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Vietnam BOT power projects: MOIT imposes tougher statutory remedies for delays

The Ministry of Industry and Trade (**MOIT**) recently issued Circular No. 43/2016/TT-BCT (**Circular 43**) which entered into force on 15 February 2017. This legal instrument sets out the criteria under which the right to develop a Vietnam power project (**Development Right**) may be terminated on the ground of prolonged project delays.

In this article, our lawyers examine the legal implications of these significant regulatory developments.

Background

Over the past two decades, there has been plenty of appetite for private sector investment in the development and financing of new, greenfield large-scale energy and infrastructure projects across Vietnam despite challenging market conditions.

As interest gains momentum from international investors, the Government of Vietnam (**Government**) has continued efforts to improve the investment climate by formulating ambitious strategic energy development plans to develop its core power infrastructure assets.

Central to the successful implementation of the 2016 Revised Power Development Master Plan VII (**Revised PDP 7**) would be that independent power producer plants (**IPP**) must be brought to completion within the required time period to ensure security of long-term national electricity production and supply, as the Prime Minister directed from a policy perspective.

However, it is worth noting that Government authorities have lately expressed concerns about prolonged project delays and cost variations in the development of certain power projects.

Several recent reported examples where sponsors fail to develop and achieve project completion include Quang Trach 1 (PetroVietnam), Quang Trach 2 (Russia's Inter RAO Group) and Kien Luong 1 BOO (Tan Tao Group/ITACO) coal-fired power projects. Further, there is a significantly

growing concern from local provincial authorities in respect of progressive works completion of the Hai Duong BOT power project.

Circular 43 is intended to provide a mechanism that aims to ensure that power projects are to be delivered on budget in a timely manner. This is crucial to ensuring the Vietnam power industry can deliver on its potential.

Signing of a MOU

The Development Right of a BOT power project is typically awarded to sponsors by way of a written consent of the Prime Minister.

Significantly, Circular 43 introduces a statutory requirement for sponsors and MOIT to sign a memorandum of understanding (**MOU**) within 90 working days from the date on which the Development Right is granted.

An MOU must include a plan for project development setting out certain key project milestones as follows:

- schedule to formulate and approve a site planning (if applicable);
- schedule to formulate and approve a feasibility study (**FS**);
- plan to negotiate a concession agreement and other project documents;
- schedule to negotiate project documents, including a power purchase agreement (**PPA**), a land lease agreement (**LLA**), an engineering, procurement and construction contract (**EPC Contract**), fuel supply contract(s) (i.e. coal supply agreement (**CSA**) or gas sales agreement (**GSA**)) and other contracts;
- schedule to initial project documents;
- the date for submission of an application for issuance of an investment registration certificate (**IRC**) and the date for formal execution of project documents;
- schedule for financial contributions; and
- schedule for ground breaking and construction, including the date for ground breaking, the commercial operation date (**COD**) for each electrical generating unit (**Unit**) and COD for the entire power plant.

Key Impact of Circular 43

Circular 43 places an emphasis on project delays, including a statutory obligation of sponsors to develop a project within the time stated in the MOU. It imposes numerous compliance and reporting obligations on sponsors.

This new legal instrument specifically states that if a BOT power project falls behind the agreed timeline of certain key project milestones and project documents have not been signed with Vietnam project counterparties, the consequences are:

- **First reminder letter**

MOIT will issue a first reminder letter to sponsors requiring them to immediately undertake and complete the delayed project work in the case of a delay of more than 30 working days compared to the project milestone set out in the MOU.

- **Second reminder letter**

If sponsors fail to achieve such project milestone after 30 working days from the date of the first reminder letter, MOIT will issue a second reminder letter.

There will be no more than two reminder letters issued by MOIT with respect to a failure by sponsors to achieve any project milestone.

A new development is the power of MOIT to request the Prime Minister to consider termination of the Development Right in circumstances in which sponsors fail to achieve a project milestone within 12 months from the date of MOIT's first reminder letter and the overall project schedule has accumulated delays of 12 months compared to their agreed timeline in the MOU.

The message is therefore clear in respect of BOT power projects which sponsors have not secured the execution of project documents: MOIT will no doubt focus greater scrutiny on those projects with its more frequent investigative and enforcement action on project delays.

A failure by sponsors to develop a BOT power project in accordance with the agreed timeline can prove costly giving rise to termination of the Development Right and such project may be awarded to another investor, subject to the exceptions enumerated in Circular 43.

If the Development Right is terminated in such event and an investment certificate previously issued in favour of sponsors in respect of a BOT power project is revoked, all costs and expenses incurred by sponsors prior to termination of such right will not be refunded.

Exceptions to the general rule

Circular 43 prescribes a number of limited exceptions to which the mandatory provisions of the general rule do not apply. Technically, project delays caused by sponsors would be non-excusable.

Those exceptions include (a) force majeure, (b) excusable delays caused by a competent State authority and (c) excusable delays caused by the conduct of a third party which directly relates to achieving specific project milestone(s).

The application of an exception will give sponsors an opportunity to agree with MOIT on an extension of time in respect of certain key project milestones initially agreed in a MOU.

Transitional provisions

Circular 43 provides a transition regime pursuant to which a BOT power project for which a MOU was signed prior to 15 February 2017 but project documents have not been signed, then MOIT and sponsors must sign another MOU setting out remaining project milestones.

The practical effect of this provision is that all BOT power projects which sponsors have not secured the execution of project documents with Vietnam project counterparties will be subject to statutory remedies in Circular 43 for prolonged project delays.

Reporting obligations

Sponsors are required to submit a monthly report to the General Department of Energy (**GDE**) and the relevant provincial people's committee on the progress of works completion in accordance with the agreed project development schedule.

Market trends

Looking forward, we believe that the Revised PDP 7 provides significant investment opportunities for foreign investment in the IPP power generation. Especially notable was the growing significance of BOT structures under the regulatory framework on public private partnerships (**PPP**), and we expect this trend continues to grow in popularity.

The Vietnam power generation markets have expanded and evolved significantly. Following success stories of Phu My 2.2 (715 MW) and Phu My 3 (716.8 MW) gas-fired power projects, commercial operation was achieved in May 2015 in respect of the US\$1.95bn 1,240MW Mong Duong 2 coal-fired power project where AES Corporation, POSCO Power Corp. and China Investment Corporation are sponsors.

MOIT forecasted that Vietnam BOT power projects involving foreign equity investment will hold a total installed capacity of 24,000MW by 2030.

A strong pipeline of BOT projects

With international investor appetite growing, strong deal flow looks set to continue over the coming years with a greater shift in project finance activities towards a wider array of new BOT power projects coming into the market. The big question is the extent to which debt finance will be made available by international lenders to finance those Vietnam projects.

To our knowledge, MOIT currently holds discussions with numerous sponsors to develop 15 greenfield BOT power projects, which we set out below.

	BOT Power Projects	Installed Capacity	Sponsors	COD
1.	Vinh Tan 1	1,200MW	CSG, CPIH and Vinacomin (project documents signed on 12 December 2013)	2019
2.	Hai Duong	1,200MW	Jaks Resources Bhd and CPECC (project documents signed in August 2011)	2019 (Unit 1) 2021 (Unit 2)
3.	Nghi Son 2	1,200MW	Marubeni Corporation and Korea Electric Power Corporation (KEPCO) (investment agreement signed on 15 November 2016)	2021 (Unit 1) 2022 (Unit 2)

4.	Vung Ang 2	1,200MW	VAPCO (One Energy Asia Limited jointly owned by Mitsubishi Group and CLP Holdings) (project documents signed on 16 January 2017)	2021 (Unit 1) 2022 (Unit 2)
5.	Nam Dinh 1	1,200MW	Taekwang Power Holdings and ACWA Power International	2021 (Unit 1) 2022 (Unit 2)
6.	Duyen Hai 2	1,200MW	Janakuasa Sdn Bhd (project documents signed on 29 December 2015)	2021 (Units 1 & 2)
7.	Song Hau 2	3,000MW	Toyo Ink Group Bhd (project documents expected to be signed by August 2017)	2021 (Unit 1) 2022 (Unit 2)
8.	Long Phu 2	1,320MW	Tata Power Co. Ltd	2021 (Unit 1) 2022 (Unit 2)
9.	Vinh Tan 3	1,980MW	VTEC (One Energy Ventures Limited (CLP), EVN and Pacific Group Corporation) VTEC and CDB signed a MOU on 5 November 2015	2022 (Unit 1) 2023 (Units 2 & 3)
10.	Van Phong 1	1,320MW	Sumitomo Corporation	2022 (Unit 1) 2023 (Unit 2)
11.	Quang Tri 1	1,200MW	EGAT International Co., Ltd. (EGATi)	2023 (Unit 1) 2024 (Unit 2)
12.	Dung Quat 1	1,500MW (gas fired)	Sembcorp Utilities Pte. Ltd. (MOU signed on 13 September 2013)	2023 (Unit 1) 2024 (Unit 2)
13.	Vung Ang 3	1,200MW	Samsung C&T Corporation	2024 (Unit 1) 2025 (Unit 2)
14.	Quynh Lap	1,200MW	to be specified	2026 (Unit 1) 2027 (Unit 2)
15.	Son My 1	2,250MW (gas fired)	GDF SUEZ, Sojitz and Pacific Group Corporation	2026 (Unit 1) 2027 (Unit 2) 2028 (Unit 3)

Other potential projects

By way of an update, South Korea's Korea Western Power Co. (**KOWEPO**) signed a memorandum of cooperation in early February 2017 with Quang Tri People's Committee on a potential development of a proposed US\$1.85 billion 1,200MW Quang Tri 2 BOT power project in Southeast Economic Zone, Quang Tri province. This project will require formal approval to be added to the Revised PDP 7.

With respect to the proposed 2,250MW Son My 2 gas-fired power plant, there have been recent high-level discussions by OMC with Binh Thuan People's Committee though this project is intended to be developed by PetroVietnam.

Recently, KEPCO also expressed interest in the development of the 2,000 MW Song Hau 3 power plant.

Gazprom International (acting through VietGazprom entity) contemplates major investment in an integrated gas-to-power project which aims to commercialise natural gas from Bao Vang gas field (Block 113) offshore Quang Tri province.

Finally, the Prime Minister has recently approved a master plan to develop a 3,000MW gas-fired power complex located in Nui Thanh district (Quang Nam province) and Binh Son district (Quang Ngai province) to utilise natural gas to be brought ashore from ExxonMobil's Blue Whale gas discoveries offshore central Vietnam.

We will continue to monitor market developments in this area and welcome any queries you may have.

Key contacts

If you have any questions, or would like to know how this might affect your business, please contact these key contacts.



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