Morgan Lewis

ASIA CHRONICLE

Issue 8

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CONSTRUCTION AND INFRASTRUCTURE

New FIDIC Contracts in 2017 for Infrastructure Projects

Seventeen years since the 1st Edition of the rainbow suite of contracts, FIDIC is rolling out new editions in 2017 to meet changing demands of major infrastructure projects.

Those active in infrastructure projects are familiar with the International Federation of Consulting Engineers (FIDIC) rainbow suite of contracts published in 1999. By way of introduction, FIDIC provides various standard form contracts such as for construction contracts (Red Book), plant and design build contracts (Yellow Book), EPC/Turnkey projects (Silver Book) and Client/consultant model services agreements (White Book).

Seventeen years on, an update is overdue. At the recent FIDIC Users Conference in London and Abu Dhabi, delegates were provided with the prerelease 2nd edition of the Yellow Book, and 5th Edition of the White Book. We highlight salient points of these pre-release versions, which should interest financiers, developers, and constructors alike. Further, new editions of the Red Book, Silver Book, and a new Emerald Book (for tunneling and underground works) will follow later in 2017.

2nd Edition of the Yellow Book 2017

The 2nd Edition is longer than its predecessor, and encourages active contract management and collaboration among parties with the purpose of dispute avoidance. It also addresses certain risk-allocation imbalances in the 1st Edition – The Contractor now bears obligations relating to fitness for purpose of its Works, whereas the Employer is now required to comply equally with the various notice provisions previously applicable only to the Contractor.

Contractor's Design Obligations

Contractors now carry greater design obligations relating to fitness for purpose under the 2nd Edition. Crucially, Sub-Clause 17.7 requires the Contractor to indemnify the Employer against all errors in the Contractor's design of the Works that result in the Works not being fit for purpose or results in any loss and/or damage for the Employer.

The risk on the Contractor is more significant now given that the limitation of liability under Sub-Clause 17.6 does not apply to Sub-Clause 17.7. The Contractor is also required to obtain insurance to indemnify its potential liability arising from breach of its professional duties that result in the Works not being fit for purpose. All these mean that the Contractor potentially bears unlimited liability if the Works are not fit for purpose, subject to applicable principles of remoteness and mitigation under the relevant governing law. Given the gap in insurance coverage available in the market for this, Contractors may take active steps in contracting out of such risks or passing them downstream through subcontracting.

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Engineer's Expanded Role

The Engineer must now possess the requisite professional qualifications, experience, and competence in the main engineering disciplines attributable to the Works, and be fluent in the ruling language of the Contract. As the Engineer should be ideally present on site, the Engineer may now appoint an "Engineer's Representative" with delegated authority necessary to act on the Engineer's behalf on site for the duration of the Works.

The Engineer's extended powers include making agreements and determinations under Sub-Clause 3.7 over disputes between the parties. In so doing, the Engineer is required to actively consult with both parties to encourage dialogue for amicable agreements, failing which to make his determination within specified time limits. To this end, an inexperienced Engineer may be challenged to maintain his neutrality (as is specifically required under Sub-Clause 3.7), especially when the Engineer also acts as the Employer's agent on other matters.

Advance Warning

For dispute avoidance, the 2nd Edition implements a new "early warning" regime. This requires the Employer and Contractor to give advance warnings to each other and the Engineer, of any known or probable future events or circumstances that may adversely affect the Works, increase the price, or cause delay.

The Engineer is empowered to give instructions to avoid or mitigate these effects. Although this borrows from other international standard forms like the New Engineering Contract, 3rd Edition (NEC3), it however lacks "teeth" as there does not seem to be sanctions for failing to give such advance warning. Also, the popular Building Information Modelling (BIM) could have been adopted as an early warning tool, but its facilitation has not been addressed in the 2nd Edition. In comparison, the upcoming New Engineering Contract, 4th Edition (NEC4) includes a BIM option.

New Claims Procedure

There is now no distinction between Employer claims and Contractor claims. All claims should now fall under Sub-Clause 20.1, and are subject to the same time periods and claims procedures. Claims are further divided into (a) claims for payment and extensions of time, and (b) other claims.

For the former, both parties must now give notice of claim within 28 days of becoming aware of an event or circumstance giving rise to a claim, and are required to provide a "fully detailed Claim" within 42 days. Failure to comply with this time frame will result in the claimant's losing its compensation entitlement, although a waiver of time limits may be sought from the Dispute Avoidance/Adjudication Board (DAB) under appropriate circumstances. We anticipate that these default time limits will encourage parties to seek early involvement of claims consultants and construction lawyers, where necessary.

For the latter category of "other claims", the claiming party must give notice to the Engineer as soon as practicable after becoming aware of the other party's disagreement with the requested entitlement. The Engineer will then make his agreement or determination under Sub-Clause 3.7.

Dispute Avoidance/Adjudication Board

The DAB adopts principally a similar tiered dispute-resolution scheme as in the 1st Edition. This includes procedures under Sub-Clause 21.4 to obtain the DAB's decision, unless a Notice of Dissatisfaction (NOD) is given within 28 days, for a reference to arbitration under Sub-Clause 21.6. The DAB's decision in such an instance will be deemed binding, but not final. If so, Sub-Clause 21.4.4 states that the arbitration must commence under Sub-Clause 21.6 within 182 days of the NOD, failing which the DAB's decision becomes final and binding on the parties.

Another significant change is in Sub-Clause 21.7, which provides that the winning party in a DAB decision has an express right to refer to arbitration a failure of the losing party to comply with the DAB decision, regardless of whether the DAB decision is binding, or final and binding. In other words, Sub-Clause 21.7 is applicable even if a NOD had been validly given to render the DAB's decision binding but not final. The arbitral tribunal shall then have the power to order enforcement of the DAB decision.

5th Edition of the White Book 2017

The White Book is one of the most widely used standard forms for professional services contracts between the Employer and its Consultants. The key changes in the 5th Edition from the 4th Edition are highlighted below.

Services

Due to the confusion arising from the 4th Edition's segregation of Consultant's Services into Normal, Additional, and Exceptional Services, the 5th Edition has returned to the conventional definition of Services, with the Scope of Services defined at the outset. Any subsequent changes to the Scope of Services shall be deemed to be variations under Sub-Clause 5.

Standard of Care

The standard of care required of the Consultant remains one of exercising reasonable skill, care, and diligence, and not "fitness for purpose". The 5th Edition further limits such standard of care to only the Consultant's performance of the Services, albeit at a higher project-specific standard. All other obligations, such as those relating to the commencement and completion dates, procurement, and reporting, are considered absolute obligations.

Programming

The 5th Edition strengthens the programming provisions by requiring the Consultant to provide a programme within 14 days of commencement, which

should contain specificities such as order and timing of services, key dates for services, decisions, and approvals. The Consultant is required to update the programme to account for slippages in schedule.

Termination

The 5th Edition expressly differentiates the Client's termination for convenience and termination for default. The Client cannot now terminate for convenience in order to carry out the services itself or through a third party. However, the Client has a right to immediate termination following the Consultant's insolvency or corruption.

Conclusion

We understand that FIDIC is considering whether and how to facilitate the adoption of the BIM, which is gaining traction internationally as a new construction management tool for complex projects. It may well do so via a protocol or guidance note, as has been the route taken by the Joint Contracts Tribunal (JCT) standard forms, or by introducing modular provisions like the NEC4 or drafting instructions for particular conditions to be annexed to the general conditions.

Nonetheless, the pre-release version of the new editions is a brave step by FIDIC in fostering greater co-operation among all stakeholders in infrastructure projects. That said, greater clarity is appreciated on some of the shifts in risk allocation mentioned above.

FINANCIAL SERVICES

Amendments to Japan's Act on the Protection of Personal Information Take Effect

Asset management firms—both in Japan and abroad—may need to take quick action to comply with the amended Act.

On September 9, 2015, the amendments to the Act on the Protection of Personal Information (PIPA) were promulgated, and they became effective on May 30, 2017. This article summarises the parts of these amendments that are most relevant to registered financial instruments business operators (FIBOs) in Japan, their head offices, and affiliates in other jurisdictions.

Entities Subject to the PIPA

The PIPA applies to so-called "business operators handling personal information" (BOHPIs), which, under the PIPA prior to the amendments (Former PIPA), excluded businesses whose databases contained only a limited amount of personal information on any single day during the preceding six-month period (that is, an amount based on which it would not be possible to identify more than 5,000 individuals).[1]

This "small business operator exclusion" is no longer available under the PIPA following the effective date of the amendments (Amended PIPA). This means that businesses that maintain personal information databases for business use are subject to the Amended PIPA regardless of how many individuals are identifiable based on the information contained in these databases.

Applicability Outside Japan

The Former PIPA was applicable only to conduct that occurred in Japan. However, under Article 75 of the Amended PIPA, major parts of the Amended PIPA will apply to conduct that occurs outside Japan where a business has acquired personal information in connection with supplying goods or services to a person in Japan and then utilises such personal information in a foreign country. For example, if a business sells products or supplies services to a person in Japan directly or through a Japanese office or branch, the Amended PIPA applies to the handling of that person's personal information or anonymously processed information[2] even if it occurs at the foreign headquarters of the business outside Japan.

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[1] Article 2, Paragraph 3, Item 5 of the Former PIPA and Article 2 of the Order for Enforcement of the Former PIPA.

[2] Information relating to an individual that can be produced from processing personal information so as never to be able to identify a specific individual by taking certain action (Article 2, Paragraph 9 of the Amended PIPA).

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Transfers of Personal Information to and from Third Parties

Under the Amended PIPA, if a BOHPI provides personal data to third parties outside Japan, it must—in addition to the other third-party rules that originally exist—obtain advance consent from the subject(s) of the personal information confirming that the subject(s) consent to such personal information being provided to a third party in a foreign country. [3]

However, certain exceptions to this consent requirement apply when

- the receiving third party is in a foreign country prescribed by the rules of the Personal Information Protection Commission as having equivalent standards to those required in Japan in regard to the protection of an individual's rights and interests, or
- the receiving third party has established a system conforming to standards prescribed by the rules of the Personal Information Protection Commission as a necessary system in order to continuously take measures equivalent to those that should be taken by a BOHPI.

Unfortunately, however, because the Personal Information Protection Commission has not so far designated any countries that are recognised as having such equivalent standards, the first exception above is not currently available in practice.

When the BOHPI provides personal data to a third party, it must keep a record pursuant to the rules of the Personal Information Protection Commission on the date of the personal data provision, the name of the third party, and other matters prescribed by the rules (subject to certain exceptions). [4] These records must be maintained for the period prescribed by the Ordinance for Enforcement of the Amended PIPA, which is generally three years. [5]

Article 26, Paragraph 1 of the Amended PIPA contains a new requirement (subject to certain exceptions) that a BOHPI receiving personal data from a third party must confirm the name and address of the third party and, if the third party is a corporation, the name of the third party's representative, as well as the circumstances under which the personal data was acquired by that third party (subject to certain exceptions). [6] The BOHPI must then create and

[3] Article 24 of the Amended PIPA.

[4] Article 25, Paragraph 1 of the Amended PIPA. This provision was made to protect personal data from a person who sells personal data. So, several exceptions are provided in order not to prevent normal business practice.

[5] Article 25, Paragraph 2 of the Amended PIPA and Article 14 of the Ordinance for Enforcement of the Amended PIPA.

[6] According to the guideline, it is recommended to confirm and record the compliance status of how the person who provides personal data acquired such personal data from the individual.

maintain records of matters related to such confirmation and other matters prescribed by the rules of the Personal Information Protection Commission (subject to certain exceptions).[7] These records must be maintained for the period prescribed by the Ordinance for Enforcement of the Amended PIPA, which is generally three years.[8]

Penalties for Noncompliance

The Amended PIPA provides for criminal and civil penalties for disclosure or misuse of personal information covered by its provisions. Where a BOHPI (if a BOHPI is a corporation, officers, representatives, or administrator of the BOHPI) or an employee or a person who used to be in such status transfers such information to a third party for payment or other personal benefit to the individual or another, that individual will be subject to imprisonment with labor (penal servitude) for a period of one year or less and a fine not exceeding ¥500,000.[9]

In addition, a BOHPI that violates an order issued by the Personal Information Protection Commission under the Amended PIPA may be sentenced to penal servitude of not more than six months or a fine not exceeding ¥300,000.[10]

Impact on Foreign Asset Managers and FIBOs Generally

Larger FIBOs have for some time been taking steps to address their obligations under the Amended PIPA and ensure compliance with its provisions—both in Japan and abroad. In particular, obtaining customer consent to share information covered by PIPA with foreign parent organizations and affiliates has been a major challenge given the delicate relationships local FIBOs have with major Japanese investors, as well as the difficulty of seeking *post facto* consent to sharing.

Compounding the problem is the relatively low recognition of the new obligations under the Amended PIPA among the typically small offices of many foreign-capitalised FIBOs in Japan. Many client relationship management (CRM) databases are networked and freely accessible by head offices and affiliates outside Japan in circumstances where evidence of specific client consent to such sharing may be difficult to demonstrate. Under the Amended PIPA, it may be possible to make arrangements whereby affiliates could meet the standards for sharing prescribed by the rules of the Personal Information Protection Commission, but in many instances these arrangements may not yet have been implemented. Compliance officers in Japan and abroad should carefully review whether their current systems meet the new requirements and, if necessary, take action to limit access to data

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[7] Article 26, Paragraphs 2 and 3 of the Amended PIPA.

[8] Article 26, Paragraph 4 of the Amended PIPA and Article 18 of the Ordinance for Enforcement of the Amended PIPA.

[9] Article 83 of the Amended PIPA.

[10] Article 84 of the Amended PIPA.

covered by PIPA until relevant consents are secured or compliance sharing procedures implemented.

What Asset Management Firms Should Do

Asset management firms outside Japan that are only now becoming aware of the Amended PIPA and that have or seek Japanese investors should do the following as soon as possible:

- Review databases to determine the extent of Japanese investor personal information held;
- If there are any employees in Japan, the types of employee information held by the firms should be reviewed and appropriate information security and consent procedures should be put in place with respect to such employee personal information;
- Review and update the Personal Information Policies (typically included in Japan Compliance Manuals maintained locally) of Japanese affiliates to ensure that they are in compliance with the Amended PIPA;
- Amend "client intake processes" for Japanese investors (including contacts as well as clients) to include express consents to the sharing of personal information amongst affiliated firms (including parent companies);
- Prevent access by affiliates to Japanese investor information until relevant consents are obtained if the current system does not meet the standards prescribed by the rules of the Personal Information Protection Commission; and
- Put in place written compliance policies and transparent systems sufficient to demonstrate compliance with the Amended PIPA in regulatory inspections.

Private Equity Transactions in Vietnam*

A Brief History of M&A in Vietnam

Vietnam is one of the fastest-growing countries of Southeast Asia with an average annual GDP growth of 6%. Investors are attracted to the country for its low manufacturing costs in manpower and raw materials, making it an even cheaper alternative to their big Chinese neighbour, but also for its emerging middle class in a national population of 95 million. Vietnam has set attractive tax rates for companies and most of its import/export trade barriers and tariffs have been eliminated with ASEAN nations, and other countries beyond, such as Japan, China, and South Korea, while the free trade agreement with the European Union should come into force in the near future (contemplated in 2018).

During the first years after Vietnam launched the "Đổi mới" policy in 1986 and progressively reconnected with the global economic order, foreign investments in Vietnam would primarily consist of direct investments for projects associated with the establishment of new companies, particularly in infrastructure projects, often jointly with a local partner. The liberalisation of the economy was at a too-early stage to draw interests in mergers and acquisitions opportunities, and the inadequate legal framework was also a hurdle.

Before 2007, there were less than 50 M&A transactions per year and the highest deal value would remain below US$300 million. In 2007, Vietnam acceded to the World Trade Organisation (WTO) and pledged to open (subject to certain restrictions) a large number of economic sectors to foreign investment under WTO's rules. Since then, the M&A market has been constantly expanding. In 2015, the total value of M&A deals was estimated at US$5.2 billion, with almost 50% arising from overseas purchasers.[1]

Another recent important milestone is the entry into force of a new Law on Investment and a new Law on Enterprises in 2015, making it easier for investors to undertake acquisitions in Vietnam.

Opportunities and Challenges

Despite good prospects, Vietnam remains a small market for acquisitions in the private sector. The number of deals completed in one year does not usually exceed 500. Although we have seen a few big names investing in the country,

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*The article was drafted thanks to the support and guidance of our colleagues from Audier & Partners.

[1] Source: Stoxplus – M&A Opportunities from Global Integration – Report 2016. In that report, Stoxplus estimates that 341 deals were completed in 2015 while 98 of them were originated from overseas.

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including TPG Capital, Goldman Sachs, CVC Capital Partners, and the Singaporean fund GIC, the appetite of foreign funds for Vietnamese deals remains moderate. That is due to several factors. First, even if the number of opportunities is increasing day by day, deal size remains fairly low, the great majority of the transactions being valued at US$15 million or less. Another reason is the cultural gap and the difficulty faced by foreign investors in coping with an economic environment still marked by red tape, corruption, and a lack of corporate governance. Eventually, access to information about the private sector remains challenging and public records on companies are limited.[2]

Notwithstanding all the above obstacles, one should not neglect the vast potential of the country. With a stable political environment and an inflation rate that is under control, the opportunities for making high returns are real. Last year, the French distribution conglomerate Groupe Casino exited from Big C Vietnam and sold it to Thai company Central Group, in an unprecedented US$1.14 billion transaction. Another Thai company, TCC Group, the largest investor in Berli Jucker PCL (BJC), completed the purchase of Metro Cash & Carry Vietnam from German Metro Group. The deal was valued at US$710 million. Those two significant transactions are good examples of the increasing vitality of Vietnam in the private sector.

In this article, we will cast light upon the legal tools and constraints in respect of an acquisition or a subscription of shares in a Vietnamese private company by a foreign purchaser. After reviewing the legal framework applicable to foreign investments and the recent changes in corporate laws, we will outline the legal procedure to comply with when investing in non-listed shares. Finally, we will contemplate certain structural issues for an investment that is made from overseas.

Legal Framework of Investments in Vietnam

Foreign investors versus domestic investors

Vietnam has established an original legal regime for businesses whereby investors are subject to two distinct procedures, one being set out under a law on investment and the other under a law on enterprises. The law on investment will generally require any foreign investor having a business project to obtain an investment registration certificate (IRC) to be delivered by the Vietnamese authorities (Provincial Department of Plan and Investment or Provincial Industrial Zone Management Authority depending on location of the project) before incorporating an entity in Vietnam. Domestic investors are not required to apply for an IRC. Under the law on enterprises, the incorporation of the entity in which the foregoing investment project will be operated can be achieved

[2] Basic corporate information is accessible at:https://dangkykinhdoanh.gov.vn/en-gb/home.aspx. Information on mortgage on movable assets and information on intellectual property are also easily accessible. Financial information (such as financial statements and reports) is difficult to find, except for listed and other public companies.

through the issuance of an enterprise registration certificate (ERC), equivalent to a certificate of incorporation, delivered by the Business Registration Office under the same Provincial Department of Plan and Investment (DPI).

It is worth noting that the above bi-cephalous procedure has drastically evolved since its first implementation in the wake of the Đổi mới. Originally setting a clear discrimination between foreign investors and domestic investors, it has progressively grouped both categories under the same regime although differences of treatment still apply today.

Recent improvements in the legislation

In 2014, a new law of investment (the 2014 LOI) and a new law on enterprises (the 2014 LOE) marked a significant step in the harmonisation of the foreign and local regimes, demonstrating a continuous pro-investor approach. One of the important contributions of these new sets of laws is a more accurate definition of the concept of 'foreign investor' and 'deemed foreign investor'. Under the 2014 LOI, a foreign invested company is deemed a foreign investor if the amount of investment by a foreign investor, or by a domestic company in which a foreign investor holds 51% or more, accounts for 51% or more of the share capital. Investment projects by a domestic company where the foreign investor or the deemed foreign investor holds less than 51% will not be subject to an IRC. Foreign investors are still required to obtain an IRC before establishing a company in Vietnam to implement the first project regardless of the percentage of investment capital it will hold in the domestic company.

The 2014 LOI also defines a framework for M&A transactions, allowing foreigners to invest in existing domestic companies whether by way of acquisition of shares or contribution to the share capital. Such an investment does not require the foreign investor to apply for any IRC but the investment must be registered if it is made in a conditional sector or if the foreigner will own more than 51% of the share capital as a result of its investment.

Restrictions on foreign investors

Although it has improved the landscape for foreigners looking to invest, Vietnamese legislation and international commitments still include certain requirements and restrictions. Vietnam still wishes to control the stream of foreign capital entering the country and to favour domestic investors in a large variety of sectors. For instance, the 2014 LOI listed more than 200 conditional sectors related to national defense and security, social order and security, social ethics, or public health. Investments in conditional sectors involve a deeper control by public authority, differing from one sector to another. The specific investment conditions applicable to investments in conditional sectors are detailed either in the specialised laws governing the particular sector or in international commitments such as the Vietnamese WTO Commitments on Services (Vietnam's WTO Commitments). As a result,

an investor contemplating an investment in a Vietnamese company will need to first scrutinise the list to clarify if the business at stake is conditional, as otherwise such investor could be subject to specific conditions and potentially a complex and uncertain procedure.

Additionally, a few areas of the economy provide for limitations on foreign holding. These include the banking and financial sector (foreign investors may establish a fullyowned subsidiary but may not acquire more than 30% of the ownership of Vietnamese commercial banks and, for banks operated as joint venture, foreign investors' ownership cannot exceed 50%) and some sectors in the logistic field. Retail and distribution are open to foreigners up to 100% holding but the obtaining of an IRC and required industry-specific licenses (business license and retail outlet license) is still complicated in practice. The authorities will also fix a cap for foreign shareholding in respect of state owned companies that are in a process of equitisation. Despite all these surviving restrictions, the trend remains, however, to keep on liberalizing the economy.

A Better Climate for M&A Transactions

Recent developments in Vietnam law have improved the conditions for making an investment in the private sector. They relate to the nature of instruments that a Vietnamese company may now issue to attract investors and to the investment procedure that has been simplified.

More tools for private equity investors

Under the 2014 LOI, anyone may invest in a private company by way of acquisition or subscription of shares. The investment can consist of ordinary shares or preference shares, as contemplated under the 2014 LOE. Preference shares can be multiple voting shares, shares with special rights to dividends, and redeemable shares. However, voting preference shares can only be held by an organisation authorised by the government and by founding shareholders, and such shares cannot be further transferred. Voting preference shares held by a founding shareholder must be converted into ordinary shares after three years from the issuance date of the ERC. Shares with special rights to dividends and redeemable shares are non-voting shares.

The 2014 LOE also contemplates the issuance of bonds and convertible bonds regulated under a Decree 90/2011. The issuing company must have been profitable on an operating basis for the previous year. The minimum term is one year and convertible bonds may not be transferred during the first year of their issuance except among professional securities traders. Any bond issue plan will need to be approved by the competent corporate body. Issuance of the above securities must be denominated in Vietnam Dong, save in the case of issuance of international bonds, which is, however, subject to the control of the State Bank of Vietnam. For that reason, any overseas investor must include as a risk factor any foreign exchange fluctuation risks.

PRIVATE EQUITY

Minority or majority investments?

As previously stated, a minority investment in an existing domestic company up to 51% is not subject to any authority approval; contrast a majority investment or an investment in a conditional sector. In the context of an acquisition of a minority stake, only the ERC will need to be amended to reflect the new share capital (as applicable), the new members in the case of an investment in a limited liability company, and the changes, if any, in the governance. If the investment consists of taking a majority stake or a conditional sector, foreign investors should comply with the registration requirement of the 2014 LOI, which works as a condition precedent, before the procedure for amendment of the ERC can take place. Investors have a choice to submit to the competent authority, for ERC amendment purposes, either a subscription agreement (in case of share issue by the target company) share purchase agreement (in case of share transfer) or share payment evidences. Parties are free to set forth the conditions of their investments subject to any applicable regulation. This typically includes representations and warranties granted by the issuer and the founding shareholders as well as a mechanism of indemnification for the investor.

An investor shall also pay attention to the antitrust regulations applicable in Vietnam. An acquisition leading the purchaser to own 50% or more of market share is prohibited, and those between 30% and 50% are subject to the approval of the Vietnamese Competition Authority. A new competition law is however, expected to be passed in the first months of 2018.

While considering an investment in a Vietnamese private company, investors should be aware of certain matters of corporate law that will influence their governance in the invested company.

Setting The Rules of Governance

While considering an investment in a Vietnamese private company, investors should be aware of certain matters of corporate law which will influence their governance in the invested company.

Two main forms of legal entity

Vietnamese law, which is built on a French civil legacy, makes an important distinction between a Limited Liability Company (the LLC) and Joint Stock Company (the JSC). The LLC is meant to be a small or medium-sized private structure from one (with a special regime) to fifty shareholders (designated as the members), relying on its members directly, whereas the JSC is deemed to be a larger structure that can welcome an infinite number of shareholders (but shall have at least three shareholders), enabling its listing on a stock market place. These two forms of companies share many similarities but also differ in some aspects.

The governing bodies of an LLC consist of a Board of Members and a General Director or Director essentially. A Multiple Member LLC having 11 members or

more must also establish a Control Committee. A JSC is composed of a General Meeting of Shareholders, a General Director or Director, and a Board of Management as the executive organ of the company. The JSC can also appoint a formal Control Committee or choose the option of an Internal Auditing Committee that must be established directly under the Board of Management.

Decisionmaking process

In an LLC, resolutions can be adopted by voting at a meeting or seeking written opinions instead of holding a meeting as provided in the articles of association[3] of the company. A number of votes representing at least 65% of the total contributed capital calculated among the members attending the meeting, or members holding at least 65% of the share capital for written resolutions, are necessary to pass a resolution. A higher 75% of votes of the total contributed capital of the members attending the meeting must be obtained for special resolutions in situations such as a sale of more than 50% in value of the company's assets or a change in the company constitution.

In a JSC, resolutions of the General Shareholders Meeting are adopted at a meeting when they are approved by a number of shareholders representing at least 51% (or more as may be provided in the company's articles of association) of the total number of voting shares of all shareholders attending the meeting. A percentage of at least 65% or more as may be provided in the company's articles of association will be required for special resolutions.

Shareholders of the company can consent to higher thresholds of majority than what the law provides, both in the LLC and in the JSC. Therefore, a minority investor with less than 25% of the share capital can propose to provide in the articles of association that its consent be required for a list of decisions that it will consider as strategic.

How to ensure the liquidity of the investor?

The investor and the existing shareholders will also organise the rules of liquidity of their shares. Private agreements can be entered into to regulate their relationships and there will not be any obligation for the parties to subject their terms to the approval from or even disclosure to any Vietnamese authority. Vietnamese corporate law does not prohibit rights of first refusal, preemption rights, drag-along or tag-along rights (among others), which are commonly used in private equity transactions. However, such mechanisms are not expressly provided by law either and parties should, therefore, bear in mind the potential obstacles to the enforceability of such rights. For instance, even if a shareholder consents to the automatic transfer of its shares in case of a sale of the business by the exercise of a drag-along process, the transfer of

[3] The term used in Vietnamese law for articles of association is closer to "charter".

the shares will still remain subject to the formalities to be completed before the Vietnamese authorities (as explained above, if a foreign investor is the purchaser, the 2014 LOI will apply). Likewise, if a shareholder is in breach of its contractual obligations, for example, a fraud to a right of first refusal, the provisions of the shareholders' agreement may not be sufficiently protective for the non-defaulting parties. Under article 358 of the Civil Code, *"where an obligor fails to perform an act which it must perform, the obligee has the right to request the obligor to perform the act, or the obligee may perform the act or assign the performance of the act to another person and to require the obligor to pay reasonable expenses incurred and compensate for any damage*." and "w*here a person has an obligation not to perform an act but, nevertheless, performs such act, the obligee has the right to require the obligor to cease performing the act, make restitution and compensate for any damage*". In theory, article 358 would allow a party to seek from the courts the enforcement of the defaulting party's obligations or the restitution of any shares transferred in breach of a restriction set forth in the shareholders' agreement. However, specific performance is rarely granted by a Vietnamese judge. In addition, the rare publication of case law makes it difficult for a claimant to know in advance if he has a strong case for enforcement. For that reason, practitioners regularly advise the parties to submit their disputes to arbitration (where they can appoint arbitrators who will have a greater knowledge and exposure to the M&A environment) rather than to the courts. Overseas arbitration will be favoured especially when all shareholders have interests located outside Vietnam.

Cross-border considerations

A typical question for an investor engaged in an M&A transaction will be the place of jurisdiction to incorporate a vehicle of investment. The 2014 LOI has opened the door for foreign invested companies established in Vietnam to be shareholders of other Vietnamese companies[4] and it now seems possible for a foreign investor to incorporate a company with the purpose of making acquisitions in the private market. In practice, it is recommended that the company should not strictly be incorporated as a holding company for purpose of successfully going through the process of registration under the 2014 LOI. The scope of business can, for example, be extended to consultancy services.

When one or several investors are based overseas, the holding company will preferably be incorporated overseas. Singapore and Hong Kong are typically the locations for such entities, due to their favourable corporate income tax treatment, the ease of incorporating a company, and the enforceability of local law. The latter factor is relevant in facilitating enforcement of arrangements among shareholders in the holding company in a jurisdiction offering greater flexibility to determine the rules of governance and liquidity.

[4] See article 23 of the 2014 LOI.

At the time of exit, in case of the sale of the Vietnamese investment, parties may agree that the shares in the holding company will be transferred to the purchaser rather than the shares in the Vietnamese company, in order to simplify the whole process.

Bringing up the domestic partner?

For an investment in a Vietnamese corporation where Vietnamese shareholders continue to hold a stake, investors may consider bringing such local shareholders up to the holding company who would invest from the holding company, which in turn would buy out 100% of the shares of the Vietnamese target. By doing so, the holding company would become the sole shareholder in the Vietnamese target, and all shareholders, being relocated in an overseas jurisdiction would be bound by a shareholders' agreement under the law of such jurisdiction, with greater comfort in term of enforceability. However, this would subject the transaction to the regime of the 2014 LOI since the Vietnamese target would become a foreign invested company. In addition, such structure would face plenty of difficulties due to the restrictions on Vietnamese entities and nationals in investing abroad. In principle, such entities and nationals must obtain an investment registration certificate from the Ministry of Planning and Investment and a certificate of registration of direct investment account from the State Bank of Vietnam. In addition, political approval is required when the amount of investment overseas exceeds certain thresholds. Parties would also need to ensure that all tax obligations are complied with. For all the above-mentioned reasons, such a structure is rarely implemented and whenever parties are considering it, they will need to ensure full compliance with Vietnamese law.

NEWS

Community Impact Week: Shanghai Team Hosts the Nature Conservancy

Our Shanghai office enjoyed lunch and a visit from pro bono client The Nature Conservancy as part of our firm's Community Impact Week. The Nature Conservancy is a charitable environmental organisation headquartered in Arlington, Virginia, and is the largest environmental nonprofit group in the Americas by assets and by revenues. LEPG partner Lesli Ligorner (SH) and her team have been providing legal advice on labour and employment matters for the client for many years and have been engaged to continue to do so.

From left are LEPG China advisor Xiaoqian Zhou (SH), of counsel Dora Wang (SH), and partner Lesli Ligorner (SH); Liang Kan of The Nature Conservancy; and CBT partner Todd Liao (SH).

Community Impact Week: Tokyo Office Visits Children's Home

Our Tokyo office kicked off its Community Impact Week with a high-energy visit on June 4 to the St. Francis Children's Home in Ota-ku, Tokyo. Twelve Tokyo office lawyers, staff members, and friends spent the afternoon with nearly 25 children, ages 3 to 12, and the home's staff in a series of English-language learning activities and waffle and crepe making. Our volunteers sang songs, played games, and read to the children, and also donated waffle makers, soft drinks, and books to the home. Those who were unable to participate in the event made generous monetary contributions and donated time in preparing materials for the activities.

For the last 10 years, members of the Tokyo office have sponsored a charity holiday drive and party for the home's 50 children, ranging in age from 3 to 18.

NEWS

Tokyo office members volunteer at the children's home for an afternoon of English learning and waffle and crepe making.

Community Impact Week: Singapore Office Supports Children's Cancer Foundation

Our Singapore office hosted beneficiaries of the Children's Cancer Foundation (CCF) on June 10 during the firm's Community Impact Week. During the event, lawyers from our Singapore office partnered with clients in the food and beverage industry—Carlsberg, Chef Works, Bar-Roque Grill, Shanghai Dolly, and 1-Rochester Group—to raise awareness and funds for CCF, a nonprofit organisation in Singapore that provides much-needed support to children with cancer and their families. In a first for the office, we invited clients to be partners and co-sponsors of the event by sponsoring charity auction items like food and beverage vouchers.

Our lawyers also did their part by decorating art pieces such as mugs, clay pigeons, terrariums, and model airplanes, and donating used books as part of CCF's book donation drive. The office hosted 15 to 20 CCF children, ages 7 to

10, who are cancer survivors and/or are in remission. The children and their families received a morning of entertainment, including a magic show, balloon sculpting, and games.

From left, CBT partner Elizabeth Kong (SI), Litigation associate Eugene Lee (SI), and CBT trainee Siak Yong Goh (SI) create decorative items to put up for charity auction.

IM partner Edward Bennett (SI), left, and CBT partner Arnaud Bourrut-Lacouture (SI) view the items for the auction.

NEWS

Chris Wells Presents to Alternative Asset Managers in Japan

IM partner Chris Wells (TO), who serves as a vice-chair of the Japan Chapter of the Alternative Investment Management Association (AIMA-Japan), spoke at a panel titled "A Time of Change: How the Regulatory Framework for Japanese Alternative Asset Managers is Evolving," at the 12th AIMA Japan Hedge Fund Forum in Tokyo. The event was held at the Jiji Press Hall and attracted more than 150 leading fund operators and managers, prime brokers, fund administrators, institutional investors, regulators, government officials, and policymakers in Asia. Chris also presented awards to those who last year successfully predicted what the Nikkei Index and Japan/US dollar rate would be on March 31. The forum was AIMA's most successful event in Japan to date.

AIMA is a global organisation that aims to promote the alternative investment industry's global expansion, develop sound practices, enhance industry transparency and education, and liaise with the wider financial community.

Tsugumichi Watanabe Presents at Pennsylvania Investment Seminar in Tokyo

CBT partner Tsugumichi Watanabe (TO) spoke on June 19 in Tokyo at the "2017 Pennsylvania Investment Seminar—Business Environment in Pennsylvania and Its Competitive Superiority" to more than 100 executives and managers from Japanese companies that have invested or are considering investing in Pennsylvania. The seminar was sponsored by the Pennsylvania Department of Community & Economic Development (DCED), organised by the Japan External Trade Organization (JETRO), and supported by the Tokyo Chamber of Commerce and Industry. It provided an overview of Pennsylvania's economic, business, and legal environment as well as a case study by a Japanese company already invested in Pennsylvania.

Our Tokyo office was once again invited to speak at the seminar by the Japan representative office of the DCED based on last year's presentation. Japanese investment in Pennsylvania covers a wide variety of industries ranging from life sciences to food manufacturing. Japanese companies with investments in Pennsylvania include Olympus, Nissin, Meiji, Sekisui, Rohto, Eisai, Toshiba, Tokio Marine Group, and Mitsubishi Electric. The seminar provided an opportunity for Morgan Lewis to strengthen its relationship with the Commonwealth of Pennsylvania in connection with promoting Japanese business in the commonwealth.

HEADLINE MATTERS

CMC Infocomm: Mandatory Unconditional Cash Offer

Morgan Lewis is advising CMC Infocomm Ltd. on the mandatory unconditional cash offer by Yinda Pte. Ltd. for all of its shares. The offer arose when Yinda entered into a sale and purchase agreement with two of CMC's major shareholders, TEE International Ltd. and CMC Engineering Sdn. Bhd., to acquire approximately 113 million shares at S$.095 ($.07) apiece, resulting in Yinda's mandatory general offer for CMC. The offer price in cash values CMC at approximately S$14.5 million ($10.5 million), and represents premiums of 18.8% and 34.6% above the one-month and three-month volume weighted average price of CMC, respectively.

CMC is listed on the Catalist board of the Singapore Exchange. The group provides integrated communication solutions and services to communications network operators and communication network equipment vendors in Singapore, Malaysia, Thailand, and the Philippines.

The team was led by CBT partner Bernard Lui (SI), with assistance from associates Parikhit Sarma (SI) and Aaron Leong (SI).

A-Volute: €2M Increase in Share Capital to Pursue Expansion

We recently assisted A-Volute SAS, an audio technology company incorporated in France, and its founding shareholders in an increase of the company's share capital in which existing shareholders and business angels participated. The round of discussions also allowed some of the historical investors to exit the company. A-Volute aims to reach an annual turnover of 16 million euros within the next three years and to employ 100 people against the current 45 employees allocated among France, Singapore, and Taiwan. The purpose is also to pursue development of the business in Southeast Asia and in the United States. We have advised A-Volute on its corporate, commercial, and intellectual property matters for almost three years.

The team was led by CBT partner Arnaud Bourrut-Lacouture (SI).

IndoSpace: Formation of $500M Joint Venture with CPPIB

We recently served as Singapore counsel to IndoSpace on the formation of a joint venture with the Canada Pension Plan Investment Board (CPPIB): IndoSpace Core. CPPIB has initially committed approximately $500 million to the joint venture and will own a significant majority stake. IndoSpace Core will focus on acquiring modern logistics facilities in India and has committed to acquiring 13 industrial and logistics parks from current IndoSpace development funds, with the option to acquire additional industrial and logistics park assets valued at approximately $700 million currently being developed by IndoSpace funds. IndoSpace Capital Asia, newly constituted as a Singapore private company, will manage IndoSpace Core.

HEADLINE MATTERS

We advised on the Singapore law aspects of the transaction, including the structuring of IndoSpace Core, the complex transaction documentation, and the regulatory status of IndoSpace Capital Asia.

The team was led by IM partner Daniel Yong (SI), with assistance from associate Caitlin Yap (SI).

Victory in obtaining debt recovery of US$29M

We recently acted for a global communications construction company (the client) involved in the construction of telecoms towers in Myanmar, to obtain a recovery of US$29 million of debt owed to it by its business partner (the counterparty) for various towers that client had built in Myanmar. Our client's recovery of the debt was hampered by the terms of claim for the subordination deed it had entered into pursuant to a master lending agreement between the counterparty and other financiers, which prevented it from suing the counterparty for the increasing debts owed. Faced with these restrictions, we advised the client to commence legal action in Court for pre-action discovery of the master lending agreement premised on the counterparty's representations, which induced our client to sign the Subordination Agreement. This was coupled with client continuing to negotiate a settlement with the opponent.

We secured a settlement for the client on terms acceptable to both our client and the counterparty's Mezzanine lenders, the client recovering close to US$29 million, nearly US$5 million more than what was initially offered to settle this matter. This was a win for our client as enforcement of any judgment in Myanmar where the counterparty's assets are situated would have been challenging and time consuming.

The team was led by Litigation partner Lynette Chew (SI), and CBT partner Arnaud Bourrut-Lacouture (SI), with assistance from associate Eugene Lee (SI).

COFFEE WITH . . .

Edward Bennett

Edward Bennett is a Morgan Lewis' corporate, finance, and investment management partner.

As a recent joiner to the firm's Singapore office, I was curious to see how cycling, my usual form of commute and long-held passion, would be viewed by my new colleagues. This close to the Equator, there are of course some good reasons why cycling to the office hasn't caught on in quite the same way it has in European, North American and Australian cities. However, I was delighted to find I'm not alone at Morgan Lewis in my two-wheeled obsession, although it will be a while yet before I find the bike racks in the office carpark full to capacity every morning.

So, in trying to convey the joys of cycling and commending it to my unconverted colleagues, I turn to the words of some other more astute observers of human nature, not all of them known as cyclists.

"Nothing compares to the simple pleasure of riding a bike" (John F. Kennedy)

Whenever the topic comes up with clients or colleagues, the most common reaction is surprise and a comment on how dangerous cycling on the roads is in a city like Singapore. Rather than trot out all the research on the overall health benefits, the real answer is that I would still carry on riding in places far more dangerous and unsuitable for commuting by bike. However, I confess my nerves and lungs would probably draw the line if I lived somewhere like Hong Kong or Jakarta. Anywhere else, the mental transition as you step on a bike and feel the breeze in your face is, depending on which end of the day you face, a refreshing wake-up call or the perfect antidote to the office. You feel simultaneously connected with the real world because, let's face it, there's a considerable penalty for failure, but also a sense of inner calm as you are completely distracted from whatever taxed your mind before you set off.

Anyway, who are we to argue with JFK? Legend has it that he experienced a far wider range of pleasures, simple or otherwise, than most of us ever will.

"It is by riding a bicycle that you learn the contours of a country best, since you have to sweat up the hills and coast down them" (Ernest Hemingway)

The well lubricated author frequented the Long Bar at Raffles Hotel, but I'm not sure he ever actually cycled in Singapore. Whilst he would have sweated up even the smallest of its hills, he would have struggled to find one large enough to feel he was coasting down the other side. Nevertheless, his point still stands and my travels to places like Sri Lanka, Taiwan, Japan, Nepal, and Romania have been immeasurably

improved by experiencing it all from the saddle, on- or off-road and connecting with people and the landscape in a way that's just impossible if you merely spill occasionally out of an air-conditioned car or bus. Also, what really clinches this kind of cycle touring for me is the guilt-free delight of tucking away a gourmet meal and a glass of the local brew every time you stop anywhere. Tuscany is the perfect example of this, especially when you realise that every town of any interest always sits on top of a big hill.

"It doesn't matter if you're sprinting for an Olympic medal, a town sign, a trailhead, or the rest stop with the homemade brownies. If you never confront pain, you're missing the essence of the sport. Without pain, there's no adversity. Without adversity, no challenge. Without challenge, no improvement. No improvement, no sense of accomplishment and no deep-down joy." (Scott Martin)

I think Scott Martin comes closest here to capturing the essence of what I get out of biking and how it connects with life more generally. Whilst others, particularly the French, might argue that biking has some religious dimension, I'd merely say that I'm an enthusiastic dabbler in all sorts of sports, but I always come back to cycling. I've even entered some road-races since moving to Singapore from the UK, but I soon gave that all up, preferring instead the competition I had always had on a bike just within myself and amongst my cycling friends. "Can my mind overcome my body and complete 500 kilometres around Lombok in a single day?" I blithely speculated two years ago. The answer, somewhat inevitably, was "no" but I enjoyed the (as it turned out, insufficient) training and testing the theory all the same. At the opposite end of the sport, the journeyman pro Cadel Evans notes how simple a machine the bicycle is. After all, basic physics dictates that to enjoy coasting downhill you have to climb up the other side, preferably beforehand. This "input ≈ output" equation is the universal law we encounter every day when we try to improve at anything, whether at home or at work and whether as a friend, colleagues or trusted adviser. The secret seems to be in learning how to enjoy the uphill section.

This all sounds a bit earnest, so I'll finish by mentioning my forthcoming trip rolling along amongst the vineyards of Burgundy. To cajole my partner into joining I promised that, in addition to sampling the odd Grand Cru, she could ride an e-bike whilst I will grind away without battery-powered assistance. Frankly I can't reconcile e-biking with my "no adversity, no challenge" mantra, but that won't bother me if we open a bottle at the end of the first day and neither bike has been thrown in a hedge in despair. The key lesson will then instead be that cycling is also a team sport: just like real life again, I suppose.

THE LAST WORD

The Last Word is a regular segment giving you a light-hearted insight into the personalities at Morgan Lewis.

When you are terrified of heights

No one wants to admit to their weaknesses, but this is one that gives me great resolve: I am inexplicably and irrationally terrified of heights. I have stopped dead in my tracks, unable to move forward or back, when trying to cross the George Washington Bridge where you can see through the grating to the Hudson River below. One of my earliest memories is when I froze in fear at the top of the steps of the US Capitol! (Yes, you may be wondering if that is a mistaken memory, but it is not – I was that afraid of heights.)

Fast forward to 1997, when I fell in love with my spouse of now 19 years and had to learn to paraglide, or to become (a) a designated driver of paragliders who flew cross country (meaning I would give rides to or pick up paragliders), or (b) a weekend widow. Before I met my husband on a blind date, he made it abundantly clear that he went flying every weekend that it did not rain.

Option (a) was not an option for me. I could not contemplate spending my weekend days in the car transporting others to participate in a sporting activity after spending Monday through Friday litigating cases. Neither was option (b), as I also wanted to go to the mountains and get out of New York City—and out of the car. So, it was decided that to pursue this relationship, I would learn to leap off cliffs and trust a piece of nylon to lift me up instead of dropping me splat onto the ground below.

Before I relocated to China in 2006, I not only learned to fly on a pimple of a mountain in New York State, but I traveled around the United States and Europe just to find incredible flying sites. I flew off mile-high mountains and landed in vegetable fields or beaches in Turkey, soared over vacation homes in northern Denmark, flew over grizzly bears and mountain lions in Jackson Hole, Wyoming, and flew cross-country in France and across part of Lake Annecy by mistakenly following the glider in front of me instead of turning to land in the designated landing zone. I have landed in the middle of fields, only to be encircled by a herd of "raging bulls", which I only learned later, after running for my life while bogged down with heavy gear and an unfolded purple and yellow wing bouncing behind me, that it was the colourful wing that attracted the interest of this herd of cows (not bulls), and not me!

I have never felt 100% comfortable or at ease on launch—at times those little butterflies in my stomach while waiting to take off took my breath away, and I have even cried on a launch or two, the ones where the ground just drops and it feels like you are launching yourself over a cliff. But I did fly with the birds and learn to see the world from a different lens (literally from many thousands of feet in the air!). I have learned that with resolve, we can do things we never thought we were capable of.

Lesli Ligorner, Partner, Shanghai

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