

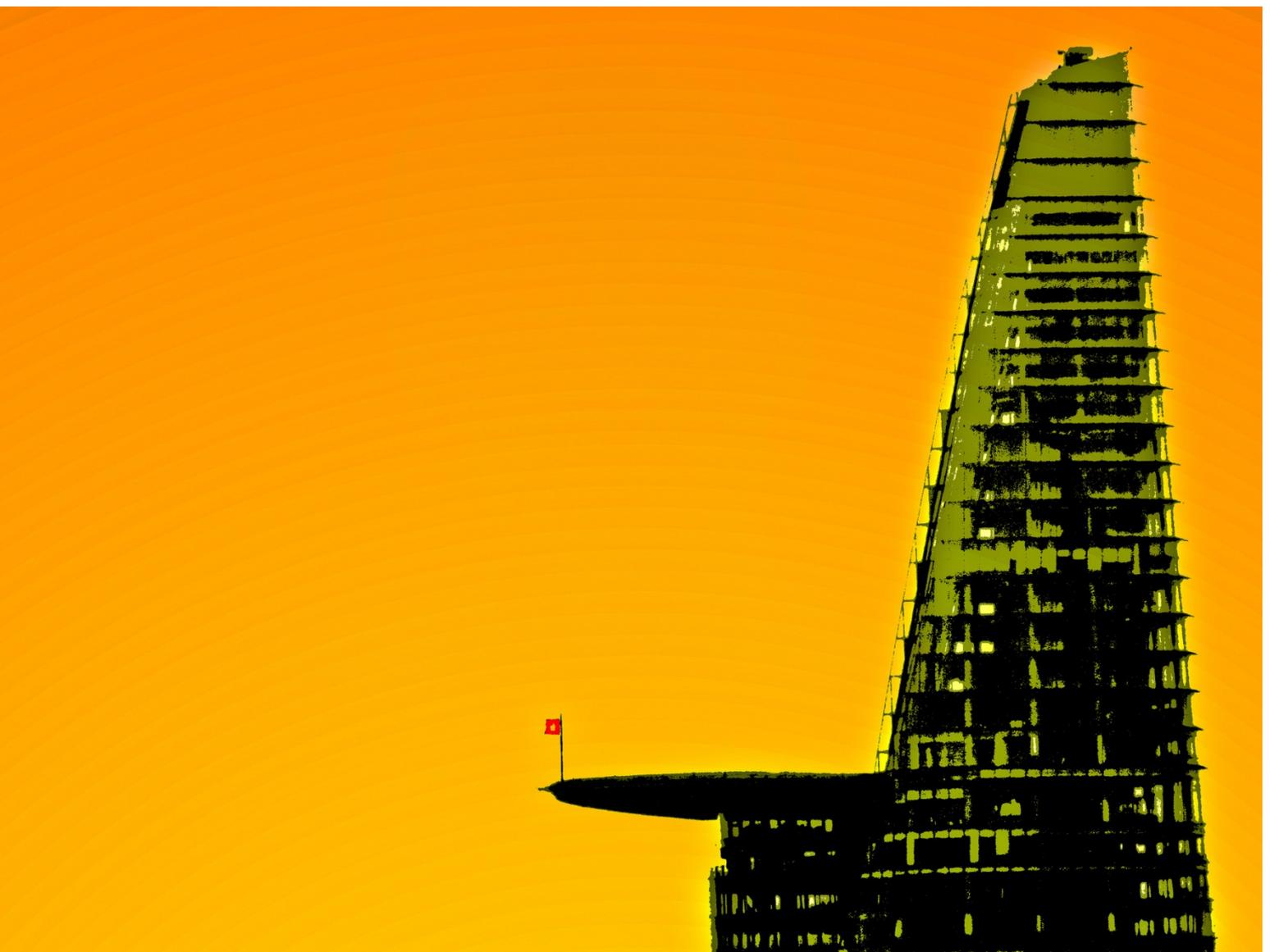


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Legal Update

[Nov, 2016]



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LEGAL UPDATES

[Nov, 2016]

Part I: Legal Briefing.....Page 3

InvestmentPage 3

- 1. Amending Law on Investment 2014

BankingPage 4

- 2. Circular 28/2016/TT-NHNN provide amendments, supplements to Circular No. 21/2014/TT-NHNN

Tax.....Page 6

- 3. New Decree on Registration Fee

Part II: Issues in Focus.....Page 7

- 1. Precedents in Vietnam

Part I: Legal Briefing
Part II: Issues in Focus

1. Amending Law on Investment 2014

The Law on Investment 2014 has partially been amended.

A Law on revising the current Law on Investment shall come into effect on 01 January 2017. The key changes are to (i) remove about 30 conditional investment business lines; (ii) supplement 01 prohibited business lines; (iii) supplement 02 conditional investment business lines; and (iv) repeal a number of Articles in Law on Tendering No. 43/2013/QH13 and Law on Construction No. 50/2014/QH13.

On 22 November 2016, the National Assembly resolved to ratify Law (the “**Amendment Law**”) on amendment to, supplement for Article 6 and Appendix 4 on List of conditional investment business lines (the “**IBL**”) in Law on Investment No. 67/2014/QH13 as amended by Law on Hydrometeorology No. 90/2015/QH13 (the “**LOI**”). It is expected that the promulgation of the Amendment Law will be announced soon.

(i) List of conditional IBL

Previous position: There are 268 CIBL as prescribed by the LOI in its Appendix 4 (the “**268 List**”).

New position: The Amendment Law provides an Appendix listing 243 conditional IBL (the “**243 List**”). This 243 List is made based on (i) removal of about 30 conditional IBL in the 268 List; (ii) combine, amend a number of conditional IBL in the 268 List; and (iii) supplement 02 new conditional IBL, particularly:

- a. Business of camouflaging equipment and software to recording, video recording and locating; and
- b. Car manufacturing, assembling and importing.

The two aforementioned IBL will be treated as conditional IBL from 01 July 2017. The Government will provide transitional with respect to entities conducting IBL (a) and (b) above.

(ii) List of prohibited IBL

Previous position: The LOI provides that firecrackers business (*kinh doanh các loại pháo* in Vietnamese) is a conditional IBL regardless such firecrackers include banger (*pháo nổ* in Vietnamese) or not.

New position: While in the Amendment Law, banger business is a prohibited IBL.

(iii) Repeal of a number of Articles in Law on Tendering No. 43/2013/QH13 and Law on Construction No. 50/2014/QH13

Article on conditions applicable to (i) entities conducting activities of training, improving about tendering for individual; and (ii) organizations making, investigating construction investment projects shall be repealed from 01 January 2017.

The changes in the Amendment Law will help the investors have more favor in investing into a number of IBL which will no longer be conditional IBL.

2. Circular 28/2016/TT-NHNN provide amendments, supplements to Circular No. 21/2014/TT-NHNN

A revised Circular on Scope of foreign exchange activities conducted by credit institutions and foreign bank branches; and conditions, sequence and procedures for consent from State Bank took effect from 18 November 2016. The key changes were to supplement approval contents of primary types of forex transactions recorded in the License or Decision of amendment, supplement of License; to broaden primary types of forex transactions on the domestic and international market; and provisions on the conditions, application approval of forex transactions activities...

The State Bank of Vietnam has issued **Circular 28/2016/TT-NHNN** dated 5 October 2016 (**Revised Circular**) provide amendments, supplements to Circular No. 21/2014/TT-NHNN dated 14 August 2014 (**Circular 21**) with the highlighted points as follows.

Offshore investment activities by credit institution and branches of foreign branch (referred to as Banks)

Circular 21 silenced in the offshore investment activities conducted by Banks. The Revised Circular expressly stated that the activities conducted by Banks in this regard shall be governed by the regulations on offshore investment activities applicable to other eligible entity permitted by laws.

Broadening the scope of basic forex activities conducted by commercial banks

On domestic market

In comparison with Circular 21, the Revised Circular permit commercial bank conduct additional basic forex activities as follows: (i) open current accounts for foreign credit institutions; (ii) take foreign currency deposits from foreign credit institutions; (iii) conduct interest rate derivatives and other forex-related derivatives; and (iv) provide other forex activities. In which, the two latter require approval and guidelines from the State Bank.

On international market

In comparison with Circular 21, the Revised Circular permit commercial bank conduct additional basic forex activities as follows: (i) enter into sale and purchase forex transactions with a term, forex swap transactions with foreign financial institutions; and (ii) conduct interest rate derivatives and other forex-related derivatives with permission and guidelines from the State Bank of Vietnam (**SBV**).

Loosen conditions required for basic forex activities*On domestic market:*

Instead of 6 conditions required by Circular 21, commercial banks shall only satisfy following 2 conditions for obtaining consent from SBV: (i) establish information technology system meets the requirements for processing, risk management, security and safety of forex activities; and (ii) have an internal regulation on management of risks.

On international market

The required conditions for conducting basic forex activities is also loosened, in particular, commercial banks only required (i) to satisfy the conditions applicable to basic forex activities on domestic market mentioned above and (ii) to have internal regulation on selection of institutional partners and limits to forex transaction with foreign partners.

Allow deposit accounts at overseas branches or subsidiaries

Requirement of internal regulation on selection of institutional partners and limits to forex transaction with foreign partners shall not be applied to commercial banks that open their deposit accounts (not deposit payments) at their own overseas branches or subsidiaries.

The total deposits of commercial bank at all of its branches, subsidiaries overseas shall not exceed 10% of its charter capital.

The Revised Circular takes effect from 18 November 2016, which shall facilitate basic forex activities conducted by commercial banks with the broadening scope of activities and loosening required conditions for such activities.

In brief, Circular 02 will help to create a new investment environment which will be more competitive, as well as attract the investment capital in a new way from the private area so as to develop the infrastructure of the country.

Circular 02 will come into effect on 18 April 2016.

3. New Decree on Registration Fee

On 10 October 2016, the Government issued Decree No. 140/2016/ND-CP stipulating the registration fee (“Decree 140”), which supersedes Decree 45/2011/ND-CP dated 17 June 2011 and Decree 23/2013/ND-CP dated 25 March 2013 on the same content (“Decree 45 and 23”).

Under Decree 140, the payment procedure of registration fee is stipulated in details. In particular, for assets being house and/or land use right, the dossier for registration fee declaration (“Dossier”) shall be submitted to the land use right registration authority. Within 3 working days from the date of submission of the full dossier, the tax branch of the locality where the asset is registered shall issue a notice on submission of registration fee to the applicant (“Notice”). For other assets, the Dossier shall be submitted to the tax branch locality where the asset is registered, by which the Notice will be issued within 1 working day from the date of submission of the full Dossier. The applicant shall submit the registration fee within 30 days from the date on which he receives the Notice.

In addition, Decree 140 also provides more cases of registration fee exemption, i.e. (i) the transferee of assets who continues investing in facility or house construction for the purpose of transfer, or (ii) the organisation or individual using land allocated by the State and having a land use right certificate, who is required to convert to the form of land lease with one-off payment of land rent for the entire lease term.

Decree 140 takes effect from 1 January 2017.

Part I: Legal Briefing
Part II: Issues in Focus

PRECEDENTS IN VIETNAM

Upon the promulgation of Decision No. 220/QĐ-CA dated 06 April 2016 and Decision No. 698/QĐ-CA dated 17 October 2016, Supreme People’s Court of Vietnam have so far announced 10 legal precedents varying with different legal segments e.g. criminalization, civilization, administration and commerce.

These precedents hugely attract public attention since they are the very first precedents after the effectiveness of Resolution No. 03/2015/NQ-HĐTP acknowledging, for the first time, the use of precedents during the adjudication proceedings by court. In criminal matter, Precedent No. 01 invokes the differentiating measure between murder and causing injury intentionally. For such purpose, Precedent No. 01 focuses on the injured position on the victim’s body to justify the criminal’s intention whether to kill or just to injure the victim. Meanwhile, 6 precedents from No. 02 to No. 07 fall in civil matters which mainly focus on resolving issues relating to the land use right (“LUR”) and assets attached to LUR (“Assets”) of wife and husband upon divorce; LUR and Assets ownership identification upon transfer, donation and inheritance. In this instance, the most highlighting proposition is the parties’ intention. Particularly, regardless the transactions do not satisfy the form required by laws, the court will base on the explicit intention to grand the ownership over the LUR and Assets of the former owner to acknowledge such ownership of the following owner. In addition, the precedents also recognize the contribution of the nominee (i.e. who is named in the certificate in case the actual owner is not entitled to own LUR in Vietnam) and of the designated heritage keeper. In comparison to the above, Precedent No. 08 and No. 09 attract the biggest concern since those resolve the overdue interest rate for loans provided by commercial banks. Precedent No. 08 stipulates that the overdue interest rate is based on the contractual one. In case the parties do not agree on the overdue interest rate in the contract, such rate will be the average rate of three banks in the area.

Needless to say the issuance of 10 precedents has initiated a new era of adjudication proceedings in Vietnam, the actual contribution of those precedents are still in doubt. Firstly, some of methodologies or resolving measures herein are considered to be not innovative since they have already been applied long ago. For example, the criteria to differentiate between murder and causing injury intentionally are familiar to the hearing practice and the parties’ agreement on overdue interest rate must have always been followed. Secondly, some of the corresponding omissions are still left unregulated. For example, Precedent No. 09 has not set out the method to determine the referred banks for the average interest rate. The term

of “three banks in the area” is too wide which might possibly lead to future dispute on designating those banks. Last but not least, some precedents contain only a paragraph of one court’s award. This results in the unclear context as well as the resolving measures of those precedents. Such shortage causes the user confused to clarify whether their cases are relevant or their application is appropriate. By the considerable endeavor of the penal of judges, they selected out the valuable precedents but the precedents still have shortcomings. For example, precedents will be applied for the “similar” cases, the panel of judges however has not given any explanations on how the similar case is; and merely extracts a small part of case law to serve a precedent. Thus, it makes more confused in determining “similar” cases and facing difficulty to understand whole pictures of the dispute

To conclude, legal precedent is still relatively new term in Vietnam and the recognition of the precedents is considered as a significant change in judicial system of Vietnam. Such change constitutes a clear legal basis and serves as a precedent for proceeding in order to be consistent with mind within the Levels of Court in Vietnam. Besides many shortcomings, 10 precedents are to be deserved as a valuable legal source for judicial activities of judges. It is believed that the next precedents will remedy above shortcomings and bring many more values.

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