



Ho Chi Minh City Branch Office
Suite 605 Saigon Tower
29 Le Duan Boulevard
District 1 Ho Chi Minh City
Vietnam
Tel +84 8 822 1717
Fax +84 8 822 1818
nigel.russell@phillipsfox.com

Hanoi Branch Office
Suite 401 Hanoi Tower
49 Hai Ba Trung
Hanoi
Vietnam
Tel +84 4 936 0990
Fax +84 4 936 0984
bill.magennis@phillipsfox.com
www.phillipsfox.com

Adelaide
Brisbane
Canberra
Melbourne
Perth
Sydney
Auckland
Wellington
Hanoi
Ho Chi Minh City

Construction Law Update

April 2004

At its 4th session on 26 November 2003, the National assembly passed Law 16-2003-QH11 on Construction (the "Law"). Effective as from 1 July 2004, this is the first full Law on Construction in Vietnam. Prior to the Law, construction activities were conducted pursuant to an array of decrees, decisions, circulars and official letters. Although the Law now provides an overall structure for conducting construction activities in Vietnam, it still requires issuance of implementing guidelines to fill-in a number of sections left unaddressed by the Law.

Objectives

The Law governs construction activities and the rights and obligations of both domestic and foreign organizations and individuals investing in construction of works and engaging in construction activities. The Law attempts to regulate the continuity of construction planning and the responsibility for such planning. In fact, responsibility is a key theme throughout the Law; ensuring that all persons engaged in various aspects of construction activities are duly registered (where applicable), possess the requisite capabilities to undertake their respective tasks and are held accountable for their performance of such tasks. This accountability also extends to those investing in construction works and those approving construction activities. The Law provides for compensation to be paid by those who cause damage to the State or people by failing to exercise proper approval (in the case of decision-makers) or proper competence (in the case of those engaged in construction activities).

Definitions

As defined in the Law:

Construction activities comprises formulation of construction master plans, formulation of investment projects for construction of works, construction survey design of construction of works, execution of building works, supervision of execution of building works, management of investment projects for the construction of works, selection of contractors in construction activities and other activities related to construction works.

This publication is copyright. Except as permitted under relevant laws, no part of this publication may be reproduced by any process, electronic or otherwise, without the specific written permission of the copyright owner. ©Phillips Fox

The material contained in this publication is not intended, and should not be relied upon, as legal advice. Should you wish further information on the topic of this publication, please do not hesitate to contact kevin.hawkins@phillipsfox.com.

Construction works means a product of labor and of building materials and equipment installed in the works, attached to a fixed area of land which may include sections above and under ground or water surfaces, and which is building in accordance with a design. Construction works includes public works, residential housing, industrial works, traffic works, irrigation systems, energy works and other works.

Execution of building works comprises construction of the following works and installation of equipment at such works: new works; works being repaired, up-graded, relocated, rebuilt, revived or dismantled; and works under warranty or works being maintained and serviced.

Investment project for construction of works means a collection of proposals relating to expenditure of capital to build new works or to extend or renovate existing works in order to develop, maintain or improve the quality of the works or the quality of a product or service within a certain period of time. Investment project for the construction of works shall include an explanatory section and a preliminary designs section.

Investor in construction of works means a capital owner or a person assigned to manage and utilize capital for investment in construction of works.

A. Regulatory framework for construction activities

1. Types and levels of construction works:

The Law specifies that construction works will be distinguished by type and by level; level being determined according to the scale of the works, technical requirements, materials used for construction and the expected life span of the finished works. There are to be 5 levels for each type of construction work: special, level 1, level 2, level 3, and level 4. Although the Law specifies the number of levels, it does not yet specify the types of construction works, nor details as to what level is assigned to a particular construction works. The Law, as is the case with many provisions contained within the Law, refers to forthcoming government guidelines that will provide more specificity.

2. Regulations and standards:

The Law provides that construction activities must be conducted pursuant to regulations and standards "promulgated or recognized" by the "State administrative body for construction" (recognizing that projects are administered by different authorized State bodies at different levels under the Law). The Law permits the use of foreign construction standards for construction activities provided such standards are approved by the relevant authorized State body for construction.

3. Capability:

The Law requires that individuals engaging in constructions activities have a "capability for construction practice". Capability is determined based on professional training, experience, and ethics. If registration for a particular expertise is required, then such individual must also be registered. Capability for construction activities pertains to organizations, and is determined based on individuals with construction practice capability within such organization and based on the organization's experience in construction activities, financial capacity, equipment and management capability. Further, foreign organizations and individuals engaged in construction activities must be granted an operating license by the State administrative body for construction.

4. Policy of encouragement:

The Law encourages construction activities to be planned to use progressive scientific technologic advances in construction; to use new building materials; to economize use of natural resources; to protect the environment; and for development in "remote and distant" areas and in flood prone regions.

5. Conduct prohibited in construction activities:

- (a) Constructing works in areas in which construction is prohibited;
- (b) Building works contrary to master plans or in violation of construction;
- (c) Failing to comply with the conditions on capability for practicing as a construction contractor or capability for construction activities;
- (d) Building works which fail to comply with construction regulations and construction standards;
- (e) Breaching safety and environment hygiene regulations;
- (f) Building on public space, public areas, pathways or other expanses which are already the subject of approved and proclaimed construction master plans;
- (g) Giving or receiving bribes in construction activities.

B. Construction master planning

One of the essential features of the Law is its intent that construction activities be organized and planned rationally and be consistent with earlier planning. The Law provides that Construction master plans be formulated at various levels for 5 and 10 year periods to ensure "long-term developmental direction". The State guarantees to budget funding for the formulation of such master plans and will raise funds from other sources if necessary. The State has charged people's committees at all levels to formulate construction master plans within their administrative boundaries.

Construction master plans are classified into three categories as follows:

(i) Regional construction master plans:

For key areas and inter-provincial areas, the Ministry of Construction formulates the tasks, for such planning, obtains opinions of concerned ministries and then submits the plan to the Prime Minister for approval. For provinces and cities under central authority, the people's committee for such province or city ("Provincial PC") formulates the regional construction master planning and submits the plans to the People's Council for approval. The contents and requirements for such plans are set forth in the Law. Once approved, amendments to regional construction master plans are only permitted if: there is a change in the master plan for overall socio-economic development of the region, in the master plan for development of a branch in the region, or in the strategy for national defense and security; or there is a change in geographical, natural or socio-economic conditions or in population numbers.

(ii) Urban construction master plans ("UCMPs"), including general and detailed UCMPs:

The Ministry of Construction formulates general UCMPs for construction of new inter-provincial urban areas, high-tech zones and special economic zones, and submits same to the Prime Minister for approval after obtaining opinions from concerned ministries, branches and PCs. Provincial PCs formulate general UCMPs for areas of Special category, category 1, category 2, and category 3. The plans are submitted to the PC to pass and then, with the exception of category 3 plans, the plans are sent to the Ministry of Construction for evaluation and onto the Prime Minister for approval. Category 3 plans can be approved by the People's Council. PCs of districts, townships and provincial towns ("District PCs") formulate general UCMPs for urban areas of categories 4 and 5. The plans are then submitted to the District

People's Council to pass and then to the Provincial PC to approve. Amendments may only be made to general UCMPs in limited circumstances prescribed in the Law.

District PCs are responsible for formulating detailed UCMPs consistent with the approved general UCMPs. The required contents of a detailed UCMP are specified in the Law. Provincial PCs have authority to approve detailed UCMPs for special, category 1, category 2, and category 3. District PCs are authorized to approve category 4 and category 5 detailed UCMPs. Amendments to detailed UCMPs can be made only in limited circumstances prescribed in the Law.

The Law contains provisions for urban design with respect to general UCMPs (eg. prescribing height restrictions for buildings) and detailed UCMPs (eg. specifying colours of works on each street route). The specific regulations on urban design are to be provided later by the Government.

(iii) Master plans for construction of rural residential areas:

Provincial PCs are required to formulate the master plan for construction in rural residential areas. The plan is submitted to the Provincial People's Council to pass and in turn submitted to the District PC to approve. Plan contents are prescribed in the Law. Again, plans may only be amended in limited circumstances, as provided for in the Law.

Once the competent State body approves a construction master plan, all level PCs (Provincial and District) have 30 days to proclaim a detailed construction master plan within their respective administrative boundaries. The contents for such proclamation are prescribed by the Law. For proclamation of regional and general construction plans, the contents of such proclamations are to be determined by the person authorized to approve the related plan. Detailed master plans must be implemented within 3 years from the date of proclamation. The person who authorized the plan is responsible to take measures to ensure implementation of such plan. Any plan not implemented within such 3 year period must be amended or rescinded and re-proclaimed again in accordance with the proclamation process described above.

Each relevant administrative body for construction is required to provide information to investors relating to the construction master plan under its authority. (Other management obligations of an administrative body for construction are detailed in the Law.)

C. Investment Projects for Construction of Works ("IPCW")

1. General requirements:

The requirement for IPCWs vary according to their scale and nature, and the source of invested capital. A small-scale IPCW or one involving buildings for religious works (or other works as stipulated by the Government) need only formulate an eco-technical report. The contents of such report are set forth in the Law. An IPCW that entails a large investment must submit an Investment Report to the competent authority requesting permission before formulating the IPCW. The contents of the Investment Report are described in the Law.

An IPCW that uses capital of foreign investors additionally must ensure that calculations on the cost of construction comply with fixed levels and eco-technical norms issued by the relevant State administrative body for construction. An IPCW which uses ODA funding must ensure prompt reciprocal capital.

Except as noted above, an IPCW generally must contain two main elements: an explanatory statement and preliminary designs.

2. Evaluations of IPCWs and investment decisions:

The Law requires that each IPCW be evaluated in accordance with Government regulations before an investment decision can be made. Important national IPCWs must first be evaluated and advocated by the National Assembly before being submitted to the Prime Minister to make an investment decision. The Law provides that forthcoming regulations will specify the process for evaluation and investment decision making with respect to all other IPCWs.

3. Management of IPCWs:

May occur in one of two forms: (i) either the investor in construction of works hires a consultancy organization to manage the project; or (ii) such investor undertakes to directly manage the project. If an investor chooses the latter form, such investor must establish a management board, which will be responsible before the Law for decisions made with respect to the IPCW.

4. Construction survey:

The Law sets forth the contents required in a construction survey, the required qualifications of persons who conduct construction surveys, and the rights and obligations of such survey contractors.

5. Design of construction works:

The Law regulates the design of construction works and those contracted to render such design work. Among other things, the Law requires that such designs conform to the applicable general master plan, the landscape, regulations on architecture, and with the IPCW.

Design of construction works comprises three steps: preliminary designs, technical designs, and design drawings for execution of building works. The number of design steps depends on the nature and scale of the particular construction works. In a 2 or 3 step design implementation, each step must be approved before undertaking the next step.

One-step design requires only design drawing for execution of building works - applicable to construction works of small-size where only an eco-technical report is required. Two-step design requires preliminary design and design drawings for execution of building works - applicable when an IPCW must be prepared. Three-step design requires preliminary design, technical design, and design drawings for execution of building works - applicable to large scale and complex IPCWs.

The Law encourages selection of an architectural design through tender but only mandates use of such tender process if the IPCW is for headquarters of State agencies (district level and above), cultural buildings, sports buildings, and other public works (all of large scale), and special architectural works.

The Law also guarantees the copyright of the author of the selected design plan, and offers priority to such author to conduct the further design steps, if qualified by capability of practice.

6. Evaluation and approval of designs:

The State administrative body for construction evaluates preliminary designs at the time it approves the IPCW. The investor in the construction works organizes evaluation and approval of subsequent design steps, not inconsistent with the preliminary designs.

D. Construction works

1. Construction permits:

With the exception of a limited number of works (such as State secret construction works, emergency construction works, and other small-scale construction works described more particularly in the Law), an investor in construction works must obtain a construction permit prior to commencing construction works.

The Law sets forth the contents of the Application file and conditions that must be satisfied in order to obtain the construction permit.

The authority to issue construction permits depends on the size, type and location of the particular construction works, as illustrated in the chart below. Permits not issued or denied within the required time-limit are deemed to be approved.

Permit-issuing authority	Construction works	Time-limit for issuance
Provincial PC	Large scale Special architecture Religious works Works within their administrative boundaries	Within 20 days
District PC	Urban areas and commune areas within their administrative areas	Within 20 days
Commune PC	Separate dwelling houses in rural residential areas under approval construction master plan	Within 10 days

2. Site clearance:

A plan for site clearance for construction works must be prepared and included with the IPCW for approval at the time the IPCW is evaluated and approved. If a site clearance plan includes resettlement, a resettlement plan must also be included. Payments for site clearance may be in one or more of the following forms: (i) payment of money; (ii) land use right; or (iii) residential housing ownership, but must be subject to the approval by a compensation council for site clearance. Persons breaching this provision to make compensation for site clearance outside the framework established by the Law risk criminal prosecution in addition to other penalties.

E. Execution of building works

Execution of building works is permitted to begin once:

- (a) There is a surface area for construction ready to be handed over.
- (b) There is a construction permit.
- (c) There are approved design drawings for execution of building works.
- (d) There is a building contract.
- (e) There are capital funds to ensure the building schedule in accordance with the approved building schedule in the investment project for construction of works.
- (f) There are measures to ensure safety and environmental hygiene during the construction process.
- (g) With respect to new urban areas, the whole or each part of technical infrastructure works has been completed.

All building sites must display contact information of the investor, head of building site, design contractor, and supervisor of the execution of building works. In addition, the site shall display a notice board that lists the commencement and completion dates and amount of total invested capital.

Contractors for execution of building works must provide a warranty for the constructed works. The warranty period will be determined by the Government in later guidelines.

The Law provides that in the below circumstances construction works shall be dismantled:

- (a) in order to conduct site clearance for construction of new works;
- (b) when construction works which are in danger of collapse adversely impact on the community and adjoining works;
- (c) when the construction works are built in an area in which construction is prohibited;
- (d) when the construction works are contrary to construction master plans, were built without a construction permit or are incorrect in terms of the provisions of an issued construction permit;
- (e) other circumstances as stipulated by law.

F. Supervision

All construction works must be under a supervisory regime that begins immediately from the commencement date of the construction of works. Investors in construction works may either conduct the supervision themselves (if he or she has the requisite capability to supervise) or hire a consultant supervisor.

G. Selection of contractors

The selection of contractors pursuant to the Law must also comply with the Laws on tendering but it is unclear from the Law how the laws on tendering will precisely accord with the Law. The Law provides for four forms of selecting contractors in construction activities:

- (a) Open tendering is required for selection of the contractor for execution of building works.
- (b) Limited tendering is used for selecting a construction consultancy contractor and a contractor for execution of building works with high technical requirements.
- (c) Contractors for smaller works and items of building works may be appointed by the investor in construction work or the person making the investment decision (state).
- (d) General contractors in construction activities and design contractors may be selected in accordance with the provisions set forth in the Law.

H. Contracts

Contracts in construction activities must be prepared in writing and must comply with the Law and all other relevant laws. The Law recognized that contracts for construction activities can be quite varied and set forth only basic items that must be contained in such contracts.

Construction bonuses and penalties on construction works funded with state capital are limited. A bonus shall not exceed 12% of the value on the profitable part of the contract and penalties cannot exceed 12% of the value of the contract that is breached.

Contract disputes are required to be settled first by negotiation before proceeding to arbitration or court action.