May, 2022 No.47

This issue covers the following topics:

India

OVERHAUL OF CYBER-INCIDENT REPORTING REQUIREMENTS

サイバー空間での犯罪や情報漏洩の増加に伴い、民間企業ではサイバーセキュリティの重要性が高まるなか、インドのサイバーセキュリティに関する監督機関であるコンピュータ緊急対応チームが、2000 年情報技術法に基づいて「安全で信頼できるインターネットのための情報セキュリティ実践、手順、予防、対応、サイバーインシデントの報告」に関する新しい指針を公表した。

Introduction

On 28 April 2022, the Indian Computer Emergency Response Team ("**CERT-In**"), the national agency monitoring and supervising various functions in relation to cyber-security, has issued new directions relating to 'Information Security Practices, Procedures, Prevention, Response, and Reporting of Cyber Incidents for Safe & Trusted Internet' ("**New Directions**"), under the Information Technology Act, 2000.

The New Directions are an extension of the Information Technology (The Indian Computer Emergency Response Team and Manner of Performing Functions and Duties) Rules, 2013 ("**Rules**") and significantly widen the types of cyber security incidents that must be mandatorily reported to CERT-In, while also introducing a swathe of changes to the compliance requirements applicable to entities operating within India. The New Directions will come into effect on 28 June 2022. Subsequent to the issuance of the New Directions, the CERT-In has also published Frequently Asked Questions (FAQs) on its website, which provide further clarity on the applicability of the New Directions.

Summary of Key Provisions

1. **Reporting:** The key change that has been introduced by the New Directions is in relation to mandatory reporting requirements. Under the Rules, only certain identified cyber security incidents were mandatorily reportable and the rest could be reported voluntarily, within a reasonable time. Under the New Directions, however, almost all kinds of cyber security incidents, including but not limited to (i) data breach; (ii) data leak; (iii) attacks on Internet of Things (**IoT**) devices and associated systems, networks, software, servers; (iv) attacks or incidents affecting digital payment systems; (v) attacks through malicious mobile apps; (vi) unauthorised access to social media accounts; (vii) attacks or malicious/suspicious activities affecting systems / servers / networks / software / applications related to big data, block chain, virtual assets, virtual asset exchanges, custodian wallets, robotics, 3D and 4D printing, additive manufacturing, drones etc., have to be mandatorily reported to the CERT-In within 6 (six) hours of noticing such incidents or being brought to notice about such

incident. This essentially means that, any and all types of cyber breaches are now mandatorily reportable, irrespective of the severity of the breach. The obligation to report is on every entity operating in India such as service providers, intermediaries, data centres, body corporates and government organisations (collectively referred to as the "**Covered Entities**"). The details regarding methods and formats of reporting cyber security incidents have been published on the website of CERT-In. Through the FAQs, the CERT-In has clarified that Covered Entities can provide all such information that is readily available to the entity within 6 (six) hours of noticing a cyber-security incident and the remainder of the information can be provided within a reasonable time.

2. **Extra-Territorial Applicability:** The FAQs clarify that the New Directions will have extra-territorial application. The New Directions will also apply to foreign Covered Entities in all matters concerning cyber incidents and cyber security incidents. Further the FAQs also state that all Covered Entities offering services to Indian users are required to designate a Point of Contact (to interact with CERT-In concerning the compliance of the Directions) even if such Entities do not have a physical presence in India. Such Covered Entities are also required to maintain logs and records of financial transactions conducted in India, in the manner set out below.

3. **Maintenance and disclosure of logs:** Covered Entities must mandatorily enable logs of all their ICT systems and maintain them securely for a rolling period of 180 days. All logs have to be maintained within India. These should be provided to CERT-In along with reporting of any incident or when ordered / directed by CERT-In. While the New Directions provide that the logs have to be maintained in India, the CERT-In has, via the FAQs clarified that the logs may be stored outside India also as long as the obligation to produce logs to CERT-In is adhered to by the entities in a reasonable time. CERT-In has also specified a non-exhaustive list of logs that are required to be maintained which include Firewall logs, Intrusion Prevention Systems logs, SIEM logs, web / database/ mail / FTP / Proxy server logs, Event logs of critical systems, Application logs, ATM switch logs, SSH logs, VPN logs etc.

4. **Synchronisation with NTP Server:** Covered Entities are required to connect to the Network Time Protocol (NTP) Server of National Informatics Centre (NIC) or National Physical Laboratory (NPL) or with NTP servers traceable to these NTP servers, for synchronisation of all their ICT systems clocks. Entities having ICT infrastructure spanning multiple geographies are permitted to use accurate and standard time source other than NPL and NIC, however, they must ensure that their time source does not deviate from NPL and NIC.

5. **Disclosure of Information:** The Rules empower CERT-In to seek information from regulated entities from time to time, subject to certain conditions. The New Directions have widened these powers and pursuant thereof, if the CERT-In issues any order/directions to a Covered Entity, such entity must mandatorily take action or provide information or any assistance to CERT-In, as directed. This provision of information is not just applicable in the case of a cyber-security incident but rather allows CERT-In to seek information to take protective and preventive actions. The FAQs however clarify that the CERT-In will exercise these powers not on a continuous basis but rather only at the time of cyber-security incidents.

6. **Recordal of data:** Data centres, virtual private server (VPS) providers, cloud service providers and virtual private network service (VPN Service) providers are required to register the following accurate information which must be maintained by them for a period of 5 years or longer as mandated by law: (i) validated names of subscribers/customers hiring the services; (ii) period of hire including dates; (iii) IPs allotted to / being used by the members; (iv) email address and IP address and time stamp used at the time of registration / on-boarding; (v) purpose for hiring services; (vi) validated address and contact numbers; (vii) ownership pattern of the subscribers / customers hiring services.

7. **Requirements for virtual assets industry:** The New Directions also apply to virtual asset service providers, virtual asset exchange providers and custodian wallet providers (as defined by Ministry of Finance from time to time). Such entities are required to maintain the following information for a period of 5 years: (i) all information obtained as part of KYC from users; and (ii) records of financial transactions including information relating to the identification of the relevant parties involved in the transactions such as IP addresses, along with timestamps and time zones, transaction ID, the public keys (or equivalent identifiers), nature of transactions, addresses or accounts (or equivalent identifiers), date and amounts involved. Records of all financial transactions must be maintained only in India.

8. **Penalty:** Any failure to furnish the information as required under the New Directions or any non-compliance

with the same may invite punitive action under Section 70-B (7) of the Information Technology Act which stipulates imprisonment for a term which may extend to 1 (one) year or with fine which may extend to INR 100,000 (Indian Rupees One Hundred Thousand) or both. Penalty provisions under other laws may also be applicable.

Conclusion

The New Directions have far-reaching implications and require entities operating in India to undertake several technological changes including ensuring that appropriate mechanisms are in place to comply with the short timeline of 6 hours to report cyber security incidents. Foreign entities not having a physical presence in India but providing services to Indian users would also be required to appoint personnel as points of contact within India to liaise with the CERT-In. Several infrastructure changes would also be required to synchronize the ICT systems with the NPT servers, to maintain full and accurate logs and record all relevant information. Businesses will have to internally assess their practices and may be required to overhaul their cyber security practices and processes to ensure compliance with the New Directions.

[Author]

Rashmi Grover (Nagashima Ohno & Tsunematsu Singapore LLP)
rashmi_grover@noandt.com

Rashmi Grover is an attorney in the Singapore Office. She is qualified in India and the UK. Her areas of practice include mergers and acquisitions, private equity and general corporate. She has extensive experience working in the Indian market and advising clients on corporate commercial and finance transactions including transactions involving mergers, acquisitions, formation of joint ventures, private equity investments, business/asset acquisition transactions, regulatory filings and debt issuances.

Indonesia

NEW APOSTILLE REGULATION: INDONESIA'S EFFORT TO PROMOTE EASE OF DOING BUSINESS

インドネシアは 2021 年に外国公文書の認証を不要とする条約（ハーグ条約）を批准した。これまでは国外で作成された文書を一定の公的な用途で使用する場合には、公正証書化した上で在外インドネシア大使館での認証（legalization）を得る必要があったが、ハーグ条約への批准及び国内法令の整備により、認証の手続きに替えてアポスティーユと呼ばれる付箋のみで足りることとなった。

Introduction

Indonesia has acceded to the 1961 Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents ("**Hague Convention**"). The relevant local statute which gives effect to the Hague Convention is the Presidential Regulation No. 2 of 2021, which was followed by its implementing regulation namely the Regulation of Minister of Law and Human Rights No. 6 of 2022 ("**MOLHR Regulation 6/2022**").

Currently, any documents to be used in Indonesia but signed outside the territory of Republic of Indonesia must be legalized in the Indonesian Embassy where such document is signed. This requirement not only takes time, but also adds extra costs to the entire process. The most common case is when an Indonesian company wishes to prepare a circular resolution of shareholders to adopt certain resolutions, and one or some shareholders are domiciled outside Indonesia. That shareholder must visit the Indonesian Embassy to have the documents legalized and deliver the legalized documents to Indonesia for preparation of notarial deed.

Enforceability

The MOLHR Regulation 6/2022 as the implementing regulation to enforce the Hague Convention will enter into force on 4 June 2022. Upon such enforcement, it is expected that the legalization for documents signed outside Indonesia will no longer be necessary. Under the Hague Convention, a competent authority appointed by a contracting state is responsible for issuing certificates ("**Apostille**") which acts to certify the origin of public documents produced by that contracting states. Contracting states to the Hague Convention are obliged to accept Apostille as sufficient for the purposes of verifying the origin of a document.

The government of Republic of Indonesia has appointed the Ministry of Law and Human Rights ("**MOLHR**") as the competent authority to issue the Apostille for documents signed in Indonesia to be used in other contracting states. According to the MOLHR Regulation 6/2022, the applicant of Apostille service shall submit an online application along with supporting documents (such as ID of the applicant) and the scan copy of document for which the Apostille is being requested. Having received such application, the MOLHR will conduct a verification of the application, and once verification is completed, the applicant will be requested to pay the official fees. Upon payment, the applicant will be notified electronically to collect an apostilled certificate and bring the document originally requested for apostilling.

For Singapore, which has also acceded to the Hague Convention, the competent authority to affix the Apostille is the Singapore Academy of Law ("**SAL**"). Thus, starting from 4 June 2022, documents signed in Singapore which are intended to be used in Indonesia will no longer need to be legalized by the Indonesian Embassy in Singapore, and can instead be used in Indonesia after the document has been certified by Apostille by SAL.

Implementation in Practice

While the MOLHR Regulation 4/2022 is clear that now Indonesia has fully acceded to the Hague Convention, we expect that there will be a gap between the written regulation and implementation in practice during the initial period. Some Indonesian notaries may be reluctant to accept the Apostille issued by a competent authority of other contracting states, and still require the normal process (i.e. notarization and legalization). However, once fully effected and accepted, the Apostille process will ease doing business in Indonesia.

[Author]

Ichsan Montang (Nagashima Ohno & Tsunematsu Singapore LLP)
ichsan_montang@noandt.com

Ichsan Montang is an Indonesian qualified attorney in the Singapore Office. He graduated from the University of Indonesia with Cum Laude predicate and obtained his LL.M. degree in Erasmus University Rotterdam, the Netherlands. Prior to joining NO&T, Ichsan worked at one of the most prominent law firms in Indonesia and experienced in handling both domestic and international clients. He focuses his practice on mergers and acquisitions, foreign direct investment, general corporate matters, TMT, and real estate business.

Vietnam

CHANGES IN THE RULE FOR SELECTION OF DEVELOPER OF COMMERCIAL HOUSING PROJECT

ベトナムでは、ここ 10 年で住宅開発に対するベトナム国内外のディベロパーの関心は急激に高まったが、どのような条件が満たされた場合にディベロパーが入札を経ずにその開発権を取得することができるのかについては、こうした時代背景を反映し、条件を一気に厳しくした後に少しずつ緩和させるなど、数次にわたる法改正によって何度も変更されている。本稿では、こうした住宅開発にかかる開発権を、入札を経ずに取得する条件の変遷と今後の展望についてご紹介する。

Background

Under current law, development rights of a commercial housing project may be granted to a company in one of the following methods: (i) land auction, (ii) project tendering, or (iii) approval of developer.

With respect to methods (i) and (ii), the State will allocate land to the developer who has won the bidding and paid land use fee ("LUF"), equal to the bid price, to the State. These two methods are in the nature of acquisition of land from the State without needing to obtain a land conversion permit ("LCP") from a competent authority to change the land use purpose.

Whereas, method (iii) allows a company to acquire land from existing occupants and obtain an investment policy approval ("IPA") and approval of investor ("IA") (collectively, "IPA/IA") from the competent authority to develop the project[1]. Thereafter, the developer will need to obtain the LCP and pay LUF to the State.

Over the past nearly 20 years, method (iii) has been the most common way to obtain the development rights of a commercial housing project. However, the conditions relating to this method (iii) have been amended several times and are expected to be further amended in the future. In this article, we discuss the recent changes regarding this method (iii).

Law on Residential Housing 2014 ("LRH") Requires Residential Land for Entire Project Land

Prior to the effective date of the LRH (i.e., 1 July 2015), the selection of developer of a commercial housing project was made in accordance with the old LRH 2005 and its implementation regulations, according to which a company may be selected as developer if such company had the land use rights ("LUR") for "any types of land" as long as the use of such land for residential development is consistent with the approved zoning[2].

This rule was tightened under the LRH. Article 23.1 of the LRH set a new condition for selection of developer by stipulating that the company must have acquired "residential land" for the project. This wording was strictly interpreted by the relevant authorities in that the company was required to have residential land for the entire project land. Consequently, only small sites (mostly suitable for a boutique apartment project) could qualify for grant of the IPA/IA, while hundreds of other larger sites were unable to obtain the IPA/IA due to the lack of residential land for the entire project land.

Law on Investment 2020 ("LOI") Relaxes The Requirement But Causes A Chicken And Egg Situation

Article 75.1(c) of the LOI (which amends Article 23.1 of the LRH, effective from 1 January 2021) permitted a company has the LUR for "residential land and other type of land" to be selected as a developer, provided the non-residential land portion is permitted by a competent state agency to be changed to residential land.

This amendment allows those companies which have acquired less than 100% residential land (i.e., residential and other type of land) to be issued with the IPA/IA as long as the non-residential land portion has been issued with the LCP to convert into residential land. However, in accordance with the Land Law 2013, to be issued with the

[1] Generally, to secure the development rights of a commercial housing project, the developer must obtain an IPA and IA from competent authorities in accordance with the LOI and LRH (as defined below).

[2] Article 13.3 of Decree 90/2006 and Article 13.1 of Decree 71/2010 on implementation of the LRH 2005.

LCP, the developer must first obtain an investment approval (which appears to mean IPA/IA) from the competent authority in accordance with the LOI. Therefore, this has become a chicken and egg situation and consequently, although the law appears to include the case of "residential land and other type of land", those companies who may fall into this case have not been able to obtain the IPA/IA due to the difficulty to get the LCP.

Law 03/2022 ("Law 03") Resolves The Chicken And Egg Situation But Leaves Out 100% Non-Residential Land

In early 2022, the National Assembly passed Law 03 to amend nine different laws (including the LRH and LOI), effective from 1 March 2022. Under Law 03, Article 23.1 of the LRH is further amended to ease the requirement on the LCP. In particular, the developer may be issued with the IPA/IA if the non-residential land portion "meets the eligibility requirements for change in purpose of land use for the project".

The wording in this amendment indicates that the condition of having the LCP is no longer required. Instead, the non-residential land is simply required to meet the requirements for getting the LCP in order to be issued with the IPA/IA. This appears to be an effort of the law- makers to clear the chicken and egg situation. The amendment also makes clear that following the issuance of the IPA/IA, the developer must obtain the LCP and pay the LUF to the State for the land use conversion.

Notably, Law 03 does not include the case where a company has acquired only "other type of land" (i.e., non-residential land). The original draft proposed by the Government includes three cases for selection of developer in accordance with Article 23.1 of the LRH 2014: (a) residential land, (b) residential land and other types of land, and (c) other types of land. The National Assembly eventually refused to include case (c) in Law 03/2022. It has been reported that the law makers were concerned that in case (c), the developers would pay less LUF to the State as compared to the LUF payable under the methods (i) or (ii) (land auction or project tendering) and therefore, there have been opinions that case (c) should be conducted via land auction or project tendering.

It has been reported by the media that about 200 projects in Ha Noi and Ho Chi Minh City, which fall into case (c), will have to wait for the new rule.

Conclusion

Although both amendments under the LOI and Law 03 attempt to relax the conditions for selection of commercial housing developer by providing an additional case for granting IPA/IP to those companies that have acquired "residential land and other type of land", they fail to include the case of "other type of land" like the conditions applicable under the old LRH 2005 and its implementation regulations. It is unclear whether the National Assembly will further amend the LRH to allow the companies that hold 100% non-residential land (i.e. other types of land) to be approved as developer under method (iii) in the future or if they have to go through method (i) and (ii), how their land costs will be dealt with.

[Author]

Hoai Tran (Nagashima Ohno & Tsunematsu Ho Chi Minh City Branch)
hoai_tran@noandt.com
Hoai Tran is a Vietnamese qualified attorney in the Ho Chi Minh City office. His areas of practice include mergers and acquisitions, joint ventures and real estate transactions. Hoai has extensive experience working in Vietnam related matters and this includes acquisition and sale of private companies and businesses, establishment of project companies, project transfers, land acquisitions, real estate developments, leases and sales.

[EDITORS' PROFILES]

Nobuo Fukui (Nagashima Ohno & Tsunematsu Singapore LLP)
nobuo_fukui@noandt.com

Nobuo Fukui is a partner at Nagashima Ohno & Tsunematsu and a representative of its Singapore Office (Nagashima Ohno & Tsunematsu Singapore LLP). He has been stationed in Singapore since 2013 and providing legal services mainly to Japanese companies and its affiliates to expand their business into south-east Asian countries.

He is a graduate of the University of Tokyo (LL.B., 2001) and Duke Law School (LL.M., 2009). He was admitted to the Japan Bar in 2003 and New York State Bar in 2010. He worked as a foreign lawyer at Widyawan & Partners (Jakarta) from 2010 to 2013, focusing on Indonesian legal practice, and he has extensive legal experience in the Indonesia related transactions.

Rashmi Grover (Nagashima Ohno & Tsunematsu Singapore LLP)
rashmi_grover@noandt.com

Rashmi Grover is an attorney in the Singapore Office. She is qualified in India and the UK. Her areas of practice include mergers and acquisitions, private equity and general corporate. She has extensive experience working in the Indian market and advising clients on corporate commercial and finance transactions including transactions involving mergers, acquisitions, formation of joint ventures, private equity investments, business/asset acquisition transactions, regulatory filings and debt issuances.

www.noandt.com

NAGASHIMA OHNO & TSUNEMATSU

JP Tower, 2-7-2 Marunouchi, Chiyoda-ku, Tokyo 100-7036, Japan
Tel: +81-3-6889-7000 (general) Fax: +81-3-6889-8000 (general) Email: info@noandt.com

Nagashima Ohno & Tsunematsu is the first integrated full-service law firm in Japan and one of the foremost providers of international and commercial legal services based in Tokyo. The firm's overseas network includes offices in New York, Singapore, Bangkok, Ho Chi Minh City, Hanoi and Shanghai, and collaborative relationships with prominent local law firms throughout Asia and other regions. The over 500 lawyers of the firm, including about 40 experienced attorneys from various jurisdictions outside Japan, work together in customized teams to provide clients with the expertise and experience specifically required for each client matter.

Singapore Office
(Nagashima Ohno & Tsunematsu Singapore LLP)

6 Battery Road #40-06
Singapore 049909
Tel: +65-6654-1760 (general)
Fax: +65-6654-1770 (general)
Email: info-singapore@noandt.com

Bangkok Office
(Nagashima Ohno & Tsunematsu (Thailand) Co., Ltd.)

34th Floor, Bhiraj Tower at EmQuartier
689 Sukhumvit Road, Klongton Nuea
Vadhana, Bangkok 10110, Thailand
Tel: +66-2-302-4800 (general)
Fax: +66-2-302-4899 (general)
Email: info-bangkok@noandt.com

HCMC Office
(Nagashima Ohno & Tsunematsu HCMC Branch)

Suite 1801, Saigon Tower
29 Le Duan Street, District 1
Ho Chi Minh City, Vietnam
Tel: +84-28-3521-8800 (general)
Fax: +84-28-3521-8877 (general)
Email: info-hcmc@noandt.com

Hanoi Office
(Nagashima Ohno & Tsunematsu Hanoi Branch)

Suite 10.04, CornerStone Building
16 Phan Chu Trinh, Hoan Kiem District
Ha Noi City, Vietnam
Tel: +84-24-3266-8140 (general)
Fax: +84-24-3266-8141 (general)
Email: info-hanoi@noandt.com

Shanghai Office
(Nagashima Ohno & Tsunematsu
Shanghai Representative Office)

21st Floor, One ICC, 999 Middle Huaihai Road
Xuhui District, Shanghai 200031, China
Tel: +86-21-2415-2000 (general)
Fax: +86-21-6403-5059 (general)
Email: info-shanghai@noandt.com

For more details on our overseas practice

If you would like the convenience of receiving future editions of the NO&T Asia Legal Review by email direct to your Inbox, please fill out our newsletter registration form at the following link: https://www.noandt.com/en/publications/newsletter/asia.html
Should you have any questions about this newsletter, please contact us at <asia-legal-review@noandt.com>.
Please note that other information related to our firm may be also sent to the email address provided by you when subscribing to the NO&T Asia Legal Review.