



vietnam legal update

July 2009

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part 1 – selected new legal instruments

1.1 A rose by any other name ...

Circular 03-2009-TT-BNG dated 9 July 2009 of the Ministry of Foreign Affairs guiding English translations of official names of entities, titles and senior officials within the State administrative system for purposes of external relations (*Circular 03*)

Shakespeare famously wrote:

'What's in a name? That which we call a rose
By any other name would smell as sweet.'

Reading Circular 03 you may think the Ministry of Foreign Affairs (or MOFA as it is now to be officially abbreviated) is inclined to disagree.

Circular 03 provides guidance on the English translations (and in some cases, abbreviations) of official names of entities, titles and senior officials. For the most part, the official names are unremarkable and are regularly used in English documentation in Vietnam. A few, however, are worthy of note.

- Vietnam is officially to be written using 2 words – Viet Nam. In full it is to be referred to as the Socialist Republic of Viet Nam. Fortunately, Circular 03 concedes that the English noun Viet Nam becomes 'Vietnamese' in adjective form, rather than the more cumbersome 'Viet Namese'.
- Viet Nam's capital gets the same treatment, officially becoming 'Ha Noi'.
- The previously monikered 'Ministry of the Interior' has been changed to the more homely 'Ministry of Home Affairs'.
- The Office of the Government is given forward momentum in the abbreviation 'GO'.

It is, however, perhaps a little disappointing that the MOFA (or the Ministry of Planning and Investment – remaining officially abbreviated as MPI!) did not take this opportunity to clarify the official names and abbreviations for common terminology in the investment sector. Our wishlist for the next raft of official names would definitely include:

- an abbreviation for Multiple Member Limited Liability Company, or at least 'Limited Liability Company'; and
- clarity on the use of Shareholding Company (or SC) instead of the wordier (and arguably far less descriptive) term 'Joint Stock Company'.

Confirmation of titles, including Managing Director and General Director, would certainly not go astray. The latest National Assembly amendments to the Law on Land (discussed in detail below) including the introduction of the wordy 'Certificate of land use right and ownership of house and other assets on the land' also yield a few titles in desperate need of abbreviation.

For now, at least in our translations (we've decided to stick with Vietnam as one word for VLU ease-of-reading), we will have to get used to using the 'space bar' on our keyboards more often.

1.2 What the National Assembly did next – update on capital construction and housing law amendments

Law 38-2009-QH12 dated 19 June 2009 on amendment to a number of articles concerning capital construction in the Law on Construction No. 16-2003-QH11, the Law on Tendering No. 61-2005-QH11, the Law on Enterprises No. 60-2005-QH11, the Law on Land No. 13-2003-QH11 and the Law on Residential Housing No. 56-2005-QH11 (Law 38)

Our May issue of VLU addressed some of the key law amendments being considered by the fifth session of the 12th National Assembly held in May and June this year.

As noted, one draft amendment law proposed wide-ranging amendments relating to investment in 'capital construction' including amendments to the Law on Enterprises and Law on Investment.

On 19 June 2009, in response, the National Assembly passed Law 38 which will take effect on 1 August 2009. In its final form, Law 38 made no changes to the Law on Investment and the Law on Corporate Income Tax and only a single, revised, amendment to the Law on Enterprises. Ultimately, Law 38 amends only the Law on Enterprises, the Law on Construction, the Law on Tendering, the Law On Land and the Law on Residential Housing. We now consider some of the more significant of these amendments.

Law on Enterprises – extending, not eliminating, the re-registration deadline

As discussed in previous editions of VLU, the Law previously provided a 30 June 2008 re-registration deadline for foreign invested companies established prior to 1 July 2006. Although the draft amendment law proposed a wholesale deletion of the deadline, in the end Law 38 simply imposes a new deadline – this time, 5 years from the effective date of the Law on Enterprises (being 1 July 2011). This extension naturally raises the question, what will they do if the bulk of affected enterprises still fail to re-register by the new deadline?

This would seem fairly likely, at least for joint venture companies established under the old Law on Foreign Investment, very few of which re-registered before the previous deadline. Why? The fact that re-registration necessitates re-negotiation of the JV documents (so that control issues, for instance, are dealt with in accordance with the Law on Enterprises) might have something to do with it.

Law on Construction – good news on approval of feasibility studies and preliminary designs

One significant change to the Law on Construction concerns the need for approval of a 'feasibility study'. Under the current Law, before an investor can develop an investment project, the feasibility study or preliminary design for a project must be approved by a relevant competent body. In practice, this requirement has been a considerable obstacle for investors given the complex administrative procedures involved.

In a welcome amendment, Law 38 eases this burden for some investors by requiring only internal appraisal of the project by the developers themselves. However, Law 38 also provides that in some 'necessary cases', an investor will still be required to obtain approval of its preliminary design from the relevant body. Unfortunately, Law 38 provides no details as to what these 'necessary cases' may be. For that, we will need to await the Government's specific regulations on evaluation and approval of designs for construction of works, as promised in Law 38.

Another important change, also tied to the approval of the feasibility study, concerns the potential need to vary or re-appraise an approved feasibility study:

- in the event of earthquake, storm, flood, tsunami, fire, act of public enemy or other force majeure events;
- on appearance of factors which yield higher efficiency; or

- where a change in the master plan directly impacts the location, scale, purpose of project.

If any of these events result in a change of location, scale or objective or in the approved total invested capital being exceeded, the project owner must return to the original investment approver for their 'decision' (or re-appraisal). In a further welcome amendment, Law 38 excludes from these requirements any investment project which has less than 30% state owned capital.

Law on Land and Law on Residential Housing – one certificate to bind them all

Historically, Vietnamese law has provided for a number of different certificates necessary to indicate entitlement over land, residential houses and construction works. Importantly, title over land is generally evidenced separately from title over houses and construction works on that land. Title over land is covered by a Certificate of Land Use Right (commonly referred to as the 'red book') while title over a house may be covered by either a separate Certificate of House Ownership or a Certificate of Land Use Right and House Ownership (commonly referred to as the 'pink book'). A Certificate of ownership of construction work is only ever issued separately to an investor.

The resulting multitude of certificates has created confusion for land users and owners of houses and construction works. Law 38's amendments simplify the process. Going forward, there will be only one certificate, to be known as a Certificate of Land Use Right, House Ownership and Other Assets attached to Land (***New Certificate***).

For vacant land the New Certificate will cover only title over the vacant land. Owners of houses or construction works have the option to register on the New Certificate the title over houses and construction works as the need arises.

Law 38 provides that all reference to Certificates of Land Use Right in the Land Law and Certificates of House Ownership in the Law on Residential Housing be replaced by references to the New Certificates. It also provides that existing certificates remain valid, but holders of the certificates can apply for a New Certificate without charge. New Certificates will also be issued to the assignee on any assignment of land use rights or ownership of houses or other assets on land.



Law 34-2009-QH12 dated 18 June 2009 on Amendment to Article 126 of the 2005 Law on Residential Housing and Article 121 of the 2003 Law on Land

In our May issue we also discussed the proposed amendments to laws concerning purchase of houses by overseas Vietnamese. In this case, the National Assembly passed the law in the same form proposed in the draft. As we said previously, these changes will be welcomed by overseas Vietnamese as they open up the criteria for house ownership and clarify certain rights, such as leasing rights for such house owners.

1.3 Governing the banks – a revised regime

Decree 59-2009-ND-CP dated 16 July 2009 on organisation and operation of commercial banks (*Decree 59*)

Decree 59, which comes into effect on 15 September 2009, issues new regulations for the organisation and management of commercial banks. Unlike its predecessor, Decree 49-2000-ND-

CP, Decree 59 primarily deals with the management structure of commercial banks while leaving banking operation issues to other specific regulations.

The main purpose of Decree 59 appears to be to update the management rules of commercial banks to make them consistent with the regulations under the 2006 Law On Enterprises. To this end, Decree 59 makes various cross references to the Law on Enterprises for general management rules and sets out in full only specific, additional regulations applicable to commercial banks. We now take a more detailed look at the some of the main specific regulations.

Scope of application

Decree 59 applies to the following commercial banks (**Commercial Banks**):

- State commercial banks (being banks in which the State owns 50% or more of the capital);
- shareholding commercial banks (understood to be banks originally established with 100% Vietnamese capital, although foreign investors may subsequently invest);
- joint venture commercial banks (being banks established with foreign invested capital which must be in multiple member limited liability form); and
- commercial banks with 100% foreign owned capital (which must be in the form of a single or multiple member limited liability company).

Importantly, Decree 59 applies to joint venture commercial banks and 100% foreign owned commercial banks only in respect of issues not already provided for in Decree 22-20006-ND-CP dated 28 February 2006 on organisation and operation of foreign bank branch, joint venture bank, 100% foreign owned bank and representative offices of foreign credit institutions in Vietnam. Some of the key elements of Decree 22 and its implementing Circular were considered in VLU back in March 2006 and June 2007.



Management structure

Under Decree 59, the management structure of a shareholding commercial bank and of a State commercial bank in the form of a shareholding company comprises:

- the General Meeting of Shareholders;
- a Board of Management;
- a Board of Controllers; and
- a General Director and assisting internal departments.

The management structure for a wholly-State owned commercial bank, a joint venture commercial bank and 100% foreign owned commercial banks is the same, minus the General Meeting of Shareholders.

For all Commercial Banks, Decree 59 prescribes that the Board of Management must have at least 3 members with a maximum of 11 members. The specific number is to be stipulated in each bank's Charter. Decree 59 also requires that at least half of the Board of Management members be either non-executive or independent members, and there must be at least 2 independent members.

The criteria for determining independence is set out in Decree 59. Broadly, a Board of Management member will not be independent if they:

- are employed by the bank at the time of appointment or have been so employed in the last 3 years;
- have any close relatives who hold more than 5% of the voting capital in the bank or who are (or were in the last 3 years) a manager or member of the Board of Controllers of the bank;
- have been a manager or member of the Board of Controllers of the bank in the previous 5 years;
- own 1% or more of the voting capital of a shareholding bank or together with related persons own 5% or more.

The chairman of the Board of Management need not necessarily be an independent member but must not hold an executive role at the bank.

For shareholding commercial banks, an individual or corporate member must be represented by no more than 1/3rd of the total number of members on the Board of Management. For individuals, their representation is aggregated with that of their related persons for this purpose.

Management personnel

The charter of a Commercial Bank may provide that either the chairman of the Board of Management or the General Director is the legal representative of the bank. Importantly Decree 59 requires the legal representative to reside in Vietnam and when absent from Vietnam to delegate his/her authority in writing to another person in accordance with internal rules on delegation of authority issued by the Board of Management. While the residency requirement is the same as that under the Law on Enterprises, Decree 59's specifics on delegation need to be noted.

Under Decree 59, full-time members of the Board of Controllers as well as the General Director are also required to reside in Vietnam throughout their term of office.

Decree 59 also specifies qualification requirements for members of the Boards of Management, Board of Controllers and the General Director (**Management Personnel**) of Commercial Banks and identifies certain persons as being restricted from holding such positions. Broadly, the required qualifications, such as educational qualifications and experience, are as you would expect given the importance of these roles in a financial institution. Similarly, many of the categories of person prohibited from holding positions are also to be expected, such as those convicted of serious crimes or who have been involved in the previous financial failure of an enterprise.

The Decree also details certain restrictions on holding concurrent positions – for example, a member of the Board of Management may not concurrently be a member of the Board of Controllers of the same bank or the manager of another credit institution (without consent or unless that other institution is a subsidiary).

Importantly, appointment and resignation of Management Personnel must be approved by the Governor of the State Bank of Vietnam. The State Bank of Vietnam also has the right to suspend the duties of Management Personnel if it considers such a move necessary.

Particular rules for commercial shareholding banks

Decree 59 pays special attention to the regulation of the operation and management of commercial shareholding banks, presumably given the growing numbers of this type of bank in recent years.

In particular, Decree 59 provides for a few deviations from the general rules in the Law on Enterprises for these banks including:

- a requirement that each such bank has at least 100 shareholders;

- the total par value of dividend preference shares must not exceed 20% of the charter capital of the bank. The Management Personnel are prohibited from purchasing dividend preference shares issued by their bank;
- where a shareholder is an investment trustee for other persons, they must supply information about the 'true' owner of the shares. A failure to do so may result in suspension of the trustee shareholder's rights in relation to the shares;
- the shareholding of any individual or organisation and their related persons is capped at 10% or 20% respectively of the bank's charter capital ;
- any transfer of a significant shareholding or a transfer of a shareholding resulting in a current significant shareholder no longer being such a shareholder or a new person becoming a significant shareholder must be approved by the State Bank of Vietnam. Decree 59 does not define what is meant by 'significant' so it is likely that this will be addressed in subsequent regulation by the State Bank of Vietnam;
- restrictions on the transfer of shares by Management Personnel. Specifically, during their term of office and for 1 year following, a member of the Management Personnel may assign up to 50% of their shares in the bank by giving prior notice to the State Bank of Vietnam. 50% of the total number of shares owned at the time they were elected or appointed must be retained for at least 1 year after their appointment ceases; and
- shares and bonds of the banks must be purchased in Vietnamese dong and paid for in full in one instalment.



Transition

Some transition periods are specified, recognising that existing Commercial Banks may need time to change their management structures in order to comply with Decree 59's provisions:

- necessary adjustments to the composition of their Boards of Management must be made within 24 months;
 - requirements for the qualifications of members of the Boards of Management and Boards of Controllers must be implemented at the next election or appointment;
- similarly, requirements for the General Director and other executive managers, must be implemented at the next appointment; and
 - commercial shareholding banks have 24 months to adjust the ratio of their shareholding to comply with the Decree's requirements.

All other provisions of Decree 59 must be complied with from the date the decree takes effect.

1.4 Stimulating news for the tourism sector

Official Letter 4581-VPCP-KTTH dated 6 July 2009 on the policy to stimulate the tourism sector in Vietnam (Official Letter 4581)

Following proposals from various Ministries including the Ministry of Culture, Sport and Tourism, the Ministry of Finance, the Ministry of Industry and Trade and the Ministry of Transport, the Deputy Prime Minister (on behalf of the Prime Minister) has issued Official Letter 4581 setting out policies for stimulating tourism in Vietnam.

In addition to emphasising the importance of proper implementation of existing incentives such as tax and fee reductions, and generally encouraging good service standards in tourism, Official Letter 4581 also details the Prime Minister's:

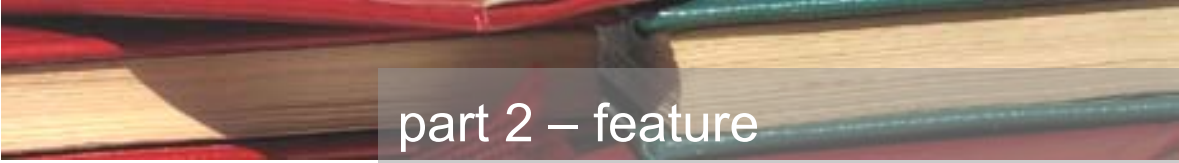
- in-principle approval for 'international joint venture enterprises' to provide off-shore travel arrangements for Vietnamese and non-Vietnamese citizens who are living and working in Vietnam; and
- approval of a trial program allowing selected 4 star hotels to offer entertainment services until 2:00am.

Other proposed incentive initiatives include the preparation of a plan for the construction of retail centres for tourists as well as 'rest stations' (restaurants combined with petrol stations) designed for tourists.

For foreign investors in the tourism sector, perhaps the most significant proposal is that to allow international travel joint venture enterprises to provide international travel services for Vietnamese and non-Vietnamese citizens living and working in Vietnam. Currently, pursuant to the guidelines in Vietnam's WTO commitments, a foreign invested enterprise may only provide inbound international travel services. We understand that the Ministry of Culture, Sport and Tourism is in the process of drafting a regulation which would govern foreign invested enterprises providing inbound and out-bound travel services.



From a practical perspective the Official Letter itself does not provide for any definitive action, instead it merely exhorts action from Ministries. Although good intentioned, without concrete action taken by those Ministries assigned responsibilities, the effect of these policies is likely to be limited. Often in Vietnam, policies (and indeed laws) are rendered less effective due to the lack of implementing guidelines or regulations. It remains to be seen whether the policies proposed in the Official Letter will suffer the same fate.



part 2 – feature

court case commentaries

This month, our case commentary series covers an appeal before the Judges' Council of the Supreme Court, the highest judicial office in Vietnam.

The appeal sought to reverse an earlier decision of the Court of Appeal, which in turn had set aside an original decision of the provincial court of Bac Giang province. This type of appeal, known as a cassation or judicial review procedure, may only be brought on application by a court or a procurator. In this case, at the request of the People's Committee of Bac Giang province, the appeal was lodged by the Chief Justice of the Supreme Court and supported by the Chief Procurator.

VI XUAN TRUONG V. PEOPLE'S COMMITTEE OF BAC GIANG PROVINCE

Cassation Decision No. 04/2006/HC-GDT dated 09 November 2006

The facts

This case concerned a 134 m² piece of land located next to a busy coach station in Son Dong, Bac Giang province. Mr Vi Xuan Truong and his family had occupied this piece of land for use as a shop and residence since 1983. In 1998, an application prepared in Mr Truong's name was submitted to the authorities for the issue of a land use rights certificate for the land. The application was approved by the relevant council and Mr Truong was issued with a land use rights certificate on 28 December 1999.

In 2001, the People's Committee of the local district issued a notice to Mr Truong, informing him that his land was to be repossessed by the State on the grounds that his land use rights certificate had not been issued in accordance with the regulations.

Mr Truong and his family strongly opposed the decision and refused to give up the land. Finally, in 2003, the local district's people's committee allocated a different piece of land to the Mr Truong which he accepted and used to build a house.

However, despite accepting the new land, Mr Truong continued to refuse to move out of the first piece of land and the local district's people's committee continued its efforts to take it back.

The authorities maintained that errors had been made in issuing the respondent with the land use right certificate and for that reason the resulting land use rights certificate ought to be revoked. According to the authorities:

- the relevant land belonged to a specialised area which could not be used for residential purposes; and
- although the land use rights certificate application was prepared in Mr Truong's name, it was not actually signed by him. It was signed by a different person and there was no evidence that that person had been authorised by Mr Truong.

On this basis, in October 2004, the People's Committee of Bac Giang province issued Decision 1549/QD-CT cancelling Mr Truong's land use rights certificate.

In July 2005 Mr Truong and his family lodged an application in the administrative division of the

Bac Giang People's Court seeking to have Decision 1549 set aside. Their application was dismissed. They then appealed to the Court of Appeal in the Supreme Court which, in January 2006, reversed the decision of the court below and quashed Decision 1549.

This final application considered by the Judges' Council of the Supreme Court sought an order that Decision 1549 be restored.

The Decision

The Judges Council agreed with the appeal and restored Decision 1549, with the effect that Mr Truong's land use rights certificate was cancelled.

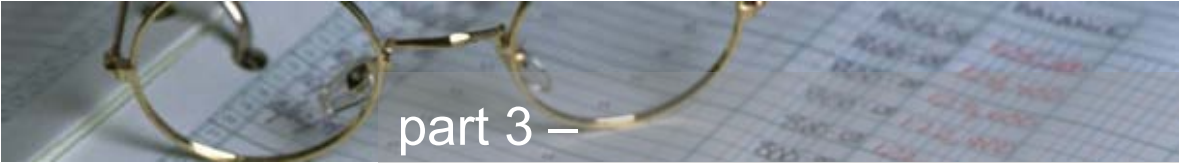
The Judges' Council agreed with the original view of the authorities that the relevant officials had made a mistake in issuing the land use rights certificate and as such Mr Truong's land use rights certificate was not properly issued. Specifically, they agreed that there had been two procedural irregularities: firstly, the relevant piece of land had been in a specialised, non-residential area and secondly, the original application for the land use right certificate had been lodged in Mr Truong's name without his authorisation.

The Judges' Council also reasoned that the People's Committee of Bac Giang province was justified in cancelling the land use right certificate, given that Mr Truong had been allocated a different piece of land, which he had accepted and used to build a house.

The Commentary

It seems only fair and equitable in this case that Mr Truong, having been given and accepted a different piece of land, should return the first piece of land to the State. However, it is not entirely clear how these circumstances were used by the court as a legal basis for its decision, given that 'equitable' principles are not part of the Vietnamese legal system.

The other grounds for the Judges' Council decision was that state officials had committed procedural errors in issuing the land use rights certificate. This seems quite harsh and serves as a reminder that there is no concept of "indefeasibility of title" in the Vietnamese land system. The lesson is that one may not be able to rely solely on the existence of a land use right certificate to ascertain or confirm title in a piece of land. The process and the paper-trail in obtaining that certificate should also be scrutinised carefully to make sure that the title is not tainted by any procedural irregularities. This lesson applies not only to land use right certificates but equally to any other licences issued by state authorities.



part 3 – did you know?

3.1 More hurdles in the trading and distribution sector

Official Letter No. 4422/BCT-KH dated 18 May 2009 of the Ministry of Information and Trade providing guidelines to management boards of industrial zones, processing zones and economic zones in implementing procedures to issue licenses for trading activities of FOEs (Official Letter 4422)

In December 2008 we considered some additional documentation hurdles facing the licensing of foreign-invested trading and distribution entities. At the time, we noted that it was still early days, particularly given that the sector was not due to open up to 100% foreign owned enterprises until 1 January 2009.

Unfortunately, the earlier Official Letter's focus on assessing the 'feasibility' of the project was not the end of the additional hurdles for licensing in this sensitive sector. Now, with over 6 months of practical experience, the requisite procedures for an application of this type remain unclear and ever-growing.

What do the laws say?

The procedures for a foreign owned enterprise to apply for a license to conduct import and distribution business are set out in Circular 09/2007/TT-BTM dated 17 July 2007 of the Ministry of Trade, as amended by Circular 05/2008/TT-BCT dated 14 April 2008 (**Circular 09**).

In short, Circular 09 (as amended) provides that:

- a foreign investor applying for a license to conduct import and distribution business at the same time as applying for establishment of the foreign owned enterprise must submit an application file to the licensing authority for issuance of an investment certificate. The licensing authority, only after obtaining approval from the Ministry of Industry and Trade (**MOIT**) on the trading and distribution activities, will issue the Investment Certificate, which will serve concurrently as the establishment license for the enterprise and the Business Licence for import and distribution activities; and
- a foreign owned enterprise which has already been established but which would like to add import and distribution into its approved business lines must submit an application file to the licensing authority for issuance of a Business License. In this case the licensing authority, again only after obtaining approval from MOIT on the trading and distribution activities, will issue a Business Licence. As a result, these enterprises will have two concurrent licenses – an Investment Certificate (for its establishment and other activities) and a Business Licence for its import and distribution activities.

Under the Law on Enterprises and the Law on Investment, because addition of new business activities will result in changes to the contents of project and business registration, foreign invested enterprises wishing to add import and distribution activities will need to submit an application for amendment of its Investment Certificate to reflect these changes.

What has been our experience?

In practice, different licensing authorities take different approaches to the issuance of licenses to foreign invested enterprises wishing to conduct import and distribution activities. Some licensing authorities will issue only a Business Licence without amending the Investment Certificate while others will only amend the Investment Certificate without issuing a Business Licence. Of course, there are others who issue or amend both!

Beyond the confusion caused by these multiple processes, foreign owned enterprises who have successfully obtained licensing in the form of an amended Investment Certificate or the issuance of an Investment Certificate only (in the case of a newly established entity) may face difficulties with relevant authorities, such as the customs office or tax authorities, who are unfamiliar with the way the different documentation for conducting import and distribution is being handled by different authorities. For example, customs authorities familiar with the Business Licence concept may request a copy of that license before releasing goods. It will likely be an uphill battle convincing these authorities that the Investment Certificate concurrently serves as the Business Licence, despite the wording of Circular 09.

The latest volley - Official Letter 4422

Recently, MOIT issued Official Letter 4422 providing guidelines to management boards of industrial zones, processing zones and economic zones in implementing procedures to issue licenses for trading activities of foreign owned enterprises. While only addressed to management boards of zones, other licensing authorities (such as local Departments of Planning and Investment) may find its content instructive.



In the context of foreign invested entities applying to add trading activities to their licensed business scope, Official Letter 4422 repeats the requirements of Circular 09 and further requests that the management boards, having obtained MOIT's approval, issue both a Business Licence and an amended Investment Certificate to reflect the change in business scope. This would require the relevant applicant to prepare 2 application files: one for the Business Licence and one for amendment of the Investment Certificate.

Official Letter 4422 also adds several further content requirements for the 'Explanatory Statement on Satisfaction of Business Conditions' document (the document evidencing the feasibility of the project which is lodged as part of the application dossier). Again, like Official Letter 6446 discussed in our December 2008 issue, these requirements seem to go beyond what is contemplated under the legislative framework. The required contents include:

- nationality of the investors;
- form of investment (including the relevant percentage capital contribution of joint venture parties or whether the entity is 100% foreign invested);
- a list of the goods to be imported and distributed (detailed by description and HS codes); and
- a description of the scope of trading activities (eg wholesaler, retail seller or commercial advertisement). This description must also include further detailed requirements including:

- procedures to be instituted from the goods' arrival to port until completion of the customs clearance;
- the business cycle of trading activities, being the goods circulation process from the completion of customs clearance to delivery of goods to customers;
- the proposed market and customers;
- the storage plan; and
- 'professional management issues' which we understand refers to any specific special controls (such as food or drug safety procedures) for goods under the particular control of relevant professional authorities.

The Official Letter also leaves room for authorities to require additional 'relevant' issues be covered in the explanatory statement, so there may be more to come.

3.2 Vietnam accedes to the UN Convention Against Corruption

As recently reported in the Ho Chi Minh City Law Newspaper (Pháp Luật TPHCM) and the United Nations Office on Drugs and Crimes' website (www.unodc.org), on 30 June 2009 Vietnam's President signed the approval for Vietnam's accession to the United Nations Convention Against Corruption (**UNCAC**).

As discussed in previous editions of VLU, including a feature piece in our February 2009 issue on the US Foreign Corrupt Practices Act (**FCPA**), Vietnam's legislative efforts to combat corruption in government have developed significantly in the past decade.

In 2003 Vietnam signed the UNCAC but Vietnam did not, at that time, ratify or accede to the Convention. A signature is a preliminary endorsement of the UNCAC, indicating a country's intent to consider the UNCAC and possibly ratify it. If a country signs but does not ratify a convention, as was the case in Vietnam, it is not legally bound by the UNCAC but has an obligation to refrain from acts that would defeat the UNCAC's objectives.

Following on from its signature to the UNCAC, the National Assembly of Vietnam issued the Law on Anti-Corruption on 29 November 2005, which became effective on 1 June 2006.

With this latest move, approving the accession to the UNCAC, Vietnam has become a 'member state' and as such is required to reflect the UNCAC's guiding principles, definitions and compulsory provisions in domestic legislation.

While corruption prevention, public monitoring, law enforcement and international cooperation are all principles shared in both the UNCAC and the Anti-Corruption Law, it remains to be seen whether any specific amendments are required to be made to the domestic legislation or processes to accord with Vietnam's new international obligations as a member state.

FCPA violator pleads guilty

In another corruption-related update, a US Department of Justice media release dated 29 June 2009 reported that Joseph T Lukas, one of the four individuals arrested for FCPA violations in connection with activities in Vietnam, has pled guilty. The key elements of Mr Lukas' case were detailed in our February 2009 VLU.

According to the media release, Mr Lukas has admitted that between 1999 and 2005 he, and other employees of Nexus Technologies Inc, agreed to pay and knowingly paid, bribes to Vietnamese government officials.

The media release also confirms, as reported in the February VLU, that Mr Lukas faces a maximum sentence of 10 years' prison.

3.3 Can I contribute my housing contract?

Official letter No. 82/BXD-QLN (OL 82) of the Ministry of Construction dated 13 July 2009 on capital contribution by contract on undertaking to sell/purchase apartment (*Official Letter 82*)

Under Vietnamese law investors may 'contribute capital' (or transfer 'assets') into a company, so as to become the owner or part-owner of that company.

The Law stipulates specific forms of assets that may be contributed, including Vietnamese currency, freely convertible foreign currency, gold, value of land use rights, value of intellectual property rights, technology, technical know-how and also 'other types of assets' recorded in the company's charter.

Decree 108/2006/ND-CP dated 22 September 2006 defines invested capital (which is understood to mean capital able to be contributed) to include rights under contracts, rights with respect to real property and 'other assets and rights' having economic value.

The Ministry of Construction (**MOC**) has recently issued Official Letter 82 indicating its view on whether a proposed purchaser of an apartment, who has signed a contract to buy the apartment, can contribute the value of that apartment as capital into an enterprise.



The Letter addresses a live issue for prospective buyers of apartments in new developments who 'buy' apartments (or sign contracts) 'off the plan', that is before the apartment is completely constructed and therefore, before there is any residential housing ownership certificate. Depending on the pace of construction for an individual project,

investors may not receive their residential housing ownership certificate for several years.

MOC's view

The MOC concluded that an investor cannot make a capital contribution in the form of the value of an apartment under a signed contract to buy that apartment. The MOC's view was based on the following principles:

- one of the conditions for any house transaction under the Law on Residential Housing is that there must be a residential housing ownership certificate, and a party to the house transaction must be the owner of the house or a lawful representative of the owner; and
- assets used for capital contribution must be owned by the investor at the time of contribution.

Because a purchaser who has only signed a contract to purchase an apartment does not have a residential housing ownership certificate and does not therefore yet 'own' the apartment, they cannot contribute its value as capital.

Contribution of contractual rights to purchase apartment?

Official Letter 82 concentrates on the question of whether or not an investor can contribute the value of the apartment for which the contract has been signed. It does not, however, address directly the question of whether a prospective buyer can contribute as capital their 'rights' under the contract to buy the apartment.



Arguably these contractual rights have 'economic value', particularly given the fact that it is relatively common for prospective buyers to assign their rights in such contracts to other prospective buyers in order to profit from any change in value of the underlying property.

However, given MOC's opinion in Official Letter 82, the position is far from clear. Further clarification would be of assistance to investors.

3.4 Compensation in the event of State recovery of land

Vietnamese law gives a provincial People's Committee the right to recover land from any land user for the purposes of:

- national defence or security;
- public use; or
- certain economic development activities.

In the event of such recovery, the affected land user may be entitled to compensation or assistance for resulting loss or damage to its assets. Such compensation may cover loss or damage relating to:

- land or land costs;
- construction works;
- trees;
- interruption of business;
- interruption of employment;
- moving expenses; and
- others expenses considered appropriate by the relevant authorities.

What compensation or damages are available if land is recovered by the State?

While most losses relating to general assets are eligible for compensation, only in certain circumstances does the loss of land use rights lead to compensation. Specifically, under Decree 197-2004-ND-CP of the Government dated 3 December 2004 on land compensation (**Decree 197**), the only land eligible for compensation (**Qualified Land**) is that:

- allocated by the State and for which payment of land use fees has been made; or
- assigned from other land users.



Importantly, land leased from the State is not subject to compensation. However, Decree 197 provides that the user of leased land may be entitled to 'financial assistance' at the discretion of the relevant authority. In all circumstances, the amount of financial assistance may not exceed the amount of compensation to which a land user of Qualified Land would otherwise be entitled.

Circular 116 of the Ministry of Finance dated 7 December 2004, which guides Decree 197, provides further detail – as well as further confusion – to the question of possible financial assistance.

Arguably, Circular 116 may limit the prospective recipients of assistance to State-owned enterprises and State bodies. Other users of leased land, such as private enterprises, may be only entitled to assistance for moving. Unfortunately for those private enterprises, the guidelines on implementation of Decree 197 developed by some provincial People's Committees may be of no more help, omitting to make any mention of financial assistance entitlements for private enterprises. At the end of the day, a private enterprise leasing land from the State may face the difficult situation of being refused financial assistance beyond the provision of a new site which may be smaller in size or less favourable in location.

The small piece of positive news, however, is that the land user of leased land will be entitled to some compensation for the 'remaining investment costs on land', being pre-paid land rental for the period following the recovery of the land, any levelling costs and other directly relevant costs pro-rated for the remaining term of the lease.



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).

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

- Decree 24 implementing the Law on Promulgation of Legal Instruments, 5 March 2009
- Circular 78 amending Circular 75 dated 5 July 2007 on contributions to a Fund to fight contraband tobacco, 20 April 2009
- Decision 253 on listing and trading Government bonds denominated in USD, 24 April 2009
- Decision 159 with UpCoM (unlisted public companies market) trading rules, 27 April 2009
- Decree 41 on administrative penalties in the insurance business sector, 5 May 2009
- Resolution 31 with legislative program for year 2010, 17 June 2009
- Law 34 amending the Law on Residential Housing and the Land Law on right of Vietnamese residing overseas to own a residence in Vietnam, 18 June 2009
- Directive 854 on pilot model for State Economic Groups and on reform of equitization procedures, 19 June 2009
- Law 38 amending articles on investment in capital construction in the Law on Construction, the Law on Tendering, the Law on Enterprises, the Law on Land and the Law on Residential Housing, 19 June 2009
- Letter 8882 regarding extension of time for payment of VAT on goods imported to form fixed assets, 22 June 2009
- Circular 12 on construction practising certificates, 24 June 2009
- Letter 4292 regarding investment as between Vietnam and UAE and other countries in the Gulf region, 25 June 2009
- Circular 133 reducing import duty on kerosene from 35% to 30%, 30 June 2009
- Letter 4941 prohibiting exchange of US dollars higher than at the stipulated rate, 1 July 2009
- Circular 16 dated 9 December 2008 on import pursuant to the 2009 tariff quota, as amended by Circular 18, 3 July 2009
- Letter 4581 with measures to stimulate tourism, 6 July 2009
- Circular 03 providing official English names of State entities and titles, 9 July 2009
- Decision 33 dated 2 March 2009 on bordergate economic zones as amended (to permit duty-free sales to continue until the end of 2012) by Decision 93, 10 July 2009

- Decree 59 on organization and operation of commercial banks, 16 July 2009
- Decision 1682 reducing the interest rate payable to banks on their compulsory reserves for VND deposits from 3.6% to 1.2%, 17 July 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 July 2009. To view all laws uploaded, please visit www.vietnamlaws.com

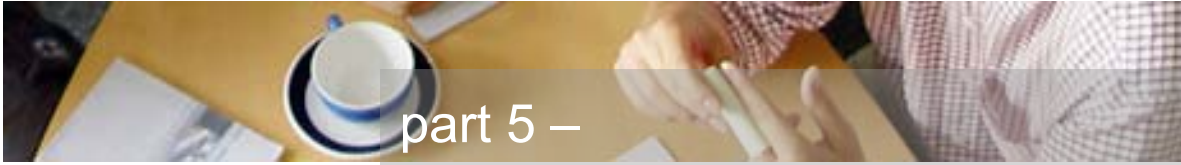
Search function for Vietnam Legal Update

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)

Translations

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



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 Phuong Anh Mai, a lawyer in our Ho Chi Minh City office.



Phuong Anh is a Vietnamese qualified lawyer who was inspired to become a lawyer after working as an administrative assistant at a foreign law firm in Vietnam.

Phuong Anh joined Allens' Ho Chi Minh City office in 2007.

Phuong Anh's practice focuses on labour issues, foreign investment, corporate and commercial matters.

Aside from her use of computers in the office, Phuong Anh is famous for being the most "low-tech" person in the office. She prefers to spend her spare time with her young son at bookshops, parks and swimming pools. Cooking for friends is another favourite past time.

Quote from the source: "Một nụ cười bằng mười thang thuốc bổ" (translation: Laughter is the best medicine).