



vietnam legal update

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In brief: Given ongoing pressures on the Vietnamese economy, it has been another busy month for the State Bank of Vietnam. This month we look at their recent activity concerning foreign exchange and trading in gold as well as their new rules for strategic investment in State-owned banks. Our case commentary reports on a recent court win for brand-owners in the fight against cyber-squatters and we also take a look at a recent tax decision and the new mining law that will soon take effect.

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The SBV gets serious about strategic investments in State commercial banks

Circular 10 of the State Bank of Vietnam providing criteria for selection of strategic shareholders of State commercial banks undergoing equitisation, dated 22 April 2011 (*Circular 10*)

Given recent news reports that large State commercial banks may soon be seeking proposals from interested strategic investors, it is timely that the State Bank of Vietnam has recently issued Circular 10 on this very subject, which will come into effect from 1 June 2011.

So, what is a strategic investor in a State commercial bank?

'Strategic investors' - in the context of investment in any State-owned enterprise undergoing equitisation (not just State banks) – are defined in Decree 109-2007-ND-CP of the Government on conversion of enterprises with 100% State owned capital into shareholding companies, dated 26 June 2007 (*Decree 109*) as:

domestic investors and foreign investors with financial and enterprise management capability; who transfer new technology, supply raw materials, and/or develop the product consumption market; and whose long-term interests are closely connected with the enterprise.

Who can be a strategic investor in a State bank?

Circular 10 instructs State commercial banks undergoing equitisation to select strategic shareholders who are reputable investors with the financial capacity and ability to assist the State bank in the following areas:

- raising capacity in management, executive operation and risk management;
- applying modern technology;
- developing banking products and services; and
- developing other sectors consistent with the developmental strategy of the State bank,

(Areas of Assistance).

Further, Circular 10 also requires that any potential strategic investor in a State commercial bank:

- provide strategic advantages connected with the developmental strategy of the particular State bank;
- not create a conflict of interest; and

- not create a monopoly in the context of unfair competition as regards other clients and investors of the particular State commercial bank or other credit institutions.



Both foreign and Vietnamese strategic investors wishing to invest in a State bank must undertake to provide assistance in developing the bank's products, services and technology

Foreign strategic investors

Criteria for foreign strategic investors in commercial shareholding banks has been in place for some years now, regulated by Decree 69-2007-ND-CP on Purchase by Foreign Investors of shareholding in Vietnamese Commercial Banks dated 20 April 2007 (**Decree 69**). These requirements would apply equally to purchases by foreign investors in State commercial banks undergoing equitisation.

However, in addition to the general definition of a strategic investor under Decree 109, and the general requirements under Circular 10 that must be met by all strategic investors in a State commercial bank as noted above, Circular 10 also introduces further requirements for foreign investors if they want to be a strategic investor in a State commercial bank. The table below highlights the difference in the requirements for a foreign strategic investor depending on the whether intended bank for investment is State owned or privately owned.

Criteria for a foreign strategic investor in a State commercial bank undergoing equitisation (Pursuant to Circular 10)	Criteria for a foreign strategic investor in an unlisted (private) Vietnamese Commercial Bank (Pursuant to Decree 69)
The foreign strategic investor must be a foreign credit institution or foreign financial institution with minimum total assets of 20 billion USD in the year prior to the year of registration to participate as a strategic shareholder	Same requirement. Note: this applies to any foreign credit institution purchasing a shareholding in a Vietnamese bank irrespective of whether it will be a strategic shareholding.
The foreign strategic investor must have at least 5 years international operational experience.	The foreign strategic investor must have international operating experience in the banking sector.

Criteria for a foreign strategic investor in a State commercial bank undergoing equitisation (Pursuant to Circular 10)	Criteria for a foreign strategic investor in an unlisted (private) Vietnamese Commercial Bank (Pursuant to Decree 69)
The foreign strategic investor must be rated by international independent credit rating organisations (for example Moody's or Standard & Poor) at the level of capable of fulfilling financial undertakings and operating normally even when the economic situation and conditions change in a non-profitable direction.	Same requirement.
The foreign strategic investor must not be a strategic shareholder, major shareholder or founding shareholder of any other credit institution in Vietnam.	A foreign credit institution is only permitted to be a foreign strategic investor in one Vietnamese bank. However, a foreign credit institution is limited to participating in the board of management of up to two Vietnamese banks and there are no restrictions on a foreign credit institution being a major shareholder or founding shareholder of other credit institutions in Vietnam.
The foreign strategic investor must provide a written undertaking to provide assistance to the invested State commercial bank in the Areas of Assistance and undertake to form a long-term association with that bank.	The foreign strategic investor must provide a written undertaking to provide assistance to the Vietnamese bank regarding development of banking products and services, increasing managerial and executive manpower and applying modern technology.

Vietnamese strategic investors

To date there are have been no criteria specifically for domestic strategic investors in commercial shareholding banks as Decree 69 only provides for selection criteria for foreign strategic shareholders. However, Circular 10 now provides that domestic investors who want to acquire a strategic stake in a State commercial bank must meet a number of requirements including:

- being an enterprise with experience and good managerial capability (of note, there appears to be no requirement that such domestic strategic investor be a credit institution);
- having minimum total assets of 3,000 billion dong in the year prior to registering to become a strategic shareholder;
- not being a strategic shareholder, major shareholder or founding shareholder of any credit institution in Vietnam at the time of registering to participate as a strategic shareholder;

- providing a written undertaking to provide assistance to the State commercial bank in one or more of the Areas of Assistance;
- providing a written undertaking not to assign the shares it purchases for at least five years from the date of becoming a strategic shareholder, and not conducting any transaction with the State commercial bank resulting in a conflict of interest or creating a monopoly or unfair competition as regards other clients and investors of the State commercial bank and as regards other credit institutions. The five year transfer restriction is consistent with the restriction on transfer placed on foreign strategic investors under Decree 69; and
- a domestic strategic shareholder which is itself a credit institution must satisfy additional criteria including:
 - having a capital adequacy ratio above 10% in the year prior to registering to participate as a strategic shareholder (being higher than the generally applicable 9% requirement); and
 - having a 'bad debt' ratio below 2% in the year prior to registering to participate as a strategic shareholder (being lower than the 3% requirement applicable where a credit institution purchases shares in excess of statutory ratios).

What's next?

Although criteria for strategic investment in State banks have now been spelt out, the actual requirements imposed on investors may not necessarily stop there. Specific criteria for selection of strategic shareholders for each State commercial bank remains subject to the approval of the Prime Minister.

Given the news reports, it seems we may see sooner rather than later how Circular 10 will be implemented in practice as State commercial banks look to attract and welcome strategic investors.

Proposed new ban to support VND

Draft Circular of the State Bank of Vietnam guiding restrictions on use of foreign exchange, dated 17 May 2011 (*Draft Circular*)

Signalling a further step-up in the Vietnamese Government's efforts to instill greater confidence in the Vietnamese Dong (**VND**), the State Bank of Vietnam (**SBV**) has issued a Draft Circular that seeks to ensure the use of VND in all transactions.

General ban on quoting prices in foreign currency

Under measures set out in the Draft Circular the SBV proposes to generally ban the use of foreign currency in all transactions, payments, listings, advertisements,

quotations, pricing and contracts executed by residents or non-residents. This ban includes any reference to a price in VND converted to a corresponding foreign currency amount or statements that prices are adjustable according to fluctuations in the exchange rate between the VND and foreign currency.

If the proposed ban is introduced, it could have a significant impact on businesses. Salaries of local employees could no longer be quantified by reference to a foreign currency. Similarly, rental prices, professional services and a range of other goods and services which are currently commonly quoted in USD would need to be reframed into VND.

Impacts may also be felt in other areas where contracts and agreements have previously included a foreign exchange conversion mechanism, for example where the price of shares in a company is calculated as the Vietnamese equivalent of US\$1 million determined in accordance with the exchange rate on the date the share certificate is issued.



Proposed new rules aimed at reducing 'dollarisation' would confirm ban the quoting of prices in foreign currency or the referencing of foreign currency exchange equivalents

Exceptions to the rule

There are, however, stipulated exceptions to this general ban on using foreign currency. These largely mirror those already set out in Decree 160/2006/ND-CP of the Government on Implementation of the Ordinance on Foreign Exchange Control. Key exceptions include:

- resident business entities in the hotel, tourism and aviation transportation sector who may list and advertise prices of goods and services in VND and the equivalent foreign currency on non Vietnamese-language websites and publications for clients;
- credit institutions with a valid foreign exchange services license;
- certain internal and intra-group remittances by organisations;
- contributions by residents to implement a foreign investment project in Vietnam;
- payment between an investor and general contractor to pay for imported goods and services;

- insurance contracts between insurers and institutional customers, provided that the contract is reinsured offshore;
- non-residents entering into contracts in foreign currency for payment of goods and services for export; and
- payment of salary, bonus and allowances to resident and non-resident foreigners.

Given the potential impact of the Draft Circular, we will be monitoring its progress through the State Bank very closely. Watch this space!

Deferred tax ... for some

Decision 21-2011-QD-TTg of the Prime Minister on deferral of 2011 corporate income tax for small and medium sized enterprises, dated 6 April 2011 (**Decision 21**)

The Prime Minister recently issued Decision 21 providing for deferral of corporate income tax (**CIT**) for certain small and medium sized enterprises (**SMEs**). The Ministry of Finance (**MoF**) subsequently issued implementing Circular 52/2011/TT-BTC on 21 April 2011.

Who qualifies?

SMEs are defined in Decree 56/2009/ND-CP on assistance to the development of small and medium-sized enterprises, dated 30 June 2009, as:

- companies in the manufacturing sector with a maximum capital of VND 100 billion or a maximum annual average workforce of 300; and
- companies in the trading and services sector with a maximum capital of VND 50 billion and a maximum annual average workforce of 100 employees.

Details of the deferral

The CIT deferral is for one year from the date on which payment of CIT would otherwise be due and applies to CIT provisionally assessed in each quarter of 2011, as well as to any amount of CIT payable on finalisation of CIT for 2011. It includes any CIT payments for 2010 which have been legitimately carried forward from 2010.

The deferral does not apply to certain types of income such as that derived from real estate activities, securities trading, finance and insurance. In order to avail themselves of the deferral, SMEs with income generated from these activities will need to carve this out of their total income (and maintain separate accounts) when calculating the amount of CIT eligible for the deferral.

Any other deferrals in the offing?

It had been reported in the news that the MoF had also sent a proposal to the

National Assembly proposing personal income tax deferrals, reductions or exemptions for low income earners. Later reports indicate that this proposal was rejected.

Curtailing the banks' use of gold

Circular 11/2011/TT-NHNN of the State Bank of Vietnam ending the use of gold in capital mobilisation and lending by credit institutions, dated 29 April 2011 (**Circular 11**)

In another recent move designed to support liquidity of the Vietnam Dong and improve the Vietnamese economy by combating inflation, the SBV has issued Circular 11. Circular 11 prohibits several activities previously permitted under the SBV's Circular 22/2010/TT-NHNN dated 29 October 2010 (**Circular 22**). Under Circular 22, credit institutions which were licensed to deal in foreign exchange were also allowed to mobilise deposits in gold through the issue of negotiable instruments and provide loans in gold for the production and trading of gold jewellery.

What has changed?

Circular 11, which took effect on 1 May 2011, has now generally put a stop to the mobilisation of deposits and lending in gold by credit institutions and branches of foreign banks.

In terms of gold lending, Circular 11 goes so far as to prohibit credit institutions from providing loans in gold even under already executed loan agreements if the loans have not been fully disbursed. Credit institutions and foreign bank branches are also prohibited from depositing gold at other credit institutions or conducting any trust, investment activities or any other forms of loans in gold.

In terms of deposits, credit institutions must not mobilise capital in gold, although there is a limited-time exception for the issue of short term certificates where gold is required to repay existing customers and the institution's gold inventories are insufficient. All such certificates must be terminated before 1 May 2012 .

Finally, Circular 11 provides that any gold already mobilised by credit institutions must not be converted to VND or any other monetary forms, and any gold amounts already converted must be closed out before 30 June 2011.

Ongoing reporting requirements

Circular 11 also sets out standard forms on which credit institutions must report to the SBV on the status of any gold mobilisation or loans. The reports are due by the 10th day of each month, relating to the previous month. These reporting requirements apply equally to transactions commenced before and after the effective date of Circular 11.

Case commentary: cyber-squatters beware

Circular 10/2008/TT-BTTTT of the Ministry of Information and Telecommunication providing for the settlement of disputes over Vietnam's country code domain name ".vn", dated 24 December 2008 (*Domain Name Circular*)

Although the Domain Name Circular was issued in late 2008, successful reliance on it by Samsung Electronics Co. Ltd Samsung (**Samsung**) in a recent Vietnamese court decision has demonstrated its potential as a powerful weapon for trademark and other intellectual property owners seeking redress against cyber-squatters.

Vietnam's regulation of domain name speculation

The practice of 'cyber-squatting' – where a person speculates in domain names by registering famous brand name domains and then seeking to sell them for inflated prices to the true owners of those names – has been rampant in Vietnam. A search at the Vietnam Internet Center (**VNNIC**) reveals many famous entities (both local and foreign) have been registered as .vn domain names by organisations or individuals who do not have any relationship with the relevant famous entity.

Unfortunately such practices were aided, rather than hindered, by early regulation – such as Decision No. 92-2003-BBCVT of the Ministry of Post and Telecommunications (**MPT**) promulgating regulations on management and use of internet resources, dated 26 May 2003 (**Decision 92**) – which, in attempting to promote e-commerce in Vietnam, set out simple procedures for registration of domain names so that VNNIC could respond promptly in processing applications.



Samsung's recent successful legal action against cyber-squatters sends a strong message that Vietnam is serious about policing domain names

Although Decision 92 was repealed and replaced by Decision 27/2005/QD-BBCVT of the MPT promulgating regulations on management and use of internet resources, dated 11 August 2005 (**Decision 27**), not many changes were introduced. Domain name registration remained on a 'first come first serve' basis and the only limitations were that domain names should not:

- contain words that may offend or be contrary to Vietnam's interest, national security, social morals, culture or customs; or
- relate to geographical name, leaders, famous person or generic name of an economic industry or sector, line of goods, governmental political or social organization which may create confusion or dispute.

Moreover, although these early regulations tasked those seeking registration with ensuring that the proposed registration did not infringe pre-existing rights, the regulations did not require VNNIC to verify whether or not a domain name registration might violate any intellectual property rights.

The early regulations were also limited in their provision for dealing with domain name disputes. While Decision 92 provided that VNNIC would handle disputes, no specific dispute resolution policies were set out. Decision 27 provided some procedures for resolution, placing the MPT as the final decision maker.

At the same time, the Law on Intellectual Property provided that it was an act of 'unfair competition' for someone to register a domain name identical with, or confusingly similar to, protected trade names in order to benefit. Such an act of unfair competition was potentially subject to an administrative penalty in accordance with the Law on Competition.

It therefore remained unclear whether a brand owner would be able to seek satisfactory redress for cyber-squatting from VNNIC, the MPT or even the Competition Council.

In 2007, Decision 27 was replaced by Circular 09/2008/TT-BTTTT of the Ministry of Information and Telecommunication (**MOIT**) guiding the management and use of Internet resources, dated 24 December 2008. For the first time, this Decision set out clear principles for domain disputes, providing that they were to be settled in accordance with the Law on Information Technology through negotiation and conciliation, arbitration or by the courts.

On the same day, the MOIT issued the Domain Name Circular. Importantly, this Circular set out 3 criteria which a complainant must prove to dispute a domain name registration:

- that the disputed domain name is identical or confusingly similar to the name of the complainant or identical or confusingly to the trademark or service mark in which the complainant has lawful rights or interest;
- that the defendant has no lawful rights or interest in the domain name; and
- that the domain name is being used with a malicious intent.

The earlier Samsung domain name dispute

Samsung's recent court action was not its first success in a domain name dispute involving Vietnam. Back in 2004 Samsung brought a case before the Arbitration

and Mediation Center of the World Intellectual Property Organization (**WIPO**) in relation to the domain name 'samsungfunclub.net', which had been registered to a Vietnamese resident entity, ABC Group. The Arbitration and Mediation Center has jurisdiction to hear disputes in relation to generic top level domains including .net domains. Applying the Internet Corporation for Assigned Names and Numbers (ICANN) Uniform Domain Name Dispute Resolution Policy, the Center's Panel held that ABC Group's registration of samsungfunclub.net was:

- identical or confusingly similar to Samsung's trademark;
- ABC Group had no rights or legitimate interest in the domain name; and
- the registration and its use was in bad faith.

The Center's panel ordered that the domain name be transferred to Samsung.

The facts

In 2009 Samsung once again found itself in dispute over domain names in Vietnam. This time, the domain names in question were 'samsungmobile.com.vn' and 'samsungmobile.vn' which had been registered by Mr Duong Hong Minh and ViTechNet. Having registered the domains, Mr Minh and ViTechNet offered to sell the names to Samsung for more than 200 million VND.

Samsung filed a complaint before the Hanoi Peoples' Court arguing that the domain names were identical to its trademark, that Mr Minh and ViTechNet had no legitimate interest in the domains and that they had been registered in bad faith.

The decision

At first instance the Hanoi Peoples' Court ordered that the registration for 'samsungmobile.com.vn' be withdrawn and granted Samsung priority rights in relation to its future registration. However, the court dismissed Samsung's application in relation to the domain name 'samsungmobile.vn' because this registration had been transferred from ViTechNet to another third party before the dispute was heard.

Samsung appealed the decision and in March 2011 the Appellate Court of the Supreme Peoples' Court in Hanoi upheld the appeal, ordering that the registration of 'samsungmobile.vn' also be withdrawn and Samsung be given priority over its registration. In doing so, the Appellate Court held that the transfer of the domain name was invalid because the Domain Name Circular prohibits any transfer of a disputed domain name.

Commentary

The courts demonstrated that the Vietnamese regulations are robust and can be relied upon to resist the demands of cyber-squatters. This sends a welcome and strong message that the Vietnamese regulators and courts will take seriously, and support, the legitimate rights of intellectual property owners in Vietnam.

New mining law to come into effect

Law 60/2010-QH12 of the National Assembly on Minerals, dated 17 November 2010 (**New Minerals Law**)

Although issued on 17 November 2010, the New Minerals Law will take effect from 1 July 2011 when it replaces the Law on Minerals dated 20 March 1996 (**Old Minerals Law**). In this article we take a brief look at some of the key changes between the old and new laws.

Fewer licence types, but extended terms

The Old Minerals Law made provision for four licence types covering the different stages of a mining project: prospecting, exploration, mining and processing. The New Minerals Law has halved the licence types. Now, prospecting will be done under the exploration licence, while an enterprise with a mining licence may also conduct the processing of minerals.



The New Minerals Law makes changes to the rules surrounding licencing as well as introducing new fees

In line with these changes the maximum duration of the exploration licence has been extended. Original licences are now for a maximum 4 years, with the ability to extend for up to another 4 years. It is not all good news, however, with new harsher restrictions imposed on exploration licence holders seeking to extend their licence. Under the New Minerals Law, for each extension, the licence holder must surrender 30% of the licensed site.

Narrowing the authority of the People's Committees

The People's Committees have less authority to issue licences under the New Minerals Law. While they can still issue exploration and mining licences for common construction materials and peat and individual mining, they will no longer be able to grant mining licences for areas which have been explored but are not

within the master plan for nationwide mineral mining. Their licence-issuing rights will be limited to areas which contain scattered and small-scale minerals under the authorisation of the Ministry of Natural Resources and Environment.

Increased requirements for the auction of mining rights

There has been a significant change in approach to the requirements for mining rights to be auctioned. The Old Minerals Law provided for only a limited number of areas where mining rights were subject to auction. In contrast, under the New Minerals Law all areas are subject to auction except those specifically exempted by the Government. Of course, without a Decree yet being issued, it remains to be seen how much of a change this will be, depending on the breadth and precise criteria set for areas not subject to auction.

Stricter conditions for licence application and transfer

In a move designed to ensure that capable investors are identified from the outset and to stop the 'flipping' of licences, the New Minerals Law imposes several new conditions on applicants for licences. For example, under the new Law in order to apply for an exploration licence, the applicant's equity contribution must be at least 50% of the total investment required for the exploration of the project. The requisite percentage is 30% for mining licence applicants. In terms of transferring licences, the New Law will not permit the transfer of an exploration licence until at least 50% of the estimated project cost has been spent.

New fees

The New Minerals Law imposes a new 'mining right' fee for mining licences, although at the same time it does abolish the existing 'exclusive right fee' applicable to exploration and the 'royalties fee' previously set out in the Old Minerals Law (although applicable royalty taxes set out in the tax laws will continue to apply).

The mining right fee will be determined depending on the value, reserves and quality of minerals, the kind and category of minerals and the conditions for conducting mining in each case, with the Government tasked with issuing specific regulations on the method for calculation and the rates of fees.

The new mining right fee will be payable even by those who have already been issued with a licence under the Old Law although only in connection with any part of their mineral reserves which have not yet been mined.

Legal instruments recently uploaded on to the Vietnam Laws online database

Vietnam Laws online database (available at www.vietnamlaws.com) is an online searchable database containing English translations of more than 3,500 Vietnamese laws. Legislation recently uploaded includes:

- Decision 124 with HCM City Stock Exchange Trading Regulations, 9 October 2007 as amended 24 November 2008
- Circular 37 on administrative offences in the securities sector, 16 March 2011
- Decision 21 granting a one year deferral on payment of year 2011 CIT by small and medium-sized enterprises, 6 April 2011
- Decision 22 on trial procedures via the internet for ships entering/exiting seven major Vietnamese ports, 15 April 2011
- Circular 10 with criteria for selection of strategic shareholders of State commercial banks undergoing equitisation, 22 April 2011
- Decision 929 raising the State Bank's refinancing interest rate and reverse repo interest rate to 14%, 29 April 2011
- Circular 12 regulating digital signatures, digital certificates and digital signature certification services of the State Bank, 17 May 2011
- Draft Circular of State Bank guiding restrictions on use of foreign exchange, 17 May 2011

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