Newsletter
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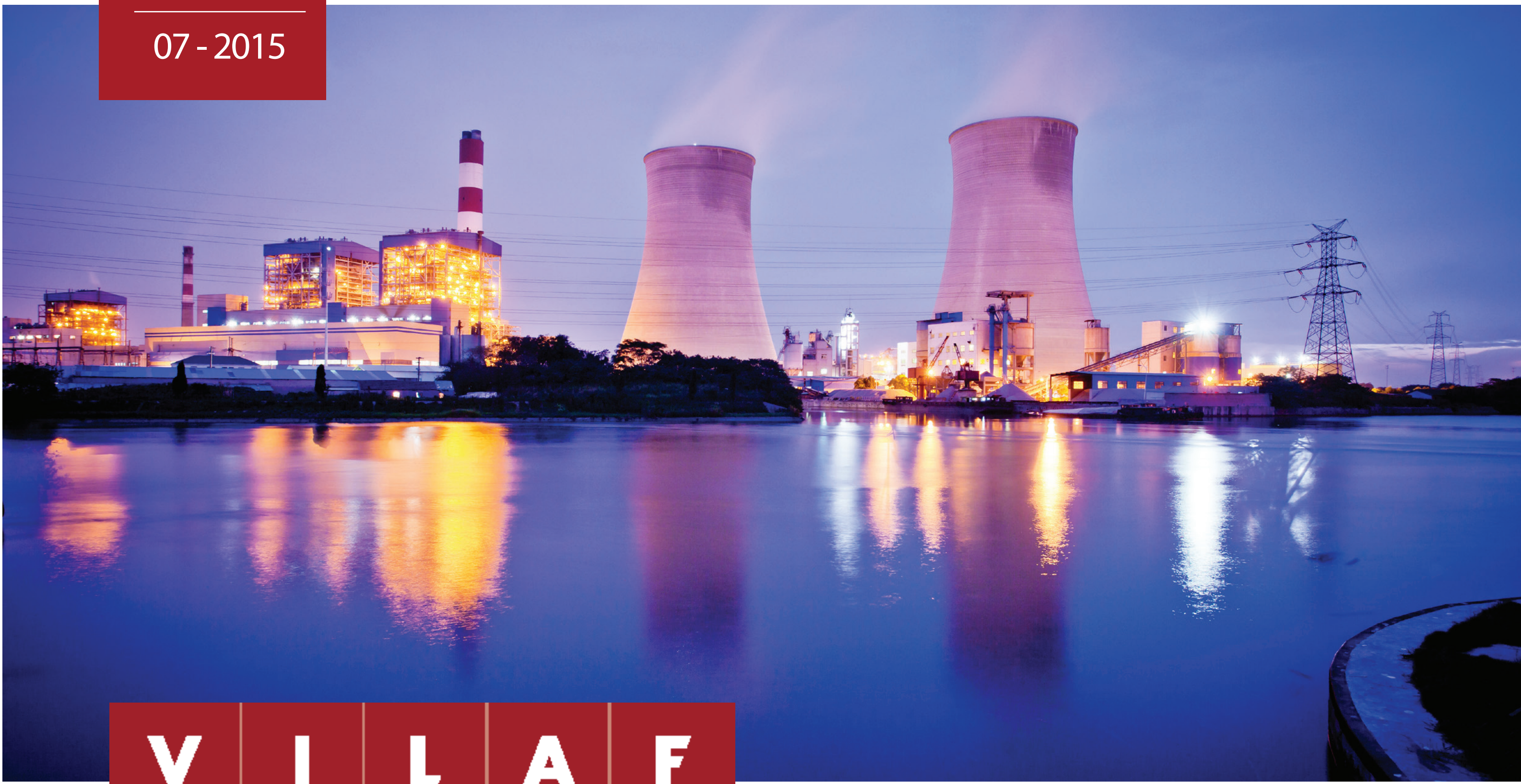

VIETNAM INTERNATIONAL LAW FIRM

Newsletter Summer 2015:

Legal Framework for Developing and Financing Projects Taking Shape

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1. New Decree on Selection of Investors subjects PPP projects to competitive selection of investors;
2. New BOT Power Projects Circular sets forth cases where direct appointment of investors is permitted;
3. New Legal Opinions Decree narrows the documents eligible for the Ministry of Justice legal opinions in PPP projects and government guaranteed loans;
4. New Construction Contracts Circular expands the types of projects the construction of which is subject to its governance;
5. New Bank Guarantee Circular provides conditions for a bank to issue a guarantee for a residential project developer's obligations to future house buyers.

Selection of Investors

Government Decree 30/2015/ND-CP ("Decree") subjects PPP projects to competitive selection of investors

Decree 30, taking effect from 05 May 2015, provides for a framework for competitive selection of investors for major projects (other than upstream oil and gas projects, which are regulated under Decree 115/2009/ND-CP). The Ministry of Planning and Investment is currently working on the draft circular clarifying certain issues still left open under Decree 30.

Projects covered

Under Decree 30, all PPP projects (including BOT, BTO, BT, BOO, BTL, BLT, O&M projects) shall be subject to competitive selection of investors. In addition, projects which (i) use *land with high economic value*, and (ii) are on the approved list of projects for construction of urban buildings, new urban residential areas, commercial houses, commercial and services buildings, multi-purpose complex buildings also fall under the scope of Decree 30. Further guidance is expected to clafiry what consitutes *"land with high economic value."*

Incentivizing Unsolicited Proposals for PPP Projects

A potential investor with an approved feasibility study report or an approved project proposal (for Group C projects as defined under the Law on Public Investment 2014) shall be given priority in competitive tender as follows:

a) For bid evaluation with the service charge method, the prices offered by other bidders (other than such potential investor) shall be deemed to increase by 5% for ranking purposes;

b) For bid evaluation with the method of State capital contribution, the State capital participation proposed by other bidders (other than such potential investor) shall be deemed to increase by 5% for ranking purposes;

c) For bid evaluation with the method of social benefits and State benefits, the contribution to Stage budget proposed by such potential investor shall be deemded to increase by 5% for ranking purposes; and

d) For bid evaluation with a combined method, such potential investor shall be given a ranking priority corresponding to the weighted ratio of the combined method but the total prority value shall not exceed 5%. Further guidance is required to clarify this priority mechanism.

Direct appointment

Direct appointment of investor shall be applied in one of the following cases:

a) Only one investor registers and satisfies the pre-qualification requirements;

b) Only one investors pre-qualifies;

c) Only one investor is capable of implementation because the project involves intellectual property, trade secret, technological know-how or capital arrangement; or

d) Projects which have been proposed by the investors and satisfy the below requirements:

i) Being a PPP project or a project using land with the land use purpose of protecting national sovereignty, national bounderies, and islands; and

ii) The feasibility study (for PPP projects), or project proposal (for PPP Group C projects) has been approved by the authorized State body; and

iii) Having a reasonable proposal for service fee or State capital contribution portion;

iv) Meeting the requirements for protecting national sovereignty, national bounderies, and islands; and

v) Considered by the Prime Minister as projects with feasibility and highest effeciency.

International and Domestic Tenders

International tender shall be applied to PPP projects and projects using land, except for projects which are subject to domestic tender.

Domestic tender shall be applied to:

a) Projects in sectors with restriction on foreign investors' participation under Vietnamese laws or international treaties to which Vietnam is a party;

b) Projects for which foreign investors do not participate in the international pre-qualification process or fail to be pre-qualified;

c) PPP Group C projects as definded under the Law on Public Investment 2014; and

d) Projects using land and with estimated total investment cost (excluding the cost for site clearance and compensation) of less than VND 120 billion.

Procedure for BOT Power Project

Ministry of Industry and Trade Circular 23/2015/TT-BCT ("Circular 23") stipulates the procedures for investment in a BOT power project.

Circular 23, which will take effect on 1 September 2015, sets forth the detailed process for investment in a BOT power project.

Direct appointment of investors

Circular 23 defers to relevant regulations on tender and selection of investors to govern the selection of investors for BOT power projects. However, Circular 23 provides the list of cases where direct appointment of investors are permitted as below:

a) Projects falling within the National Power Master Plan for which the Prime Minister directly appoints the investors;

b) Any project falling within the National Power Master Plan where only one investor has proposed to participate and for which the Prime Minister has approved in principle the direct appointment of the investor;

c) Any project not falling within the National Power Master Plan, proposed at the initiative of the investor and approved by the Prime Minister.

Working group

Within 15 working days after the MOU is executed between the investor and the Ministry of Industry and Trade ("MOIT"), the General Department of Energy shall propose to the MOIT the interdisciplinary working group for the negotiation of the BOT project documents including the BOT contract, the GGU and the MOIT's acknowledgement and consent. Members of the working group shall include representatives from the MOIT and representatives from certain other ministries and relevant State agencies including Vietnam Electricity.

Investment registration certificate ("IRC")

Within 30 days after the parties sign the investment agreement, the investor must submit an application for the IRC. Within 30 days after the IRC is issued to the investor, the investor must incorporate the BOT project company and prepare for the official signing of the project documents.

Ministry of Justice Legal Opinions

Government Decree 51/2015/ND-CP ("Decree 51") narrows the documents eligible for the Ministry of Justice legal opinions

Decree 51, which will take effect on 15 July 2015, for the first time consolidates the rules on the procedures to obtain and the contents of the Ministry of Justice legal opinions ("Legal Opinion") in relation to all relevant types of transactions involving the Government.

Transaction documents eligible for Legal Opinion

Only a transaction document to which a Vietnamese governmental agency ("Vietnamese Party") is a party is eligible for the Legal Opinion. Decree 51 names the followings as eligible transaction documents:

(i) An international treaty relating to an ODA loan and preferential loan and other related documents (if any) to which the Vietnamese Party is a party;

(ii) A loan agreement entered into in the name of the State, the Government or the Ministry of Finance;

(iii) A Government guarantee for loans or international bond documents;

(iv) An agreement on issue of international bonds of the Government;

(v) PPP projects (comprising the project contract, Government guarantee document (if any), land lease contract and other documents relating to the project to which the Vietnamese Party is a party); and

(vi) Other special cases as assigned by the Government or the Prime Minister.

This change would cause future Legal Opinions issued for PPP projects and Government guaranteed loans to deviate substantially from existing precedents, where State enterprises and contracts being guaranteed by the Government have traditionally been covered in such Legal Opinions.

Contents of Legal Opinion

Decree 51 sets forth the basic contents of a Legal Opinion, including the following:

(i) Conditions, circumstances and assumptions necessary to clarify the purpose and scope of the Legal Opinion;

(ii) Assessment of the legal status of the Vietnamese Party signing or issuing the document;

(iii) Assessment of the authority of the Vietnamese Party to sign and issue the document;

(iv) Assessment of compliance with the law of Vietnam regarding procedures for negotiation, signing and issuance of the document; and

(v) Purpose of use of the Legal Opinion to other organizations and individuals.

Other contents can be included in a Legal Opinion, provided that such inclusion shall comply with the following basic rules:

(i) A Legal Opinion must conform with the law of Vietnam as at the time of issuance;

(ii) A Legal Opinion may only be issued after the documents considered for issuance of the Legal Opinion have been duly signed and approved or ratified;

(iii) A Legal Opinion does not increase, decrease or change the rights and obligations of the parties under the documents considered for issuance of the Legal Opinion or pursuant to the law applicable as at the time of issuance; and

(iv) The contents of a Legal Opinions do not assess circumstances, events or other items not directly related to the law of Vietnam.

Construction Contracts

Government Decree 37/2015/ND-CP dated 22 April 2015 ("Decree 37") expands the scope of construction-related contracts ("construction contract") subject to its governance

Expansion of scope of application

While its predecessor Decree 48/2010/ND-CP applied only to a project which is at least 30% funded by State capital or a State enterprise's capital, Decree 37 expands its scope of mandatory application to (i) even a project which is less than 30% funded by State capital or a State enterprise's capital but of which the portion of the State capital investment is more than VND500 billion (ii) any project of a State enterprise (note that under the new Law on Enterprises, State enterprises are defined as those which are wholly owned by the State), and (iii) any project of a State authority, political organization, socio-political organization, social organization or a unit belonging to the People's armed forces or public service providers.

Time limitations

Decree 37 sets out certain time limitations in the case that the construction contract is silent. In particular, 56 days after the date of suspension of the performance of the contract on the ground of a default, if the default is not remedied, the non-defaulting party has the right to terminate the contract unless otherwise agreed by the parties. Similarly, the employer has the right to terminate the contract if the contractor suspends its construction work for 56 consecutive days causing a breach of the construction schedule, and the contractor has the right to terminate the contract if the construction work is suspended for 56 days due to the employer's fault or if the employer delays payment for 56 days unless otherwise agreed by the parties.

Performance bond

Decree 37 adds the requirement that the performance bond must be at least 2% of the contract price. It however exempts a construction consultancy contract from the performance bond requirement.

Advance Payment and Advance Payment Guarantee

Decree 37 reduces the minimum advance payment required for a consultancy contract from the current 25% to 15% (for a contract of more than VND 10 billion) and 20% (for a contract of VND10 billion or less) of the contract price. The minimum advance payment required for other types of construction contract remains unchanged.

If the parties agree on advance payments higher than the minimum advance payment required under Decree 37 for any construction contract (but generally the advance payments cannot exceed 50% of the contract price), the portion of the contract that corresponds to the excess advance payment is not eligible for price adjustments.

If the advance required under a construction contract exceeds VND 1 billion, the contractor must supply to the employer an advance payment guarantee with a value equivalent to the advance.

Bank Guarantee

State Bank of Vietnam Circular 07/2015/TT-NHNN ("Circular 07") provides conditions for a bank to issue a guarantee for a residential developer's obligations to future house buyers

Circular 07 replaces Circular 28/2012/TT-NHNN on bank guarantees and will take effect on 9 August 2015.

Language rule for bank guarantee softened

It is no longer mandatory to issue a bank guarantee involving a "foreign element" in Vietnamese language. Instead, in such a case, the bank can issue a bank guarantee in English, and, when required by the relevant authority, may provide a Vietnamese translation certified by its authorized representative. Circular 07 does not define a transaction "involving a foreign element" but the Civil Code, to which Circular 07 refers as one of its legal bases, defines this generally as a transaction where any of the parties is a foreign individual or entity or the assets involved are located outside Vietnam.

Guarantee for a non-resident client

Circular 07 defines the "client" of the guarantor as the party whose obligations are guaranteed in a guarantee and the "client" of the confirmed guarantor as the guarantor of the underlying obligations.

Circular 07 generally does not change the requirements for a bank to issue a guarantee for a non-resident client. Nevertheless, it exempts these requirements when the non-resident client is an offshore credit institution (such as when an onshore bank issues a "confirmed guarantee" with respect to an offshore bank's guarantee for the obligations of an onshore entity).

A branch of a foreign bank may not issue a guarantee for a non-resident client except a back-to-back guarantee or a confirmed guarantee where the entity with the guaranteed underlying obligations is onshore.

Guarantee for a developer's obligations to future house buyers

A bank of which the banking license permits issuing bank guarantees may grant a bank guarantee for a developer client's obligation to hand over its future houses to buyers. The conditions for issuing such a guarantee include amongst others:

• The future houses satisfy statutory conditions for sale;
• The future house sale agreement must provide for the developer's duty to refund the prepaid price when the developer breaches its handover schedule;
• The guarantee must be effective until at least 30 days after the scheduled house handover date.

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VILAF NEWS: Deals that we advised that have recently closed

IFLR First Tier Law Firm

IFLR1000 continues to rank VILAF as a First Tier Law Firm in Vietnam in 2015 for all the four areas of practice covered in their report: M&A, Banking & Finance, Capital Markets and Energy & Infrastructure.

Vinh Tan 1 BOT Power Project reaching financial close

VILAF advised sponsors including China Southern Power Grid Co., Ltd. ("CSG"), China Power International Holding Limited ("CPIH") and Vinacomin Power Holding Corporation Limited ("VP"), and the BOT Company being Vinh Tan 1 Power Company Limited in relation to the negotiation of the BOT documents and financing of USD1.4 billion Vinh Tan 1 BOT Power Project in Binh Thuan Province.

This is the 4th foreign invested BOT power project in Vietnam reaching financial close. The financing stage has taken more than one and a half year. The construction stage will take around four years.

The VILAF team advising this deal included Partner Dang Duong Anh and Senior Associate Nguyen Vu Quynh Lam.

Mondelez acquiring the snack business of Kinh Do Corporation

VILAF advised Mondelez International Inc as its local counsel in its acquisition of 80% of equity stake in Kinh Do Group's snack business for $370 million. Mondelez is the maker of Oreo cookies and Ritz crackers. According to Reuters, the deal includes two manufacturing plants and Kinh Do's distribution network. Kinh Do is Vietnam's biggest snack producer and is the maker of Cosy biscuits and Solite soft cakes.

The VILAF team advising this deal included Partner Vo Ha Duyen, Partner Pham Si Hai Quynh, Senior Associate Trinh Luong Ngoc, Senior Associate Tran Anh Hien and Senior Associate Nguyen Anh Hao.

Mitra Energy in the reverse takeover of Petra Petroleum

VILAF advised Mitra Energy in a Reverse Takeover of Petra Petroleum pursuant to the TSX Venture Exchange (the "Exchange") Policy 5.2 - Changes of Business and Reverse Takeovers. Mitra Energy's assets in Vietnam affected by this Reverse Takeover include five upstream petroleum blocks offshore Vietnam under production sharing contracts with PetroVietnam.

Partner Luu Hoang Ha advised Mitra Energy in this deal.

Gamuda Land buying out Celadon City

VILAF advised Gamuda Land in the acquisition of its Vietnamese partners' shares in Celadon City Project to become the sole owner of this project. Celadon City is a VND25,000 billion urban development project in Tan Phu, Ho Chi Minh City, initially invested by a joint venture of Gamuda Land and Sacomreal.

The VILAF team advising this project included Partner Ngo Thanh Tung and Senior Associate Nguyen Thi Kim Anh.

Nguyen Kim Deal

VILAF advised Nguyen Kim in the sale of 49% equity stake in NTK New Solution and Technology Development Investment Joint Stock Co, which owns Nguyen Kim with a chain of 23 electronic stores, to Power Buy Company Limited, a retail subsidiary of Thai retail conglomerate Central Group. Founded in 1992, Nguyen Kim is currently the largest electronic retail operator in Vietnam.

The VILAF team advising this deal included Partner Tran Tuan Phong, Senior Associate Phan Thien Huong and Associate Nguyen Kim Ngan.

Standard Chartered Bank (SCB) in a CGIF bond deal

VILAF advised SCB in Masan Consumer's issue of USD100 million corporate bonds, guaranteed by the Credit Guarantee and Investment Facility (CGIF), a trust fund of the Asian Development Bank (ADB). This has been the first corporate bond issue which the ADB supported in Vietnam.

Partner Nguyen Quang Hung advised this deal.

CPECC in the joint venture acquisition of Jaks Hai Duong BOT Power Project

VILAF was Vietnam counsel advising CPECC in its joint venture acquisition of a holding company which owns Jaks Hai Duong Power Project, a USD1.87 billion coal-fired power plant project to be developed on a BOT basis in Vietnam.

The VILAF team advising this project included Partner Vo Ha Duyen, Senior Associate Nguyen Anh Hao, Senior Associate Vu Le Trung and Associate Nguyen Thanh Tung.

BTMU in financing new highway project

VILAF was Vietnam counsel advising Bank of Tokyo – Mitsubishi UFJ in syndicated Nexi loan to provide US$510 million to finance a highway project connected to Da Nang. 17 Japanese banks participated in this landmark financing transaction. This deal was awarded the "Deal of the Year 2014" for the Asia Pacific region by Euromoney's Trade Finance Magazine.

The VILAF team advising this deal included Partner Vo Ha Duyen and Associate Nguyen Thanh Tung.

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Credit Saison merges with HD Finance

VILAF advised Credit Saison Co., Ltd, a major Japanese credit finance company, in its acquisition of 49% of the equity interest in Ho Chi Minh City Development Commercial Joint Stock Bank Finance Co., Ltd. (HD Finance), a Vietnamese company providing retail finance services. The newly branded, HD Saison, will now offer extensive consumer finance and credit card services.

The VILAF team advising on this deal included Partner Kevin Hawkins, Senior Associate Nguyen Anh Hao, and Associate Nguyen Thanh Tung.

SCG bolstering its packaging business with acquisition into BATICO

VILAF advised TC Flexible Packaging Co, a subsidiary of Siam Cement Group (SCG) in relation to its acquisition of 80% shareholding in BATICO, a Vietnamese packaging manufacturing company in Vietnam. This recent acquisition of BATICO makes SCG Packaging the region's leading packaging company, with two flexible packaging factories in Thailand and two in Vietnam.

The VILAF team advising on this deal included Partner Kevin Hawkins, Senior Associate Trinh Luong Ngoc and Associate Nguyen Thi Kim Ngan.

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