



Indochina notes

LEGAL UPDATES ON INVESTMENT, INFRASTRUCTURE AND FINANCE

Legislative highlights of 2010

Investment

Infrastructure

Banking and capital markets

Legislative highlights of 2010

Like the fine-structure constant theory of physics, Vietnamese legislation is often hard to measure but surprisingly strong. Time provides some perspective and ability to measure such legislation, but just as the fine-structure constant is actually a compound of several other physical constants, so too is the law a compound of the legislation, the regulatory response to the legislation and the ability to enforce. Sadly the result of the legal compound is still less predictable than the pure dimensionless number that results, regardless of the measuring system, from the use of the fine-structure constant.

January

The regulators were still naturally concerned about the financial system at the start of 2010. Decree 5 was issued on the bankruptcy of credit institutions, allowing the State Bank of Vietnam (SBV) to take control before such bankruptcy. Despite the pressures in the financial world, and in Vietnam in particular, no use of Decree 5 was recorded in 2010.

Decree 1 was issued by the government to limit various questionable practices relating to private placements of securities. Minority shareholders with very poor olfactory capabilities generally now sleep marginally better.

February

On 11 February 2010, the SBV was at it again, issuing Circular 4 on mergers, acquisitions and consolidations of

all types of banks and financial institutions. There was a theoretical possibility that the document would be used at the end of the year when banks had to meet increased capital requirements. But the banks received the expected reprieve at the 11th hour.

April

New enterprise registration rules were issued in April. For the first time, online business registration was recognised by law but, for various bureaucratic reasons, it remains limited in practice.

June

The National Assembly had a busy session, passing numerous laws, including a Law on Credit Institutions that may limit foreign bank branch lending, and a Law on the State Bank of Vietnam that may or may not give it more control over monetary policy.

Various regulations on nuclear power were also issued as part of a step change in the country's long-held civil nuclear ambitions.

July

Lenders, under pressure most of the year, received a boost from Decree 83, which upgraded the security interest registration rules that had been effect since 2000.

August

To the consternation of many observers, the Ministry of Finance issued a circular that expanded the scope of the price control regulations to private enterprises

(previously they applied only to companies with more than 50 per cent state capital).

Ever quick on the uptake, corporate issues of convertible bonds had expanded at such a rate that new securities regulations, in the form of Decree 84, had to be rushed out to protect buyers.

October

The regulations implementing the Enterprise Law were amended by Decree 102 to allow shareholders holding at least 1 per cent of a company's shares to require the inspection committee to bring suit against directors and managers who do not 'properly exercise assigned rights and duties'. In the same league, a new Consumer Protection Law was passed in November 2010 and there is an increased willingness to enforce environmental protection laws. Darkness before the dawn of a plaintiff's bar?

November

During the National Assembly session in November, further new laws were passed, including one on minerals, one amending the Law on Securities and one amending the Law on Insurance Business.

Investment

Insurance

One of the guidebooks for Vietnam, written in the US, suggests that natural hazards are limited to 'occasional typhoons (May to January) with extensive flooding, especially in the Mekong Delta'. Despite the apparently risk-free nature of existence in Vietnam, the insurance business has grown enormously since competition to state insurance companies was first allowed 10 years or so ago. The laws that were appropriate 10 years ago have therefore had to be upgraded. On 24 November 2010, the National Assembly adopted a law amending the Law on Insurance Business. The changes will be covered in a forthcoming *Legal briefing*.

Enterprise Law

There has also been some further delineation of company law. This will enable lawyers to be slightly less equivocal in some of their legal opinions. It may also encourage slightly greater corporate governance among Vietnamese companies. The salient changes contained in Decree 102

of 1 October 2010 implementing the Law on Enterprise will be discussed in another forthcoming *Legal briefing*.

Profit remittance

Most foreign investments are made for the purposes of making a profit. The ability to repatriate that profit is therefore of some passing interest. This is especially the case in an era of inflation and currency instability. The government therefore has to match its desire to attract foreign currency with the investor's desire to repatriate its profits as soon as it can. Circular 186, which came into effect in January 2011, has moved the balance notch towards the government by removing the right to remit profit on a quarterly basis. Remittance is now allowed only (i) at the end of the fiscal year, after payment of corporate income tax and the discharge of other financial obligations to the state; or (ii) on liquidation.

Fortunately, Circular 186 authorises simpler procedures for remittance. Instead of having to obtain certification from the tax authorities, remittance can be made on advance notification to the tax authorities. These notices will have to comply with a standard form provided under Circular 186.

Circular 186 does not cover the remittance of profits from indirect investments, such as those conjured up from the ever-languishing Vietnam stock market.

Vinashin restructuring

The Vietnam Shipbuilding Industry Group (Vinashin) was once one of the largest state-owned entities, supposedly operating mainly in shipbuilding but with a dazzling array of subsidiaries pursuing less nautical objectives. It now has some well-publicised financial problems. These problems are having an effect on the country and other state-owned companies, whose borrowing costs have soared on the back of the government's apparent reluctance to stand behind it. On 18 November 2010 the prime minister issued Decision 2108 approving a restructuring plan for Vinashin.

According to this Decision the restructuring will occur from 2011 to 2013. The result will be a complex of enterprises that build and repair ships, as well as certain support and training industries. These companies are expected to consist of:

- a parent company, 100 per cent of whose charter capital will be owned by the state;

- 15 subsidiaries;
- two joint venture companies;
- one affiliated company; and
- two public-service units.

Vinashin's interest in the remaining 400-odd companies in its stable should be equitised, sold or otherwise transferred, or such companies should be dissolved or put into bankruptcy.

Increase of minimum salary

On 29 October 2010, the government issued two decrees setting out new minimum salary levels for employees of local and foreign-invested enterprises, effective on 1 January 2011. The minimum wage rates are divided into four areas, as shown in the table below.

	Vietnamese businesses	Foreign-invested businesses
Area 1 – Hanoi and Ho Chi Minh City: inner city	VND1,350,000/month (approximately US\$70/month)	VND1,550,000/month (approximately US\$80/month)
Area 2 – outer city districts of Ho Chi Minh City; specified outer districts of Hanoi; inner and specified outer districts of Hai Phong; other provincial cities	VND1,200,000/month (approximately US\$60/month)	VND1,350,000/month (approximately US\$70/month)
Area 3 – remaining districts of Hanoi and Hai Phong; specified rural districts and towns	VND1,050,000/month (approximately US\$54/month)	VND1,170,000/month (approximately US\$60/month)
Area 4 – all remaining areas	VND830,000/month (approximately US\$43/month)	VND1,100,000/month (approximately US\$56/month)

These minimum wage rates constitute the basis on which employers calculate the wage scale, wage table and all types of allowances for employees.

Administrative procedures – simplification

Going back as far as Paracelsus, the world has recognised that there are no poisons, just poisonous doses. Vietnam's government is now trying to reduce the dosage of red tape. In the second phase of Project 30, its

streamlining and reform programme, the government approved simplification measures for more than 5,000 administrative procedures (APs).

It has not yet been possible to analyse how much genuinely significant underbrush has been cleared away, but even if the focus has been on the paperwork required to obtain a driver's licence rather than an investment certificate, the focus of the project and the vision it promotes are salutary. Those with a penchant for detail can review the following resolutions of the following ministries:

- Transport: Resolution No. 45 dated 16 November 2010;
- Labour, Invalids and Social Affairs: Resolution No. 48 dated 9 December 2010;
- Foreign Affairs: Resolution No. 50 dated 10 December 2010;
- National Defence: Resolution No. 51 dated 10 December 2010;
- Justice: Resolution No. 52 dated 10 December 2010;
- Committee for Ethnic Minorities: Resolution No. 53 dated 10 December 2010;
- Home Affairs: Resolution No. 54 dated 10 December 2010;
- Construction: Resolution No. 55 dated 14 December 2010;
- Natural Resources and Environment: Resolution No. 56 dated 15 December 2010;
- Agriculture and Rural Development: Resolution No. 57 dated 15 December 2010;
- Government Inspector: Resolution No. 58 dated 17 December 2010;
- Industry and Trade: Resolution No. 59 dated 17 December 2010;
- State Bank of Vietnam: Resolution No. 60 dated 17 December 2010;
- Public Security: Resolution No. 61 dated 17 December 2010;
- Health: Resolution No. 62 dated 17 December 2010;
- Education and Training: Resolution No. 66 dated 23 December 2010;
- Science and Technology: Resolution No. 67 dated 27 December 2010;
- Finance: Resolution No. 68 dated 27 December 2010;
- Culture, Sports and Tourism: Resolution No. 69 dated 27 December 2010;

- Planning and Investment: Resolution No. 70 dated 27 December 2010; and
- Information and Communications: Resolution No. 71 dated 27 December 2010.

Infrastructure

Pilot public private partnerships

Complex numbers are numbers that consist of both a real part and an imaginary part (eg multiples of the square root of -1). Public private partnerships (PPPs) share some of the same characteristics. New regulations on the subject, which became effective on 15 January 2011, constitute at best a framework for pilot projects to be pulled together on an ad hoc basis.

Despite the yards of print already devoted to them by eager consultants, there is very little of substance that can usefully be said at this stage about how, if at all, PPPs will unfold in Vietnam. It is only after experience has been derived from the pilot PPPs, after substantial training has occurred, after internal turf issues have been resolved and after viability funding has been obtained, all of which will take some years, that PPPs are likely to move from the pilot stage to something that will help the country resolve the looming (and current) infrastructure problems that are a leading worry for foreign investors.

Mineral Law

Mining activities remain dominated by domestic companies, notably by Vinacomin, the state-owned coal and mining group. The sector is one where foreign investors fear to tread. The National Assembly, thinking it could do something to help, adopted a new Mineral Law on 17 November 2010 to replace the 1996 Mineral Law. Will this reverse the current antipathy from all but the most hardened gamblers? Will Vietnam start producing the natural resources needed for its burgeoning industries? Read the answers to these and other fascinating questions in our upcoming *Legal briefing*.

Power prices

If a dying star is massive enough, the gravity created is so strong that not even light itself can break free if it gets too close. Vietnam has been moving slowly towards a more competitive electricity market for some years, with EVN playing the role of the dying star. The latest step

was taken on 14 December 2010 when the Ministry of Industry and Trade (MOIT) issued Circular 41 on power generation prices and power purchase agreements. The circular applies to power plants with an installed capacity of more than 300MW.

Circular 41 formulates the principles for establishing a power generation price bracket applicable to thermal power plants and hydro power plants. Before 1 October each year, EVN has to prepare the electricity price bracket for the following year and submit it to the Electricity Regulatory Authority of Vietnam (ERAV) for appraisal. ERAV should publicise the power generation price bracket for the following year on its website before 15 December.

Circular 41 also establishes the principles under which the price of power for newly constructed power plants can be negotiated. These prices cannot exceed the approved power generation price bracket.

Oil and gas

Deepwater Horizon was an expensive disaster for BP and indirectly seems to have precipitated BP's exit from Vietnam. Decision 84 on the exploitation of oil and gas, which comes into effect on 15 February 2011, demonstrates that it will have costs for others, as well. A number of Vietnam national standards are now to apply in connection with the construction of rigs and processing platforms. There is a greater focus on suspensions for security and safety reasons. There are new inspection and reporting obligations. There are new rules on early exploitation of oil and gas. And provisions in the old regulations have been updated.

Electricity grid connections

Children in the north of Vietnam get a day off school if the temperature falls below 10 degrees centigrade. Their unheated classrooms are too cold. Vietnamese facing power outages in the cold winter damp of the north will be warmed to the cockles of their heart (assuming they are not at school) to hear that their neighbours may help keep the rest of their body warm. In Announcement 234 dated 31 August 2010, the government instructed the MOIT to complete draft plans on the use of hydro power generated in Laos and Cambodia and on the required grid connections with such countries. EVN was instructed to develop plans to transmit electricity from regional

countries; to study the feasibility of a 500kV connection with China; and to negotiate long-term electricity import contracts with China and electricity purchase contracts with other regional countries.

Banking and capital markets

Amendment to Law on Securities

Vietnamese legislators, like their compatriots in many other countries, have never fallen for the old chestnut of presenting something in an easy manner. If you want someone to remember something, it is much better that they think about it deeply. But standards slipped a bit with the amendment to the Law on Securities of 2006, which becomes effective on 1 July 2011 and contains the following main changes.

- The term 'securities' will now include 'investment capital contribution contracts' and other kinds of securities as determined by the Ministry of Finance. An 'investment capital contribution contract' is a contract for profit-making purposes between one or more investors and an issuer whereby the investors invest cash or assets and may convert their investment into securities of an issuer.
- Regulations of the government and the Ministry of Finance currently allow securities companies to provide certain securities management services and fund management companies to provide securities advice. This is now recorded in the law.
- Investment funds investing mainly in real estate will now be allowed.
- Shares purchased in a private placement are currently subject to a lock-up of at least one year. The amended law will govern private placements by public companies. For such private placements there will be exceptions to the lock-up in the case of transfers of shares acquired under employee share offer plans, transfers by individuals to professional securities investors, transfers between professional securities investors and transfers following a court order. The amended law maintains the prohibition on a private placement within six months after the completion of a prior private placement.
- Although it is already implied, the amended law explicitly prohibits the undertaking of any securities business activities without a licence or approval from the State Securities Commission (SSC).

- An issuer offering securities to the public must undertake to list or register its shares for trading on an organised market within one year of the public offering. This undertaking must be specifically approved by a general meeting of shareholders of the issuer.
- The amended law revisits the general principles on management and public disclosure of public companies.
- An investor holding 25 per cent or more of an issuer's shares will have to conduct a public tender for any acquisition of a stake of 5 per cent or more conducted less than a year after the last public tender, or for any additional acquisition of a stake of 10 per cent or more. The amended law also records certain exceptions, for which a public tender is not required (ie where the general meeting of shareholders approves the transaction, intra-group transfers, donations and inheritance and transfers following a court decision).

Before the adoption of the amended law, the press relayed the voice of certain securities market practitioners and experts advocating wider and stronger powers and more independence for the SSC. The National Assembly considered but did not follow this suggestion.

Anti-money laundering

Steganography is the art of hiding things in plain sight. It is alive and kicking. Yet the new Circular 148 of the Ministry of Finance dated 24 September 2010 on money laundering takes aim at its relative, cryptography, which disguises the meaning of a transaction, not its existence. Under Circular 148, securities investment companies are now responsible for reporting and determining the meaning of certain suspicious transactions. 'Suspicious transactions' include (i) transactions where it is impossible to identify the parties to a transaction based on the information provided; (ii) a transaction turnover on an account that is not consistent with the customer's normal level of activity or where there is a sudden change in the transaction turnover; (iii) the re-activation of an inactive account with no apparent reason; and (iv) transactions conducted by a customer involved in illegal activities.

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