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A consolidated view
on Technology
Transfer Law and
Practice of Vietnam

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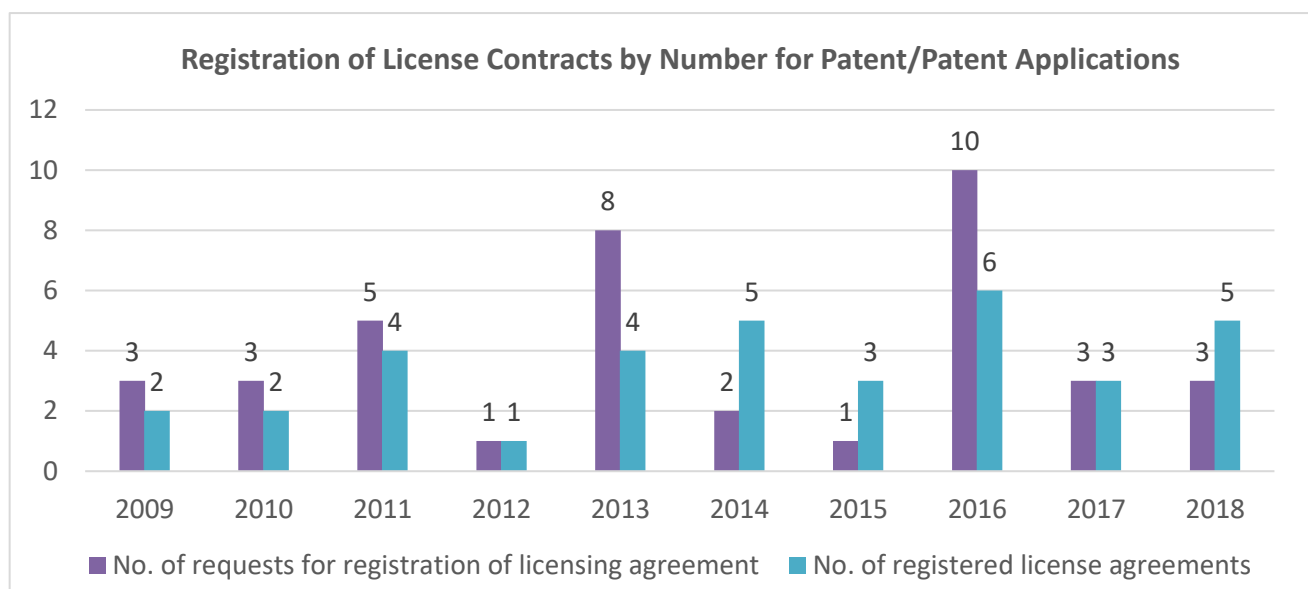
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A CONSOLIDATED VIEW ON TECHNOLOGY TRANSFER LAW AND PRACTICE OF VIETNAM

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1.1 Brief introduction

According to the statistics of Intellectual Property Office of Vietnam (IP Vietnam) in 2018, the numbers of patent license agreements applied/registered with IP Vietnam remain modest other the years from 2009 to 2018 as illustrated in the table below¹. There is no separate set of official data available for technology transfer. Therefore, the chart below only offers a limited view of the picture of technology transfer in Vietnam. We believe there were many more technology transfer cases into Vietnam in the past, given the significant FDI flows into the country.



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With the enactment of the Technology Transfer Law 2017, coming into effect on 01 July 2018, replacing the previous one in 2006, Vietnam is hoping to develop its legal system and framework to encourage advanced technologies/patent transfer and eliminate the importation of outdated and hazardous technologies, and to improve the local businesses' abilities in conducting R&D activities to boost technology transfer.

The new Technology Transfer Law 2017 requires that businesses operating in, or about to invest in Vietnam bear in mind the following important issues when it comes to technology (including patents) transfer:

- The mandatory registration in certain cases such as transferring technologies from overseas to Vietnam within **90 days as of signing date** of the technology transfer agreement;
- The mandatory application for License when transferring technologies restricted from transfer within **60 days as of signing date** of the of the technology transfer agreement;
- The mandatory contents and formalities of the technology transfer agreement; and
- The appraisal process of technology included in the investment projects.

¹ IP Vietnam's Statistics in 2018

1.2 Law and Practice

a. Types of technologies

(i) Transferable technologies

In general, Under Technology Transfer Law 2017, the subject matters that can be transferred includes the followings²:

- Technical know-how and technological know-how;
- Technology plans or processes; engineering solutions, parameters, drawings or diagrams; formula, computer software and database;
- Solutions for rationalization of production and technology innovation;
- Accompanying machinery and/or equipment of the above subject matters.

The transfer of technologies subjected to IP rights shall be carried out in accordance with the regulations of the Vietnamese IP Law.³

(ii) Technologies encouraged to transfer

- Technology Transfer Law 2017 generally lists out the types of technologies encouraged to transfer. In brief, the encouraged technologies encompass those regarded as novel and/or advanced technologies, including the following types⁴:
 - Advanced technologies, new technologies and clean technologies that are suitable for socio-economic conditions of Vietnam shall be encouraged for transfer from foreign countries to Vietnam or domestically if any of the following requirements is satisfied:
 - Produce high-quality and highly competitive products against those produced by the existing technology of the same type;
 - Produce national key products from domestic findings on scientific research and technological development;
 - Generate new manufacturing and processing services/ industries/ sectors; breed/ cultivate new varieties which have been tested;
 - Save resources, energy or fuels in comparison with the existing technology of the same type in Vietnam;
 - Generate or use new or renewable energy; store energy in highly efficient way;
 - Generate machinery/ equipment to improve educational and training quality; medical machinery/equipment and pharmaceutical products serving medical diagnosis and treatment, protection of human health and improve the physical strength for Vietnamese people;
 - Discover, handle or forecast natural disasters or epidemic diseases; serve search and rescue activities; protect environment and cope with climate change and reduce the greenhouse gas emission;

² Article 4.1 of Law No. 07/2017/QH14 on Technology Transfer issued by the National Assembly on 19 June 2017 (“**Technology Transfer Law**”)

³ Article 4.2 of Technology Transfer Law

⁴ Article 9 of Technology Transfer Law

- Assist the consistent production according production chains with high socio-economic efficiency;
 - Create products which concurrently serve national defence, security and civil purposes;
 - Develop and modernize traditional handicrafts.
- Machinery and equipment accompanying technologies that save resources, energy or fuels in comparison with the existing technology (except for the rest of the abovementioned technologies and those restricted from transfer from Vietnam to overseas i.e. technologies capable of creating (i) traditional products using traditional know-how, or other typical products of Vietnam, and (ii) main exports of Vietnam⁵); and technologies operated by fuels which are domestically manufactured products or semi-finished products are encouraged to transfer to foreign countries.

The detailed list of technologies encouraged to transfer is prescribed in Annex 1 of Decree 76/2018/ND-CP guiding technology transfer law (“Decree 76”).

In practice, specific policies in relation to stimulating and supporting technologies encouraged for transfer may differ across the provinces of Vietnam, depending on the policy for social-economic development of each area. For example: Resolution No. 82/2019/NQ-HDND dated 12 April 2019 of the People’s Council of Tra Vinh province provides for a support of 30% of the cost incurred for purchasing machinery used for technologies encouraged to transfer under the Technology Transfer Law⁶. Meanwhile, Resolution No. 81/2017/NQ-HDND dated 07 December 2017 of the People’s Council of Thanh Hoa province provides for a support of 30% of the cost incurred for making new software under the condition that organizations receiving such support shall replace the outdated technologies with the advanced technologies and those encouraged to transfer under the Technology Transfer Law⁷.

The new Law on Investment 2020 specifies projects involving transfer of technologies encouraged to transfer among those that enjoy investment incentives. Forms of incentives may include CIT incentives, import tax exemption, exemption from or reduction of land levy and land rents, accelerated depreciation and increased deductible expenses upon calculation of taxable incomes. This provision needs further guidance by the Government for implementation.

(iii) Technologies restricted from transfer

The technologies restricted from transfer are no longer popular, or can be considered quite hazardous to the environment, etc. but are still in the acceptable range under the national technical standards of Vietnam. In general, the transfer of the following technologies from foreign countries to Vietnam or domestically shall be restricted⁸:

- Technologies that are no longer popular in industrialized countries; accompany machinery/equipment of such technologies;
- Technologies that use toxic chemicals or generate hazardous waste in conformity with the national technical standards and regulations;
- Technologies that make products by adopting genetic engineering;
- Technologies that use or create radioactive substances in conformity with the national technical standards and regulations;

⁵ Article 10.2 of Technology Transfer Law

⁶ Article 5.1(c) of Resolution No. 82/2019/NQ-HDND issued by the People’s Council of Tra Vinh province on 12 April 2019

⁷ Article 3.2 and 4.1(b) of Resolution No. 81/2017/NQ-HDND issued by the People’s Council of Thanh Hoa province on 07 December 2017

⁸ Article 10.1 of Technology Transfer Law

- Technologies that use resources or minerals the extraction of which is limited domestically;
- Technologies that are employed to propagate, raise or cultivate new varieties which are not yet tested;
- Technologies that are employed to create products adversely influencing on customs and habits, traditions and social ethnics.

In terms of transfer of technologies from Vietnam to overseas, the following technologies shall be restricted⁹:

- Technologies that are employed to create traditional products or perform production activities according to traditional know-how or use or create categories/ species of agricultural varieties, minerals or typical precious materials of Vietnam;
- Technologies that are employed to create products to export to the markets in which there are products competitive with the main export products of Vietnam.

The detailed list of technologies restricted from transfer is prescribed in Annex 2 of Decree 76.

Transfer of these restricted technologies are subject to mandatory License (part d(i) below).

(iv) Technologies banned from transfer

Technologies that are outdated and hazardous to human and the environment outside of acceptable range under the national standards of Vietnam shall be banned from transfer domestically and from overseas to Vietnam. The general rules comprise of the following types of technologies:

- Technologies and machinery and equipment accompanying technologies which are no longer popularly used and transferred in developing countries and do not satisfy national technical standards and regulations.
- Technologies that use toxic chemicals or generate wastes that do not satisfy the technical national standards and regulations on environment.
- Technologies that use or create radioactive substances that do not satisfy the national technical standards and regulations.

The detailed list of technologies banned from transfer is prescribed in Annex 3 of Decree 76.

The transfer of the banned technologies under the law shall be subject to monetary fine ranging from VND 40 million to VND 50 million (approx. USD 1,720 to USD 2,150). Additional sanctions shall include seizure or forced exportation of infringing products.¹⁰

b. Appraisal of technologies

Technology Transfer Law 2017 introduces a separate Chapter II on appraisal of technologies of investment projects. Accordingly, investors must ask regulatory authorities for appraisal or comment on the technologies applied to the following investment projects when applying for issuance of investment policies/decisions under regulations of Vietnamese Investment Law:

⁹ Article 10.2 of Technology Transfer Law

¹⁰ Article 26.2, 26.3 and 26.4 of Decree No. 51/2019/NĐ-CP on administrative sanctions in relation to science, technology and technology transfer activities issued by the Government on 13 June 2019 (“Decree 51”)

- Investment project that applies technology on the List of technologies restricted from transfer;
- Investment project that applies technology and may pose risk of adversely influencing on the environment under regulations of the law on environment protection.

The competence to appraise technologies subject to transfer varies depending on the type of investment made under Vietnamese Investment Law. For example: The State appraisal board shall be responsible for carrying out the appraisal of technologies applied to investment projects which are subject to investment decision of the National Assembly¹¹, while the Ministry of Science and Technology (MOST) shall take charge and cooperate with relevant authorities and organizations to comment on technologies applied to investment projects which are subject to investment decision of the Prime Minister¹².

Upon receipt of the application for investment decision from the investors, the competent authorities shall consult relevant agencies responsible for the appraisal of the abovementioned technologies included in the investment project¹³. The procedure for cooperation between the relevant government agencies in appraising the technologies is provided in Vietnamese Investment Law and Technology Transfer Law 2017.

In case the relevant agencies responsible for conducting the appraisal need expert opinion on the matter, they shall consult the Board of Science and Technology (established according to decision of the agency in charge of the appraisal of the technology), or independent consultants.¹⁴

c. Technology transfer agreement

Technology Transfer Law 2017 stipulates certain requirements in terms of formalities for the technology transfer agreement, including¹⁵:

- The agreement must be signed and stamped (where available) by contracting parties; signature or stamp (where available) must be affixed to adjoining pages and appendices attached thereto.
- Language of the agreement can be agreed upon by the parties.

Besides, the technology transfer agreement must contain the following clauses¹⁶:

- Name of technology to be transferred.
- Technologies to be transferred, products created by the transferred technology, their quality standards.
- Transfer of the ownership and/or the right to use technology.
- Method of technology transfer.
- Rights and obligations of the parties.
- Price and method of payment.
- Duration and effective date of the technology transfer agreement.
- Definitions and terms used in the technology transfer agreement (if any).
- Technology transfer plan or schedule, and location.
- Warranty on transferred technology.

¹¹ Article 14.2(a) of Technology Transfer Law

¹² Article 14.2(b) of Technology Transfer Law

¹³ Article 34.2, 34.5 and 35.3 of Law No. 67/2014/QH13 on Investment issued by the National Assembly on 26 November 2014, amended in 2017 (“**Investment Law**”).

¹⁴ Article 20 of Technology Transfer Law

¹⁵ Article 22.1 and 22.2 of Technology Transfer Law

¹⁶ Article 23 of Technology Transfer Law

- Penalty for breach of agreement.
- Liability for breach of agreement.
- Dispute resolution authority.
- Other contents agreed upon by the parties.

d. Registration of technology transfer

Under the Technology Transfer Law 2017, there are mandatory procedures in relation to transfer of technologies from and to Vietnam that businesses should be mindful about. In general, these procedures may not be straightforward with many documents to prepare beforehand. In practice, it is sometimes difficult to meet these deadlines, especially for complicated cases which involve more than two parties and/or require careful analysis of the technologies and/or patents in questions. Therefore, it is advisable that businesses note carefully the deadlines for registration/application to consolidate necessary documents for registration/application before execution of such agreements.

(i) Application for License of technology transfer

Under Technology Transfer Law 2017, technologies restricted from transfer shall be subject to a mandatory License issued by the MOST. Accordingly, the process of applying for such License includes the following steps¹⁷:

- Seeking approval from MOST in relation to technology transfer (except for cases where appraisal of technologies included in the investment project has been carried out); and
- Applying for License from MOST.

The application documents and procedures for seeking approval and applying for License from MOST are stipulated under Articles 29 and 30 of Technology Transfer Law 2017.

- Important notes:

The party responsible for applying for the License from MOST must do so within 60 days since signing date of the technology transfer agreement¹⁸.

Under current regulations, transfer of restricted technologies without obtaining a License shall be subject to monetary fine ranging from VND 30 million to VND 40 million (approx. USD 1,290 to USD 1,720). Additional sanctions shall include seizure or forced exportation of infringing products.¹⁹

(ii) Application to register technology transfer

Under Technology Transfer Law 2017, Technology transfer agreement that falls into the following situations must be registered with state regulatory authorities - MOST (except for technologies restricted from transfer, of which transfer have been allowed by a technology transfer Licence):

- Inward or outward technology transfers from/to Vietnam;

¹⁷ Article 28.2 of Technology Transfer Law

¹⁸ Article 30.3 of Technology Transfer Law

¹⁹ Article 26.1, 26.3 and 26.4 of Decree 51

- Domestic technology transfers funded by either the state-owned capital or the state budget, except where Certificate of registration of science and technology task outcomes is available.

The application documents and procedures for registering technology transfer at MOST are stipulated under Article 31 of Technology Transfer Law 2017.

- Important notes:

The party responsible for applying for registering the technology transfer with MOST must do so within 90 days since signing date of the technology transfer agreement²⁰.

Transfer of technologies from and to Vietnam, and transfer of technologies using government budget without registration shall be subject to monetary sanction from VND 30 million to 40 million (approx. USD 1,290 to USD 1,720). Additional sanctions shall include seizure or forced exportation of infringing products.²¹

e. Price for transferring technology

The price of transferred technology must be audited and applied in accordance with regulations of the Law on taxation and prices in the following cases²²:

- Technology is transferred between the parties among which one or both parties have state funding;
- Technology is transferred between the parties having parent company-subsidiary company relationship;
- Technology is transferred between the parties having association relationship as prescribed by the law on taxation.

f. Taxes

Technology Transfer Law 2017 does not provide for a consolidated scheme for applying tax policies to technology transfer transactions. The regulations on taxation in relation to technology transfer can be found in the laws on personal income tax (PIT), corporate income tax (CIT) and value added tax (VAT) and related guidance on taxation schemes applied to foreign businesses operating or having income in Vietnam, etc. Some notable points in relation to taxation scheme applicable to technology transfer are listed below:

- Technology transfer is exempt from VAT²³.
- The Law on Corporate Income Tax 2008, amended and supplemented in 2013 and 2014 provides for several circumstances under which a business may enjoy tax rate incentives such as investment projects made in education, cultural, environmental sectors, or projects carried out in areas with economic and social difficulties, etc; or newly set up enterprises under investment projects in the domains of **high technology**, scientific research and technological development, development of the

²⁰ Article 31.4 of Technology Transfer Law

²¹ Article 25 of Decree 51

²² Article 27.3 of Technology Transfer Law

²³ Article 4.21 of Circular No. 219/2013/TT-BTC guiding the Value Added Tax Law issued by the Ministry of Finance on 31 December 2013.

States infrastructure works of special importance, or manufacture of software products. In such cases, businesses are entitled to the tax rate of 10% for fifteen years, etc²⁴.

- For foreign businesses operating or having income in Vietnam, Vietnamese regulations provide that the income from transfer of technology shall be subject to 10% of copyright income (including income from transfer of technology). If such technology cannot be separated from the accompanying machinery (if any), the tax rate applied to the transfer shall be that applied to the supply of such machinery i.e. 1%.²⁵

1.3 Recommendations

From the above, it is necessary that businesses operating in Vietnam note the following important points in relation to technology transfer.

- Check or consult expert opinion on the type of technologies (including any patents) that businesses are about to transfer (whether they fall under encouraged, restricted, or banned technologies) and any incentives/policies applicable to those technologies;
- Note the mandatory contents and formalities of the technology transfer agreement under Vietnamese law;
- Note the circumstances under which the price of technologies transferred shall be audited;
- Follow carefully the deadlines and procedures for applying for License, or registering technology transfer (if required), and prepare necessary documents for registration/application before executing the technology transfer agreement to ensure timely submission in Vietnam;
- Consult and follow expert opinions on investments that involve use of restricted technologies subject to mandatory appraisal under Vietnamese law;
- Consult tax experts on applicable taxation scheme for the technology transfer agreement.

²⁴ Article 13.1 of Law No. 14/2008/QH12 on Corporate Income Tax issued by the National Assembly on 03 June 2008, amended and supplemented in 2013, 2014.

²⁵ Article 13.2 (a) and (b) of Circular 103/2014/TT-BTC guiding taxation applied to foreign businesses operating or having income in Vietnam issued by the National Assembly on 06 August 2014.