

Vision & Associates

Attorneys,
Patent & Trademark Agents
Investment & Business Consultants

OUR OFFICES:

Hanoi Office:

Unit 308-310, 3rd Floor,
Hanoi Towers
49 Hai Ba Trung Street, Hoan
Kiem, Hanoi, Vietnam
Tel: (84 4) 3934 0629
Fax: (84 4) 3934 0631
E-mail: vision@vision-associates.com

Ho Chi Minh City Office:

Unit 1801, 18th Floor,
Saigon Trade Center
37 Ton Duc Thang Street,
District 1, HCMC, Vietnam
Tel: (84 8) 3823 6495
Fax: (84 8) 3823 6496
E-mail: hcmvision@vision-associates.com

PUBLICATION

GUARANTEEING MORE TRANSPARENCY

By Luu Tien Ngoc

Background

As you all may be aware that the Government of Vietnam just issued Decree No.15/2011/ND-CP, dated February 16, 2011, on issuance and management of Government guaranties (“Decree 15”).

Decree 15 was issued to update regulations on the issuance and management of Government guaranties in the Law on Public Debt Management (which became effective on January 1, 2010), making the issuance and management of Government guaranty clearer and more transparent, and improving the effect of Government guaranty in the new context of the country development. It was stated that Decree 15 would be effective on April 5, 2011, and replace Decision No.272/2006/QD-TTg, dated 28 November 2006, of the Prime Minister, on issuance and management of Government guaranties to foreign loans.

To achieve the said objectives, Decree 15 includes a number of new and updated provisions and extends its application scope (not only foreign loans as stated by Decision 272) to local loans, local and foreign bonds issued by local companies (including State-owned companies, local companies and companies with foreign capital). However, in the scope of this article, we do not intend to brief the new and updated provisions of Decree 15, but focus only on one point, from the legal perspective, which may be of interest by:

1. Existing shareholders¹ or equity members¹ (including foreign shareholders or equity members) in a company, which intends to have guaranties from the Government, via the Ministry of Finance of Vietnam (“MoF”), for its intended loans or issued bonds, during the time they remain shareholders or equity members of the said company; and
2. Potential investors (particularly foreign investors), who intend to buy shares¹ or equity capital¹ in a company, which has already an executed loan or issued bonds with guaranties by the Government of Vietnam (via the MoF).

FIRM VALUES:

Like its economy, Vietnam's laws are changing rapidly. **Vision & Associates** is well versed in local laws as well as in international professional standards. Our philosophy is to find the innovative solutions needed to satisfy your business requirements in a cost-effective manner.

Further restrictions on transfers by major existing shareholders or equity members

Pursuant to Article 15.3.(b), Decree 15, at the time upon which the MoF considers the issuance of the guaranty, the company (i.e. the guaratee) must undertake that, during the effective time of the Government guaranty:

1. All major shareholders or equity members, each of which individually holds at least five percent (5%) of the total paid-up charter capital, are required to undertake collectively to hold at least sixty five percent (65%) of the total paid-up charter capital of the company, for the entire period of time during which the Government guaranty remains its effect. The company is obliged to register the list of the said major shareholders or equity members with the relevant stock exchanges, in accordance with the guidance from the MoF.
2. In case a major shareholder or equity member in the said list intends to transfer entire or part of its shares or equity capital to any other investors outside the said list, the new investors must satisfy all criteria on financial capabilities, which will be approved by the MoF.
3. In case the company (i.e. the guaranty) issues any additional amount of shares or calls for any additional amount of equity capital, the company is required to register additionally the new investors in order to maintain the undertaking of the said sixty five percent (65%) by all major shareholders or equity members (i.e. each of which individually holds at least five percent (5%) of the paid-up charter capital) of the company.

We understand that the restrictions on the transfers as described above will apply to all major shareholders or equity members (i.e. each of which individually holds at least five percent (5%) of the total paid-up charter capital), including not only local major shareholders or equity members, but also foreign major shareholders or equity members.

If it is the case, and except for the restrictions as applicable to local shareholders or equity members to foreign investors as further described in the next section, the restrictions on the transfers as described in this section will not apply to the transfer by all minor shareholders or equity members (i.e. each of which individually holds lower than five percent (5%) of the total paid-up charter capital).



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Vision & Associates is locally and internationally recognized as a leading professional firm of Vietnam. Peers opine that “this firm is one of the only real choices”, which “can do everything-it is very pro-active and clearly one of the major players”, while clients commented: “The team has an excellent handle on the changing local laws; it provides good value and high-quality, practical advice”. Our partners, associates and staff have not only varied legal, but also financial and technical backgrounds and business minds. The partners and associates’ extensive experience in the major areas of the practice, with substantial national and international contacts, allow the Firm to advise clients on a variety of domestic and international matters.

As a consequent, all minor shareholders or equity members (i.e. each of which individually holds lower than five percent (5%) of the total paid-up charter capital) will be entitled to trade freely their shares or equity capital.

Since the said guidance by the MoF is not available (which as stated in Decree 15, will be issued by the MoF), no body at the moment knows how the registration (with stock exchanges), additional registration (with stock exchanges), and approval (by the MoF) will be made.

We assume that the said registration, additional registration and approval would be for the purpose of monitoring the transfer to be made by the said major shareholders or equity members, during the effective time of the Government guaranty, and for the ultimate benefits of the Government (i.e. the guarantor). However, from the legal perspective, we take the view that:

1. The registration and additional registration would, to some extents, make sense with respect to public companies (particularly listed companies), of which shares are traded on a relevant stock exchanges. However, we cannot imagine how they will work with respect to non-public companies (particularly limited liability companies), of which shares or equity capital will be traded outside the stock exchanges.
2. Pursuant to the Law on Enterprises, there is only case where a transfer of shares or equity capital being restricted (e.g. by founding shareholders within the first three (3) years). It means that a shareholder or equity member is entitled to freely sell out entire or a part of its shares or equity capital, without any limitation by the law. In that sense, the restriction by Decree 15 to the transfer of shares or equity capital by major shareholders or equity members, during the effective time of the Government guarantee, should be justified so as to make it being in compliance with the law.

Further restriction and conditions on transfers by all local shareholders or equity members to and purchases by foreign investors

Pursuant to Article 15.3.(a) of Decree 15, at the time upon which the MoF considers the issuance of the guaranty, the company (i.e. the guarantee) must undertake that, during the effective time of the Government guaranty:

MEMBERSHIP:

Vision & Associates, its partners and/ or associates retain the membership of a large number of local and international professional organizations in and outside Vietnam. They include not only domestic organizations such as Hanoi Lawyers Association, Bar Associations of Hanoi and HCMC, etc. but also international and regional organizations such as and other cities, VIPA, Inter-Pacific Bar Association (IPBA), Law Association for Asia and the Pacific (LawAsia), International Association of Independent Law Firms (InterLaw), International Trademark Association (INTA), Asian Patent Attorneys Association (APAA), International Association for the Protection of Industrial Property (AIPPI), ASEAN Intellectual Property Association (ASEAN-IPA), etc.

1. The company (i.e. the guaranty) will only be permitted (to allow) the transfers, entire or a part of the shares or equity capital, by local shareholders or equity members (i.e. being Vietnamese individuals and/or organizations), to foreign investors, after the company (i.e. the guaranty) has fulfilled the re-payment of all debt obligations to the lenders (i.e. the beneficiary), with respect to the outstanding debts, in proportion with the ratio of the shares or equity capital to be transferred.
2. The company (i.e. the guaranty) will be obliged to make a prior written notification to the MoF. Within fifteen (15) business days from the receipt of the notification, the MoF will send its written reply to the company (i.e. the guaranty).

We understood that the restrictions and conditions on the transfers as described above, will apply only to the transfer by local shareholders or equity members to and the purchase by, foreign investors. If it is the case, and except for the restrictions as applicable to major shareholders or equity members (i.e. each of which individually holds at least five percent (5%) of the total paid-up charter capital) as described above, the restrictions and conditions on the transfers as described in this section will not apply to the transfer by minor foreign shareholders or equity members (i.e. each of which individually holds lower than five percent (5%) of the total paid-up charter capital) to other foreign investors.

Since there is no guidance by the MoF in existence, no body, at the moment, knows on which basis the MoF will make its reply to the company (i.e. the guaranty), and it is unclear of what the MoF tends to say, by stating "in proportion with the ratio of the shares or equity capital to be transferred", when trying to understand the full meaning of Article 15.3.(a).

Exceptional cases as approved by the Prime Minister

We note the exceptional cases as provided by Article 15.3.(c) of Decree 15, that in special cases, the MoF will make a proposal to the Prime Minister for his consideration and making his decision on waive of the restrictions and conditions as provided by Articles 15.3.(a) and 15.3.(b), as described above.

Conclusion

Having identified some points that may negatively affect the rights and

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benefits of shareholders, equity members and foreign investors, we strongly believe that the MoF has thoughtfully studied all of those points, and will work out proper solutions and guidelines to early translate Decree 15 into practice, which will balance the legal rights and benefits of all relevant parties in a guaranteed loan/bond transaction, including the Government (i.e. via the MoF, being guarantor), the lenders (i.e. the beneficiary), the company (i.e. the guaranty), and fully respect the legal rights and benefits of shareholders or equity members in the company./.