

## CLIENT UPDATE SEPTEMBER 2016

### Recent Legal Developments in Vietnam

#### **Circular No. 06/2016/TT-BKHDT on investment in the form of public-private partnership (“PPP”)**

Recently, there have been substantial developments in the regulations public-private partnership (“**PPP**”) investments. PPP includes any form of investment on the basis of a contract between a regulatory agency and an investor, a project enterprise to carry out, manage and operate an infrastructure and public service project. Decree No. 15/2015/ND-CP (Government, 14 February 2015) (“**Decree 15**”) on investment in the form of public-private partnership is the current key legal instrument regulating this investment form, which generally provides the different forms of PPP for parties’ choosing, including:

- Build – Operate – Transfer contract (BOT contract)
- Build – Transfer – Operate contract (BTO contract)
- Build – Transfer contract (BT contract)
- Build – Own – Operate contract (BOO contract)
- Build – Transfer – Lease contract (BTL contract)
- Build – Lease – Transfer contract (BLT contract)
- Operation & Management contract (O&M contract).

As a further development, on 28 June 2016, the Ministry of Planning and Investment (“**MPI**”) enacted Circular No. 06/2016/TT-BKHDT (“**Circular 06**”) to guide the implementation of Decree 15 to constitute a more comprehensive legal framework for deploying PPP in practice.

Significant points are as follows:

- (a) Circular 06 sets out procedures to obtain the Investment Registration Certificate (“**IRC**”) applicable to PPP projects. Accordingly, MPI shall directly receive the application dossier submitted by the investor and issues the IRC for the following projects:<sup>1</sup>
  - (i) projects of national importance in accordance with laws on public investment;
  - (ii) projects for which ministries sign project contracts, or for which agencies authorised by ministries being competent authorities sign project contracts; and
  - (iii) projects implemented in two or more provinces.

For other projects which are not within the competence of the MPI, the People’s Committee shall appraise and issue the IRC. Investor will then submit the application dossier to the Department of Planning and Investment (DPI).

Within 25 days from receipt of the full and valid application dossier, the competent authority will issue the IRC for the investor.<sup>2</sup>

- (b) Circular 06 also introduces basis templates of project contracts. While Decree 15 only states the general responsibility of the competent authority to organise compensation, site clearance and resettlement, Circular 06 further requires that

<sup>1</sup> Circular 06, Article 14.2; and Decree 15, Article 39.

<sup>2</sup> Circular 06, Article 16 and Article 17.

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the investor has an obligation to secure the capital sources for payment of expenses for compensation, site clearance and resettlement.<sup>3</sup>

- (c) State-funded investment projects which have been already carried out by the State may also be converted into a form of PPP investment.
  - (i) The conversion of the state-funded investment projects to the PPP form shall proceed according to such projects' adherence to the following conditions.<sup>4</sup>
    - (1) Conform to the program or the plan for the development of sectors, regions and the plan for the local socio-economic development;
    - (2) Conform to the investment sector;
    - (3) Prove that the investor has capacity for attracting and acquiring the commercial capital, technique and experience in project management;
    - (4) Have ability to constantly and stably provide the good quality products that satisfy the consumer's need; and
    - (5) Have total investment capital of at least VND 20 billion (approx. USD 1 million), except for projects under the Operation & Management contract and the projects on infrastructure works for agriculture and rural development, and the services for enhancing the correlation of agricultural production with farm product processing and sale.
  - (ii) Circular 06 stipulates two options for converting existing state-funded investment projects to a PPP projects, including:
    - (1) Full withdrawal of state capital funded for the work; or
    - (2) Use of partial or entire state investment for implementing the project.

Depending on the selected options, the rights and obligations of the investor and the State will be determined accordingly.
  - (iii) As a matter of procedure, the conversion must be conducted via a due appraisal process. Relevant ministries, regulatory bodies and provincial People's Committees shall first make a proposal for conversion of the investment form for approval by competent authority before executing the contract with investor.
- (d) An investor is entitled to partially or entirely transfer its rights and obligations specified in the project contract to a lender or other investors, provided that the transferee satisfies the following conditions:<sup>5</sup>
  - (i) Has financial and management capability to execute the project contract and relevant contracts;

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<sup>3</sup> Circular 06, Annex I, Item 8(c).

<sup>4</sup> Circular 06, Article 5.1; and Decree 15, Article 15.1.

<sup>5</sup> Circular 06, Article 13.

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- (ii) Commits to continue the performing rights and obligations authorised by the transferor according to the provisions of the project contract and the relevant contracts; and
- (iii) Complies with other requirements as agreed in the project contract, the loan contract and relevant agreements between the competent authorities and the investor.

In addition, the transfer of a part or all of the rights and obligations under the project agreement shall not affect the target, scope, technical standards, and progress of the project and must meet the conditions for investment and operation according to the regulations defined in the Law on Investment and other agreed requirements specified in the project contract. A written agreement on the transfer shall be made between the parties to the project contract and the transferee. Lender shall negotiate the concession agreement under the terms of the loan agreement.<sup>6</sup>

The investor shall go through the application procedures for modification of the IRC. For cases of transfer of rights and obligations according to a project contract that results in changes to the contents of the enterprise registration certificate, the project management enterprise shall carry out the procedures for modification of enterprise registration certificate according to Laws on Enterprises.

- (e) The equity capital of the investor shall be provided according to the schedule agreed in the project contract. According to current law, for projects with investment capital of up to VND 1,500 billion, the investor's equity capital must be at least 15% of the total investment capital. Similarly, when a project's total investment capital exceeds VND 1,500 billion, the investor's equity must make at least 15% for the investment capital of up to VND 1,500 billion, and at least 10% for the investment capital exceeding VND 1,500 billion.<sup>7</sup> At the time of registration for establishment of a project management enterprise, the investor shall decide the amount of equity capital to be contributed to the charter capital.

If the charter capital of the project management enterprise is lower than the required equity capital, the investor shall commit to raising the charter capital during the implementation of the project.<sup>8</sup> However, Circular 06 does not clearly stipulate the specific time-line for raising the charter capital in this event.

- (f) Circular 06 takes effect from 20 September 2016.

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<sup>6</sup> Decree 15, Article 34.

<sup>7</sup> Decree 15, Article 10.2.

<sup>8</sup> Circular 06, Article 20.4.

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### ***ASEAN Economic Community Portal***

With the launch of the ASEAN Economic Community (“AEC”) in December 2015, businesses looking to tap the opportunities presented by the integrated markets of the AEC can now get help a click away. Rajah & Tann Asia, United Overseas Bank and RSM Chio Lim Stone Forest, have teamed up to launch “Business in ASEAN”, a portal that provides companies with a single platform that helps businesses navigate the complexities of setting up operations in ASEAN.

By tapping into the professional knowledge and resources of the three organisations through this portal, small- and medium-sized enterprises across the 10-member economic grouping can equip themselves with the tools and know-how to navigate ASEAN’s business landscape. Of particular interest to businesses is the “Ask a Question” feature of the portal which enables companies to pose questions to the three organisations which have an extensive network in the region. The portal can be accessed at <http://www.businessinasean.com/>.

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