminated if they show any signs of involving illegal activity, including cryptocurrency. It is an effort that spreads from the highest levels of government to the grassroots and, as Covid-19 before it, we must fight its use like we would fight an invader.

A Glimmer of Hope

But the future of cryptocurrency in Vietnam isn't all glum. Midway through 2020, there was a glimmer of hope for an officially shunned activity. On May 10th or 11th, the Ministry of Finance announced that it would set up a committee to "be in charge of studying and proposing policies to manage virtual assets and crypto currencies (sic)." According to Viet Nam News,

"The group had nine members, lead by Phạm Hồng Sơn, deputy chairman of the State Securites Commission. Other members are from the State Securities Commission, the General Department of Taxation, State Bank of Việt Nam's Department of Banking and Financial Institutions and Legal Department, Việt Nam Customs and the National Institute for Việt Nam Finance."

At least one ministry, then, is interested in something more than an outright ban on cryptocurrency. Unfortunately, a Google search does not return any additional news on the committee or its findings and there does not seem to be any other movement in other ministries or in the government to change existing policies regarding cryptocurrency in Vietnam.

The Future of Cryptocurrency in Vietnam

Cryptocurrency is based on the blockchain, a distributed ledger that copies itself as it grows and is extremely difficult, if not impossible, to erase or fabricate changes to existing entries. That technology is not banned in Vietnam. In fact, it is one of the proposed subjects of a regulatory sandbox that is under consideration by the government. That sandbox would allow blockchain developers to work with government regulators to ensure that their activities are in compliance with laws and to either amend existing laws or draft new laws to regulate developing technologies. The sandbox has yet to be approved, however, and the pace of regulatory adoption in Vietnam is generally slow.

If and when the sandbox is adopted, blockchain

will begin to see acceptance in government circles. The framework and the undergirding basis for the technology will be developed and the government will grow comfortable with the concepts involved. Once that happens, it will have in place the ability to transfer those laws, in large measure, to a possible reopening of the gates to cryptocurrency. Additional laws will be required, however, to regulate what is arguably a financial instrument. Regulations of the technology will not be enough. As discussed earlier, tax regulations will be required, transactional guidelines and international standards will need to be adopted. Much work will need to be done before cryptocurrency in Vietnam is readmitted to the family of acceptable payment forms.

Whether that change in the policy happens in the near future or farther out is difficult to say. Other countries in the region have allowed cryptocurrency and developed legal guidelines for its use. Malaysia and Singapore, Indonesia and the Philippines all allow cryptocurrencies and regulate them. But Vietnam is not alone in prohibiting cryptocurrency. Thailand, Laos, Myanmar, and Cambodia, too, do not allow their use to date. Many of those countries have small economies and limited government resources, however, making it difficult to develop the regulatory bodies necessary to govern the deployment of a new form of currency. Vietnam, and Thailand too, is a large country with an established tax base. It is capable of developing the regulatory organs necessary.

In addition, Vietnam is keen to move into the world of technological advancement. In an article posted on VN Express International yesterday, analysts predicted that if Vietnam fostered the creation of new technologies rather than simply the manufacturing of foreign technological goods, the rate of growth of the information and technology sector would surpass the rate of growth of the country's GDP by two to four times. And the government wants just that. And increasingly, cryptocurrency is the currency of technology. With the recent boom in Bitcoin's value and the concomitant spike in alternative cryptocurrencies, the validity and legitimacy of cryptocurrency was buoyed. If not the future, cryptocurrency is part of it and by continuing to turn its back on that future Vietnam might just be cutting its own throat.

Vietnam's government must balance the possibility of failed ventures and fraud against the advancements that can occur by adopting a technology that is increasingly proven and increasingly vital to the technological economy. Whether the government decides to continue the cryptocurrency ban or to repeal the ban and adopt legislation to regulate it will have a major impact on Vietnam's ability to adapt to the future of money and to remain an important actor in the global economy as a whole.

Data Privacy Obligations in Vietnam

(25 January 2021)

A few weeks ago, I wrote about individual user's data privacy rights in Vietnam. This week I want to write about the service provider's data privacy obligations in Vietnam. While two sides of the same coin, this side is perhaps even more important because it is where the action takes place. Users can activate their rights, but it is the service providers who must respond with positive acts. This article will examine two elements of these obligations. First, I'll discuss the law as it relates to who actually has to abide by Vietnam's data privacy regime and the myriad problems with that jurisdictional claim. Second, I'll discuss the obligations themselves.

Who is Obliged to Protect Individuals' Data Privacy?

Scope of Application

The first step is to understand who is obligated to abide by the rules of data privacy in Vietnam. Obviously, these rules apply to Vietnamese citizens and organizations, they are already governed by Vietnamese law so it's no stretch at all to apply rules of data privacy online to them. Even if they act as a service provider in a foreign jurisdiction they will still be subject to Vietnam's laws on data privacy. What is less clear is the application of these laws to all foreign individuals and organizations who *"are directly involved in or are related to network information security activities in Vietnam."* Network information security means

"the protection of network information and information systems against any illegal access, use, disclosure, interruption, amendment or sabotage in order to ensure the integrity, confidentiality and availability of information (italics are mine)."

Two more definitions are important to understand in order to comprehend the scope of the data privacy laws. First is the definition of network, which is *"the environment where information is supplied, transmitted, collected, processed, stored and exchanged via telecommunication networks and computer networks."* Second is the definition of information systems which are *"any assembly of hardware, software and databases which is purposely set up for establishment, supply, communication, collection, handling, storage and exchange of network information."*

What is "information"?

The first problem with defining the scope of application of the rules for data privacy is the definition of information. In the law on network information security, which is where most of the data privacy regulation currently comes from, there is no definition of the term. Going back a step to look at the law on information technology, there is no definition of the term. Both the civil code and the constitution have guarantees and discuss "personal information" but they don't contain a separate definition of "information." The only definition that I can find is contained in the law of information access. It defines information as:

"messages, data contained in texts, dossiers,

prepared documents, existing in the form of writing, printing, electronic, paintings, pictures, drawings, tapes, records, image recordings, sound recordings or other forms which originate from an organ of the government."

That seems comprehensive, but it only applies to media produced by government organs. It might apply when dealing with state secrets and state security, but not to "network information" which, according to the body of the relevant laws, obviously includes sources outside the government. Information, then, is undefined and for the purpose of determining whether an individual or organization is involved with "network information" allows the governing authorities to arbitrarily decide when to apply data privacy requirements.

Activities Giving Rise to Obligations

The definitions above suggest that the data privacy rules will apply to foreign individuals or organizations who are conducting activities to protect the information provided online (the environment where information is exchanged) and the use of hardware and software set up for the purpose of using and exchanging such information (e.g., computers, telecommunications channels, and the internet infrastructure). This is relatively straightforward at first blush, but there's a snag: the verb at the very beginning of the definition of network information security.

Individuals and organizations, Vietnamese or foreign, must be involved in the "protection" of this information and the infrastructure on which it is used. This suggests that in order for this law to apply the service provider must be actively protecting the information on the network. What about someone who doesn't care about protecting his information and simply puts it out into the world?

It would seem that such a lackadaisical attitude would exclude him from the application of this law. Fortunately, most folks who are involved with the collection and use of information on Networks do have some form of protection in place, if only to maintain their proprietary control over such information, and thus would satisfy the requirement. Assume, then, that if you are involved in the collection, use, and exchange of information–and particularly personal data–you are subject to these rules.

What Does "in Vietnam" Mean?

One final point of contention–and perhaps the most important–on the application of network information security rules is the question of jurisdiction. The scope of these rules applies to foreigners who are involved in information protection activities "in Vietnam". Does this mean that the information protection activities must occur in Vietnam, or that the information protected is in Vietnam? I am of the opinion that the former is the case.

Looking at the original Vietnamese version, the participation or relationship to information protection activities must take place in Vietnam, this itself implies–as the definition of "network" includes the environment which gives rise to data–that not only the act of protection must occur in Vietnam, but that it must be of data which arises from the data collection environment in Vietnam. This, then, despite my best efforts to bring clarity, remains confusing and difficult to apply in reality. When does an act of protection of data occur in a specific geographical location? When there is an office in which the IT folks type in the information on their keyboards or somewhere in cyberspace when the instructions are carried out on an app? It is a distinction, between the source of network information and the protection of network information security, that is very fine.

Unfortunately, the Ministry of Information and Communications, the Ministry of Public Security, and the People's Courts are not likely to make such a fine distinction in their application of the written laws. Thus, the smart money is for foreign individuals and organizations who have "network information" or "information systems" in Vietnam to comply with Vietnam's data privacy rules. But even stating such a simple rule of thumb is fraught with difficulty. While to know if one has "information systems" in Vietnam is fairly straightforward as it involves hardware, physical assets, and IP, knowing whether one has "network information" in Vietnam is an entirely different question.

Possible Precedent

I'll discuss the law which contains the data privacy rules shortly (the network information security law) but for now, know that it does not include any guidance on this issue and the only other relevant guidance available is in the Cybersecurity Law in its discussion of data localization. But even here the requirement is currently limited to the provision of services "on cyberspace in Vietnam." There is no explanation of how to determine when "cyberspace" is "in Vietnam". Otherwise, there are two pieces of legislation that are currently being considered that could give rise to a better definition of when "network information" is in Vietnam.

The first is a decree that will revise the Cybersecurity law. I discussed this in detail in my post about data localization in Vietnam so I won't discuss it here. Briefly, though, it would only impose a data localization requirement after there have been cybersecurity violations related to the foreign domain or service provider. Thus, cyberspace would only be strongarmed into Vietnam's jurisdiction if there are problems affecting Vietnam or its citizens.

`The second piece of legislation is a law that will revise current rules regarding e-commerce in Vietnam. The contemplated law addresses when Vietnam's e-commerce regulations apply to offshore providers. They are currently contemplating two strategies for determining such applicability. First, the offshore e-commerce provider uses a .vn domain name, the content of its website is in Vietnamese, or it has at least 100,000 transactions originating in Vietnam within one year. In this case, the service provider will be required to set up a representative office in Vietnam. Second, the offshore e-commerce provider uses a .vn domain name, the content of its website is in Vietnamese, or the number of transactions originating in Vietnam exceeds an as of yet unspecified threshold. In this case, the service provider will be required to appoint a legal representative in Vietnam or open a representative office.

Neither of these approaches defines when "network information" is determined to be "in Vietnam", but they do provide some understanding of the government's thinking on how to enforce its rule on foreign service providers. A third piece of legislation currently being drafted is a comprehensive data privacy law that is expected to be ready for the National Assembly's consideration at its next session. No version of this law has been published yet, though it is being drafted in concert with advisers from the European Union and some think that this means it will reflect the EU's GDPR. Whatever that new law holds, however, does not help foreign individuals and organizations to understand when they must comply with Vietnam's data privacy rules if they deal only in "network information" now.

There is no other conclusion, then, than that the law of Vietnam on the localization of "network information" for the purposes of data privacy is uncertain and that the smart

foreign service provider will make sure that any "network information" that obviously targets or reasonably relates to the Vietnam market is protected according to the rules discussed below.

Handling Personal Information

Before diving into the specific obligations that lay at the feet of those individuals and organizations handling personal information, it is important to understand what handling personal information means. The law on network information security defines "handling personal information" as the "performance of one or more operations to collect, edit, use, store, supply, share, and disperse personal information in the network for commercial purposes." Know then that whenever I refer to "handling personal information" or "data" I'm referring to all of those defined activities. And what is "personal information" that it needs handling? Personal information is "information associated with the identity of a specific person." Again, here, we find a lack of detail on what "information" actually means and must make an assumption that if it is of a nature that it can be "handled" on a "network". If such is the case then it probably falls within the thresholds of the definitions. All of this is important because, in addition to the above discussion of who must abide by these laws, only those individuals and organizations which handle personal information must fulfill the data privacy obligations I am about to discuss.

Data Privacy Obligations

1. Take Network Information Security Measures

The first obligation of individuals and organizations who handle personal information is to ensure the network information security for the personal information that they handle. Network information security means:

"the protection of network information and information systems against any illegal access, use, disclosure, interruption, amendment or sabotage in order to ensure the integrity, confidentiality and availability of information."

The law classifies information systems into five different categories depending on the type of information they handle and the purpose for which they handle it. The information classified ranges from publicly available information to state secrets. There is a defined process and authorities for classifying information systems and any individual or organization subject to the network information security law must abide by them. Most individuals and organizations handling personal information in relation to information systems for profit will fall in either category two or category three. Each category has different obligations for the technical standards it must deploy in taking network information security measures. I won't detail the standards in this article, as they are more technical than legal, but know that those handling personal information will likely be obliged to know, understand, and apply them.

2. Publish a Privacy Policy

The second obligation of parties handling personal information is to develop and publish a policy for the handling and protection of the personal information which arises from organizations and individuals themselves. The way this is written in Vietnamese it is unclear whether the policy must apply to the individuals and organizations that handle personal information or to the individuals and organizations to which the personal information that is handled belongs. The prevailing interpretation is that those handling personal information must develop and publish a policy for the handling of their users' personal

information and this gives rise to the necessity of websites and internet service providers to post a privacy policy on their websites which explains how they handle personal information. Other than compliance with the law, there are no other guidelines for the formulation of this policy.

3. Notify Owner of Scope and Purpose of Collection

Third, those handling personal information must, before collecting personal information, inform the owner of the personal information why they are collecting it and what they intend to use it for. They must also obtain the personal information owner's consent. While it is not specifically stated that this must be an affirmative consent, the anti-spam laws require, and the authorities have regularly interpreted the law to require that such consent cannot be obtained through passive means. In other words, a website cannot state only that its continued use will signal consent, it must include a method for the user to actively agree such as an opt-in button. This, and many of the other data privacy obligations can be dispensed with by including them in the privacy policy and obtaining the users consent to the privacy policy prior to using a website.

4. Notify Owner of Changes in Purpose of Use

The fourth obligation, however, cannot be dispensed with by general statements in the privacy policy. If those handling personal information change the purpose for which they use the personal information from that originally stated when they first obtained the personal information owner's consent, they must obtain a subsequent consent to such change. It is not enough for the privacy policy to state that the purpose may change and that the initial consent covers any such changes, a separate consent must be obtained.

5. Maintain Control of Information

The fifth obligation comes in due course. Those handling personal information cannot share that information with any third party, except in a few specific cases: upon request from a competent state authority, they have obtained the consent for the same from the personal information owner, or they may share collected personal information for the purposes of billing and preparation of invoices with organizations with which the handler has a written contract. These issues can easily be disposed of in the privacy policy.

6. Provision of Personal Information Collected

The fifth obligation comes in due course. Those handling personal information cannot share that information with any third party, except in a few specific cases: upon request from a competent state authority, they have obtained the consent for the same from the personal information owner, or they may share collected personal information for the purposes of billing and preparation of invoices with organizations with which the handler has a written contract. These issues can easily be disposed of in the privacy policy.

7. Altering Personal Information Upon Request

The seventh obligation requires those handling personal information to comply with requests from the personal information owner to update, change, or delete the personal information collected from the personal information owner. They must also cease providing the personal information to previously approved third parties upon the request of the personal information owner. Again, how all of this is to be accomplished remains uncertain, as well as what constitutes "updating", "changing", or

"deletion". In traditional databases this should not be an issue, but for service providers utilizing blockchains to handle personal information, the specific definition of these terms is vital.

Once those handling personal information receive a request to update, change, delete, or stop providing information as outlined in the last paragraph, they must not only make the requested alteration but then must notify the personal information owner that such alteration has been accomplished. If they are unable to make such alteration for "technical or other factors" they must notify the personal information owner of the same. Whether this broad exception would include the foreseeable difficulties of blockchains in amending or deleting information is uncertain as untried. The law on network information security is six years old after all.

8. Deleting Personal Information

The eighth obligation is for those handling personal information to delete the stored personal information at the expiration of any information storage requirement. This requirement changes depending on the purpose of collecting the information and the industry of those handling personal information. For specific guidelines look at the relevant laws governing specific sectors.

9. Maintain Managerial and Technical Standards

The ninth obligation is to take "appropriate" measures to ensure that the management of handled personal information and the technical standards for such handling are sufficient as to protect the personal information that is collected and stored. Any individual or organization that has an information system must either appoint a manager to ensure network information security or, if there is no such manager, then direct the IT staff to specialize in information security. Whoever is ultimately in charge of information security for the information system must ensure that the information system has been properly classified as to the nature of its information system (see discussion under point 1 above) and organize the implementation of network information security according to such classification's requirements, organize the inspection and assessment of safety measures and risks to the information system, provide training to those involved with network information security, and coordinate with the Ministry of Information and Communications regarding network information security infrastructure. The technical standards are also defined according to the classification of the information system and are rather technical so I won't go into them here.

10. Remedy Technical Incidents and Risks

The tenth and final obligation involves "technical incidents or risks." Whenever a technical incident occurs or a risk is discovered, those handling personal information must take remedial action and "blocking measures" as soon as possible. There is no requirement to notify the owners of personal information, or even the government authorities of any such technical incident or risk. The only requirement is to remedy the problem.

Conclusion

Often times it is difficult to know what the law requires. Coming from a Common Law background where such ambiguities in the statutes could be interpreted by courts, it is particularly difficult to understand what the legislature of Vietnam intends. In trying to figure out who has to comply with data privacy laws the difficulties are immense. Poor drafting

and vague language make it unclear who has to comply with the rules. This is particularly vexing for service providers based outside the territory of Vietnam that have customers or users inside Vietnam. Do they need to comply with Vietnam's privacy laws or don't they? Unfortunately, the answer is unclear and as the law stands, the government can pick and choose when it wants to apply the law.

Sure, there are three changes to the law under consideration that could clarify this confusion for various sectors, but they aren't law yet and for service providers operating in the now, the status of compliance remains under a cloud.

But if it is determined that a service provider falls within the scope of the law and must comply with Vietnamese regulations on data privacy, then there are ten specific obligations by which they must abide. From technical standards to consent requirements to preservation, and ultimately the destruction of data service providers can know their duties. Those are clear and, in fact, rather minimal. Unlike the EU's GDPR or California's Consumer Privacy Act, Vietnam's existing data privacy laws are lax and outdated. As I mentioned above a new law is currently in the drafting stage and should revolutionize the country's data privacy regime. But for now, service providers must live with the uncertainty of the law on network information security and not knowing whether they are "protecting" "information" "in" Vietnam or not.

B2B Lending in Vietnam

(1 February 2021)

Last week I attended a year-end party and was asked about business-to-business, or B2B, lending in Vietnam. While I was familiar with the legal issues surrounding peer-to-peer, or P2P, lending (see my post on that topic here) I hadn't had the chance to investigate the somewhat different issues surrounding the higher level B2B lending business model.

The B2B Lending Business Model

B2B lending is similar to P2P lending in that the proprietor operates a platform on which businesses seeking loans can meet and interact with businesses who are willing to lend. This allows for faster, less invasive checks on borrowers and potentially higher returns for lenders. But there are also unique issues that arise from this model, especially in Vietnam.

First, a review of sorts. The exact business model used by a B2B lending platform will determine what business activities it conducts and therefore what business lines it must register and what licenses it must obtain. From simply providing a network where businesses can meet to conducting due diligence on borrowers to actively arranging loans the B2B lending platform will be subject to different sectoral regulations.

Business Lines of a B2B Lender

There are four business lines relevant to B2B lending in Vietnam: e-commerce (or the act of conducting transactions through electronic means), credit rating and appraisal (or the analysis, assessment, and rating of borrowers' ability to repay their debt), lending (or the extension of credit whereby the lender delivers or undertakes to deliver to the borrower a sum of money to use for a definite purpose for a definite term as agreed, on the principle that principal and interest are fully repayable), and intermediary payment services (services of provision of electronic payment infrastructure, assistant support payment services, and other intermediary payment services pursuant to state bank regulations). I'll take these one at a time.

E-commerce

This one's straightforward. Companies seeking to provide e-commerce services in Vietnam must be registered to provide the proper services with their local business registration office and must notify the Ministry of Industry and Trade prior to publishing an e-commerce website. They are subject to data privacy (see article on data protection obligations here) and cybersecurity regulations. It is also possible that, due to the fact that a B2B lending platform may be seen to act similarly to a high level social network, they may want to pursue compliance for providing a social network on telecommunications.

Credit Rating

In order to provide credit rating services, the platform will need to obtain a credit rating license from the Ministry of Finance, something that also entails consultation with the state bank and the Ministry of Planning and Investment. They must have a registered and paid-up capital of at least 15 billion VND and maintain at least five qualified credit raters on staff. They are also

subject to additional requirements of prudential and fiscal responsibility. It would seem, too, that obtaining this license is difficult as it took four years from the promulgation of the law on credit rating services until the granting of the first license.

Lending

Lending activities are regulated by the state bank of Vietnam. Though a B2B lending platform may argue that they are not technically lending, if they are conducting activities that could be classified as lending on a regular basis then they must register as a relevant credit institution. Lending means:

"a form of extension of credit whereby the lender delivers or undertakes to deliver to a client a sum of money to use for a definite purpose for a definite term as agreed, on the principle that principal and interest are fully repayable."

It is likely, however, that a B2B lending platform will not be viewed as being in the business of lending and will not have to register as a credit institution, particularly as there are provisions for non-credit institutions to issue loans so long as such activity does not become regular enough to be deemed as a business activity.

Intermediary Payment Services

If the B2B lending platform acts as an intermediary for the payment itself then the platform will likely be considered to be performing intermediary payment services. Although not a credit institution, the B2B lending platform will be required to register the business line with the local business registration office and obtain an intermediary payment services license from the state bank. To obtain the latter it must meet minimum technical requirements, have management and staff with sufficient qualifications, and maintain a 50 billion VND charter capital. They will also be subject to periodic reporting requirements concerning the nature, number, and size of payments as well as special reporting obligations upon request of the state bank.

Loan Process Compliance

Depending on how involved the B2B lending platform becomes in the loans themselves, they will have to develop solutions to assist the businesses that are parties to the loan in complying with regulations.

Domestic loans

For B2B loans where both companies are Vietnamese citizens, the restrictions are few. Each company will have to obtain the necessary corporate approvals, depending on their individual charter documents, before giving and receiving the loan. They will also have to ensure that the proper accounting and reporting of the loan, fees, and interest occurs. There is no VAT applicable to interest paid on loans between businesses in Vietnam and the borrower may deduct the interest from its corporate income tax for up to 150% of the official rate then announced by the state bank so long as it has fully paid up charter capital. Loans cannot be made in cash money though they may be made by check, bank transfer, or other means that are deemed acceptable forms of payment under the law.

Foreign Loans

For B2B lending in Vietnam where the lender is not a Vietnamese citizen, the process is considerably more complicated. Enterprises in Vietnam may only obtain foreign loans for the purposes of manufacturing projects, business, and for use as capital in investment projects of either the enterprise itself or of an investment project in which it is investing. To

apply for a foreign loan, Vietnamese enterprises must register with the state bank for all loans of medium to long term and certain short term loans with a term of more than one year. In addition to registration they will also be subject to annual reporting requirements in which they must provide updates to the state bank on the status of the loan. Disbursement and settlement of the loan from overseas will normally be made in foreign currency. If the enterprise borrowing money is already a foreign invested enterprise they may use their existing direct investment account for the purposes of the disbursement deposit and payment and obtaining the foreign currency exchange necessary to conduct the loan. If the enterprise is not a foreign invested enterprise they must open a foreign loan account at a bank in Vietnam through which they can exchange foreign currency to correspond with their lender.

Whether the B2B lending platform will specialize in loans between domestic businesses or allow foreign businesses to use the platform, they will have to ensure that they take the relevant lending regulations into account when considering whether to process payments and in obtaining information from both parties prior to consummating a loan.

Convertible Bonds

When a borrowing business decides it wants more from the lender than simply a loan, or the lender wants to be involved in the management and development of the borrower, the two companies may agree to exchange a convertible bond. This is a loan which may be repaid using shares of the borrower rather than payment in currency. I won't go into all of the issues that surround convertible bonds, but normally there are numerous legal documents including a shareholders agreement and revisions to the borrower's charter that must be prepared. I only raise the point as something that the B2B lending platform needs to consider prior to launch. Will they allow for convertible bonds and, if so, what level of involvement will the platform expect? It is a common enough financing model that anyone involved with loans between businesses needs to be aware of it and plan accordingly.

Conclusion

B2B lending in Vietnam is yet a fledgling idea and there are few companies involved with the model. It is one with great potential, however, as there are several large companies–some of which are state owned, at least in part–with cash to burn. To use that capital by investing in loans to other companies would allow them not only to grow their revenue, but assist small and medium enterprises to take the next step in their development.

B2B lending in Vietnam is more complicated than the similar model of P2P lending and it is important that prior to launching a platform a company considers all of the elements in play. They must determine how involved they will be in the interactions between businesses and the reach of their services. They must also ensure that they consider all the reporting and prudential requirements imposed on B2B lending in Vietnam, something that may not be straightforward. And they must determine whether they want to complicate their lives by allowing for more complex loan structures.

Assuming the B2B lending platform accomplishes all this, they can expect to see a brisk business in B2B lending in Vietnam as most Vietnamese tend to embrace business models that promise relatively secure profits. How they accomplish this, however, will be influenced by their compliance with law and their planning for legal risks in deciding their business model and the exact service levels they will provide to users.

Social Networks in Vietnam

(8 February 2021)

In several of my posts lately, I've mentioned the possibility of certain services coming under the laws governing the deployment and operation of social networks in Vietnam (see "P2P Lending in Vietnam" and "B2B Lending in Vietnam"). But in mentioning it, I have yet to go into any details about what those laws contain and the obligations they impose on organizations and their social networks in Vietnam. First, I'm going to address the laws under the assumption that the owner and operator of the social network is a Vietnamese resident. Only after that will I examine the issues relevant to international social networks.

What is a Social Network in Vietnam?

According to the law, a social network is:

"the information system providing network user communities with services of storage, provision, use, search, sharing and exchange of information with one another, including the services of personal website creation, forums, online chat, sharing of sound or images and other similar forms of services."

It is the facilitation of links, the connections between people that used to happen solely through physical means such as face-to-face contact or telephone conversations. It is the creation of the means of digitally conducting those connections on the network. And, just in case you need reminding, under Vietnamese law, a network is "a general concept which means a telecommunications network (fixed-line, mobile, Internet), or a computer network (WAN, LAN)." So a social network is the creation of a means of connection between people on a network. This would include websites such as Facebook, Twitter, and LinkedIn and mobile apps such as TikTok, Tinder, or–for those with different tastes–Grindr. It would also include platforms such as those discussed in my already cited posts on P2P and B2B lending.

Who Can Set Up a Social Network in Vietnam?

In order for a company to set up a social network in Vietnam–and it must be a company–they must register the relevant business lines with the business registration office and they must obtain a license to operate a social network from the Ministry of Information and Communications, or the MOIC. To obtain a license, an enterprise with the appropriately registered business lines must demonstrate that they have qualified personnel, an approved domain name, meet certain technical requirements, and have put in place measures to protect the safety, security, and management of the social network. I will take each of these in turn.

Qualified Personnel

These requirements are a bit confusing. First, there must be a division of the company in charge of content for the social network. This division must have at least one employee and whether that employee or a second, at least one employee in that division must be either a Vietnamese citizen or a foreigner who resides in

Vietnam and has at least six months remaining on a temporary residence card term at the time of application for the social network license. Finally, there must be at least one employee in charge of technical management of the social network.

There are no requirements as to the qualifications necessary for any of these employees, only that they be assigned certain responsibilities. This is different from many other sectors where employees must be able to demonstrate through either education or experience that they have a certain expertise in a given field. Here, however, the only requirement is that they be given the responsibilities assigned. Thus, a non-college graduate could easily fill this position if Vietnamese. Foreigners would be required to meet minimal immigration standards and thus would either have to have a college degree or so many years of experience in the field to qualify for the work permit that would allow them to fill the required position in the first place.

Approved Domain Name

Social networks must obtain at least one URL with the high-level domain of .vn. They may have multiple URLs and most of them may use other high-level domains such as .com or .net, but they must have at least one version which has been registered with the appropriate authorities as .vn. The social network must additionally store information on servers with their IP address in Vietnam. As this requirement comes in the same sentence as the requirement for a .vn domain name it is unclear whether it only requires that only data obtained from the .vn version must be stored in the country or whether all data obtained by the social network must be stored in the country and thus preclude the use of cloud servers or other, international data storage solutions. This is yet another ambiguous provision that addresses when "data" must be "localized" into Vietnam. And this is assuming that the enterprise running the social network is already governed by Vietnamese law.

Three more, brief, requirements pertain to the use of domain names for social networks in Vietnam. First, if the social network also provides news, the domain names for the two separate services may not be the same. This means that a company must register different .vn domain names for each, such as Facebook.vn and Facebooknews.vn. Second, the period remaining on the domain name registration with the Vietnamese registrar must be at least six months at the time of registration for the social network license. And finally, all international domain names must be registered according to law.

Technical Requirements

These requirements are more detailed, and social network providers must demonstrate that they are capable of the following:

- Store details associated with accounts, login time, log out time, IP address of users, and history of posted information for at least 2 years;
- Receiving warnings from relevant authorities regarding users' violations and taking actions against such;
- Detect, warn against, and prevent illegal access and network attacks;
- Conform to information safety standards;
- Having a backup plan to maintain safe and continuous operation and repair should breakdowns occur;
- Registering and storing personal information of users including copies of IDs and permissions of guardians for users under 14 years old;
- Obtaining the authorization of users via messages sent to their phone or email upon user registration or personal

information change;
- Preventing or eliminating prescribed violations of law (see Major Violations of Law section below); and
- Establishing a mechanism to warn users of posts containing violating content.

Measures to Protect the Safety, Security, and Management

In order to demonstrate that the social network is ready to obtain a license, they must first publicly post a user agreement on the social network website and develop a method for actively obtaining the user's consent to such agreement prior to allowing the user to proceed with using the social network. Consent must be obtained through a positive act and cannot be "assumed" by the continued use of the social network. There must be a method to prevent anyone who does not provide such consent from using the social network. For major violations of law (see section below), the social network must be able to eliminate violating information within three hours of being informed by the MOIC of such violation. As part of the user agreement, the social network must allow users to consent to and determine how their personal data will be provided to third parties (for more info on this see "Data Privacy Obligations in Vietnam"). Specifically, to social networks, the user agreement must also "*notify users of the rights, responsibilities, and risks when storing, exchanging, and sharing information online*."

Once a properly licensed enterprise has met all of these requirements, they may obtain a license from the MOIC which has a term according to the request of the applicant but no longer than ten years. During the operation of the social network, the enterprise must report infringements of specified laws to the authorities and cooperate in the removal of such infringements. To cooperate with the authorities in general and to provide them with personal data concerning users upon request. To abide by data and network protection regulations and to be subject to regular checks and inspections by the state authorities.

Issues for Foreign Providers of Social Networks in Vietnam

The rules governing the cross-border provision of public information apply to any

"overseas organization or individual uses electronic information pages, social networking sites, online applications, search services and other online equivalents in order to provide public information accessed or used by both an entity and an individual in Vietnam."

Anyone involved in these activities is expected to comply with Vietnam's laws and regulations when conducting these activities. The wording here is broad and suggests that it could apply to any social network that is generally available on the world wide web that hasn't blocked all IP addresses located within the territory of Vietnam. Perhaps this is why I can't access certain websites from Vietnam rather than some ideological censorship which I had thought previously because the owners of those websites are seeking to prevent the imposition of Vietnam's laws on their activities.

Luckily, there exists some more specific guidance. If an organization conducting the cross-border provision of public information rents digital information storage within the territory of Vietnam for the purpose of providing such services or their page, social network, online app, search services or other equivalents have been accessed by one million users in Vietnam in a given month then they are subject to additional obligations.

They must do two things, first, they must

provide the MOIC with contact information including their corporate information and the identity and contact method of a "principal contact agent" operating in Vietnam. What this suggests is that those organizations who meet these criteria must hire or appoint a "principal contact agent" in Vietnam if they don't already have a presence in the country. While not a "data localization" requirement (for more on that see "Data Localisation Requirements in Vietnam"), it still imposes some financial burden on the cross-border provision of public information. At least it is only imposed in concretely defined instances, unlike other areas of similar law.

The second obligation is to cooperate with the MOIC in handling major violations of law (see discussion in the next section) relating to their provision of services. This cooperation takes the form of removing such violations within 24 hours of receiving a request from the MOIC. If the foreign service provider fails to act at such a request and, again, after a second such request, then the MOIC will take technical actions to stop the service provider from the cross-border provision of public information. In essence, if the foreign service provider doesn't cooperate with the MOIC upon request, the MOIC will block their website to Vietnamese users. But what violations are big enough to justify the MOIC in taking such actions?

Major Violations of Law

Throughout this article, I've referred to major violations of law. For the purposes of social networks, there are a few very specific violations that trigger the responsibilities for cooperation with the MOIC and authorities in their prevention and removal. Those violations include:

- Offenses against the State of the Socialist Republic of Vietnam; harming the national security or social safety and order; destroying the great national unity; propagandizing for wars and terrorism; causing feuds and contradictions among different ethnicities, races, or religions;
- Propagandizing for or provoking violence, obscenity, depravity, crimes, social evils or superstition, destroying fine traditional customs of the nation;
- Disclosing State secrets, military, security, economic or foreign relations secrets, and other secrets as stipulated by law;
- Providing information that distorts, slanders, or insults the reputation of an organization or the honour and dignity of an individual;
- Advertising, propagandizing, selling, or purchasing prohibited goods or services; disseminating prohibited works of the press, literacy, art, or publications; and
- Falsely presenting oneself as another organization or individual and disseminating falsified or untrue information that is harmful to the lawful rights and interests of organizations and individuals.

It is an imposing list, and for both domestic and cross-border social network providers, the obligations to monitor and, upon request, remove any post or information on their social network that violates it are potentially far-reaching. Some may say it amounts to censorship. I won't get into that discussion here, but it does, certainly, amount to a considerable commitment to the development and maintenance of monitoring content on a social network for compliance with the law. A commitment that will result in scaling financial and manpower resources to ensure that Vietnam is pleased. Again, another reason why so many websites block countries like Vietnam so as to avoid the burdens of complying with its laws.

Conclusion

With all of that said, it is safe to say you now understand the basics of the law regarding social networks. It's quite a bit of work to operate one according to the law in Vietnam.

Aside from registration and licensing, there are data protection and cybersecurity requirements, content monitoring, and government cooperation obligations to which the social network provider must comply.

Data Protection and Blockchains in Vietnam

(22 February 2021)

Some time ago I had the time and the inclination to look into blockchain technology. The more I learned the more I saw that it presented a huge potential for collecting and managing data across a broad spectrum of activities. I also saw some difficulties in its deployment, especially in Vietnam. Issues of confidentiality and data privacy are central to my concerns. As such, I decided to write on the issue. This article first examines blockchain technology and the concomitant deployment of smart contracts before looking at how confidentiality can be ensured on a blockchain. Finally, I dig down into Vietnam's data protection laws and examine how they would be applied to blockchain technology.

Blockchains Are What?

Blockchains distribute data entries to ensure that no one tries to alter the ledger illegitimately. Each block contains a transaction. When the blockchain began, the first block recorded data regarding that block's transaction. When a second transaction occurred, a second block was added and a link to the data from the first block was copied along with the data from the second transaction to make up the second block. With each new block, a link back to the previous block with a link back to the previous block is included so that the transaction recorded in each new block can access every previous transaction recorded on the blockchain in a continuously updated ledger. Anyone with access to the blockchain can use what is called a block explorer to examine the blockchain for information about any transaction that is recorded in any block in the blockchain. This is how cryptocurrencies ensure that one owner doesn't spend his Bitcoin or Ethereum more than once. No matter how many transactions occur, so long as they link back to the previous block in the blockchain, the entire ledger of all transactions is accessible. It is an elegant way to decentralize the accounting, eliminate middlemen, and distribute the performance of transactional obligations.

What is a Smart Contract?

While blockchains may be used for other purposes, many currently in existence utilize some form of smart contract or code that will automatically perform a certain act by one party upon the completion of a counteract by another party. Take, for instance, Ethereum. While a block is obtained by a process of computational work called mining, Ethereum's blockchain also contains a smart contract that allows someone to pay physical currency to purchase the cryptocurrency. When the smart contract detects that sufficient currency has been paid to a specific account it automatically transfers a correlating amount of Ethereum as consideration.

Another example would be a travel insurance company that deployed a blockchain with a smart contract to pay $200 if the subscriber's flight was delayed by two hours. Say, then, that I own such an insurance policy and that I am scheduled to board a Vietjet plane from SGN to LAX but two hours after the flight is scheduled

I'm still sitting in the terminal waiting for the uniformed gate attendants to announce boarding. As soon as that second hand ticks over on the second hour, the smart contract will execute and automatically transfer money from the insurance company's accounts into my personal account. By automating a contractual relationship the parties eliminate the need for third-party decision-makers and the expense of processing each claim individually.

But the insurance company, unlike a cryptocurrency, faces an additional challenge with its usage of blockchain. Under traditional blockchain architecture, remember, the ledger containing each block's data is linked to every successive block. This very distribution, by its nature, means that the information collected through each transaction is public and not confidential between the parties. Without some form of security, Jay in Arkansas, USA, can access the data of Nguyen in Vietnam. That creates a problem for enterprises or governments seeking to deploy private blockchains as both are likely restricted by rules and legislation requiring that the data of transaction parties be kept confidential. This is a problem that would seem to limit the potential for blockchain usage.

Confidentiality Issues on a Blockchain

Confidentiality isn't a real problem for cryptocurrencies. As an owner of a specific cryptocurrency, I keep my Bitcoin in a digital wallet. That wallet has a specific digital address that is, in theory, unconnected with any personal data regarding myself (such as name, address, email, bank acount number, etc.). The information recorded in the Bitcoin ledger that is distributed down the blockchain is the digital address of my wallet and the amount of currency I possess. Thus, in theory, I am protected from the disclosure of the fact of my ownership of Bitcoin and any abuse of my data. Aside from the fact that the public nature of my account size opens the potential of digital attacks for wallets with large amounts of Bitcoin, information about me is secure so long as I am careful not to endow my wallet with any identifiable data. So, in theory, the blockchain ledger of a cryptocurrency is–if not confidential–at least anonymous. The same cannot be said for other applications of blockchain technology.

Private Blockchains

There are a few possible solutions to this issue of confidentiality on the blockchain. First is the deployment of private blockchains. A private blockchain is a blockchain for which access is controlled by either a single entity or by rules coded into the blockchain by a single entity. That means that only those users who are permitted by the owner of the blockchain may have access to the data in the blockchain. This is a start and allows organizations to internalize functions that may be proprietary but not sensitive such as origin location and progress in a given supply chain or work schedules and attendance records of a very large organization such as a transnational manufacturer or government. But this solution does little to protect more sensitive data between tiers of access in a single organization. Billy, for instance, does not want the mail clerk to know his salary and compensation scheme as manager of the marketing department, information that would be available on a private network in the absence of additional protections.

Encryption

The second solution, or at least an element of it, is encryption. The owner of data can deposit information on a block in the blockchain only after it has been encrypted. The owner of the data will have a private key to the data

and therefore only those with the private key will be able to access the encrypted data. This would allow an HR department to deposit personnel records on the blockchain and, as new information is obtained with every passing month, a new block could be added with appropriate encryption to update the blockchain ledger and maintain the records in time. This information, if encrypted, would be accessible only to those with the private key. In theory, they could create different keys for different levels of data and distribute them according to security levels and need. Thus upper management could have access to all personnel records with a wallet full of private keys while individual employees could have access to only their own records given a single private key. Unfortunately, with encryption alone, the benefits of blockchain are limited beyond a basic database with permissions. In order to truly take advantage of blockchain technology, there need to be more complex rules encoded into the blockchain allowing permissions and usage of data in the blockchain's ledger.

Smart Contracts

The third element of the solution is smart contracts. As discussed above, a smart contract is an action coded into the blockchain that automatically performs upon the fulfillment of a given condition precedent. Using IF/THEN statements, the coding can contain a number of conditions that must be fulfilled and a number of actions that can be taken automatically upon their fulfillment. This would allow owners of encrypted data on a private blockchain to create a smart contract specifying that only users with a certain security clearance can access the encrypted data. Once a user proved their clearance by inputting a security password, then the specified encrypted data would be made available to them. This obviates the need for creating, storing, managing, and transmitting numerous private keys as the owner of the data can be satisfied that only those users who meet their specified criteria can access their data. The same idea could be used to allow for the entry of new data or change tracking by a limited subset of users, or to allow researchers access to only certain elements of data inscribed on the blockchain.

Perhaps an example. BurstIQ, a Medtech company, has deployed a blockchain solution for the collection, storage, and use of individual medical records. BurstIQ's blockchain is a private blockchain though data, if permitted, can be added to the blockchain by medical professionals, medical devices such as a Fitbit or other sensors, and the individual being monitored. Information is encrypted thus preventing everyone with access to the blockchain from viewing all the rest of the data on the ledger. The blockchain contains a series of smart contracts which the subject of the medical records can control to allow certain individuals or devices to enter data, access data, or use data. Thus, for instance, the user can allow their endocrinologist to know about their vasectomy but not their neurosurgeon. And they could in turn allow researchers access to their exercise history and documented EKGs but not their blood sugar and cholesterol levels. Using a combination of all three solutions: private blockchains, encryption, and smart contracts the blockchain is capable of collecting, storing, and keeping confidential private users' data.

By limiting access, encrypting data, and creating a permissions system using smart contracts the blockchain can be used for many more situations than the original use of a public blockchain suggested. The confidentiality of data subjects can thus be protected from disclosure or abuse and companies and governments can deploy blockchains without worrying about violating confidentiality laws as

they can ensure–as much as is possible without relying on the sequestering of data in a physical silo–client's data privacy. Blockchain, then, can be used not only for public purposes such as cryptocurrency, but for much more sensitive sectors such as government, medicine, legal representation, and any other business that requires confidentiality and data security.

Vietnam's Data Protection Laws and Blockchain

Unfortunately, many of the new data protection laws proliferating around the globe require vendors to do more than simply prevent the unauthorized disclosure of users' data. Many of them, including Vietnam, require the ability to amend or completely remove the data from the possession of the data collector as well as a number of other rights. Specifically, referencing my previous article on "Individual Data Privacy Rights", data processors must create mechanisms that allow users to exercise the following rights:

- To protect their own personal data when using the internet;
- To give or withhold permission for the collection, processing, and storage of personal data;
- To be informed of the purpose and scope of the collection of their personal data and the use to which such personal data will be put;
- To give or withhold permission for the sharing of personal data with third parties;
- To request that the sharing of personal data with a third party cease even if they had previously provided permission for such sharing;
- To access their personal data that an organization has collected or stores;
- To update, amend, rectify, or delete the personal data that the organization has collected or stores and to receive notification from the organization when such a request is completed;
- To receive compensation for any damages caused by the organization's violation of legal obligations when processing personal data.

Many of these rights can be easily handled on the blockchain by utilizing privacy policies and smart contracts. Notification of uses for and sharing of data and several other rights are handled through publication prior to accessing a blockchain. Limiting or changing who has access to data on a blockchain can be handled using smart contracts as discussed above as it is easy to give users the right to identify who has access to their data using this method. Changes to permissions can also be allowed using a more sophisticated smart contract that would allow for subsequent encoding by the user. Access to a user's own data on a blockchain is easily allowed and can be sequestered from other user's data using encryption methods discussed above. Updates can be made by simply adding another block of data to the chain that references the original block on which the user's data was inscribed. And while Vietnam does not specifically allow for liquidated damages, it is possible to define specific damages that might be caused by violations of data protection laws and program smart contracts to automatically compensate users upon foreseeable breaches that might cause damage.

The problem for blockchains under Vietnamese law comes with the requirements of allowing for the amendment, rectification, and deletion of the user's data. The nature of a blockchain is such that data, once inscribed on a block and buried beneath subsequent blocks, cannot be changed without breaking the chain. Because each block contains a link to the previous block in its then current state, to change a block would change the link and, in effect, remove the block from communication with the next block. If

one block is removed, all the blocks before it will no longer be in communication with all of the blocks after it, and access to all of the data on the chain will be lost. Thus, changing–or even removing–a block destroys the blockchain. This is further complicated when one takes into consideration the duplication of the blockchain that occurs when there are a large number of users and the adding of blocks is automated (an element of blockchain I did not discuss above and that is not necessarily relevant to the discussion of confidentiality and data privacy here).

While it may be arguable that inscribing data on a subsequent block that is different than that inscribed on the original block with instructions to ignore the original version of the data could be viewed as an amendment under Vietnam's data privacy laws, this does not address the requirement for allowing the user to be able to delete her data. Here, again, it is arguable that a subsequently encoded block could bear instructions to essentially skip the original data block and thus the user's data would be effectively deleted. Enforcement authorities in Vietnam, unfortunately, tend to interpret legislature literally, and thus a failure to actually delete the data despite effectively erecting a wall against access to it would likely be considered a failure to comply with the law. This is a basic and seemingly immovable obstacle to the broad adoption of blockchain technologies by Vietnam, a contradiction to the country's stated desire to encourage the development of blockchain.

Conclusion

This, of course, is based on the now existing data protection laws. Just last week the government issued the first draft data protection law it is considering to update the country's data protection regime. I have not read the draft law yet, but a few comments from my colleagues that I have seen suggest that it does not effectively address this apparent conflict as it maintains the requirement of deleting data without defining the effective act of deletion. This is also in conflict with the contemplated Fintech regulatory sandbox that will allow for the adaptation of regulation to individual new technologies and includes blockchain among its subjects. Whether an applicant to this sandbox would be allowed to escape or modify this requirement upon review by authorities is unclear as the sandbox program is still merely a proposal. However Vietnam decides to proceed with the legislation of blockchain, it will have to reconcile its data protection laws with the realities of the blockchain if it desires to utilize the same for advancing technological management of a large number of sectors.

Vietnam's New Draft Data Protection Law

(1 March 2021)

It finally happened. A few weeks ago, the Ministry of Public Security issued its draft Decree on Personal Data Protection. This is apparently the second draft though I've only seen reference to a previous "outline" issued at the end of 2019. Prepared in conjunction with advisors from the EU it is less intense than I had thought it might be given such influence. It is also riddled with problems. I have only read the English version with a couple of references to the Vietnamese version to confirm issues here and there. With that caveat, I want to give a brief overview of some of the rights and responsibilities ensconced in the draft decree.

Scope

The draft decree is not very clear on who must comply with the provisions of the decree. It purportedly applies to anyone "involved in personal data." While personal data is defined as "data about individuals or relating to the identification or ability to identify a particular individual," the act required is not clear and definitely not defined. The question of national borders is also largely ignored. The definition of personal data processors includes both domestic and foreign entities, but it is not clear how many of the provisions of the decree will apply to them. It is worth noting that the personal data of Vietnamese citizens must be kept within the borders of Vietnam except for certain, explicit exceptions (which I will discuss below).

Types of Personal Data

There are two types of personal data defined by the decree, basic and sensitive. Basic personal data is essentially data that can be used in the identification of a person. It also includes data regarding the online activities of an individual. Though it is defined, the defined term is never used and it is not clear that basic personal data is actually part of personal data. This is obviously a drafting error and will hopefully be remedied in consultations.

Sensitive personal data is data about the life and preferences of an individual: genetics, health, criminal history, politics, etc. It is interesting that both gender identification and sexual orientation are included in this list, possibly a sign of the government's moving towards more liberal attitudes about these issues. Sensitive personal data is treated with separate rules for its processing and sharing. For the purposes of this article, I assume that the drafters intended for personal data to include basic personal data, despite their failure to actually include it in the appropriate definitions.

The processing of personal data, which probably are the acts deemed to make an entity become "involved in" personal data include:

"collection, recording, analysis, storage, alteration, disclosure, granting of access to personal data, retrieval, recovery, encryption, decryption, copy, transfer, deletion, or destruction of personal data or other relevant actions."

This is important to understand as the rest of the draft decree refers back to these acts in

imposing enumerated rights and obligations.

Rights of Data Owners

Those who are the originators of personal data have specified rights. Those rights include the following:

- to allow or not allow personal data processors or third parties to process their personal data;
- to receive notices from the personal data processors at the time of processing or as soon as possible;
- to request the personal data processors to correct, view, and provide a copy of their personal data;
- to request the personal data processors to terminate the processing of personal data, restrict the right to access personal data, terminate the disclosure or access to personal data, delete or close collected personal data;
- to file complaints in specified circumstances; and
- to claim compensation in the case of a breach.

Most of these rights can be infringed if other legal provisions disallow, amend, or limit them in some way. They may also be waived through consent and ignored upon request from government authorities. They may also be limited by the interests of national security, social order, and safety. There is also an exception for use of personal data by the media, though it is limited for purposes of the public good. This could allow authorities to cite this decree in prosecuting the media for use of personal data they deem not to fall within provided definitions. Note the language regarding deletion, to "delete or close collected personal data." This may be an effort to allow for an alternative treatment of collected data from its simple destruction, an issue for the use of data on the blockchain (as discussed in my article on data protection and the blockchain in Vietnam).

Consent

As stated in the rights of individual data owners, individuals have the right to consent to the processing of their data. Unlike previous regulations, the draft decree explicitly defines the required elements of such consent. Prior to giving consent, the individual data owner must be informed of:

- Types of personal data to be processed;
- Purpose of personal data processing;
- Relevant subjects with whom personal data is processed and shared;
- Conditions for transferring or sharing personal data to a third party; and
- Data subjects' legitimate rights related to the processing of their personal data.

Silence or non-response cannot be considered consent and though consent doesn't have to be in writing, it must be in a form that can be printed or copied in writing. Consent may be partial and withdrawn at any time. Proper consent will be deemed to continue through the required life of the personal data: 20 years for the purposes of state agencies, unspecified–though it may be required for up to 20 years after the personal data owner's death–for non-government data processing entities.

If the data processor desires to use or share the data outside the scope of the activities disclosed in the initial **consent** they must notify the personal data owner and obtain additional consent. Requirements of law and the authorities are excluded. They may also use scrubbed personal data for research and statistical purposes (activities that are regulated by the draft decree but outside the intended scope of this article).

Data Protection Measures

Entities processing personal data must take specified measures to ensure the protection of collected personal data. They must gather statistics as to the collection and use of personal data, limit access to equipment used in the processing of personal data, encrypt collected and processed data, and develop internal regulations for the protection of personal data throughout processing activities.

Internal data protection regulations must include the allocation and possibly the creation of a data protection department with appointed expert personnel. The regulations must provide for procedures to guarantee data protection and deal with complaints or breaches. Regulations must be inspected by a newly minted government agency called the Personal Data Protection Commission up to twice annually.

Cross-border Transfer of Personal Data

As mentioned above, the personal data of Vietnamese citizens must be kept within the borders of Vietnam. It can only be transferred upon the satisfaction of the following four conditions:

- The data owner's consent is granted for the transfer;
- The original data is stored in Vietnam;
- Proof is obtained that the recipient country, territory or a specific area within the recipient country or territory has issued regulations on personal data protection at a level equal to or higher than that specified by the draft decree; and
- Written approval is obtained from the personal data protection commission.

The draft decree then proceeds to obviate this requirement and say that transfer may be made upon obtaining consent from the personal data owners and the making of a commitment to protect that data. Whether this is an alternate approach to the issue is unclear in the language of the draft but such would seem to be the case as the two articles are completely contradictory in their requirements.

Fines

Violations of the draft decree will receive impressive fines of from 50 to 80 million VND for a first offense. Violations related to sensitive personal data, cross-border transfer of personal data, and second offenses of other violations will receive a fine of from 80 to 100 million VND. And additional repeats of the specified offenses will receive a fine of 5% of the revenue of the entity that has been obtained in Vietnam.

Other Issues

The draft decree covers other issues as well. It addresses the processing of children's data, data of deceased individuals, and as mentioned using data for statistical or research purposes. It also creates the new Personal Data Protection Commission and outlines that body's responsibilities. The Commission is to be based at the Department of Cyber Security and Hi-tech Crime Prevention and Control under the Ministry of Public Security. Finally, the provision sets out the responsibilities of relevant government organs at the various levels of the administrative hierarchy.

The draft decree on personal data protection is an interesting beast. In some areas, it offers clarification to previously confusing regulations but in others proceeds to increase that confusion. Particularly concerning is the lack of any attempt to place the new regulations within the existing frameworks of cybersecurity and data protection requirements for foreign data processors. This may change throughout the

consultation process as Vietnam is increasingly demonstrated a desire to exert control over all foreign digital service providers who have the slightest relation to the country. It will be interesting to see how this draft changes by the time it is finally adopted.

Foreign E-Commerce Providers in Vietnam

(8 March 2021)

Recently, I came across an update that referred to an official letter clarifying tax issues as relates to foreign e-commerce providers. I'll discuss it in more depth in a bit, but in essence, it said that foreign e-commerce providers will be treated like all foreign service providers for purposes of taxes. I've been running across Vietnam's continuing efforts to extend its authority over foreign providers in the digital space lately, so when I read about this newest development it made me pause.

Why is Vietnam so intent on trying to control cyberspace providers offshore?

I don't have an answer to that, though I suspect there are two reasons. One, the government wants to expand its tax base–fiscal motivations are always attributable to governments–and, two, it has a very urgent desire to control its citizen's access to the internet. Throughout the various laws and drafts of new decrees that address different aspects of cyberspace, the government repeatedly includes the option to terminate access to Vietnam for foreign service providers who fail to comply with its policies. It missed its opportunity to impose a countrywide filter like China so now it is trying to pick and choose the information it wants to let through. At least, that's what I suspect is behind these continued policies of expansionary cyberspace control.

But I digress. As a Vietnam-based blogger, it is not my place to theorize on these issues too expansively. What I want to discuss, though related, is more restricted in scope. E-commerce, specifically, foreign e-commerce, and when they are deemed to be within the control of Vietnam's laws.

The rest of this article will address three things. First, the existing policy regarding foreign e-commerce providers. Second, the recent decision on the tax treatment of those foreign e-commerce providers. And third, the proposed policy for the treatment of foreign e-commerce providers that is currently under consideration.

Existing Policy for Foreign E-Commerce Providers

The current e-commerce policies date from 2013 before the government of Vietnam embarked on its current policy trajectory. As such, they are limited in scope. In general, they do not apply to foreign e-commerce service providers. The stated application is, in fact, limited to:

1. Vietnamese traders, organizations or individuals;
2. Foreign individuals residing in Vietnam;
3. Foreign traders and organizations with their presence in Vietnam through investment operation, establishment of branches and representative offices or website set-up under Vietnamese domain name.

This would suggest that foreign e-commerce service providers have little to no obligation to abide by Vietnamese laws. But this is before taking into consideration the law on

cybersecurity of 2018 which requires that anyone

"carrying out activities of collecting, exploiting [using], analysing and processing data [being] personal information, data about service users' relationships and data generated by service users in Vietnam"

must not only have servers in Vietnam in which to store that information but must also have a representative office or branch in the country. Therefore, foreign e-commerce service providers who offer their services to customers in Vietnam would most certainly be required to abide by this policy and thus come within the scope of Vietnam's laws.

I won't go into further discussion of the cybersecurity law as I've discussed it multiple times, originally in my article on data localisation in Vietnam, and again in my article on data protection obligations.

Tax Treatment of Foreign E-commerce Providers

On 17 December 2020, the tax department issued an official letter in response to Netflix's apparent request to be treated differently than traditional offshore commercial entities which are subject to the foreign contractor tax. In their official letter, the tax department refused Netflix's request and announced that there is currently no legal basis for treating foreign e-commerce providers as different than foreign commercial entities that provide goods or services to Vietnamese citizens. This means, therefore, that foreign e-commerce providers who provide goods or services cross-border to Vietnamese citizens (including companies) are subject to the foreign contractor tax the same as any foreign service provider.

Foreign Contractor Tax

As I'm not an expert in tax, I'll quote from our soon to be updated legal guide on the matter:

"While not a separate tax, the FCT is the scheme by which the earnings of foreign companies or individuals offshore providing services for Vietnamese tax residents ("Foreign Contractor") are taxed. It is a combination of the VAT [value added tax] and CIT [corporate income tax] or PIT [personal income tax]. There are three methods by which a Foreign Contractor can choose to be taxed by Vietnam. First, the deduction method which requires the Foreign Contractor to register with the Ministry of Finance, conduct Vietnamese accounting, and pay taxes as if they were a Vietnamese tax resident. Second, the direct method allows the Vietnamese purchaser of the goods or services of the Foreign Contractor to withhold the relevant taxes from its payment to the Foreign Contractor and then submit that withheld amount to the tax authorities on behalf of the Foreign Contractor. Finally, the hybrid method allows the Foreign Contractor to act as a Vietnamese tax resident for the purposes of VAT but to have their CIT or PIT withheld by the Vietnamese purchaser. The applicable tax rates are published separately by the Ministry of Finance and vary depending on the nature of the goods or services sold into Vietnam."

That's all I have to say about the foreign contractor tax.

Proposed Policy for Foreign E-Commerce Providers

Last year, the government issued a second draft of a decree to amend the existing regulations on e-commerce. There are a couple of points worth exploring here. First, the draft decree changes the scope of the regulations. The existing rules currently apply to the following foreign providers:

"Foreign traders and organizations with their

presence in Vietnam through investment operation, establishment of branches and representative offices or website set-up under Vietnamese domain name."

The draft decree amends that list and broadens it to include "Foreign traders and organizations who have e-commerce activities in Vietnam."

This amendment alone broadly expands the ability of Vietnam to access foreign e-commerce providers. If this language is adopted, it will include any foreign e-commerce provider who is deemed to be "in" Vietnam under the increasingly broad definitions being adopted by the National Assembly and government.

But the draft decree goes further and actually defines when an e-commerce website has "activities in Vietnam."

There are two approaches that are proposed in the draft law.

The first approach would impose compliance obligations on any e-commerce website that uses a Vietnamese domain name, the Vietnamese language, or has more than 100,000 transactions originating in Vietnam in a given year. Any foreign e-commerce provider who meets one of these criteria would be obligated to register their activities and open a representative office in Vietnam.

The second approach would apply to any foreign e-commerce website that uses a Vietnam domain name, the Vietnamese language or has a total number of transactions/views/orders from Vietnamese organizations or individuals that exceed a number to be determined by the authorities. Any foreign e-commerce provider who meets one of these criteria would be required to register their activities and appoint a legal representative in Vietnam.

In either case, the proposed policy would act to dramatically expand Vietnam's reach, though at least they are likely to require some nexus with Vietnam.

Conclusion

E-commerce is a major market. According to Statista.com, e-commerce accounted for over six billion dollars in 2020, a sizable chunk of the country's GDP. With nearly seventy percent of the population accessing the internet in 2019, there is a huge potential for e-commerce providers, both domestic and foreign, to make a profit in Vietnam. There is also a huge potential for tax revenues to be gained by the government. Whatever the National Assembly's motivations–which are often opaque–for expanding its reach to foreign cyberspace actors, Vietnam is on the march. Foreign e-commerce providers need to be aware of the rules before they deal with Vietnamese customers and understand that they may already have some legal obligations in the country.

Data Privacy of Children in Vietnam

(15 March 2021)

A couple weeks ago I wrote about Vietnam's new draft data protection regulations. Part of those regulations cover the protection of children's data in the online environment. That is not the first instance of regulations for data privacy for children in Vietnam, however. As approximately 36% of Vietnam's population is under 24 years old and 22% under 14, there are a large number of children using the internet in Vietnam. I thought it important, therefore, to discuss the current and proposed legislation regarding data privacy for children in Vietnam.

Existing Regulations on data privacy of children in Vietnam

First and foremost, internet service providers should understand that general data privacy rules apply to children as well as adults. I wrote about the data protection obligations of internet service providers some time ago and you can see that post for a full understanding of those obligations. But there are additional obligations imposed when dealing with the data of children.

Age of Consent

Children capable of giving consent for the use of their data are older than seven years old. There are no regulations for children under seven and we can assume that they are too young to be able to consent and therefore their data should not be published at all. Children from seven, however, are capable of giving consent for the use of their data. Before internet providers can publish the private data of children over seven, however, they must not only obtain the consent of the child but also of the child's parent or guardian.

The upper limit to this requirement is relatively clear. The law on children specifies that children are anyone under 16 years old. According to the civil code, however, minors from 15 to 18 years old can enter into civil transactions without the consent of their parents except for those related to immovable property and as otherwise prescribed by law that requires parental consent. The law on children and the civil code, therefore, can be deemed not to be in conflict. Even though children who are 15 years old–old enough to enter civil transactions independently of their parents according to the civil code–may enter into many civil transactions, because the law on children requires parental consent for the publication of their data, it falls under the exception of the civil code.

But that consent is only required for the publication of private information, not the collection or analysis or other use of that information. The law on children does not address these other potential actions as regards data. The civil code would then presumably be the guide. For all other acts besides publishing data, therefore, the consent of the parents would seem to only be required for minors under 15 years old. This may be a moot point as most children under 16 are using the internet for the purposes of social media which does involve the publication of private data and therefore seems to require the consent of parents for children under 16 years old. It makes

little sense to apply a separate standard to distinguish minors capable of entering into civil transactions from children.

In general, however, we advise clients that all matters of data collection, use, or publication involving children would impose the 16 years old limit rather than the younger 15 years that could arguably apply. The law on children is controlling in most cases when dealing with minors under 16 years old and splitting hairs with the authorities is less effective than simply eliminating the collection and non-publication use of 15-year-old children without parental consent.

What is Private Data

Obtaining the consent of the child and the parent–both of which are required to publish private data of the child–is only the first step in treating a child's data. Internet providers must also understand what that private data is, as the definition of private data is different for children than for adults.

Private data of children is information on:

"name, age and characteristics for personal identification; information on health status and privacy written in health records; personal images; information on family members and caregiver of the child; personal property; telephone number and mail address; address of and information on residence place and native place; address of and information on school, class, learning result and friends of the child; and information on services provided for the child."

This definition is more inclusive than the current definitions of private data for adults, even for those definitions of private data contemplated by the draft individual data protection law. Data privacy for children in Vietnam, therefore, covers not only the child but the child's caregiver and parent or guardian. Anything that might provide someone seeing the published data enough information to locate the child.

Other obligations

There are only two additional obligations that are distinct to the treatment of data privacy of children in Vietnam. Internet providers must deliver warnings to children when they change their private information. They must also remove the private data of a child upon the request of the parent or caregiver of the child, organizations and individuals with child protection responsibilities as prescribed by law, and the child herself. Otherwise, the rules applicable to data protection in general apply.

Regulations in the Draft Decree

The draft decree on individual data protection includes some provisions treating the "processing" of the personal data of children. There are several provisions that do little to change existing rules on the age of consent but do supplement the provisions on actions requiring consent and termination of processing activities.

Firstly, the draft decree requires consent to be obtained by parents for all "processing" of children's personal data, not just for the publication of that data. Processing includes:

"any action(s) to do with personal data, including collection, recording, analysis, storage, alteration, disclosure, granting of access to personal data, retrieval, recovery, encryption, decryption, copy, transfer, deletion, or destruction of personal data or other relevant actions".

Therefore, consent of the child and the parent or guardian would be required for any of these actions on the part of the data processor. And as

the treatment of children's personal data does not stretch to include sensitive personal data, the scope of included data types is less broad than that in the law on children. The data for which processing requires consent includes:

1. Surname name, middle name, and birth name, alias (if any);
2. Date of birth; date of death or date of going missing;
3. Blood type & gender;
4. Place of birth, place of birth registration, permanent residence, current residence, hometown, contact address, email address;
5. Education;
6. Ethnicity;
7. Nationality;
8. Phone number;
9. ID card number, passport number, citizen identification number, driver's license number, plate number, personal tax identification number, social insurance number;
10. Marital status;
11. Data reflecting online activities or activity history.

It is unclear at this point whether the draft decree would supersede the requirements of the law on children as regards the processing of children's data or whether the existing regulations will remain in effect. It is possible that these regulations will be seen as supplementary to the law on children rather than replacing the relevant provisions of that law. If so, consent would be required for all of this data as well as the data regarding the caregivers and parents of the child.

Data processors must conduct the following actions when processing children's data: they must correct inaccurate or misleading personal data; update inadequate personal data; update and handle outdated personal data; and delete personal data that is no longer needed for the purpose of data processing. All data processing of personal data of children must be terminated if the collection of data has been completed or is no longer necessary for the purpose which was stated in obtaining consent and when required by the child and guardian in accordance with the law; parents or guardians withdraw their consent for the processing of the child's personal data; and at the request of a competent authority when there are sufficient grounds to prove that the processing of personal data affects children's legitimate rights and interests.

Conclusion

The treatment of data privacy of children in Vietnam is a sensitive issue. Children are treasured in Vietnam as they will grow up to take care of aging parents. They will also be responsible for seeing their parents safely at rest in the afterlife and appeasing the needs of their spirits. Children are vital, then, to the lifecycle of the Vietnamese. To protect them, and their data is an important part of seeing those children grow successfully into adults capable of fulfilling their filial duties. Unfortunately, the laws regarding the collection, processing, and publication of children's data are minimal. It is very easy for internet providers to run askance of the rules without realizing it. Care is required, therefore, in treating the data of children and in deciding who, exactly, is a child. But the market for children users of internet services in Vietnam is huge with from 25 to 30 million children in the country. It is an attractive market and internet providers must be wary when approaching it. Minimum standards should be applied to ensure that the laws are complied with and the interests of children protected.

Legal Issues with Blockchain in Vietnam

(29 March 2021)

A while ago I wrote about blockchain and data protection issues in Vietnam. In that post, I discussed the Vietnamese government's promotion of the development of blockchain technology in the country. I also pointed to certain difficulties in its adoption due to certain requirements in the existing data protection laws. While it is uncertain that the recent draft decree on personal data protection will address those issues, I don't want to rehash those issues.

Instead, I want to discuss three different legal challenges to the adoption of blockchain in Vietnam. Issues that make its use and deployment problematic legally in a country that seems keen to develop its technology. There are two types of blockchain, public blockchain–like Bitcoin and Ethereum–which publicly distribute their ledgers through preprogrammed routines that are not controlled by any founder or company, and private blockchains which can be controlled and access to which can be restricted by the individual or company that deploys the blockchain.

Most of the legal problems with blockchain in Vietnam are involved with public blockchains as there is little control over where each block on the chain is created or stored. Private blockchains, as limited by the developer, can avoid these issues. Therefore, these issues can be eliminated through the careful anticipation of these problems and policies for preventing behaviors on the private blockchain that would put the developer in violation.

The three issues are relatively straightforward. First, in a public blockchain, once the chain is deployed and the ledger is made public there is not necessarily a controlling counterparty. Second, the duplication of the blockchain and the multiple nodes that are a feature of the technology allow for each block on the chain to be created anywhere data can be accessed and stored. This leads to questions of jurisdictional control. And related, the third issue is one of data localization, or requirements for maintaining data within a specific jurisdiction–in this case, Vietnam.

The Lack of a Counterparty

In traditional transactions, there are two or more parties involved in the exchange of goods or services. Party A agrees to provide widgets to Party B and Party B agrees to pay a specified amount of money to Party A in return. Blockchain does not have a Party A. Take Bitcoin, for example. Once Satoshi Nakamoto, whoever or whatever he/she is, deployed the Bitcoin blockchain, it became an autonomous technology. The Bitcoin ledger was reproduced across several nodes by the instructions encoded in its programming and each time someone purchased or sold a Bitcoin, the block recording that transaction in the ledger was automatically added to the chain. Bitcoin was earned through a process of mining, which involved the use of computing power to perform specific calculations. There is no depository for physical assets to back Bitcoin and its value is earned simply by the amount of money people are willing to pay

for it. That means that there is technically no issuing organization. Bitcoin has no controlling government or bank or company. The mining process was in service to the blockchain rather than to a counterparty. There is no one to whom responsibility or liability can be imputed for Bitcoin. And that means that the initial Bitcoin transactions were, in essence, unilateral. Only after a miner obtained his Bitcoin could he turn around and sell what he had to a counterparty.

This is the case of most, if not all, public blockchains. Once the blockchain has been deployed, it is an amorphous and ambiguous blob floating in the public ethernet. There is no party to answer to governments or purchasers for violations of the contract, no one who can be taken to court or pay administrative fines. No counterparty.

This is a problem. In Vietnam, while it is possible to enter into a contract with a one-sided, or unilateral, obligation, it is not possible to enter into a contract without a counterparty. Obligations, as defined are "acts whereby one or more entities…perform…or refrain from performing certain acts in the interests of one or more other subjects." By definition, then, obligations require an entity and a subject. There have to be two parties involved for an obligation to arise. In public blockchains there is only one party–though we may reach a point in the future where AI and other technologies are legally defined as an entity or person, we're not there yet–and the law of Vietnam simply does not contemplate the possibility of a transaction between one party and an electronic ledger.

Jurisdictional Issues

One aspect of blockchain that I didn't address in my previous post was the idea of nodes. In public blockchains, the entire chain is duplicated to multiple nodes in various clouds or servers. Each node is updated whenever there is a new block added to the chain–there is a mechanism for each node to confirm that a new block is legitimate, but I won't go into that here–and each block added to the chain does not necessarily have to be stored in the same place as the rest of the blockchain. This creates a double confusion as there are both multiple copies of the blockchain in different locations and multiple locations for each node. This presents a problem for governments, like Vietnam's, who are continually trying to define the scope of their authority over everything within their boundaries, including data.

As there is no controlling counterparty in a public blockchain, even if it is deployed by a Vietnamese entity, is it governed by Vietnamese law? What if the nodes and blocks are dispersed globally? Which government has the right to regulate the blockchain? Is it the country in which the entity that deployed it is located? What if there is no identification of geography. Satoshi Nakamoto, of Bitcoin, may be one person or many persons and no one knows where he/she/they is located. The internet, and the dispersal of data that it has wrought, are borderless. How does a country like Vietnam decide how to legislate something that does not necessarily exist within its boundaries?

This is a challenge with which the Vietnamese government is regularly struggling. The cybersecurity law and its draft guiding decree, the draft personal data protection decree, and the draft e-commerce decree all contain provisions for defining when an internet-based entity is subject to Vietnam's laws. But even then, without a controlling counterparty to respond to government requests or commands, how does that government impose its will? This is a problem for public blockchains and a major issue for a government that is keen to extend its control.

Data Localization

The problems with jurisdiction, and Vietnam's efforts to respond to such problems, were reflected in the country's 2018 cybersecurity law. In that law, the National Assembly required that data collected online from Vietnamese citizens remain within the boundaries of Vietnam. This poses a challenge to many international internet services that would like to expand their coverage to Vietnam. It also poses a direct challenge to blockchains. As a borderless technology, blockchains–especially public blockchains–are not designed to keep the data contained in their ledgers in any specific geographic location. Even if they are deployed in Vietnam, their very design is intended to utilize the international internet and thus will not be bound by a specific country's regulations. This puts public blockchains, at a basal level, in violation of Vietnam's existing laws. This is again complicated by the lack of a controlling counterparty to which Vietnam can appeal to and against which the government can enforce its laws.

Another issue is the proposed strategies that Vietnam has put in place for dealing with social networks and websites. Current law requires websites and social networks to comply with certain content restrictions if they desire to have access to Vietnam's internet. There are signs that similar moves are being made in the realms of e-commerce and cybersecurity. But how does a government block a decentralized ledger from accessing the internet. The nodes are not located at any specific IP address for the government's censors to block, there is no geographical location for them to isolate. Public blockchains, by their very democratic nature, could be viewed as a threat to centralized governments everywhere–not just Vietnam's.

Conclusion

All of these issues, however, can be avoided by private or restricted-access blockchains. A company that deploys a blockchain for health or financial information can control where the nodes and blocks are stored and who has access to the chain. They are very much a controlling counterparty to the blockchain as they deployed it, control access, and regularly add blocks. It is in this realm that the government has the chance to regulate and to impose restrictions. But so far, there is little sign that blockchain-specific legislation–or even legislation that contemplates blockchains–is in the pipeline. For a government keen on technological advancement, Vietnam's legislature is awfully slow to catch up. Companies interested in deploying private blockchains will have to make sure that their blockchains are kept within the boundaries of the country, that they maintain control of them, and that they treat the data contained within them properly. This requires the creation of monitoring and control mechanisms–something that can be legislated–and the conscious decision on the part of entities deploying blockchain to comply with the law.

E-Commerce Contracts in Vietnam

(5 April 2021)

In traditional contracts, the contract is dependent upon the agreement of the parties. That agreement is reached through a process of contract formation. In the first step, one of the parties makes an offer of providing either goods or services. The other party then will review the offer and accept or reject it. If they accept the offer, that acceptance is deemed as sufficient to create an enforceable contract between the two parties. The offer and acceptance can both be made with certain terms and conditions. There are also restrictions on how an offer and acceptance can be made, when they are deemed to be made, and whether they are effective in whole or in part.

While the above process is generally applicable to most transactions between equally situated parties, there are certain issues raised when one of the parties is a merchant or advertiser. What elements of an advertisement or fixed price for the sale of goods or services constitute an offer? In law school, we studied several legal cases that discussed when an advertisement can be considered an offer sufficient to allow for acceptance and thus form a contract. Retailers and service providers must take care in developing their advertising and in-store displays in order to know when they are making an enforceable offer.

In most jurisdictions, this process was codified prior to the development of electronic media and, more specifically, the development of e-commerce. For e-commerce providers, there is the dual complication of being a merchant making advertising-type offers and the issue of electronic media. In Vietnam, there are specific regulations for the process of entering into a contract between an e-commerce provider selling goods or services online and a consumer. This post will examine the legislation governing the formation of e-commerce contracts in Vietnam.

Offer

When an e-commerce provider in Vietnam who has an online ordering function on their website posts an item or service for sale, they normally include the price and introductory details regarding the item or service. There are also the implied terms and conditions that are included elsewhere on the website. According to the regulations governing e-commerce in Vietnam, when such introductory information and terms and conditions are made electronically without specifying a receiving party, then this is not an offer that gives rise to a contract upon acceptance but a notice of the offer. It becomes an offer, however, if the terms and conditions specify what responsibilities will be imputed upon acceptance. This means that it is important to understand that simply posting an item for sale and having a customer offer to pay for it is not enough to form an enforceable contract unless the terms and conditions specify that upon accepting the price and agreeing to pay for it the e-commerce merchant will be bound as if it were an acceptance of the offer. Otherwise, the offer to pay the price for the goods by the consumer will be viewed as an independent offer, and only upon the merchant's acceptance will a contract be

formed. This latter is the normal scheme contemplated by the law, but if the merchant wishes for the display of goods or services to constitute an offer, then special care must be taken. It is an issue that needs to be considered in developing the merchant's standard terms and conditions.

Normally, then, a customer must create and send an "e-document" via the online ordering function in order to constitute an offer to the merchant for purchase of the goods or services posted on the website. An e-document has very specific features. In order to have the same legal validity as a physical document, the e-document must be capable of having the integrity of the information contained in it assured from the time the information is initially entered, and the e-document must be accessible and usable in its complete form when necessary. The integrity of an e-document is determined by its completeness and unchangeableness. And it is assured by one of the following methods:

1. Signing the E-document with a digital signature issued by a legal digital signature certification service provider;
2. Storing the E-document in the system of a licensed E-contract certification service provider that the parties have agreed to select;
3. There is an assurance from the traders or organizations providing infrastructure for the creation, sending, and storage of the E-document on the integrity of the information contained in the E-document during the sending and storage in the system; or
4. Other measures which the parties have agreed upon.

Whether stating a preferred method in the standard terms and conditions of the merchant and then allowing the customer to abide by that method is sufficient to constitute "agreement between the parties" pursuant to item 4 is difficult to say. Technically, there is no agreement between the parties until the contract is formed, and demonstrating this assurance is necessary to have a legally enforceable e-document and thus the offer necessary to form a contract. There is currently no guidance on this issue. C'est la vie.

Assuming, therefore, that the online ordering function of the merchant creates a form in which the customer can fill out his information and satisfy the requirements of an e-document, then the submission of that form will become the offer from the customer to the merchant to buy the goods at the price contained in the notice of offer (the posted introductory information and terms and conditions of the goods or services). Before the customer submits the form, and in order to make the e-document an enforceable offer, the customer must be able to review, supplement, modify, and confirm the contents of the e-document. There are three elements to this review:

1. The name of goods or services, their number and type, the method and time of delivery or provision, and the total value of the contract and the payment details must be displayed to the customer. This display must be capable of being stored or printed by the customer;
2. The display must include the customer's chosen method for the merchant to respond to the proposal for contract commitment and the time limit to respond to the proposal for contract commitment; and
3. Permit the customer to cancel the transaction or confirm the proposal for contract commitment.

Once these elements have been satisfied, then the e-document may be submitted to

the merchant and constitute the official and enforceable offer. Upon acceptance of the offer by the merchant according to the method specified by the customer, a contract will be formed. But how is acceptance made?

Acceptance

Acceptance of the customer's offer must be in the form specified in the e-document offer from the customer. This form will likely be specified by the merchant and accepted automatically through the standard terms and conditions so there is little need for developing a customized response. The acceptance, however, must be in a form that is capable of being stored, printed, and displayed by the customer upon its receipt. An acceptance must include the following information:

1. List of all goods or services that customers have ordered, the number and price of each product, and the total value of the contract;
2. Time of delivery or service provision; and
3. Contact information for the customer to ask about the status of contract performance when necessary.

The merchant has a limited amount of time to respond to the offer of the customer. If they have specified a time limit in their standard terms and conditions then that time limit will apply. If there is no time limit, then the default is 12 hours. After the time limit expires, any "acceptance" by the merchant becomes a new offer to the customer that is enforceable upon acceptance by the customer. An acceptance is deemed delivered upon receipt by the customer. At that time, and only at that time, is the contract deemed concluded and completely enforceable by both parties. An e-commerce contract in Vietnam will have been formed.

Conclusion

The method for creating a contract in e-commerce is not entirely disconnected from traditional contract formation processes. It is, however, slightly different, and understanding how the offer and acceptance flow is important when preparing the standard terms and conditions for the merchant and in developing the forms and e-documents that will constitute the offer and acceptance between the customer and the merchant. Failure to properly understand these rules when operating in the e-commerce sector in Vietnam will make it difficult to enforce e-commerce contracts in Vietnam.

Mobile Money Pilot Program in Vietnam

(12 April 2021)

On 3 March 2021, the Prime Minister of Vietnam issued a decision that authorized a pilot program for the use of mobile money in Vietnam. This is a major step forward in the use of non-physical currency in the country and marks a potential change in the direction of the government's policies towards digital currencies. This article will examine the provisions of this new decision and the implications of mobile money in Vietnam.

Prior to this decision, the use of digital currency was not allowed in Vietnam. This prohibition was applied to all non-traditional means of payment including cryptocurrency, digital coins, and all forms of digital currency. Internationally, a customer can purchase digital tokens, or coins, and use those coins to purchase goods or services. This was not allowed. We have advised several clients on this issue and anyone wishing to offer the opportunity to "top-up" or otherwise create the ability to store value in a digital form was disappointed. They could only credit existing accounts, not provide digital tokens.

The decision of the Prime Minister, however, sets out a two-year pilot program for just that, digital tokens. But the purpose is not intended to be for purely commercial reasons. Only 63% of adults in Vietnam possess bank accounts and thus it is difficult for many citizens of the country to access the convenience and sources of goods and services provided online. However, there are nearly 130 million phones in the country (less than 100 million people). By allowing people to top-up accounts on their phones through payment at kiosks or minimarts, more people will be able to access the goods and services available online and in digital formats. This is designed to assist the people in "rural, mountainous, difficult, remote, border and island" regions. This is not simply for the convenience of sophisticated urban dwellers but for those people who don't have access to banks or other existing methods of payment.

The pilot program is limited. Only businesses that already have intermediate payment service licenses for providing e-wallets, businesses with licenses to establish a public mobile land telecommunications network or specified subsidiaries can participate in the pilot program. Once they have registered for the pilot program they will only be able to offer limited services to users.

Users can sign up for the services using their mobile accounts. But they must demonstrate their identity in a Know Your Customer requirement through the provision of identity cards, citizen identification, or passports. They must also have a registered mobile account for at least three months prior to signing up for the service. These fairly stringent requirements seem intended to limit the opportunities for abuse and fraud.

The mobile money pilot program will be allowed throughout the territory of Vietnam, though priorities are those areas already mentioned: rural, remote, border and island regions. Mobile money will only be allowed

to pay for goods domestically. There are no provisions for allowing cross-border payment.

Customers will be allowed to top up or withdraw from their Mobile Money accounts at physical kiosks, via bank accounts and e-wallets. They can also pay for goods and services at stores accepting Mobile Money.

In addition, money transfers between customers' Mobile Money accounts will be supported. There is a maximum cap set on the total transactions allowed to minimize the risks of digital piracy and other abuses. In any given month, a single user can only transact up to VND10 million for all transactions, including withdrawals, transfers, and payments.

Businesses providing mobile money services must open a security bank account and guarantee that there is enough money in the account to cover the amount of mobile money outstanding at any given time. Businesses must also develop a system that allows government authorities to check the amount of mobile money in circulation against the amount of money in the bank account. Additional requirements are in place for prevention of money laundering and the protection of customer's data.

Businesses must put in place safeguards, technology, and training for personnel at points of deposit and withdrawal. They must also put in place reporting and notification protocols for informing customers of their obligations and rights regarding the mobile money and comply with consumer protection principles. Additional guidelines are given for the purposes of technical standards and requirements regarding the method of monitoring individual accounts. Responsibilities of various government bodies are set forth and the two year pilot program time limit will begin once the first mobile money business receives authorization for its provision.

This is a major milestone for the development of digital technologies. Paired with the continuing news that the government is investigating the possibility of allowing cryptocurrencies, this demonstrates that they are no longer sticking their head in the sand when it comes to digital monies. Not only will this allow for a broad range of unbanked individuals to have access to goods and services only available online, which will also provide an expanded customer base for domestic merchants, but it will allow for the deployment of new technologies to serve those individuals.

Vietnam has long had a cash-based economy and the idea of being able to convert that cash into digital form without having to open a bank account or have the financial reputation necessary to obtain credit will drastically expand the purchasing power of the unbanked. It will also have the knock-on effect of providing sophisticated city dwellers the ability to buy digital tokens and participate in online games and other luxury behaviors that were previously not allowed. It will benefit rural and urban, consumer and merchant alike.

Registering E-Commerce Websites in Vietnam

(26 April 2021)

Last week I examined the four types of e-commerce websites that are allowed to operate in Vietnam (see "Some Issues on E-Commerce in Vietnam"). For each type, there is either a notification or registration requirement before the website can commence operations. This week I wanted to discuss the requirements for such notification and registration of e-commerce websites in Vietnam.

First, a quick review. The four types of e-commerce websites allowed in Vietnam are classed as:

1. Sales websites
2. Trading Floors
3. Online Auction
4. Online promotion

Each website has different characteristics and different requirements for operation and information necessary to provide to customers. Sales websites require that the operator notify the Ministry of Industry and Trade, or MOIT, prior to commencing operations. Trading Floors, Online Auctions, and Online Promotions websites must all register with the MOIT, a much more stringent procedure than mere notification.

Notification of E-Commerce Websites in Vietnam

Before conducting a notification procedure, the owner of a sales website must ensure that they meet a few basic prerequisites. They must be a trader or organization properly registered with the appropriate business lines and or an individual who has been issued a personal tax code, and they must have a website with a validly registered domain name and comply with relevant legislation on information management. If they have satisfied these two requirements then the only remaining task prior to commencing operations is the notification.

Notification must be conducted online. The MOIT has set up an online portal for e-commerce and the notification is to be completed via the announcement tool on that Management Portal. The announcement tool will require the following information to complete a notification:

1. Domain name of the E-commerce website;
2. Type of goods and services to be introduced on the website;
3. Registered name of the traders, organizations or name of the website owner;
4. Address of the head office of the traders, organizations or permanent residence of individuals;
5. Number, date and place of issue of the certificate of business registration of the traders, or number, date of issue and unit issuing the establishment decision of the organizations, or tax code of the individuals;
6. Name, title, identification number, telephone number and E-mail address of

the trader's representative and the person who is responsible for E-commerce website;

7. Other information as prescribed by the Ministry of Industry and Trade.

There are a few steps in the process. First, the applicant must register for an account, which is where the above information will be declared. The MOIT will then have three days to confirm whether the information is complete and open your account, sending a notification to your registered email address. Upon such confirmation, you can then proceed to conduct the notification for your sales website using the available form. The MOIT will then have three days to acknowledge whether the form was filled out properly and with all the necessary information. If that is the case, then there will be no further action necessary. If the MOIT find that there is inaccuracies or incompleteness in the form they will require you to fill it out again.

Registration of E-Commerce Websites in Vietnam

Registration of the three other types of e-commerce websites in Vietnam is more involved than notification. First off, only traders or organizations can operate these three types of websites. Individuals are not included in the types of entities allowed to operate them. As with sales websites, they must be properly registered with the appropriate business lines and have a valid registered domain name. They must also a plan for service provision with includes a model of organization and operation (including operation of service provision, promotion and marketing services inside and outside the online environment); the structure, features and essential information on the service provision website; and the division of rights and responsibilities between the traders or organizations providing E-commerce services with the parties using the services. With this plan in place, the only remaining duty prior to commencing operations is the registration of the website.

Registration requires more information than notification. In order to properly lodge a registration, the owner of a relevant e-commerce website must prepare and submit the following documents:

1. Application for registering websites providing e-commerce services (made according to the Form TMDT-1 in the Annex promulgated together with Circular 12/2013/TT-BCT).
2. Authenticated copies of the establishment decision (for organizations), certificate of Business registration, certificate of investment or license of investment (for traders).
3. Scheme on supplying services including:
   (i) Model of organization and operation including operation of service provision, promotion and marketing services inside and outside online environment.
   (ii) Structure, feature and essential information on the service provision website.
   (iii) Dividing rights and responsibilities between the traders or organizations providing E-commerce services with the parties using services.
4. Regulation on operation management of websites supplying e-commerce service including:
   (i) Application for setup of E-commerce service provision website
   (ii) A certified copy of establishment decision (for organizations), certificate of business registration, certificate of investment or License of investment (for traders);
   (iii) Service provision plan as specified in

point 3 above

(iv) Regulations on operation management of E-commerce service provision websites shall comply with provisions of this Decree and regulations of relevant laws.

(v) Form of contract of service provision and general transaction conditions, if any;

(vi) Other documents specified by the MOIT.

5. The model service contract or cooperation agreement between trader, organization possessing website supplying e-commerce services with traders, organizations and individuals participating in goods sale or service provision on that website.
6. General transaction conditions that apply to the goods sale and service provision on the website (if any).

All of that is necessary to lodge a registration with the MOIT. The process is fairly straightforward. As with the notification discussed above, the applicant must register for an account at the online portal. The MOIT will have three days to confirm the account and notify the applicant of such at their registered email. Then the applicant will lodge the above documents. The MOIT will have seven days to review these documents and confirm whether the information is complete. If they find additions or changes necessary they will notify the applicant who must then make such amendments or changes. If the MOIT finds the dossier sufficient, they will request the applicant to submit hard copies of the dossier. Once the MOIT receives the hard copies they have thirty days to review the full application dossier and inform the applicant of a successful registration.

Conclusion

The registration of e-commerce websites is obviously more onerous than the notification for sales websites. It is important to understand exactly what kind of website one intends to operate so as to know which procedure must be complied with. Knowing that, the process is relatively straightforward. It simply takes paperwork–a task for which Vietnam is well practiced–and time. That is, of course, assuming that one is interested in opening a Vietnamese based e-commerce website. This does not apply to cross-border providers (see "Foreign E-Commerce Providers in Vietnam").

Personal Data Leaks in Vietnam

(24 May 2021)

According to an article in VN Express International's website (see "Personal data leak affects thousands of Vietnamese") the news of a major leak of personal data was announced. (Other articles covered the news in the Vietnamese language, but for purposes of discussion, the English language story will work best.) The data, which comprised 17 GBs of personal data, was posted on a notorious hacker site that is known for the sale of personal data and other illegal activities. The data allegedly came from the Pi Digital Currency, or a related site, and consisted of Know Your Customer data that had been collected from Vietnamese users in registering to mine the cryptocurrency.

This gives rise to a goodly number of issues.

First, per Vietnam's cybersecurity law, a cyberattack includes among other things, acts of:

"Infiltrating, harming or appropriating data stored or transmitted on a telecom network, the Internet, a computer network, information systems, information processing and control systems, database or e-facility"

Thus, if the illegal appropriation of data occurred in Vietnam, it would be deemed a cyberattack and the appropriate response would be meted out. That response, according to law, would include–according to the cybersecurity law–action on the part of the cybersecurity task force to coordinate with the system administrators to determine the origin of the cyberattack and collect evidence. System administrators are required to promptly and completely comply with requests for information from such a task force. Lovely law that it is, the cybersecurity law does not actually contain a prohibition against cyberattacks and the only penalty is imposed for violations of the law. More useful, perhaps is the law on network information security which requires that administrators who discover a data breach must act quickly and decisively to fix the breach.

While the law on network information security has been the subject of some implementation legislation–none of which actually addresses this issue–the cybersecurity law's implementing decree has been bogged down in consideration for nearly two years. There is minimal guidance for actually dealing with a cyberattack and, even then, it must either be in relation to national security or "cause serious harm to social order and safety" before the cybersecurity task force will even begin an investigation. It is estimated that this week's data leak only affected approximately 10,000 individuals. Whether this constitutes serious harm to social order and safety is a good question and may result in minimal or no action on the part of the government to address the leak.

A second consideration that is very relevant is the source of the leak. Per the article, the individuals whose data was leaked were all mining cryptocurrency for an internationally located blockchain. This gives rise to a couple of issues. First, as the Pi Digital Currency is not located in Vietnam, the ability of the Vietnamese government to take any action

against the entity which collected the personal data is basically nonexistent. This, despite numerous legislative attempts to improve the reach of Vietnam's jurisdictional control in cyberspace, proves Vietnam's ineffectiveness in dealing with cross-border violations of its laws when those providers fail to comply with Vietnam's laws. In draft form at the moment are provisions that would allow the government to block such sites from access to Vietnamese cyberspace upon repeated violations, but in the absence of a Chinese-style control of the country's internet, there is little Vietnam's government can do to prevent access to Vietnamese data by foreign providers.

The additional issue that the leak's source raises is that of cryptocurrency itself. While the government has repeatedly made it clear that Vietnam does not allow cryptocurrency as a means of payment and does not deem digital currency as legal tender, Vietnam is in the forefront of global cryptocurrency adopters. One report stated that over half of the cryptocurrency transactions come from three countries in Asia, one of which was Vietnam. By refusing to acknowledge cryptocurrency as a means of payment the Vietnamese government has also failed to deal with the large number of its citizens involved with mining cryptocurrency and holding cryptocurrency assets in electronic wallets and other e-locations offshore. As this data leak demonstrates, Vietnam is all in when it comes to cryptocurrency despite what its government says and, if the government truly wishes to protect its citizens, should address the issues revolving around cryptocurrency rather than sticking its head in the sand like some Southeast Asian ostrich.

And for the sake of consistency, I'll repeat my frequent argument one more time. Technology is progressing at a rapid pace and the Vietnamese legislative model is glacial. If the government truly wishes to prevent abuse and to regulate, and ultimately tax, the technology that is becoming profuse globally and locally, then they need to develop some means to tackle fast-moving issues in an equally rapid way. They have recently approved a pilot program for digital money targeting the unbanked and poor, and have a longstanding proposal for a regulatory sandbox in the fintech area (that excludes cryptocurrency) but there has been no concrete action. These ideas remain as pilot schemes or proposals, and have been so for quite some time. Something needs to change if the government doesn't want to be left behind by a citizenry eager to capitalize on technological advancements that promise new means for wealth acquisition and equal efforts to abuse and defraud.

New Online Advertising Restrictions in Vietnam

(7 June 2021)

While I have written largely about Fintech issues in this blog, the scope of my responsibilities extends to other areas involving technology and media. This week, therefore, I am going to write on a subject that has caused a bit of a stir in Vietnam regarding the regulations that just went into force governing online advertising in Vietnam.

At the end of March, the Government issued a decree amending administrative penalties for organizations involved in media business activities including advertising. The decree covers things from newspapers and films to the theater and online advertising. But there are three provisions that have created a disturbance among businesses involved in online advertising in Vietnam.

The first is not terribly controversial. It requires that users of a webpage must be able to voluntarily close or open any advertising that is not in a fixed area of the page. This seems to be simply a prohibition against floating advertisements that may cover content on a webpage. And as it requires that users be able to "open" such advertising it may prevent the now ubiquitous second-generation pop-up advertising that now plagues almost every webpage. It is unclear exactly what this provision requires and the decree is still too new–as it only came into force last week–to know the intent of the authorities.

The second is more problematic. It requires that there be no advertising interspersed within the content of the news or articles on a webpage. As Dat Nguyen in an article for VN Express International pointed out:

"Global newspapers allow ads to appear in the middle of articles for free users, and this should also be the case in Vietnam, because users have the choice to click on the ad or ignore it and continue reading, the association argued.

The new regulation will create unfair competition between Vietnamese companies and global advertising giants like Facebook and Google, which account for over 80 percent of total ad revenues in Vietnam.

They won't have to abide by Vietnamese laws and therefore won't make changes to their ads format, the association pointed out".

By preventing in-content advertising, Vietnamese advertisers will be unable to offer high-quality placement for online advertising. According to Le Quoc Vinh, a businessman working in the advertising industry in Vietnam, in an editorial for VN Express International,

"As a rule, advertisers are willing to put their money where they believe has a certain audience in the segment they want to reach. They would pay even more if they are guaranteed to appear on pages with important, attractive content that the readers never skip, like page 3, page 5 or the first page of important sections... Luxury brands used to compete with each other for the best spots that they believed readers, those that could potentially pay for their products, would see first. If not, at the very least, they would want their ads to appear

to the right of the top articles in the first half of the magazine".

Websites that offer content free of charge to users and that operate to make a profit rely on advertising income to pay the bills. Without the option of presenting advertising in the middle of content where readers are most likely to see it, Vietnamese websites will be unable to offer prime advertising locations and thus must take a hit on their bottom line. Not only will this prevent them from providing the same quality content that they might otherwise have done, but it will serve to reduce their competitiveness with cross-border advertisers and content providers. With reduced original content quality or quantity Vietnamese websites will lose any edge they may have had by their Vietnamese-ness.

The third is equally, if not more, problematic. The time limit to close online advertising which is not fixed is now limited to 1.5 seconds. This seems to apply to video and audio ads in particular. This effectively eliminates them as an option. For one and a half seconds–end of advertisement.

As an example, Youtube allows five seconds before a user can skip an ad. This is long enough to provide the identity of the advertiser and an idea of what the product is and to decide whether to continue watching the ad or to skip it. It has proven rather effective for Youtube as they had revenues of $19.7 billion last year and their primary source of income is from these video advertisements.

By limiting the allowed time for video advertising to one and a half seconds, the government of Vietnam has created a situation wherein video advertising loses its attractiveness. It is too short a period to give enough information to the viewer to even know the identity of the advertiser let alone the product they are trying to sell. This will have the same chilling effect on competition in the video space of online content creation in Vietnam.

In Vietnam, very few people actually pay for online content. They frequently feel it is a right to enjoy content free of charge and thus the primary and sometimes only means for making a profit for content creators in Vietnam is through online advertising. By limiting the ability of domestic content creators from capitalizing on their content to leverage advertising dollars the government is discouraging content creation that might be targeted to Vietnamese users. While this may actually be their goal, it is seen as "unfair" to Vietnamese businesses who must abide by the new decree.

El-Salvador, Cryptocurrency, and Vietnam

(14 June 2021)

As I've written before, Vietnam currently views cryptocurrency as a prohibited form of payment (see "Cryptocurrency in Vietnam"). The State Bank of Vietnam ("**SBV**") has repeatedly made it clear that it does not recognize cryptocurrency or any digital currency as legal tender. Although a recent program initiated a pilot program for e-money (see "Mobile Money Pilot Program in Vietnam"), that is essentially a means of digitizing hard currency without opening a bank and any value is backed by actual cash. Cryptocurrency, on the other hand, has no underlying asset which backs it and its value is created largely by the willingness of individuals to purchase it. Mining, which is the process of creating new cryptocurrency, is essentially the use of computing power for unrelated tasks that create no actual asset.

In Vietnam, legal tender is considered cash and defined as non-cash payment methods. Under the law, the latter includes cheques, payment orders, collection orders, bank cards and other payment instruments as prescribed by the State Bank. Non-cash payment instruments out of this scope are illegal. Cryptocurrency falls outside the scope of defined non-cash payment instruments and is therefore not recognized as a means of payment. Nor has the government of Vietnam or the SBV provided an avenue for the use of cryptocurrency as legal tender.

Internally, then, Vietnam has no legal means for using cryptocurrency as legal tender, but what about through foreign exchange?

Foreign exchange is a means for exchanging a country's currency for another country's currency. It involves a process of valuation of each currency against the other. Once that value is established it is possible to determine the difference in purchasing power of each country's currency and then make an exchange. (Forgive my ad hoc definition.) So long as a country has a legitimate currency then, in theory, another country should recognize it and be ready to exchange its own currency knowing it can use that currency and its power to purchase in exchange for other, perhaps more valuable, currencies.

In practice, this doesn't always happen. When I was in Laos it was difficult to exchange Laos Kip outside of Laos itself. The Kip was weak and undesirable as coming from the poorest country in ASEAN. Only Thailand and some locations in Vietnam would offer an exchange for Kip. The Thai Baht was preferable and the US dollar much preferable. For with either one could travel and not face the difficulties of a weak currency or of trying to exchange that currency in a country that wanted nothing to do with it. In reality, then, not every currency is freely exchangeable.

In Vietnam, foreign exchange comprises a list of half a dozen or so different possibilities, but most relevant are *"currencies of other countries or the common currency of Europe and other common currencies used for international or regional payments"* also referred to as foreign currency. Technically, then, the SBV should recognize all foreign currencies, no matter how

undesirable they may be, and exchange them for Vietnamese Dong.

This last week a particular wrinkle presented itself that may test this theory.

On 9 June, the Congress of El Salvador passed a bill that will recognize Bitcoin as legal tender. Furthermore, Bitcoin will float against the US dollar. This means that its value will be established in comparison with the US dollar rather than, say, Brazilian or Mexican currency. El Salvador now becomes the first country in the world to make a cryptocurrency legal tender and adopt it as an official national currency.

A country, then, now has Bitcoin as its currency. And the currency of other countries (besides Vietnam) is recognized as foreign exchange by the government of Vietnam and the SBV. Under the letter of the law, therefore, Vietnam must now recognize Bitcoin as exchangeable for Vietnamese Dong. Whether they actually do is a different question, but assuming they follow their own laws then certain consequences will follow.

First, Vietnamese citizens will now be able to use VND to purchase Bitcoin. At the current moment, Vietnam is the second-largest investor in Bitcoin by country, behind Nigeria. That Bitcoin has been purchased through various means, the specifics of which I'm not aware. However, the SBV has issued legislation preventing e-wallets or banks or credit institutions or card issuers from allowing Vietnamese citizens to use their resources for the completion of fraudulent or illegal acts, specifically the purchase of cryptocurrency. It is necessary, then, for Vietnamese to use their VND to purchase foreign currency, transfer that currency out of the country for a legitimate purpose, and then offshore make a purchase of cryptocurrency.

Now that Bitcoin is the lawful currency of another country, the purchase of foreign currencies in a foreign exchange transaction is no longer illegal or fraudulent. Vietnamese citizens can now use VND to purchase Bitcoin, in theory.

Second, as a corollary, the SBV can now regulate the purchase of Bitcoin by Vietnamese citizens. One of its primary responsibility under the law on the state bank is to control foreign exchange. Current controls on the amounts of foreign currency that can be brought into the country and exchanged for VND will apply to Bitcoin. Proper procedure would require that Bitcoin now can only be purchased through licenced foreign exchange enterprises, either banks or exchange centers. Purchasing Bitcoin through e-wallets or trading floors would remain technically illegal as an impermissible method of making foreign exchange.

Third, once a Vietnamese citizen lawfully obtains Bitcoin in a legitimate foreign exchange transaction, they may now possess it without fears that the government will cease their accounts or penalize them for having a cryptocurrency, a fear that currently many in the country have. So long as the Bitcoin is purchased through approved channels, its possession should not be challenged. However, the flipside of this is that Bitcoin that has previously been purchased through illegitimate channels may now be deemed as smuggled currency and seized by customs.

There may be further consequences of this landmark event, I'm simply throwing out some things that occur to me, but there is most certainly going to have to be some reaction on the part of the government of Vietnam and the SBV. Whether that action is to declassify El Salvador's currency as acceptable foreign exchange or to finally give Bitcoin some degree of legitimacy in the country remains to be seen, but the law as currently written would suggest that the latter might actually happen.

Cybersecurity for Online Payment Services in Vietnam

(28 June 2021)

Intermediary payment services ("**IPS**") are regulated and licensed by the State Bank of Vietnam ("**SBV**"). IPS include very specific activities, namely:

1. E-payment infrastructure supply services, including:

    (i) Switching service;
    (ii) Electronic clearing service; and
    (iii) Online payment portal service.

2. Services supporting payment services, including:

    (i) Authorized collection or payment service;
    (ii) Online money transfer service; and
    (iii) E-wallet service.

All of these services require a license from the SBV and there are currently more than forty licenses granted in Vietnam. But in providing these services there are additional responsibilities for the protection of safety and confidentiality of data and information. These provisions are outlined in Circular 35/2016/TT-NHNN dated 29 December 2016 (Circular 35).

Circular 35 applies to all IPS conducted on the internet. For purposes of developing servers and host databases for information, Circular 35 divides the areas of relevant information into several zones that include an internet connection zone, demilitarized zone ("**DMZ**"), user zone, management zone, server zone. Depending on the role of the function in question it may be placed in various zones. For example, computers in service of providing information on the Internet are to be placed in the DMZ and those involved with hosting and data processing in the server zone. All outside connections must go through the DMZ before connecting with any internal zones.

Servers must reach up to 80% of their stated efficiency and be kept separate from other servers involved in different zones. Backup servers must be made available to ensure continuous service. Databases must be updated hourly and backed up to a Disaster Recovery Center. Software used in conducting IPS must be checked by the provider and the code provided by the original programmer must be tested and set out procedures for dealing with errors if and when they occur. Other requirements exist for any update of the program or change to ensure that the update does not unduly affect the operations of the IPS. All data transmitted on the internet must apply end-to-end encryptions and all transactions on the IPS must be authenticated using two-factor authentication.

When IPS uses mobile applications there are additional requirements. In addition to confirming the link used for accessing the app, the app must be protected so as to prevent

reverse engineering and all logins to the app must be monitored and confirmed. If a user enters the incorrect password five times or more then the app must temporarily block the user from accessing the app.

Internet access to IPS must be through a login and password and passwords must meet certain minimum requirements. The password must be at least 6 characters longs, including letters and numerals, containing uppercase and lowercase or special symbols. Passwords must be changed at least every 12 months.

When conducting two-factor authentication the OTP message must include an indication of the OTP's purpose and expire within five minutes of its receipt. Additional requirements apply if providing an OTP matrix card or OTP generator on a mobile device. When the IPS allows for digital signatures, they must comply with relevant laws on digital signatures and authentication of the same.

Circular 35 contains requirements related to personnel staffing in an IPS service provider. They must have staff specifically tasked with the supervision of the system's operation who can deal with technical incidents and network attacks. They must receive annual training to ensure they are capable of handling the safety and confidentiality of the system. There must also be staff who are tasked to deal directly with customers and who are to contact customers promptly upon detecting unusual transactions. And the staff in charge of authenticating accounts and administering them must be separate from the staff involved with issuing accounts.

The IPS provider must ensure the system against vulnerabilities and weaknesses by taking the following actions:

1. Adopt measures for preventing, combating, and finding changes of the website and Internet Banking application.
2. Establish mechanisms to discover, prevent and combat intrusion or attacks to the Internet Banking system.
3. Cooperate with regulatory agencies, information technology partners in timely discovering incidents and cases of system failure and insecurity so as to implement prompt preventative measures.
4. Review and inspect the update of patches of the system software, database management system and application at least quarterly.
5. Assess security and confidentiality of the Internet Banking system at least annually. Implement attack drills to assess the levels of security of the system.

The internet banking system must be monitored by approved personnel and all access points to the management and supervision of the system must be kept in a separate control room that is only accessible upon approval of authorized personnel. Any remote access to this equipment must be through two-factor authentication. Specific criteria must be established for logging details that signal an unusual transaction. A mechanism must be in place for monitoring and reporting violations or incidents of confidentiality in the system.

In order to prevent interruption of services, the IPS provider must set in place procedures for dealing with threats to the continuous operation of the services. This must include proactive identification of threats and for those classified as medium or high-level risks provide for specific actions to prevent them from occurring. Personnel, equipment, and financial resources must be allocated to ensure the continuous operation of the system and regular drills must be practiced in order to prepare for any possible interruption.

Information Provision

The IPS service provider must provide customers with the following information upon registering an account:

1. Method of providing services: on the Internet, via mobile equipment or telecommunication. Method of accessing Internet Banking services equivalent to each equipment on the Internet, mobile equipment, or telecommunication equipment;
2. Transaction limits and transaction authentication measures;
3. Necessary conditions for equipment to use services: OTP generator, mobile phone number, email, digital certificate, mobile equipment to be installed with the software;
4. Risks in connection with using Internet Banking services;
5. A contract that contains:
   (i) Rights and obligations of the client when using Internet Banking services;
   (ii) Responsibility of the service provider for the confidentiality of the client's personal information; method of collecting and using the client's information; commitment not to sell or disclose the client's information;
   (iii) Commitment to ensuring the continuous operation of the Internet Banking system;
   (iv) Other contents in terms of Internet Banking services (if any).

Sensitive information of customers must be encrypted and safeguards put in place to ensure that information collected is not abused. Access to customer's data must be limited to relevant personnel. And procedures must be put in place for controlling access to the physical servers where databases containing sensitive information of customers are stored.

This is not a comprehensive list but covers most of the requirements that IPS providers must satisfy when dealing with cybersecurity and confidentiality issues on their internet and mobile payment service platforms. It is important to ensure that at the very least these standards are met so as to protect the provider from legal action and to maintain the privacy and safety of customer information, particularly as IPS providers deal in sensitive information related to financial accounts.

The Vietnam National Innovation Center

(5 July 2021)

So I learned a thing this week. Apparently, Vietnam is developing a national innovation center ("**NIC**") aimed at promoting innovative startups in the country. What that means is not entirely clear as of yet. The NIC was only approved at the end of 2019 and seems heavily reliant on a physical location that remains unidentified, though somewhere in the Hoa Lac Hi-Tech Zone in the Hanoi area. Whether the NIC will be limited to a single center is also unclear as it is allowed land rent privileges in all special economic zones.

The purpose of the NIC is to provide innovative startups in Vietnam with a launching pad and with incentives and support to help build the innovation ecosystem and encourage the development of creative and technology-related startups. You can visit the NIC's English website, here, but don't expect to learn much. The site is glitchy and rather vague about a lot of issues and a quick glance at the Vietnamese site shows that there's not much more information available there either.

That said, the NIC has a lofty mission.

"To build the nations complete innovation ecosystem, provide facilities to support innovative enterprises with a focus on promoting technological transfer, research & development, and commercialization in a favorable regulatory experimenting environment to ensure competitiveness on regional and international levels".

The NIC will not only provide space for startups once the NIC's construction is completed, but they will provide support for seeking investments, the administrative tasks involved in making those investments happen, tendering, and a host of other things.

The government is going all-in with the NIC and providing a great number of benefits to the center itself including exemptions from land rents and infrastructure fees throughout its 50-year term, and a 10% corporate income tax rate with exemptions for the first several years. The NIC is, according to certain language, eligible for all of the highest incentives and support available. However, the NIC is not authorized to take out loans or to receive donations that are not non-refundable in its own name. This limits, somewhat, its potential growth as it will be restricted by what donations it can round up and the government's spending allocations.

Participants that are encouraged to locate in the NIC include innovative startup enterprises, telecom enterprises; and IT, automation, and other relevant enterprises. All of these will be allowed to use the NIC to establish offices and research and development departments. Unfortunately, participation at this point and access to the many benefits allocated to startups as part of the NIC seems to be dependent on actually locating at the NIC physical plant. Whether the NIC will allow for virtual offices or provide a co-working environment where participants will be able to maintain only a minimum presence to enjoy the incentives is not stated.

But perhaps that is why there are so many actual incentives, to make up for having to work in the Hoa-Lac Hi-Tech Zone. The list of incentives was set out in the middle of last year in Decree 94/2020/ND-CP and further amended a few months ago. The list is impressive.

NIC Innovative Startups Incentives.

Foreigners working at the NIC will be eligible for multiple-entry visas with a duration commensurate to their actual time at the NIC. Immediate family members of such foreigners will also be eligible for these visas.

Participants may receive sponsorship, support, loans, and loan guarantees from the National Technology Innovation Fund, from the National S&T Development Fund, the Fund for Development of Small and Medium Size Enterprises, and from S&T Funds of central provinces and cities.

Participants are exempted from certain pre-qualification requirements under the law on tendering when they submit tender bids for contracts. Stated exemptions include those regarding the participants' capacity and experience, requirements on turnover, financial resources, and similar contracts. Small and micro-startups at the NIC will be treated the same as contractors providing goods deemed to have 25% of their costs being domestic production costs. I'm not familiar with the law on tendering, but I take it this is a specific category of a contractor with specific criteria assigned.

The NIC will also provide support for participants located at the center. They will assist in the conduct of administrative procedures that may arise throughout the lifecycle of the startup, from initial research and development to investment to commercialization. They will provide the entry and exit permits as necessary to staff. And they will provide their network (probably still small at this point) of relevant industry insiders. Participants will also have access to the NIC's labs and technology resources.

Two benefits that are rather big come in the process of various registrations. As the NIC will work closely with the economic zone's business registration office, they are guaranteeing a one-day turnaround for business registration upon receipt of a properly completed application dossier. On paper that reduces the time to obtain an Enterprise Registration Certificate by two weeks while, if it actually happens that quickly, could save upwards of a month or more in waiting on the authorities. The second big benefit is in the registration of industrial property rights. Participants at the NIC will, upon request, be directed to the front of the line when it comes to registration of IPRs with the authorities and this could not only save a considerable amount of time but may mean the ownership of IP when competing claimants file.

Finally, participants will be eligible for the highest incentives allowed by the law on tax, which could mean a considerable reduction in corporate income tax. It isn't clear whether this applies to both the enterprises at the NIC and the individuals working for those enterprises or just the enterprises. Either way, the savings could be significant.

When I was in Laos my employer wanted to create a special economic zone in which they would control all of the administrative processes involved in the life cycle of any enterprise that decided to incorporate in that zone. That would mean approvals of business registration, immigration, import/export, tax, everything, and in so doing remove much of the red tape friction that occurs in developing countries. While the NIC does not necessarily achieve this same level of sovereignty, it seems

that it might go a long way in reducing the various struggles faced by foreign investors seeking to set up shop here in Vietnam.

The NIC is an interesting idea for innovative startups in Vietnam, and there is potential here, but China long ago put in place similar and more extensive programs to lure in foreign innovators. If Vietnam truly wants to compete in the market for foreign talent and for innovative startups, then they need to offer these same benefits on a wider level, not just on a single campus outside Hanoi. It is a start, however, and the NIC symbolizes the government's desire to promote innovative startups in Vietnam. Whether it actually happens and whether it works remains to be seen.

Electronic IDs in Vietnam

(26 July 2021)

Last month the Government issued a draft decree on the process for obtaining and using electronic IDs in Vietnam. This comes as a welcome installment in Vietnam's slowly moving modernization of its legal regulations regarding the internet, data, and digital media. This post will review the basics of the draft decree relevant to most people interested in the concept. The decree contains a great deal of material on becoming certified as an entity for authenticating digital IDs, but I won't go into that. If you really want to know you can get in touch.

There are a few basic concepts explained in the definitions. An electronic ID is a digital number that allows an individual to be identified on the internet. The owner of the electronic ID is the specific individual who has been authenticated as connected to the electronic ID. The authentication of electronic IDs is the process of connecting the individual with the number through a process of confirmation of the identity of an individual applicant. That confirmation involves the provision by the individual of a government-issued ID to the entity that is conducting the authentication process.

An electronic ID in Vietnam must contain a code which is unique to the individual authenticated, plus certain personal information regarding the owner of the electronic ID. That information must include the Personal ID or Citizenship number of the individual, the full name, birthdate, gender, nationality, phone number, and email. Other information may be included if agreed between the owner of the electronic ID and the provider of the electronic ID.

It is interesting to note that the draft decree goes out of its way to discuss the data protection principles revolving around this data. ID providers can only use the data for purposes specified to the owner of the ID upon its creation and must obtain the owner's permission prior to sharing that data with any third party. It even specifies the nature of that permission must take a form that is either printable or displayable through digital means. This corresponds with the provisions in the draft decree on personal data protection which was issued earlier this year. It will certainly be interesting to see how these provisions read when the final decrees are promulgated.

Electronic IDs in Vietnam are separated into four levels with varying levels of authentication required. At level one, the electronic ID is only authenticated by personal data provided by the owner of the ID. Level two requires a copy of a government-issued ID to be provided by the owner of the ID. Level three requires a direct investigation of the ID or electronic confirmation of the ID from the relevant government authorities. Level four requires a face-to-face meeting, either directly or electronically, between the owner of the ID and the entity providing the ID.

The process for obtaining each of these levels of authentication is set out in detail, which I won't bore you with at this stage, and each level contains the requirements of the preceding level. Once an electronic ID is issued, the level of its authentication will lend it greater trust to entities which accept electronic IDs in Vietnam.

Entities accepting electronic IDs will be allowed to set the level of authentication which they will accept, though the required technological requirements for exchanging electronic IDs and accepting them safely will be promulgated at a later date.

The bulk of the draft decree involves the qualifications and requirements for entities involved with the authentication and issuance of electronic IDs. Protection of data, network information security, and cybersecurity are linked to existing laws for each of those subjects and cited as necessary in the performance of creating, authenticating, and using electronic IDs. Responsibilities of everyone involved, from the individual owner of the electronic ID to the relevant government entities governing electronic IDs are set out.

Specifically, the owner of an electronic ID must protect his own personal data and abide by the relevant laws in sharing that information on the internet. Report changes in his personal information immediately upon the occurrence of such. Guarantee the supervision of his method of authentication. And if the electronic ID is at a level of three or higher immediately report to the provider of the electronic ID whenever he loses control of the ID or when a third party improperly accesses the ID or in other instances that may cause the loss of safety of the data.

The responsibilities of entities who accept electronic IDs involve deciding what level of authentication they will accept for transactions on the internet, conclude agreements with those providing the electronic IDs to ensure the freedom of choice by owners of electronic IDs, and not sharing the personal data attached to the electronic ID unless they have the agreement of the owner of the ID.

The draft decree also contains model notifications for the various steps of obtaining, amending, and using the electronic IDs. These range from requests for an electronic ID to requests for obtaining permission to become an entity that authenticates electronic IDs.

Electronic IDs have long been needed as Vietnam moves quickly into the electronic age. The massive scale of its digital economy, which is only predicted to expand exponentially, and the recent pilot program for digital money for the unbanked and poor, will only increase the need for authenticated identifications in cyberspace. The draft decree is an important step in preparing the citizens of this country for their impending digital life.

Is VNDC a Stablecoin for Vietnamese Investors?

(16 August 2021)

Lately, I've been busy with some research surrounding crowdfunding in Vietnam. Perhaps I'll address some of those issues at a later date, but right now I want to discuss something I discovered during that research.

As of 1 July 2019, a Singaporean company VNDC Holding PTE., LTD., introduced the VNDC stablecoin to the market (You can access their website here), a cryptocurrency that is pegged to the Vietnamese Dong.

What are Stablecoins?

The VNDC is a stablecoin. Unlike cryptocurrencies such as Bitcoin or Dogecoin, a stablecoin is linked and essentially backed by a fiat currency. This allows for the coin to avoid the volatility in trading that has been demonstrated by the influence of a few individuals on the price of Bitcoin, e.g., Elon Musk. Because it is linked to a fiat currency, in this case the Vietnamese Dong, the price of the coin is stable compared to actual currency. While this does not allow for the massive profits and losses that attach to regular cryptocurrency, it does provide the assurance that the stablecoin will have approximately the same value throughout the process of initiating and completing a transaction. It also makes exchanging the stablecoin for fiat currency more efficient as the value of the stablecoin is already pegged to fiat currency. Finally, it allows for those staking the stablecoin to see regular growth in their investment as the operators of the stablecoin can use the stablecoin on the actual market through a consistent currency exchange.

But is a stablecoin like VNDC a cryptocurrency according to the laws of Vietnam? In 2014, the state bank defined Bitcoin as

"a kind of digital currency (virtual currency) which is neither issued by the government nor a financial institution but is created and operated based on the systems of computer connected to peer-to-peer internet networks".

While this definition is not official as it was offered in a press release, it is the only definition the state bank has provided for cryptocurrency and, under this definition, VNDC, which operates without the backing of a financial institution and is based on internet technology utilizing the blockchain would be considered a cryptocurrency. This remains true despite the fact that the value of the VNDC is pegged to a fiat currency, such limitations on its value do not obviate the other characteristics which define it as a cryptocurrency.

As I noted in "El-Salvador, Cryptocurrency and Vietnam" and "Cryptocurrency in Vietnam", Vietnam does not currently recognize the use of cryptocurrency as a lawful means of payment. In fact, the state bank has gone so far as to require banks and other financial institutions to be alert to transactions that may be for the purchase of cryptocurrency, terrorist funding, and money laundering. (A veritable smorgasbord of legitimacy in which to be included.) This means that, under the current law, if the VNDC stablecoin is, in fact,

a cryptocurrency, its purchase by means of Vietnamese-based bank accounts may be monitored and reported to the authorities and the amounts suspended according to regulations of the state bank.

But over the last decade in Southeast Asia I've noticed that little things like laws don't necessarily stop people from doing something. The VNDC stablecoin is supported by Kardiachain, a Vietnamese blockchain startup, and is used as a payment method for CongTroi.org for use as a payment method. Other e-commerce sites targeting Vietnamese users have also partnered with VNDC in order to process payments adding a sense of legitimacy to their product and suggesting some form of government approval on the part of Vietnam's authorities.

Vietnam and the VNDC Stablecoin

While VNDC may be a stablecoin pegged to the Vietnamese Dong, it is not a Vietnamese cryptocurrency. The VNDC exchange, wallets, and other apparatus are all owned and controlled by a holding company in Singapore. The VNDC stablecoin is a foreign cryptocurrency that is targeted to Vietnamese citizens and its primary webpage is in Vietnamese. Thus, it would be considered a foreign e-commerce service provider under existing regulations.

Now, this may not provide too many problems at the moment, but that moment is soon to change. Already, Vietnam has moved to require purchasers of foreign e-commerce goods and services to withhold taxes on their purchases (see "Foreign E-Commerce Providers in Vietnam") and is considering myriad decrees that would extend Vietnam's control over foreign e-commerce service providers who are targeting Vietnam. (See "Indochine Counsel's official special alert on the draft decree on internet services" and "New Online Advertising Restrictions in Vietnam" and "Vietnam's New Draft Data Protection Law".)

Whatever criteria that the government eventually decides to apply to foreign e-commerce service providers doing business across the border into Vietnam, in order for them to continue to operate they will be obliged to create some sort of presence within the territory of Vietnam. Either a representative office, a branch, or a legal representative located in Vietnam. In this way, Vietnam hopes to make the foreign e-commerce service providers liable to Vietnamese law through the ability to serve process on those companies in such a manner that will be enforceable in the courts.

Another element of these new laws being considered requires the offshore e-commerce service providers to comply with requests from the Vietnamese authorities regarding offending content (an article yet to be written). The requests will come in the form of a communication to the legal representative in Vietnam and will request that the foreign service provider alter or remove the offending content so that it is no longer in violation. After a certain number of requests, I believe two, and if the foreign service provider still refuses to comply, then the Vietnamese authorities will block the website of the service provider in Vietnam.

Remember, this is still under consideration and it's not yet clear what criteria will be used to determine whether the offshore provider is required to have a presence in Vietnam. One option requires 100,000 transactions arising in Vietnam, one requires the website be in Vietnamese, and still others require the website be registered as a .vn site. All of this is in the future, but once it becomes law, and unless the state bank adopts cryptocurrency in some form as a legitimate means of payment, then

the VNDC stablecoin will be viewed as a foreign e-commerce service provider operating in an illegal sector and likely to be blocked by the authorities.

Vietnam and Cryptocurrency, a Review

Note the caveat. In a recent plan issued by the prime minister for the period from 2021 through 2026 he mentioned in one line that he would like the state bank to investigate cryptocurrency with the possibility of adopting it for use. The document ran in the tens of pages and this bit of news comprised one line. But holy hannah did the press go crazy. Headline after headline announced that Vietnam was considering the use of cryptocurrency, that the prime minister had ordered the state bank to adopt cryptocurrency, and other variations on the theme. The fact of the matter is, the prime minister simply asked the state bank to investigate the possibility. Technically, the state bank formed a committee for that purpose two years ago and we still haven't heard anything on the issue. I think it highly unlikely that Vietnam is going to change its policy on cryptocurrency anytime soon, and that means that when the draft decrees on cybersecurity and data protection and online advertising all come into effect, the VNDC stablecoin is going to be blocked by the Vietnamese government as a violation of existing laws.

That said, the government is not going to confiscate the VNDC already purchased by Vietnamese citizens, there are no provisions for the nationalization of currency without providing a fair payment and as VNDC does not purport to actually be Vietnamese Dong it does not run afoul of laws against forgery or fraud. It does seem like it has a limited shelf life, however, as the Vietnamese government has repeatedly demonstrated a desire to clamp down on the use of innovative technology and ensure that it can control what does and doesn't cross its borders in the digital domain.

Vietnam Leads Cryptocurrency Adoption *(23 August 2021)*

In the last few days, it's been hard to ignore the fact that (according to this VN Express article) Vietnam leads the world in cryptocurrency adoption. A survey by US-based consultancy Finder found that of survey respondents 41% of those based in Vietnam had invested in cryptocurrency, with 28% of the total investing in Bitcoin. It would seem, therefore, that Vietnam leads cryptocurrency adoption despite the fact that cryptocurrency is not a legal means of payment in the country.

Why is Vietnam a Leader of Cryptocurrency Adoption?

According to the VN Express article, one of the main reasons that Vietnam has such a high rate of cryptocurrency adoption is that it offers a method for remittances to be sent from overseas Vietnamese to their families in Vietnam without facing the stiff exchange rates or transaction fees associated with traditional financial transactions.

There are a couple of reasons why I don't buy this explanation.

First, the gap between men and women who hold cryptocurrency assets was highest of any surveyed country in Vietnam. While this could be representative of the Confucian hierarchical family structure, one would think that if cryptocurrency were used as a means of sending remittances to the country then more women would hold cryptocurrency as the recipient of remittances sent by men and other family members overseas.

Second, the type of cryptocurrency held by the Vietnamese is largely Bitcoin and other highly volatile assets. If the purpose of holding cryptocurrency was to send money home to mama, the choice might be something less likely to lose value rapidly, perhaps a stablecoin like VNDC (see "Is VNDC a Stablecoin for Vietnamese Investors?") that is pegged to the Vietnamese Dong and, in theory, would be easily convertible to spendable currency.

Third, the very fact that cryptocurrency is not a legal means of payment in Vietnam is not considered a foreign currency, and that banks are warned not to allow accounts to transact in cryptocurrency means that if someone were sending cryptocurrency home as a remittance payment, there's no way for mama to convert the cryptocurrency into spendable cash. She may have an asset that theoretically has a great deal of value, but she can't use it, and this makes the remittance payment essentially worthless. Unless of course mama is using the remittances to invest in foreign stock exchanges, in which case she doesn't need the remittance in the first place.

Why do I think Vietnam leads cryptocurrency adoption?

There are a few more plausible reasons for Vietnam's placement at the top of Finder's poll (here's the link for the full survey).

First, the Vietnamese have a long history of distrust in the Vietnamese Dong. Ever since the wars of the last century the Dong has

had a tradition of losing value quickly. It has only been in the last few years as Vietnam has plugged into the global economy and gained monetary stability that inflation has stabilized and the Dong has ceased to be a symbol of throwing good money after bad.

Second (and correlated), Vietnamese regularly look for assets that hold value more securely than cash currency. Gold, traditionally, has been the asset of choice. It is a physical asset that they can wear as jewelry or bestow as dowry and it will always be exchangeable for goods and services.

Third, Vietnamese are born gamblers. They're willing to take a risk on something if it promises a chance at big returns. Cryptocurrency, and Bitcoin in particular, has demonstrated a huge potential for upside growth, though it has also seen the opposite, losing tens of thousands of dollars in value in a very short period. But this, coupled with a tendency to lionize individuals like Elon Musk (who is the most influential factor in Bitcoin's value at the moment), suggests that Vietnamese are willing to take a risk on an asset that may or may not increase in value tomorrow.

What this cryptocurrency adoption means for Vietnam

While I have to question the methodology of the Finder survey as resulting in completely reliable results, it does mesh with an earlier Statista survey that found Vietnam second globally in cryptocurrency adoption (see survey here) behind Nigeria. That Vietnam is a leader in cryptocurrency adoption, is perhaps most largely a problem for its government.

As I've discussed before, Vietnam has not allowed cryptocurrency as a legal means of payment (see "El Salvador, Cryptocurrency and Vietnam" and "Cryptocurrency in Vietnam") and has, until just last month, shown little sign of actually moving towards adopting a framework for regulating and taxing the crypto-assets. By refusing to recognize cryptocurrency and leave it unregulated, Vietnam is seeing a massive, and technically illegitimate, outflow of dollars from its economy.

I'm not an economist, but most cryptocurrency has to be purchased using US Dollars. And as Vietnam does not allow its purchase in-country, the Vietnamese who are purchasing cryptocurrency have to obtain US Dollars and send them out of the country to expatriate accounts before they can purchase cryptocurrency. While neither the Statista nor Finder surveys indicated the hard numbers of how much cryptocurrency is actually owned by Vietnamese citizens, if the adoption rate continues to grow and the dollars continue to flow out of the country without any action to recoup their value by the government, then cryptocurrency adoption may lead to an effect on Vietnam's balance of payments and reserve ratios.

Vietnam's government is also, by refusing to recognize cryptocurrency in the face of such massive adoption, fostering a black market that encourages an attitude of flaunting the law. Vietnam considers itself a law and order country, the people are generally law-abiding. Corruption is a problem, and it is possible to see cryptocurrency as contributing to that issue. Cryptocurrency is held offshore, there are no methods currently in place in Vietnam to monitor its ownership or sale. It is a simple matter to transfer cryptocurrency from my account to an official's account in exchange for some benefit or favor. By ignoring cryptocurrency, the government has allowed a simple means of corruption to flourish.

Conclusion

All of this goes to the point I've been making for some time. Vietnam needs to recognize cryptocurrency and set in place regulations for its use and taxation. Only by recognizing and regulating it will the government be able to prevent the negative aspects of its use in corruption and illegal transactions and by taxing it gain some benefit from the outflow of foreign currency reserves. And as Vietnam leads cryptocurrency adoption globally, it will be able to see some significant increases in government revenues and FDI contributed via alternative currencies.

While I know the initial refusal to recognize cryptocurrency lay in several scam cryptocurrencies back in 2017, instead of sticking its head in the sand like the proverbial ostrich, the government should have promulgated regulations to prevent such abuses and take advantage of the many benefits that may be available to it by recognizing what is increasingly becoming an acknowledged asset class.

Non-Fungible Tokens in Vietnam

(30 August 2021)

Non-fungible tokens ("NFTs") or cryptographic tokens are unique digital signatures or tokens created by using blockchain technology, in particular using relevant platforms that operate on blockchains, which are used for certifying ownership of digital files of real or intangible assets.

Cryptographic tokens represent a set of rules, encoded in a smart contract–the token contract. Every token belongs to a blockchain address. These tokens are accessible with dedicated wallet software that communicates with the blockchain and manages the public-private key pair related to the blockchain address. Only the person who has the private key for that address can access the respective tokens. This person can, therefore, be regarded as the owner or custodian of that token. If the token represents an asset, the owner can initiate the transfer of the tokens by signing with their private key, which in turn generates a digital fingerprint or digital signature. If the token represents an access right to something somebody else owns, the owner of that token can initiate access by signing with their private key, thereby creating a digital fingerprint.[1]

Cryptocurrencies utilize this technology to ensure that each unit of the currency is individual and non-reproducible, thus, each unit of the cryptocurrency is represented by a single block on the blockchain and as the blockchain is reproduced and certified countless times during each new transaction, it is impossible to alter the initial entry on the blockchain and thus alter the value or nature of the cryptographic token it represents. While crytptocurrencies are the most visible and popular use of blockchains, NFTs have increasingly gained in popularity as a means of promoting the sale and ownership of intellectual property rights ("**IPRs**").

Tokens as Currency

Not all tokens are NFTs, however, and many tokens are represented as cryptocurrency or represent other assets beyond simply those involved with IPRs. In Vietnam, tokens are not currently recognized as property or, in the case of the asset being money, i.e., cryptocurrency, as a legal means of payment.

Tokens that represent assets being money, i.e., cryptocurrency, are not allowed by law for use as a means of payment. According to Decree 101, unlawful payment instruments are any payment instruments that are not specifically allowed.[2] Specifically allowed payment instruments include: cheques, payment orders, authorized payment orders, collection orders, authorized collection [encashment] orders, bank cards, and other payment instruments as stipulated in State bank regulations.[3] So far the SBV has not specifically allowed for tokens as a

1 https://blockchainhub.net/tokens/

2 Article 4.7, Decree 101/2012/ND-CP dated 22 November 2021 on Non-Cash Payments as amended by Decree 80/2016/ND-CP dated 1 July 2016.

3 Article 4.6, Decree 101.

legal means of payment in Vietnam and has, in fact, explicitly stated that cryptocurrency is not a lawful means of payment.[4]

According to the Civil Code, Property comprises objects, money, valuable papers, and property rights and includes immovable property and movable property. Immovable property and movable property may be existing property or off-plan property.[5] Off-plan property includes non-formed property and formed property that the entity has established his/her ownership rights after the time of transaction establishment.[6] Property rights are rights that are able to be valued in money, including property rights to subjects of intellectual property rights, the right to use land, and other property rights.[7]

Property Rights in Tokens

While tokens, whether cryptocurrency or another form that represents money, cannot be used as a means of payment, it is possible they may be deemed property. While the digital representation of assets is not specifically stated in the definitions of property under the Civil Code, it is possible that a token represents a property right. In the case of NFTs the token is a unique digital address that represents a specific asset and gives the owner of the NFT the right of sole ownership of the asset which it represents. This has been most developed in the world of art where NFTs that represent individual and unique works are sold and the buyer then possesses the token. However, the token itself does not possess any property rights as it is merely a unique signature that is representative of the underlying artwork. The piece of art may be copyrighted and possess IPRs, but the token representing it is simply an address on a blockchain and does not possess any individual IPRs itself. The rights in the NFT can be valued in money, however, as has been demonstrated by the recent auctions of NFTs representing artwork that have reached several millions of dollars. This means they may be considered property under the definition of property rights in Vietnam's Civil Code. It should be noted that while this definition may be interpreted to include NFTs as a property right and thus as property, there has been no legal framework governing the sale or purchase of NFTs or any of the rights and obligations related to NFTs.

There has so far been only one instance of an NFT platform in Vietnam, CongTroi.org is an NFT marketplace for Vietnamese artwork. It is hosted offshore and artwork can be purchased using VNDC, a stablecoin pegged to the Vietnamese Dong. While this may represent Vietnamese artwork, it is not actually operating in Vietnam. To my knowledge, there are no other uses of NFTs in Vietnam.

Cryptographic tokens and the underlying blockchain technology that they utilize have the potential to revolutionize several sectors of the global economy. However, it is important to distinguish the tokens themselves from the assets they represent. In the case of NFTs, often they represent actual IPRs that can be enforced and need to be maintained against infringement. This does not, however, imbue the NFTs themselves with the same rights as the IPRs to which they are attached. In the case of cryptocurrency, tokens have no intrinsic worth other than the value attached to the use of computing power and the amount of money that someone is willing to pay for them. Other uses of tokens may be developed and the legal

4 Dispatch No. 5747/2017/NHNN-PC dated 21 July 2017.

5 Article 105, Civil Code.

6 Article 108, Civil Code.

7 Article 115, Civil Code. Article 115, Civil Code.

systems of those countries whose citizens engage in their pursuit must be advanced to handle the challenges that these technologies create.

In Vietnam, tokens remain largely unregulated. While cryptocurrency is currently prohibited as a means of payment, it is also being examined by the state bank of Vietnam with the possibility of adoption within the next five years. NFTs are completely unregulated, though the underlying assets, primarily IPRs, can be protected using the existing intellectual property laws. The treatment of the tokens themselves, however, remains unclear under Vietnam's regulations. Blockchain technology has been included in the list of FinTech to be included in the proposed regulatory sandbox that was suggested under the last prime minister. However, there has been no further action to suggest the government or ministries are ready to address the multiplying issues surrounding cryptocurrency, NFTs, and cryptographic tokens in general.

NFT Gaming and Vietnam *(11 October 2021)*

Last week it was announced that Singapore company Sky Mavis raised 152 million USD on a valuation of three billion from major players in the Venture Capital universe. While I am not privy to the full structure of Sky Mavis, it is owned and operated by Vietnamese developers living in Ho Chi Minh City. It is, in essence, a Vietnamese project, something that is contradictory to local legislation in a way that I'll explain shortly.

The value in Sky Mavis is a game. Axie Infinity. It's an online game that involves Pokemon-like creatures living and growing and fighting and doing all the things that online games do. Each of these characters is a created non-fungible token (NFT). When someone wants to play the game, they have to buy three NFT characters using actual currency. This has been estimated to cost upwards of four hundred USD. But once they buy in, the player owns the characters they have purchased. They can add to them or sell them to someone else or mate them with other characters using a love potion to create new characters that they will subsequently own.

Value is added as each player uses his character to build portions of the game world or to create new characters and is referred to as "Play-to-pay" by its founders. The game is built on the Ethereum blockchain and uses the open ledger technology to ensure that each transaction involving the characters is authenticated and unique. In this way the game is a blockchain technology.

But the game also involves digital currency and cryptocurrencies in the way players can buy and build characters. Players can also purchase parcels of the game itself, in effect becoming property owners within the game's ecosystem. This allows players to accrue value by playing the game and once they own characters or property they can sell it to other players for a profit.

While the buy-in price is steep, there are even charity groups who help poor youth in developing countries to make the initial three-character purchase that allows them to get started in the game in a revolving fund. And because the game uses cryptocurrency, which can be purchased in many ways without necessarily controlling a bank account, many of the game's players are among the unbanked in the developing world.

As a lawyer in the developing world, and in particular in a country that still prohibits the use of cryptocurrency as a legal form of tender, there are a few questions that come to mind.

First, are the NFT characters considered to be assets according to the law and as such, the use of cryptocurrency to buy or sell them a legally recognized transaction that would fall under Vietnam's prohibition against using cryptocurrency?

Second, what jurisdiction does Vietnam possess over the game world created by Sky Mavis and the possible transactions occurring involving Vietnamese players?

And finally, because I have the kind of mind that thinks this, doesn't the purchase and sale of characters encourage negative sentiments regarding personal free will and human rights?

Cryptocurrency Use For Purchasing NFT Gaming Characters

As I mentioned in my post "Non-Fungible Tokens in Vietnam", the primary determinant of property applicable to NFTs is whether they can be valued in money. At first blush the Axies Infinity characters would seem to be valued in money as payment is required to purchase and sell them. But this is deceptive. Money, as defined by Vietnam, is not used to purchase the characters, cryptocurrency is. Because Vietnam does not recognize cryptocurrency as a legal means of tender, technically, then, the characters are not property.

This gives rise to a couple of implications. First, a transaction in the characters or elements of the game is not a recognized transaction in assets in Vietnam and thus does not give rise to the alteration of civil rights or obligations of citizens. It is outside the scope of the Civil Code as currently constituted and thus the transactions contemplated are not considered civil transactions. As they are not governed by law, there is no legislation governing the interaction between purchaser and seller of, essentially, non-existent ether (ones and zeros in the form of a character). This means that, second, the use of cryptocurrency to purchase and sell characters in Axies Infinity is not against the law of Vietnam because the law of Vietnam does not recognize that any transaction is taking place.

What Jurisdiction Does Vietnam Have Over The NFT Game?

The second question is less clear. In 2018, Vietnam issued the law on cybersecurity which professed to expand its reach to any and all service providers who had any relation to Vietnam's cyberspace. It purportedly required them to open a branch or representative office and to store data in Vietnam. A subsequent draft of an implementation decree that remains un-adopted softened this approach somewhat, but we have seen throughout the development of a number of draft decrees under consideration in the cyberspace and e-commerce sectors that the government is keen to expand its control over Vietnam's internet users.

If Axies Infinity has a geographical jurisdiction it is in Sky Mavis' home country of Singapore and thus Vietnam cannot claim control over the governance of the game. But what about the players themselves. While cryptocurrency is used to sell and purchase characters, players must come by cryptocurrency somehow. There are two methods for obtaining cryptocurrency as of this moment: (1) mining, which is an unregulated activity in Vietnam, or (2) purchase using fiat currency. If the players make their initial buy-in to Axies Infinity with mined cryptocurrency there is little Vietnam's government can do about it, but for Vietnamese players who use fiat currency to purchase their cryptocurrency, the prohibitions against the use and acceptance of cryptocurrency as a form of legal tender applies.

I discussed this in multiple blogs, but most relevantly in "El-Salvador, Cryptocurrency, and Vietnam". Not only are individuals prohibited from using cryptocurrency to buy and sell in Vietnam, but Vietnamese banks have been advised not to allow their accounts to be used for the purchase of cryptocurrency either. This means that players of Axies Infinity in Vietnam must transfer fiat currency to an account outside of Vietnam, then use that account to purchase cryptocurrency and then use that cryptocurrency to purchase characters in Axies Infinity. This may not seem as difficult as it sounds, however, as "Vietnam Leads Cryptocurrency Adoption" globally and there must therefore be a large number of Vietnamese citizens with offshore

cryptocurrency assets.

The Ethical Question Of Buying And Selling Characters

While it is true that the characters in Axies Infinity are essentially ones and zeroes, they are imbued with characteristics that suggest they are avatars, or at least in the form of avatars that have been long recognized as representing players or other individuals. That the game promotes the breeding and selling of characters strikes me as a somewhat questionable activity. Is this not a digital form of slaveholding? That a player must first buy three characters who he can then breed, or he can use them to capture more characters. He can sell and buy characters at whim and it matters not that these characters are similar to characters that the player has been playing as avatars for years prior.

While I have no answer to this question as I am not an ethicist, I think it is a worthy one. Slavery cut an ugly swath across the history of many a nation and for such a popular game, one which encourages play by poor youth, to involve a digital form of the evil suggests that there are other questions which must be asked. Obviously the characters are not sentient, but the representation and actions which are involved are too close to those that chained millions of people across the ages for me to find comfort in the distinction. I think investors must be careful in their choices when looking at Axies Infinity and other play-to-pay game models as the lessons taught to players are all too close to lessons taught by white slave masters.

Regardless of whether Axies Infinity is ethically sound, it has successfully completed a major funding round. And though its holding company is incorporated in Singapore, it is essentially a Vietnamese company and Vietnam has the rightful claim on its spiritual success. Congratulations to Sky Mavis, then, on a successful funding round.

Vietnam Finally Amends E-Commerce Rules

(25 October 2021)

A Guide to the Important Points for Cross-border E-Commerce Providers and Foreign Investors

It has been coming. We have been talking about the new regime for e-commerce and other elements of the internet for ages it seems. When will Vietnam finally issue their new rules for governing e-commerce, and specifically, for governing cross-border e-commerce providers?

On September 25, less than a month ago as I write this, the Government issued decree 85/2021/ND-CP which amends and supplements the existing decree on e-commerce activities in Vietnam. (For those interested, the original decree was decree 52/2013/ND-CP dated 16 May 2013.)

Decree 85, as I'll call it, covers familiar ground (see "Registering E-Commerce Websites In Vietnam", and "Some Issues on E-Commerce in Vietnam", among others). But as with every piece of legislation that passes through the halls of government in this, the rising dragon of a country, we begin at the beginning.

Who is Governed by Decree 85?

Largely the same people fall within the scope of Decree 85, though there are some exceptions. E-commerce activities in fintech sectors, gambling, and information dissemination, i.e., news and entertainment providers, are governed by Decree 85 only insofar as there are no specialized regulations governing their activities. A caveat that allows for a great deal more legislation down the road, and hopefully soon, to govern these sectors that are so vital to Vietnam's economy.

But the big question, here, and the one we've been discussing for a year now, is what the Government intends to do with foreign e-commerce service providers. The approach is not novel to Decree 85 and has its genesis in the earlier drafts which were distributed in the last year.

Instead of specifying which foreign actors fall within any defined category, the broad brush is painted to include those who participate in specified "e-commerce activities" in Vietnam. The locus, therefore, is on what the cross-border service provider does in Vietnam. And there are three activities which, according to Decree 85, categorize the foreign e-commerce provider as conducting "e-commerce activities" in Vietnam.

1. They set up their e-commerce website using a .vn domain name;
2. They set up their e-commerce website displaying the Vietnamese language;
3. They have more than 100,000 transactions originating in Vietnam in a given year.

That's what the Government finally ended up with. Those three requirements. That means that companies setup in Singapore or some other jurisdiction by Vietnamese investors to target Vietnam (see "Vietnam's Outward Investment Problem") will have to abide by the regulations of Decree 85.

What does Decree 85 require of Cross-border e-commerce Providers?

The next big question, then, is what do those foreign companies that are considered to be conducting e-commerce activities in Vietnam have to do? First off, they have to register their e-commerce activities pursuant to Decree 85 as it amends Decree 52. There does not seem to be a separate registration process for foreign entities so that would mean that they must comply with the notification of an e-sales website (which is fairly simple) or the registration of one of the other types of e-commerce website (which is subject to market approach conditions for foreign investors).

In addition to the proper procedure for notifying or registering their e-commerce website with the authorities, the cross-border provider who engages in this scurrilous activity of conducting e-commerce activities in Vietnam must either establish a representative office or appoint an authorized representative.

Now the setting up of a representative office is fairly straightforward, but the requirements surrounding an authorized representative are less clear. Does this authorized representative have the same rights and obligations as set out in the law on enterprises? The Civil Code provides for representation and outlines a set of rules for representatives (they may be individuals or entities and they act in the name of the principal), but the specific liability of these authorized representatives is not stated?

They do have three very specific responsibilities outlined in Decree 85.

1. Cooperate with regulatory authorities to prevent transactions of goods and services in violation of the law of Vietnam;
2. Fulfill the obligation to protect consumers' interests as well as quality of goods and services as prescribed by the law of Vietnam;
3. Submit statistical reports as prescribed by January 15 of each year.

What remains unclear, and is never specified in the Civil Code, is what liability accrues to the authorized representative for the bad acts of the cross-border e-commerce service provider? What if the authorized representative complies with these provisions of the decree but their principal fails to act in a timely and proper manner to comply with the requirements of the authorities? Will the authorized representative be treated as a legal representative of a juridical person and made subject to civil, administrative, or even criminal liability? A dangerous ground indeed.

Market Approach Limitations

While perhaps not salient to cross-border providers of e-commerce services in Vietnam, the question of market approach restrictions is important to companies and individuals seeking to invest in the e-commerce sector. As is the case with any sector, the Investment Law sets out basic conditions for market approach based on treaties to which Vietnam is a party, and in addition other laws may add specific requirements. Decree 85 includes two.

First off, foreign investors can only invest in e-commerce in Vietnam through the formation of an economic establishment. They must form a company to conduct the investment. Individuals cannot act on their own to perform e-commerce services. This would seem to eliminate freelancers, though the implications are not entirely clear. Individuals may, however, invest in the capital stocks of a company involved in e-commerce in Vietnam.

The second major market approach limitation

applies to investments in the five largest e-commerce companies in the market at any given time. This determination is based on the total visits, number of sellers, total transactions, and total transaction value of each e-commerce website. If the foreign investor has a controlling investment in one of these five companies (which is determined by share ownership, board control, or a veto right over certain reserved matters) then their investment must be approved by the Ministry of Public Security as relating to national security.

Conclusion

While Decree 85 contains multitudes of additional regulations (we may yet get to that in the coming weeks) this covers the main points of interest for cross-border e-commerce providers and foreign investors. The rest of the details apply to e-commerce companies already set up and operating in Vietnam and what they must do to be in compliance with regulations.

Laos, Cryptocurrency Mining, and Vietnam

(8 November 2021)

In September, the government of Laos authorized six companies to mine and trade cryptocurrency. Last week they announced that as part of the country's expansion into the cryptocurrency markets, they anticipate including nearly 200 million USD in their 2022 national budget from Bitcoin mining. The theory is that, using the massive amounts of hydroelectric power that the country is capable of producing, they can connect the computing power necessary to mine cryptocurrency to those power sources and thus have a near limitless ability to mine cryptocurrency.

According to an article in the 3 November 2021 issue of The Vientiane Times, the government of Laos intends to use this 2,000 billion Kip boon to support officials, support the Covid-19 fight, and to repay debts of the government. It is unclear whether the government will itself get involved in the mining of Bitcoin or whether it anticipates that this additional revenue will come from taxes and other fees generated by the companies authorized to mine and trade cryptocurrency.

Looking at this development from Laos' neighbor Vietnam, one has to ask a couple of linked questions. First, what are the rules and how will this mining of cryptocurrency be converted into fiat money or otherwise converted into currency capable of paying international loans? And second, will the government of Laos be able to prevent cryptocurrency miners from using their mined cryptocurrency to conduct activities that are illegal or dangerous?

The trial is proceeding without a legal framework in place. Six companies have been authorized to start mining cryptocurrency while half a dozen ministries scramble to try to come up with regulations to control the mining and trading of the currency. Whatever the rules end up looking like, it will be difficult for the government to convert 200 million USD worth of Bitcoin into fiat currency and bring that cash within its borders. If it is anticipating the revenue to come from taxes on companies authorized to mine cryptocurrency, they will face the additional problem of trying to control foreign exchange with a currency that they don't recognize as official. Bitcoin and other cryptocurrencies are borderless and the companies mining them may be able to convert their Bitcoin to fiat currency in any jurisdiction that will have them. Monitoring and then taxing the Bitcoin will create a major problem for the Laos government. As an aside, it could create problems for Vietnam's foreign exchange as well.

As I've stated before, multiple times, Vietnam has prohibited cryptocurrency. But that has not stopped Vietnam from rising to the top of the list of global adopters of the currency (see "Vietnam Leads Cryptocurrency Adoption"). As the largest holder of cryptocurrency in the world, and with China stamping down on its use, Vietnamese buyers are poised to buy into the cryptocurrency that will be coming out of Laos. Especially as there are so many informal networks connecting the two countries already and migrants in both countries to refer sellers and buyers. As Vietnam has not authorized

the use of cryptocurrency, these Vietnamese purchasers have to buy USD or other foreign currencies to conduct their transactions, which depletes Vietnam's dollar stocks. If Vietnam becomes a transit nation for Laos mined cryptocurrency, then there are definitely possibilities for the flight of foreign currency.

In a September *article by Sebastian Strangio on thediplomat.com*, he stated that in Laos:

"Chinese organized crime syndicates have become deeply enmeshed with the various illicit trades - everything from gambling and smuggling to wildlife and narcotics trafficking - that flourish along the porous and loosely policed borderlands stretching across eastern Myanmar, southern China, and the northern reaches of Thailand and Laos.

Laos has is also becoming an increasingly important node in the networks of international drug trafficking syndicates that reap tens of billions of dollars per year from the sale of narcotics - mostly methamphetamine - produced in rebel- and militia-held regions of Myanmar's Shan State, with which Laos shares a porous and loosely policed border".

Those borders exist with Vietnam as well. Just last week the police in Laos seized over seven tons of drugs from smugglers in the north of the country. While there is much to be said about the idea of sovereign nations, Vietnam and Laos share a border that is over two thousand kilometers long. There is a great deal of cooperation between the two governments. Vietnam, both officially and commercially, is a top donor to Laos behind China, Japan, and Thailand. The financial dealings between the two countries are deeply enmeshed, almost a billion dollars of two-way trade occurred in the first nine months of this year, and that's considering the borders were largely closed due to Covid-19. As I mentioned, Vietnam and Laos share several informal networks and the high adoption rates of cryptocurrency in Vietnam could provide an outlet for illegal payments and unmonitored transactions.

Especially in light of China's crackdown on cryptocurrency. Much of the Bitcoin will probably transit through Thailand, which allows cryptocurrency to a certain extent, but much of it will flow through the already questionable networks that extend through Vietnam. This could present a challenge to Vietnam in the global fight against terrorism and money laundering as Laos is already notorious for its lax legal regulations and by allowing a currency that is completely anonymous, they are only opening the door to additional violations of international standards. That Vietnam might be implicated through the natural outflows of cryptocurrency from Laos to Vietnamese citizens, is just one more reason why Vietnam needs to make a move to legislate cryptocurrency.

Up to this point, Vietnam's primary concerns with cryptocurrency have been with financial fraud. They have stated multiple times that cryptocurrency schemes are used to defraud individuals of large amounts of money and that is the reason that they have prohibited their use in the country. But they are sitting in a situation that is ripe for much greater crimes. With such a large percentage of the population adopting cryptocurrency, including surely a few Bitcoin whales, there is a possibility that they could be funneling this money into terrorism or using the anonymity of cryptocurrency to launder money from illegal activities both in and out of Vietnam. If Vietnam is serious about its commitments under multiple treaties to prevent money laundering and the funding of terrorism, then they need to put in place mechanisms to monitor and regulate the purchase, use, mining, and trading of cryptocurrency.

While Vietnam has gone a long way towards its goals of becoming a middle-class economy, it is still close enough to its developing roots to be at a heightened risk for hosting corruption and criminals who are more than willing to take advantage of loopholes in the existing regulations and lax enforcement to move monies in such a way as to implicate Vietnam in deleterious ways. To avoid becoming a haven for crypto-crime, Vietnam needs to make a move to bring the owners of cryptocurrency within the ambit of the law and provide legal means for its use.

In-Game Units in Vietnam *(29 November 2021)*

About a month ago I wrote about "NFT Gaming and Vietnam". In that blog, I discussed some of the issues with Axie Infinity–as their recent massive funding round was the prompting for the post. But I did not really dig into the legal issues of buying and selling virtual assets in games in Vietnam with what is referred to as In-game units. We recently did some research on this issue for a client so I'm going to borrow from that. (Thank you to Thai Gia Han and Ly Nghia Dung for your work on the client's matter that allows for this blog post.)

The exact legal term for in-game units is "virtual currency", which is defined as a type of toolset out by video game providers for being used to exchange and/or purchase in-game virtual items, reward points and skills. Video game providers are only allowed to create in-game virtual items, virtual currencies, or reward points in accordance with the contents or scripts as reported in their approved dossiers and in their periodical reports.

The rules for in-game units in Vietnam

In-game units can be virtual currencies, virtual items, reward points which must be specified in the dossier for obtaining the MIC's approval for specific video games' content and script (the "**Approved Games Script**") and the periodical report of such video game provider for such game and can only be created by the licensed video games providers in accordance with such Approved Games Script. According to the Approved Games Script, the players can buy in-game units via intermediary payment services (e-wallets), bank-based payment services, and other permitted payment methods under the laws.

The creation and provision of in-game units must comply with the regulations of the MIC, including:

- In-game units can be exchanged for in-game virtual items created by the video game provider in question;
- The video game provider in question is responsible for managing all in-game units in accordance with the Approved Games Script;
- In-game units can only be used within the game in question and in accordance with the purposes as reported by the video game provider in question. In-game units are not assets and not convertible into money, payment cards, coupons, or other valuable items outside the game in question; and
- Any trading of such in-game units between users in any form is prohibited.

Video game providers must be duly established and operate under the laws of Vietnam with the appropriate business lines and obtain the applicable sub-licenses / permits for each game in correspondence to the specific type of game they provide. According to the WTO Commitments, foreign investors may not hold more than 49% of the legal capital of enterprises involved in video game services.

Pursuant to the foreign exchange rules, the transactions related to purchases of in-game units by the players are not one of the cases of permitted use of foreign exchange within the territory of Vietnam. Accordingly, such transactions must be paid in Vietnam Dong.

In-game units are unique legal virtual assets that

can be bought by Vietnam Dong and recognized under the prevailing laws of Vietnam. Any act of creating, providing, and using in-game units not in accordance with the Approved Games Script including the exchange of such in-game units into money, payment cards, coupons, or other valuable items outside the game will be subject to administrative sanctions, i.e.: a fine up to VND200 million.

What the rules for in-game units mean in Vietnam

Now, in relation to Axie Infinity, despite the fact that they are essentially a Vietnamese startup they are officially a Singapore company (see "Vietnam's Outward Investment Problem", "Establishing an Offshore Company for Vietnamese Startups", and "From Offshore Holding Company to Vietnamese Subsidiary in Vietnam" for more information regarding the process of offshore-ing a Vietnamese startup) and that means they are not subject to these restrictions regarding In-game units.

They can use cryptocurrency as the legal means of payment to purchase virtual assets within their game, they do not have to obtain the approval of the MIC prior to initiating the use of in-game units, nor do they have to abide by the rules regarding the transfer of value outside the game itself.

As it is, I am not familiar with the exact situation of Axie Infinity in its infancy and cannot testify whether they began as a Vietnamese startup, per se, before or after they began the use of cryptocurrency for the purchase of Axies. However, it is applicable to Vietnamese startups prior to their offshore-ing if they want to use In-game units for the purchase and sale of virtual assets within their games.

And again we come to an obstacle that suggests that the government of Vietnam would be best served by allowing cryptocurrency and virtual assets to be used in Vietnam. Take for instance, Axie Infinity. If they had remained a Vietnamese company and the use of virtual assets was allowed, the government not only would be able to gain from the influx of $152 million, but they would be able to charge Value Added Tax (VAT) for every sale and purchase of Axies that originated in Vietnam.

On the other hand, that raises an interesting issue which I do not believe they have considered to date: how will the Vietnamese government tax outbound e-commerce transactions, especially if they were to involve virtual assets? Presumably, outbound e-commerce transactions that resulted in physical shipping of goods by say, Tiki.vn, would be charged export fees and VAT and ultimately Corporate Income Tax, but what if a Vietnam-based company were to start selling virtual assets, like NFT art or In-game units, offshore? Would VAT apply to those sales? How would the government monitor the income from such sales when it is made in cryptocurrency that is variable and untraceable?

While opening cryptocurrency and outward investment restrictions would allow Vietnam to fight for a position as a regional investment hub for startups and scalable SMEs, it also creates difficulty for the government's tax authorities. How to monitor and tax transactions that exist only on a global network of blockchains that have no geographical boundaries? While the potential for tax on inbound sales is great, there is potentially little they could do to tax outbound sales in such an instance.

Something to think about.

Blockchains or Databases, a Discussion

(6 December 2021)

I recently had a conversation with an official from the US Consulate here in Ho Chi Minh City, in which we discussed cryptocurrency and blockchain issues. On repeated occasions he asked the question: what makes blockchain different from a regular database? That got me thinking. There are certainly some instances in which there is no special advantage to using the blockchain over a traditional computer database, but there are surely some instances where a blockchain solution will improve performance considerably.

Now, let's begin at the beginning.

As I outlined in "Data Protection and Blockchains in Vietnam", the basic idea of a blockchain is that it provides a cross-checkable distributed ledger for storing data. This means that multiple copies of a single version of the blockchain are stored in various "locations" and that each new entry in the blockchain will be confirmed through proof of work (the idea that the entity making the insertion into the blockchain has conducted specific computing tasks necessary to confirm that it is legitimate) or proof of stake (which is utilized primarily in private blockchains and is considered, essentially, the authority of the distributer of the blockchain to access the blockchain). Because the blockchain is distributed over several "locations" and each distribution is identical to all other distributions it therefore becomes impossible for any previous entry on the blockchain to be altered without creating a branching chain, which could then be compared with other distributions and shown to be illegitimate. This is the distributed ledger technology in a nutshell.

This distributed ledger technology is especially helpful for cryptocurrencies in that it allows for the entry of new blocks by an unlimited number of entities or individuals in a manner that allows for anyone with access to a distribution of the ledger to confirm whether the entry is legitimate. By conducting the computing processes required for proof of work, the party proves they have contributed sufficiently to justify their new entry on the blockchain. And by utilizing smart contracts on the blockchain it then becomes possible to add additional transactions (buying or selling of cryptocurrency) to the blockchain and thus anyone can check to see if the seller actually owns the cryptocurrency in question.

But what about other uses of blockchain.

In my discussion with this official, he mentioned a Vietnamese developer who was deploying a couple of different types of blockchain in the country. The first blockchain was a logistics tracker that allowed for the recording and sharing of information regarding the site of origin of produce and other goods manufactured in any given country. This is an instance where blockchain is very useful. Rules of origin must be complied with in all international shipping. For a durian grower in Cambodia to be able to make a verified entry on the blockchain that a particular box of durians was sourced on his farm allows for customs inspectors in China to then check

the blockchain and confirm exactly where the durian originated. It is an effective use of the blockchain because there are thousands of potential users located around the world with interests in information that is capable of being verified or, at least, unchanged once it is entered. By using the distributed ledger inherent in the blockchain, an entry from Cambodia can be viewed in China, Switzerland, or Rwanda and in each location be assured that it is the same entry that was originally made. This allows each step in the chain of custody of shipped goods to be logged and later confirmed anywhere in the world. This is a situation where blockchain is definitely advantageous.

The other deployment this official mentioned was in health care. Here the idea is that Covid vaccination status will be entered into a blockchain by local medical personnel and distributed in such a manner so that other officials and stakeholders can check that status anywhere else in a jurisdiction which can access the blockchain. He said that currently there are several provinces here in Vietnam that have signed on to this technology but was skeptical as to why it was worth going to the effort of creating a blockchain when a simple shared database could accomplish the same thing.

And I think the answer, in both cases, is a matter of scale.

On the provincial, or city, level it doesn't make sense to deploy a blockchain when everyone in the jurisdiction is already on a shared network. It is just as easy to create a simple database with permissions and allow access through traditional search queries. But once the scale increases to the point where numerous users are requesting access to the data, such as in the situation where international logistics agencies seek confirmation of country of origin, then it makes sense to distribute the information on a blockchain in numerous copies across the globe.

But even with this idea of scale, anyone dreaming of deploying a master blockchain to control any given type of information in a global context faces the exact same difficulties that prevent any given traditional database from becoming widespread. How does one deployment garner the buy-in by all stakeholders in a given industry or jurisdiction?

Take the healthcare blockchain, for example. In order for it to be truly useful, every healthcare provider in a given city, or county, or country must subscribe to the blockchain. Not only must they have access to it for inquiries, but they must also have access to it for entries. And they must all choose to consistently make those entries. Otherwise, I could have received my Covid vaccine in Nha Trang but unless that specific provider enters that information on the blockchain, it does me no good in Ho Chi Minh City even if the authorities there check the blockchain because information regarding my vaccination status will not be there to check. It becomes a situation where the only way to ensure compliance with blockchain usage is through government fiat, and once that happens, it becomes a public private-blockchain and there is no longer any difference between a government-controlled database and the blockchain.

And consider the logistics example. Taking into consideration global stakeholders only magnifies the problem. Now you have to ask questions about international authority, is there any one international organization that can compel the use of the blockchain to record entries? Such a blockchain would be meaningless unless everyone participates. To have two hundred different blockchains providing the same information but for different countries or industries would create a situation where there is no efficiency at all in the process. Customs and logistics entities would have to perform checks of each database

to confirm whether there is any entry for a particular shipment.

Globalizing a blockchain also brings into question the issue of data sovereignty? The GDPR in Europe and several other emerging data protection laws prevent or severely limit the options for the transfer of data outside of a given jurisdiction. By entering data on a global blockchain that data is, by its nature, exiting the originating jurisdiction. What can countries do to prevent abuse of data by bad actors in other jurisdictions? What can individuals do to protect their data in a globalized blockchain?

That's why cryptocurrency is really the only industry that has seen a major adoption globally, because it can be operated anonymously without government oversight or enforcement. Once information on a blockchain becomes sensitive or private then one has to consider laws and protections and safeguards against abuse. It becomes a question of power and sovereignty and that has proven over and over again to be a question upon which the governments of the world simply cannot agree.

Cryptocurrency Gambling Ring Hacked by Government

(13 December 2021)

All right, one more blog post about cryptocurrency. A little over a week ago, the Ho Chi Minh City police announced they busted a major gambling ring (see article from Bloomberg here). They arrested 59 people and confiscated 40 laptops, over 70 cell phones, ATM cards, and over 130,000USD worth of Vietnamese Dong. The gambling ring involved two websites that required the use of a specific e-wallet to buy two types of cryptocurrencies. Once there were a large number of bettors playing on the sites the operators would crash the site and collect the money from the e-wallets of the bettors. Ostensibly, the two sites in question claimed to be linked to international gaming site Evolution.com, but the head of that site refutes such claims. In total, the ring saw a movement of 3.8 billion USD during its lifetime.

Now, cryptocurrency.

The targets were apparently Vietnamese and southeast Asian gamblers. While I've mentioned repeatedly that cryptocurrency is not allowed as a form of legal tender in Vietnam, and banks and bank card providers are encouraged to report transactions linked to cryptocurrency purchases, there remain numerous ways for Vietnamese citizens to buy cryptocurrency.

E-wallets, whether based in Vietnam or elsewhere, are not, technically, cryptocurrency. There is no restriction for buying into an e-wallet as they can be used for more than simply purchasing crypto. But once money is in an e-wallet it can easily be used to purchase crypto, which seems to be the route many Vietnamese who own crypto assets have taken.

This flow of funds is technically legal so long as the Vietnamese resident does not try to use the cryptocurrency as a legal tender in Vietnam. There is also a group of academics who suggest that tokens and cryptocurrency can be deemed to be an asset under the laws of Vietnam, despite what several lawyers have to say (see article from VASS in Vietnamese here). If that is the case, then cryptocurrency can technically be held by Vietnamese citizens, even though they can't use it to buy anything in Vietnam. They can still use it to make purchases cross-border and internationally. They can also use it as a parking lot for value, one which–from recent history–has demonstrated a growth rate much larger than the best fixed-rate available at Vietnamese banks.

But cryptocurrency remains open to abuse.

As demonstrated by this gambling ring and the way in which the operators would essentially lure in hapless Viets and then steal their money, there remain a large number of opportunities for fraud and theft of cryptocurrency, especially in an economy where there is no regulation of the sector.

Again, I reiterate my strong suggestion that the Vietnamese government create legislation to regulate cryptocurrency. It will not only assist in the prevention of crypto fraud, the financing of terrorism, and money laundering, but it will also allow the government to reap funds

through taxing crypto transactions. Is this not a desirable end if you're a government? Would it not be best to put in place protections for your citizens that will, at the same time, serve as fundraisers for the government's coffers?

But I digress...

Cryptocurrency is, by its nature, anonymous. The only link evidencing the possession of cryptocurrency is through the digital address of the e-wallet that contains the crypto. From my understanding, it is even possible to print out the code for cryptocurrency and hold the asset completely separate from the internet. This means that cryptocurrency is at least as anonymous as hard cash, possibly less so as cash has discreet serial numbers and can be traced while there are currently no legal methods for piercing the veil of an e-wallet linked to a crypto account.

That said, unlike cryptocurrency, e-wallet providers are backed by corporate entities which are subject to Know Your Client ("**KYC**") requirements. A corporation can be served process and required to reveal the personal information of its clients by law enforcement under the right circumstances. I'm not aware of any particular incidents of this occurring, but it theoretically would allow for governments in the jurisdictions of the companies that operate e-wallets to access the identities and locations of the owners of cryptocurrency.

But for Vietnam to access that information, to identify who is using cryptocurrency for nefarious purposes, they would have to either authorize e-wallets in Vietnam to allow the purchase of crypto or enter into agreements with the countries in which those e-wallets are based for judicial cooperation. Neither of which seems likely at this point in time.

The best option would be for Vietnam to license its own e-wallets and allow its citizens to use them to purchase cryptocurrencies. That way they would have access to the companies that operate the e-wallets and could compel disclosure of the identities of the e-wallet holders should they be linked to illegal activity. But even this would require either the development of homegrown cryptocurrencies to prevent the outflow of foreign exchange, or the unregulated exchange of foreign currency to pay for foreign cryptocurrencies. Again, neither of these appear likely.

In conclusion, then, while the government and the people of Vietnam might benefit greatly from the regulation and oversight of cryptocurrency trading in its territory, there remain too many ancillary changes necessary to make it likely for the government to take action anytime soon. Until the leaders of the country are willing to liberalize more than just crypto, I doubt we will see any effective legislation coming out of the National Assembly of government.

Technology Transfer in Vietnam

(20 December 2021)

This week I had the opportunity to edit our new legal guide for technology transfer in Vietnam. It was prepared by Yen Pham, a lawyer on our staff, and I thought I would give a preview of some of its contents as it is related to my practice.

Some Basics of Technology Transfer

Technology transfer means the transfer of the ownership or the right to use a given technology from the party with the right to transfer such technology to the technology transferee. Subject matters of technology to be transferred comprise: (i) Technical know-how and technological know-how; (ii) Technology plans or processes; technical solutions, parameters, drawings, or diagrams; formulae, computer software and databases; (iii) Solutions for rationalizing manufacture and renovation of technologies; and (iv) Equipment and machinery accompanied by one of the above-mentioned subject matters.

The government encourages the transfer of: high technologies; accompanying machinery/equipment of high technologies the transfer of which is encouraged under regulations of the High Technology Law; advanced technologies, new technologies and clean technologies that are suitable for socio-economic conditions of Vietnam.

Technology transfers may only be made subject to a technology transfer agreement. All technology transfers which are not restricted must be registered with the Ministry of Science and Technology of Vietnam (the "**MOST**"), and the transferee is responsible for such registration. For restricted technologies, approval must first be obtained from the MOST prior to entering into the technology transfer agreement. Fees such as royalties, training fees, and technical assistance fees are subject to the foreign contractor tax and must be withheld by the transferee of the technology.

Technology Transfers involving Intellectual Property Rights (IPRs)

In case a subject of a technology to be transferred is protected by IPRs under the IP Law, the transfer must be in accordance with the IP law. The agreement on transfer of IPRs must be registered with the National Office of Intellectual Property of Vietnam ("**NOIP**") in order to be considered a legally effective IPRs assignment agreement or legally effective against third parties, except for trademark license agreements. In practice, the IPRs transfer agreement may be established in a separate agreement or as a part of the TTA for convenience in registration with the NOIP.

Capital Contribution by Technology Transfer

Article 34 of the law on enterprises allows the owner(s) of a technology eligible for transfer to contribute that technology as capital in an enterprise. In addition to the registration of the agreement on the transfer of ownership of technology, if the subject matter of the technology to be transferred is protected as

IPRs under the IP Law of Vietnam, the IPRs protection titles in the name of the technology owner(s) must be assigned to the enterprise in accordance with Article 35 of the law on enterprises and the IP Law.

For the purpose of capital contribution, as provided in Article 36.1 of the Enterprise Law, such technology must be denominated in Vietnamese Dong. The denomination in Vietnamese Dong of a technology to be transferred shall comply with the following provisions:

- Technology contributed to an enterprise upon its establishment shall be valued by members or founding shareholders on the principle of consensus or shall be valued by a price evaluation organization. In the case of valuation by a price evaluation organization, the value of the assets contributed as capital must be approved by more than 50% of members or founding shareholders. If the technology contributed as capital are valued at more than their actual value at the time of capital contribution, the members or founding shareholders must jointly make an additional contribution in an amount equal to the difference between the valuation and the actual value of the technology contributed as capital at the time of completion of the valuation, and concurrently, are jointly liable for any loss and damage caused by the contributed technology being valued intentionally at more than their actual value; and

- Technology contributed as capital during the course of an enterprise's operation shall be valued on the basis of the agreement between the enterprise's owner or the members' council or the partners' council in the case of an LLC or partnership or the board of management in the case of a shareholding company on the one hand and the owner of the technology on the other hand, or by a price evaluation organization. Where a price evaluation organization conducts the valuation, the value of the technology contributed as capital must be accepted by the owner of the technology and the enterprise's owner, the members' council or the partners' council or the board of management in the case of a joint-stock company. Where the technology contributed as capital is valued at more than its actual value at the time of capital contribution, the owner of the technology, the enterprise's owner or members of the members' council or the partners' council or members of the board of management shall jointly make an additional contribution in an amount equal to the difference between the valuation and the actual value of the technology contributed as capital at the time of completion of the valuation, and concurrently, are jointly liable for any loss and damage caused by the contributed technology being valued intentionally at more than their actual value.

Technology transfer creates a great deal of value for transactions in any country, and in Vietnam, the government is keen to see useful and advanced technologies transferred into the country and used to promote the development of industry and services. The ability to contribute technology as capital in an enterprise in Vietnam is also an important method for building startups with an international element or of luring in major manufacturers who might need to transfer technology to a subsidiary in Vietnam for the purpose of conducting high-technology manufacturing. Either way, Vietnam is happy to see proper technologies transferred into the country and will, surely, continue to provide incentives for the same.

The Metaverse and Vietnam

(10 January 2022)

On 28 October 2021, Mark Zuckerberg, CEO and majority shareholder of Facebook (now Meta apparently) announced this thing called the Metaverse, a ripped off concept from countless science fiction books that, according to Wikipedia, is:

"a hypothesized iteration of the Internet, supporting persistent online 3-D virtual environments through conventional personal computing, as well as virtual and augmented reality headsets".

The idea, then, is to create virtual worlds for the internet. This mimics early representations of the internet that showed virtual reality navigation and hypothesized a world akin to our own in which internet addresses could be navigated much the same way as a street address, by driving or walking or flying through streets and down laneways. I remember in the early 1990s reading about how the internet would develop into this in a matter of years.

Now, thirty years later, Zuckerberg has decided to make this vision a reality. But what works in America may not work in other parts of the world, nor be particularly well adapted to different cultures. As I'm a lawyer in Vietnam and working with tech law, I have to wonder whether Zuckerberg's Metaverse will be able to operate in Vietnam and what some of the legal implications might be if it tries.

The first thing that comes to mind relates to the hit song "Baby Shark." How will a virtual reality world be perceived when it is hindered by an underwater internet cable that is constantly beset by fiberoptic hungry sharks? There is simply not enough bandwidth to provide a fully rendered three-dimensional world for every user of the internet in much of the developing world, Vietnam included. The infrastructure has to be improved before something like this can even begin to be contemplated. Sure, Vietnamese telecoms are pushing forward with a commercial 5G network, but that only applies to phones and SIM cards, not to wi-fi or LANs. How will the virtual reality displays be linked to the internet and how will they be able to push that much data through spotty networks?

The second thing that comes to mind relates to the Weird Al Yankovic parody of Michael Jackson's "I'm Bad" in which he sang about the fact that he was "Fat". By turning the internet into a virtual world, where everything is visually represented and essentially akin to a video game, the Metaverse will be encouraging an already alarming trend towards sedentary lifestyles. Vietnam is no exception to the increasing obesity problem facing developed countries and children who are already gorged on fast food and processed sugar who walk around like pudgy marshmallow puffs in too tight t-shirts will only continue to gain weight as they learn that they can be entertained while conducting activities that most of us currently accomplish with a simple internet search. Not only will fat accrue, like interest on a payday loan, but addictions that bring with them mental health problems such as depression and anxiety and paranoia will follow as well. If the Metaverse takes off in Vietnam then the

country will be faced with a pandemic of low level mental health crises that it is ill equipped to handle. Vietnam has a dismal mental health care system and even struggles to acknowledge that mental health even exists. I've heard stories of schizophrenics being taken to exorcists or being encouraged to talk to the dead and used as Carnivalesque attractions for their parents to make money. If Vietnam is going to invite a major cause of mental health problems into its borders, then it needs to modernize its beliefs and healthcare system accordingly, otherwise there will be entire generations of mentally ill children and youth and eventually adults who are unable to function as productive members of society.

Those are practical problems, there are numerous legal issues as well. The biggest, perhaps, the question of data. Virtual reality devices, as conceived currently, will likely collect a great deal of data from their users. As these devices will be worn, there will be several vital data collected, such as location, movements, physical reactions, vital signs, etc. Much of this information is currently under contemplation as "sensitive personal data" and will require a much greater call for consent than non-sensitive personal data. Will there be regular stop signs along the road of the Metaverse signaling instances requiring consent? I can imagine a car driving along an expressway and about to take an exit that leads to a new vendor. That vendor will require the personal data collected by the virtual reality devices and may not have previously been contemplated by existing consents. Will the Metaverse be able to build in toll booths (of a sort) that will stop the users and request their additional consent prior to letting them off the expressway?

And where, exactly, is the Metaverse? This personal data will be constantly updated and shared with vendors and virtual locations in real time. Even the yet to be adopted draft decree on personal data protection requires a great deal of paperwork prior to allowing data collected from Vietnamese citizens to be transferred across the jurisdictional border. If the Metaverse is international, how will the transfer of such data be controlled and permissions be obtained? Vietnam's laws are no where near sophisticated enough to handle the myriad issues that will arise from a virtual reality internet.

Finally, and back to a practical point, it is likely that a virtual reality world will undermine the fine heritage and culture of many countries. Vietnam is a country where there is a great deal of respect for parents and leadership (largely stemming from a Confucian inculcation in the 15th Century under the Hong Duc Reign Era). Will a Metaverse where hours and hours of the day are spent in a virtual world where there are no links to the family and culture that exists in reality have an even more adverse effect on youthful manners than video games already have? If in America video games are deemed to be largely responsible for some of the worst cases of student involved violence, do we really want to accept this idea as an import into a country that has respectably low levels of violence and crime and a high level of civil obedience?

Would we not be better served to spend the time and the money that would go into turning the internet into a fancy three-dimensional world on saving the environment, or on feeding the poor and housing the homeless? Aren't there more pressing, more real, problems facing us today that could be solved with the trillions of dollars that are about to be spent on virtual reality? And that's not even addressing the ethical issues of trying to replace physical reality with virtual reality. The advertising will be even more intrusive and more abusive than it already is. The violations of privacy and the promotion of negative images and activities

(however you choose to define them). The countless crimes that will be committed.

Call me jaded, but I see a much more Phillip K. Dick world coming from this direction of development than anything that Gene Rodenberry might ever have imagined. I'm not a Luddite, but I don't think the Metaverse is going to end well for anyone, let alone Vietnam.

Axie Infinity Redux

(7 February 2022)

Vietnam's startup darling Axie Infinity is in the news. Like the United States on the back of trillions of dollars of newly printed dollar bills, Axie Infinity is suffering from a classic economic problem: inflation.

Here's the skinny.

Axie Infinity is a blockchain item, based on Ethereum, where it uses a couple of different technologies. First, cryptocurrency. Twice. Axie Infinity uses a standard cryptocurrency, AXS, that is purchased using other external currencies: either fiat or a recognized crypto currency. With AXS purchased and in the bank, users can then buy Axies, which are NFT monsters (the second blockchain technology). This cryptocurrency is limited and is only used to purchase goods in the game, it is not used to pay back to players or even to cash out of the game, though individuals who possess AXS can trade it on crypto exchanges or for fiat.

It falls to the second cryptocurrency Smoot Love Potions, or SLP, to provide the actual in-game economic driver. Once players have bought into the game with AXS they earn SLP by accomplishing tasks, fighting other Axies, and a few other things. From the inception of the game, SLP was unlimited, it was given out to anyone who accomplished the requisite activities, and there were no restrictions on how much of it could be issued. With enough SLP earned, a player could cash out onto a crypto exchange for fiat or other crypto. Thus the model of play-to-earn.

But the unlimited issuance of SLP created a problem. With millions of players earning unlimited amounts of SLP, its scarcity plummeted and then so did its value. From a peak of .44USD a coin, it sank this last week to approximately .01USD a coin. But before I get into the externals, it is important to note that within the last few days Axie Infinity has announced plans to limit the further issuance of SLP, make it harder to get, and possibly start issuing certain amounts of AXS within the game. Like a reactive central bank, this has acted to plump the value of SLP and AXS and the cryptocurrencies have seen an increase of upwards of 17% in the last couple of days.

But why does this matter when only those few people who actually play the game care?

Because of who those people happen to be.

In what was, I suspect, an unintended consequence of the play-to-earn model, Axie Infinity has become a digitally outsourced income generator for rich country investors.

In order to join the fun, a player has to pony up a sizable buy-in before they own the three Axies required to play the game. When AXS was at its peak, this cost close to a thousand dollars, an investment that much of the world was incapable of fronting. But the amount of money that a player could earn in any given day, at its peak around 70 or 80 USD, was not sufficient to lure in the players who had access to the initial capital necessary to play the game. It was, however, more money than people in, say, the Philippines, averaged in a week of hard labor. Playing Axie Infinity, for them, seemed like an easy income that would bring immense wealth compared to the average yearly income of a few

thousand dollars. But how could they get the money to buy those first three Axies?

Like any good oil well, they needed to find some fat cat investors who would be willing to pay the buy-in and take a cut of their earnings as repayment, plus interest, on their investment. Even at a 30% take of the daily earnings at 70 USD, the remaining 40 USD still meant a sizeable increase in the salaries of people in several developing countries.

What happened, then, was the development of "sponsorships" in which American or European investors "sponsored" a sweatshop player to play the game and feed the play-to-earn model, and they would reap a continuing return on their investment. I haven't seen any of the "sponsorship" agreements, but the imbalance in party sophistication is obviously immense. What is a dirt poor farmer in a developing country supposed to do when a rich white guy from Texas agrees to sponsor them?

There does not appear to be a standardized procedure for sponsorship nor an Axie Infinity approved contract. A quick Google search shows that potential players are seeking out sponsorship through whatever means possible, whether that be Facebook or Reddit or Twitter or some other online venue. From everything I've read this last week, there seems to be no governance of these sponsorships and no support for players in their negotiations with sponsors.

One does not have to be a pre-Perestroika party member to realize that such an egregious imbalance will inevitably lead to abuses. And as the majority of the players on Axie Infinity are from developing countries with sponsors, this abuse is very likely widespread and endemic.

As I mentioned above, I am giving the founders of Axie Infinity the benefit of the doubt in assuming this external business model was an unintended development and that it was not the goal of the startup from the beginning. With that caveat stated, the reason for my writing this week's post is to use my small online fiefdom to encourage Axie Infinity to act not just to adjust the internal economics of the SLP and AXS cryptocurrency, but to institute some kind of minimal governance standards for players and sponsors. A form contract or required disclosures on the part of sponsors. I know it is impractical to offer legal advice to every potential player, but there is a great deal which Axie Infinity can do to level the playing field between sponsors and players.

To continue with an ethical and moral agenda, Axie Infinity needs to address this terrible inequality that has arisen as a result of their play-to-earn model and seek a balance that will protect their players from abuse and exploitation.

Banker's KYC in Vietnam *(14 February 2022)*

Know Your Customer, or KYC, is a process of identification and verification of customer information by financial entities in accordance with the prevention and combating of money laundering and financing of terrorism. For KYC in Vietnam, financial entities must apply measures to identify customers in the following cases:

- When a customer initially opens an account comprising a checking account, savings account, card account, or other types of account;
- When a customer initially establishes a relationship with the financial entity in order to use products or services supplied by such financial entity;
- When a customer conducts an infrequent high-value transaction (a transaction with a total value of VND300 million or more within the one day by a client without an account or with a checking account but who has not conducted transactions within a period of six (6) months or more);
- When implementing an electronic money transfer without details of the name, address or account number of the sender;
- When there is suspicion about any transaction or parties to a transaction being connected to money laundering activities; or
- When there is suspicion about the accuracy or completeness of previously collected client identification information.

KYC is controlled by the Anti-Money Laundering Law, the Counter-Financing of Terrorism Law and the guiding legislation for each. A financial entity must comply with measures for customer identification and verification, customer identification information, the collection, processing and transfer of information on prevention and combating of money laundering, and responsibilities for reporting high-value transactions as stipulated by the government from time to time.

Information required to be collected for KYC in Vietnam

For individual customers

The main information required for the identification of individual customers includes:

- The full name; date of birth; nationality; occupation, position; phone number, number of people's identity card or passport along with the date of issuance and place of issuance; permanent registered residential address and current residential address for a Vietnamese individual customer; or
- The full name; date of birth; nationality; occupation, position; number of passport together with the date of issuance and place of issuance, entry visa; registered residential address overseas and registered residential address in Vietnam for a foreign individual customer.

For Organizational customers

The identification information required includes trading name both in full and in abbreviated form, head office address, telephone number, fax number, operational

sector, information about persons establishing and/or representing the organization as set out above.

In addition to customer information, banks must also apply measures for identification and updating information of the beneficial owner of the customer being an organization. The determination of the ultimate beneficial owner shall be based on three criteria as follows:

- The individual actually owning one account or transaction: the account-holder or joint accountholders or any person controlling the activities of such account or transaction or the beneficiary of such account or transaction;
- The individual with the right of controlling the legal entity: an individual, directly or indirectly, owning at least 25% of the charter capital (equity) of such legal entity; owner of private enterprise; other individuals actually control such legal entity; and
- Individuals with the controlling right over the investment entrustment or authorization agreement; the entrustor or person delegating authority; or the person with the right to control the individual, legal entity or entrustor organization or organization delegating authority.

Electronic-KYC in Vietnam ("eKYC")

Transactions using technology that enables customers in their conduct and do not require a meeting in person with a member of the staff of a bank are regulated as transactions related to new technology. Regulations from last year (which are discussed more fully in "eKYC Comes to Vietnam") grant permission to the banks to decide whether to meet the customer in person on the initial establishment of the relationship. In case they choose not to meet the customer in person, the financial entity must apply measures and technology to identify and verify the customer.

Specifically, an individual customer of a bank is allowed to open a personal checking account online with that bank with the application of four steps, (1) the collection of information concerning the application for checking account opening, (2) the check of that information, (3) examination, and (4) verification of the customer identification information. For the purposes of eKYC, the customer can send an application enclosed with documents directly or by post or by other electronic means to the bank.

A bank is entitled to decide, at its sole discretion, measures, methods and technology to identify and verify the customer for the purpose of opening a checking account online, provided that they satisfy the following minimum requirements:

- The bank must adopt solutions/ technologies for collecting, checking and verifying to ensure the match between a client's identity and biometric data (including biological factors/ characteristics that are specifically used to identify a person, cannot be forged, and are rarely matched with those of another person such as fingerprints, face, iris, voice and other biometric factors) and corresponding information and biometric data on the client's identity papers or personal identity data certified by competent authorities or other credit institutions or electronic certification and identification service providers;
- The bank must adopt technical methods for certifying the identified client's consent to contents of the agreement on opening and use of the checking account;
- The bank must formulate procedures for risk management, control and

assessment that include measures for preventing acts of impersonating, intervening, correcting or falsifying the verification of a client's identity before, during and after the checking account opening, and measures for checking and verifying a client's identity to make sure that transactions made via a checking account opened online are made by the holder of that checking account. Where any risks or differences between identity and biometric factors of a client or any suspicious transactions, as prescribed in the Anti- Money Laundering Law, are detected during the use of a checking account, the bank or foreign bank branch must promptly refuse or suspend transactions, block or freeze that checking account, and re-verify the client's identity. Procedures for risk management and control must be regularly reviewed and adjusted based on information/data updated during the provision of services; and

- The bank must adequately store and manage information/data used for identifying clients during their opening and use of checking accounts in chronological order, including: client's identity and biometric factors, sounds, images, videos and recordings, telephone number used when making transaction, and transaction log. Information/data must be stored safely, kept confidential, backed up and have its adequacy and integrity ensured to serve the inspection, examination and solving of trace requests, complaints and disputes, and provide information at the request of competent authorities. Storage period shall comply with the Anti-Money Laundering Law.

Ancillary Data Services in Vietnam

(28 February 2022)

Data Intermediaries and Analytics Firms

International treatment of data has led to the creation of a couple of categories of service providers: data intermediaries who are third parties that transfer data from one entity to another and are bound by the rules of specific jurisdictions, and analytics firms who take the data provided by banks or financial institutions and other publicly available data to compose an analysis of that data and report on some aspect of the individual or entity under examination–most commonly this is a credit scoring entity.

Vietnam's legislation does not currently contemplate either of these entities explicitly. However, both may find through inference and study a few guidelines for their implementation. While there has previously been legislation regarding credit ranking–which is aimed mainly at credit institutions and corporation's credit worthiness rather–credit scoring, which focuses on individual lenders credit worthiness based on data collected from a jurisdictions credit institutions and governmental organizations, is less clear.

This post will briefly examine what there is to know about each of these entities in Vietnam and what the legislation means for the treatment of an individual's data.

Rules for data intermediaries in Vietnam

The only definition of "intermediary services" extant in Vietnamese legislation relevant to personal data is listed out as, (i) internet services, (ii) telecommunication services, (iii) lease of digital information storage space services including the lease of website storage services, (iv) online social networks services, and (v) digital information searching services.

Storage of digital information contents by these intermediaries in their systems is transitory, temporary, automatic and for a limited period to meet the technical requirements of digital information content transmission. However, the digital information content in this context is limited to works, performances, phonograms and video recordings, broadcast programs protected under the Intellectual Property Law and is not applied for any other kind of information/data.

As there is no specific definitions or regulations for a "data intermediary" in Vietnam, it is difficult to understand how a data intermediary service would be treated in Vietnam. Though under the new investment law foreign investment is allowed in any sector that is not limited or prohibited, the licensing authorities tend to treat unregulated areas as something they don't understand and, as a result, don't license.

One way to proceed with licensing and operating a data intermediary in Vietnam, is to base it on the international concepts of data intermediaries that cover a wide range of different activities and governance models for companies that facilitate access to or sharing of data including the provision of platforms or infrastructure to facilitate the transfer of data. A data intermediary service might then fall within

the business lines of data processing, hosting and related activities and/or information portals for providing the platform.

Rules for analytics firms supporting financial services

Data analytics supporting financial services, except for credit information services provided by credit information companies (see "Credit Information in Vietnam"), may be categorized as services auxiliary to financial services which are not categorized. From the perspective of the laws of Vietnam, analytics services supporting financial services is neither a conditional business (as there is no specific regulations), nor subject to specialized rules. There are no specialized rules governing the activities of analytics firms supporting financial services.

Credit Scoring

Credit scoring services in Vietnam operate in a legal vacuum. Apart from the National Credit Information Center and credit information companies, there are no specific regulations governing credit scoring activities of other companies nor treating such activities as conditional business lines under the Investment Law.

In practice, the credit scoring service is provided by fintech companies (e.g., Trusting Social, FiinGroup JSC, etc.). Such companies are not required to obtain special licenses nor requirements except for being duly registered with the major business lines including data processing, information portals, other information service activities and market research.

In terms of data protection, as a result of the lack of specialized regulations, it is hard to determine what personal data or corporate data is allowed to be collected and processed for the purpose of credit scoring. Therefore, such companies may take the approach that "all data is credit data" and from alternative sources, including but not limited to mobile data, social network data, e-commerce, financial or other business transactions. Depending on the types of data and the provided forms of data (via e-commerce platform or non-e-commerce platform), the companies in question must be subject to compliance with the general regulations on data protection (see "Data Protection in Vietnam").

The State Bank of Vietnam has proposed a regulatory sandbox for fintech activities in the sector of banking, which may provide regulations on credit scoring, as a banking support activity. However, the first draft of this decree has been under discussion now for quite some time and there has not been any further legislation detailing the structure or proposed contents. It is uncertain, therefore, whether the regulatory sandbox will govern these two data related activities.

E-Transactions in Vietnam *(14 March 2022)*

Electronic Transactions (E-Transactions) in Vietnam

As defined in the Electronic Transaction Law (the ET Law), electronic transaction or e-transaction means a transaction conducted by electronic means. Electronic means are means that operate on the basis of an electric, electronic, digital, magnetic, wireless, optical, electro-magnetic technology or similar technologies. Any transactions by electronic means in the form of data messages (information created, sent, received and stored by electronic means) in accordance with the ET Law will be deemed to be recognized as written transactions.

The ET Law provides, among others, general regulations on protection of data messages and the information confidentiality in e-transactions, particularly in the signing and performance of e-contracts using e-signatures.

In short, an e-signature is a signature created in the form of words, letters, numerals, symbols, sounds or other forms by electronic means, logically attached or associated with a data message, and capable of certifying the person who signs the data messages as well as the consent of such person to the content of the signed data. Being a subset of e-signatures, a digital signature is created by transforming a data message using an asymmetric cryptographic system, whereby the person obtaining the original data message and the public key of the signatory is able to determine correctly the following: (i) that the above-mentioned transformation is made with the correct private key corresponding to the public key in the same key pair, (ii) the integrity of the contents of the data message as from the time of making the abovementioned transformation. The management, provision and use of e-signature is regulated in the ET Law, while digital signature related issues are separately stipulated in Decree 130 dated 27 September 2018.

Information or content under the form of a data messages collected from the e-transactions will have **the legal validity as the original** if the content of such information or data message meets the conditions of integrity since its first creation, is accessible and usable in its complete form as needed. The contents of a data message shall be considered to have integrity when such contents remain unchanged since its first creation in the form of a complete data message, except for changes in their appearance arising out of the process of sending, storage or display of the data message. Data messages will have the **legal validity as evidence** as determined on the basis of the reliability of the method of creating, storing or transmitting the data message; the method of ensuring and maintaining the integrity of the data message; the method of identifying the creator and on other relevant elements.

Pursuant to Article 35 of the ET Law, when entering into an e-contract or e-transaction, the contractual parties or involved parties are allowed to agree on technical requirements, certification, conditions to ensure the integrity and confidentiality related to such e-contract, e-transaction (the "**E-Transaction Certification Method**"). Accordingly, unless otherwise provided for by law, they can agree to use whatever E-Transaction Certification Method

for certifying their acceptance/approval to the data message in question including e-signatures, digital signatures, or any other agreed methods provided that information or data messages collected from such e-transaction adequately meets the conditions to be recognized as discussed above, i.e., integrity, accessibility and usability of the contents of a data message collected from e-transactions since its creation in the form of a complete data message.

Some common E-Transaction Certification Methods currently in use include a digital signature provided by a licensed digital signature certification service provider, and the mechanisms agreed by the parties to express their consent to e-transactions such as online functions on the website, e-mail, messages, or other methods, etc. While a digital signature, a valid E-Transaction Certification Method, is provided for and is ensured by a third party service provider in accordance with the laws of Vietnam. The other E-Transaction Certification Methods will ensure the validity of the related e-transactions in accordance with the ET Law by legal entities applying the certification method / mechanism without any further licenses required and they must prove the validity of such e-transaction themselves.

As per Articles 21 and 22 of the ET Law, an e-signature shall be created in the form of words, script, numerals, symbols, sounds or in other forms by electronic means, logically attached or associated with a data message and shall be capable of certifying the person who has signed the data message and certifying the approval by such person with respect to the content of the signed data message. It may be certified by an organization providing e-signature certification services.

An e-signature shall be deemed to have been secured if such e-signature is certified an organization providing e-signature certification services, or satisfies all of following 4 conditions:

- The data creating the e-signature solely attaches to the signatory in the context in which such data is used;
- The data creating the e-signature is only under the control of the signatory at the time of signing;
- All changes in the e-signature after the time of signing are detectable; and
- All changes in the contents of the data message after the time of signing are detectable.

As per Article 3.6 of Decree 130, a digital signature means a form of e-signature created by transforming a data message using an asymmetric cryptographic system, whereby the person obtaining the original data message and the public key of the signatory is able to determine correctly the following:

- That the above-mentioned transformation is made with the correct private key corresponding to the public key in the same key pair; and
- The integrity of the contents of the data message as from the time of making the above mentioned transformation.

In practice of dispute resolution in the courts of Vietnam, the court accepts the evidence in the form of a data message. Except for the case of using digital signatures to certify the validity of an e-transaction, the involved parties submitting the evidence in the form of a data message will be obliged to prove that the content of such data message is integral, accessible. and usable, i.e.: the court will consider and examine the value of this type of evidence on the basis of the written statement for recording the entire contents of data message sent via electronic means made by the bailiff ("*Thừa phát lại*" in Vietnamese) in accordance with the prevailing laws.

How Cross-border Data Collection Threatens Us All *(21 March 2022)*

I'm a little scared. And it's Facebook's fault.

The thing is, for the longest time, the world was organized into discreet territories with their own sovereignty, powers, and abilities to control the trade that crossed their borders. They could physically stop something or someone from entering their country by holding them up at the border or turning them back at the airport. With the advent of the internet and, particularly, Facebook and social media that use (and arguably abuse) their abilities to cross borders at whim, the territorial sovereignty of countries is no longer effective.

You see, Facebook (and I'll use Facebook as a stand in for the myriad companies that gather data of users for various purposes across borders online) only has one corporate domicile, in the United States. But its operations cross the globe and have, in fact, become an integral part of billions of people's lives to the point where they are entering into contractual obligations, sharing private data, and creating and participating in other civil rights that may arise from activities on their sites. They control who is deemed to be fraudulent and who can post certain things on their feeds. Increasingly, too, there are some people who see them akin to a state actor in that they should be responsible to obligations (in the United States at least) of the protection of free speech and other constitutional rights that traditionally only accrue to representatives of the state. They collect funds and disburse funds and they collect and manipulate data.

And perhaps this is the most terrifying aspect of social media and the internet.

Theoretically, an individual's identity belongs to the individual with which it is identified. The few jurisdictions that have legislated the concept have similar though slightly different definitions of who owns what data, but in general, an individual owns her own data. It follows, then, that they have the right to use and trade that data the same way they would an asset like currency or commodities. This creates civil rights in the data, the right to protect it, the right to say who can use it, the right to deny its use, among others.

In a recent report on the website clario.co, titled Big Brother Brands Report, the cybersecurity company analyzed dozens of major social networking sites and determined what percentage of possible data they collected from users. This information ranges from name, birthday, gender, to sexual preference, location, and bank accounts. But it also includes access to all of a users image library and even access to the face, voice, and appearance of anything in the images or video which an individual either posts or uses to identify themselves on or too websites.

The company that collects the most data is Facebook, which collects 79.49% of all available data categories from users. It is followed by its brother website Instagram, which collects 69.23% of all available data. The numbers trail off from there, but hands down Meta, the owner of both Facebook and Instagram, collects the

most data of any company in the world.

And here's the scary part.

There are approximately 66 million Facebook users in Vietnam. Citizens of a sovereign nation that exercise their civil rights and the assets of their personal data on one website that has no physical domicile in the country. They are voluntarily giving up their rights to control the data they share to an American company. A United States company controls the data of almost two thirds of the citizens of Vietnam, two countries that until the 1990s were enemies.

It's a little discussed element of China's refusal to allow Facebook into that country. Most discussions focus on the damage such a decision did to civil and human rights, to freedom of speech and ideas, and to the ability of the country's citizenship to access information about and from the West. Oddly enough, when the United States did the same thing to Chinese companies under the Trump administration, no one complained about China's right to share their ideas with the United States or to have an online dialogue with American citizens. No, the discussion focused on the data and the privacy and the control of information in the hands of a potentially hostile government.

Despite the spin put on the various actions of governments, the truth is, that by allowing Facebook to control so much data and information about the individuals in a foreign country, that country is allowing a United States citizen access to more information than has been traditionally available to the best spies and saboteurs during wartime.

And taking the instance of China and Facebook, if a country like Vietnam, which is already under scrutiny for some of its actions by Western democracies, were to block Facebook from its borders–even if it did so with the very legitimate interest of protecting its citizens from control and abuse by a foreign national–it would be ostracized by the global community and even possibly hit with sanctions based on what is a very real and important decision for national sovereignty and independence.

More, there is nothing Vietnam can do to control or limit Facebook beyond what Facebook chooses to let it. Without any physical assets in the country, Facebook can avoid taxes, can avoid responsibility for violations of the law, and can behave as an essentially unregulated actor in everything it does in Vietnam because it is not in Vietnam subject to any legal agreements, treaties, or commitments. There is no privity, no legal connection between Facebook and the Vietnamese government and the only threat that Vietnam has is to cut the site off from the country completely, an act that–as suggested–would create a furious uproar in the global community full of outrage that Vietnam was violating some mythical human right of its citizens to use social media.

Facebook, and the other social media giants, which are based in one country but act globally without benefit of treaty or legal structures, has created a new type of sovereign. Or at least, if they are to be fairly regulated and the balance of power across borders is to remain in place, they need to be created as a new type of sovereign. As United States corporate citizens, they can easily skirt the regulations of external countries with minimal risk, and in this way they can become a serious threat to foreign countries who may not want the United States to have access to all of its data.

What is required is a decoupling from a specific country. The location of the corporate headquarters needs to be disconnected from the legal jurisdiction and the global actor needs to become a new type of international organization capable of entering into its own

treaties (or at least commitments) with countries and subject to a globally agreed set of rules and guidelines that will be enforced by a global majority rather than minority governments acting as "rogues" to protect their citizenry from an overpowering American data taking.

The exact structure such a reshuffling might take is unclear, but it is necessary if countries like Vietnam (like any country other than the United States) is going to have a legitimate chance to stand up to the likes of Facebook in any meaningful ways other than shutting off all access to their territorial boundaries.

E-Commerce in Vietnam, a Review

(28 March 2022)

Under the laws of Vietnam, e-commerce activity means conducting a part or the whole of the process of commercial activity by electronic means connected to the internet, mobile telecommunications network or other open networks. A commercial activity is any activity for profit-making purposes, comprising purchase and sale of goods, provision of services, investment, commercial enhancement, and other activities for profit making purpose. The operation of e-commerce in Vietnam is currently governed by Decree 52 (Decree No. 52/2013/ND-CP of the GOV dated 16 May 2013 on e-commerce activities, as amended by Decree No. 08/2018/ND-CP dated 15 January 2018 and Decree No. 85/2021/ND-CP dated 25 September 2021) and its guiding circulars. Based on general rules set forth in Decree 52, e-commerce activities conducted via application on mobile devices are specified in Circular 59 (Circular No. 59/2015/TT-BCT of the MOIT dated 31 December 2015 on ecommerce via applications on mobile devices, as amended by Circular No. 21/2018/TT-BCT of the MOIT dated 20 August 2018), while e-commerce websites are separately governed by Circular 47 (Circular No. 59/2015/TT-BCT of the MOIT dated 31 December 2015 on ecommerce via applications on mobile devices, as amended by Circular No. 21/2018/TT-BCT of the MOIT dated 20 August 2018).

Pursuant to Decree 52, e-commerce websites or apps can be construed that such website or app is set up to serve part or the whole of the process of purchasing and selling goods or providing services, from displaying and introducing goods or services to concluding contracts, providing services, making payment and providing after-sales services. Accordingly, there are two forms of organization of e-commerce activity, i.e., **sales e- commerce website / mobile application and e-commerce service provision website/ app**. A sales e-commerce website is an e-commerce website that are established by traders, organizations or individuals to serve their trade promotion, sale of goods or supply of services. An e-commerce service provision website is an e-commerce website developed by traders, organizations or individuals to provide an environment for other traders, organizations or individuals to conduct their commercial activities. Such website will be set up in one of the following types:

- E-commerce trading floor;
- Online auction website;
- Online promotion website; and
- Other types of **website** as stipulated by the Ministry of Industry and Trade;
- For operation of such a website / app, it is required to satisfy the described specific conditions under Decree 52 for its official operation including requirements on carrying out the procedures with the Ministry of Industry and Trade;
- A sale e-commerce website or a sale app is subject to notification of a sale e- commerce website or a sale app with the MOIT through the online tool on the portal of management of e-commerce activities (the "**Notification Procedure**");
- A service provision website, which is

divided into various types of services, must register their service provision website or app with the MOIT through the online tool on the portal of management of e-commerce activities (the "**Registration Procedure**").

The safety and security in e-commerce transactions including requirements on personal data protection must comply with the regulations on Chapter V of Decree 52. Accordingly, during their e-commerce operation, organizations and individuals who collect, use and transfer personal information of customers must have and publish a privacy policy containing the prescribed contents under Article 69.1, e.g., the purpose of collection, scope of use, terms of storage, and information accessibility provisions for individuals or organizations, etc.

Unless otherwise stipulated by laws, organizations or individuals must adhere to a principled requirement under the prevailing laws of Vietnam in respect of personal data protection, i.e., a requirement on obtaining the consent from data subjects prior to processing their personal information. Infringements of the personal information protection in the sector of e-commerce shall be subject to administrative penalties in accordance with Decree 98-2020.

For information purpose, Decree 52 has been amended, supplemented by Decree 85-2021, which will take effect as of 1 January 2022.

E-commerce websites/apps are deemed to be e-commerce activities in Vietnam if they involve one of the following three elements:

1. The e-commerce website uses a .vn domain name;
2. The e-commerce website displays the Vietnamese language;
3. The e-commerce website has more than 100,000 transactions originating in Vietnam in a given year.

All entities falling within these definitions must first, register their e-commerce activities pursuant to Decree 85 as it amends Decree 52. This seems to include foreign entities who provide these service cross-border as they must comply with the notification of an e-sales website (which is fairy simple) or the registration of one of the other types of e-commerce website (which is subject to market approach conditions for foreign investors).

In addition to the proper procedure for notifying or registering their e-commerce website with the authorities, the cross-border provider who engages in conducting e-commerce activities in Vietnam must either establish a representative office or appoint an authorized representative. The representative office or authorized representative must be responsible for the following items:

1. Cooperate with regulatory authorities to prevent transactions of goods and services in violation of the law of Vietnam;
2. Fulfill the obligation to protect consumers' interests as well as quality of goods and services as prescribed by the law of Vietnam;
3. Submit statistical reports as prescribed by January 15 of each year.

A recent discussion with the head of the Ministry of Public Security with local chambers of commerce revealed that, in principle, the cybersecurity requirement of data localization will be imposed on any entity providing cross-border e-commerce services or sales that is seen to fail in its obligation to cooperate with the Vietnamese authorities. This would suggest that data localization, then, is only imposed on those entities who have screwed up at least once and

failed to repair the fault at the request of the authorities.

E-commerce activities continue to receive attention from the government and the National Assembly and this overview will only apply for a brief period of time until there is more detailed information and regulation provided by the authorities. In the meantime, feel free to pursue your sales or services websites and apps per the above, remembering always that this is not legal advice we dispense here, but only informational suggestions.

Move to Earn and Vietnam

(25 April 2022)

A new NFT model has recently hit the news, StepN, which is a game/program/model in which users have the opportunity to buy an NFT sneaker which represents their real sneaker and is linked to their movements via their cellphones or smartwatch. They can then be rewarded with cryptocurrency according to how much they actually move in any given day. I thought I'd look at this model in more detail.

Though not a Vietnamese based game–it's co-founded by two Asian-Australians–StepN requires a buy in of the approximately $1000US in order to obtain the NFT that is linked to a step counter app that can be downloaded to a mover's phone. By tracking the number of steps the NFT shoes take, a mover can earn the game's utility crypto tokens, GST. This token is on public exchanges and can, therefore, be exchanged for more valuable crypto or eventually hard currency. GST currently has no restrictions on the amount that can be placed in circulation. The founders say that someone can earn up to $450US worth of crypto a day for running an hour. The governance token, GMT, is limited to 6 million tokens and can only be earned once a mover has reached level 30 in the StepN biosphere.

The article points to two flaws in this model, both of which are intimately known to Vietnamese NFT investors as the Axie Infinity play-to-earn has recently suffered them.

First, with an unrestricted supply of the utility token GST, the more people who use StepN the more GST will be issued and the value of the GST issued will decrease against other currencies, thus decreasing the incentive to walk/run and making it harder to recoup the initial investment. However, this is moderated by the ability to actually earn the governance token within the StepN ecosphere. With Axie Infinity, players were only able to earn the unrestricted coin. The problem, rather, is that once the six million tokens of GMT enter the ecosphere, the founders lose the incentive they have built into the game. In theory, once a mover reaches the elite level 30, they must use their GMT in order to purchase the increasingly expensive upgrade NFT options. And even if they cash out their GMT on a crypto exchange, the only place that the GMT truly has value is in the StepN ecosphere in which case the GMT will be returned to the ecosphere and used to make purchases and thus return to the founder bank. Whether that will be enough to avoid the issues of inflation that floundered Axie Infinity and other play-to-earn games in the past is uncertain. The economics are too new and it is difficult to predict (especially for someone who isn't an economist) the outcomes.

The other issue raised by the article is the concern that this move-to-earn model is similar to a pyramid scheme in which the early adopters are really the ones who will benefit as subsequent adopters' buy-ins will be used to fund the payment for the early adopters. This would be true if the GST and GMT were not exchangeable on a public crypto exchange, but in this case, the time of buy-in is less a determinant than the level of movement. This means that the infusions of value into the ecosystem from new entrants will benefit those at level 30 and above rather than those who came first. While albeit, those who came to StepN first are likely to be the first ones to reach

level 30, that placement is not exclusive nor is it dependent on time of adoption.

For me, StepN is the first platform based on the blockchain which actually seems to have some benefit to mankind. Cryptocurrency, which requires proof of work to mine, does not direct that work towards any potentially useful result, it is simply the use of computational power to churn through algorithms. I remember when I was in high school and college you could donate your unused computer time to the Search for Extraterrestrial Intelligence to help the project process findings from its radio telescopes. While not necessarily a hugely useful contribution to society, it was, at least, a contribution. Cryptocurrency has failed to meet even that level of usefulness.

And the NFT craze has yet to truly do anything useful. Basketball pictures, bored apes, and other signed (blockchain located) images and content that have largely been sold for the profit of the one selling them. Even Axie Infinity and other play-to-earn games do nothing to actually contribute to society other than to entertain those low level players in the Philippines who rent out their time to rich landlords from Europe and America. Axie does not create anything or accomplish anything. It is simply a way to move funds between landlords and players and founders and investors. There is no net gain to the ecosystem of society.

With StepN, for the first time, the concept of NFTs and cryptocurrency are being used for a purpose which helps people and improves the lives of those who buy the NFTs. Though it is possible to rent out the NFT sneakers to others to run and walk and earn the owners of the sneakers GST and eventually GMT, it is not the main goal. The main goal is to encourage physical fitness, and it accomplishes this in two ways. First, there is the cost of buy-in. Nearly a thousand dollars to buy a pair of NFT sneakers. That's a considerable investment and to fail to run/walk in order to recoup that investment would mean a negative result for the purchaser. Second, there's the reward of cryptocurrency to encourage positive behaviors. A carrot and stick approach that might be much more effective as motivation than other means.

Ultimately, StepN is the first time I have seen a real-world utility to NFTs. With luck, this will succeed more on the merits of individuals actually running/ walking rather than renting out their NFT sneakers to other runners and the benefits will be duplicated in other areas of endeavor. Imagine a study-to-earn or a volunteer-to-earn model that would encourage students to spend time hitting the books or individuals to help others. With the increasing capability of technology to monitor behaviors through phones and other sensors, who knows what the limit of potential for the (blank)-to-earn model might be.

Data Localization Revisited, a Vietnam Primer

(9 May 2022)

Data Localization, Where We Stand

In 2018 the National Assembly passed the controversial new law on cybersecurity that subsequently went into effect on 1 January 2019. In addition to providing rules that allowed the government to arguably censor residents who posted objectionable content on the internet, it also expanded and simultaneously solidified the data localization requirements in Vietnam.

"Both domestic and foreign companies providing services of telecommunications, internet, and value-added services in cyberspace in Vietnam that conduct the collection, exploitation, analysis, or processing of data of individuals, data about relationships of service users, or data generated by users in Vietnam must preserve that data in Vietnam during the time period regulated by the Government."

Finally the Government provides specific requirements for what activities actually give rise to the data localization requirements in Vietnam. Only those foreign companies providing services that access and use data of Vietnamese users must preserve that data within the territory of Vietnam. These requirements remain broad and far from concrete. Much like the GDPR in Europe, this requirement still could be interpreted to require a dog groomer in Idaho to maintain a server in Vietnam if that dog groomer collected data from an outlier Vietnamese visitor to her website. That alone prevents this requirement from being truly enforceable, but the language of the above legislation also provides a vaguely "to be defined" requirement as to the time period. Also, the preservation of "that data in Vietnam" does not specify how that data is to be preserved. Will a data cloud hosted in Vietnam be sufficient, or is the requirement of the 2013 decree requiring a physical server still in effect?

If that weren't enough, the law on cybersecurity imposes a second, more onerous and controversial requirement on these service providers. Any company that provides the services described above must additionally open either a branch or representative office in Vietnam. Some commentators saw this as an effort by the Vietnamese Government to increase the reach of its regulatory authority by making anyone who provides internet services in the country open an office in the country.

Draft Decree dated 21 August 2019 guiding the LOCS (the "**2019 Draft Decree Detailing the LOCS**")

Following the issuance of the Law on Cyber Security (LOCS) in the middle of 2018, the draft decree detailing the LOCS by the MPS was released on 31 August 2018 for public comment (the "**2018 Draft Decree Detailing the LOCS**"), in which is provided clarification for the LOCS' requirement of data localization and establishment of representative offices by foreign entities.

Per Article 25.1 of the 2018 Draft Decree Detailing the LOCS, any enterprise, whether local or off-shore, which meets prescribed conditions, must conduct data storage onshore and establish a branch or representative office

in Vietnam (the "Data Localization Regulation"). The Data Localization Regulation has raised concern both locally and internationally as sets obstacles for enterprises, especially off-shore enterprises, integrate and development technology in Vietnam.

This Data Localization Regulation was modified in a 2019 Draft Decree Detailing the LOCS. Accordingly, as per Article 26.1 of the 2019 Draft Decree Detailing the LOCS, the Data Localization Regulation is now as follows:

- The Data Localization Regulation shall be applied to protect the national security, social order and safety, social ethics and community health only. Other cases are excluded.
- The Data Localization Regulation shall be applied when there is sufficient basis to determine the following three elements:

In other words, an enterprise will only be subject to the Data Localization Regulation when all of the aforementioned conditions are met.

The Data Localization Regulation will only be applied upon the request of the Minister of MPS. The 2019 Draft Decree Detailing the LOCS also sets out the period for enterprises to implement the Data Localization Regulation, which is six (6) months as from the date of a decision of the Minister of MPS according to Article 26.4(c) therein.

When all of the conditions for applying the Data Localization Regulation are met as mentioned above:

- Local enterprises are responsible for data storing; and
- Off-shore enterprises are responsible for data storing and establishing a branch or representative office in Vietnam.
- Types of information to be stored include: data on personal information of service users in Vietnam; data generated by service users in Vietnam; and data on the relationships of service users in Vietnam, including friends, and groups with which the user connects or interacts.
- Regarding the period that data must be stored and a branch or representative office maintained, please refer to the table below:

Subject to be governed	Period under the Draft Decree Detailing the LOCS
Data on personal information of service users in Vietnam	In accordance with the period of the storage request; At least 12 months
Data generated by service users in Vietnam	In accordance with the period of the storage request; At least 12 months
Data on the relationships of service users in Vietnam	In accordance with the period of the storage request; At least 12 months
Maintaining branch/representative office in Vietnam	From: the date of receiving request; To: the date enterprise no longer operates in Vietnam; or stipulated services are no longer provided in Vietnam
The system log for the purpose of investigating and processing breaches of the law on cybersecurity	Not exceed 12 months; At the request of the DOCS & HCP

Data Localization, An Update

Earlier this year, the Ministry of Public Security (MPS) disclosed to a meeting of interested chambers of commerce that the enforcement of the data localization rules of the LOCS will only be applied in certain circumstances. Namely, the MPS requires that should information posted on a website or app be on the list of prohibited content, and the service provider has received a request from the MPS or other authorities to remove the content, and the service provider fails to remove the content, then, and only then, will the MPS require the data localization occur.

While this is a nifty update, it is unofficial and made as a verbal statement during a meeting to discuss the draft decree. We have yet to see a specific regulation passed and promulgated which actually spells this detail out. However, when that occurs, we will update you accordingly. Until then, this is the best we're going to get as far as clarity on data localization.

Blockchain Fraud and Vietnam

(30 May 2022)

In a recent article in VN Express, the author discusses a recent trend in Vietnam for websites and apps to hop on the move 2 earn bandwagon in an effort to scam money from users before they are caught and shut down.

First off, move 2 earn is essentially a metaverse game in which users spend hundreds of dollars to buy an NFT pair of shoes, or a bike, or some other item that can link to sensors in the users phones. Then, when users run with their phones, they earn cryptocurrency for every kilometer that they move, thus move 2 earn.

In the predominant move 2 earn model, much like play 2 earn, there are two types of cryptocurrency involved with the application. The first is a utility currency which is what must be purchased in order to buy the shoes and which only high level runners who have been using the app for some time can access in their earnings. The second currency is a game currency which is what the game gives to users in exchange for movement.

Economics aside, the idea is that both cryptocurrencies are listed on crypto exchanges and thus can be exchanged for other cryptocurrencies or for actual fiat currency, thus earning the runners/ movers money for their movements.

In Vietnam, and apparently elsewhere, several small time players have initiated apps that mimic these move 2 earn models. Sites such as SexN or SleepN which purport to pay users in exchange for having sex or for simply sleeping. Who wouldn't want to play those games?

But just as quickly as a user is lured by the concept, they are ripped off. These sites have reportedly sold their NFT play things for hundreds of dollars, but don't have the same infrastructure as legitimate move 2 earn games. Instead, they are glorified Ponzi schemes wherein the first participants are paid from the joining fees of subsequent participants.

The metaverse, apparently, isn't free of con artists.

This is especially dangerous in Vietnam for two reasons. First, Vietnam is keen to adopt any new technology that might make money fast. It seems to be a national pastime, from lottery to cryptocurrency, if there's the hope of a big windfall, Viets tend to be on board for the long haul. Second, the government seems to be aware of this characteristic and, as it did with cryptocurrency, will act to protect its people against abuses.

These two combine to suggest that, if too many of these move 2 earn copycats develop in the Vietnamese metaverse, the government will move to not only shut them down, but to shut down all NFT apps, and could even extend such bans to blockchain applications as well.

As of this moment, the Vietnamese government is still keen on blockchain usage. They see it as a potentially useful and productive database technology that can assist in a number of different sectors. But the largest use to date of

blockchain is cryptocurrency, a technology that is currently not allowed to be used in Vietnam. The increasingly predominant technology after cryptocurrency is becoming NFTs which rely on the smart contracts built into Ethereum and other blockchains that allow for the unique signing of digital assets.

But that initial enthusiasm, which has yet to actually be codified in any regulations, could easily wane if the government sees blockchain abuses that harm its citizens. That would mean not only a loss of possibilities for Vietnam, but could potentially handicap Vietnam's digitalization efforts.

If the metaverse is going to come into existence globally and we'll all start living in a science fiction movie where we live through digital avatars and stay cocooned in our hidey-holes to avoid interaction with the real world, and this seems to increasingly seem likely, then Vietnam is going to want to be at the forefront of adoption.

Right now Southeast Asia is largely divided in its treatment of cryptocurrency and blockchain. Singapore and Malaysia allow it, Thailand, Vietnam, and others prohibit it. Vietnam has an opportunity to step into a position of leadership in digitalization and technological advancement by properly recognizing the potentialities of blockchain, move 2 earn, NFTs, and cryptocurrency.

But as I've said elsewhere, this requires a much more nimble regulatory process.

Right now a law goes through approximately a year of drafting before it is read at the national assembly in two consecutive assemblies before it is finally passed and promulgated. This multi-year process prevents the government from reacting to new technologies in a timely manner, leaving them to respond to years old technology that has moved beyond the drafted laws by the time it actually becomes law.

There have been some attempts at this with pilot schemes (see ride hailing and mobile money), but the regulatory sandbox that has been promised for nearly two years now remains mired in some kind of legislative muck. The prime minister has given an in principle approval but there has yet to be a pronouncement of any kind initiating the sandbox. This needs to change if Vietnam hopes to be able to take advantage of the technologies presenting themselves and to be able to deal with the efforts of both legitimate and criminal actors who seek to utilize them.

For we have seen with cryptocurrency the effectiveness of simply prohibiting its use. Vietnam ranks consistently as the global leader of cryptocurrency adoption despite the fact that the government has prohibited its use for legal tender. Vietnamese will flock to these new technologies as they do to any potentially profitable venture. It is better to be part of the movement with a reactive and advanced legislative procedure rather than waiting until problems emerge, prohibiting the technology, and seeing it adopted despite the ban.

Axie Infinity and Dispute Resolution

(13 June 2022)

This last week I gave a presentation for ASEAN Legal Alliance on NFTs, Axie Infinity, and the major problem digital assets present for national sovereigns. I've previously written in this space about the difficulty of the Metaverse being largely owned and operated by an American company. Citing the United States reaction to Chinese limitations to Facebook in order to protect their citizens from having their data collected by a foreign company in a country currently at odds with them. That Facebook and, by extension, the Metaverse collect more data on its users than any other social media provider and that doing so presents a very real risk to foreign governments who wish to protect the data of their citizens.

This problem of data privacy being controlled by a bully company in a bully country is only the beginning of the problem, especially for countries that may not be in the exact sphere of influence of the Western alliance. Let me explore the issues using Axie Infinity as a definite example for ease of discussion. (Also as a way to localize the problems to Vietnam and ASEAN.)

As I've written elsewhere, Axie Infinity is an NFT game using the play-to-pay model that has become increasingly popular over the last six months. Users buy NFT avatars, or Axies, for a given amount in order to play. This amount ranges in an amount just shy of one thousand dollars' worth of AXS, one of the games cryptocurrencies. With these Axies, users can then breed more Axies which they can sell, or battle other Axies to earn SLP, the game's other cryptocurrency. A player who spends several hours a day on the game can earn fifty to seventy dollars in a day in SLP.

Because the nature of the game play is time intensive, it is very attractive to users in developing countries where the average daily income is quite a bit less than the amount that can be earned through game play. But the cost of joining the game is sufficiently prohibitive that very few of these same players are able to afford the buy-in. This has given rise to a sponsorship situation where investors in wealthy countries sponsor a player in a developing country in exchange for a percentage of the user's daily earnings. This proved fruitful initially until it became obvious that the unlimited supply of SLP devalued the cryptocurrency and changes were required to make it more difficult to earn.

Another challenge of Axie Infinity arose when, a few months ago, North Korean hackers stole over 600 million dollars' worth of players' SLP from the game. Not only was this a blow to the game's reputation and the incomes of the users who struggled to make ends meet on their income from the game, but it also demonstrated the larger issue of lax cybersecurity in the blockchain (an issue I will address at a later date.)

All of this gives rise to a large number of potential disputes in relation to the game play and all if the ecosystem of relationships that arise therefrom.

First, the relationship between Sky Mavis, the holding company in Singapore that owns Axie Infinity and the founders who all live in Vietnam. Second, the relationship between Axie Infinity and its users. Third, the relationship between sponsors of the users and the users themselves. And finally, the relationship between all of these and foreign criminal actors like the North Korean hackers.

The first relationship, that between the founders as owners of Sky Mavis and the game of Axie Infinity stands on fairly well-developed corporate law grounds. In general, the founders are excluded from liability beyond their share of contributed capital to the company. Though that may be considerable given the fact that the founders have opened up new funding rounds in an effort to replace the stolen funds and to compensate users for their losses. As a result of such rounds, the founders will likely have to sacrifice a considerable portion of their remaining shares and, as such, their wealth in the value of the company.

But what about Axie Infinity and its users? A brief review of the game's terms and conditions reveals that users are automatically made subject to the same by the act of playing the game. The terms are governed by the laws of the Cayman Islands and dispute resolution is to be in the Cayman Islands using arbitration according to the American Arbitration Association's rules. This is simply bizarre. The Cayman Islands have no special claim to legislation that is particularly friendly to NFTs or cryptocurrency and aside from the assumption that Sky Mavis houses their bank accounts in the country there seems to be no other obvious connection. But assuming that users can go to the Caymans to resolve disputes, there remains the issue of who exactly is a user.

The Axie Infinity terms do not contemplate the sponsor/player relationship and it is unclear if there is a general relationship defined by either type of individual. A brief search some time ago revealed that players often post on Reddit or other messenger boards in search of sponsors. If this is generally the case, then the players are entering into ad hoc relationships with wealthy and sophisticated sponsors. It is likely that any contract is drafted by the sponsor and heavily biased in their favor. There is no existing body of law that governs such a relationship across country borders as it may or may not be seen as an employment relationship. If it is, then it remains unclear which country's laws would apply. If it isn't, then there is even less certainty other than simple laws of contracts, and the international law of contracts in services is much less developed than that for the sale of goods.

Regardless of who is in charge and who actually sustains the relationship as a user to Axie Infinity, there is also a major question posed by the theft by the North Korean hackers. The hackers stole the money from the game's Master e-wallets that was, apparently, held in trust for users until they cashed out. While it seems that Axie Infinity would have a case against the hackers should they ever be brought to justice, what about the users whose funds were actually stolen? And what about the sponsors? Does Axie Infinity or Sky Mavis hold the controlling interest in the funds? And how are blockchain thefts regulated?

The questions that digital assets and decentralized ledgers present are multi-faceted and cross-jurisdictional. Not only is it unclear what sovereign has the right to prosecute offenses or torts, but even in what jurisdiction such prosecution is to take place remains uncertain. There is no clear answer when there is no entity backing the asset, such as many cryptocurrencies which are completely decentralized and have no government or even corporation to support them. There is too much

that must be resolved that requires international cooperation that isn't happening in order to resolve the conflicts.

Apparently, the discussion of how these multi-jurisdictional conflicts is to be resolved I'd just beginning to take place, but these conversations are in the very beginning stages and have yet to reach the level of legislation or treaty negotiation. Let's hope that we can have more success resolving these issues than we have in saving the environment.

Draft Decree on Fintech Regulatory Sandbox

(20 June 2022)

A couple of months ago, the government of Vietnam issued a second draft decree on implementation of the regulatory sandbox for financial technologies (Fintech). We have been looking for this for a long time and, I'm ashamed to say it, I missed it when it first came through my inbox because I wasn't looking for it in Vietnamese. But this last week I saw a piece that referenced the draft decree and upon further investigation I got my hands on the thing.

As the final decree will govern the ultimate disposition of Fintech regulations, I thought I would spend a bit of time examining what is contained in the decree in anticipation of public comment and final acceptance.

To begin, the draft decree broadly applies to two types of technology:

1. Technologies used by Credit organizations that act as banks according to the Law on Credit Institutions.
2. Technologies developed in the banking sector by financial institutions independently developed.

While the draft applies to technology, there is a further restriction of which companies can participate in the sandbox, namely credit institutions and Fintech companies that receive authorization from the State Bank of Vietnam (SBV).

Financial technologies in the banking sector consist of innovative creations and current financial services on technology apps that apply in the banking sector.

Financial technology companies are organizations that are not credit institutions, branches of foreign banks with authorization to act in Vietnam, that independently provide Fintech or information cooperation with credit institutions or foreign banks that provide Fintech to the market.

If a company is an eligible company as defined, they must also demonstrate that they operate using one of the following technologies:

1. Providing credit on a technology platform;
2. Credit Scoring;
3. APIs;
4. P2P Lending;
5. Blocktain Technology or Distributed Ledger Technology; and
6. Any other technology that is in line with the goals of the sandbox.

Some definitions of eligible technologies:

- Peer-to-Peer Lending (P2P Lending) is defined as activities of giving loans using technology that is developed and occurs on Fintech apps from companies that make P2P Loans with the role of indirectly connecting lenders and borrowers.

- Application Programming Interface (API) is defined.

- Credit scoring is defined as the collection and analysis of information regarding the credit worthiness of individuals both real and corporate.

- Blockchain is defined.

The application of the sandbox is for specific purposes and the goals of the sandbox as listed in the draft decree include:

1. To promote innovative technology and modernize the technology used in the banking sector and provide citizens and corporations easy, transparent and low cost services.
2. To create an environment in which regulators can assign the risks, fees, and benefits of Fintech technology and to promote the progress and development of Fintech Technology according to the demands of the market.
3. To limit the risks that customers face in participating with Fintech technologies that have not yet been regulated by the laws of Vietnam.
4. To assist the regulatory authorities to create legislation and have the authority to create legal and managerial regulations for the Fintech.

The draft decree additionally sets out the procedure for applying to participate in the sandbox. And specifically, the conditions that must be met by prospective participants before they apply. These conditions include:

1. Being a company in the territory of Vietnam not in the process of restructuring, merger, division, etc. Not being in the categories of credit institutions governed as special cases under the law of credit institutions;
2. The legal representative and general manager must request the participation to assist with the development of the company's specialization in Fintech;
3. The technology used by the company meets the following conditions:

    i. It is not currently contemplated or in the process of being contemplated by any law or legal decree;
    ii. It creates added value or benefits the users of the service in Vietnam;
    iii. It was created with the intent to limit the risks to banks and banking activities;
    iv. It meets all the other requirements set out for participation in the sandbox;
    v. It is capable of being promoted to the market upon successful completion of its participation in the sandbox.

Participation in the sandbox is limited to a two year window, and should the regulations necessary to govern the participant's technology be promulgated prior to the expiration of that two years, then they will be asked to leave the sandbox and abide by the new legislation.

The draft decree then examines the process for P2P Lending institutions to participate before it moves to issues more relevant to the regulator, in this case the SBV, such as initiating the sandbox and terminating the sandbox. How participants can apply to extend the time of their participation in the sandbox. What constitutes evidence of completion of the sandbox. Etc.

In addition to the draft decree itself, there are several appendices which contain the forms for application and various tasks related to participation in the sandbox.

While it remains a draft, the decree on the Fintech regulatory sandbox does show that

someone in the government is keen to move forward with the sandbox. This is a good thing, though one could still wish for greater speed in its implementation. For Vietnam to remain competitive regionally in Fintech, it must come to terms with the rapidly changing technology and the need for quick and reactive legislation to govern it.

One hopes that, through the regulatory sandbox, the SBV will be able to meet the regulatory demands of the many companies who already provide services in this sector and do so without any appropriate legislation. With luck, we'll see this decree accepted by the government and promulgated within the next few months, but as with every piece of legislation in this country, we may yet be disappointed. Watch this space for more.

Challenges to a Global KYC Experience

(4 July 2022)

Know Your Customer ("**KYC**") is a major element of most countries' anti-money laundering legislation. Vietnam is no exception. It has developed a comprehensive set of KYC regulations and has even extended the process to allow for digital KYC confirmation.

And herein lies the problem. KYC relies on the cooperation of each country. Vietnam may have comprehensive KYC laws for its citizens, but a country like Laos or Cuba or some other lesser developed country might only have rudimentary legislation.

Take Laos PDR, for example. They have KYC legislation, they even have a single portal app for KYC confirmation (even though it doesn't work), but the information they require to confirm KYC is limited to the Identifications and details of its citizens. Non-residents cannot confirm KYC within the system.

And this is true of most KYC regimes.

Take Coinbase for instance, the largest cryptocurrency e-wallet. When I tried to sign up for an account it asked me to provide ID. I provided a United States passport, but because my IP address is registered in Vietnam, it would not accept that ID as valid because it did not match the types of ID provided by Vietnam's government. I would need to provide a CMND ID or a Vietnamese passport to satisfy Coinbase.

This is a problem.

If the world is going to continue to move towards an international community, then it needs to develop systems and regulations that can cover activities that reach beyond a country's borders. And these regulations need to have the ability to extend beyond the likes of the United States FATCA or the EU's GDPR.

As I've written about the Metaverse and recently about blockchains, technology is presenting a challenge to existing sovereignty as imagined by the leadership of traditional countries. It is only a matter of time before technology reaches a point where it becomes impossible to use existing forms of dispute resolution to resolve disputes between users and providers and between users and users.

Court jurisdiction is dependent on geographic boundaries. An act must have occurred within such boundary or have some legal link to that boundary in order for the court there to prosecute the law against the party who committed the act. Where does an avatar live? Where is the cadastral register of the Metaverse located? What if I live in Vietnam but control a website that is located in Canada?

And what if I live in Bali as a digital nomad? How am I supposed to meet Indonesian standards of KYC if I am not issued an Indonesian ID?

KYC, and NFTs, and digital assets exist in a world that has no borders, and trying to impose borders upon it is only going to create problems and difficulties that will develop as conflicts arise and solutions remain uncertain.

How does the Metaverse conduct KYC for users before they purchase meta property? I haven't spent any time in the Metaverse, but I imagine this would provide an excellent means for criminals to launder money through property investments in the digital realm. Especially because the Metaverse is owned by Facebook which is a United States company and can only perform KYC for United States citizens?

Without regulations that allow for multi-jurisdictional KYC, what is there to prevent criminals and terrorists from accessing huge amounts of property through shell companies? And who is qualified to make those regulations? Is the United States going to become the country who issues the rules for everyone else by default of the fact that Silicone Valley is located in that country?

Increasingly, I see the need for a new kind of digital regulation. A global cooperation that will provide for the possibilities of digital standards in KYC. There needs to be a single solution provided across jurisdictional boundaries that can be used for every transaction in any country.

Perhaps a single identification should be issued to global citizens. Create an organization that is capable of confirming identifications with each country's government and issuing a globally recognized ID that can be used for KYC purposes in the Metaverse and for other digital asset trading.

Such an entity might look similar to international government organizations currently in use, but it would also require a sacrifice of sovereignty on the part of world governments.

But so does every aspect of digital technology require such a sacrifice.

Since the dawn of humankind, man has fought over territory. Millions and billions have died over the millennia for the spread of empires and the aggrandizement of rulers. Are we to continue this bloody expansionism in the digital sphere or are we going to move beyond borders and create something new, something that has not been imagined by traditional thought?

How are we supposed to continue into a future that requires different methods of ruling with the traditional power rituals that have been around for centuries. It is only a matter of time before the situation arises where countries start attacking the Metaverse as an agent of the United States government and treating it as a data spy. And unless the current regime of dispute resolution, of KYC, and of digital governance is transformed, they will be justified in so doing.

It's time to change the traditional methods of government because we are seeing the creation of a challenge to existence at its traditional best. We need something more than national boundaries and jurisdictional disputes. We need something that will provide the means to separate KYC, the Metaverse, and the blockchain from the control of any given government.

What that looks like, ultimately, will need to be considered by thousands of people working in concert and may be difficult, but who said things worth doing should be easy.

AI and the Law in Vietnam

(11 July 2022)

I have spent so much time writing about data privacy and fintech regulations in Vietnam that I have forgotten to look at another technology that is vitally linked yet also distinct. That technology, artificial intelligence, is being used to understand and manipulate data and to produce interpretations and actions of smart contracts and companies.

According to dictionary.com, artificial intelligence is:

"the theory and development of computer systems able to perform tasks normally requiring human intelligence, such as visual perception, speech recognition, decision-making, and translation between languages".

This ability results largely from the use of large databases that can be used to train AI algorithms to learn how to interpret new data that it encounters. An example will help.

In Arizona, there is a small town in which Tesla has enacted tests for its AI driverless vehicles. So far, only one major incident has occurred in which a woman was killed by a car. What happened, according to Neil deGrasse Tyson, is that the AI of the vehicle had been trained to recognize pedestrians, and had been trained to recognize bicycles, but when it encountered a woman pushing a bicycle it was left without the proper training and safety defaults did not yet exist. It got confused and surged forward, killing the woman pushing the bike.

The limitations of AI are also worth exploring, though I may save that for another post. For now, it is only necessary to understand that AI requires absolutely staggering amounts of data in order for it to conduct the machine learning necessary to interact with novel situations. And so far, only a few organizations have the data necessary to complete such training. In Vietnam, too, even fewer organizations possess sufficient data. And even if they are blessed with sufficient data, the way they use the data under current regulations is unclear.

As of this moment, the draft decree on personal data protection remains a draft. The Government has yet to approve or issue the draft. Not surprising given the fact that the term for gathering public comment expired only at the beginning of this year. But that said, one has to consider two different regimes of law in order to understand what must be done to comply with Vietnamese law on the subject.

The first, and at the moment most important, data regime is the existing regulations ensconced in the Network Information Security Law and its minimal treatment of personal data. According to the few articles in the law that govern personal data protection, there are a couple of provisions of note.

Organizations or individuals who seek to collect and use the personal data of individuals in Vietnam must first obtain the consent of those individuals. That consent may be rescinded at any moment. In addition, should the individual whose data is under question requests amendment, update, or deletion of that data then the collector of such information must comply with such request. Finally, any organization or individual seeking to share the information of a data subject must first obtain

the consent of such subject.

Most of these regulations may be resolved by a well drafted privacy policy and terms and conditions (at least for companies operating in the telecommunications and internet spheres). But very few companies in Vietnam who possess enough data to be able to train AI are actually seeking to utilize AI. The majority of AI activity is currently in the startup sector and requires the collection of data from third parties or larger organizations. This invokes the concept of data sharing, a concept not contemplated by the Network Information Security Law.

Two draft decrees, however, do contemplate this concept, the draft decree for personal data protection and the draft decree on fintech sandbox.

The first of these two draft decrees contemplates data shared for research purposes, a new concept under Vietnamese law and one that would lend itself to the development of AI much more readily than existing regulation. Under this draft, data used for the purpose of research must go through a scrubbing process that removes any data that may be able to identify the data owner before sharing the data with a third party. Data collectors must also ensure that the data owner is apprised of the fact that their data may be shared for research in their privacy policies or terms and conditions.

The second draft decree indirectly considers the sharing of data, though primarily through third party providers who are not allowed to amend or change the data while it is in their possession. These are called Application Programming Interfaces and are little more than facilitators for the transferring of data from one party to another. This allows data collectors to transfer data to another party (for reasons stipulated in the privacy policies and terms and conditions only) via the API.

A third draft decree that should consider AI, but doesn't, is the draft decree on e-transactions. None of these recent drafts consider the regulation of AI, not even the draft decree on fintech sandbox. This failure on the part of the government to move forward with up-to-date regulations governing new technologies will only dampen the motivation and de-incentivize founders and startups from operating in the Vietnamese domain.

What the government needs to do, in addition to implementing the draft decrees already shared for public comment, is to develop a method for accelerating the passage of technology related legislation. As it is, a law takes at least a year from initial concept to passage by the National Assembly, and the government seems hardly faster with years passing between concept and promulgation. This is a serious problem given the fact that technology is advancing much more rapidly. Until Vietnam can create a method for regulating technology in near real time, they will fail in their efforts to be a lure for high-tech startups and founders. They will remain the new world factory and never reach the next step.

Some Issues of Data Protection in International Websites

(18 July 2022)

In last week's Economist there featured an article about the Chinese founded app TikTok. As the article was written with an America aligned editorial policy it took a warning stance suggesting that even though ByteDance, the holding company that owns TikTok is domiciled in the Cayman Islands, the ultimate beneficial owners remain it's Chinese founders.

The Economist pointed out that, in addition to the ability of the Chinese Government to influence content posted on the app through censorship and strong arm tactics, they may also be able to access private data connected to users.

According to the article, China has an existing legal policy that gives the government the right to access all data collected by Chinese companies, even if that data is hosted offshore. And this, for a western economy, promotes fear and caution more so than the possibility of the Chinese government controlling editorial content through propaganda or spam based content.

While Vietnam goes out of its way to keep a cultural and policy separation between itself and China, it remains associated with China from its geographical proximity and single party governance. And through that association one can easily forecast the future challenges that Vietnamese companies may face as they reach a critical point of global adoption and, more specifically western countries.

Even Axie Infinity, the largest and most successful effort to date by Vietnamese founders. But the question of whether Vietnam can access the various data collected by Axie Infinity from its users is both legislatively and practically difficult to answer.

Axie Infinity is owned by a Singapore holding company called Sky Mavis. Its dispute resolution is arbitration in the Cayman Islands, yet its data is stored in the United States. This gives rise to a few questions.

First, there has been little to no data privacy legislation passed by the federal congress. The data protection laws that do exist have been passed by individual states so it is difficult to determine what law would apply to the data collected by Axie Infinity. It is likely, however, that data stored in the United States will be subject to search and seizure by the authorities if they have obtained a properly legalized search warrant. This means that data collected on users in Vietnam, the Philippines or any third country would subsequently be accessible by the authorities in the United States. Thus creates a major vulnerability for developing-world users living in countries that may have minimal protections for their citizens' data.

Second, what other countries might be able to access the data stored in the United States? The Cayman Islands, where Axie Infinity is domiciled? Singapore, where Sky Mavis is domiciled? Or the countries in which the data subjects live? And by a simple extension of such a question, what countries' governments can request access to that information through

either legitimate searches or through fiat demands of such data?

Third, as a resident of Vietnam which is currently considering the passage of more extensive data protection regulations, what rights do they retain in the data collected on foreign individuals?

I use Vietnam, here, as an example fir there is little privacy between the founders and Axie itself as the corporation exists in Singapore. But the concept remains whether the country in question is Singapore or Vietnam. Ultimately, the answer turns on whether the data protection laws in existence in that country allow for data sharing of all users or only users domiciled within that country's boundaries?

In China, it does. And previously in Vietnam there has been no such power granted to the Ministry of Public Safety. And a review of the second draft personal data protection decree fails to clarify this question. We must therefore turn to the Cybersecurity Law which requires the localization of all data collected about Vietnamese citizens within Vietnam. A draft decree softens this requirement somewhat, and oral statements from the Ministry of Public Safety reveals that they only enforce this regulation based on the failure to remove information at the request of the authorities. But even this is not an answer.

It would seem, therefore, that Vietnam's leaders have not imagined the situation in which a Vietnamese internet company becomes popular enough that it's treatment of such foreigner's data remains unregulated and unrecognized. I suspect that the National Assembly or the government will realize all too soon that they are sitting on a treasure trace of data that could give them a greater understanding of foreign habits and information.

Another option that the government may take is to require foreign internet services who collect data in Vietnam to submit to requests by the Vietnamese authorities to hand over the data collected by them about Vietnamese citizens. Already, they have given warning that they can shut down given domains from accessing Vietnam if they find a company to be uncooperative.

But to date, the National Assembly has not seen fit to draft laws which could great expand Vietnamese' regulators access to data that is currently collected by foreign internet companies.

New Thoughts on Blockchain

(8 August 2022)

For the first time in a while, I find myself somewhat unprepared for Monday. As such, I want to review some of the thoughts I've had lately on technology, Vietnam, and the law.

Crypto Thefts and Implications

This weekend the web was a buzz with news of the theft of nearly 200 million dollars in Bitcoin. I was also informed by an article on the topic that served to explain some areas of the technology that I had yet to fully comprehend and that acted to lead my thoughts in a new direction regarding cryptocurrency.

E-wallet Thefts

From the very beginning, blockchain was designed in such a way as to decentralize banking, but in so doing it also created a very large loophole in its programing, the wallet in which the cryptocurrency registration code was stored.

Now blockchain, and Bitcoin, first hit the scene as an answer to centralized banking. What would happen if we could create a secure, decentralized ledger that would allow everyone to check the legitimacy of every transaction while at the same time preventing anyone from identifying anyone else in the ledger.

And then some guy with a Japanese sounding name (or maybe it was many guys and a few ladies as well) released the bitcoin cryptocurrency utilizing blockchain. In the beginning users had a few options for securing their transactions by using a unique code that would identify them to the blockchain and allow them to transfer money or take other actions beyond simply keeping accrued funds in one place on the ledger.

The choices were simple, you use an e-wallet, you secure the code for your transaction on your own ledger/computer/whatever, or you print out the code and secure it in your own safe along with your gold jewelry bearer bonds and whatever else you find most precious.

After some major losses to private holders, the idea of keeping the code to access transactions fell out of favor and was largely replaced by what have since been named e-wallets. These involved a digital venue for securing your blockchain identification. These also have become the largest weak link of the entire blockchain experiment.

A few months ago Axie Infinity last over 600 million USD. Now Solana has reported approximately 200 million USD stolen from e-wallets. Almost every big theft in the last year or two has involved weaknesses in the e-wallets, not the blockchain.

And that is, ultimately, the weakness. Well, one of the weaknesses, of distributed ledger technology. Similarly to NFTs, there is nobody in existence to certify the reliability of an e-wallet. Blockchain may present itself trustworthy of users, but absent policy regarding blockchain and the role of e-wallet providers as potentially credit or finance

organizations, there is no one but themselves conducting significant self-aggrandizement.

I do not possess enough knowledge to provide a review of a company like BlockChain, but there is a huge information bias between the user and the provider. And who can certify companies as capable of trustworthiness in a global market that is not confined to American users but is an international organization. Yet once more, we come up against the need for international forms of regulations and the creation of new, digital inspectors.

Blockchain's Potential versus It's Negative Implications

When I read through the above LinkedIn article, I had a sudden clarity of one part of the concept I haven't had a grasp of to date. And this, unfortunately, is a major element of the Blockchain. It is the very central idea behind blockchain. With each block in the chain able to bear its own information or smart contracts and each block can be doubly compressed into chains, there is huge potential for usage in myriad industries.

Previously, I thought that blockchain was rather silly, a waste of time and money, a gimmick to get fools to buy into a Ponzi scheme. (My opinion on cryptocurrency remains largely unchanged). What has changed is my respect for the Blockchain technology. That is capable of such massive amounts of compression of data is huge.

What is silly is proof of work–other process of each miner to compile and compress the information that will be added as a new block in the chain. While it allows for the decentralization and massive scale of global currencies, it is intended use is frivolous and fictitious. But that requirement is avoided by is a silly way to waste lots of energy in decoding information that can more efficiently be stored and updated on a limited number of server. Proof of stake, on the other hand, allows for a centralized system to assign access to the compressed chain and have the ability to add additional blocks that will act as permanent pieces of the chain. And with that in mind, there is a great deal of good that blockchain can do beyond cryptocurrencies.

Legislating the Metaverse in ASEAN

(15 August 2022)

The Metaverse is a projected new technology that will be used to connect users all across the globe and will involve both virtual reality, social media, and traditional technologies. The Metaverse has largely been promoted by Facebook's parent company Meta, but that, according to Meta President of Global Affairs Nick Clegg, does not mean that Meta is the founder of the metaverse. In an interview at the 2022 CEO Summit of the Americas, Clegg suggested two important elements for the future of the metaverse.

First, Clegg admitted that Meta may be taking a lead in developing the metaverse, but if it is to truly become a global phenomenon with the ability to connect people from every country, it will need to avoid becoming a silo-ed entity. Everyone, Clegg suggested, needs to be involved in building the metaverse, not just Meta. He suggested that the metaverse should be developed along similar models as the internet, which he said was developed collaboratively by numerous companies.

Second, Clegg proposes that the development of the metaverse may have begun, but just like the internet it will require ten to fifteen years before it is fully developed and truly able to connect users globally. Because of this lead time, he thinks it is possible for sovereign nations to build legal safety rails, or buffers, that will contain behaviour on the metaverse. Governments can look at the metaverse as it is envisioned now, and develop the full legal regimes to govern, protect, and tax actions on the metaverse.

As a lawyer in Southeast Asia, I have seen the beginnings of Web 3.0 in a few startups. Increasingly ASEAN companies are seeking to move into the newly available spaces of the metaverse. So far, these enterprises rely on traditional contracts and dispute resolution, but there may be other ways to move forward. The rest of this article examines the growth of the metaverse in ASEAN and the road towards creating regulation and dispute resolution procedures compatible with the new technologies extant in the projected digital world.

ASEAN and the Metaverse

To start, I want to look at the leading companies in metaverse technology in SE Asia. Tech Collective has compiled a brief overview of companies that have already reached unicorn status in SE Asian and have elements that take part in the metaverse:

- First, the article suggests that Axie Infinity acts as a web 3.0 company as it uses virtual avatars, Axies, for playing the game using purchased or "bred" NFTs that can be used in contests or in various other aspects (I have discussed Axie Infinity most recently in "Blockchain Hacks and Axie Infinity", "Axie Infinity and Dispute Resolution", and "Axie Infinity Redux").
- Second, SHR Ring from Thailand has developed a secure record keeping blockchain that is secure and able to share records using smart contracts between parties.

- Third, BuzzAR is a Singapore based augmented reality company that is seeking to connect users to interact with the real world using avatars and photo editors and includes daily activities through which users can not only interact, but earn as well.
- Fourth and finally, MetaDhana is a company seeking to create an entirely AI run metaverse which will operate using a native token, fighting games, NFT art and numerous other features.

While the metaverse may be expanding, and the number of startups growing exponentially across the globe, one is wont to link developments by region. The EU, for example, has promulgated its own data privacy regulations, technology laws, IP rules. And perhaps next after the EU, ASEAN is the closest thing to a cohesive alliance of nations in the world. While the EU has yet to decide how it is going to treat the metaverse in its regulatory schema, ASEAN is in a position to lead the way towards a regional network of regulations that will govern the metaverse within its boundaries.

Regulating the Metaverse

The metaverse will need regulation, there is no question. We cannot rely on Mark Zuckerberg and Elon Musk to create a coherent and meaningful environment that will protect vulnerable users and prevent egregious financial crimes. In an article, Martin Boyd, President, Banking Solutions-FSI, discussed a few of the real world dangers of the potentialities of the metaverse. He also discusses three steps that can be implemented now to prepare for the very real challenges that the VR metaverse will present.

First, he suggests that the metaverse set standards for financial transactions, including Know Your Customer (KYC) standards that will officially link real world users to their avatars or properties in the metaverse. This will help avoid money laundering and also act to certify the authenticity of NFT issuances. (I wrote about KYC in Vietnam most recently in "**Banker's KYC in Vietnam**").

Second, he suggests implementing financial best practices. This will include setting rules for exchange rates between stable coins and unattached crypto, providing real world collateral for transactions involving major debt in the metaverse, and other technologies that already exist in the physical financial systems can be applied to the metaverse.

Third, he suggests that there should be either a voluntary or compulsory rating service that will act similarly to a credit rating service in combination with a content age rating service. This will help consumers to know what venues are safe, what venues should be off limits to children.

This is only a brief overview of some of the potential dangers of a metaverse. When Neal Stevenson proposed the concept in his 1982 novel Snow Crash, the technology to live in a digital world was a long way off. But in that time the internet 1.0 and 2.0 have passed. The internet of things and smartphones and optical networks have proliferated. AI, virtual reality, and augmented reality are becoming consistently more robust and capable of reaching the heights imagined by science fiction authors for years. It is nearly impossible to imagine all of the crimes that may arise in this new space, but in addition to proactively drafting regulation to, as Boyd said, "guard rail", the metaverse, we must consider how disputes will be resolved in a regional or global web 3.0.

Dispute Resolution in the Metaverse

Ekaterina Oger Grivnova in a post on Delos Dispute Resolution last month discusses some of the possible implications of dispute resolution in the metaverse. While she offers several issues, I want to paraphrase her suggestions of three possible ways to move forward with dispute resolution in a metaverse where jurisdictions may not matter and where it may even be difficult to identify the parties to a given dispute.

- **Traditional Dispute Resolution.** She suggests that the traditional means of dispute resolution that are currently in existence will face difficulty in adapting to the rules of the metaverse. From questions of venue and identity, there also remain questions of enforcement and trust in the process. In order for these processes to remain, they must be quickly resolved with a minimum of human interference and a minimization of bias in awards.
- **Hybrid Dispute Resolution.** She suggests that disputants may choose to identify universal practices and international rules to potential disputes rather than specific sovereign nations' laws which may be inappropriate for use in the metaverse. She also thinks that there may be room for real world injunctions of metaversal crimes, such as freezing bank accounts or seizing property. As for enforcement, they may continue to impose limitations on losing parties' actions in the metaverse to encourage compliance with a judgement or award.
- **Decentralized Dispute Resolution.** In this instance, dispute resolution is performed by decentralized decision makers, perhaps from a pool of qualified and randomly selected arbitrators. The resolution involves on-chain enforcement in which both parties contribute funds to a block on the chain which hosts a smart contract which will disburse funds automatically upon the arbitration panel's entry of an award.

These approaches may well result in actual dispute resolution routes on the metaverse, but it is a long way from transitioning from nation-state sovereignty to a multi-regional or global venue which may be accessed from any point around the world. And not all disputes lend themselves to arbitration. Criminal acts and some torts will require some semblance of a judiciary who is capable of understanding the technologies that comprise the metaverse and are able to synthesize the multi-jurisdictional elements present in a digital space.

Decentralized Dispute Resolution in ASEAN

In ASEAN, a host of developers and founders are seeking to take advantage of web 3.0 and the metaverse. With companies already providing some metaversal activities, it is only a matter of time before irremediable disputes arise for which the stated rules of given terms and conditions will be insufficient to provide dispute resolution. What, then, is left?

While Glegg suggests that the silo-ization of the metaverse should be avoided, it is highly unlikely that sovereign nations will be willing to give up their abilities to regulate and tax transactions on the metaverse. Given that fact, and the performance of existing metaversal entities, it would seem that a regional structure for dispute resolution would be the ideal. ASEAN already has several treaties in effect to govern relations between member states and many of the member countries have their own national alternative dispute resolution panels.

What is needed, whether nationally or regionally, is a codification of decentralized dispute resolution rules and a platform that will include the qualities that Grivnova

suggests. This will involve not only lawyers, but programmers and app developers. It will be a multi-variate process, but it is likely the best way to move forward in protecting users on the metaverse. At least, looking to some form of dispute resolution, will be a beginning. How criminals will be caught, prosecuted, and punished remains.

A Modest Proposal

(22 August 2022)

Many professions maintain a code of conduct. Doctors must swear by the Hippocratic oath. Lawyers must uphold their jurisdiction's ethics rules. Politicians and military often swear to uphold the constitutional documents of their country. Even Starbuck's baristas must abide my health and safety regulations. There are rules for almost every field, but not quite all fields.

As a lawyer, I must maintain high standards of ethics, but when our firm deals with intellectual property (IP) we interact with a sector which is ill served by ethics or codes of conducts: the creation of intellectual property.

This is perhaps best noted, and frequently, by an examination of an example from the United States. During World War II, the Manhattan Project in New Mexico researched, developed, and assisted in the use of the first atomic bomb. While obviously a weapon, its creators, like J. Robert Oppenheimer who directed the project, later experienced intense doubt about the purpose for which their invention had been used.

"I have become death, the destroyer of worlds," a famously cited line from India's Bhagavad-Ghita, reflected Oppenheimer's severe concern that he had brought a terrible evil into the world. Often, scientists have faced this dilemma, whether to pursue their ideas which may be used to commit violence or terror, or to seek some other, safer avenue of pursuit that will not be so attractive to those who would use them for ill.

In an article published in the most recent edition of the magazine wired, Jackie Snow relates the efforts of a Native American named Amelia Winger-Bearskin to address this issue in one specific sector of the scientific community: software development.

Programmers create code in various computer languages and for various reasons. Oftentimes previously created code is copied and pasted to achieve the purposes of a programmer without having to laboriously recreate that code. Some of the oldest computer languages such as Unix and C++ have a potential database of existing code that stretches for decades. And many programs and systems today make use of that code.

But there is no extant ethical code of conduct for computer programmers, no way for them to monitor the use of their code after it has left their hard drive. This is especially true of programmers who have signed IP use agreements with their employers. These IP use agreements are often very one sided and allow the companies to own the IP created by their employees, thus removing any possible limitations on the use of the IP by its creators.

This is very much the situation in the United States and other jurisdictions where software code can be copyrighted. This means that the coder is creating a work for hire, and they cannot exercise ethical control over the code's use.

Despite its absence, Winger-Bearskin suggests that there should be. She offers a model that may lend itself to the creation of an opportunity for coders to, at a minimum, indicate their desires regarding the code they create.

Her model is akin to the readme files that developed early in programming's history to provide users with a guide for the use of the software as well as some of the purposes of specific code language. Winger-Bearskin suggests such an attachment could be included with software code to reflect the preferred uses as desired by the coder. This would allow coders to express whether they want their code to be used for government purposes, weapons development, or other purposes entirely.

While such an addition is not necessarily a code of conduct, it would provide coders to give their input into the use and abuse of their code. The problem is, however, that a readme file filled with ethical guidance from the coder would have no enforceable prohibitions on the coder's employer or others who gain access to the code. Nor would it act as an industry wide governance that all coders could apply to their programs. Without developing such a code, Winger-Bearskin's idea will bear few teeth.

However, an unrelated development might offer some form of enforcement for a coder's ethical interests.

As I've discussed (see "Blockchains in Vietnam"), smart contracts are contracts embedded into blocks of a chain, usually Ethereum, that will, upon the performance of a specific action, perform the counterparty's responsibility automatically. A common example is a vending machine. The offer comes from the owner of the vending machine in the cost listed for the soda or snack. It is accepted when the buyer inserts payment into the machine. And without any further human interference, the soda or snack is delivered, thus concluding the contract.

In theory, programming code could be dumped onto a block with the readme file available as a definition of offer, similarly to an NFT. A smart contract would then require the prospective user to make a legally binding commitment that they will abide by the readme's contents. Once that acceptance is granted, the buyer would then automatically receive the code for use. This would also allow for the inclusion of fees for purchase.

Such a system would create a new gig-economy for software programmers and allow them to have greater control over the use of their code. It may not be perfect, but it might be a way for programmers to remove themselves from the tyranny of work-for-hire contracts that prevent them from otherwise gaining from their intellectual property.

Impacts of Vietnam's New Data Localization Decree

(12 September 2022)

Last week, I posted our firm's coverage of the new decree for implementation of the law on Cybersecurity in Vietnam (the "**Decree**"). This week I want to look at some of the effects this will have on enterprises doing business in Vietnam. As a base definition, data localization roughly means a requirement that data collected from the residents of a certain location remain within that location. In this case, a national jurisdiction.

Starting at the macro level, and according to Wikipedia (here), there are a baker's dozen of countries that impose some form of data localization regulations. They include:

1. Australia
2. Canada (certain provinces)
3. China
4. Germany
5. India
6. Indonesia
7. Kazakhstan
8. Nigeria
9. Russia
10. Rwanda
11. South Korea
12. Spain
13. Vietnam

The European Union has contemplated rules to limit member states from implementing data localization protocols as a protectionist policy that would hinder the economic development of the EU. This gives rise to the observation that, in the CPTPP, RCEP, and the EVFTA, Vietnam has agreed to reduce non-tariff obstacles to investment and trade. As the data localization requirement in Vietnam is so recent, there has yet to be an opportunity for treaty partners to weigh in with their responses. However, it is conceivable that data localization will be seen as a hindrance to investment and give rise to application of dispute resolution measures.

The consequences here could be much larger than Vietnam's government contemplated. The data localization requirement automatically applies to Vietnamese enterprises. Vietnamese enterprises which are broadly defined to include *"enterprises that are established or registered for establishment according to the laws of Vietnam and that have their head office in Vietnam"*. For a head office to be considered as located in Vietnam, it must have an address for the purposes of contact, confirmation from the relevant administrative unit, and maintains a phone number, fax number, or email (if any).

Application of the data localization requirements might be applicable to foreign companies incorporated within Vietnam as incorporation requires the operation of a head office in the country. This would appear to include joint ventures and even 100% wholly foreign owned enterprises that are incorporated according to the 2020 Enterprise Law. Herein lies the biggest obstacle from the Decree.

Internationally linked enterprises currently in Vietnam constitute a major contribution to the country's economy. And many of these companies operate continuing data transfers

across their international footprint. Take for instance, international law firms or banks. They regularly communicate data regarding clients and activities cross border. From its definition, they are likely now required to cease such activities and hold specific types of data in situ.

In review, the types of data that must be localized includes: (i) personal information of service users in Vietnam; (ii) data generated by service users in Vietnam; and (iii) data regarding the relationships of service users in Vietnam. This means that any enterprise in Vietnam possessed of an enterprise registration certificate will not be allowed to transfer these types of data, regardless of their previous policies regarding data sharing. And the time left to comply is less than three weeks until the Decree comes into effect, a very large task awaits.

Compliance is easier for cross-border providers.

The application of the data localization on "foreign enterprises" includes those enterprises that are incorporated under a foreign nation's laws. Even then, not every foreign enterprise offering cross border services is required to comply. The business sectors in which the foreign enterprise acts and that give rise to application of the data localization requirements include:

(i) telecom services; (ii) services of data storage and sharing in cyberspace (cloud storage); (iii) supply of national or international domain names to service users in Vietnam; (iv) e-commerce; (v) online payment; (vi) intermediary payment; (vii) service of transport connection via cyberspace; (viii) social networking and social media; (ix) online electronic games; and (x) services of providing, managing, or operating other information in cyberspace in the form of messages, phone calls, video calls, email, or online chat.

From a review of these sectors, there is a definite theme, telecommunications and internet-based services dominate the list. Traditional hard assets or trade goods delivered through brick-and-mortar stores or freight transport may, according to relevant trade agreements, be provided cross border and will not need to comply with the data localization requirement. Nor, in fact, will most foreign enterprises be providing digital services to Vietnam. A good thing as the list encircles huge MNCs like Google, Meta, AirBNB, Paypal, Visa, and a host of others. So long as enterprises cooperate with the authorities of Vietnam, they will escape the data localization requirements. In addition to being included in the list of sectors to which the requirements apply, such services must be used to violate Vietnam's cybersecurity law in order to trigger the data localization requirements.

The following is a sample of the potential violations of the cybersecurity law which would trigger the data localization requirements. This list is not complete as there are several pages, but demonstrative.

1. Information in cyberspace with contents being propaganda against the Socialist Republic of Vietnam comprises:

    (i) Distortion or defamation of the people's administrative authorities;
    (ii) Psychological warfare, inciting an invasive war; causing division or hatred between [Vietnamese] ethnic groups, religions and people of all countries;
    (iii) Insulting the [Vietnamese] people, the national flag, national emblem, national anthem, great men, leaders, famous people or national heroes.

2. Information in cyberspace with contents inciting riots, disrupting security or

causing public disorder comprises:

(i) Calling for, mobilizing, instigating, threatening or causing division, conducting armed activities or using violence to oppose the people's administrative authorities;
(ii) Calling for, mobilizing, inciting, threatening, or embroiling a mass/crowd of people to disrupt or oppose people [officials] conducting their official duties, or obstructing the activities of agencies or organizations causing instability to security and order.

3. Information in cyberspace which causes embarrassment, or which is slanderous comprises:

(i) Serious infringement of the honor, reputation/prestige or dignity of other people; and
(ii) Invented or untruthful information infringing the honor, reputation or dignity of other agencies, organizations or individuals or causing loss and damage to their lawful rights and interests.

4. Information in cyberspace which violates economic management order comprises:

(i) Invented or untruthful information about products, goods, money, bonds, bills, cheques, and other valuable papers; and
(ii) Invented or untruthful information in the sectors of finance, banking, e-commerce, e-payment, currency trading, capital mobilization, multi-level trading and securities.

5. Information in cyberspace with invented or untruthful contents causing confusion amongst the Citizens, causing loss and damage to socio-economic activities, causing difficulties for the activities of State agencies or people performing their public duties [or] infringing the lawful rights and interests of other agencies, organizations, and individuals.

One more requirement exists before the foreign enterprise providing cross border services will be required to localize data and maintain a local presence via a branch or representative office in the country. That requirement is that, upon information and request of the relevant department under the Ministry of Public Security, the foreign enterprise failed to comply, failed to fully comply, or otherwise challenges any method of dealing with the breach recommended by the cybersecurity task force.

That's it. But it does greatly extend Vietnam's control of data originating in the country. I am wary to point to any example from the twelve other countries who enforce data localization requirements, but it does smell a bit of an attempt to limit certain information critical of Vietnam from appearing on the Vietnamese inter webs. It also may be a step in the government's ongoing efforts to impose tax duties on large international telecommunications and internet service providers who have a major role in advertising cross border into Vietnam.

One other point, if a foreign enterprise falls within all three of the requirements listed above and are required to localize their data and incorporate a presence in the country, they will have 12 months from the receipt of such enforcement notice to comply. A bit more 1984 than Brave New World, but still a large step for a country on its way to becoming an emerging market.

Data Privacy and Vietnam's Government, Some Questions

(21 September 2022)

According to Vietnam Plus yesterday, Ho Chi Minh City authorities are hopeful that their gross regional domestic process will be composed 25% of the digital economy. The plans are ambitious.

Accordingly, attention will be paid to raising public awareness of digital transformation; organizing the implementation of digital transformation tasks and building digital government; and integrating and effectively exploiting data to serve the fight against COVID-19 pandemic, socio-economic recovery and development, and modern-oriented governance.

Specific action programs will be mapped out and implemented, while the application of information technology will be accelerated across fields in association with ensuring information security and safety in building digital government, economy and society.

Investments will be strongly poured into human resources development, focusing on training and fostering cadres, civil servants and public employees.

The directive was issued by the standing board of the municipal party committee. As with most directives from party folks, the three paragraphs above comprise the main gist of the thing. and for those familiar with the data protection issues, it is cause for concern. See this: "Attention will be paid [to] effectively exploiting data to serve the fight against Covid-19 pandemic, socio-economic recovery and development, and modern oriented governance."

Without a proper understanding of what the government intends to do regarding the protection of personal data of its citizens as the draft decree on personal data protection is still gestating in Hanoi, one must contemplate what powers the government of Ho Chi Minh City will obtain in its efforts to comply.

Existing data protection laws in Vietnam are primarily founded on the requirement that the data collector/user get the permission of the data subject prior to its disclosure, transfer, or other use. And while this is somewhat carried through into the draft decree, the role of the government as a data collector is ill defined. One thing that is clear, government authorities may request access to collected data. The instances when the collection of data collected by corporate providers can be obtained by the government are not well set out. And what role the government plays in actually collecting its own data on citizens? Well. Me oh my.

The boost in digital economy from (an estimated 14% of GRDP in 2022 to 25% in 2025) will not only give rise to situations in which the government will want access to data from corporates, but it will also provide myriad types of data that the government can collect and

collate and analyze and transfer and abuse.

This gives rise to the famous question of who watches the watchmen?

- Human resources development and tracking;
- Public health information;
- Information regarding the movement of peoples;
- Utilities consumption;
- Economic status;
- Relationship data;
- Identification details;
- Financial movement;
- Online activity;
- Life-rhythms details (sleep, eat, drink).

Off the top of my head, there are ten potential categories of data that the government could collect on its citizens. And in most of those cases, they will not have to notify the data subjects of the fact, or the final disposition of, that data.

There are benefits. Analysis of traffic flows can lead to changes that will reduce gridlock and traffic jams in the urban center. Public health information will allow authorities to determine the best approach to react to threats like Covid-19 and monkeypox. General statistical information can be generated on demographics and wealth flows. There are many benefits to the collection of data, but with the development of AI and its implicit bias, one has to wonder in what position is a citizen in relation to its government in the collection and use of personal data?

To date, the most visible response by world governments is to act as a watch dog. They pass legislation and implement policing that will prevent the abuse of the personal data of their citizens by bad actors (EU, California). But there are also instances where the government has sought to utilize data on its citizens in nefarious and questionable ways (Xin Jiang, Egypt, North Korea). Between these two extremes is a spectrum of different approaches. In Vietnam, as seen in the new Decree on Cybersecurity issued last month, the government demonstrates a degree of protectiveness over its citizens in the requirement of retaining local data within the geographical territory of the country. This has made them one of only a handful of countries to do so. But to what end?

While I don't want to write a dystopian missive in this post, the digitalization of the economy and the move towards adoption of the internet of things, AI, blockchain and the metaverse can't fail but to strike a discordant note. In many instances, the collection of data for use by the authorities is legitimate and necessary. But there reaches a point where the intrusion into a citizen's privacy may cross the line of acceptability.

It's a conundrum stretching back decades when science fiction authors sold their imaginations on paper as they described societies in which government observation and intrusion into individuals' lives exceeded all reason. I feel fairly confident that Vietnam will not walk down that path. Why?

Vietnam has already gone down that road and found it didn't work. With Doi Moi and the gradual opening of the country's economy (including the drafting and promulgation of thousands of regulations) Vietnam has seen the benefits of living as a global citizen rather than as one isolated by ideology. FDI, cross-border trade, gigantic trade inequities that scale in Vietnam's favor, the recent hints towards easing up on certain minority groups (see the announcement that LGBT peoples are not sick), and a dozen more instances of progress both economically and socially have shown Vietnam that if it wishes to continue this forward

momentum it must walk a thin line between data oppression and data liberty.

Since the second half of the 2020s, Vietnam has seen major GDP growth. With the inevitable digitalization of the world, and Vietnam's economy, it does need to address these issues. What will the government be allowed to do in collecting and using its citizens' data? Will that data be used for the betterment of the population or of the politicians and the wealthy who are in a position to enter into agreements that may involve data sharing? What recourse will a citizen have if the use of his data by the government causes him, or others, harm?

It will be interesting to see the final version of the decree on personal data protection and hopefully gain a greater understanding of the government's relationship with its citizens regarding their personal data.

Protecting Vietnamese Crypto Organizations from Unwieldy Regulation

(3 October 2022)

For over ten years now blockchain technologies have largely been focused on cryptocurrencies and attempts to raise the popularity of the underlying technology. In Vietnam, early incidents involving Ponzi schemes and fraudulent investments led the bank of Vietnam to declare that cryptocurrency would not be accepted as legal tender in the country. They then went further and ordered banks to monitor and prevent accounts from purchasing cryptocurrency. While publicly stating continued support for the underlying blockchain technology we have only recently seen any attempts to regulate the same, primarily in the draft decree governing fintech sandbox.

But the government of Vietnam has found itself somewhat like an ostrich with its head in the sand. Vietnam has recently been ranked as the world's leading adopter of cryptocurrency with more per capita adoption than either the USA or China. Part of this prize comes from the ease of stepping around state Bank orders by uploading fiat to e-wallets and then using the e-wallets to purchase crypto. The other part is that Vietnamese have long held a mistrust of banks and this, coupled with a very healthy risk attitude, has led the adoption of crypto.

But what about other blockchain technologies? Axie Infinity and StepN have both garnered headlines in the country as Axie Infinity is the brainchild of Vietnamese developers and StepN has led to a host of fraudulent imitators targeting Vietnamese cybercitizens. But the skies the limit as demonstrated thus last week by the presentation of Build Vietnam 2022 held in Ho Chi Minh City.

This conference brought together industry experts from across the world to discuss the future of blockchain and to make networking connections amongst the 500 plus attendees.

The conference was organized by KryptoSeoul and the recently formed KryptoVietnam.

And therein lies a tale...

An internet search of KryptoVietnam reveals that there is a minimal web presence for the organization. They do not seem to have a website and the majority of the information about them is published on their Facebook page.

I suspect there is a reason for this. As I noted already, cryptocurrency is prohibited to be used as payment and local banks are prohibited from processing cryptocurrency transactions. This means that, at the time, an organization like KryptoVietnam must walk a fine line between promotions of blockchain technologies and discussions of cryptocurrency that might be considered in violation of banking regulations.

By relying on Facebook as its online home

it creates a buffer between the founders/operators and the government. Though in light of the recent decree guiding the cybersecurity law that buffer may be a small one.

Under that decree, foreign e-commerce players who provide services cross-border into Vietnam must not only pay taxes on their revenues derived from Vietnam, but they must also cooperate with the police if they want to avoid onerous requirements of storing all Vietnamese originating data in country. Many of the reasons available to the police to request such cooperation include violations of the law or promoting the same.

Now, KryptoVietnam may yet be too small to raise the hackles of the state prosecutors, it might just enter their sites depending on how cryptocurrency and blockchain develop in the country.

The process might look like this:

(i) The department within the Ministry of Police responsible decides that the information posted about cryptocurrency is in violation of stated laws and thus warrants a further investigation.
(ii) They find something objectionable and contact Facebook to either ask that the poster change the information or remove it completely.
(iii) Facebook will have to decide whether to abide by the authority's request. This decision is one that I see will resolve itself rather quickly. Facebook makes millions and millions of dollars from cross-border advertising in Vietnam. The ability of one small organization to post on their platform does not come close to their interest in avoiding the penalties of failing to cooperate.
(iv) Facebook removes the content and continue to operate without hindrance in the country, or Facebook refuses to cooperate and is required now to remove all Vietnamese data within the country and to open an office within the jurisdiction.

Facebook cares very little about such things, thus, they will likely cooperate 99% of the time. And as such KryptoVietnam would thus be required to seek out other options, though even those would be easily disallowed by an IP wall that would prevent access to such sites by any computers located in Vietnam. But then one gets into the role of virtual private networks and a winding rabbit hole of back-and-forth contests.

Whether or not Vietnam eventually adopts cryptocurrency, they are keen on the blockchain. How they intend to monitor it and regulate it many possible iterations remains to be seen. For now, let's hope for more organizations like KryptoVietnam who continue to push the boundaries of technology while placing Vietnam number one in the world of blockchain.

CHAPTER 15

Other Pieces Of Thoughts

Harmony in Vietnam

(2 July 2018)

Face.

Face it, you have to deal with Face if you're working in Asia or in Vietnam. It's part of the entire Asian mindset, though in Vietnam it's slightly diluted thanks to the presence of Confucianism.

What is Face? It's a combination of relationships, perception, and behavior. It's something that makes machismo seem benign. Almost everyone in SE Asia, China, and those in East Asia all practice Face.

Face is the reputation of the individual in his or her society. In a way, it's like a present-life Kharma, that can be lost or gained by behavior and reputation.

So why does it matter?

Because losing Face, or causing someone to lose Face, is despicable. I'm working on a project tangentially involved with the Nam Cam mobster case in the early 2000s. Nam Cam, was the head mafioso in Ho Chi Minh City. He'd invited a powerful mobster from Hanoi to join him in Ho Chi Minh City. Unfortunately, shortly after arriving she began to set up her own organization to challenge Nam Cam.

All was hunky dory, though, until she sent a box full of rats to one of Nam Cam's restaurants. It was a major loss of Face, and in his world, the only solution was murder. Now, I'm not trying to propose the instigation of a blood feud in Vietnam, but Face is vital.

Now, as a foreigner in Vietnam, you might think it difficult to come to terms with acting in such a way as not to inspire others to lose Face, or for that matter, yourself to lose Face. But there really is one simple way to ensure you don't lose Face.

Respect.

Simple. You'll go around the internet trying to find hints and tips for avoiding losing Face in Vietnam. But they're only hints and tips. They might help on the surface, but they all go back to the basic idea of RESPECT.

Lawyer Confidentiality

(9 July 2018)

Lawyer confidentiality is a big deal. Not only for big deals, but for little ones too.

As a lawyer from California, I'm bound by certain privileges and confidentiality rules. Amazingly, so are lawyers from Vietnam.

Unlike in American law, where one has the work product doctrine and the confidentiality of communication doctrines, Vietnam has three points when it comes to confidentiality.

First, communications, information, cases, matters are to remain confidential unless the client specifies in writing or there is a specific law which requires disclosure. This is much like the client communication doctrine in the United States, where lawyers must treat as confidential all communications received from a client.

Second, there is a State's interest exception. Lawyers must not use information, matters, or cases of their clients if such use will infringe the State's interest, the public interest, or the lawful rights and interests of organizations, bodies, or individuals. This exception is not one of revelation, unlike exceptions to other laws, rather, this is an exception of use. Lawyers can of course use information from a client in pursuing their matter, but if they use such information to injure the interests of others, then they may be responsible before the State.

Third, law firms must ensure that their staff does not disclose confidential information of their clients. This is important as it ensures that confidentiality extends to the staff of the law firm.

These rules are ensconced in the Law on Lawyers which was issued in 2006. As Vietnam lures more and more international investment it must adjust its rules to allow for confidentiality and privilege that meets the standards set by those making foreign investment into the country. Until then, these are the rules.

It also doesn't hurt to emphasize the need for confidentiality. I remember on multiple occasions, in Vietnam, Cambodia and Laos, being told by my superior to make sure I treated something as confidential, a warning given above and beyond the rules from the Law on Lawyers. So, if you're concerned about confidentiality, make sure to emphasize that point to your lawyer.

Treating in Vietnam

(6 August 2018)

We received a comment on an unrelated business that sparked my imagination and reminded me of something very special about Vietnam.

The primary tenant is simple: he who invites, pays. At least that's what I've experienced in my life in Asia. But then, it becomes something of a system of gifts, similar to the guan xi of China.

In Laos, I invited friends to a dinner at the best Chinese restaurant in town. It was a farewell dinner as I was leaving town, and I wanted to pay back some of the people who had paid for me before. But times were difficult to arrange, and it ended up that I hosted a few friends and some complete strangers. But that's how it worked. Old and new friends.

In Vietnam I experienced one of the more interesting experiences. Three white guys and a table full of Viets. When the kitchen closed and the dining room erected us, we went to the bar where some overtly willing young woman joined us. They sat by the three white guys, myself included, and got perfectly comfortable. A few minutes later our hosts excused themselves, but then came the three white guys, all of us professionals and all of us clearly uncomfortable with the presentation. So, in the end we all left at the same time.

And then there was the friendship of a partner who shared a similar birthday. At the time the principle was that each birthday boy or girl invited the office for a meal. This could end up a burden but, on my birthday, I was particularly broke as it was early in my time in Asia and I was working for somewhat of a low salary, so we decided to combine the meals for all of us who had a birthday near each other. By doing this we figured we could eat at a nicer restaurant and have a more expensive meal. Little did I know how many hundreds of dollars it would ultimately cost. I brought a couple million to contribute, but this partner paid the remaining amount without flinching. I am grateful to him for that.

Vietnamese people are capable of great kindness, and in their focus on relationships, it's a system of care and friendship. We hosted some visitors from Malaysia, took them to an upscale restaurant and then to live music and drinks. They were simply doing fact finding and there was no promise of business, but they knew my partner and so we did them right, I was invited along for the ride.

In all, of my experiences in Asia, not just Vietnam, I have found the people to be giving and kind to strangers, foreigners, and colleagues. I would hope that you have a similar experience on your visits to Asia.

Incorporation Blues

(27 August 2018)

For those used to the ease of opening businesses in various countries, like Singapore or New Zealand (which are the number one and two ranked countries for ease of opening a business), there may be surprises set for the unwary entrepreneur in Indochina.

I am not going to go into the nitty-gritty of incorporation, at this point in time, but I do want to hit on a few interesting issues.

First of all, there is the question of a name. You can reserve this yourself by starting the process of incorporation and hope that by the time you reach the point of reserving a name, no one else has taken your preference. But this is ill sorted and may lead to disappointment. Throughout the region there are business fixers, who can take care of this, and incorporation itself, for an appropriate fee. They have a contact, or maybe two, within the relevant ministries, and they will take you from no business to business, but by using one of these fixers you may run into complicated extra work, and fees, or the incorporation process might be seen as improper later on by the government.

You don't want this to happen.

At one point I was tangentially involved with a business that sought to create a corporation, instead of going through the channels and using an expensive lawyer, the client sought out cheaper alternatives. In doing so, they relied on the wife of a government employee to take care of the registration. This led to inefficiencies, and further "relationship" builders. This was not an ideal situation.

In Cambodia, where I worked for a time, incorporation was not the only problem. Fixers, and their government contracts, wouldn't take care of business that wasn't profitable, my client wanted to close several shelf companies in the country but was unable to because there was no profit in it for the pencil pushers. We talked about coming to an understanding with them, but that fell askance of certain anti-bribery regulations in the client's country.

Be that as it may, consider all your options. If you choose a fixer over a law firm, you will probably pay less money, but you will also have more headaches, now, and throughout the life of your corporation.

Vietnam wins AFF Suzuki Cup

(17 December 2018)

Vietnam wins the AFF Suzuki Cup. After ten years of trying since their last victory in the tournament they have come in at the top.

I remember nine years ago, or so, the first time I was stuck in the streets surrounded by young men and women on motorbikes, dressed in red shirts with yellow stars, waving flags, honking horns, and otherwise making noise and a nuisance of themselves. It wasn't until later that we realized why the commotion. Vietnam had won a game in the tournament.

I also remember getting out early from work to see a game between Vietnam and, I believe, Malaysia. It was a game they lost then, but the enthusiasm and the fun of the event were very memorable. Vietnam takes pride in its accomplishments as a nation, which very well they should.

I don't have much to say legally related simply to congratulate Vietnam on their win, and to remember that Vietnam is a rising economy and country, and a great place for trade and investment.

Moving in Vietnam

(24 December 2018)

Moving. It's something I've just done, though not in Vietnam. I've done it before, however, and there are a few things to consider, legally, that might affect your relocation efforts.

First, land, or property. In Vietnam you can't own land as a foreigner, or even condominiums. You can only lease a condominium or house in a development for fifty years. However, you could obtain Vietnamese citizenship after five years of residency and language training and tax paying and then own land. But that's the hard way. I'm sure that eventually this restrictive area will be deregulated further, and Vietnam will host a condominium law similar to Thailand or Cambodia.

Rent tax. There is a tax, and depending on who you rent from, you may have to pay this in addition to the rent.

Registration of living. You are required to register with the police for every night you stay in a place in Vietnam. If you move into a new apartment or a new hotel you will have to register with the police and let them know that you are where you are. This involves a copy of your passport. Usually the landlord will handle this, but make sure it happens, otherwise there may be dire consequences.

Work permit. If you're working in Vietnam, then you need to have a work permit. This can be handled through your employer but is necessary if you wish to continue working in Vietnam. Some of Vietnam's requirements for obtaining a work permit are draconian, so beware.

Otherwise, you'll also run into shipping issues. You can't ship household goods into Vietnam without a work permit. And you can't get a work permit until you've started working. It's a catch-22, unfortunately, but you'll have to work your way around it. So, there are a few hints about moving in Vietnam. Make sure you stay on top of the law, rather than the law staying on top of you.

Happy New Years Vietnam *(2 January 2019)*

Happy New Years.

This blog post is timed so that you receive it as you it as you arrive at work on the first day after the new year holiday. Why? Because there are some hints and tricks that I want to talk about involving holidays, and it seemed the thing to do.

First, Vietnam has eleven annual holidays. That means there are eleven chances to relax and refresh without stressing your personal holiday reserves. Most of these holidays fall around Tet, but there are others.

The thing is, if you're an expat working in Vietnam, you technically get thirteen days of official holidays. First, you get an extra day during Tet for travel. And second, your native national day is considered a holiday for you. That means you get two days that the local staff don't get.

That's it. That's all I wanted to point out. A short blog. But one to be remembered. So yeah, Happy New Years. And may the coming year be filled with fun, adventure, and prosperity. May you have harmony in your family and work environment, and may you find yourself pleased with your progress as a human being.

Happy New Years.

Shop & Go Gone Bust

(8 April 2019)

Shop & Go, a chain of nearly a hundred convenience stores in Ho Chi Minh City and Hanoi was sold to Vingroup for $1. Shop & Go was a Singaporean enterprise that was one of the first in the convenience store space in Vietnam.

Unfortunately, Shop & Go was not profitable, building up debts of around ten million dollars before agreeing to sell to Vingroup for the nominal fee. Vingroup intends to rebrand Shop & Go with its VinMart+ brand and will not only close some stores but replace staff and contents of the stores.

This is a cautionary tale. Vietnam is a prime investment location, but just because you have a good idea and some money, doesn't mean you'll succeed. In fact, without a lot more than a good idea and some startup capital you'll probably fail.

While Vietnam has consistently ranked among the top GDP per capita earners in the world over the last decade, it is also one of the tougher markets to get into. There is a lot of competition. That high GDP rate, and the relatively young workforce combine to make the place an attractive market for entrepreneurs.

But what about need. Just because something is useful in the United States, or even Singapore, doesn't mean it will be successful in Vietnam. Look at McDonald's. They came in expecting a hundred stores overnight, so far I count three in Ho Chi Minh City. That's a far cry from the success story expected. And even then, they have modified their menu considerably to take into account Vietnamese tastes.

You need to know the place, the culture, the needs of the people. You can't just come in with that great idea and expect to succeed in Vietnam because it's a bustling market. It took a decade before the first western malls began to take off, and now they are popular, while the traditional stall markets like Ben Thanh and Tan Dinh continue to do well throughout the country.

It's a conundrum, but one that requires local expertise. You have to know what the people need. And uniquely, lawyers are placed well to answer this need for a need. While the law is slow to respond, sometimes it does anticipate needs based on international norms, and on anticipating currents in the custom.

Take for example, credit rating agencies. I remember when the government issued regulations for the opening and operation of these institutions. This was in anticipation of dealing with some of the lousy debt that had accrued at banks throughout the country. This was an area where someone with the right funds, the right experience, and the right advisors could have come in and taken steps to build a successful rating agency.

Also, consider gambling. A couple years ago the government issued specific regulations allowing gambling to be entertained as something for the masses. Though there were limited types allowed and certain restrictions, someone who was paying attention could have taken advantage of that regulation and applied to run a greyhound racing den, or a sports betting ring.

Regardless, knowledge of the ground environment is key.

Happy Five-Day Weekend

(29 April 2019)

Happy Reunification Day. Happy May Day. And Happy bridge holiday, which is today, which makes for a five-day weekend, something unheard of in the United States.

Forty-four years ago tomorrow tanks rolled down the streets of Saigon and the North and the South were reunited after decades of division under the French and then the Americans.

Since then, there have been hard times, good times, and better times. Things are looking up for Vietnam and the long road of war and occupation has finally led into a road of peace and prosperity. May this continue into the coming years.

And May Day. Who needs an introduction to May Day. It's the workers day.

So Happy holidays, everyone, and see you on the flip side.

Private Sector Thriving

(6 May 2019)

Thanks to Dr. Matthias Duhn on LinkedIn, for sharing the link to the interview with the Minister of Planning and Investment. The original interview ran in Vietnam Investment Review, and is a reassuring assessment of the private sector economy.

One of the highlights of the article, and I'll let you read it for yourself, is that the private sector is one of the larger elements contributing to GDP in Vietnam. It is also a major element of investment capital contributed to the investment economy in the last two years.

Perhaps the most important part of this interview is the fact that the Minister of Planning and Investment realizes the difficulties facing private sector economies in Vietnam. While there are many benefits set up for FDI and PPP investments, there is little in the way of incentive for private sector investments, nor has there been much of an attempt to eliminate red tape and bureaucratic obstacles.

In fact, he said,

"The state needs to continue boosting administrative reforms and improve the domestic business climate more effectively and practically. This would make it more favorable for enterprises to join the market at a lower cost and develop quickly.

The state is also looking to bring more transparency and attractiveness to all mechanisms and policies for enterprises, so that they can boost innovation and creativity and approach new technologies. I would like to stress this point because the Fourth Industrial Revolution and the digital economy are creating immense opportunities for nations like Vietnam to make breakthroughs in development, thanks to new production methods and new business models".

This is interesting, that as a highly placed minister he is conscious of the position the Vietnamese government plays in the development of the private sector economy. This, like the startup economy, is one area where the government is just now seeing the benefits of growth and incentivization. With luck we'll see a boom in private capital investment, and the development of a bureaucratic infrastructure that will allow for the rapid growth of an economic sector.

Report from INTA in Boston

(28 May 2019)

I spent last week in Boston where I attended, with our managing partner Dang The Duc, the International Trademark Association's (INTA) annual meeting. It was a fast paced round of networking and meeting, with over 11,000 attendees. A very large conference. Crazy, really.

It started with a long flight from Vietnam to Japan, where a layover brought us to an even longer flight from Tokyo to Boston. I watched several movies and listened to quite a bit of music, read some, and tried to sleep.

In Boston we started the next day, with meetings that took us from Los Angeles practitioners to Indian patent attorneys. I met with several great lawyers who are eager to bring the opportunities of Vietnam and ASEAN to their clients.

I also visited many of the booths that were set up, several hundred, and talked with practitioners from China, India, Lebanon–with delicious baklava–and many other countries. It was a successful tour of the world of IP and several new software options to assist law firms and in-house counsel in providing IP services to their clients and employers.

Perhaps the biggest part of INTA, and the most visible, are the parties. Each night there are receptions, parties, and all sorts of events scheduled by various international law firms in an effort to provide a chance for clients and practitioners to meet and socialize. I attended several of these events, and while I don't drink anymore, I did have the chance to watch as several others turned red in the face and eventually became intoxicated.

At the end of the week there was a closing reception at the Museum of Science of Boston. This was an interesting event at which I sang karaoke, "Rainbow Connection" from the Muppet Movie, a song many of my colleagues at Indochine Counsel will recognize as a reprise of my favorite karaoke song.

I also met with a fellow classmate from Santa Clara University School of Law where I attended law school over ten years ago. It was the first time I'd seen a classmate in years and we spent several hours catching up and speaking of the past and the future.

All in all it was a great event and provided an opportunity for me and Duc to highlight Indochine Counsel's IP expertise and their ability to work with law firms throughout the region and the globe.

In Laos

(26 August 2019)

I try not to let my personal life interfere with this blog too much, though I do on occasion tell personal stories. I'm currently sitting in Laos Plaza Hotel in Vientiane, Laos, and wondering at the difference between Vietnam and Laos. While there is indeed some new construction here in Vientiane, it is nothing like what I see in Vietnam. There could hardly be a bigger difference.

Laos is a small country with only about six million inhabitants, compared to Vietnam's 97 million. Ho Chi Minh City, where I live, has over 10 million people alone. That's a sizable difference and it can tell in the amount of foreign money pouring in.

While FDI in HCMC surpasses several billion a year, that's probably all that Laos gets, and that's definitely not all that Vietnam gets. There's a difference in work force, in location, in geography, it's all different. Though last I checked Laos had a 30 day a year sick leave policy for workers, which is quite nice compared to the limited sick leave allowed in Vietnam. But that is also something that attests to Vietnam's productivity. Workers work hard in Vietnam, and they spend their time in the office, in the paddy, on the farm. It's part of what makes Vietnam what it is, it's resolution and resilience, learned from thousands of years of fighting invaders.

Infrastructure, too, is a major boon. Vietnam lies on the coast and has access to shipping and rail and roads. Laos is landlocked, and must transship everything through either Thailand or Vietnam, and this is expensive, making manufacturing in Laos impractical for supply chain purposes. Though the infrastructure is improving with the Chinese Belt and Road program building a railroad and a highway through the country to connect Laos with China and Thailand in a more efficient, more nexus oriented, way.

Laos is Vietnam's little sister in politics, following much the same path, though it also has failed to modernize to the same extent that Vietnam has. It's a dichotomy, a juxtaposition of two extremes. One is poverty, in Laos where the socialism of Kaisone Phomvihane and the Party became overwhelming to the needs of reality and what would eventually become economic liberalization.

So, Vietnam is in a good position, when you look around it, and it's a place to invest your money. It has many advantages. Certainly, it's not Singapore, but it's getting to the point where it can compete. Infrastructure, workforce, geography, all of these are in Vietnam's favor. Rather be there than in Laos, at least for investment purposes, anytime.

Independence Day

(5 September 2019)

Hello all. This most recent Monday was September 2, 2019, the 74th anniversary of Vietnam's Independence Day.

At the end of World War II, on the same day that the Japanese surrendered to the American troops in Japan, Ho Chi Minh stood on a pedestal in Hanoi and read the Declaration of Independence which he had written. This declaration was well aimed at the American side of the war, as it mimicked in many ways the American Declaration.

Unfortunately, as three decades of war attest, that didn't work. But Vietnam has liberalized its economy and reformed itself to the point of becoming a world competing economy. And with the luck of the trade war bearing fruit for Vietnamese supply chains and manufacturing, there looks to be a boon coming in the next few years.

But what is behind all that? Is Vietnam something special? Is it so different from China in its approach to the economy? To society?

I would argue that, yes, it is. Vietnam is a distinct and unique country with a very special heritage and history. Though many of its cultural norms migrated from China during the Chinese occupations and the Le Dynasty in the fifteenth century, Vietnam remains distinct.

Not only is it different geographically, but historically, Vietnam has laid its own path, marching less along the lines of Communism and its ilk, than upon the lines of good for its own society. Though there were experimentations in the fifties and sixties, and only in the seventies and eighties did Doi Moi come into being, the history of Vietnam is one of economic power. They defeated four world powers. They have turned the destruction and misery of war into the future.

I would praise Vietnam for its history, for its people, for its place in the global world. Sure, this is an encomium, but hey, it's Independence Day week. Let Vietnam celebrate its uniqueness. Let Vietnam take a moment to remember the struggle of decades to free itself from the oppressive colonialism of the West, and the stifling Communism of the East. It's taken time, sure, but it's on the right path, and if things continue the way they are, Vietnam is poised to become a huge economy on a global scale.

Ten Years in Indochine

(30 September 2019)

Ten years ago tomorrow I started my first day working for Indochine Counsel. I was a year out of law school, having spent six months finishing the qualifying requirements for the California Bar Association and then six months trying to find work in the middle of the Great Recession. The future seemed bleak but then I came to Vietnam and found a position working corporate and commercial for Indochine Counsel. I started on October 1, 2009, ten years ago.

I thought I would take this anniversary opportunity to review some of the things that I've seen at Indochine Counsel and to perhaps publicize the abilities of the firm.

Since I came on board Indochine Counsel has grown in size, from approximately 20 to now 30 lawyers, added three partners, and moved offices from Nguyen Du to Nguyen Thi Minh Khai. In the beginning, IC only had a Ho Chi Minh City office, but in the interim, they opened a Hanoi office, and have appointed a partner there to lead the team in the North. The other two partners appointed are females, marking IC as a progressive firm aware of the need to promote gender equality.

From the beginning IC was well ranked by international directories. They remain ranked and recommended by the same legal directories. In fact, Duc was just named as an elite practitioner. IC was ranked tier one for media law, and the firm was recommended for mergers and acquisitions. The trophy case of the firm is full of rankings and awards received by Duc and the lawyers who work for Indochine Counsel.

I have gained many good friends through Indochine Counsel, even though I don't work there full time, and have been able to maintain relationships that mark a lasting bond. I have helped edit college entry essays, attended vacation trips and gotten to know the children of many of the members of the firm. I have worked on Client Alert and now this blog since their inception. They remain helpful hints for clients and colleagues about the present state of the law in Vietnam.

Vietnam has changed too. Most of the skyline now visible across the Saigon River from District 2 is new, built in the last ten years, and acts as a sign of the construction and development that have occurred so rapidly throughout the country. The Supreme Court has begun issuing precedent marking a now hybridization of the legal system between Civil and Common Law. Vietnam has moved from a minor exporter to a major exporter, taking the lead from China in the midst of the current trade war between the United States and China. Vietnam is respected around the world and is seen as a major investment destination.

I have changed too. I've struggled with mental health issues, worked in three countries, and written several books. I'm still a lawyer, though, and still able to help, just like the lawyers at Indochine Counsel, to guide investors through the landmines and obstacles of the legal system in Indochina and, more specifically, in Vietnam.

So You Want to Become Vietnamese?

(25 February 2020)

Because it's of interest to me, and to a lot of people, and I looked into it recently, I'm going to discuss a topic of law that is in an area of practice outside of Indochine Counsel's expertise. I want to talk about the requirements to become a naturalized Vietnamese citizen. Not only is it important to me, and many others, but it is under reported online. There isn't a good deal of accurate information available in English, so here we go.

A foreigner who wants to become a Vietnamese citizen must meet certain requirements.

First, they must have sufficient civil act capacity under the law of Vietnam. Basically, the person is able to legally enter contracts (or is a dependent of such) who is not mentally unable to form the capacity for civil acts. Most foreigners who might be living in Vietnam would likely meet this requirement.

Second, they must follow the constitution and laws of Vietnam, the existing tradition, customs and behaviors of the people of Vietnam. This is fairly straightforward. If you live in Vietnam you have to obey the laws of Vietnam. That part is easy, definable, and concrete, the other part, the customs and traditions allow for a bit of subjective decision making on the part of the administrators who make naturalization decisions. There is no definition of these things, and they could deny an application simply because they don't like the way you look and say you aren't following the traditions. It's subjective, unfortunately, but if you meet all the other requirements, and are actually wanting to become a Vietnamese citizen, they are likely to wave you through nonetheless.

Third, you must know Vietnamese well enough to become part of the community of Vietnam. This is, too, subjective. There are no standardized tests for Vietnamese, though the University of Humanities and Social Sciences offers a Vietnamese course and certification of language capability. If in doubt, I would go through that course and take that test just to have a document to point to. Vietnamese love their certificates.

Fourth, you must have lived in Vietnam for five years before the time of your application for naturalization. This is straightforward. There is little guidance as to whether this means you have to spend over half of each year in Vietnam–enough to be considered resident–or whether you must have spent more time.

Fifth, you must have the capability of living in Vietnam. This is taken to refer to the ability to support yourself through legitimate work in the country. You can't become a Vietnamese citizen and hope to survive off the questionable social security network that exists. They don't want poor people becoming Vietnamese citizens. They have enough of those already.

Those are the basic requirements. If you meet those you have a good chance of becoming a naturalized Vietnamese citizen. There are exceptions, however.

You don't have to fulfill the last three

requirements (know Vietnamese, live here for five years, or be able to support yourself) if you are the parent, spouse, or child of a Vietnamese citizen; if you have special merit from the establishment and development of the country, or if to allow such is for the benefit of Vietnam.

And, most importantly, unless you fall under those three categories, you must give up your prior citizenship. That means that an unmarried professional from another country who comes into Vietnam, who doesn't marry a Vietnamese, but who wants to become Vietnamese, must give up his or her previous citizenship while someone who marries a Vietnamese spouse does not. I suppose it fits with the Government's policy of encouraging childbearing, but still, a little awkward.

Finally, anyone becoming Vietnamese must assume a Vietnamese name (which they can choose themselves) and if the Government decides that it would be contrary to the benefit of the country for you to become a citizen, then you won't become a citizen. It's the final catchall that's found throughout the legal system that allows the Government to act as it will regardless of what the law might otherwise say.

But then, if you want to become Vietnamese, you probably know how to live with that. It's something I'm considering four years from now, once I get my continuous five years in. But in the meantime, good luck, and if you want to go through the naturalization process–we don't do it for you, but–we can refer you to law firms that can help.

In Recognition of International Women's Day – Women in Law in Vietnam

(10 March 2020)

In Vietnam, the women rule, at least as far as demographics are concerned. According to the last census, there are 48,327,923 women, enough to comprise 50.2% of the population. Nearly 88% of the population aged between 25-59 participated in the labor force. A slightly different statistic from The Economist states that "some 79% of women aged 15 to 64 are in the labor force, compared with 86% of men." The age ranges are different, but the fact is that nearly 80% of women old enough to work in Vietnam are working. That figure is higher than all the members of the OECD except Iceland, Sweden, and Switzerland. According to Dezan-Shira "Female laborers account for 48.4 percent of the country's workforce and create 40 percent of the nation's wealth."

Women, it is obvious from these statistics, are a major part of Vietnam's economy. I site these numbers in recognition of International Women's Day–which occurred this week–and of the importance of equality in the workplace, even in countries riddled with a Confucian ideology (important because of its misogynistic definitions of relationships between individuals of different genders).

While I could find no relevant statistics for women in law practice in Vietnam, Grant Thornton reported last year that 36% of senior management teams in Vietnam included women. That ranks Vietnam second in Asia, behind the Philippines, for including women in management positions.

"The report showed the top four roles of Vietnamese women in business are Chief Finance Officer (36 percent), Chief Executive Officer or Managing Director (30 percent), Human Resources Director and Chief Marketing Officer (25 percent)."

A brief survey of law firms, and from my own experience, firms are rarely aware of equality. While some high-profile firms, like VILAF and LNT & Partners, have females as managing partners, the vast majority of both partners and management at law firms in Vietnam is male. Women tend to occupy lower-level associate positions and administrative or secretarial functions.

While this statement is not meant to condemn law firms in Vietnam, it is simply to point up that the issue is not front of mind for most lawyers, a demographic who, due to their education and position dealing with legislation often affecting equality, frequently are at the forefront of equality battles throughout the world.

The most recent statistic I could find showed that Vietnam had over 11 thousand lawyers and 4,000 trainee attorneys. That number has surely grown. As a portion of the overall population, lawyers represent a small number, and facing an environment that is not necessarily friendly to boat rocking, it is understandable that activism is something that is not common amidst the community of law practitioners.

That said, there remains much to be done for equality without petitioning the National Assembly for legislative change. Hiring and promotion policies can be set in place and adhered to. When I interned at VILAF over a decade ago, I helped draft an equal hiring policy that was adopted by the partnership. VILAF is one of the few firms with a female managing partner. Throughout Vietnam there remain questions about whether that push for equality is reflected in the day to day lives of their employees.

For other firms, too, high level policies don't always translate into an environment friendly to women and minorities. The problem, as I see it, is that management in most Vietnamese law firms are more concerned with product output and thus spend their time on management issues only when there is a fire to be put out. Regular performance reviews and feedback interviews of employees and associate attorneys would offer those in the trenches the opportunity to voice dissatisfaction with coworkers and management who might be acting negatively in the workplace.

Active management, then, would be a good first step. Of the half dozen law firms I've been involved with in Southeast Asia, only one provided a regular performance review and then it was focused so entirely on my mistakes that I left feeling depressed and defeated, not able to voice my own thoughts on the performance of my supervisor or of any problems I might have within the environment of the company.

As the number of lawyers registered with the bar association in Vietnam is minimal, there are practically no unions in place to protect law firm employees. Each firm is defined by the personality and the opinions of the management and partnership and the morale and allowable behavior of the associates and employees are formed accordingly. Again, this is a call for more active management, management aware of its effect on those who it oversees, but still, something that can be improved.

Perhaps I should be more lenient as the concept of a law firm in Vietnam is barely twenty years old. The firm is young, and many of these problems are found in the more developed world as well. It is a flaw in the law firm order that allows for an inordinate power inequality between management and employees and creates an environment which is so powerfully shaped by one or a few personalities. To go further would enter into a discussion of labor relations and that would take far more than I'm allotted by a single blog post.

Suffice it to say, then, that in some ways Vietnam is doing well. In pure statistics it performs competitively with the best countries in the world. Unfortunately, the situation is fraught with ages old ideologies that create an atmosphere of expected subservience and can intimidate those who are at the bottom end of defined relationships. To improve requires an active measure of change on the part of men and management. We can all do better and, in the memory of the annual International Women's Day, each of us should consider ways to improve our personal relationships and our treatment of others.

A Personal Economic History on Vietnam's Reunification Day

(30 April 2020)

Reunification Day in Vietnam. Forty-five years ago today the helicopter lifted from the roof of the American embassy, the tanks rolled down what became Le Duan Street, and the Vietnam War officially came to an end. For the United States this ushered in nearly half a century of recriminations, regrets, and disbelief. For Vietnam a long road of isolation and eventual liberation that has led to one of the few positive growth stories in the world in Q1 2020.

For years after what Vietnam now refers to as Reunification Day, the country was poor and relied heavily on aid from the Soviet Union. But in the mid-Eighties the economic policy of Doi Moi led to relaxing of State control over all economic factors and the beginning of small-scale capitalism.

It took another decade before the United States reopened diplomatic relations with Vietnam. Relations that have become increasingly friendly since, a slow progress that almost climaxed in the Trans-Pacific Partnership under Obama, but that was quashed by his successor.

And then the Enterprise Law was passed, and the Investment Law. It became possible for citizens and then foreigners to invest capital in business. No longer was the State the sole source of capital, the sole manager, the sole. Vietnam began to open up. Amendments were made, different versions passed the National Assembly. Vietnam began to grow more prosperous and became a frontier market.

Not the first brave soul to venture into the wild, I dipped my toe in Vietnam for the first time in 2003. Diamond Plaza was the only shopping center. It had a KFC and a bowling alley. The three big hotels (Sheraton, Park Hyatt, and Caravelle) existed downtown, a few serviced apartment complexes served the needs of expat managers and technicians, and the backpacker section the needs of the adventurous Australian and European youths who came to Southeast Asia seeking the dollar a liter beer.

I stayed with a co-religionist family in the Somerset Apartments on Nguyen Binh Khiem in District One. I lazed about during the day, swam in the pool, read and wrote, and then dressed for the evening English class I taught at Duong Minh English school in District 3. A solid twenty-minute walk–enough to leave me sweaty and grimy–that took me along Hai Ba Trung past Tan Dinh Market. It was an idyllic life. I spent a few hundred a month and lived fine. It was a fun summer, and my first experience with the Vietnamese who won the war. (I had previously spent two years with the Vietnamese population in California–who were still fighting the war on the streets of Orange County.)

And then a new version of the Enterprise Law. As a law student, I offered commentary on the draft law–even by that time the international community managed to elicit a drafting process that allowed for stakeholder input–though the National Assembly by and large ignored the more Western requests. But they passed the law,

and its companion the revised Investment Law, and began to see increased inflows of FDI.

While I was in law school, Vietnam acceded to the WTO (at the time still a respected institution) and opened wide the doors to international investment and trade. After a decade of negotiation and liberalization, the Communist country was welcomed into the Capitalist West by the international community. They signed IP agreements, and opened their doors to imports, and allowed a phased entry into numerous service sectors by foreign players. It was a triumph for Capitalism.

And it presaged a burst of legal activity the likes of which the country had never seen before. Previously, attorneys had existed for civil disputes, family affairs, and as the local representative for international firms seeking to be present in the country. Around 2000 the most prominent local firms began to form, and then in the mid-2000s, in anticipation of the WTO commitments and the increase of FDI inflows, the deluge.

Indochine Counsel came into existence in 2006, formed by practitioners of what had, essentially been a French-led firm before, and like so many other firms at the time opened their doors for business. And the bulk of their business became foreign investment. I remember in 2009 spending much of my time in the WTO commitments. The first thing we did when confronted with a request for service was to check the commitments, to see what the restrictions were on the service sector, and only once we'd confirmed what commitments allowed would we move into the local investment and enterprise laws.

Business establishment was a big thing then, and took months, and cost thousands and thousands of dollars, and required a huge amount of red tape with countless different ministries involved. Saigon Trade Center on Ton Duc Thang was the tallest building in the city, Times Square was an abandoned hole in the ground, Vincom Centre was under construction, and Bitexco was a concrete tower rising so high that every road in the city led directly to it. The FDI inflows were immense–though they would grow larger–and a new city was being built.

Yet Vietnam was still considered frontier, a risky investment. Special Economic Zones were coming into being where infrastructure was being built to provide for international manufacturers who wanted to take advantage of the cheap labor available in a developing country. Intellectual Property protections improved. The number of bootleg DVD stores in the city decreased–though just upstairs from the newly opened Carl's Jr. was a bootleg retailer–in Ho Chi Minh City's first real shopping mall.

And the country continued to progress. By 2011, the WTO commitments had been phased in completely and Vietnam was now open and liberal, a Socialist country with Communist features. Vietnam joined ASEAN, and came privy to the ASEAN China, ASEAN Japan and other free trade agreements. Japan and Korea grew their investments in the country to the point of near economic imperialism. (I can't say much, I live in Binh Thanh District's Little Japantown.)

A new revision of the Enterprise Law and Investment Law came into effect and, in many ways, protected the shareholder and non-management stakeholders much more effectively than Western legislation. It had been a few hard years after the Great Recession, but Vietnam managed largely positive economic growth during the time, and though, not the fastest-growing economy in Southeast Asia, one of the most consistent high-performers.

Business formation ceased to be the bread and butter of law firms like Indochine Counsel. The few years since the WTO accession and the dissemination of corporate governance led to a growing number of Mergers and Acquisitions in the market. Sure, there had always been some, but the mid-2010s saw a huge increase in foreign instigated M&A. Intellectual Property law became developed enough to require actual legal acumen. Compliance developed to the point of necessity. The stock market was a thing now.

The city sprawls, now–much like it did before, but now the skyline is filled with high rise apartments, office towers, and hotels. Cars are de rigger though the motorcycle still rules. Infrastructure has improved and green energy is so prevalent that the national grid struggles to cope with the influx. New enterprise and Investment laws are expected during the next meeting of the National Assembly. The EVFTA is expected to be approved at the same meeting and then to enter effect–the most sweeping and complete free trade deal that Vietnam has entered yet.

Indochine Counsel is no longer one of a few, but one of many. The law has become complex enough to demand specialization–Indochine Counsel has partners in each of the main areas necessary for conducting investment and business in Vietnam–and foreign firms abound. International ratings agencies are on the verge of classifying Vietnam as a developing market along with the likes of China, India, and Brazil. Even the backpacker district has become a glitzy and expensive place to get drinks.

Ever since Vietnam's first Reunification Day on April 30, 1975, there have been many changes. Socially, legally, economically, internationally the country has grown from a backwater destitute from thirty years of war to an economic powerhouse on top of the Coronavirus and well poised to lead the region in growth and development for the next decade. Forty-five years on, Vietnam celebrates Reunification Day and proves that Democratic Capitalism isn't the only way to have success.

About the Author

Steven Jacob, a California-certified attorney, brought a wealth of international legal expertise and insight to the field of Vietnamese business law. With a J.D. from Santa Clara University, he joined Indochine Counsel in 2009, where he showcased his versatility across a spectrum of legal matters, from international trade to intellectual property.

Steven's journey through Indochina included a pivotal role in Cambodia and Laos, contributing to significant legal proceedings in corporate law and assisting with high-profile international arbitration. He was known for his adept handling of intricate legal scenarios, both in-house and as a consultant. The breadth of his knowledge is reflected in his practice areas, which span corporate and commercial law, inward investment, and international trade, among others.

Steven also shared his knowledge through numerous articles and legal publications, establishing himself as a thought leader in the region. Steve passed away in 2022 in Laos. "Navigating Vietnamese Business Law: Insights and Reflections" serves as a fitting homage to Steven's legacy, a celebration of his contributions, and a reflection of his commitment to bridging legal worlds.

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.

Indochine Counsel advises clients in the following areas:

- Anti-trust & Competition
- Banking & Finance
- Corporate & Commercial
- Energy, Natural Resources & Infrastructure
- Intellectual Property
- Inward Investment
- Labour & Employment
- Litigation & Dispute Resolution
- Mergers & Acquisitions
- Real Estate & Construction
- Securities & Capital Markets
- Technology, Media & Telecommunications

A full list of partners, associates and other professionals is available on our website.

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