

VIETNAM LEGAL UPDATE

April 2007

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On 11 January 2007, the Phillips Fox Vietnam practice officially joined Allens Arthur Robinson (**AAR**), Australia's oldest and largest law firm. This merger linked the Phillips Fox Vietnam team with an already strong regional network of AAR offices, and expands AAR's on-the-ground presence in Asia through the addition of offices in Hanoi and Ho Chi Minh City.

AAR now has offices in Bangkok, Beijing, Brisbane, Hanoi, Ho Chi Minh City, Hong Kong, Jakarta, Melbourne, Perth, Phnom Penh, Port Moresby, Shanghai, Singapore and Sydney.

The AAR Vietnam practice continues to be led by resident partners Bill Magennis and Nigel Russell, who have a combined 29 years' residency and experience in Vietnam. The team in Vietnam includes 18 other lawyers from Australia, the US, Korea and Vietnam. An outline of our growing practice, as well as more about AAR's network, has been included in this VLU issue, in 'Part 3 Did You Know'

Under our new AAR 'umbrella', we are pleased to resume publication of the Vietnam Legal Update with this issue.

Part 1 Selected New Legal Instruments

1.1 Foreign shareholding in Vietnamese banks

Decree 69/2007/ND-CP on Foreign Credit Institutions Purchasing Shareholding in Vietnamese Commercial Banks dated 20 April 2007 (Decree 69).

A much anticipated decree

The revision of the existing regulations on foreign share purchases in Vietnamese shareholding banks (locally known as joint stock commercial banks (**JSCBs**)) has been much anticipated by foreign investors. Decree 69 is a straightforward decree of only eight pages. However, political sensitivities, other changes to the banking regulatory framework and World Trade Organisation (**WTO**) accession have all played a part in the delay in its promulgation.

Foreign shareholding caps

Decree 69 contains the following restrictions on foreign investment in JSCBs, including JSCBs that are listed and State-owned banks undergoing equitization (a process akin to whole or partial privatisation):

- (a) the maximum number of shares that can be owned by foreign investors and their affiliated persons combined is 30 per cent. This is consistent with Part II of the Schedule of Specific Commitments in Services to the Report of the Working Party on the Accession of Viet Nam to the WTO (WT/ACC/VNM/48).

The new reference to affiliated persons of foreign investors is interesting. We understand that affiliated persons include joint venture banks and wholly owned foreign-invested banks licensed in Vietnam, and, if so, reduces the attractiveness of establishing these entities;

- (b) a foreign strategic investor can have a shareholding of up to 15 per cent of the charter capital of a JSCB, or 20 per cent if the specific approval is given by the Prime Minister on the proposal of the Governor of the State Bank of Vietnam. Therefore, the recent announcements made by some foreign investors (such as United Overseas Bank, HSBC and Deutsche Bank) that they have struck deals to acquire up to 20 per cent in a JSCB will still require specific State Bank backing and Prime Ministerial approval: Decree 69 does not give these investors a right to the entire acquisition.

A strategic investor is defined as a reputable foreign credit institution with financial capacity and ability to provide assistance to the JSCB during the development of banking products and services, raising managerial and executive capability, and applying modern technology; and which has strategic advantages connected with the strategy for development of the JSCB, and which satisfies the specific criteria stipulated by the JSCB. A strategic investor must provide a written undertaking to provide assistance to the JSCB in relation to the matters listed above. In earlier drafts the undertaking had to be made to the State Bank, in later drafts the undertaking had to be made to the JSCB but in the issued Decree 69 it is unclear to whom the undertaking must be made. In the absence of direct language we assume it is only to the JSCB;

- (c) other foreign credit institutions can only have a shareholding of up to 10 per cent of the charter capital of a JSCB; and
- (d) foreign investors that are not a credit institution can only have a shareholding of up to 5 per cent of the charter capital of a JSCB.

State Bank Governor approval required

Decree 69 provides that the Governor of the State Bank must give written approval for the purchase by a foreign credit institution of a shareholding in a JSCB.

Limitations

A foreign credit institution may only participate in the board of management of up to two JSCBs and may only be the foreign strategic investor in one JSCB.

Conditions

The JSCB selling shares to foreign investors must satisfy the following conditions:

- (a) minimum charter capital of VND1,000,000,000,000;
- (b) healthy financial status and it meets the conditions (unspecified) of the State Bank;
- (c) the management and executive structures, and the internal inspection and audit systems all operate effectively; and
- (d) it has not received a penalty from the State Bank or another appropriate authority in the past 24 months for breach of any regulations on safety (for example, prudential regulations).

These conditions are new to the issued Decree 69 and did not appear in its earlier drafts. Exemptions are contemplated under Decree 69, but only on the application of the State Bank to the Prime Minister, who is ultimately responsible for granting the exemptions.

A foreign credit institution purchasing shares in a JSCB must satisfy the following conditions:

- (a) minimum total assets of USD20 billion;
- (b) international operating experience in the banking sector; and
- (c) it has the required international credit rating.

Assignment

Foreign strategic shareholders are restricted from assigning their shares in a JSCB for five years. Foreign credit institutions (that are not strategic shareholders) holding shares that equal 10 per cent of the charter capital of a JSCB are restricted from assigning their shares for three years.

Effectiveness

Decree 69 will be effective 15 days from publication in the official gazette. Publication had not occurred as of the date of this VLU issue.

1.2 Trading and distribution

Decree 23-2007-ND-CP of the Government Providing Regulations for Implementation of Commercial Law Regarding Purchase and Sale of Goods and Activities Directly Related to the Purchase and Sale of Goods by Enterprises with Foreign Owned Capital in Vietnam dated 12 February 2007 (Decree 23)

The Youth Newspaper recently reported that the Ministry of Trade (**MOT**) sent a written response to the Ho Chi Minh City Department of Planning and Investment (**HCMC DPI**) indicating that, at present, the MOT will not consider licensing any foreign-invested companies to import and distribute products in Vietnam. Despite the recent issuance of Decree 23 in accordance with Vietnam's WTO commitments in the trading and distribution sector, the MOT cited the lack of an implementing circular as the basis for its recalcitrance in approving any such licenses at this time.

Decree 23 authorizes, subject to prior written approval of the MOT, provincial people's committees (in the case of Ho Chi Minh City through the HCMC DPI) to issue business licenses to new foreign-invested trading and distribution enterprises and already established foreign invested enterprises seeking to add trading and distribution activities (or literally, 'activities of purchase and sale of goods and activities directly related to the purchase and sale of goods'). In the case of such new foreign invested enterprises, the business license would be included as part of the investment certificate issued to the new enterprise.

Decree 23 provides that foreign-invested companies established for the purpose of engaging only in import/export of products without distribution, and already established foreign-invested companies seeking to add import/export as an additional activity (again, without distribution), do not require the approval of the MOT. The MOT's response to the HCMC DPI, as reported above, should not apply

to foreign investors in this situation, but it is not clear how the HCMC DPI will interpret and apply this response from the MOT. So the wait continues until, presumably, a circular can be issued.

In accordance with Vietnam's WTO commitments, foreign investors should be permitted to engage in trading and distribution activities (with respect to those products permitted under the terms of the WTO commitment schedule) in the form of a joint venture with a Vietnamese party (foreign party not holding more than 49 per cent of the charter capital) beginning from 11 January 2007. As from 1 January 2008, the limitation on the percentage of foreign charter capital is abolished (ie in theory permitting the foreign party to hold a 99 per cent interest). As from 1 January 2009, the joint venture requirement is abolished and a 100 per cent foreign invested enterprise in trading and distribution will be permitted (subject always to the WTO schedule of permitted products).

Who, and what activities, does it cover?

Under article 2, Decree 23 applies to all foreign-invested commercial enterprises, implying that the enterprise must be established in Vietnam. Such companies may be established only in a form consistent with international treaties and consistent with the laws of Vietnam. The following activities may be conducted under Decree 23:

- (i) wholesale sale of goods;
- (ii) retail sale of goods;
- (iii) agency for buying and selling goods and/or services;
- (iv) commercial franchising; and
- (v) import and export of goods.

Approval processes for business licences

The following provisions apply in connection with the issuance of business licenses on the trading and distribution sector:

Form	Licensing procedure	Comments
First time investors	The investment body (in most cases the people's committee (PC)) will accept and process the application file, but must obtain the written approval of the MOT. The investment certificate will also act as the business registration certificate.	
Import/export without distribution	No approval from the MOT.	It is not clear if the application procedure of Decree 23 must still be followed, or whether the investor follows the 2005 LOI/LOE procedures.
Existing foreign invested enterprises (FIEs) with an investment certificate (under the 2005 LOE/LOI) or an investment licence (under the LFI)	PC will issue the business licence after receiving written approval from the MOT.	It is not clear if FIEs established under the LFI have to re-register first under Decree 101. It is not clear if this 'business licence' is in the form of an amendment to the investment certificate or a separate piece of paper. It is not specifically stated that the investor must issue an application file to the PC, but we assume that it does.
Existing FIEs with an existing right to distribute	Nothing, except that it must follow the procedures for additional retail sales outlets.	

Under Decree 23, the application file for a business licence is relatively straightforward. It must include:

- a standard application form (to be issued by the MOT);
- explanatory statement on satisfaction of the conditions (that is, how the investor and the investment satisfy the undertakings in international treaties);
- proposed business or operational contents of the activities of the enterprise (which activities it can conduct, which activities it cannot conduct, types of services permitted to be provided); and
- copy of the investment certificate (presumably, this does not apply to first-time investors).

Retail sales outlets

The business or operational contents of the enterprise must be specifically recorded in the business licence. In addition, companies must submit an application to establish each retail sales outlet. Although not specifically stated, the implication is that this application is not required, however, for the first retail sales outlet. The application must be submitted to the PC where the proposed retail sales outlet will be established, and the PC must obtain a written opinion from the MOT before issuing the licence.

1.3 Corporate income tax

Decree 24/2007/ND-CP, providing detailed implementation of the Law on Corporate Income Tax, dated 14 February 2007 (repealing Decree 164 dated 22 December 2003 on CIT (as amended by Decree 52 dated 6 August 2004) and Article 36.1 of Decree 187 dated 16 November 2004 on incentives for equitized companies) (Decree 24).

Decree 24 on corporate income tax (*CIT*) closely follows the content of the prior Decree 164. Most of its significant changes reflect the Law on Investment/Law on Enterprises (**2005 LOI/LOE**) regime; of note, however, Articles 33 to 36 on incentive rates are new, and implementing provision 46 is new.

Taxpayers affected

The net cast by Decree 24 is deliberately broad and covers all of the following:

- (a) organizations producing and trading goods and services, including State-owned enterprises, limited-liability companies, shareholding companies, partnerships, enterprises with foreign-owned capital and foreign parties to business co-operation contracts under the LOI/LOE, foreign companies and foreign institutions conducting business activities in Vietnam beyond the scope of the LOI/LOE, private enterprises, co-operatives and other administrative and professional bodies engaged in production and trading of goods and services;
- (b) domestic individuals producing and trading goods and services, such as business individuals and groups, medical practitioners, lawyers, accountants, auditors, painters, architects, music composers and others, individuals who lease assets such as houses, land, means of transportation, machinery and equipment;
- (c) foreigners conducting business in Vietnam with income sourced in Vietnam, irrespective of whether the business operation is conducted in Vietnam or overseas; and
- (d) companies overseas conducting business activities through resident establishments in Vietnam such as branch, operational office, plant, workshop or warehouse offices, construction/project site, establishments providing consultancy services, and agents or representatives in Vietnam.

Rates and incentives

The standard CIT rate is 28 per cent. There are also lower incentive rates (20 per cent, 15 per cent and 10 per cent), CIT exemptions for certain periods, CIT reductions during the exemption period, and reduced rates for project expansion, all described under Decree 24.

Under Decree 24, companies having investment projects that satisfy certain conditions are eligible to receive CIT incentives. Generally speaking, to receive incentives the investment must be in a specific sector where the Government has determined investment to be needed, or in a remote or difficult region. Decree 108 (dated 22 September 2006) contains very detailed lists – Lists A, B, C and D - which set forth the sectors and regions covered.

Below is a chart setting forth CIT rates:

Tax rate	Criteria	Period applicable	CIT Exemption period	50% CIT reduction period
28%	Applicable to every company unless it qualifies for an incentive CIT rate	Entire period	Two years from generation of taxable income in case of <u>manufacturing companies.</u>	Two subsequent years
20%	Applicable to newly established companies engaged in business sectors on List B	For 10 years from commencement of business operations	Two years from generation of taxable income	Three subsequent years
	Applicable to newly established companies with projects implemented in regions on List D	For 10 years from commencement of business operations	Two years from generation of taxable income	Six subsequent years
15%	Applicable to newly established companies engaged in business sectors on List B and implemented in regions on List D	For 12 years from commencement of business operations	Three years from generation of taxable income	Seven subsequent years
10%	Applicable to newly established companies with projects implemented in regions on List C	For 15 years from commencement of business operations	Four years from generation of taxable income	Nine subsequent years
	Applicable to newly established companies engaged in business sectors on List A	For 15 years from commencement of business operations	Four years from generation of taxable income	Nine subsequent years

1.4 Digital signatures

Decree 26/2007/ND-CP, providing detailed implementation of the Law on Electronic Transactions in relation to Digital Signatures, dated 15 February 2007 (Decree 26)

Gap following law

The Law on E-Transactions was issued on 29 November 2005 and stipulated provisions on e-signatures. Article 24.3 of the Law promised that the Government would provide specific regulations on the management and use of e-signatures, and on 15 February 2007, the Government finally issued Decree 26 regulating digital signatures.

Basic terms of Decree

Under Decree 26, a 'digital signature' is defined as a form of electronic signature made by transforming a data message using an asymmetric cryptosystem by which the identity of the original data message owner and the 'public key' of the signatory are able to be accurately verified. A digital signature is signed by using the 'private key' corresponding to the public key recorded on the digital certificate for which a public or specialized service provider has issued a certificate of satisfaction of security conditions for the digital signature.

Digital signatures are commonly used in financial and banking transactions. They are not the same

as simple scanned or electronic signatures.

In relation to the legal validity of digital signatures, Decree 26 states that where the law stipulates that a document must be signed, a data message shall be so deemed if the data message bears a digital signature. Therefore a digital signature carries the same validity as a manual one.

Where the law stipulates that a document must be affixed with the seal of a body or institution, the sealing requirement shall be deemed satisfied if the data message bears the digital signature of a person authorized by the law to use the seals, and if such digital signature ensures security as stipulated in Decree 26.

In order to use digital signatures, a company or individual must subscribe for a digital certificate issued by an authorised digital signature certification service company. Decree 26 also stipulates rules for the establishment of digital signature certification service companies and the provision of digital signature certification services.

Under Decree 26, the digital signature certification service is conditional (see Part 3 below) and is subject to licensing authority of the Ministry of Post and Telecommunication. A business license of a digital signature certification service has a term of 10 years.

1.5 Electronic transactions in financial activities

Decree 27/2007/ND-CP, on Electronic Transactions in the Financial Sector, dated 23 February 2007 (Decree 27)

Decree 27 regulates electronic transactions in the financial activities, specifically the activities of tax, customs, treasury, securities, accounting and auditing.

Electronic transactions are defined by Decree 27 to be transactions carried out via electronic means. Electronic documents contain information created, sent, received and stored by electronic means during financial activities in the form of data message (**e-document**). E-documents include electronic documents in accounting, revenue and disbursement, customs declaration and customs clearance procedures, securities trading documents, financial statements, accounting finalisation and other types of electronic documents appropriate to each type of transaction as stipulated by law.

Under Decree 27, parties to electronic transactions in financial activities must implement them correctly in accordance with the following principles stipulated in the Law on E-Transactions (see above):

- voluntary selection of electronic means to conduct transactions;
- agreement on selection of a type of technology to conduct electronic transactions;
- no technology to be considered as the sole technology in electronic transactions;
- ensuring equality and security in e-transactions; and
- and protection of legitimate rights and interests of bodies, organisations or individuals, and interests of the State and interests of the public.

Electronic transactions using digital signatures in financial activities with the State financial authorities must use digital signatures and digital certificates issued by authorised public digital signature certification service providers. Organisations and individuals have the right to choose the form and tools for encryption of electronic documents, and provided such encryption must be implemented in accordance with law.

Under Decree 27, electronic documents may be converted to paper documents, but certain conditions must be satisfied first, ie maintenance of the integrity of the contents of the electronic document, inclusion of a discrete serial number confirming that there has been conversion of an electronic document to the paper document, and the full name and signature of the person conducting the conversion should appear on the papers. Paper documents may also be converted to electronic documents, under the same general conditions.

Decree 27 became effective 13 March 2007.

Part 2 Features

2.1 Law Maps

Introduction to Law Maps

In this and subsequent issues of Vietnam Legal Update, we will be featuring Law Maps. These maps summarise, in diagrammatic form, the main legal instruments (laws, decrees, circulars, etc) in different areas of law important to investors and others doing business in Vietnam.

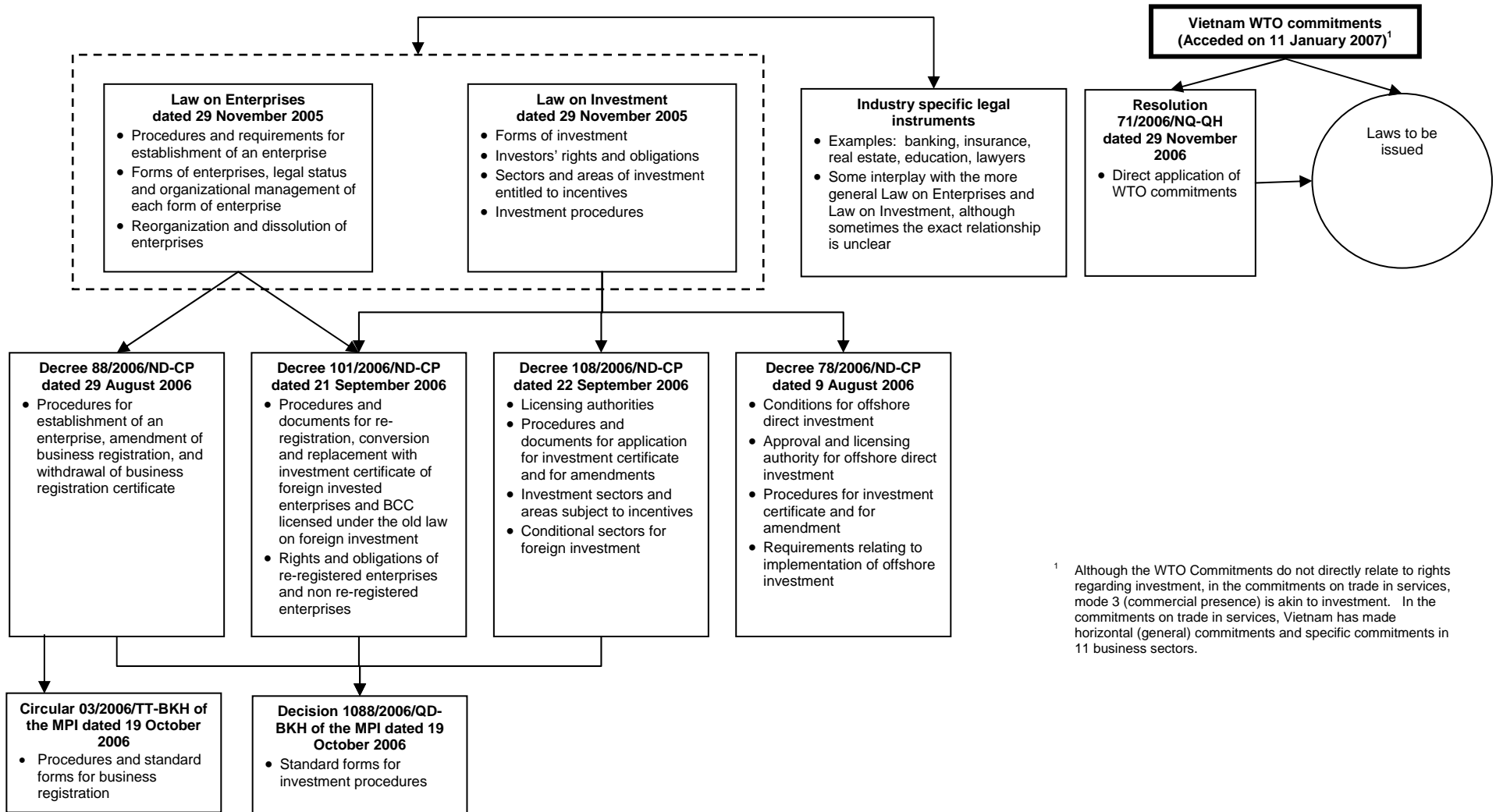
There is often confusion as to which laws apply to a certain transaction or activity, and moreover, as to how the various legal instruments are intended to interrelate or be interpreted. Our Law Maps are intended to clarify some of this confusion and to serve as a basic reference guide for the particular sector of the law to which they relate.

As most VLU readers know, the laws change frequently in Vietnam, and each of the Law Maps we introduce is therefore dated.

Investment Law Map

The first of our Law Maps to be featured in the VLU covers investment law. Please see below:

LAW MAP – INVESTMENT



¹ Although the WTO Commitments do not directly relate to rights regarding investment, in the commitments on trade in services, mode 3 (commercial presence) is akin to investment. In the commitments on trade in services, Vietnam has made horizontal (general) commitments and specific commitments in 11 business sectors.

2.2 The securities market in Vietnam

Applicable laws

This following is an introduction to the legal framework that governs the securities market in Vietnam, in particular public offers, listing, public companies and buying shares. We focus in this article on Law 70-2006-QH11 of the National Assembly on Securities (**Law 70**) and Decree 14-2007-ND-CP of the Government dated 19 January 2007 Providing Detailed Regulations for Implementation of a Number of Articles of the Law on Securities (**Decree 14**). The Ministry of Finance (**MOF**) is expected shortly to issue a regulation to further provide guidance to the State Securities Commission (**SSC**) on regulating and establishing investment funds, securities companies and fund management companies. An update will be provided once the regulation has been promulgated.

Relevant regulatory bodies

- (a) SSC is the official regulator of the stock exchange, and is overseen by the MOF.
- (b) The HCMC Securities Trading Centre (**HCMCSTC**): is an administrative unit of the SSC. It is a securities trading and listing market and offers and is the official mechanism through which new government bonds are issued and is the secondary markets for several existing bonds. Under Law 70, the HCMCSTC is to convert to either a Stock Exchange or a Securities Trading Centre in the form of a limited liability company or a shareholding company by July 2008. It is expected that the HCMCSTC will be converted into a Stock Exchange.
- (c) The Hanoi Securities Trading Centre (**HASTC**): is an administrative unit of the SSC. It is a securities trading and listing market and offers and is also Vietnam's official over-the-counter market for securities. Under Law 70, the HASTC is to convert to either a Stock Exchange or a Securities Trading Centre in the form of a limited liability company or a shareholding company by July 2008. It is expected that the HASTC will be converted into a Securities Trading Centre.

Public offer process

In Vietnam, the processes of a public offer (**PO**) and listing are different, although companies may do the two simultaneously. A PO is an offer to sell shares, bonds or fund certificates via the mass media, or to at least 100 investors excluding institutional investors or to an unspecified number of investors.

- (a) Participants
 - (i) The issuer or issuing organization. This is the enterprise making the PO. The securities may be listed or unlisted.
 - (ii) Underwriters. Securities in a PO may be distributed by underwriters. Underwriters must be securities companies authorized to underwrite issues of securities or a commercial banks approved by the SSC to underwrite issues of bonds, on conditions regulated by the MOF. The role of the underwriter is to assist the issuer to complete procedures prior to the PO, to purchase the securities for resale or the unsold portion of the securities from the issuer, and to assist the issuer to distribute the securities to the public.
 - (iii) Custodian banks. These are commercial banks that are either domestic or foreign-invested (that is, not an offshore licensed bank) and are licensed to carry out securities depository activities, including the keeping and maintaining of securities.
 - (iv) Investors. Investors who wish to purchase securities may be Vietnamese or foreign investors, but foreign investors must first apply for a securities trading code. Foreign investment is also subject to limitations (discussed below).

- (b) **Currency and par value**
Securities offered by a PO must be denominated in Vietnamese dong. The par value for shares and fund certificates is VND10,000 and the minimum par value for bonds is VND100,000.
- (c) **Conditions for a PO**
- (i) **Shares.** An issuer of shares must be a shareholding company with paid-up capital of at least VND10 billion at the time of registration of the PO, must have made a profit in the year prior to the PO and must not have accumulated losses as at the year of registration of the offer. The general meeting of shareholders of the issuer must pass an issue plan and plan for utilisation of the proceeds earned. (In the case of a enterprise with foreign-owned capital that is converting to a shareholding company in combination with making a public offer of shares, Decree 14 clarifies that the issue plan and plan for utilisation is passed by the owner of the enterprise with 100 per cent foreign owned capital and the board of management of a joint venture enterprise).
 - (ii) Under Decree 14, other specific conditions apply to newly established enterprises conducting an initial public offer if the enterprise is in the infrastructure or high-tech sectors. These conditions include the obligation for there to be an underwriter, and the obligation for there to be a bank supervising utilisation of the proceeds earned from the offer.
 - (iii) **Bonds.** An issuer of bonds must have paid-up capital of at least VND10 billion at the time of registration of the PO, must have made a profit in the year prior to the PO, must not have accumulated losses as at the year of registration of the offer and must not have more than 100 overdue debts payable. The board of management or members' council of the issuer (as applicable) must pass an issue plan and plan for utilization and repayment of the proceeds earned. The issuer of bonds must also give an undertaking to investors to discharge its obligations.
 - (iv) In the case of convertible bonds, the issue plan and plan for utilisation proceeds must also have a plan for issuance of the shares for conversion and all plans must be passed by the general meeting of shareholders (not the board of management).
 - (v) **Fund Certificates.** Issued fund certificates must have total value of at least VND50 billion. There must also be an issue plan and a plan for investment of the capital funds earned.
- (d) **Prospectus**
Issuers of a PO must prepare a prospectus. The main contents of a prospectus are prescribed in Law 70 and the MOF has been delegated the task of creating a sample form prospectus. Among other things, the prospectus must include the financial statements of the issuer for the two years prior to the issue of the PO. The prospectus must be signed by the chairman of the board of management, the general director, the financial director/accountant (only in the case of shares and bonds) and the legal representative of the underwriter.
- (e) **Registration**
The issuer must register the PO with the SSC. To register, the issuer must submit a request for registration and attach those documents that are required by Law 70 (and which will be given more detail in specific regulations of the MOF). The documents required include the prospectus, the charter (or in the case of a PO of fund certificates, the proposed charter of the securities investment fund) and relevant resolutions and undertakings by the issuer. In the case of a PO for fund certificates, the contract for supervision between the custodian bank and the securities investment fund must also be submitted. The SSC has 30 days from receipt of the registration statement to certify registration.
- (f) **Announcement**
Within seven days from certification of registration, the issuer must make a public

announcement in three consecutive newspaper issues. The announcement must stipulate the time in which investors have to register to purchase the securities. The time limit can be set by the issuer, but must be a minimum of 20 days.

(g) Registration to purchase and payment of monies

When an investor registers to purchase the securities, it must pay the purchase price into an escrow bank account and this money will remain in escrow until completion of the PO.

(h) Allocation and delivery

The issuer must allocate the securities within 90 days from the SSC's certificate of acceptance, and physically deliver the securities to investors within 30 days from the date the offer ends.

The listing process

Listing is the process of taking a privately-owned organisation, including an equitized or equitizing State owned enterprise (**SOE**), and making the transition to a publicly-owned entity whose shares can be traded on the HCMCSTC or HASTC.

(a) Conditions, application and procedures for listing

The regulations on the conditions, application files and procedures for listing a company are contained in Decree 14 (**not Law 70**).

The conditions for listing on the stock exchange (of which there are currently none in Vietnam) are different from the conditions to list on a securities trading centre. However, in anticipation of the HCMCSTC converting to a stock exchange, new registrations for listing on the HCMCSTC must satisfy the conditions applicable for stock exchange listings, while existing listed companies on the HCMCSTC have two years to satisfy these conditions. Companies failing to meet these requirements will have their listing moved to the HASTC.

(b) Conditions, application and procedures for listing on the Stock Exchange/HCMCSTC

(i) Shares. The listing company must be a shareholding company with paid-up capital of at least VND80 billion at the time of registration for listing, must have made a profit in the two years prior to year of listing and must not have accumulated losses as at the year of registration for listing. There must not be overdue debts payable (unless a lawful reserve has been made for them) and there must be public disclosure of all debts owed to the company by officers and major shareholders. At least 100 shareholders must own 20 per cent of the voting shares of the listing company, and there must be an undertaking from shareholders who are also officers of the company to hold 100 per cent of their shares for six months from the date of listing and 50 per cent of their shares for the following six months.

(ii) Bonds. The listing company or SOE must have paid-up capital of at least VND80 billion at the time of registration for listing, must have made a profit in the two years prior to year of listing and must not have overdue debts of more than one year. There must be at least 50 bondholders in any one bond issue.

(iii) Fund Certificates. Issued fund certificates must have total value of at least VND50 billion. There must be an undertaking from the initial shareholdings and members of the committee of representatives of the fund to hold 100 per cent of their shares for six months from the date of listing and 50 per cent of their shares for the following six months. There must be at least 100 owners of fund certificates.

(c) Conditions, application and procedures for listing on the HASTC

(i) Shares. The listing company must be a shareholding company with paid-up capital of at least VND10 billion at the time of registration for listing, must have made a profit in year prior to year of listing and must not have overdue debts of more than one year (with no current debts or financial obligations to the State). There must be at least 100 shareholders with voting shares, and there must be an undertaking from

shareholders who are also officers of the company to hold 100 per cent of their shares for six months from the date of listing and 50 per cent of their shares for the following six months.

- (ii) The conditions relating to profitable business operations and overdue debts do not apply to newly established enterprises in infrastructure and high-tech sectors or equitizing SOEs.
- (iii) Bonds. The listing company or SOE must have paid-up capital of at least VND10 billion at the time of registration for listing, and all bonds in the issue must have the same maturity date.
- (iv) Other types of securities. The task of stipulating conditions for listing other types of securities has been delegated to the MOF.

(d) Registration

The listing enterprise must register with the relevant exchange or trading centre. To register, the listing enterprise must submit a registration slip and attach those documents that are required by Law 70 (and which will be given more detail in specific regulations of the exchange/trading centre). The documents required include the prospectus, relevant corporate resolutions, register of shareholders/bondholders and required undertakings.

The Stock Exchange/Securities Trading Centre has 30 days from receipt of the registration slip to approve or refuse the application.

(e) Trading

Current guidelines on securities, membership of the HCMCSTC/HASTC and trading in securities are contained in Circular 58 of the Ministry of Finance dated 17 June 2004 implementing Decree 144 (**Circular 58**). In time, Circular 58 should also be repealed by a new circular implementing Law 70 and Decree 14. In the interim, the HCMCSTC and the HASTC continue to apply the day-to-day trading rules contained in the Circular 58.

In addition, under Law 70, the HCMCSTC and the HASTC each are given the responsibility to issue regulations on the trading of listed securities within their respective centres.

(f) Other trading

Securities listed on a Stock Exchange cannot be traded outside the Stock Exchange, unless otherwise stipulated in the trading rules of the Stock Exchange.

In comparison, securities listed on a Securities Trading Centre (**STC**) can be traded at a securities company that is a trading member of the STC.

(g) Taxation holidays – almost over

Previously, to encourage investment in Vietnam's securities market, various incentives were offered, including preferential corporate income tax rates to companies upon listing. However, this preferential tax treatment ceased on 1 January 2007.

Dividends from shares have been free of personal income tax since 1994. However this very long 'temporary exemption' is expected to come to an end under the proposed Law on Personal Income Tax, which was considered by the National Assembly in October-November 2006 and is expected to be passed in 2007. If passed in its current draft form, dividends from shares will be subject to personal income tax at a proposed rate of 5 per cent from 1 January 2009.

Public companies – a new concept

A public company is a newly introduced concept in Vietnam. A public company is a shareholding company with any of the following characteristics:

- shares have been issued via a PO;
- shares are listed on the HCMCSTC or the HASTC; or

- shares are owned by 100 or more investors, excluding professional securities investors, and have a paid-up charter capital of VND10 billion or more.

Importantly, and interestingly, a company does not need to be listed to be deemed a public company.

New rules introduced for public companies include:

(a) Filing

A public company must lodge the public company file with the SSC within 90 days of becoming a public company. The public company files comprises the company's charter and business registration certificate, the most recent financial statement and summarized information on its business operations scale, management organization and shareholding structure.

(b) Major shareholders

A shareholder of a public company is deemed to be a major shareholder when it holds directly or indirectly (undefined) 5 per cent or more of the voting shares the company. Upon becoming a major shareholder, the shareholder must report to the SSC and the HCMCSTC or HASTC (depending on where the shares of the public company are listed/offered). The information that must be reported is not extensive: only details of the investor (name, address) and details of the shares (number, percentage). However, important changes to this information, including a change of the number of shares in excess of 1 per cent, must also be reported.

(c) Takeovers

An offer to purchaser 25 per cent or more of the voting shares in a public company must be made by a 'public offer to acquire'. The public offer to acquire must be registered with and approved by the SSC (the law does not detail any criteria or basis for the approval) and must be announced in the mass media.

Of note, if after implementation of the public offer to acquire, the acquirer holds 80 per cent or more in the public company, the acquirer must, if the remaining shareholders so request, acquire the remaining shares at the announced price of the offer to acquire.

(d) Disclosure requirements

A public company must publicly disclose certain information and report it to the SSC. Annually, a public company must disclose its audited financial statements. In addition, it must disclose information within a short period (24 hours, or 72 hours) upon the happening of a prescribed event, for example if an account of the public company is frozen (within 24 hours) or if a decision is made to borrow bonds with a value of 30 per cent or more of the company's equity (within 72 hours).

Foreign investors – how to purchase shares

(a) Unlisted shares

To contribute capital or purchase shares in Vietnamese enterprises, foreign investors must open a Vietnamese dong capital contribution and share purchase account (**Account**) at a commercial bank operating in Vietnam. All transfers of funds for the purpose of contributing capital, purchasing and selling shares, transferring capital contribution, receiving and using dividends or profits distribution, or purchasing foreign currency from authorised banks for remittance abroad and other transactions relating to any activity of capital contribution or purchase of shares in Vietnamese enterprises by foreign investors must be performed through this Account. This Account may only be used for capital contributions and share purchase activities.

Within two working days from the date of opening the Account at a commercial bank, the foreign investor must register the Account with the State Bank (Department of Foreign Exchange Control). Under law, the State Bank must certify registration of the Account within

five working days, or otherwise provide written notice of its reasons for refusing to provide certification. A foreign investor is only allowed to perform receipt or payment transactions through the Account after obtaining a document on certification of account registration from the State Bank. Therefore it is important for potential investors to organize this account well in advance of the relevant share purchase date.

Other than the controls over the Account, trading in unlisted shares is largely unregulated.

(b) Listed shares

The foreign investor must apply for a securities trading code from the HCMCSTC/HASTC. The application consists of an application form and supporting documents. Unfortunately, the supporting documents that originate outside Vietnam (for example, the constitution and establishment documents of the foreign investor) are subject to the tedious requirements of notarisation and certification.

Investors must then open a VND securities trading account with a registered broker in accordance with Decision 1550 of the State Bank of Vietnam dated 6 December 2004 to service activities of the purchase and sale of securities. The following accounts must be opened by the broker at an authorized bank in Vietnam:

- (i) a specialized, on-call foreign currency deposit account, into which foreign currency of the foreign investor is deposited (i) for the purpose of conversion into VND for purchase of securities or (ii) after conversion from VND for the purpose of remittance overseas or other authorized foreign currency remittances in Vietnam; and
- (ii) a specialized, on-call VND deposit account, into which all VND amounts (after conversion from foreign currency) and all VND income from securities investment is transferred and from which all VND remittances for purchase of securities or for conversion into foreign currency is made.

Listed share certificates must be centrally deposited at the Vietnam Securities Depository (**VSD**). This happens in two steps: first, the owner deposits the certificates with a depository member (for example, the broker or depository bank) and second, the depository member in turn deposits the certificates at the VSD.

Cash settlement is made via the settlement bank, which in Vietnam is the BIDV.

Foreign investors – restrictions

(a) Prohibited and conditional sectors

Four prohibited sectors and nine conditional sectors are listed in the 2005 LOI. These sectors apply equally to foreign and local investors.

In addition foreign investment is conditional in 13 sectors specified in Decree 108 and 'other investment sectors in international treaties of which Vietnam is a member and which restrict the opening of the market to foreign investors'. It is not yet clear what the conditions are, and whether they may include restrictions on indirect investment.

(b) Other restrictions

The current (to the extent that they have not been specifically repealed) laws of Vietnam consist of the following restrictions:

- (i) there is a cap on total foreign shareholdings in or capital contributions to any one unlisted domestic business of 30 per cent of the charter capital (**30 per cent rule**);
- (ii) the range of unlisted companies in which foreign investors may purchase shares is also restricted by sector (only 35 business lines are permitted); and
- (iii) foreign investors may hold a maximum of 49 per cent of the total shares of any one company listed at a stock exchange or registered for trading at a securities trading centre (**49 per cent rule**).

Although not yet specifically repealed, these restrictions may be affected by the 2005 LOI, which stipulates 'investors must be permitted to invest in all sectors and in all industries and

trades which are not prohibited by law'. Therefore, under this general rule foreign investors should be (in theory) permitted to invest in all sectors and all industries provided that they are not in a prohibited or conditional sector (as above).

It is not clear if the authorities will interpret the 30 per cent rule and the 49 per cent rule as being repealed by or, alternatively, qualifying the 2005 LOI. We consider that the better view is that these rules should be repealed by the 2005 LOI. This view is consistent with the WTO principle of national treatment. However, we understand that in a meeting held on 18 January 2007 between the Government Office, the MOF and the SSC, the Government Office expressed the Prime Minister's opinion that the 49 per cent rule would continue to be applied 'temporarily'.

In any event, specific restrictions will continue to apply to conditional sectors (for example, banks) in accordance with commitments made under international agreements.

Key players in the securities markets

(a) General

Securities companies and fund management companies are the key players in the Vietnamese securities industry. This section provides an overview of the scope of activities under Law 70 of these companies

(b) Securities company

As at 29 December 2006, the SSC has issued 55 operational licenses to securities companies under the previous securities law regime. After the effective date of Law 70, being 1 January 2007, there have not been any operational licenses issued and the most likely reason is that the implementing regulations for Law 70 have not been promulgated to guide the SSC in its work. Under Law 70, securities companies are permitted to engage in any or all of the following activities (the minimum legal capital is listed along side each of the activity):

- (i) securities brokerage (VND 25 billion);
- (ii) securities self-trading (if the securities company engages in this activity it can only conduct the other activity of underwriting) (VND 100 billion);
- (iii) underwriting issues of securities (VND 165 billion);
- (iv) securities investment consultancy (VND 10 billion);
- (v) financial consultancy services; and
- (vi) other financial services.

The permitted areas of activity are limited compared to the business areas permitted under the old securities law regime. The prescribed minimum legal capital has also increased. This explains why there was a rush towards the end of 2006 to obtain a securities company license from the SSC.

(c) Fund management company

Prior to the effective date of Law 70, 18 operational licenses were issued by the SSC to fund management companies. Again, there was a rush to obtain a license towards the end of 2006 because the scope of business activities has been restricted under Law 70. A fund management company can only engage in fund management and portfolio management and the minimum legal capital for establishment is VND 25 billion.

Funds

We will report on the regulation of investment funds in Vietnam once the MOF issues the regulations on this subject, expected soon.

Investment funds have been driving much of the bullish Vietnamese stock market. There have been a growing number of offshore and onshore investment funds established in recent years. At least 25 investment funds are operating in the market. The Prime Minister has reportedly indicated

that regulations on capital controls will be tightened to prevent capital flight which probably means that the MOF's soon to be released regulations will introduce further regulatory controls on the operation of funds.

Part 3 Did You Know?

3.1 New Public Holiday in Vietnam – King Hung Day

The National Assembly passed in early April 2007 an amendment of Article 73 of the Labour Code, which gives employees one more public holiday in Vietnam. The new holiday is 10 March of the lunar year (or 26 April in the western calendar year this year).

The new holiday is effective from 2007, although due to the late announcement, many companies announced that they would begin acknowledging the holiday only in 2008. The holiday commemorates the death of King Hung, who created the nation of Van Lang, which is present-day Vietnam. Please see <http://www.vietspring.org/legend/goldenage.html> for more information.

Under the Labour Code, there are now nine public holidays in Vietnam:

- Calendar New Year Holiday: one day (the first day of January of each calendar year);
- Lunar New Year Holidays: four days (the final day of the old year and the first three days of the new Lunar year);
- King Hung Day: one day (the tenth day of March of each Lunar year);
- Victory Day: one day (the thirtieth day of April of each calendar year);
- International Labour Day: one day (the first day of May of each calendar year);
- National Day: one day (the second day of September of each calendar year).

3.2 Conditional Sectors

Restatement of Conditional sectors

Pursuant to the 2005 LOI, all investment projects (regardless of whether foreign-invested or domestic) in the following sectors are conditional projects and subject to investment evaluation (as apposed to registration) prior to issuance of an investment certificate:

- (i) sectors impacting on national defence and security, social order and safety;
- (ii) banking and finance sector;
- (iii) sectors impacting on public health;
- (iv) culture, information, press and publishing;
- (v) entertainment services;
- (vi) real estate business;
- (vii) all aspects of natural resources; the ecological environment;
- (viii) development of education and training; and
- (ix) a number of other sectors in accordance with law.

For foreign investors, the range of conditional sectors is wider still, and includes any sector for which Vietnam has committed to market-opening conditions in international treaties.

Decree 108 adds some specificity to the 2005 LOI's list of conditional sectors, noting in an Appendix the following conditional sectors:

- (i) broadcasting and TV;
- (ii) production, publishing and distribution of cultural products;
- (iii) exploration and exploitation of minerals;
- (iv) establishment of infrastructure for telecommunications networks, transmission and provision of internet and telecommunications services;
- (v) establishment of public postal networks and provision of postal services and express delivery services;
- (vi) construction and operation of river ports, seaports, terminals and airports;

- (vii) transportation of goods and passengers by railway, air, road, sea and inland waterways;
- (viii) catching of aquaculture;
- (ix) production of tobacco;
- (x) real estate business;
- (xi) import, export and distribution business;
- (xii) education and training;
- (xiii) hospitals and clinics; and
- (xiv) other investment sectors for which Vietnam has committed to market-opening conditions in international treaties.

The reliance on international treaties as a source of regulation of foreign investment in Vietnam (xiv above) is troublesome, as each foreign investor must conduct an analysis of which international treaties apply to it and what types of investment projects are conditional under those international treaties before it will know for certain whether its proposed investment is conditional or not.

The Department of Planning and Investment in Ho Chi Minh City (**DPI**) recently added some clarity on this point in the WTO context by confirming that all service sector commitments in the WTO agreement are considered 'conditional sectors' under 29.2 of the 2005 LOI and, therefore, will be subject to the evaluation, not registration, process.

We therefore suggest that investors review the WTO list in determining the way forward in relation to an investment in a service sector. Please note that if the service sector is not specifically covered by the commitments, then it is not a conditional sector based on that criterion alone, but it may still be a conditional sector if it is specifically listed as such in Article 29 of the 2005 LOI, such as entertainment services (Art.29.1 (f)).

3.3 Inspection Committees

What is an Inspection Committee?

An Inspection Committee (**IC**) is a committee akin to an audit committee that must be established by a limited liability company (both one member and multiple members) or shareholding company in certain circumstances. An IC may, in some circumstances, carry out some management functions of the company if it is perceived that these functions are not being carried out or are being carried out improperly.

When is an IC required?

For a one-member limited liability company, an IC is always required (although the terminology used in this instance is "Inspectors" rather than an IC). For a multiple-member limited liability company, a limited liability company of more than 11 members must have an IC. If management needs of the company dictate, the members may agree to establish an IC. For a shareholding company in which more than 50 per cent of the shares are owned by companies (ie a single company or multiple companies), or which has more than 11 shareholders which are natural persons, there must be an IC.

How is an IC appointed?

In limited liability companies, the member(s) appoints the inspectors. In a shareholding company, a shareholder or a group of shareholders holding more than 10 per cent of the total shares in the company's charter may nominate candidates for the IC. The general meeting of shareholders appoints the IC.

Constitution of an IC

(a) One member limited liability company

Between one and three inspectors must be appointed in a one-member limited liability company. Inspectors must:

- (i) not be prohibited from being able to manage companies under Vietnamese law or to establish and manage companies in Vietnam;
- (ii) not be a related person of a member of the members' council, the chairman of the company, the director or general director or the person authorized to directly appoint an inspector; and
- (iii) have professional qualifications or work experience in accounting and auditing or professional qualifications and practical experience in the main lines of business of the company.

Other requirements may be stated in the company's charter.

(b) Multiple member limited liability company

The law does not state how an IC for a multiple-member limited liability company is to be constituted. In the absence of specific provisions for multiple-member limited liability companies, the provisions dealing with ICs of shareholding companies are probably be applicable.

(c) Shareholding company

An IC of a shareholding company may have between three to five members unless otherwise stated in the company's charter. The term of membership of an IC may be up to five years and members may be re-appointed for an unlimited number of terms.

General requirements for all ICs

The members of the IC must elect a head. The rights and duties of the head of the IC are stated in the company's charter. More than half of the members of the IC must reside permanently in Vietnam, and at least one member of those residing in Vietnam must be an accountant or auditor.

If the term of appointment of an IC expires and a new IC is not appointed (or the existing one re-appointed), the IC continues to act until replaced.

Members of the ICs must

- (a) be at least 21 years of age and be permitted to establish and manage companies in Vietnam;
- (b) not be a wife, husband, father, mother, child or sibling of any member of the board of management of a shareholding company or the director, general director or other managers of either a shareholding or limited liability company; and
- (c) not hold managerial positions in the company (including being a chief accountant). Members of the IC need not be shareholders or employees of the company.

Rights and obligations of inspectors

- (a) In a one-member limited liability company:
 - (i) inspectors are appointed to verify the lawfulness, honesty and care of the members' council, the chairman of the company and the director or general director in organizing the implementation of ownership rights and in managing the business of the company.
 - (ii) the inspectors owe their duty to the member;
 - (iii) inspectors have general obligations to review and make recommendations regarding financial and management issues; and
 - (iv) the charter may state additional duties and the member may request that the inspectors have additional duties.
- (b) In a multiple-member limited liability company, the powers, obligations, criteria, conditions and working regulations of the IC and the head of the IC must be stated in the company's charter. There are no further provisions dealing with ICs of multiple-member limited liability

companies. In the absence of such specific provisions, the provisions dealing with ICs of shareholding companies below are probably applicable.

- (c) In a shareholding company:
- (i) the IC supervises the board of management in a shareholding company, and the director or general director in either a shareholding or limited liability company in the management and administration of the company;
 - (ii) the IC owes its duty to the shareholders or the members;
 - (iii) the IC monitors the reasonableness, legality, truthfulness and prudence in management and administration of business activities of the company;
 - (iv) the IC has particular more detailed obligations relating to accounting, management and administration of the company;
 - (v) members of the IC must:
 - (A) exercise delegated rights and perform delegated duties honestly, diligently and to the best of their ability in the interests of the company and shareholders;
 - (B) be loyal to the interests of the company and of shareholders; not use information, secrets, business opportunities of the company, or abuse his or her position and powers and assets of the company for their personal benefit or for the benefit of other organisations or individuals; and
 - (C) exercise such other obligations of IC members as are stated in the company's charter
 - (vi) an IC member breaching its obligations and causing damage to the company or to other people must bear personal responsibility for compensation and all benefit and gain received directly or indirectly from a breach belongs to the company; and
 - (vii) an IC may use an independent consultant to perform its assigned duties.

3.4 Re-registration Seminar

On 30 March 2007, the Ministry of Planning and Investment (**MPI**) co-ordinated with the Hanoi Department of Planning and Investment in organizing a seminar on the implementation of Decree 101 of the Government dated 21 September 2006 on re-registration, conversion and registration for change of investment certificates of foreign invested enterprises in accordance with the 2005 LOI/LOE (**Decree 101**).

The procedures set out in Decree 101 seem to be fairly straightforward; however, many problems have arisen in practice, and representatives from affected enterprises raised many questions at the seminar in relation to implementation of Decree 101.

Problems discussed

(a) Two-year limit

Most people attending the workshop requested that the two-year limit for re-registration be removed, as the limit will end on 30 June 2008 and is seen as too short. Many enterprises currently do not want to re-register as they see no benefits in re-registration, but at the same time are anxious about what to do when the two-year limit expires.

According to the Hanoi DPI, the two-year limit only applies to foreign-invested enterprises (**FIEs**) under the Law on Foreign Investment. It does not apply to business co-operation contracts (**BCCs**), although, admittedly, this is unclear in Decree 101. The MPI confirmed that Article 170 of the LOE provides that re-registration must be done within two years.

The MPI further stated that in the provisions on both re-registration and conversion of enterprises are based on Article 170 of the LOE; therefore, both re-registration and conversion of enterprises are subject to the two-year limit, despite the fact that Decree 101 states only that re-registration of enterprises must be undertaken.

(b) Seal and tax code

Another issue discussed at the seminar was the seal and tax code for the re-registered enterprises. Decree 101 provides that a re-registered enterprise may keep its previous seal and tax code. However, this would appear to be impossible in practice, as the laws on the seal provide that the business registration number or investment licence number be carved on the seal, and, when an enterprise is re-registered, it received a new registration number.

The same problem exists with respect to the enterprise's tax code, as the enterprise used its previous investment licence to apply for the tax code.

The response from the MPI and Hanoi DPI on this point was that the re-registered enterprises should in fact apply for a new seal and a new tax code. Therefore, practice will probably vary from what the law requires.

(c) Related persons

Another issue raised at the workshop dealt with related persons in key positions within an enterprise. The LOE provides that in an enterprise, the chairman of board of management, the general director and the chief accountant cannot be related. In the past, it has been common that spouses work in the same FIE, where the husband is the general director and the wife is the chief accountant or vice versa. Now, if such an enterprise wishes to re-register, how will it be dealt with? This question was not answered by the Authorities.

(d) Application documents

Decree 101 provides that an application file for re-registration shall consist of a request for re-registration, draft new charter and a proper copy of the investment licence and its amendments. Decree 101 further provides that the body issuing investment certificates may not request the enterprise to submit any other documents apart from the above-mentioned documents. It was noted at the seminar that the licensing authorities routinely request additional documents beyond those specified by the law as part of the re-registration process. For instance, the DPI may request the decision of the owner in case of a 100 per cent foreign-owned enterprise, a board of management resolution or board minutes in case of a joint venture or shareholding company in all cases, consenting to the re-registration. Or in case of BCCs applying for change of investment certificate, despite Decree 101's requirement that only a request for change of investment certificate and a proper copy of the investment licence and its amendments be submitted, the DPI may request an audited financial report or a report on operations of the BCC.

In all such cases, there appears to be a reasonable rationale for the additional document requests; however, the fact is that they are not required by law. So investors cannot be properly given as to the applicable requirements. This issue was left unresolved at the meeting.

Further points covered/clarified:

- DPI officials clarified that where the enterprise wishes to open a representative office or a branch not involving production, the investment licence will also not be required to be amended.
- As to the recent WTO commitments, the MPI confirmed that although enterprises not re-registered can continue to enjoy investment incentives and converted enterprises may continue to enjoy investment incentives in the investment licence with respect to its licensed projects, incentives in terms of duty rates with respect to import and export of textiles and garments are considered removed immediately.
- A decree on implementation of WTO commitments will be issued in which the deadlines to remove incentives will be set out.

3.5 New Penalties for Securities Offences

The first quarter of 2007 was a busy time for the regulators at the MOF and State Securities Commission (**SSC**). These authorities are currently putting together a securities regulatory framework to fill the gaps left by the Law on Securities, which came into effect on 1 January 2007. It is a complex job, particularly when there is a lack of Vietnamese experience in this matter. The State agencies are strategizing how best to structure the regulatory framework to promote transparency and market stability, protect shareholders, embody good corporate governance practice and deter unsavory conduct.

An excellent way to see how the policy objectives are being balanced is to consider the penalties for violating the securities regulations under the recently introduced Decree 36/2007/ND-CP of the Government on penalties for administrative offences in securities and securities market sector dated 8 March 2007 (**Decree 36**).

The fines and penalties under Decree 36 ensure the above objectives are met by penalising those who are inaccurate and untrue in their information disclosures, breach reporting and listing requirements, engage in insider trading and collusive behaviour, and are involved in unauthorised activities of fund management companies and securities companies.

A noteworthy principle from Decree 36 is that employees who commit an offence under the securities regulation are held personally liable for their conduct. The employer must initially pay an assessed fine to the SSC; however, that employer is then entitled to demand the responsible employee to reimburse the fine.

Under Decree 36, certain offences, eg offences in connection with a public offering of securities, carry fines and punishment for a broad array of persons involved in such offences. In such cases, the SSC may apply fines to the issuer, underwriter, director, chief accountant, consultant, auditor or person who certified the public offer. The maximum fine imposed by the SSC is substantial: VND 70 million (about US\$4300).

There are generally two tiers of penalties based on the level of culpability. There are the basic monetary penalties, and on top of that are the tougher additional penalties that apply when there are aggravating factors to the offence. These aggravating factors involve conduct that is deliberate, premeditated and dishonest. The additional penalties may include suspension and revocation of operational licenses and invalidating the issuing of securities. Offenders who take steps to remedy their offending conduct are likely to mitigate the severity of the penalty imposed by the SSC.

Decree 36 does not impose any criminal sanction, however, it does mention that other legal instruments may impose certain securities offences that could include criminal sanctions.

The SSC has shown that they are ready to impose penalties on those who breach the securities regulations. Reportedly, Petrolimex Tanker Joint Stock received a fine of VND50 million (US\$3100) for submitting falsified documents on issuing new shares. Vietcombank Securities, a subsidiary of the State-run Bank for Foreign Trade of Viet Nam, was also fined VND30 million (US\$1860) for violating regulations on managing customer accounts, and for allowing illegal trading activity by investors.

It is widely known that illegal trading activities have distorted the securities market. Hopefully, with the passage of Decree 36, the SSC will be in a better position to police these activities to achieve market efficiencies.

3.6 More about Allens Arthur Robinson

AAR Worldwide

As noted above, Phillips Fox Vietnam officially became part of AAR in January this year. We believe the merger has resulted in a 'win-win' for the Vietnam team, AAR and our clients.

AAR is one of the largest international law firms in Asia, with more than 900 lawyers, including 179 partners. The firm has been providing legal services for clients in Australia for more than 180 years and in Asia for the past 30 years.

AAR Vietnam

As our Vietnam practice has grown over the past few years, the launch of AAR in Vietnam and the re-launch of the VLU with this issue presents an excellent opportunity to outline some of the features of our Vietnam practice.

Our legal practice is consistently rated as a leader in Vietnam by independent publications such as *Asia-Pacific Legal 500*, *Chambers Global* and *IFLR1000*. We are also widely regarded as the premier provider of legal translation services in Vietnam. Our online database of more than 3000 English translations of laws regulating investment and business in Vietnam is available at our dedicated website: www.vietnamlaws.com.

Our practice areas and experience include:

(i) Banking and Financial Services

We offer a full service finance capability covering all areas, from syndicated loans, acquisition finance, project and structured finance to capital markets, funds management, insurance and financial services licensing and regulation. We were retained for the Vietnam Government's first international bond issue and advise leading international investment groups.

(ii) Property Development

We offer a full service corporate real estate team with broad experience in all aspects of property-related law in Vietnam. Our team has acted on many of the largest property development projects in the country, including each of the first three development projects to obtain residential-for-sale licenses. We have extensive experience in the acquisition, development, sale and leasing of residential, commercial, industrial and retail properties. We regularly handle property-related financing matters and have advised on the real estate aspects of projects utilising land inside and outside industrial zones.

(iii) Manufacturing, Trade and Distribution

We have advised more than 100 foreign companies in relation to the establishment and operation of manufacturing business in Vietnam, both inside and outside industrial zones. We frequently advise on trading and distribution rights, and on advertising and promotions conducted in Vietnam.

(iv) Natural Resources

We advise on the full spectrum of legal issues in the resources sector, from minerals, gas and petroleum exploration, to production and marketing.

(v) Power and Infrastructure

We are particularly active in Vietnam's power sector, acting for several owners, contractors and suppliers, and also investors in existing independent power projects.

(vi) Telecommunications and IT

We have acted on several of the largest telecommunications projects to date and we also frequently advise on regulatory matters for foreign telecoms and IT companies wishing to provide services in Vietnam.

AAR Vietnam Opening Reception

A reception was held in Ho Chi Minh City on 27 March 2007 to officially announce the opening of AAR's Vietnam offices. The reception was attended by outgoing AAR Managing Partner Tom Poulton, incoming Managing Partner Michael Rose, who already has strong ties to Vietnam and the Indochina region, and Jim Dunstan, AAR Executive Partner, Asia. Many of our loyal and longstanding, as well as new, clients attended the reception, held at the Saigon Town Club, overlooking Ho Chi Minh City at night.



Part 4 What's new on www.vietnamlaws.com?

NEW subject categories in Vietnam Laws Online Database

Vietnam Laws Online Database on www.vietnamlaws.com is an online searchable database of English translations of more than 3000 Vietnamese laws relating to foreign investment and far beyond. Subscribers can search for legislation by subject category, keyword, date, issuing body, official number, legislation type, or advanced option. Translations can be viewed online, printed and downloaded (subject to terms and conditions).

As a reminder to readers, with the introduction of Vietnam's new investment-enterprise regime in July 2006, we've adjusted various existing subject categories and added some new ones. In particular:

- we've merged investment and corporate legislation into *Investment-Corporate*. All new investment-enterprise laws can be found in *Investment-Enterprise Regime (Post-July 2006)*. For convenience, we've included several sub-categories, such as *Principal Laws* relating to investment and enterprises. All old laws on investment and enterprises can be found in *Investment-Enterprise Regime (Pre-July 2006)*. Some forms of investment (eg BOT), some special forms of enterprise (eg State owned enterprises), and now some completely new forms of enterprise (eg foreign commercial enterprises) have their own sub-categories within *Investment-Corporate*.
- We've added other new categories covering legislation relating to *WTO & Other Treaties, Anti-Dumping & Other Safeguards, Anti-Corruption, Franchising, Mergers & Acquisitions*, and more.

Highlights of FINANCIAL updates from January through April 2007 in The Vietnam Laws Online Database include the following:

- Decree 26 dated 15/02/2007 on digital signatures.
- Decree 27 dated 23/02/2007 requiring e-documents lodged with Vietnam's financial authorities to be digitally signed.
- Decree 35 dated 08/03/2007 on e-transactions in banking operations.
- Decree 158 dated 28/12/2006 on establishing a Commodity Exchange.
- Decree 160 dated 28/12/2006 on foreign exchange control.
- Notice 20 dated 29/01/2007 on control of securities market (including foreign participation).
- Decision 03 dated 19/01/2007 on prudential ratios in banking.
- Decision 07 removing ceiling interest rates on US deposits by economic organizations with banks, effective 1 March 2007.
- Decree 14 dated 19/01/2007 on securities.
- Decree 161 dated 28/12/2006 on cash payments.
- Decision 2554 dated 31/12/2006 widening the forex trading band.
- Decision 62 dated 28/12/2006 issuing regulations on interest rate swaps.
- Decision 63 dated 29/12/2006 issuing regulations on discounting negotiable instruments.

Above is merely a snapshot of the wide range of new legislation – in ALL SECTORS – available for 2007.

NEW search function for Vietnam Legal Update

As regular VLU readers know, all issues of our Vietnam Legal Update from 1997 have previously been available on www.vietnamlaws.com. We are still in the process of merging our prior Phillips Fox system into the new AAR one, and hope to soon restore the ability to access back issues of our VLUs.

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