

LEGAL NEWSLETTER

NHQuang&Associates



IN THIS LEGAL NEWS LETTER

NEW REGULATIONS ON SECURITY FOR OBLIGATION FULFILLMENT
Page 2

NEW STIPULATIONS ON IMPLEMENTATION OF THE LAW ON EXPORT AND IMPORT DUTIES
Page 3

COMMENTS ON DRAFT DECREE REPLACING DECREE 50/2016/ND-CP ON SANCTIONING ADMINISTRATIVE VIOLATIONS IN THE FIELD OF PLANNING AND INVESTMENT
Page 4

Notable activity in May 2021

Being one of the 2 guests in the Business and Law show No. 531 (VTV2), Lawyer Tran Thanh Huyen discussed and analyzed the topic: Solving problems of market entry conditions.

Commenting on the policies to reform business conditions, Mrs. Huyen opined that enterprises have significantly reduced compliance costs thanks to these policies. In addition, the reduction of business conditions would not be effective if there were still unclear legal provisions on business conditions such as "ensuring material and technical basis", "suitable to the region's socio-economic conditions".

To improve the business environment and attract investment, Mrs. Huyen recommended that it is necessary to regulate business conditions more specifically; completing law enforcement and management, completing regulations on sanctions and post-inspection to enhance the awareness of enterprises on legal compliance.

Watch the Show at: <https://youtu.be/2Y2EErF4jdQ>

NEW REGULATIONS ON SECURITY FOR OBLIGATION FULFILLMENT

KIM ANH

On March 19, 2021, the Government issued Decree 21/2021/ND-CP providing guidelines for implementation of the Civil Code on security for performance of obligations (**Decree 21**), which takes effect on May 15, 2021. This Decree has some remarkable contents as follows:

Firstly, the supplemented regulation on the description of collaterals in contracts between secured parties and securing parties. Compared to Decree 163/2006/ND-CP on secured transactions, which was amended and supplemented by Decree 11/2012/ND-CP (**Decree 163**) issued under Civil Code 2005, Decree 21 supplements some new regulations on description of some specific collaterals, for instance: (i) In the case where a collateral is immovable property or movable property that must be registered under law, the described information as agreed upon must conform to the information on relevant certificates; (ii) In the case where investment projects used as the security for obligation fulfillment are construction projects for houses, construction projects for works other than houses or other projects that must obtain certificates, decisions by competent authorities under laws or other legal bases, the description in security contracts must present such legal bases (i.e. specifying the information written on the certificates, decisions issued for the projects); (iii) Goods circulated during manufacturing, business and warehouse processes used as the security for obligation fulfillment can be described by value or type. Description of collaterals being warehouses must include the address and code of the warehouses (if any) or other signs of warehouse location.

Secondly, the introduction of the new regulation on the right to reclaim collaterals. Decree 21 stipulates that the rights of secured parties with regard to the collaterals in security measures that have taken effect against a third party shall not change or



terminate in the case where the collaterals are transferred to other individuals as a result of trading, gift, exchange, transfer, other changes in ownership, appropriation, use or benefit gain of collaterals that lacks legal ground. However, such rights shall not arise on the following assets: (i) Collateral that has been sold, transferred or has its ownership otherwise disposed of under consent of secured parties and is no longer used as security for fulfillment of agreed obligations; (ii) Collateral that has been sold, replaced or exchanged in accordance with clause 4, Article 321 of Civil Code 2015; (iii) Collateral that is no longer available or replaced by other collaterals under Article 21 of Decree 21 on fluctuation of collaterals; and (iv) Other cases under the Civil Code and other relevant legal provisions.

Thirdly, the introduction of the new regulation on handling collaterals. Accordingly, the secured parties can handle collaterals based on agreements in security contracts without any power of attorney or written consent by the securing parties.

COMMENTS AND RECOMMENDATIONS

The promulgation of Decree 21 has contributed to overcoming the inadequacies and obstacles in civil transaction practice that Decree 163 has not yet resolved, such as the lack of regulations on the priority order to apply specialized regulations over the Decree, the right to reclaim or handle collaterals without the power of attorney or written consent of securing parties, etc. Thus, Decree 21 has contributed to facilitating individuals and organizations to maximize the economic value of properties and minimize legal risks and costs, especially for credit institutions in securing the performance of obligations. When establishing or implementing security measures, enterprises should pay attention to the new provisions of Decree 21 to draft security contracts, register security measures, reclaim or handle collaterals in compliance with the laws.

NEW STIPULATIONS ON IMPLEMENTATION OF THE LAW ON EXPORT AND IMPORT DUTIES

HAI DANG

In order to satisfy the practical needs arising in corporates' import and export activities, on March 11, 2021, the Government promulgated Decree 18/2021/ND-CP (**Decree 18**) amending and supplementing some articles of Decree 134/2016/ND-CP providing in detail a number of articles and measures to implement the Law on Export and Import Duties (**Decree 134**). Some major amendments and supplements in Decree 18 are as follows:

Firstly, Decree 18 amends and supplements the regulations on the application of duty rate to the in-country exports and imports. In addition, it provides clearer bases for exemption of duties on goods imported for further processing and processed exports. Specifically, clause 1, Article 1, Decree 18 is clearer than Article 3, Decree 134 in specifying particular cases to apply duty rate for in-country exports and imports; clause 4, Article 1, Decree 18 explicitly guides the basis to determine duty exemption for goods imported for further processing and processed exports. Accordingly, processed exports are exempt from export duties under this provision if they are entirely processed from imported goods.

Secondly, Decree 18 simplifies related tax documents and procedures by clarifying the categories and quotas of duty-free goods to be in line with international treaties to which Viet Nam is a signatory. Under Article 29, Decree 134, if relevant international treaties do not specify the categories and quotas of the exports that are duty-free, the Ministry of Finance shall coordinate with the Ministry of Foreign Affairs to report to the Prime Minister for decision. As a result, the volume of imports which have to "wait" for the Prime Minister's decision is extremely large, which adversely affects enterprises' production and business progress. But clause 12, Article 1, Decree 18 has addressed this

matter by vesting the decision-making power to confirm the categories and quotas to specialized management authorities and the authority that proposes the conclusion of or accession to the treaty in order to speed up the handling of procedures for imports and exports under international treaties.

COMMENTS AND RECOMMENDATIONS

Decree 18 has overcome the limitations of Decree 134 with clearer and more specific stipulations on in-country exports, imports and bases for exemption of duties on goods imported for further processing and processed exports, which helps reduce the time for handling related procedures, creating favorable conditions for enterprises and related subjects in implementing tax procedures. Besides, the categories and quotas of duty-free goods are confirmed by written document of the authority that proposes the conclusion of or accession to the relevant international treaty, the specialized management authorities. This helps speed up the application of duty-free on imports and exports under international treaties in comparison to the corresponding stipulations in Decree 134, and also reduces the workload for the Ministry of Foreign Affairs, the Ministry of Finance. It is suggested that businesses should update the provisions of Decree 18 to properly implement the procedures related to imports and exports.



COMMENTS ON DRAFT DECREE REPLACING DECREE 50/2016/ND-CP ON SANCTIONING ADMINISTRATIVE VIOLATIONS IN THE FIELD OF PLANNING AND INVESTMENT

PHUONG UYEN



During nearly 5 years of implementation, Decree No. 50/2016/ND-CP on sanctioning administrative violations in the field of planning and investment (**Decree 50**) has set forth specific and comprehensive regulations, creating a legal basis for the management in this field. However, this Decree is no longer appropriate when many new relevant legal documents have taken their effect, including the Law on Planning 2017, the Law on Public Investment 2019, the Law on Public-Private Partnership Investment 2020, the Law on Investment 2020, the Law on Enterprises 2020. To ensure consistency between regulations on sanctions for handling administrative violations and other legal documents in the field of planning and investment and simultaneously enhance the efficiency of state management in this field, the Draft Decree to replace Decree 50 (**Draft Decree**) is currently under consultation and will be promulgated soon. In this Legal Newsletter, NHQuang will introduce some notable contents of the Draft Decree, which have direct impacts on enterprises in business investment, as follows:

Supplementing new violation acts and increasing penalty levels for some violation acts

The Draft Decree supplements some new administrative violation acts, for example: investing in business lines prohibited by law; establishing enterprises for the purpose of money laundering; contributing capital, buying shares, buying capital contribution from economic organizations that do not satisfy the prescribed conditions, transferring investment projects that do not satisfy the prescribed conditions. Simultaneously, the Draft Decree also increases the penalty levels for most administrative violation acts, such as:

- A fine of VND 15-20 million shall be imposed for one of the following acts: Intentionally reporting or providing incorrect information affecting the process of making, appraising, or deciding a plan, program, or project; intentionally reporting or providing incorrect information affecting the supervision, assessment, inspection, and handling of violations in implementing a plan, program, or project; this fine is VND 5 million higher than that stipulated in Decree 50.
- A fine of VND 50-70 million shall be imposed on the act of using public capital for improper purposes, improper subjects or beyond the approved limit; this fine is VND 40-50 million higher than that stipulated in Decree 50.
- A fine of VND 30-40 million shall be imposed for the provision of inaccurate and untruthful information to enjoy investment incentives; this fine is VND 15-20 million higher than that stipulated in Decree 50.

Compared to Decree 50, the penalty levels for administrative violations in the Draft Decree are suitable to the nature, extent of the violation acts and also ensure conformity with the current market economy. Because investment projects are often

large-scale ones with large investment capital, if there is no appropriate fine, no deterrent could be generated and violations cannot be prevented. When a violation occurs, it will affect the investors, state revenue, and some subjects will even take advantage of regulations to cause loss and waste of state capital for public investment projects if the fine is low. In addition, the provision of new violation acts in the Draft Decree also solves the shortcomings in Decree 50 such as violations are detected without being sanctioned because there is no appropriate penalty or a number of prohibited acts under the Law on Bidding, the Law on Investment, the Law on Enterprises have not been specifically stipulated as violations in Decree 50. Moreover, the increase of the penalty levels and the supplement of new violation acts will also affect the behavior of enterprises, whereby they have to be more careful when implementing business and investment activities because the high fine levels will be a huge expense for enterprises if there is any violation act.

Supplementing 3 new fields to the scope of governance and abolishing the regulations on sanctioning some acts related to business registration

The Draft Decree expands the scope of governance with 3 new fields, including: (i) public-private partnership (PPP) investment, (ii) bidding to select investors to perform investment projects with land use and (iii) planning. The revised scope of the Draft Decree is consistent with the changes of the aforementioned Laws, creating the legal basis for state authorities to follow. Simultaneously, the Draft Decree has abolished the regulations on sanctioning the acts related to announcing the corporate seal before using, shortening the notice period before business suspension, reporting the change of information of the business manager. The abolition of these provisions is to ensure the compatibility with the new provisions of the Law on

Enterprises 2020 when this Law has abolished the above procedures.

Supplementing provisions to determine limitation periods for sanctioning administrative violations

Article 5 of the Draft Decree clearly stipulates: (i) for administrative violation acts which have ended, the limitation period shall be counted from the termination of violation acts; (ii) for administrative violation acts which are ongoing, the limitation period shall be counted from the time of detecting the violation acts; (iii) within the time limit specified above, if the sanctioned individuals or organizations intentionally evade, hinder, the above-mentioned limitation periods shall be calculated from the time when the actions of evading, hindering stop. These supplements aim to accurately determine the limitation period for handling violations, creating favorable conditions for law search and application, timely handling of violation acts, and ensuring the lawful rights and interests of subjects. This is a new provision in the Draft Decree that was not addressed in Decree 50.

At the time of this Legal Newsletter, the second Draft Decree is still in the process of consultation and will continue to have other important revisions. Businesses should pay attention to updating to comply with regulations and avoid unnecessary legal risks. We will continue with further update and information when the new Decree officially takes effect. The full text of the Draft Decree is currently posted for comments until June 29, 2021. Organizations and individuals who are interested can find the full text of the Draft Decree at <http://www.mpi.gov.vn/Pages/tinbai.aspx?idTin=49921&idcm=140> and send comments to the Ministry of Planning and Investment.



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