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Trade

The Draft 3rd of the New Commercial Law

By Nguyen Thi Thu Ha

The enactment of the present Commercial Law on May 10, 1997 marked a milestone in the country's economic and legal reform agenda by providing a comprehensive legal framework governing business relations. The law covered issues ranging from trade in services to promotional activities, the choice of law in foreign related contracts to the time limit for bringing a lawsuit in a contract dispute.

However, the six-year old law now lags behind the rapidly evolving requirements of Vietnam's dynamic integration process and fast growing economy. Since November 2003, a new commercial bill was firstly drafted by the Ministry of Trade and at the time being, the 3rd draft of new Commercial Law has been completed.

In respect of governing subjects, the Draft 3 enlarges the scope of governing of the Commercial Law to govern the commercial activities in the territory of Vietnam and apply to all organizations, individuals carrying out commercial activities in the territory of Vietnam. The Draft 3 also stipulates that acts without profit making profit of the party who is not a trader in transactions with other in the territory of Vietnam shall not be subject to the governing scope of the Commercial Law unless the non-trader party agreed to select to apply the law prior to settlement of disputes by arbitration or court.

Draft 3 provides a wider provision so that trader comprises of not only individuals, organizations having business registration certificate in accordance with the laws, but also individuals, organizations having no business registration certificate but carrying out commercial activities in a regular and constant basis as a profession. However, the Draft does not detail what is regular and constant basis.

The definitions of commercial acts and activities in the Draft 3 are approached by opened tendency and in accordance with law and international commercial practices and custom. According to Draft 3, commercial activity means the performance of one or several acts aiming at making profit by business organizations and individuals including sale and purchase of goods; provision of services; distribution; commercial representation and agency; trade promotion; consignment; leasing; leasing then buying; construction; consultancy; technical design; licensing; investment; financing; banking; insurance; exploration and exploitation; transport of goods by air, sea, rail and road ways; and other commercial acts as provided by the laws. Those enlargements would help the Commercial Law covers a lot of existing commercial acts being left aside and foreign arbitration awards neither recognized nor enforced in Vietnam due to the existing gaps in the Commercial Law 1997.

The Draft 3 has a separate part to cover commercial contracts, principles of conclusion, implementation and liabilities in case of breach of the contract. Accordingly, the subjects shall include circulative goods and possibly-provided services. Forms of commercial contract also are enlarged to include oral contract. Provisions of Civil Code 1995 on invalid contracts shall be applied to commercial contracts and exclude the situation that the contract is invalid due to disobedience of administrative procedures (such as registration, granting permission or other administrative procedures). A question arose here that will the new Commercial Law supersede the 1989 Ordinance on Economic Contracts which is too obsolete and overlapped. It may interpret from the Draft 3 that the 1989 Ordinance on Economic Contracts shall be still effect when the new Commercial Law is promulgated.

Regarding commercial penalties, the Draft 3 adds to two forms including suspending the implementation of the contract and cancellation of the contract. Moreover, the Draft 3 does accept agreement of the parties in selecting other types of penalties in compliance with the principles of Vietnamese laws.

Competition And Antitrust Bill Updates

By Nguyen Dang Viet

Following the case of Tan Hoang Minh Taxi (known as V-20 Taxi) came a series of similar unfair competition cases. The most recent and salient one relates to the bars in the Laser Beer distribution network. In those cases, many questions have been raised, relating to how the victims can be protected under the laws.

Since the Constitution and the Civil Code have firstly built up legal framework preliminarily regulating the competition matters by the recognition of various economic sectors. The Commercial Law, Ordinance on Protection of Consumer's Rights and the Ordinance on Quality of Goods further have some general regulations on competition. The problems still remain that the foregoing legal instruments are not strong enough to protect the victims and govern unfair competition practices.

As the draft of the competition law is being finalized, we will look at the prominent points in the latest bill.

Anti - Competition Agreements

Under the latest draft, anti-competition agreements are defined as agreements among business entities, individuals which restrain competitiveness in the market, including agreements for fixing prices of goods and services directly or indirectly, including fixing prices in intermediate distribution of goods and services; sharing the consumption market and/or sources of goods/service provision; limiting or controlling the quantum of production, purchase, or of goods selling/service provision; limiting the development of technology or investment; applying compulsory contractual terms of trade for other enterprises, or forcing other enterprises to accept the conditions not related to the contract's objects; preventing, slowing, or prohibiting the entry into market by other enterprises; acting in collusion with other bidders for bidding awards, etc.

All anti-competition agreements relate to collusive practices in bidding and to the fixing of prices are banned. Other anti-competition agreements shall be prohibited if the aggregate market share of the parties to the anti-agreement accounts for more than 30% of total market share. This draft provision is a development compared to the former bill. This bill however does not expressly stipulate whether such percentage is for only targeted kind of products/services. Anti-competition agreements are allowed in some special cases listed by the bill.

Abuse of Dominant and Monopoly Position

The latest bill provides that enterprise acting together with each other which have the market share in the relevant market exceeding 30% shall be considered as dominant position in the market. A group of enterprises, including 2 enterprises, 3 enterprises, and 4 enterprises, shall be considered as dominant group if the market share accounts for exceeding 50%, 65%, and 75% respectively. An enterprise shall be deemed monopoly if there is no other enterprise in the market that engages in selling or provision of goods or services.

For a long time, State owned enterprises are holding monopoly in various sectors. How to deal with this matter is a big question to legislators. To fit with such factual situation, the latest bill purports not to prohibit dominant or monopoly enterprises/groups. However, certain acts related to dominant or monopoly position are banned, for instance: selling of goods/services with the prices lower than manufacturing expenses in order to eliminating competitors; applying unreasonable selling/purchasing prices causing damages to customers; limiting quantum of production, distribution, technology, investment causing damages to customers; barring new enterprises from entry into the market; unilaterally terminating signed contracts without proper grounds.

It is necessary to note here that, among those issues, there still remain some issues that need to be governed by contractual transactions but not by the law. The bill should be considered carefully to avoid too deep interference by the State into contractual transactions between businesses.

Economic Concentration

The latest bill calls the merger, consolidation, acquisition and joint venture of enterprises as "economic concentration". Like the regime for controlling the abuse of dominant/monopoly position, the latest bill proposes to prohibit economic concentration practices if it entails that the total market share of enterprises in economic concentration account for more than 50%. However, an economic concentration practice shall be acceptable if one of enterprises in economic concentration is facing danger of being bankrupt or dissolved, or the concentration is for increasing exports and development the economy, technology subject to the Government's approval.

Unfair-Competition Practices

This is an important Chapter of the latest bill. The following acts shall be deemed as unfair-competition practices: faking of trade indications; infringement on trade secrets, corruption, coercion in business; denigration of competitors; disturbance of other enterprises; advertisements for unfair competition; sales promotion for unfair competition; discrimination in associations; and illegal multi-level sale practice.

Organizations, individuals which suffer damage or would be damageable due to unfair competition acts are entitled to request the State authorities to compel the persons/entities having unfair competition acts to stop conducting such acts, pay compensation for damage, or to impose administrative or criminal measures.

Other main parts of the bill regulate the procedures for investigation and application and sanctions against violations in the field of competition. It is worthy noted that fine upon a violation act may be amounted to 10% total revenue of preceding fiscal year of violating enterprise.

Improving the quality of regulations on BDS

By Nguyen Dang Viet

The process of forming the business development service (BDS) markets will be accelerated and be more effective should the International best practice are applied. Also, the establishment of an enabling legal environment for service sector in general, and BDS in particular, in Vietnam must ensure the compliance with the International principles and the commercial integration process.

With the overall objectives to better the competitiveness and capacity of small and medium enterprises (SMEs) in Vietnam through constructing the efficient BDS markets, the GTZ SME Promotion Project specially pays attention to introducing the International practice and norms to the BDS markets' facilitators (including promotion organizations, service providers, users, and regulators).

In the recent Report implemented by GTZ, some International practice for improving the quality of regulations governing private sector and BDS have been adequately introduced.

Despite the lure of deregulation, economic and social growth depends on a highly complex economy which requires sophisticated rules and enforcement procedures across a wide range of activities. The key issue is not the fact of regulation but the quality of regulation and administrative processes. Reforms of the type addressed below benefit all businesses but are particularly valuable for SMEs which carry, proportionately, a high compliance burden.

Improving the quality of regulation requires a multi-targeted approach incorporating design, implementation and evaluation – elimination of unnecessary regulations, more simple compliance, easier access to information on regulatory requirements, strict tests of public benefit for new regulations and eradication of inconsistencies in regulations between jurisdictions and agencies.

Generally, legal provisions governing the growth of BDS market must grasp the following elements:

Targeting: Does the regulation target the problem effectively, and apply to the right groups? Does the regulation apply too widely or narrowly?

Timely: Does the regulation solve the problem in sufficient time?

Additionality: Does the regulation have an impact on the problem the regulation is intended to target? Note that compliance might be high, but additionality low. Does it duplicate other regulations?

Administration and delivery: Is it administratively efficient for government and for business? Is compliance and administration simple and low cost? Does the regulation increase uncertainty? Do the regulatory paperwork requirements fit in with standard commercial practices, and with those required by other regulations? Does the paperwork require information from firms that could be obtained from other existing records? Does the design of administrative and delivery systems of the regulation account for differences between firms? Are reporting requirements for firms (in terms of frequency and detail) set appropriately? Is the administrative structure optimal for regulatory coordination, delivery and information provision to businesses? What systems are in place to ensure that the behaviour of regulators when dealing with the regulated are fair and appropriate?

Consistency: Does the regulation introduce inconsistencies and adverse interactions with other regulations and policies?

Accountability: Is the regulation clear, and processes for its application transparent and contestable?

Risk management: What are the risks posed by the regulation? offsetting or adverse behaviour by firms, bureaucrats or others (including corruption); are the regulations overly risk averse, or do they fail to deal with some high cost risks?; and possible liabilities for governments or others.

International obligations: Does it breach Australia's international obligations?

Enforcement: Is the enforcement regime appropriate (monitoring, fines, sanctions, education)? Is any penalty in proportion to the seriousness of the offence?

Flexibility: Is the regulation likely to be effective as technology, market structures, firm conduct and other aspects of the business environment change? Is it likely to be effective for different sorts of firms and industries, or is it only effective for a subgroup? Is the regulation flexible enough that a firm has the freedom to search for lower cost ways of achieving the goals of regulation?

Cost recovery: Who should pay for the government administrative and business compliance costs of regulation (business, taxpayers generally, a particular benefited group, the source of any externality)?

Distributional impacts: Does the regulation unintentionally transfer significant resources from one group to another? How can these transfers be avoided or reduced? Is the regulation unfair?

Business impact test: Does the regulation reduce competition and/or business innovation, with increased prices or reduced quality of goods and services? How much does it affect costs, quality or availability of inputs? Does the regulation require operational changes, including changes in personnel, or physical capital? Does it constrain business practices, for example, joint ventures?

Those principles may be used as reference for the legal regulations in Vietnam towards a more stable system, ensuring the balance between the state management purposes and interests of all economic sectors and businesses.

Auditing-Accounting

More Comprehensive Legal Framework For Independent Auditing Services

By Nguyen Thi Mai Thom

Following the new Law on Accounting issued in the middle of 2003, accounting and auditing service enterprises are more exciting with the new promulgation of the Government's Decree on the independent audit. Ten years after the first legal document, Decree No. 07/CP dated January 1 1994, setting up the foundation for the independent audit activities, the Decree No. 105/2004/ND-CP on the independent auditing (Decree 105) was issued on March 30, 2004 to replace the obsolete Decree 07.

New stipulations

The Decree 105 recognizes the auditing reports as reliable basis for state organs and higher levels' use in line with their management functions; and for shareholders, investors, partners and clients' use in the relationship with audited enterprises.

Auditing companies should note a provision in accordance with the Decree 105 that auditing companies shall operate under the form of a partnership, private or foreign invested companies. State owned, joint stock or limited auditing companies shall have to convert to those forms within 03 years from the effective date of the Decree 105, i.e. the date when the Decree 105 is published on the Official Gazette.

An auditing company must have at least 03 licensed auditors, instead of 05 as required under the former Decree 07. At least one among managers of an auditing company must be the licensed auditor. An auditing company shall have to cease providing auditing services should it has not at least 03 licensed auditors in 06 consecutive months.

Positively, the Decree 105 has provided that auditing companies must be responsible for compensating for damages caused by auditors' mistakes when providing auditing and other related services. In addition, auditing companies must buy profession liability insurance or establish the professional risk fund. This fund shall be used for purposes of compensation for damages caused by auditors' mistakes and these costs shall be considered as business costs in accordance with regulations of the Ministry of Finance.

Before the issuance of the Decree 105, there was an issue raised by businesses regarding the independence of auditing service providers in the course of rendering services. Under Item 16 of the Accounting Standard 200 issued together with Decision No. 120/1999/QĐ-BTC dated September 27, 1999 of the Ministry of Finance on promulgation of 4 Vietnamese auditing standards, auditors are not permitted to render accounting services and auditing services to one client. However, those requirements are just "professional standards", there is no regulation prohibiting auditing company from doing so. Thus, it can happen that an auditor provides auditing services to a company, whose is also provided with accounting services by the auditor's company. In this case, the auditing results may not be unbiased where possible defects of the financial statements of the audited company are covered or repaired.

The Decree 105 clarifies that the auditing companies are not permitted to provide auditing services to a client where the auditing companies are providing, or provided in previous year, accounting book recording service, finance report making service, internal auditing service, property evaluating service, finance or management consulting services. Some other banned cases are also stipulated in the Decree 105.

According to the former Decree 07, the Ministry of Finance is empowered to fix the ceiling price for auditing services conducted by auditors/auditing firms. It is a contrary to the basic principle of economic and civil transactions, i.e. parties to a contract have right to define prices. The Decree 105 has revised this unrealistic regulation by a sensible provision that auditing service fees are agreed between auditing companies customers.

Foreign auditing organizations having no branch in Vietnam may provide auditing service in Vietnam by admitting Vietnam based auditing companies as their members or cooperating with Vietnam based auditing companies in each auditing project. Foreign auditing organizations may also provide independent auditing services in Vietnam by obtaining permit from the Ministry of Finance on the case by case basis.

Further improvements needed

It should be recognized the Decree 105 is a great effort of the Government towards creating a better legal framework for the development of auditing service market in Vietnam.

In an effort to provide a clear understanding about the legal framework for the development of auditing service market, as well as other business development service (BDS) market in Vietnam, in the GTZ SME Promotion Project's Report on the legal environment for BDS in Vietnam, many legal constraints and barriers to the development of auditing services, and recommendations for removing the constraints have been indicated. It is witnessed that many constraints from Decree 07 have been positively removed under the Decree 105.

However, as the findings from the said Report, there still need some further improvements to the legal framework on auditing services. For instance, the validity of auditing report needs further recognition by tax authorities for tax finalization. In Vietnam, businesses do not keen on, and has not habit in, using auditing services spontaneously given that their audited financial reports are valueless with respect to tax officers. During tax finalization, tax authorities are setting up separate checking and inspecting system.

In addition to that, although the Decree 105 requires the responsibilities of auditing companies for damages caused by auditors' mistakes, further clarifications on types of mistakes, level of compensations need to be stipulated.

Other documents concerning Auditing/Accounting activities

- On May 31, 2004 the Government issued Decree 128/2004//ND-CP, detailing and guiding the implementation of a number of articles of the Law on Accounting concerning the State accounting.
- On May 31, 2004 the Government issued Decree 129/2004/ND-CP, detailing and guiding the implementation of a number of articles of the Law on Accounting concerning business activities.
- Circular 40/2004/TT-BTC dated May 13, 2004 of the Ministry of Finance, guiding the accounting works upon the conversion of the State enterprises into holding company.

Recent Documents in Other sectors**Taxation & Finance**

- Circular 41/2004/TT-BTC on May 18, 2004 of the Ministry of Finance, guiding the implementation of Government's Decree 100/2004/ND-CP dated February 25, 2004 on administrative sanctions on violations in the field of taxation.
- Circular 43/2004/TT-BTC on May 20, 2004 of the Ministry of Finance, guiding the settlement of the losses arised during the time of determination of the enterprises' value to the time at which the enterprise officially being converted into joint stock company.
- The Ministry of Finance issued Circular 39/2004/TT-BTC, guiding the procedures, formalities of finance dealing to the trading, transfer, receipt and settlement of debt and out-standing assets of enterprises.

- On March 24, 2004, the Standing Committee of National Assembly issued Ordinance 14/2004/PL-UBTVQH11, on amendment of and supplementation to a number of articles of the Ordinance on income tax of the persons having high income.
- The Ministry of Finance issued Circular 26/2004/TT-BTC, guiding the regulation on remittance tax and refund of corporate income for reinvestment for foreign investors;

Banking

- The Ministry of Finance issued Circular 49/2004/TT-BTC on June 03, 2004 guiding the criteria for estimation of the efficiency of financial activities of State credit organizations
- On May 25, 2004 State Bank of Vietnam issued Circular 03/2004/TT-NHNN, guiding the management of foreign exchange to the joining capital, buying share of foreign investors in Vietnamese enterprises.
- On April 29, 2004 the Governor of the State bank of Vietnam issued Decision 478/QD-NHNN, on the basic interest rate of the loan in Vietnamese dong.
- On April 07, 2004, the SBV issued Decision 351/2004/QD-NHNN on promulgation of the Regulation on currency brokerage.
- On March 22, 2004, the State Bank of Vietnam issued Decision 293/2004/QD-NHNN on the opening of oversea account and the using of granted capital, chartered capital of branch of foreign banks, joint-venture banks operating in Vietnam.

Import - Export

- The Standing Committee of the National Assembly issued Ordinance 20/2004/PL-UBTVQH11 on April 29, 2004, on preventing the dumping of commodities imported into Vietnam.

Health care

- Decision 1906/2004/QD-BYT dated May 28, 2004 of the Ministry of Health, on issuance of the Regulations on parallel import of medicine.
- On May 12, 2004 the Government issued Decree 120/2004/ND-CP, on the management of the price on medicine.

Enterprises

- On May 19, 2004 the Government issued Decree 125/2004/ND-CP, on amendment of and supplementation to a number of articles of Decree 03/2000/ND-CP dated February 03, 2000, guiding the implementation of a number of articles of the Law on Enterprises.
- On April 02, 2004 the Government issued Decree 109/2004/ND-CP, on business registration.
- On May 2004, the Ministry of Finance issued Circular 42/2004/TT-BTC, guiding the regulations on the supervision and evaluation of operational efficiency of State enterprises.

Construction-Real estate

- On May 26, 2004, the Government issued Decree 126/2004/ND-CP, dealing with administrative violation on the constructional activities, management of construction projects and using management of houses.
- On April 26, 2004 the Ministry of Finance and the Ministry of Construction issued Interministerial Circular 38/2004/TTLT-BTC-BXD, guiding the notification and control of the cost of building materials in the field of investment construction.
- The Prime Minister issued Decision 87/2004/QD-TTg on May 19, 2004, promulgating the Regulations on the management of the activities of foreign contractors operating in the field of construction in Vietnam.
- The Government issued Resolution 06/2004/NQ-CP, on a number of solutions for the healthy development of the real estate market.

Insurance

- On April 12, 2004, the Ministry of Finance issued Circular 31/2004/TT-BTC, guiding the implementation of Government's Decree 118/2003/ND-CP dated October 13, 2003 on administrative sanction upon violations in the field of insurance.
- On April 12, 2004, the Minister of Finance issued Decision 33/2004/QD-BTC, issuing the principles and fee tariff on insurance of construction.

Labor

- On April 16, 2004 the Government issued Decree 113/2004/ND-CP, on administrative sanctions upon violations in the field of labor.

Investment

- The Government issued Decree 106/2004/ND-CP on April 01, 2004, on government's fund for investment and development credit.
- The Minister of Finance issued Decision 44/2004/QD-BTC on April 29, 2004, on interest of the government's investment and development credit.

Transportation

- On March 31, 2004, the Ministry of Transportation issued Circular 06/2004/TT-BGTVT on guiding the implementation of Government's Decree 23/2004/ND-CP, regulating the life-time of trucks and passenger cars.

Miscellaneous

- Prime Minister's Decision 559/QD-TTg dated May 31, 2004, on approval of market development scheme to the year of 2010.
- On April 28, 2004, the judge council of the People's Supreme court issued Resolution No.01/2004/NQ-HDTP, guiding the application of a number of provisions of the Civil Code concerning the compensation for non-contractual damages.

- Decree 111/2004/ND-CP with detailed regulations on the implementation of a number of articles of the Ordinance on National archives.
- The Prime Minister issued Directive 14/2004/CT-TTg on April 02, 2004, dealing with the violation and prevention of illegal oversea immigration and residence of Vietnamese citizens.
- On June, the Prime Minister issued Directive 23/2004/CT-TTg, requiring all relevant offices, organizations directly involving to the management and using of petrol and oil, to use in effective manner this type of article.

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