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part 1 – selected new legal instruments

1.1 Banks face new limits on their use of short-term capital funds

Circular 15-2009-TT-NHNN of the State Bank of Vietnam regulating maximum ratio of short-term capital funds permitted to be used by credit institutions to provide medium and long-term loans, dated 10 August 2009 (*Circular 15*)

Circular 15 introduces new limits on the use of short-term capital funds by credit institutions, including banks and finance companies. Specifically, commercial banks and the Central people's credit fund face a reduction in the ratio of short-term capital funds they are able to use in providing medium and long-term loans. The Circular replaces the previous regulations issued in 2005 with Decision 457 of the Governor of the State Bank of Vietnam, dated 19 April 2005 (***Decision 457***).

What are 'short-term capital funds' and 'medium and long-term loans'?

Relevantly, Circular 15 defines 'short-term capital funds' as capital funds with a residual term of up to 12 months. The types of short-term capital funds which may be used to provide medium and long-term loans are:

- on-call deposits and fixed term deposits from organisations (including other credit institutions) and from individuals;
- on-call savings deposits and fixed term savings deposits from individuals;
- capital funds raised in the form of issuance of valuable papers; and
- loans borrowed from other credit institutions, except for loans on the inter-bank market.

In turn, 'medium and long-term loans' means loans and finance leasing with a loan term of above 12 months.

Lower limits for some

Under Circular 15, the maximum ratio of short-term capital funds which each type of credit institution can use to provide medium and long-term loans are:

- for commercial banks: 30% (down from 40% under Decision 457);
- for finance companies and finance leasing companies: 30% (unchanged); and
- for the Central people's credit fund: 20% (down from 30% under Decision 457).



Circular 15 also expressly provides that credit institutions should use their capital funds to provide medium and long-term loans in a specified sequence, using medium and long-term capital funds first, followed by short-term capital funds.

Implementation

Circular 15 will take effect on 25 September 2009 and from that date, each credit institution will not be able to use short-term capital funds for new medium and long term lending if its ratio is already higher than the (new) maximum ratio.

Given the lower limits for some, the Circular also contains transition provisions. All credit institutions are required to take measures to ensure their compliance with the new maximum ratios by 1 January 2010.

1.2 An update on capital accounts

Decision 88/2009/ND-CP on Capital Contribution and Share Purchase of Foreigners in Vietnam, dated 18 June 2009 (*Decision 88*)

Regular readers will recall that our June VLU looked at Decision 88, new regulations governing capital contribution and purchase of shares by foreign investors. The regulations, which took effect from 15 August, provided clarity in some areas but arguably more confusion in others. As noted at that time, one of the significant uncertainties raised by the Regulations concerns the requirements relating to the use of on-shore investment capital accounts in the investment process.

It is not a new requirement for investors investing in Vietnam to open a capital account at a licensed bank in Vietnam through which they must effect their equity investments. Such requirements have historically formed part of Vietnam's foreign exchange control regime and the purpose of a capital account in Vietnam is quite clear – to monitor and track foreign exchange flows. However, such controls should be balanced with the need for efficiency of foreign investment and in a manner that facilitates investment rather than imposing impractical controls.

As noted back in June, on one interpretation Decision 88 suggests that all equity investments, whether the shares or capital relate to a listed company, public company, shareholding company or limited liability company and whether the transaction is a contribution to the company or a transfer between members, must be effected through a capital account. Moreover, Decision 88 also requires that if the capital or share transfer is conducted using foreign currency, then the foreign currency must be converted into Vietnamese dong, creating an exposure to foreign exchange fluctuation for the parties.

Regulation of capital accounts prior to Decision 88

Under the existing rules (prior to Decision 88), any transfer of or subscription for shares of public companies (including listed companies) requires a capital account as well as a securities trading code. Further, there was also a requirement that the capital account be registered with the State Bank of Vietnam (**SBV**). In addition, any equity investment in a wholly Vietnamese owned company required the foreign investor to open a capital contribution account and register that account with the SBV.

Making arrangements in advance for the opening of this capital contribution is important. Often foreign investors would leave this seemingly administrative step to the last minute and end up finding that their deals had to be delayed for 2 to 3 weeks while preparing an application and obtaining registration of the account with the SBV.

Key uncertainties in the regulation of foreign exchange in equity investments

The introduction of the requirements in Decision 88 raises three key uncertainties in the foreign exchange control and capital account regime as it relates to equity investments.

The first uncertainty, averted to in our June issue, concerns share or capital transfers of non-public companies that occur between two foreigners. Currently payment for this type of transaction would occur entirely offshore. However, as discussed above, Decision 88 appears to require that payment for such transfers be brought onshore via a capital account opened at a Vietnamese bank. We understand that there is some disagreement among the Ministry of Finance, Ministry of Planning and Investment and SBV on how Decision 88 should apply to share or capital transfers between foreigners. Given this uncertainty, the conservative approach would be to effect any such transactions through a capital account in Vietnam in order to avoid any future complications on the part of the purchaser when, for example, the investee company remits profits or the purchaser wishes to take offshore cash from the future sale of the shares or capital.

The second uncertainty relates to the requirement to register the capital account with the SBV. The regulation that prescribes this registration requirement arguably regulates only investments in wholly owned Vietnamese enterprises, leaving unclear the position for capital accounts used for investments in foreign invested enterprises. Again, to ward off potential future issues with the SBV, it may be wise to register the capital account despite the gap in the regulation. The good news on this point is that current draft regulations propose to remove the SBV registration requirement entirely.

The third uncertainty arises in relation to foreign investment in instruments that allow the conversion of debt to equity, for example a convertible loan or convertible bond. When the convertible instrument is issued it takes the form of a debt. Accordingly, if the term of the loan is 12 months or more, a foreign lender will be required to register the loan with the SBV. There is no requirement for the foreign lender to open a capital account for this purpose, although the borrower will need to have a capital account of a different sort to receive the funds. However, on conversion (when the foreign lender becomes an equity interest holder), it is unclear whether the lender (now an equity investor) is required to open a capital account. Again, the conservative view would presume that the foreign interest holder would need to open an account to receive dividends and other distributions resulting from its equity ownership.

1.3 Welcome details on PIT exemptions

Circular 160-2009-TT-BTC of the Ministry of Finance guiding year 2009 personal income tax exemption pursuant to Resolution 32-2009-QH12 of the National Assembly, dated 12 August 2009 (*Circular 160*)

Likely to be one of 2009's most welcome pieces of legislation, Circular 160 provides additional guidance on personal income tax (*PIT*) exemptions for 2009. The Circular provides necessary details on the implementation of the exemptions confirmed by the National Assembly in their June resolution, as previously reported in the June 2009 issue of the VLU.

The nitty-gritty of the exemptions

The Circular confirms that income derived from business, salaries (including benefits such as uniform and travel allowances), inheritance and gifts arising during the period from 1 January 2009 to 30 June 2009 is exempt from PIT. Circular 160 clarifies that this exemption applies only if the income is paid before 31 December 2009. The Circular also clarifies that 50% of annual bonuses for 2009 paid before 31 December 2009 will also be exempt from PIT.

Circular 160 provides further relief in that income from salaries for 2008 which were paid in the exemption period (ie 1 January 2009 to 30 June 2009) will also be exempt from PIT.

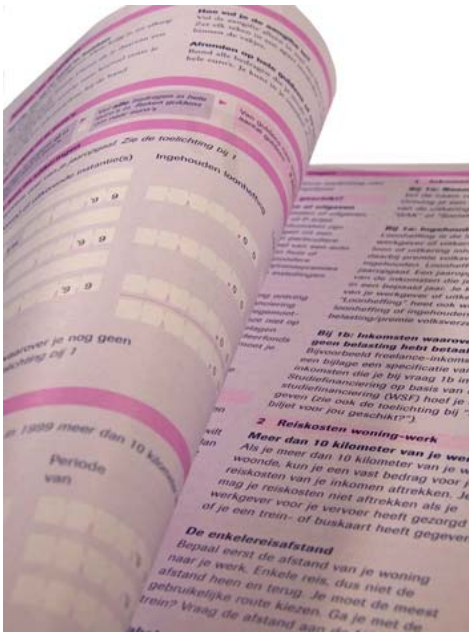
Circular 160 also confirms that income derived from investment, transfers of property (including share transfers), copyright and franchising arising during the whole of 2009 will be exempt from PIT.



In respect of income in the form of dividends, loan interest, property transfers, copyright and franchising, in order to attract the exemption, the income must arise during the 2009 calendar year and must be actually paid by no later than 30 June 2010. Even capital gains made through capital contribution to a company which arise during 2009 are exempt from PIT if they are realised and paid before this deadline – although it may be difficult to determine the capital gain arising during this 12 month period in isolation.

Tax declarations and finalisations

Circular 160 also deals with PIT declarations and finalisation for 2009. Under the Circular, a resident individual with income from business or salaries is not required to conduct tax finalisation for 2009 unless the tax payer is requesting a PIT refund or offset in the following period or the amount of PIT payable for the period from 1 July 2009 to 31 December 2009 is more than the PIT withheld.



In the case of income in the form of salaries and benefits, only that received for the period 1 July to 31 December 2009 needs to be declared. It was previously thought that the tax department may have required the average income for the year to be declared and that this would form the basis for PIT calculation.

The Circular also permits taxpayers to 'average out' their deductible expenses by sanctioning deduction against income for the period from 1 July to 31 December 2009 of 50% of any yearly lump sum social and medical insurance premiums, compulsory professional indemnity insurance premiums and insurance premiums paid in 2009. Similar apportionment applies to deductions for family dependents.

For income-paying entities, no tax declaration and finalisation for 2009 is required from entities which have paid out income from investments, property transfers, copyright and franchises. Those entities which pay out income from salary and wages are only required to conduct tax finalisation of income and tax amounts withheld and which accrue from 1 July to 31 December 2009.

1.4 Unified advertising regulations for Ho Chi Minh City

Decision 39-2009-QD-UBND of the Ho Chi Minh City People's Committee promulgating regulations on advertising activities in Ho Chi Minh City, dated 5 June 2009 (*Decision 39*)

Decision 39, which took effect on 15 June 2009 and replaced a 2002 decision, is an attempt by the Ho Chi Minh City People's Committee to consolidate the regulations on advertising in the city. The consolidated regulations cover everything from prohibited types of advertising to rules on advertising licensing and the format and duration of permitted advertisements. The regulations cover a wide variety of advertising forms including outdoor advertising, advertising on objects and through commercial promoters or at cultural events and advertising in newspapers, on radio and television as well as on goods.

We now take a quick look at the main regulations covered in Decision 39.



Prohibited forms of advertising

In addition to the usual prohibitions on advertising which violates the 'historical tradition, culture, ethics or fine customs of the Vietnamese nation' and fraudulent advertising, Decision 39 also prohibits 'advertising which causes a bad effect on urban beauty, the landscape, the environment, and traffic safety and order'. Examples of this type of advertising given in the regulations include 'advertising using means of transportation carrying people' (such as advertising on public buses) and 'using mannequins displaying lingerie, personal hygiene products or nappies in public places or in the frontage of trading places'.

Licensing

Under Decision 39 the majority of advertising activities require an advertising permit issued by the Department of Culture, Sport and Tourism (**DCST**). Permits are to be issued in accordance with the advertising master plan of Ho Chi Minh City, approved by the HCMC People's Committee.

Some forms of advertisement, however, do not require permits including:

- advertising on sunshades, trolleys, containers, eaves, strings of flags, clothes, hats, bags, gifts and packing; and
- name boards (signage) at trading premises, provided that they comply with specified size restrictions and each trading premises has only one name board.



Even though no permit is required, such advertisements must still comply with the requirements of the Law on Advertising.

Decision 39 prescribes the requisite documents for an application for an advertising permit which, controversially, include some commercially sensitive materials such as, where relevant, a copy of the advertising services contract or contract for lease of advertising means.

Importantly, Decision 39 also requires that any organization or individual conducting advertising services in other provinces and cities who wishes to conduct advertising activities in Ho Chi Minh City must obtain a registration certificate for a branch operating in Ho Chi Minh City issued by the Department of Planning and Investment of Ho Chi Minh City.

Advertising screens

Decision 39 sets out detailed requirements (such as location, size, distance etc) for advertising boards and illuminated boxes located on roadsides. Detailed regulation also covers advertising screens and televisions, which must not affect traffic and must be approved by the Department of Science and Technology.

Specific content requirements for the materials shown on such screens are also prescribed. All sub-titles must be in Vietnamese and while telecasting of text in foreign languages is permitted, the Vietnamese text must be telecast first and in a larger font than the foreign text. Decision 39 also requires that 20% of the telecast period on advertising screens and televisions must be reserved for political, economic or socio-economic information provided by the DCST.

More changes to come?

The Decision has not been without controversy. According to reports in local newspapers, the Ministry of Culture, Sports and Tourism (**MCST**) has queried whether some aspects of the new regulations are consistent with prevailing advertising rules. It was also suggested that the HCMC People's Committee did not adequately consult with the MCST before issuing the regulations. In particular, the decision to prohibit advertising on public buses (a source of significant revenue in other locations) has been questioned. This has been an ongoing issue in Ho Chi Minh City for some time and it remains to be seen whether the HCMC People's Committee make any amendments to Decision 39 in response to the criticism.

1.5 Further land regulation changes

Decree 69-2009-ND-CP of the Government providing additional regulations on land use zoning, land price, land recovery compensation, assistance and resettlement, dated 13 August 2009 (Decree 69)

In addition to the land title changes discussed in the July VLU, Decree 69 provides further changes to land regulation which will take effect from 1 October 2009. We discuss below some of the more important changes of particular interest to foreign investors.

Higher land rentals

Under the new regulations, it is likely that land rental payable for lease of land from the State will increase. The standard rate of annual land rental will be set by the authorities in the range from 0.5% to 2% of the official land price (**OLP**) published annually by the provincial people's committee. By comparison, under current regulations the standard rate is only 0.5% of the OLP, with only those sites that bring particularly good benefits for the developer being subject to a higher rate which cannot exceed 2% of the OLP. In addition, under the new regulations the provincial people's committee will be permitted to increase the OLP on an ad hoc basis to ensure that it is close to the market price.

Another change is that foreign invested developers wishing to pay land rental in a one-off payment will be required to pay an amount equal to that of land use fee payable to the State by a local developer for the same purpose and duration of land use. Currently, local developers of commercial (not residential) land pay a one-off land use fee to the State the amount of which depends on the duration of land use, for example a payment of 76% of the OLP for a 50 year land use term and 100% for a 70 year term. By comparison, currently a foreign invested developer paying one-off land rental pays an amount calculated by reference to the annual fee paid by a developer paying rent annually.

To exemplify the difference, if the annual land rental for a piece of land is determined by the relevant authority to be 0.5% of the OLP and the land duration is 50 years, under the current rules the foreign invested developer would pay a lump sum equal to 25% of the OLP. However, under the new rules from 1 October 2009, they will pay a lump sum equal to 76% of the OLP.

It seems that the purpose of this new calculation is to rectify the unequal treatment between local and foreign invested developers in terms of their financial obligations to the State. Of course, despite this new consistency in financial obligations, the manner in which local and foreign invested developers use land continues to differ. Local developers may use land in the form of either:

- land allocation from the State with one-off payment of land use fee; or
- land leased from the State with annual payment of land rental.

In contrast, foreign invested developer may only lease land from the State (they cannot be allocated land), although they have a choice to pay land rental either:

- annually; or
- fully in advance (one-off payment).

Despite these differences, land allocation from the State with one-off payment of land use fee and land leased from the State with one-off payment of land rental give the land user similar rights including transfer, lease/sublease, mortgage, capital contribution of land use rights.

Also, for the first time Decree 69 also provides a rental rate for independent underground projects, being not more than 30% of the land rental of the land surface.

Limited deduction of land clearance costs

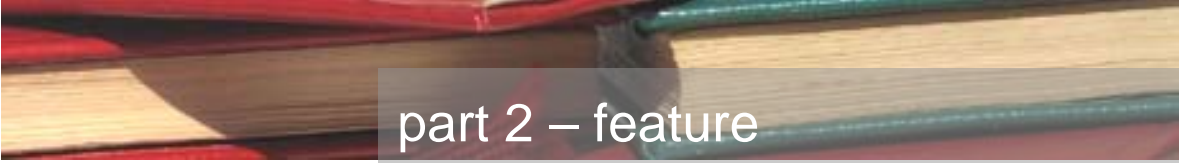
Decree 69 emphasizes that land clearance costs will be deducted against land rental only where the compensation plan has been approved by the relevant authority and the land is subject to payment of land rental. Land clearance costs for a land area which is exempt from land rental will not be entitled to any deduction or refund. The land clearance costs in this case will be credited to the invested capital of the project, meaning that the developer will be permitted to take depreciation against corporate income tax only.

Restricted conversion of certain agricultural and forestry land

Under Decree 69, the conversion of land for rice cultivation, protective forest and specialised use forest will require approval of the Prime Minister. Currently, the provincial people's committees have the authority to permit conversion of these land types.

Land clearance services

Land Fund Development Organizations established and managed by the provincial people's committees will be permitted to conduct compensation and land clearance services. This change is likely to be welcomed by developers (especially foreign invested enterprises) as currently there is no organization specifically permitted to conduct such services. Although foreign invested developers often hire a services company or a local people's committee to carry out this type of work, it remains questionable whether a services contract of this type would be valid and enforceable in Vietnam.



part 2 – feature

court case commentaries

This month, our case commentary series looks at a 2005 decision of the Hanoi People's Court which considered the validity of an award of the Vietnam International Arbitration Centre (**VIAC**). The case reminds us of the importance, under Vietnamese law, of being able to prove the actual authority of a person signing a contract on behalf of a corporate entity. It is also a reminder of some of the potential difficulties faced by parties seeking to have their Vietnamese disputes resolved by arbitration, as previously discussed in the August 2008 and October 2008 editions of the VLU.

THU DO II COMPANY LTD. V. PT VINDOEXIM (INDONESIA)

Judgment No. 02/2005/XQDTT-ST dated 11 May 2005

The Facts

On 17 November 2003, Thu Do II Company Ltd., a private company with its office in Hanoi (**Thu Do II**) and PT VindoExim, an Indonesian company with its office in Jakarta, Indonesia (**VindoExim**) entered into a contract for the sale and purchase of a quantity of urea worth USD 4 million (**Contract**).

The Contract was signed by a Mr Phan Ba Hung, as the representative of VindoExim. The Contract required Thu Do II, as the buyer, to open a USD4 million letter of credit by 27 November 2003. Thu Do II failed to open the letter of credit by this date and its request for an extension was rejected by VindoExim.

As a result of Thu Do II's failure, VindoExim commenced an arbitration proceeding before the VIAC for breach of contract and sought to recover from Thu Do II USD 100,000 (being the contractual penalty) plus USD 11,000 in legal costs.

On 21 July 2004 the VIAC conducted a hearing and on 31 August 2004 it published an award ordering Thu Do II to pay USD 100,000 to VindoExim.

The Application

On 24 September 2004 Thu Do II asked the Hanoi People's Court to set aside the arbitral award. Thu Do II's application was based on their view that the 'arbitration agreement' (namely the arbitration clause in the Contract) was invalid under the Ordinance on Commercial Arbitration and therefore the arbitral award should be set aside.

Thu Do II argued that the arbitration agreement was invalid because one of the signatories, Mr Phan Ba Hung, lacked authority to enter into it pursuant to law. Specifically, Thu Do II argued that Mr Phan Ba Hung was not an authorised representative of VindoExim because he did not have a letter of authorisation authorising him to sign the Contract. Thu Do II also alleged that in fact VindoExim did not exist in Indonesia.

After Thu Do II's application, VindoExim issued a letter signed by its Chairman, Mr LiYanto and a member, Mr Inwanto, certifying that Mr Phan Ba Hung indeed was a director of VindoExim. The

authority of Mr LiYanto and Mr Inwanto in issuing this letter was not challenged before the Court.

The Decision

The Court did not discuss the submission by Thu Do II that VindoExim did not exist in Indonesia. Presumably, this was not proven to the Court's satisfaction.

However the Court did find, as a matter of fact, that Mr Phan Ba Hung did not have a letter of authorisation from VindoExim at the time he signed the Contract. The Court also found that Mr Phan Ba Hung was not the legal representative of VindoExim because he was not named as a director of VindoExim in the certificate of incorporation or in its Charter. On this basis, the Court held that Mr Phan Ba Hung had no capacity to sign the Contract on behalf of VindoExim. The arbitration agreement contained in the Contract was therefore invalid and the arbitral award must be set aside.

Importantly, the Court did not consider relevant the letter of certification from Mr LiYanto and Mr Inwanto on the grounds that it was issued after the conclusion of the Contract and even after the arbitral proceeding had been completed. According to the Court, this letter of certification could not be used as a substitute for the letter of authorisation which, in the Court's view, should have been in existence at the time of signing the Contract.

Commentary

This decision demonstrates the importance of actual authority under Vietnamese law, and indeed contemporaneous evidence of such authority, for representatives of companies signing contracts.



In particular it reminds us that the doctrine of 'ostensible authority' appears to have no place in Vietnamese law as well as the importance of adhering to Vietnamese legal requirements when doing deals in Vietnam.

In examining the authority of Mr Phan Ba Hung, the Court had reference to Vietnamese law principles rather than the law of the jurisdiction where the relevant company (in this case Indonesia) was incorporated. Internationally, it would be usual in such a case of 'conflict of laws' for the issue of

authority to be determined by reference to the law of the place of incorporation (in this case Indonesia) because application of another law (in this case Vietnamese) may produce inappropriate results. For example, Mr Phan Ba Hung may have been authorised under Indonesian law to bind VindoExim and therefore would not have thought to get any express letter of authorisation. However, because he did not satisfy the requirements of a 'legal representative' under Vietnamese law, he was found to lack the requisite capacity.

It is possible that in deciding to apply Vietnamese law to the question of Mr Phan Ba Hung's authority, the Court may have been influenced by provisions in the Civil Code which state that when foreign individuals and foreign companies conduct transactions in Vietnam, their legal capacity is to be determined in accordance with Vietnamese law. However, arguably these provisions are not relevant here where what was being determined was the capacity of an individual to represent, or sign on behalf of, a company rather than the legal capacity of the individual or the company itself.

Even applying Vietnamese legal principles, the reasoning of the Court in reaching its decision was arguably flawed in that it did not give sufficient weight to the letter issued by the Chairman of

VindoExim certifying that Mr Phan Ba Hung was in fact a director of VindoExim.

While, as the Court noted, the letter of certification was not issued until after the Contract had been signed and even after the arbitral award had been issued, this should not have been reason to disregard it. Assuming that the authority of Mr Phan Ba Hung had not been contested at the time of the signing, or indeed in the arbitral proceeding, it is entirely logical that such a letter would be issued by VindoExim only when it came to their attention that Thu Do II was challenging the authority of Mr Phan Ba Hung.

The letter of certification suggests that Mr Phan Ba Hung had actual authority at the time of signing the Contract. What was missing was contemporaneous evidence of such authority, rather than the authority itself. Once evidence had been supplied in the form of the letter (and assuming there was no accepted challenge to the validity of that evidence) it is difficult to understand why the Court did not regard his authority as proven.

Moreover, as the letter clearly certifies the authority of Mr Phan Ba Hung in relation to the Contract it also arguably indicates an intent by VindoExim to ratify Mr Phan Ba Hung's actions in signing the Contract. As a matter of Vietnamese law, the Civil Code provides that a transaction with an unauthorised agent is valid if it is subsequently ratified by the principal. In this case, even assuming the original execution of the Contract was unauthorised, it seems that the Court should at least have considered whether the letter of certification served to ratify the signing of the Contract. Such ratification would validate the arbitral agreement, removing the basis for the arbitral award to be set aside.



part 3 – did you know?

3.1 MPI report card on Vietnam's 5 Year Plan

Ministry of Planning and Investment's Mid-Term Review of Vietnam's current 5 Year Plan (2006 - 2010)

Like all good socialist countries, Vietnam always has a 5 Year Plan. Progress against the current plan is the subject of a 161 page report prepared by the Ministry of Planning and Investment titled

'Results-Based Mid-Term Review Report for Implementation of the 5 Year Socio-Economic Development Plan 2006 – 2010'. The full report is available on the United Nations Development Program's website: <http://www.undp.org.vn/>



The report identifies several "weaknesses" that are undermining Vietnam's ability to achieve its economic and social potential. These include:

- Economic growth remains of low quality and is too reliant on inefficient State investment.
- Contrary to the official mantra "Industrialisation and Modernisation",

industry's share of GDP is falling. Three bottlenecks are inhibiting growth: poor infrastructure, lack of skilled workers (untrained workers make up three quarters of the work force) and weak economic institutions.

- Vietnam is too reliant on the manufacture of low value, low margin goods for export.
- Inflation control and other macroeconomic objectives are not being handled properly.
- The social security network remains limited.
- Environmental pollution is worsening.
- Laws and regulations remain of poor quality and are not being implemented effectively.

Other interesting snippets from the report are:

- Per capita GDP reached USD833 in 2007.
- More foreign investment is tending to come from Asian countries than Western countries.
- The average size of approved foreign investment projects has increased from USD7.1m per project in 2005 to USD51.5m per project in 2008 (helped no doubt by the approval of several mega billion dollar property projects).
- The average ratio of equity-to-debt in approved foreign investment projects has fallen over the same period from over 45% to around 33%.

- Low efficiency of State investment may have been a significant contributor to high inflation in early 2008.
- Much foreign investment is "inefficient". Most investors declare impressive figures of investment capital and profit in their application documents, but they report losses when operating. Around 70% of foreign investment projects in HCMC reported losses in 2007.
- The main causes of inefficiencies in investment arise from poor masterplanning (lacking vision and based on insufficient data), decentralisation of investment approvals and management (local authorities lack capacity and are not being properly supervised) and weak supervision of investment and construction projects.
- Much investment in real estate is speculative. In the case of foreign investment in this sector, 'giant profits' are likely to be transferred abroad with little benefit to Vietnam.

3.2 Why having your customs card stamped at the airport can be worth the hassle

Waiting in queues at airports is unlikely to be on the top of anyone's list of fun things to do, so it is often with welcome relief that you find yourself 'waved through' a Vietnamese airport by the Customs Officials. However, when bringing certain items (such as cash in excess of USD7,000) into Vietnam, it certainly pays to wait your turn and make sure you get your stamp.

You may well think that by declaring relevant goods on the white form, and passing through immigration (and getting immigration stamps), you have made sufficient declaration. Particularly if you are then merrily waved through the customs areas.

Unfortunately this may not be the case. If you do not get the customs stamps, you risk being stopped on exit (when trying to take the goods back out of Vietnam) and face fines of up to 70 million VND. You may also have to



prove the source and legality of your imports – especially in the case of cash, where criminality will need to be disproved by production of extensive documentation. The time and hassle taken to obtain these documents may find you spending much longer in Vietnam than intended, or even loss of the money if no such documents can be obtained.

3.3 What counts towards the '30% rule' in tendering?

Vietnam's Law on Tendering No. 61-2005-QH11 dated 29 November 2005 mandates the applicable rules for tendering activities for investment projects which are at least 30% 'financed by the State'. The rules regulate the selection of contractors for provision of consultancy services, for procurement of goods, and for construction and installation for tender packages for applicable projects. The '30% rule' means that the projects of certain foreign invested enterprises and Business Cooperation Contracts will need to comply with the tendering rules.

An important question, then, for foreign investors is what counts towards the '30% rule' – how do you determine whether a particular project needs to comply with the tendering rules?

As Decree 58-2008-ND-CP on Tendering, dated 5 May 2008, makes clear, it is no longer sufficient to answer this question looking solely at the level of State equity participation in an enterprise or BCC. A determination of whether or not the State finances 30% or more of the total investment amount or total investment capital of an approved project must be assessed by looking at the project (not the entity) as a whole. The assessment must consider and understand the full source and structure of the funding of the project.

The Law on Tendering defines 'State Capital' to include State budget funds, credit funds guaranteed by the State, credit funds of the State for investment and development, investment and development funds of State-owned enterprises and other funds managed by the State.

In order to assess the state financing of a project, you must first understand whether the enterprise will use its charter capital (equity capital), profits, loans or a combination of any or all of these sources for the project and in what proportions. Once that is established, you must:

- in relation to any charter capital to be used, check the source of funds used by any Vietnamese shareholder/member to contribute to that charter capital (eg land use rights; investment and development funds, etc) to see if it is State sourced, noting that any capital contributed by a State-owned enterprise will be considered State sourced, even if the State-owned enterprise borrowed that money; and
- in relation to any loans to be used, check whether the loans are provided by the Vietnamese shareholder/member or a State-owned fund, or whether the loans are guaranteed by a State-owned enterprise or a State body.

Applying this assessment, it is easy to see how a foreign invested project may find itself required to follow the tendering rules, even where the State-owned equity stake is minimal or even non-existent.

3.4 Another month and more guidance for the trading and distribution sector

Official Letter 6656/BTC-KH of the Ministry of Industry and Trade providing guidelines on licensing pursuant to Decree 23/2007/ND-CP, dated 13 July 2009 (OL 6656)

Hot on the heels of Official Letter 4422 (covered in the July VLU), the Ministry of Industry and



Trade has provided further guidance on the preparation of applications for licenses to carry out trading and distribution activities. This time, OL 6656 canvasses much of the same material and requirements as that in Official Letter 4422 but is addressed more widely to the Departments of Planning and Investment under central authority.

OL 6656 reiterates that the licensing process will differ, depending on whether a new entity is seeking to be licensed to conduct trading and distribution activities, or whether such activities are being added to an existing licence. It also reinforces the need for existing

enterprises to seek both an amendment to their current Investment Certificate as well as a new business licence.

The Official Letter also provides a hotline telephone number for those having difficulties implementing the Letter's requirements. Given the differing interpretations and requirements we have seen in this area to date, the phone may be running hot!

part 4 –

what's new online?

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 3,400 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). For English translations of Vietnam's legislation, past and current, subscribe to Vietnam Laws online database on www.vietnamlaws.com

Laws recently uploaded on the Vietnam Laws online database include the following:

- Decree 133 implementing the Law on Trade Unions, 20 April 1991
- Decree 30 on lotteries business, 1 March 2007
- Circular 05 on the State's 4% interest rate subsidy on bank loans for new investment, 7 April 2009
- Letter 4422 on issuance of business certificates for trading and distribution activities to foreign invested enterprises, 18 May 2009
- Decision 39 on advertising in Ho Chi Minh City, 5 June 2009
- Law 62 on Cinematography as amended by Law 31, 18 June 2009
- Law 36 amending the Law on Intellectual Property, 19 June 2009
- Resolution 32 amending socio-economic targets for year 2009 and including a provision on PIT exemption, 19 June 2009
- Decision 1666 on pledge of Government bonds denominated in foreign currency for VND loans from State Bank, 16 July 2009
- Circular 148 reducing import duty on aviation fuel from 25% to 20%, 21 July 2009
- Draft 4, Decree on administrative penalties for breaches of the law on labour, 4 August 2009
- Circular 15 regulating maximum ratio of short-term funds which credit institutions are permitted to use for medium and long-term lending, 10 August 2009
- Decision 07 dated 24 March 2008 on issuance of valuable papers by credit institutions as amended by Circular 16, 11 August 2009
- Circular 160 on exemption of personal income tax for year 2009, 12 August 2009
- Circular 161 on personal income tax on real property transfers, 12 August 2009
- Circular 162 reducing import duty on milk products, 12 August 2009
- Decision 1958 on second issuing tranche for Year 2009 of Government bonds denominated in USD, 17 August 2009

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 2009. To view all laws uploaded, please visit www.vietnamlaws.com

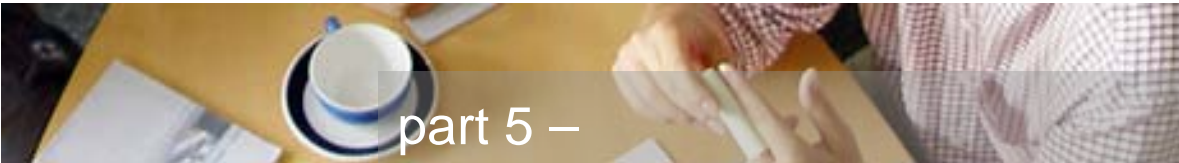
Client Update: Vietnamese companies may issue international bonds

We have added a new Asia Finance Client Update to the Vietnam Laws website. The update covers the long-awaited Decree 53/2009/ND-CP on Issuance of International Bonds, which will, for the first time, allow Vietnamese companies to issue foreign currency denominated bonds in the international market. To read more, go to the Client Update at www.vietnamlaws.com

Search function for Vietnam Legal Update

All back issues of the Vietnam Legal Update from 1997 to the present are now available on www.vietnamlaws.com. There are two pages to the website's section on the VLU:

- Monthly VLU (for issues from April 2007)
- Monthly VLU Archive (for issues prior to April 2007, back to September 1997)



part 5 – get to know us

In this section of the VLU, we shine the spotlight each month on a different lawyer from our Vietnam practice, to give readers a glimpse of who we are beyond the office. This month, our featured lawyer is Nigel Russell, a partner in our Ho Chi Minh City office.



Nigel is a bit of an old hand in Vietnam, having been based initially in Hanoi for 3 years, and for the past 13 years in Ho Chi Minh City.

Nigel's practice includes most legal things to do with foreign investment in Vietnam, including joint ventures, M&A, real estate and dispute resolution.

In his spare time, Nigel is the Chairman of The Australian International School Saigon, which he founded with his wife, Thuy, in 2006. Nigel's interests include bushwalking with his two sons and trampolining with his baby daughter.

Quote from the source: "Vietnam is a long-term investment!"