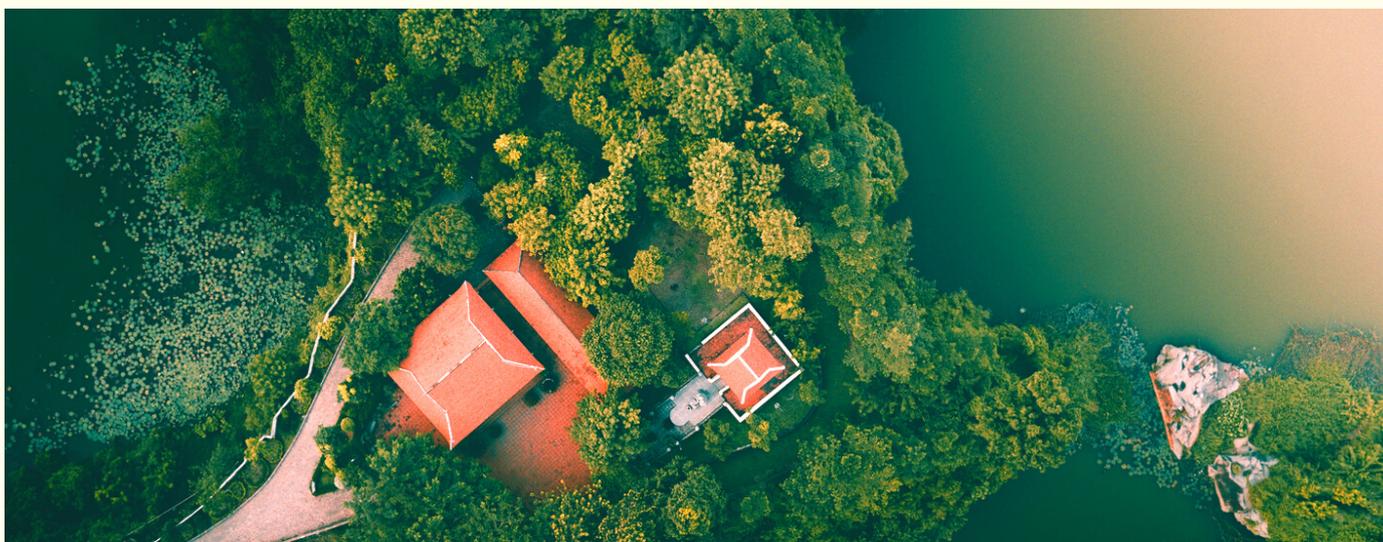


LEGAL NEWSLETTER

NHQuang&Associates



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Introduction to research

On January 27, 2021, EW Baker Center for Law and Business of the National University of Singapore held an event to launch the book "Studies in the Contracts of Law - Volume III Contents of Contracts and Unfair Terms". This is the third volume in the series Studies in the Contract Laws of Asia co-edited by Professor Mindy Chen, Dean of the Oxford Law Faculty, National University of Singapore and Professor Stefan Voganauer, Director of the Max Planck Institute for European Legal History. The volumes in this series not only provide the assessment and analysis of the Contract Law in the studied countries but also provide the comparison to clarify the relationship between the laws of these countries and their respective European source jurisdictions.

Mr. Nguyen Hung Quang - Managing Partner and Mrs. Nguyen Thuy Duong - Senior Associate of NHQuang&Associates are proud to contribute Chapter 22 - Contract Interpretation and Unfair Terms in Vietnamese Contract Law in the book "Studies in the Contracts of Law - Volume III Contents of Contracts and Unfair Terms".

This book is expected to be an invaluable source for many subjects such as scholars, researchers, judges, lawyers, legal practitioners, lecturers, and law students. The book was published by Oxford University Press in late 2020.



NEW STIPULATIONS ON CONVERSION OF PUBLIC NON-BUSINESS UNITS INTO JOINT STOCK COMPANIES

HAI DANG

In order to facilitate public non-business units (**PNUs**) that demand to convert into joint stock companies, the Government has promulgated Decree No. 150/2020/ND-CP (**Decree 150**) to replace Decision No. 22/2015/QĐ-TTg (**Decision 22**). A few key contents to be noted are as follows:

Firstly, Decree 150 amends the conditions for PNU to convert into joint stock companies. Accordingly, in lieu of 02 conditions provided in Decision 22, a PNU converting into joint stock company is required to satisfy 04 conditions in accordance with Article 4, Decree 150 as follows:

- Self-ensuring the regular expenditures in the year nearest to the time of conversion;
- Reserving some state-owned capital after financial settlement and re-valuation of their value;
- Being included in the list of the fields or sectors subject to conversion into joint stock company under the Government's decisions from time to time;
- Having a plan approved by the competent agency to rearrange and handle houses and land in accordance with the law on management and use of public assets.

Secondly, the stipulations on the method to determine PNU's value are amended. Clause 1, Article 22, Decree 150 stipulates that PNUs are required to apply at least 02 different methods of value determination (including asset method) instead of only applying the asset method under Decision 22. However, to harmonize with

actual situation of each PNU, Decree 150 allows PNUs to apply 01 method of value determination, but in such event, they are supposed to report to the competent authorities for consideration and approval.

Additionally, Decree 150 also provides detailed obligations of PNUs after converting into joint stock companies and settlement of financial issues during conversion; which are not yet clarified and specified in Decision 22, causing confusion during PNU equitization process.

COMMENTS AND RECOMMENDATIONS

Firstly, regarding the conditions for joint stock company conversion, Decree 150 has provided more meticulously than Decision 22. In Decision 22, the condition of "Having the capability to self-ensure the regular expenditures after conversion" is deemed qualitative, difficult to accurately quantify for inclusion in the conversion checklist.

Secondly, in Decree 150, the regulations on determination of PNU's value are relatively flexible, feasible, and consistent with the units' characteristics. According to the explanation by the Ministry of Finance, such open regulations in selecting the determination methods for PNU's value enables the units to apply the suitable methods for their current status; simultaneously, ensure the value of PNU's state-owned capital to be converted according to the market principle and not lower than the value applied according to the asset method. However, in the event of eligibility, PNUs should apply 02 methods of value determination to avoid any explanation requested by competent authority when using only 01 method.

It can be seen that Decree 150 has clearer and more detailed provisions in comparison with Decision 22, thereby partly encouraging PNUs to convert into joint stock companies, contributing to the improvement in the service quality, management, and operation efficiency of PNUs. Therefore, PNUs need to update new regulations of Decree 150 to be able to develop appropriate equitization plan, assuring that the conversion into joint stock company is carried out in compliance with the procedures approved by the Prime Minister.

NEW REGULATIONS ON WORKING CONDITIONS AND LABOR RELATIONS

KIM ANH

On December 14, 2020, the Government issued Decree 145/2020/ND-CP providing details and guidelines for the implementation of several articles of the Labor Code regarding working conditions and labor relations (**Decree 145**). The Decree took effect from February 1, 2020. The following are some notable contents of this Decree:

Firstly, changes in the time and method for periodic reports on changes of employees. Accordingly, enterprises shall report all changes of their employees to the Department of Labor, Invalids and Social Affairs before June 5 and December 5 every year, using Form No. 01/PLI in Appendix I attached with Decree 145. The report could be done via the National Public Service Portal or made in hardcopy (if it cannot be done through the National Public Service Portal). At the same time, they must send a notice on changes of employees to the social insurance agency of the district where the relevant head office, branch or representative office is located. Previously, under Decree 03/2014/ND-CP and Circular 23/2014/TT-BLDTBXH, enterprises was requested to report the changes of employees to the local Office for Labor, Invalids and Social Affairs or the Department of Labor, Invalids and Social Affairs (for employers in industrial zones) before May 25 and November 25 each year.

Secondly, supplementation of the requirement that labor regulations or labor regulation appendices must contain provisions on prevention and fight against sexual harassment at the workplace with such basic contents as detailed regulations about sexual harassment acts at the workplace, which are relevant to the nature and characteristics of the job and the workplace; the responsibility, time limit, procedures, and formalities for internal handling of sexual harassment acts at the workplace.

Thirdly, changes in the way of calculating the salary for unused annual paid leaves upon termination of labor contract when an employee resigns or loses his/her job. Accordingly, the basis salary to calculate

payments for unused days of annual paid leave is the contracted salary of the month preceding the month when the employee resigns or loses his/her job. Previously, under Clause 3, Article 26 of Decree 05/2015/ND-CP, the basis salary for such payment was the average contracted salary of the preceding 6 months before resignation or job loss for the employee who has worked for 6 months; or the average contracted salary of the whole working time for the employees who has worked for less than 6 months.

In addition to the contents described above, Decree 145 also provides other notable new regulations such as regulations on the persons authorized to handle labor discipline of enterprises; manners for handling invalid labor contracts; the time for advance notice upon unilateral termination of labor contracts applied to some specific industries, occupations, jobs; settlement procedures for damage compensation.

COMMENTS AND RECOMMENDATIONS

The new provisions of Decree 145 have resolved several shortcomings and limitations of Decree 05/2015/ND-CP and other decrees guiding the Labor Code 2012; thus, render the law application clear, unified, and in harmony with practical circumstances. At the same time, the Decree also creates a legal basis for enterprises to handle appropriately such issues as preventing and combating sexual harassment at the workplace or settling invalid labor contracts.

Vietnamese enterprises should update the new provisions of Decree 145 for appropriate application in their operation; and should also review their internal labor regulations for relevant amendment and supplement to ensure compliance with the provisions of the Labor Code 2019 and Decree 145.



HIGHLIGHTS OF THE DRAFT DECREE ON PERSONAL DATA PROTECTION

MAI PHUONG

*In order to create a legal framework for information collection and processing, to strengthen the protection of personal information, as well as to combat illegal personal information trading and sharing, the Ministry of Public Security has been developing the Draft Decree on personal data protection (**Draft Decree**) based on opinions of individuals and organizations. In this issue, NHQuang will analyze some outstanding contents of the latest Draft Decree (posted on the e-portal of the Ministry of Public Security on February 9, 2021) as follows:*

1. Definition of personal data

The Draft Decree defines “personal data” as “data about individuals or related to the identification of a specific individual or being able to identify a specific individual”. It should be noted that, so far, applicable legal documents have not specifically defined this term, but only addressed other related terms such as “personal information” (Law on Cyber Information Security 2015), “personal secret”, “family secret”, “information about private life” (Civil Code 2015). Moreover, in comparison with the definition of “data” in the Law on Electronic Transactions 2005, it can be understood that personal data (as a form of data in general) is also shown in the form of symbols, letters, numbers, pictures, sounds or other similar forms.

The Draft Decree stipulates 2 groups of personal data, including (i) basic personal data (for example: full name; date of birth/death, blood type, phone



number, citizen identity card number, social insurance number), and (ii) sensitive personal data (for example: political or religious viewpoints; health status; genetic and biometric data; sexual orientation, financial data). Basic personal data are defined in a “closed” list, while sensitive personal data are stipulated with an “open” list, which allows to include some other special personal data (in addition to ones specified in the Draft Decree) in accordance with provisions of law. The classification of personal data groups by listing (either closed or open) without any general criteria may lead to the instability of legal documents. As the first document specifically regulating personal data, the Draft Decree should set forth the criteria for personal data classification because the classification of personal data (especially sensitive personal data) is substantial to the application of relevant legal provisions (for example: application of sensitive personal data processing) to protect the legitimate rights and interests of data subjects.

2. Personal data processing

Personal data processing is the core content of the Draft Decree, especially in the context where Viet Nam still lacks legal documents on this issue. In fact, personal data processing draws great attraction of enterprises because of personal data’s importance in the economy of the Industrial era 4.0., which can be deemed a “gold mine” for suppliers, making it easier for businesses in identifying potential customers, thereby implementing appropriate advertising activities for target audience and increasing the sale of goods and services.

The Draft Decree provides that “personal data processing is a single or multiple activity(ies) that affect(s) personal data, including collecting, recording, analyzing, storing, changing, disclosing, access granting, retrieving, recovering, encrypting, decrypting, copying, transferring, deleting, destroying personal data or other related activities”. Personal data processor is defined by the Draft Decree as “a domestic or foreign agency, organization, or individual that carries out personal data processing”. Accordingly, “personal data processing” covers a wide range of activities from collecting, storing, analyzing to transferring, access granting, etc., which all require

compliance with personal data processing regulations. The situation is the same with personal data processor, of which the scope includes both domestic and foreign organizations and individuals.

In principle, all personal data processing activities must be informed to the data subject. The notice must include the following basic contents: Information about the personal data processor; Type of personal data processed and processing method; Processing time and purpose; Type of personal data processed under special circumstances or with special processing purposes which may pose risks of significant damage; Rights and procedures for exercising the rights of data subjects; Ranking in personal data protection reliability by the Committee of Personal Data Protection; Information related to cross-border personal data transfer from the territory of Viet Nam.

There are some exceptions to the obligation of notifying data subjects, in which a personal data processor does not need to notify about personal data processing in some cases, such as personal data processing that serves scientific research or statistics purposes; personal data processing under legal regulations, international agreements, or international treaties; or in cases that do not affect the rights and interests of the data subject and it is impossible to notify the data subject, etc. However, the provision to determine that personal data processing “*does not affect the rights and interests of the data subject*” is rather vague because the data processor cannot act on behalf of the data subject to determine whether the personal data processing affects their rights and interests or not. Likewise, the scenario that “*it is impossible to notify the data subject*” can also create difficulties in actual application since it is unclear whether the “impossibility” refers to the capacity of a specific data processor or general technical limit (in Viet Nam or in the country of the data processor) applied in contacting data subjects.

In fact, full and accurate notification of data collection – the first step of personal data processing, is a crucial step in ensuring the rights and interests of data subjects. It is extremely necessary to specify the exceptions that allow personal data processing without notice to data subject, and in the principle, to minimize these exceptions.

3. Cross-border data transfer

The Draft Decree stipulates that “cross-border data transfer” is “*the use of cyberspace or electronic*

devices and means to transfer personal data of Vietnamese citizens to a location outside the territory of the Socialist Republic of Viet Nam”. According to the Draft Decree, personal data of Vietnamese citizens can be transferred out of the borders when 4 conditions below are met: (i) it is consented by data subjects, (ii) the original data are stored in Viet Nam, (iii) it is proven in writing that the place receiving data has been applied personal data protection regulations at a level equal to or higher than those provided in the Draft Decree, and (iv) there is a written consent of the Committee of Personal Data Protection.

The application documents for cross-border personal data transfer include an application form and a report of impact assessment on cross-border personal data transfer. The agency receiving these documents is the Committee of Personal Data Protection – an organization of the Government, located at the Department of Cyber Security and Hi-tech Crime Prevention, the Ministry of Public Security. According to the Draft Decree, this Committee consists of no more than 6 members who have professional qualifications and legal experience on personal data protection, and operate across multiple-position work regime. In practice, such limited contingent together with the multiple-position work regime of the Committee’s members have raised concerns about the capability to receive and handle application documents for cross-border personal data transfer, especially in the context that Vietnamese enterprises are accelerating digital transformation and strengthening international cooperation.

The full text of the Draft Decree is now available on the e-portal of the Ministry of Public Security for comments within 2 months from the date of publication – February 9, 2021. Enterprises, organizations and individuals interested in personal data protection can find the full text of the Draft Decree at: <http://bocongan.gov.vn/van-ban/van-ban-moi/lay-y-kien-gop-y-doi-voi-du-thao-nghi-dinh-quy-dinh-ve-bao-ve-du-lieu-ca-nhan-519.html> and send comments to the Ministry of Public Security within the prescribed time limit.

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