



VIETNAM LEGAL UPDATE

August 2008

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Hanoi
Suite 401, Hanoi Tower
49 Hai Ba Trung
Hanoi, Vietnam
Tel +84 4 936 0990
Fax +84 4 936 0984
bill.magennis@aar.com.au



Ho Chi Minh City
Suite 605, Saigon Tower
29 Le Duan Boulevard
District 1
Ho Chi Minh City, Vietnam
Tel +84 8 822 1717
Fax +84 8 822 1818
nigel.russell@aar.com.au



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Clear Thinking



Part 1 Selected New Legal Instruments

1.1 Holding pattern for local bank licensing

Official Letter No. 7171-NHNN-CNH of the State Bank of Vietnam on notification of direction from the Prime Minister in Letter 4944-VPCP-KTTH dated 29 July 2008, dated 8 August 2008 (Official Letter 7171)

8 August 2008 turned out to be not so lucky for Vietnamese shareholding commercial banks (**VSCBs**). On this day, the State Bank of Vietnam (**SBV**) announced in Official Letter 7171 that it would temporarily suspend licensing, and receiving application files for, the establishment of VSCBs. According to the SBV, this decision has been issued at the direction of the Prime Minister (in Official Letter 4944 of the Government Office (dated 29 July 2008)), who has called for the SBV to amend the conditions for establishment of VSCBs 'to make the criteria more appropriate'.

Until the new criteria are issued, the SBV will temporarily suspend further consideration of both accepted and new applications for establishment of VSCBs.

Economic conditions dictate further tightening up

Official Letter 7171 is considered to be a further measure of the SBV to tighten establishment and operation of the increasing number of domestic banks licensed over in recent years in order to ensure stability of Vietnam's banking system in the current economic climate. A similar decision was issued by Vietnam's State Securities Commission in April of this year in respect of fund management and securities companies, to limit the rapidly growing number of such companies.

Press reports have indicated that as of 31 July, the SBV had issued approvals-in-principle for the establishment of 10 VSCBs, the majority of which are investments of State-owned companies and corporations. All of these are now on hold. Vietnam TV has also recently reported that Petro Vietnam has pulled out from a plan to establish a new local bank in which it will hold a majority share, based on these developments.

Banking system

At the end of May 2008, Vietnam's credit institutions system consisted of five State-owned commercial banks (including Vietcombank converted into a shareholding company), six joint venture banks, 36 VSCBs, 44 branches of foreign banks, 10 finance companies, 13 finance leasing companies and 998 local people's credit funds.

Official Letter 7171 has placed investors in new VSCBs between 'the devil and the deep blue sea'. They have spent time, effort and capital in laying the infrastructure, technology and staffing (some are reported to have employed more than 100 staff) groundwork for the launch of their new banks. So pulling out now will come at some cost. But holding on while the new criteria are being developed is also not a viable alternative, as the invested capital can be tied up indefinitely, pending the issuance of new regulations. Moreover, when the new regulations are finally issued, the investors will be required to adjust their applications to the new criteria, which will further delay the establishment process.

Larger economic issues paramount

As Official Letter 7171 appears to have been issued by the Prime Minister's office to address the larger economic situation in Vietnam, new VSCBs will likely have to bear the brunt of things for a while longer.

1.2 Construction safety – Vietnam oxymoron?

Decision No. 10/2008/QĐ-BXD dated 25 June 2008 of the Ministry of Construction promulgating regulations on conditions of capacity of contractors during execution of construction works or projects that have special requirement (*Decision 10*)

We have all seen construction sites which bear the sign 'An Toan la Het' (meaning 'Safety First'), while noting that the workers don't wear shoes or helmets. And we have read the newspaper reports about bridges and buildings collapsing while under construction.

In what appears to be a major step towards addressing these concerns, the Ministry of Construction has issued Decision 10 earlier this summer. Decision 10 specifies the 'conditions of capacity and experience of contractors when executing building works with special requirements'. We decipher what this means below.

'Conditions of capacity and experience of contractors'

Under Decision 10, contractors and their staff who execute certain building works are required to have 'sufficient specialised capacity' as well as 'proper experience'. Contractors must have participated in at least one building project with 'special requirements of the same or similar scale'. Their superintendent (or person in charge of technical matters) must have the appropriate university qualifications, ie a minimum of seven consecutive years experience in the execution of building works and prior experience on at least one project of the same or similar type. In addition, the senior technical officers on the project also need appropriate university or college qualifications and a minimum of two or four consecutive years of experience on the execution of building works.

Decision 10 requires further that the primary machinery and equipment used for projects with special requirements must have been tested and have satisfied certain technical and safety requirements.

What are 'building works with special requirements'?

Decision 10 defines 'building works with special requirements' as construction project works or items of works with 'complex technical features'. They include: foundation work using barret piles or bored piles; demolition of buildings having a height of ten metres or more; and installation of heavy equipment or facilities. They also include the following:

- construction of underground storeys;
- dams with a height above 25 metres;
- storage tanks and oil and gas pipelines;
- housing works of 20 storeys or more;
- construction projects in the form of a tower of a height of 50 metres or more;
- bridge works with the length of the main span being 100 meters or more;
- vault bridges of a height of 50 meters or more;
- bridges with piers of 30 meters height or more; and
- underground project works and offshore project works.

Responsibility of Investors and Contractors

Decision 10 requires investors to select qualified contractors and regularly supervise them during the course of construction. Execution of building works will be temporarily or permanently suspended, and the contractor is legally liable to the investor, if it fails to fully satisfy all of the conditions.

While admirable in its objective of attempting to improve the quality and safety of construction in Vietnam, the implementation of Decision 10 will be the test. Although the decision leaves significant gaps to be filled by subsequent laws and regulations, or by authorities on a case-by-



case basis, it is hoped that Decision 10 will provide a solid foundation for further improvements in the construction field.

1.3 Re-registration update

Law 60-2005/QH11 on Enterprises dated 29 November 2005 (LOE) and Decree 101-2006-ND-CP of the Government on re-registration, [and/or] conversion by enterprises with foreign invested capital and registration for replacement with Investment Certificates by Enterprises with foreign invested capital pursuant to LOE and Law on Investment dated 21 September 2006 (Decree 101)

Further to our continuing coverage of the topic of re-registration for foreign owned enterprises (FOEs) (see June edition of the VLU), the question of extension or abolishment of the 30 June 2008 deadline still hangs in the balance. Despite the authorities' earlier pronouncement that there would be no extension, there have been recent indications to the contrary.

In an interview held by the Voice of Vietnam Radio in mid of July, Pham Manh Dung, head of the legal department of the Ministry of Planning and Investment (MPI) noted that the MPI was in fact proposing to either extend or abolish the deadline for re-registration of FOE. So what's going on? Will it be extended or not? Will it be done away with entirely? Can you extend a deadline that has already passed?

Extension would seem reasonable in light of the fact that only 2-3% of the nearly 6000 FOEs in Vietnam had re-registered through the first six months of 2008.

However, the official line on the subject has been that no extensions will be given.

He said, she said

Against this conflicted backdrop, we have contacted the MPI and both departments of planning and investment in Hanoi and Ho Chi Minh City. While an official in the MPI refused to answer directly whether the deadline would be extended, both Hanoi and Ho Chi Minh DPI confirmed that at this moment, the deadline of re-registration had come and gone without extension yet.

Questionable status

If this is the case, and there is no extension, it remains unclear how the vast majority of companies which have not re-registered should be regulated. Moreover it begs the question of why these companies have not re-registered. Are there good reasons for this?

A major reason for the lack of re-registration is that many companies anticipate no change to the capital or the scope of their projects, and they are content to let them 'run their course' under the old law and existing constitutive documents.

A second reason is that many FOEs are joint ventures, and they don't want to re-open their joint venture documents to renegotiation.

A third reason appears to be that many FOEs are 'scared' of the complication of the re-registration procedures. Procedures provided in decree seem simple, but the actual administrative procedures are perceived as obstacle for FOEs.

Another reason that can be considered as a fourth excuse for non re-registration is that a number of benefits that FOEs enjoy under old law do not appear clearly available under the new laws. Moreover, it is not clear to FOEs how Vietnam's accession to the WTO, and the new rules applicable there under will affect them. So they simply prefer to sit tight.

Good reasons for non-registration? Probably not. But so far, there is no negative consequence to such inaction. And there is still the possibility that the re-registration deadline will be extended, or the requirement done away with altogether. More information is needed from the MPI so that FOEs can make informed decisions on the re-registration issue.

1.4 Three years and 33 steps....just to *begin* the project?

How many steps does a construction project in Vietnam need to undergo before it can begin? And how long does each of those steps take or last?

The answer, according to a document distributed at a recent seminar organised by the Ministry of Construction (**MOC**) in cooperation with HCMC Real Estate Business Association, is an amazing three years and 33 procedural steps!

This may seem unbelievable (at least to construction neophytes in Vietnam!), but it is the fact, and it is grounded in the law. The negatives of this three year, 33-step procedure were the main subject of the real estate seminar.

Constructive recommendations

In the document handed out at the seminar, the MOC recommended that seven of 33 steps could be removed entirely, immediately reducing 274 days for a project to start. An additional eight steps should be improved or merged with some of the remaining steps, which would result in simplification of procedures and reduction of the workload, for the authorities as well as the investors, ultimately saving time and effort for all parties.

The standard procedure proposed by the MOC at the seminar for the start of a construction project would consist of only eight steps, with time reduced to approximately one year.

It is an unknown whether the MOC's proposal will make it through all the legislative steps necessary to make it a reality. In the meantime, investors and contractors in the construction sector must live with the current procedure and slog their way through all 33 steps to kick off their projects.

Our translation of the document distributed by the MOC at the seminar appears below:

Procedures and Documents	Body which Resolves the Step	Time-limit for resolution (in days)	Recommendations and proposals [for change]
1. Provision of information on zoning	Department of Architectural Planning (or Department of Construction)	12	Retain as is
2. Introduction of a location for the project (in a case where the investor does not yet have land)	Department of Architectural Planning	30, 60	Recommend that this step be merged into Step 1 on provision of information on zoning
3. Verification that the land boundaries are not subject to dispute or legal proceedings (in a case where the investor already has land)	Ward people's committee	73	Recommend repeal
4. Agreement from the local authorities (where the land is situated) on the location for the project	Commune or district people's committee	15	Recommend repeal
5. Determination of the landmarks being the boundaries for building, and of technical infrastructure data	Department of Architectural Planning and the Construction Zoning Institute	10, 30, 90	Recommend merge this step into Step 1 on provision of information on zoning
6. Approval to assign the investor to prepare detailed construction master planning on a scale of 1/2000	People's committee of the province or city	30, 45, 90	Retain as is
7. Evaluation of the task of detailed construction master planning on a scale of 1/2000 <i>(formulation and evaluation of the task)</i>	Department of Architectural Planning (or Department of Construction) <i>(State body and the investor)</i>	15 (365)	Update in accordance with new procedure
8. Approval of the task of construction detailed master planning on a scale of 1/2000	People's committee of the province or city <i>(State body and investor)</i>	15 (455)	Update in accordance with a new procedure

Procedures and Documents	Body which Resolves the Step	Time-limit for resolution (in days)	Recommendations and proposals [for change]
9. Evaluation of the plan for construction detailed master planning on a scale of 1/2000 <i>(preparation and evaluation of the plan)</i>	Department of Architectural Planning (or Department of Construction) <i>(State body and investor)</i>	15 (485)	Update in accordance with new procedure
10. Approval of the plan for construction detailed master planning on a scale of 1/2000	People's committee of the province or city <i>(State body and investor)</i>	15 (485)	Update in accordance with new procedure
11. Approval of the draft task of plan for construction detailed master planning on a scale of 1/500	Department of Architectural Planning (or Department of Construction)	55	Recommend repeal
12. Approval of formulation of the task of construction detailed master planning on a scale of 1/500	Department of Architectural Planning (or Department of Construction)	28	Recommend repeal
13. Approval of boundaries, of landmarks and of the area of the land block/s in order to formulate the construction detailed master planning on a scale of 1/500 and to formulate the project	Department of Architectural Planning (or Department of Construction) <i>(State body and investor)</i>	60 (170)	Recommend repeal
14. Approval of the boundaries of the land block/s in order to formulate the construction detailed master planning on a scale of 1/500 and to formulate the project in the locality where the land is situated	Urban district people's committee and/or rural district people's committee	13	Recommend repeal
15. Evaluation of the task of construction detailed master planning on a scale of 1/500	Department of Architectural Planning (or Department of Construction)	60	Update in accordance with new procedure
16. Approval of the task of construction detailed master planning on a scale of 1/500	People's committee of the city <i>(State body and investor)</i>	70 (970)	Update in accordance with new procedure
17. Evaluation of the plan for construction detailed master planning on a scale of 1/500	Department of Architectural Planning (or Department of Construction) and inter-branch departments <i>(State body and investor)</i>	60 (150)	Update in accordance with new procedure
18. Approval of the plan for construction detailed master planning on a scale of 1/500	People's committee of the city (or urban district) <i>(State body and investor)</i>	[blank] (122)	Update in accordance with new procedure
19. Evaluation and approval of Environmental Impact Assessment Report	Department of Natural Resources and Environment shall preside over a joint branch Evaluation Council People's committee of the province or city to approve	45, 30	Recommend merge this step into Step 18 to avoid detailed master planning on the two scales of 1/2000 and 1/500 respectively
20. Assign investor to the project	People's committee of the province or city <i>(State body and investor)</i>	37 (240)	Retain as is
21. Procedures for registration and issuance of investment certificate	People's committee of the province or city <i>(State body and investor)</i>	37, 30 (330)	Recommend repeal this step for domestic investment projects
22. Approval of overall plan for proposed compensation and assistance for site clearance and notification of land recovery	Urban district people's committee and/or rural district people's committee	15, 60	Recommend improve/update this to reduce procedures and time
23. Decision on land allocation or land lease	People's committee of the province or city	30	Recommend improve/update this to reduce procedures and time
24. Survey and preparation of cadastral file serving the work of land recovery and compensation for site clearance	[blank]	30, 60	Recommend improve/update this to reduce procedures and time
25. Survey and staking out boundary landmarks	Department of Natural	30, 120	Recommend

Procedures and Documents	Body which Resolves the Step	Time-limit for resolution (in days)	Recommendations and proposals [for change]
servicing site clearance and handover of the project landmarks	Resources and Environment		improve/update this to reduce procedures and time
26. Agreements with specialized branches, and on power and water supply	Local specialized branch management body/bodies, enterprise/s conducting services business	30, 60	Recommend merge this step into Step 18
27. Procedures on permissible clearance heights	Ministry of Defence	30	Recommend merge this step into Step 18 to avoid extra procedures on reaching agreement for each building works
28. Procedures on fire fighting and prevention	Ministry of Public Security	30	Recommend merge this step into Step 18
29. Agreement on architecture	Department of Architectural Planning	60	Recommend merge into Step 18
30. Evaluation of preliminary design	Department of Construction or Ministry of Construction	30, 60	Recommend merge into Step 18
31. Issuance of construction permit	Department of Construction	30	Recommend repeal because building works of an urban zone project, residential zone project or IZ project which have approved construction master planning are exempt from a construction permit
32. The work of site clearance - The urban and/or rural district together with the investor shall establish a Council in order to implement compensation for site clearance - The investor to hire a land fund development centre to conduct this	Investor + Urban district people's committee and/or rural district people's committee (or Land Fund Development Centre)	90, 180, 730	[blank]
33. Completion of the design file and commencement of the building works	Investor		

1.5 Proposed key reforms to toughen securities business licenses

Vietnam's stock market 'connection' continues. A number of measures have recently been introduced by the Government to stabilise the market. The fluctuation band has been reduced to a low of 1% on the Ho Chi Minh City Stock Exchange (**Exchange**) which means share prices cannot move above or below 1% of the previous day closing price. The Government has also directed the State Capital Investment Corporation charged with managing the Government's investment portfolio of VND 7,548 billion to purchase stock on the Exchange.

Interestingly, the Government has targeted securities businesses (ie securities companies and funds management companies) with the Prime Minister directing the Ministry of Finance (**MOF**) to re-assess how securities business are licensed and make proposal to the Government on appropriate changes. The State Securities Commission (**SSC**) has also issued a decision that from 28 April 2008 it will not accept any application for a securities company or funds management company license until further notice. It is probably a fair policy given the saturation in the industry with 92 securities companies and 35 funds management companies currently licensed. It is rumoured that the large number of securities businesses have fuelled the volatility and instability in the market by creating unhealthy speculation.

To address this situation, the MOF has released draft reforms that propose to toughen the licensing of new securities businesses. The MOF and SSC are collecting expression of interests on these reforms. A summary of the key reforms are below.

No nominee arrangements

If the investor is an individual person, the source of the capital contribution in securities business must come from the investor and no other party. The investors must prove their source of income and ability to contribute the charter capital.

Only quality investors welcome

Any corporate investor in a securities business must be operating for a minimum of five years and must have minimum charter capital of VND300 billion.

- If the securities business is established in the form of a single member limited liability company, the investor must be a credit institution or insurance company established under the relevant laws.
- If the securities is established in the form of a multiple member limited liability company or shareholding company, at least one of the investors must be a credit institution or insurance company established pursuant to relevant law and such investor must hold at least 30% of the charter capital of the securities business.
- A corporate investor must have made profit over the last two consecutive years.
- Founding shareholders must together hold at least 65% of the charter capital and may not transfer for a period of three years unless the transfer is to other founding shareholders.

The proposal to allow 100% foreign-owned funds management companies is also on the table. However, it is not known whether this proposal will become a reality given this will be an early implementation of Vietnam's WTO commitments which is generally not a policy objective of the Government.

Details of the proposed reforms may be accessed on the website of the State Securities Commission at www.ssc.gov.vn

Part 2 Feature

ENFORCEMENT OF INTERNATIONAL ARBITRATION AWARDS IN VIETNAM

As the level of international commercial activity increases in Vietnam, so does the potential for disputes between local and international companies and investors. Traditionally, most foreign parties who enter into contracts covering commercial activities within Vietnam make provision for the resolution of disputes through arbitration conducted outside of Vietnam with the aim of enforcing the foreign award within Vietnam. This route is viewed as preferable to resort to the courts in Vietnam, but it not be as reliable or as 'failsafe' as investors believe.

This month's VLU Feature article takes a candid look at Vietnam's treatment of international arbitral awards, as the legal system and laws have evolved.

What Vietnam has and has not signed on to

In 1995, Vietnam acceded to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1959 (***New York Convention***).

Two reservations

In acceding to the New York Convention, Vietnam made two reservations. The first reservation permitted Vietnam to restrict the enforcement of international arbitral awards only to such awards involving a 'commercial dispute'. The scope of this term has been the subject of debate in Vietnam and was given a very narrow interpretation by Vietnam's Court of Appeal in *Tyco Services Singapore Pty Ltd v Leighton contractors (VN) Ltd*, Judgment No. 02/PTDS, 21 January 2003, Court of Appeal of the Supreme People's Court of Vietnam in Ho Chi Minh City (***Tyco***). However, this case was decided prior to the adoption of more recent legislation, including Vietnam's new Commercial Law of 1 January 2006 (***Commercial Law***), which now provides an expansive definition of commercial activities. Currently however there is no published precedent or indication of how a court would interpret 'commercial dispute' in the context of the current, broader Commercial Law.

The second reservation made by Vietnam in acceding to the New York Convention was that of reciprocity: Vietnam would recognize enforcement of foreign arbitral awards in Vietnam from countries not parties to the New York Convention only if those countries similarly recognized enforcement of arbitral awards from Vietnam.

On 15 September 1995, Vietnam codified its treaty commitment in domestic legislation by enacting the Ordinance on Recognition and Enforcement of Foreign Arbitral Awards (***the Ordinance***). In adopting the Ordinance, the provisions and reservations agreed in the New York convention, with one exception, were restated without any significant changes. Article V of the New York Convention set out a list of defences that might apply to enforcement of an arbitral award. One of those defences provided that an award would not have to be enforced if its enforcement would 'violate the public policy of the enforcing country'. Vietnam altered that defence by expanding the Ordinance to encompass the 'basic principles of the laws of Vietnam'. This so-called public policy exception to enforcement is rarely applied by most countries and, when it is, it is only in the context of the enforcement itself, not generally in relation to the facts of the underlying dispute. Unfortunately, this has not been the history of such defence in Vietnam.

In the case of *Tyco* mentioned above, one of the ancillary reasons given by Vietnam's Court of Appeal for overturning the lower court's order to enforce the foreign arbitral award, was that in the underlying facts, there were two issues that violated Vietnam's basic principles of law: (1) the construction contract, which was the subject of the dispute, was determined by the court to be invalid because the contractor in this case had failed to obtain the requisite construction permit; and (2) the same construction contract contained a provision obviating *Tyco's* Vietnam tax requirements.



Vietnam appears to have overextended its application of this defence by reviewing the factual elements of the dispute itself. In this context, the subject matter of the dispute upon which an arbitral award is made must conform in all respects with the laws and regulations of Vietnam in order to ensure its enforcement by a competent court in Vietnam. Otherwise, a Vietnamese court may refuse to enforce an international award on very technical grounds, or for a breach of a law that is merely incidental to a contract.

On 1 January 2005, Vietnam enacted a new Code of Civil Procedure (**the Code**) which repealed, among other legislation, the Ordinance. Article 342(2) of the Code defines foreign arbitral awards governed by it as

"Awards rendered outside Vietnamese territory or rendered inside Vietnamese territory by foreign arbitrators selected by the agreement of the parties to resolve disputes arising from legal business, commercial or labour relationships."

Moreover, under the Code, as with the Ordinance that preceded it, a decision of a competent court in Vietnam is required in order to enforce a foreign arbitral award in Vietnam. The scope of arbitration appears to extend to include 'business' and 'labour' disputes as opposed to only 'commercial' disputes; however it is unclear whether the courts will interpret this expansion as falling within the scope of the 'commercial dispute' reservation to the New York Convention.

Unfortunately, the Code retains the same enforcement defence language ('contrary to the basic principles of the laws of Vietnam') that had been set out in the Ordinance. Hence, the Tyco reasoning on this issue may still prevail, with courts continuing to refuse enforcement of international awards for highly technical reasons.

Domestic Arbitration

In 2003, Vietnam enacted the Ordinance on Commercial Arbitration (**2003 Arbitration Ordinance**) to address domestic arbitration. It is much broader in scope than previous laws concerning domestic arbitration and provides an expansive definition of commercial activities. It also provides an improved and effective mechanism for the enforcement of awards and the grounds for setting aside an award. Foreign parties and Vietnamese parties in dispute have the flexibility to appoint foreign arbitrators, conduct the proceedings overseas and use foreign rules of procedure. Importantly domestic awards are enforceable in the same way as court judgments; they do not have to be recognised and enforced by the courts. However, the 2003 Arbitration Ordinance limits the autonomy of parties by reserving significant powers to the Vietnamese courts. A court may intervene to appoint a chairman of the arbitration tribunal or to rule that the tribunal does not have jurisdiction. The courts also retain all powers regarding interim relief to the parties. Consequently, a domestic arbitration proceeding could meet with considerable interference from a local court.

Time

As with most cases where authorities in Vietnam are involved, one may expect a certain amount of delay in enforcing an award via the court system. Unfortunately, as there are so few instances of enforcing international arbitral awards in Vietnam, it is not possible to accurately gauge the timing required to complete the enforcement process. Further, as has been shown in the Tyco case, there is the potential for enforcement to be subject to further review by a higher court.

Lack of Precedent

To date there have been very few instances of enforcement of international awards in Vietnam – successful or not. In April 2001, the Court of Lam Dong Province recognized an arbitral award on the basis that it conformed to international practices. In that case, Vietnam Sericulture Corporation v Kyunggo Silk Coy, the arbitrators in a proceeding in Geneva, Switzerland issued an arbitral award of USD425,900 to be paid to Kyunggo Silk Coy. Although a Vietnamese court made a decision formally recognizing and enforcing the award, there is no information available as to whether the award amount was ever paid.

Conclusion

Arbitration, both international and domestic, is not yet a popular choice for dispute settlement in Vietnam. While international arbitration is more likely to lead to a fair outcome, the award may be difficult to enforce. It appears that Vietnamese courts take a more active role in reviewing the merits and facts of such awards rather than simply recognizing the award and enforcing it. In the past, the relevant laws may have left foreign investors with little confidence that such awards would be enforced in Vietnam. In the last few years, the enactment of new legislation may have helped to assuage some concerns, but without any more recent cases to rely upon, it is difficult to accurately assess the potential outcome for enforcement of such awards. On the other hand, while domestic awards are, at least in theory, enforceable, there are risks that the level of permissible court interference may thwart the arbitral proceeding.

If and when arbitration becomes a feasible option for commercial dispute resolution in Vietnam remains to be seen. In the interim, parties should be thinking laterally about any available means of redress. Questions such as: does the other side have offshore assets located in a jurisdiction more inclined to enforce international awards? Can the dispute be resolved at least to some extent between the parties without third party intervention? Should the aggrieved party just cut its losses and move on? Are all relevant.

In the final analysis, a pragmatic compromise may bear more fruit for parties to a commercial dispute than the pursuit of justice through arbitral or legal means.

Part 3 Did You Know?

3.1 Shorter shelf-life for service sector

When a company is incorporated (or to use the Vietnamese expression, 'established') in Vietnam, it will have an indefinite life, but the 'project' or 'business' for which it has been established will be officially approved for a limited duration only. As a matter of law, the duration for which a project may be approved may be up to 50 years in most cases, or 70 years in special cases.

Less for service businesses

This notwithstanding, licensing authorities are generally prepared to approve service businesses (eg project managers and architects) for shorter durations, the general rule having somehow settled on 20 years. The rationale for this seems to be that 20 (or so) years should be 'enough time' for an investor to make a sufficient return on investment. The authorities sometimes also wish to preserve the right not to renew the business approval, which they can do for any reason whatsoever. So 20 years is granted, and the investor *might* get another 20 (or so) years.

Change of mindset called for

This mindset clearly fails to acknowledge the considerable risk to an investor of establishing a business in Vietnam, and building up its goodwill, only to be 'short-changed' in terms of licensing, or subject to an arbitrary re-evaluation process after a relatively short period of time. Why shouldn't service sector investors be offered the same 'life' as other investment sectors?

3.2 Beware the generosity of authorities

If something appears too good to be true, it generally is. International investors should be mindful of this wise adage when considering any tax incentives granted to a project by a government authority. While the extent of any tax incentive on a project is determined by the relevant authority and not by the investor, it is the investor who will pay the price if the State later determines that the local authority was too generous with the incentive it offered (which, in some cases, may have been key to the investor's decision to locate in that province).

Target provinces

Investigative authorities are currently hot on the trail of several international enterprises with projects or businesses in Binh Duong and Dong Nai Provinces, and to date, four of these enterprises have been found to be reaping the benefits of overly generous tax incentives. Hapless investors found to be paying too little tax now face a very hefty repayment bill to the State, with no recourse to the authorities that granted the incentives.

Fair?

This strange (one ordinarily would not question the authority of a government official to grant the incentives and other matters relevant to a project, right?), and seemingly unfair, situation suggests that investors need to possess a complete and thorough command of the tax laws in Vietnam before negotiating with local authorities regarding the incentives they seek, and are ultimately granted. This, in turn, suggests that the investor should spend sufficient time coming to grips with the Vietnamese tax laws, or that he or she should hire a lawyer to advise as to the efficacy and validity of the tax incentive granted. Not exactly the kind of thing one would expect to need a lawyer for, but to be safe, someone on the investor's side needs to know the tax laws...especially in Binh Duong and Dong Nai, it seems.

3.3 Membership at a cost

We are familiar with many benefits accorded Vietnam by virtue of its accession to the WTO. But are there downsides to WTO membership? As reported recently in the Vietnam Economic Times, the answer is sometimes 'yes'.

Sony exit

Late last month, Japanese electronics giant Sony Corporation announced its plans to close its television assembly plant at the end of September. With the closure will come the loss of 200 jobs.

The plant, located in Ho Chi Minh City, has been producing television sets for Vietnam's domestic market since 1994. However, a Sony spokesperson said that sales of their TVs in Vietnam have dropped off in recent years, with the demand possibly covered by shipments from Sony plants in Malaysia and Thailand.

Vietnam's acceptance into the WTO last November has helped ease trade barriers here, as Vietnam transitions from a socialist economy to one implementing free-market reforms. What goes along with this is the opening up of the market to products made abroad, and an end to some practices and laws which favour Vietnam-made products. This is good for consumers, who now have a choice. On the flipside, however, it has hurt investors (foreign and domestic) who manufacture products for local sale. Sony is such an investor, and its decision to pull out of Vietnam is a loss – both in terms of jobs and in terms of a reputable investor.

Joining the WTO, and development generally, and, indeed carry costs for Vietnam in the short term. Fortunately, however, the benefits are hoped to outweigh the costs in the end.

3.4 Continuing saga of foreign investment in Vietnamese companies

Under Decree 139 implementing the Law on Enterprises (**LOE**) and the Law on Investment, foreign investors are entitled to contribute capital and to purchase shares at an unrestricted level in Vietnamese enterprises, except for the certain cases (eg listed companies, companies in specific industries, equitised State owned companies and companies in WTO committed sectors).

Law versus practice

In practice, however the local departments of planning and investment (**DPI**) are reluctant to register foreign ownership in Vietnamese companies in accordance with the decree provision. It normally takes months for the authorities to respond to an application file for registration of foreign ownership, and it seems that a straightforward procedure for registration of foreign ownership in Vietnamese companies is still to be developed by the DPI.

Inability to register

Article 86.4 of the LOE requires companies to register with the licensing authorities (not simply send notification of) shareholders owning 5% or more of the shares of the enterprise. Failure to complete this registration formality may result in an administrative fine for the company. However, it appears that currently some DPIs are only prepared to receive registration notices from companies and do not issue any confirmation/acknowledgement to the companies of such notices. As such, the companies do not have any evidence of their compliance with the above registration requirement, and run the risk of being fined.

Registration of foreign ownership in Vietnamese companies is conducted at the Business Registration Division of the local DPI, which in the past dealt only with investment by Vietnamese individual and companies. Predictably, it seems that this division is less familiar with regulations on foreign investment than the Foreign Investment Division of the DPI. As a result, the situation can arise where foreign investors can easily establish a 100% company at the Foreign Investment Division but cannot register any interest in a Vietnamese company at the Business Registration Division in the same sector.

Better ways to get in?

Some foreign companies would expect the M&A route to provide a simpler means establishing their business presence in Vietnam. However, given the current difficulties in registering foreign ownership in Vietnamese companies, investors often find it more straightforward to create a new joint venture with a Vietnamese partner rather than buying into such partner.

3.5 Record keeping for companies established in Vietnam

Companies which are established in Vietnam are generally required to maintain and retain the following books and documents:

- (i) The Company Charter (including any amendments), regulations on company management and a register of members or shareholders;
- (ii) Any certificates and licences relating to the business of the company, including registration and certification of asset ownership;
- (iii) Minutes of meetings of members or management and any other records of company decisions;
- (iv) The Prospectus for issue of securities, if any;
- (v) Reports of the Inspection Committee or independent auditing organisations; and
- (vi) Accounting records including vouchers, accounting books and financial reports.

The law does not specify how long documentation in (a) to (e) is to be retained. Presumably it would be prudent to retain all such documentation for the life of the company, and a reasonable period thereafter, as it provides a complete and accurate record of the establishment, progress and evolution of the company.

Special rules for accounting records

However, Decree 129/2004/ND-CP dated 31 May 2004 (Decree 129) specifically contemplates the archiving and duration for retention of accounting records. All accounting data must be archived for a minimum of five years from the end of the annual accounting period or from the date upon which work is work is finalised, whichever is more appropriate in the circumstances.

General accounting data - including but not limited to receipt slips, payment slips and warehouse entry and exit slips, which are not used directly to post entries in accounting books or financial reports – must be archived for a minimum of five years from the end of the annual accounting.

Accounting data posted directly into the accounting books or used in any financial, auditing or inspection reports as well as documents relating to the liquidation of fixed assets must all be archived for a minimum of 10 years from the end of the annual accounting period. Third party accounting documents, such as those belonging to an investor or created during an audit by an independent auditing organisation, must be retained for a minimum of 10 years from the date on which the report is finalised or the work ends. Any accounting data relating to the evolution of the Company – for example, the establishment, merger, conversion, or termination of the Company – must also be retained for a minimum of 10 years.

Companies must also be mindful of any other laws pertaining to their particular businesses which may regulate the retention and archiving of accounting records for longer periods.

Any accounting data which forms an historical record or has national significance must be permanently archived. Documents which fall within this category are determined by the legal representative of the company on a case by case basis.

Once the relevant period of retention has expired for accounting documents, they may be destroyed as directed by the legal representative of the company.

Are e-files acceptable?

In this enlightened age of environmental friendliness and cyber efficiency it is worth pondering if the current law accommodates or even contemplates electronic archiving of accounting data, if only to reduce storage requirements. Article 33 of Decree 129 does provide for the electronic archiving of electronic vouchers; however, the vouchers must be also printed out and stored as hard copies. For the time being, then, it seem that the trees will not be spared.

Part 4 What's New Online?

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 3,500 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, and also printed and downloaded (subject to terms and conditions).

Laws recently uploaded on the Vietnam Laws Online Database include the following:

- ➔ Ordinance 34 on grassroots democracy, 20 April 2007
- ➔ Decision 100 on accreditation of valuers to conduct valuations of enterprises undergoing equitization, 6 December 2007
- ➔ Decision 916 on customs monitoring of import and/or export goods on request by intellectual property rights holders who suspect such goods are counterfeit, have false brand names or otherwise breach IPR, 31 March
- ➔ Decision 352 transferring Government bond trading to the Hanoi Securities Trading Centre, 16 May
- ➔ Directive 20 on strengthening management of the stock market, 23 June
- ➔ Decision 22 delegating authority to manage cosmetics business to the management committee of the Moc Bai border gate economic zone, 2 July (*****please note that we incorrectly stated the year of this law as 2007 in the July issue of the VLU; in fact, this is a 2008 law***)
- ➔ Decision 21 on foreign exchange agents, 11 July
- ➔ Circular 67 on environmental protection fees payable for mineral mining, 21 July
- ➔ Draft Law on high-tech, 25 July
- ➔ Decree 79 dated 4 October 2002 on finance companies as amended by Decree 81, 29 July
- ➔ Decree 80 amending registration fees, 29 July
- ➔ Joint Circular 05 on business, tax and seal registration pursuant to the Law on Enterprises, 29 July
- ➔ Draft 1 Decree on corporate income tax dated 22 March and still current as at 30 July
- ➔ Decision 014 dated 28 December 2007 on tariff quotas on import goods in year 2008, as amended 31 July
- ➔ Decision 24 applying import permits for cars and many other consumer goods for the rest of this year, 1 August
- ➔ Decision 64 increasing export duty from 10% to 20% on iron and non-alloy steel, 1 August
- ➔ Decision 67 reducing import rates for some milk, soya bean and chemical compound items, 5 August
- ➔ Draft amendments to Decree 14 dated 19 January 2007 on securities, 5 August
- ➔ Law 78 on tax management, 29 November 2006 of new shareholding commercial banks, 8 August
- ➔ Letter 7171 suspending licensing of new shareholding commercial banks, 8 August
- ➔ Decree 90 on anti-spam (junk email and text messages), 13 August
- ➔ Decision 1650 widening the securities trading band, 14 August
- ➔ Letter 1350 on establishment of 4 new industrial zones in Ha Nam province, 50k from Hanoi, 15 August

- ➔ Decree 91 on public announcement of results of audits conducted by the State Auditor, 18 August
- ➔ Notice confirming ratios of shareholding of foreign investors in Vietnamese commercial banks, 19 August
- ➔ Decision 30 suspending the need for export permits for iron and steel, 22 August
- ➔ Draft 2 Law on Special Sales Tax (now expected to take effect 1 April 2009 and with increased tax rates for alcohol, cars, betting and other businesses), 25 August
- ➔ Letter 5559 on management of golf course projects, 25 August

The list above is merely a recent snapshot of the wide range of new legislation now uploaded and available on Vietnam Laws Online through August 2008.

NEW search function for Vietnam Legal Update

We are pleased to advise that we have at last completed the merger of the prior Phillips Fox VLU database into the current Allens one. As such, readers may now find all back issues of the VLU from 1997 to the present, at www.vietnamlaws.com. There are two pages to the website's section on the VLU as follows:

- ➔ 'Monthly VLU' (for issues from April 2007)
- ➔ 'Monthly VLU archive' (for issues prior to April 2007, back to September 2007)



Part 5 Get To Know Us

In this issue of the Vietnam Legal Update, we continue with our feature spotlighting the hard-working lawyers from our two Vietnam offices. Our in country (Hanoi and Ho Chi Minh City offices) legal team hails from Australia, the United States, Finland and Vietnam, with our total number of lawyers now standing at 25.

Featured this month is Linh Bui, a lawyer in our Ho Chi Minh City office.



Linh is a qualified Vietnamese lawyer in our Ho Chi Minh City office. She returned to Ho Chi Minh City in 2004 after graduating from Moscow State University, and joined the firm (then Phillips Fox) in November 2005. Linh's areas of expertise include foreign investment, mergers and acquisitions, and corporate and commercial law. Linh will soon be seconded to our Singapore office for a two-month stint, and will be back with us in November.

In her free time, Linh enjoys reading and learning to cook.

Quote from the source: "After living abroad for years, I realised that there is no place better for me than Vietnam. I came back to be surprisingly amazed by our country's development. And now I am glad to be a part of it."