



ClientAlert

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Introduction

Dear All,

This month saw a handful of new regulations that affect business in Vietnam. We've briefed them and outlined the most important changes from each new regulation. They cover topics from new rules for intellectual property enforcement to a review of some more changes in the new enterprise law, which are likely to affect many businesses.

In addition, we are excited to announce that we have moved. Starting from 28 September 2015, we are no longer in Han Nam Office Building at 65 Nguyen Du. We are instead in the much more modern Centec Tower at Unit 305, 3rd Floor, Centec Tower, 72-74 Nguyen Thi Minh Khai, District 3, Ho Chi Minh City. While we are excited about this news, you should also note that our telephone and fax numbers, email addresses and website remain unchanged. In recognition of nearly ten years in the Han Nam Office Building, we also discuss some experiences in that office and how it affected our efforts to serve you as clients.

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

Kind regards,
Indochine Counsel

In this issue

Guidance for Determining Value of Infringing Goods and Illegal Benefits for IPRs Enforcement	2
Relaxation of Restrictions on Share Assignment by the Founding Shareholders	3
New Guidance on Doing Real Estate Business.....	4
New Decree on Enterprise Registration	7
Memories of Han Nam.....	8

Guidance for Determining Value of Infringing Goods and Illegal Benefits for IPRs Enforcement

Decree No. 99/2013/ND-CP on sanctioning of administrative violations in the domain of industrial property (“**Decree 99**”) was issued on 29 August 2013 and supersedes Decree No. 97/2010/ND-CP, dated 21 September 2010, on the same matter (“**Decree 97**”). For the implementation of Decree 99, the Ministry of Science and Technology (“**MOST**”) promulgated Circular No. 11/2015/TT-BTC, dated 26 June 2015 (“**Circular 11**”), which supersedes Circular No. 37/2011/TT-BTC, dated 27 December 2011, on guidance of the implementation of Decree 97 (“**Circular 37**”).

Decree 99 provides guidance on the determination of the value of infringing goods/ services which form the basis of the penalty imposed on a violator, Circular 11 provides that the value of infringing goods/ services will be counted by the volume of goods/ services multiplied by the unit price at the moment of commission of the administrative violation by the violator. The unit price will be the listed price, contractual price, invoicing price, or declared import price.

If there is a basis to suspect that such price used for determining the value of infringing goods/ services is wrong, the authorities may use the applicable price as follows in priority order: price informed by the local financial agency or local market price at the moment of committing the violation by the violator; or the cost of the goods if such goods have not yet been sold in the market. In addition, if there also is no basis for application of these prices, a price determination council shall be established.

Circular 11 also specifies that the illegal benefits gained by a violator from the IPRs infringement, which are to be sent to the State budget comprise not only cash but also valuable papers and other properties which will be determined in accordance with Circular No. 149/2014/TT-BTC, dated 10 October 2014, of the Ministry of Finance, regulating the sending of illegal benefits gained from administrative violations in the State budget. If the illegal benefit is cash it will be counted by the volume of goods/ services already illegally transferred, sold, dispersed, or destroyed multiplied with the unit price, wherein the volume of goods/ services will be based on the statement of the violator and as verified by the competent person, and the unit price shall be the one recorded in the documents, materials of the violator, or market price of the similar goods/ services. However, if it is impossible to determine the volume of the infringing goods/ services and the unit price thereof, the illegal benefit shall be all cash gained by the violator from the violation.

Circular 11 took effect on 11 August 2015.

Relaxation of Restrictions on Share Assignment by the Founding Shareholders

One of the most notable points of the new Law on Enterprises dated 26 November 2014 (“**2014 Enterprise Law**”), is the relaxation of restrictions on founding shareholders’ ordinary shares during the previously defined three year lock-up period (the “**Lock-up Period**”).

Both the old enterprise law (i.e. the 2005 Enterprise Law) and the 2014 Enterprise Law regulate that within the Lock-up Period, a founding shareholder may freely transfer his or her shares to other founding shareholders. However, within the Lock-up Period they are restricted from transferring their ordinary shares to person not being the founding shareholder under obtaining approval from the General Meeting of Shareholders (the GMS). Under the 2005 Enterprise Law, such transferee shall automatically become a founding shareholder whilst the 2014 Enterprise Law has removed such regulation. As a consequence, such transferee shall not be regarded as a founding shareholder, and when re-selling those shares to others within the Lock-up Period, shall not be subject to the aforesaid restriction.

According to Article 119.4 of the 2014 Enterprise Law, all restrictions on ordinary shares of founding shareholders shall be lifted after expiry Lock-up Period. Such restrictions shall not apply in the following circumstances:

Additional shares which founding shareholders receive after the date of company establishment

It is hypothesized that on the date of establishing a Joint Stock Company (“**JSC**”), A – a founding shareholder – holds 10000 shares of JSC. Within the Lock-up Period, A has additional 5,000 shares. Under Article 119.4, the 2014 Enterprise Law, those 5,000 shares will be outside the purview of the said transfer restriction. In other words, A may freely re-sell those 5,000 shares to persons not being founding shareholders of the JSC.

Shares which founding shareholders transfer to persons not being the founding shareholders of the company

Under the 2014 Enterprise Law, if A, a founding shareholder, may obtain approval of the GMS and duly transfer his/her 5,000 shares within the Lock-up Period to B, a non-founding shareholder of the company, B shall not become the founding shareholder of the company as mentioned above. Therefore B may, even within the Lock-up Period, freely transfer those 5,000 shares to any other person.

In brief, it can be seen that the 2014 Enterprise Law, in comparison with the Law on Enterprise 2005, has relaxed regulations in relation to the restriction upon ordinary shares of founding shareholders within the Lock-up Period.

New Guidance on Doing Real Estate Business

On 10 September 2015 the Government issued Decree No. 76/2015/ND-CP (“**Decree 76**”) guiding detailed implementation for a number of articles of the Law on Real Estate Business. Decree 76 takes effect as of 1 November 2015 and replaces Decree No. 153/2007/ND-CP, dated 15 October 2007, of the Government.

There are a number of notable regulations stipulated in Decree 76 that clarify provisions in the Law on Real Estate Business and are outlined below.

Regarding the legal capital

Decree 76 stipulates that any organization or individual engaged in real estate business must establish an enterprise and the legal capital of such enterprise must not be less than VND20 billion. However, there are two exceptions to the foregoing regulation, which are:

- a) Organizations, family households and individuals who sell, transfer, lease out or grant hire purchase of real estate on a small scale and irregularly¹; and
- b) Organizations and individuals who run real estate service business.

The legal capital of an enterprise engaged in real estate business (the “**Real Estate Enterprise**”) is determined on the basis of its charter capital and the Real Estate Enterprise is not required to conduct registration procedures for the confirmation on its legal capital.

In addition, pursuant to Decree 76, any and all Real Estate Enterprises which are under operations but fail to satisfy the requirement on legal capital shall be entitled to continue operating, provided that they must fulfill such requirement within one year as of 1 July 2015 if they still do real estate business.

Regarding the templates of contracts in real estate business

Decree 76 includes six model contracts for real estate transactions enclosed in its appendices. The model contracts can be divided into three groups as follows:

1. Group 1: Contracts applicable to residential houses and construction works that are existing or to be formed in the future, including:
 - (a) Sale and purchase contract (“**SPC**”);

1. According to Article 5 of Decree 76, there are seven cases in which the organizations, family households and individuals who sell, transfer, lease out or grant hire purchase of real estate can be considered as doing real estate business on a small scale and irregularly.

- (b) Lease contract; and
 - (c) Hire purchase contract (“HPC”);
- 2. Group 2: Contracts applicable to the land use right, including:
 - (a) Land use right transfer contract; and
 - (b) Land use right lease (sublease) contract;
- 3. Group 3: Contract applicable to the transfer, in whole or in part, of a real estate project.

It is stipulated in Decree 76 that such model contracts are for the purpose of guiding and reference and are not compulsory. However, the contract to be executed by the contracting parties must have sufficient contents as prescribed in the Law on Real Estate Business and not contrary to the laws of Vietnam.

Regarding the transfer of contract

Decree 76 reaffirms the provision of the Law on Real Estate Business that allows a purchaser or a hire purchaser to transfer the SPC / HPC to another third party when the application dossier for registering the certificate of land use right, residential house ownership and ownership of assets attached to land has not been submitted to the competent authorities.

Besides, based on regulations in Section 3 and Section 4, Chapter II of Decree 76, it can be inferred that the transfer of contract shall apply to (i) HPC of existing residential houses and construction works, (ii) HPC of residential houses to be formed in the future, and (iii) SPC of residential houses to be formed in the future.

However, Decree 76 only concretizes procedures for transferring both types of HPCs at (i) and (ii) above since the transfer of SPC of residential houses to be formed in the future will comply with the laws on residential housing. Accordingly, the general transfer of HPC shall comprise four steps as follows:

- (a) Step 1: a transferor and a transferee shall prepare a document to transfer the HPC (the “**Transfer Document**”) or request a notary public to prepare such Transfer Document.
- (b) Step 2: the Transfer Document shall be notarized in case the transferor is not an enterprise functioning in real estate business; otherwise, the notarization shall be conducted upon mutual agreement of the parties.
- (c) Step 3: the transferor and the transferee shall be obliged to pay taxes, costs and fees in relation to the transfer of the HPC.

- (d) Step 4: the owner of residential house / construction works gives confirmation on the Transfer Document. This confirmation is free of charges and must be completed within five working days as of the full receipt of required documents.

Regarding the transfer of real estate project

	Projects of which the investment is decided by the provincial or district level People's Committee	Projects of which the investment is decided by the Prime Minister
Receiving agency	<p>The People's Committee ("PC") of the province where the project is located or the agency authorized by the PC as follows:</p> <ul style="list-style-type: none"> ▪ Department of Construction with regards to new urban zones and residential house development projects. ▪ Specialized department as stipulated by the PC with regards to other real estate projects. 	<p>The PC of the province where the project is located.</p>
Duration for approval	<ul style="list-style-type: none"> ▪ Within 30 days as of full receipt of proper application dossier, the receiving agency shall consult with a number of departments, carry out appraisal and report the PC to execute a decision allowing the transfer. 	<ul style="list-style-type: none"> ▪ Within 45 days as of full receipt of proper application dossier, the receiving agency shall consult with a number of ministries, carry out appraisal and report to the Prime Minister.
Execution of transfer contract	<ul style="list-style-type: none"> ▪ Within 30 days as of the decision of the PC or the Prime Minister, the parties must complete executing the transfer contract and finish handing over the project or part of project (as the case may be). ▪ Before handing over the project or part of the project to the transferee, the transferor must notify all of its clients (if any) and announce by means of mass media 15 days in advance in terms of the transfer, rights and interests of clients and relevant entities. 	

New Decree on Enterprise Registration

On 26 November 2014, the National Assembly of Vietnam adopted a new law on enterprises (“**2014 Enterprise Law**”) which took effect on 1 July 2015 and replaced the law on enterprises 2005.

Together with the new law on investment, the 2014 Enterprise Law is considered another historical milestone to improve the legal framework in Vietnam.

Decree No. 78/2015/ND-CP on enterprise registration (“**Decree 78**”) has recently been issued to reinforce the spirit of “business freedom” of the 2014 Enterprise Law, providing detailed instructions and guidance on enterprise registration. Some of the notable changes of Decree 78 compared to the current decree on enterprise registration (Decree No. 43/2010/ND-CP) are as follows:

Firstly, Decree 78 no longer requires the investor to submit documents confirming the legal capital by the authority in case the new business line requires legal capital or a valid copy of the certificate of practicing for individuals according to the specialized areas when the investor submits the dossier for setting up the enterprise operating in conditional business lines.

Secondly, the investor is now able to register their operation on-line. Accordingly, the investor can register their operation via the National Information Portal on Enterprise Registration. On-line enterprise registration dossiers include the same documents as required for the paper dossier and are converted into the electronic form. Decree 78 also stipulates that on-line enterprise registration dossiers have the same validity as the paper ones.

Thirdly, Decree 78 provides that the Enterprise Registration Certificate (“**ERC**”) also serves as the Tax Registration of the enterprise. In the event of any inconsistency between the electronic ERC, Branch Registration Certificate, Representative Office Registration Certificate, Certificate on business locations, and paper ones, the one which records information in the enterprise registration dossier shall prevail.

Fourthly, Decree 78 simplifies registration procedures by stating that the enterprise registration authority is not allowed to request for additional documents or other documents not required in the enterprise registration dossier by the law. In this regards, the number of required documents in the application dossier is also reduced significantly and the time to obtain the ERC following submission of a valid dossier is shortened from five (5) working days to three (3) working days.

Furthermore, Decree 78 clarifies and classifies cases where the enterprise is required to notify and register changes to the licensing body when there is any change to the enterprise registration content. Accordingly, the enterprise is required to register change to the enterprise registration, including register change to headquarters, name, partnership, legal representative, charter capital, contribution capital, member (limited liability with two members or more), owner (the sole proprietorship) and change to operation registration of the branch, representative office and business

locations. The enterprise is only required to notify in writing to the licensing bodies when there is any change to the business lines, investment capital of the owner of the sole proprietorship, information of the founding shareholders (for joint stock company), the shareholders being the foreign investors in unlisted joint stock companies, tax registration and other contents which are not required to carry out registration procedures.

Decree 78 comes into force on 1 November 2015 and replaces Decree No. 43/2010/ND-CP and Decree No. 05/2013/ND-CP.

Memories of Han Nam

If you haven't heard yet, Indochine Counsel has moved. Starting on the day that I'm writing this they are no longer in the Han Nam Office Building, by in Centec Tower. This change brings to mind memories of Han Nam that are not necessarily nostalgic, but they are worth sharing as Indochine Counsel takes this momentous step in their development.

I remember when I first came to Indochine Counsel I was set down in a cubicle in the corner. It was just beneath the air conditioner, but because the air conditioner was not directed straight down but out, it was incredibly hot. Now, I can handle heat pretty well, but I sweat, and sitting in that corner I was sweating profusely. It took about a week for me to convince the office manager to switch me to another seat, this one in the direct angle of the air conditioner.

When I first started, too, Indochine Counsel only had one corner of the fourth floor into which it crammed nearly twenty staff members. It was a tight fit. Later this was remedied when they expanded into the next office over and doubled their space allowance. But still, the problem of heat and air conditioning remained.

During my time working in Laos, I took a week and visited Indochine Counsel to help them prepare the content for their new website. I was seated in the new office space about as far as one could get from any of the air conditioners and I spent each hour there sweating and sweating. I wasn't even dressed formally, but wearing jeans and a t-shirt and I still sweat about as much as the proverbial pig.

Only when I returned to Indochine Counsel as Of Counsel was I given a temporary office in the library. The library was a small room with a single air conditioner for which I controlled the temperature. This was the only time in the Han Nam building that I did not feel overheated. And then there was the construction. Inches away from the back balcony of the Han Nam building someone decided to build a building, stealing Han Nam's parking and creating a ridiculous racket that interrupted meetings and made thinking difficult.

An old building, Han Nam stood only about eight or nine storeys tall. Indochine Counsel, on the fourth floor, was an advanced intelligence in an old body. Like some kind of science fiction film, Indochine Counsel was moving into the twenty-first century without upgrading. But that has finally changed.

The new offices in the Centec Tower are modern and clean, brightly lit and full of air conditioning. It's a happy day for Indochine Counsel to be moving into new offices that are more fitting of our role as a modern business law firm, and to continue to offer the highest level of service that we've offered since we first started in the Han Nam building back in 2006.

About Indochine Counsel

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

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

Indochine Counsel advises clients in the following areas:

- Inward Investment
- Corporate & Commercial
- Mergers & Acquisitions
- Securities & Capital Markets
- Banking & Finance
- Property & Construction
- Taxation
- Intellectual Property
- Technology & Media
- Mining & Energy
- International Trade
- Dispute Resolution

A full list of partners, associates and other professionals is available on our website. |

Contact Us

For further information or assistance, please contact the following Indochine professionals:

Dang The Duc

Managing Partner
duc.dang@indochinecounsel.com

Luu Xuan Vinh

Managing Associate
vinh.luu@indochinecounsel.com

Le Nguyen Huy Thuy

Partner
thuy.le@indochinecounsel.com

Nguyen Hai Yen

Associate, IP&T Practice Group
yen.nguyen@indochinecounsel.com

To Xuan Tinh

Partner
tinh.to@indochinecounsel.com

Le Thi Hai Duong

Junior Associate
duong.le@indochinecounsel.com

Phan Anh Vu

Partner
vu.phan@indochinecounsel.com

Nguyen Thi Hong Anh

Partner, Head of IP&T Practice Group
anh.nguyen@indochinecounsel.com

Ho Chi Minh City

Unit 305, 3rd Floor, Centec Tower
72 -74 Nguyen Thi Minh Khai, District 3
Ho Chi Minh City, Vietnam
T +848 3823 9640
F +848 3823 9641
E info@indochinecounsel.com

Hanoi

Unit 705, 7th Floor, CMC Tower
Duy Tan Street, Cau Giay District
Hanoi, Vietnam
T +844 3795 5261
F +844 3795 5262
E hanoi@indochinecounsel.com

www.indochinecounsel.com

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