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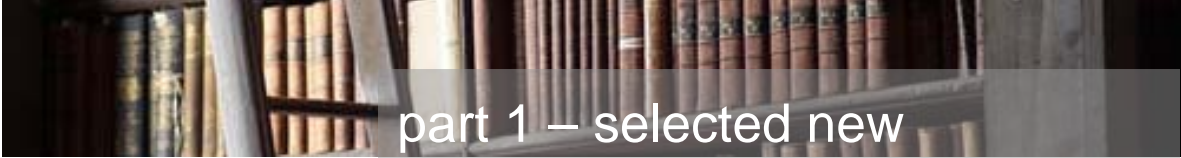
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## part 1 – selected new legal instruments

### 1.1 More foreign investment regulation – but is it any clearer?

#### **Decision 88 of the Prime Minister of the Government on capital contribution and purchase of shareholding by foreign investors in Vietnamese enterprises dated 18 June 2009 (*Decision 88*)**

Decision 88 issues new regulations governing 'capital contribution' and 'purchase of shares' by foreign investors in Vietnamese enterprises (**Regulations**) which will take effect on 15 August 2009.

#### **Scope of application**

The Regulations prescribe rules on forms of investment, payment, requisite entity approvals and the rights, interests and obligations of foreign investors. The Regulations apply to investments in an existing Vietnamese entity made by a foreign investor whether by way of:

- capital contribution into, or subscription for shares; or
- acquisition of a capital contribution portion or shares from an existing member or shareholder.

Importantly, the Regulations clearly state that they do not apply to foreign investment for the purposes of establishing entities in Vietnam or investment in the form of Business Cooperation Contracts, Build Operate Transfer Contracts or other similar contractually-based direct investments. Despite these clear exclusions, the Regulations also make reference to a foreign investor subscribing for "initially issued shares". It is not clear how this is intended to operate given the exclusion of investment for the purposes of establishing entities.

The Regulations also do not apply to investments carried out by way of "merger or acquisition", which we understand excludes transactions where 2 Vietnamese-established entities are merged or where a foreign investor acquires the whole of an existing Vietnamese enterprise. Relevant regulations for these transactions are set out in the Law on Enterprises and the Law on Investment and their implementing regulations.

Finally, the Regulations also do not apply to stock market transactions which are covered by specialised securities laws.

Specialised branch laws or provisions in international treaties continue to take precedent over the provisions set out in Decision 88 and the Regulations.

#### **Replacing Decision 36**

Decision 88 and the Regulations replace Prime Ministerial Decision 36 dated 11 March 2003 (**Decision 36**). Decision 36, which was promulgated before the introduction of the Law on Enterprises and Law on Investment, established rules governing capital contribution and purchase of shares in Vietnamese entities under the old regime but had not been replaced since 2006 when the new investment law regime commenced. Although Decision 36 contained provisions which were broadly inconsistent with the new investment law regime, because it had not been officially replaced some people, including some authorities, continued to hold the view that Decision 36

remained operative. One example was Decision 36's 30% blanket cap on foreign investment in Vietnamese entities.

By formally replacing Decision 36 and clarifying the right to invest at unrestricted levels, Decision 88 should finally put to rest any lingering adherence by licensing authorities to the old blanket 30% limit. This is an important clarification.

Unfortunately, however, beyond this clarification, Decision 88 seems to raise more queries than it answers. This may be partially caused by the fact that the Regulations mirror many provisions of Decision 36 with seemingly little regard for the changes in the regulatory framework between 2003 and now. Also, as is often the case, we will have to wait until implementing Circulars are issued by the relevant ministries to determine the full effect of the changes wrought by this Decision. How the Regulations are interpreted and administered by the local level authorities will also require close monitoring.

We will now address some of the finer details of the Decision and the Regulations and consider some of the potential issues raised.

### **Who is a "foreign investor" for the purposes of the Regulations?**

The Regulations apply to "foreign investors" who are defined to include:

- organisations established outside Vietnam;
- organisations established in Vietnam (including investment funds and securities investment companies) which have foreign investment levels above 49%; and
- individuals without Vietnamese nationality, whether living in Vietnam or overseas.

The specific inclusion of Vietnamese-established entities with more than 49% foreign investment in the group of foreign investors sits somewhat uncomfortably with the reference to foreign investors used in the Law on Investment and its implementing legislation. The Law on Investment refers only generically to "foreign organisations" which arguably may be limited to entities established outside Vietnam. While clarification on the position of foreign-invested Vietnam-established entities would be welcome, Decision 88, as a Prime Ministerial Decision, sits below the Law on Investment and cannot, from a legal hierarchy standpoint, purport to change the Law on Investment.

Interestingly, unlike Decision 36, no specific mention is made of overseas Vietnamese or persons of Vietnamese origin. Although not clear, it is likely that the Regulations will apply to overseas Vietnamese because they do not have Vietnamese citizenship, even if they reside in Vietnam.

### **Which "Vietnamese entities" are covered?**

The Regulations apply to all forms of Vietnamese enterprise: shareholding companies, single and multiple member limited liability companies, partnerships, private enterprises and equitizing State Owned Enterprises.

While not entirely clear on their face, it appears that the Regulations apply equally to all Vietnamese established entities, regardless of whether they were initially established with 100% Vietnamese capital or with foreign invested-capital. This represents a significant departure from Decision 36 which applied only to companies originally established with 100% Vietnamese capital.

### **Permissible levels of foreign capital contribution and share purchase**

As noted above, one important area where the Regulations do provide some clarity is in the complex area of applicable foreign ownership limits.

After listing the relevant sources of limits on foreign ownership, namely:

- securities laws (for example the 49% cap on public companies discussed in the May edition of VLU);

- specialised branch laws (for example the 30% limit on aggregate foreign investment in Vietnamese established joint stock banks);
- international treaties (for example the levels for various services sectors, committed to by Vietnam as part of its entry into the WTO); and
- State-owned enterprise equitization plans,

the Regulations make clear that in all cases where no limit is applied by any of the means listed above, a foreign investor may contribute capital or purchase shares at an "unrestricted" level – that is, a foreign investor may buy 100% of the shares or interests in a Vietnamese entity.

The Regulations also clarify that where differing limits apply to a Vietnamese enterprise because it operates in multiple sectors, the lowest permitted level will apply.

### **Payment mechanics**

The Regulations reiterate the right of foreign investors to contribute capital or purchase shareholdings by making payment in Vietnamese dong, freely convertible foreign currencies or other lawful assets. However, it goes on to prescribe that where foreign currency is used, that currency must first be converted into Vietnamese dong. Specific rules about the valuation of any lawful assets used are also set out.

The Regulations also prescribe that all activities relating to the investment in the Vietnamese enterprise, including purchase, assignment, receipt of dividends and other profit distribution must be conducted through an on-shore investment capital account opened by the foreign investor with a commercial bank in Vietnam.

A significant uncertainty raised by the Regulations is whether these payment and account requirements are intended to apply to a transfer of share or assignment of capital contribution or only to the contribution of capital or purchase of shares from the enterprise itself. If the provisions apply to all these types of activities, a sale of shares in a Vietnamese enterprise between 2 foreign investors would require payment on-shore, in Vietnamese dong and via 2 on-shore capital investment accounts.

### **Corporate approvals for foreign investment in Vietnamese enterprises**

The Regulations also address in some detail the foreign investment process from the perspective of requisite corporate approvals. Given that these requirements are already addressed in the Law on Enterprises and its implementing legislation, the Regulations risk confusion by setting out some additional and possibly conflicting requirements.

One example is the requirement for the Chairman of the Members Council or General Director of a multiple member limited liability company to prepare, and have approved by the Members Council, a plan specifically addressing the capital contribution portions to be received from foreign investors. This is not a requirement under the Law on Enterprises and it may result in additional burdens if the relevant licensing and business authorities require a copy of such a plan when registering foreign investments.

The Regulations also appear to permit a shareholding company to issue additional shares to foreign shareholders by having a plan for such issue approved by the general meeting of shareholders. This is inconsistent with the pre-emptive right set out in the Law on Enterprise's right for each individual shareholder to be given a pro-rata entitlement to any new shares being issued. Although we are aware that the process set out in the Decision (approval of a plan by the General Meeting of Shareholders) has been used in the past in order to issue shares to strategic foreign investors, as a Decision of the Prime Minister, in terms of legal hierarchy, the Regulations cannot amend or waive the right granted by the National Assembly's Law on Enterprises.



## Rights, interests and obligations of foreign investors

The Regulations also address the rights, interests and obligations of foreign investors. These largely cross refer to the rights, interests and obligations set out in other legislation including the Law on Enterprises, securities laws, foreign exchange laws etc. Again, however, some specifics are included which some may argue narrow existing rights. For example, the Regulations specifically recognise the right of a foreign investor to pledge their shares in credit relations and use their shares as security. The fact that the relevant Regulation refers only to shares, may be seen as indicating that the same rights to do not apply, say, to a foreign investor's capital contribution portion in a limited liability company. Such a position, however, is inconsistent with the Civil Code which specifically recognises the right to use a capital contribution portion as security for performance of civil obligations. As such, it is likely that the reference to shares only is simply a drafting anomaly.

### Does the Decision change any licensing procedures?

Finally, although not entirely clear, it appears that the procedures set out in the Regulations are intended to sit alongside (and not replace) existing regulations, for example in relation to licensing procedures. This is particularly the case, given that it is a Decision of the Prime Minister and in terms of hierarchy it should not amend or change any requirements set out in higher level instruments, such as the Law on Investment and its implementing decrees.

## 1.2 At last – confirmation of PIT exemption until 30 June 2009

### Resolution 32/2009/QH12 of the National Assembly, dated 19 June 2009

On 19 June 2009, on the last day of their meeting, the National Assembly finally addressed the long awaited issue of personal income tax (*PIT*) deferral. To the relief of Vietnamese taxpayers, the National Assembly determined that the PIT whose collection had been deferred since January 2009 would not be repaid, but would instead be a 'gift' to the tax payers.

### Rumours, gossip and indicative events

As reported in previous editions of the VLU, payment of PIT was originally deferred in February this year by the Ministry of Finance's Circular 27 of 2009 (*Circular 27*) and Official Letters 1823 and 1845.



Up to 19 June there had been widespread rumours that the tax payment deferral was likely to turn into an exemption, but no certainty. There had also been rumours and indications, but again no certainty, that the deferral period would be extended beyond 31 May 2009. The General Department of Taxation even issued Official Letters 0833 and 9873 on 15 June (notably 4 days before the National Assembly's resolution) guiding the lower tax departments to continue the PIT deferral until 30 June 2009.

### From deferral to exemption – the NA Decision in a nutshell

The National Assembly's resolution essentially does 3 things:

- it converts the original tax deferral into a tax exemption – meaning that the PIT previously deferred will not need to be paid;
- it extends the non-collection period for all PIT to 30 June 2009, from the original 31 May deadline given in Circular 27; and
- it continues the PIT exemption for certain limited types of income until the end of 2009.

#### **What income is exempt from PIT?**

From guidance in Official Letter 9873 we understand that for resident individuals, income arising from business activities, salaries and wages as well as from capital investments, capital & securities transfers, income from royalties, franchising, inheritance and receipt of gifts will be exempt from PIT where it is paid between 1 January 2009 and 30 June 2009.

For non-resident individuals, PIT exempt income is limited to that arising out of capital investments, capital & securities transfers, from royalties and franchising.

The National Assembly Resolution also states that the extended exemption, up to the end of 2009, applies only to income arising out of capital investments, capital & securities transfers, royalties and income from franchising.

It also appears likely, in particular from Official Letter 1823, that the exemption will apply only to income paid in the exemption period and that income arising before 30 June, but paid after 30 June, will not be exempt.

#### **Still not the full story?**

It is likely that further regulation will still be required to address precise details, for example the mechanics for determining how PIT will be calculated for income paid in the second half of 2009.

### **1.3 Implementing regulations for foreign residential ownership – one step closer to reality**

#### **Decree 51-2009-ND-CP on Foreign Organisations and Individuals purchasing and owning housing in Vietnam, dated 3 June 2009 (*Decree 51*)**

Decree 51 guides and implements the 5-year pilot scheme introduced by Resolution 19-2008-QH12 of the National Assembly, dated 3 June 2008 (**Resolution 19**) which permits certain foreign individuals and foreign-invested enterprises to purchase housing in Vietnam.

As reported in the VLU in April 2008, a pilot scheme for foreign residential ownership had been long debated and promised. Although it was proposed that the scheme be addressed by amendment to the Housing Law, ultimately the National Assembly established the scheme under Resolution 19. The scheme commenced on 1 January, but until recently, there were no implementing regulations, making reliance on the scheme practically impossible. The long-awaited Decree will be effective from 1 August 2009.

#### **The nitty-gritty**

Decree 51 does not change any of the basic elements of the scheme as set out in Resolution 19. It reiterates that:

- eligible foreign individuals are allowed to acquire only one apartment in a "project for commercial development of housing" (as opposed to a house);
- the ownership period is limited to 50 years for individuals and the term of the investment project for companies (after which time the owner must sell the apartment within 12 months);
- the foreign owners must not lease out the apartment – that is, it must be used by an individual owner as a residence and in the case of eligible foreign enterprises it must be used as a



residence by its employees). In the latter case, it appears that the foreign enterprise cannot receive rental payments from employees living in the apartment although provision of the apartment could, presumably, form part of a salary package.

Interestingly, while Resolution 19 allows eligible foreign enterprises to acquire multiple apartments, Decree 51 is silent on this point. Despite this, it appears that acquisitions of multiple apartments by eligible foreign enterprises will still be possible.

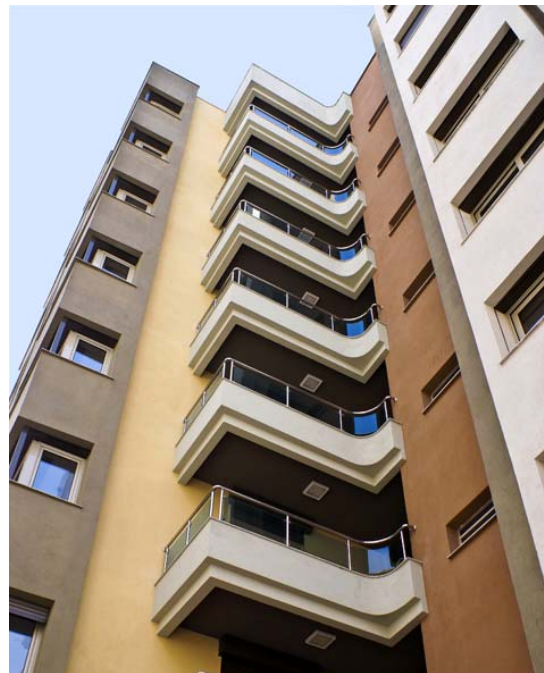
### Who is eligible?

Decree 51 does provide more detail on the eligibility requirements set out in Resolution 19 (which were broadly similar to the seven categories of eligible purchasers originally proposed in the draft amendments to the Housing Law discussed in the April 2008 edition of VLU).

### Eligible foreign individuals

The categories of eligible foreign individuals are:

- individuals who have made a direct investment in Vietnam and as such are named in an investment certificate with a residual term of at least one year or persons able to prove membership of a board of management (or similar) of an enterprise operating in Vietnam;
- general directors, directors or deputy directors of enterprises operating under the Law on Enterprises or heads or deputy heads of a subsidiary of the enterprise (it is unclear whether this includes branches of a company);
- foreigners who have received a decoration or medal from the President of Vietnam for contribution to the country;
- foreigners who have received a certificate from a Ministerial level body for special contributions to Vietnam. In this case, the certificate must be sent to the Ministry of Construction (**MOC**) which will make a recommendation to the Prime Minister;
- foreigners who are working either as a lawyer or in one of the following sectors: economy, science, technology, environment, education and training, culture, information, sport and physical education, medical health and social sectors and who have:
  - engineering qualifications or a bachelors or higher degree; and
  - either a work permit or a practising certificate for their specialty issued by a competent Vietnamese authority;
- foreigners who have 'special skills'. If relying on this special skills category, the foreigner must have certification of these skills from a relevant Vietnamese professional association or Ministerial body which has jurisdiction over their area of expertise and a practising certificate issued by a competent Vietnamese authority (if the law requires a practising certificate for that specialty) or work permit (if the law does not require a practising certificate). Given the difficulties in obtaining the certification, many foreigners with special skills may choose instead to rely on the earlier condition relating to those with professional qualifications; and
- foreigners married to a Vietnamese citizen having a marriage certificate issued by the competent Vietnamese or foreign authority.



To be eligible all foreign individuals must have a permanent or temporary residents card (or similar) allowing them to reside in Vietnam for 12 months or more. Persons eligible for diplomatic or consular immunities and privileges are not eligible to purchase an apartment under the scheme.

A 'foreigner' is defined in the Decree as anyone who does not have Vietnamese nationality. In our May 2009 edition of VLU, we covered existing criteria for residential housing ownership by overseas Vietnamese and proposed amendments to existing regulations applicable to overseas Vietnamese.

#### **Eligible 'enterprises with foreign owned capital'**

An enterprise with foreign owned capital is an enterprise established by a foreign investor in order to conduct foreign investment activities in Vietnam or a Vietnamese enterprise in which a foreign investor invests in order to be directly involved in its management.

To be eligible for the scheme, enterprises with foreign owned capital must be currently operating in Vietnam and have an investment certificate with a residual term of at least one year. Enterprises conducting 'real estate business' are not eligible.

#### **Mechanics of purchase**

All apartments which are purchased from a real estate business enterprise must be purchased through a real estate trading floor (as defined in the Law on Real Estate Business).

Where an apartment is purchased from a developer (and possibly other real estate business enterprises) the vendor must have an approval for the project and either a land lease contract, a decision on allocating the land or a land use right certificate. In addition, a surface area drawing of the apartment must be available as well as minutes of handover, attaching building management rules in the case of an already-developed apartment.

In the case of on-sale or acquisition by way of inheritance or gift, an ownership certificate is required from the vendor and building management rules must be attached to the minutes of handover.

If the apartment is purchased from a real estate business enterprise, notarisation of the sale and purchase contract is not required. In contrast, notarisation of the contract is required when acquiring an apartment from an individual owner.

Transaction taxes and registration fees apply equally to Vietnamese and foreign individuals and organisations.

The Decree also sets out an application form and details the documents required for an application file to apply for a housing ownership and residential land use right certificate. Applications are made to the Department of Construction (**DOC**) with jurisdiction over the locality of the apartment. The relevant DOC then sends the draft certificate to the local Peoples' Committee for signing and sealing and return to the DOC. Details of foreign individuals are also sent to the MOC for entry onto its website. The stated time limit to issue the certificate is 30 days from receipt of a complete application file.

#### **What rights does a foreign owner have?**

Apartment owners have the right to use the common areas of the apartment block along with other owners and lessees. If a foreign individual or owner sells or otherwise transfers the apartment to a domestic entity or Vietnamese citizen, the transferee will be entitled to a land use right on a 'stable and long term basis' with the term to be specified in the housing ownership certificate.



## 1.4 A sharper knife in the anti-piracy tool box

### **Decree 47-2009-ND-CP on Penalties for breaches of copyright dated 15 May 2009 (Decree 47)**

Copyright infringement is a recognised problem in Vietnam. Key areas of copyright infringement include piracy of DVDs and CDs, books and business software.

Foreign groups, such as the International Intellectual Property Alliance, have recognised the efforts made by Vietnam to address this problem (for example the issuance of Joint Circular 01 in February 2008 which confirmed that wilful infringements of copyright on a commercial scale, which are detrimental to the interest of right holders may be subject to criminal prosecution) but urge further work.

#### **The latest development – Decree 47**

The latest development was the recent issuance of Decree 47. For the first time, under Decree 47, all the administrative penalties for various types of copyright infringement are detailed in a single legal instrument. Decree 47 also stipulates heavier fines for copyright infringement and gives more

power to relevant state authorities and officials to deal with breaches of copyright. Highlights include:

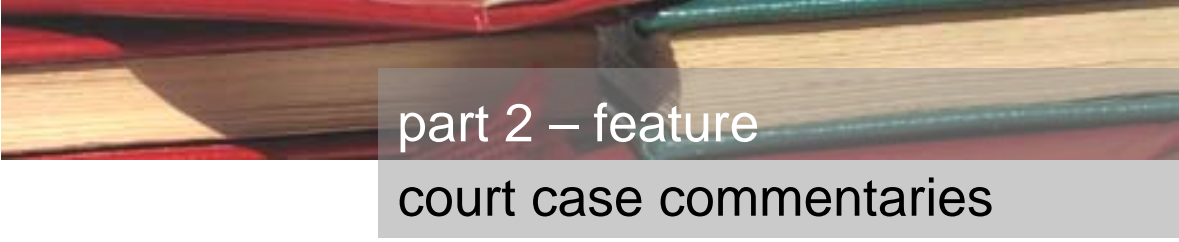


- detailed provisions covering a range of offences from infringement of regulations on registration to acts of storage or advertising of infringing goods;
- a maximum fine of up to VND 500 million can be imposed for infringing the right to copy works, while the highest fine under the predecessor Decree was just VND 70 million;
- in addition to fines, other measures to remedy consequences of copyright infringement including destruction of

the infringing goods; and

- the ability for specialised inspectors and the chief inspectors of the Department and Ministry of Culture, Sport and Tourism to impose fines (at varying levels) as well as the chairman of a People's Committee of a commune, district or province. Customs officers, market management officers and the police also have the right to impose fines for some offences.

The Decree takes effect from 30 June 2009.



## part 2 – feature court case commentaries

This month, our case commentary series considers a 2006 decision of the Economic Court of Ho Chi Minh City. The decision, handed down on the day of the hearing, considered the right of a lender under a convertible loan agreement.

### **VEIL INFRASTRUCTURE LIMITED V. DUC HANH CONSTRUCTION LLC & DUC HANH CONSTRUCTION SC**

**Judgment No. 421/2006/KDTM-ST dated 24 August 2006**

#### **The Facts**

Veil Infrastructure Limited (**VIL**), a company registered in the British Virgin Islands, brought an action against two Vietnamese companies, Duc Hanh Transport Construction Limited Liability Company (**Duc Hanh LLC**) and Duc Hanh Transport Construction Shareholding Company (**Duc Hanh SC**), both seemingly owned by the same group of people.

On 6 November 1998, VIL entered into a convertible loan agreement with Duc Hanh LLC and its members in which VIL agreed to provide Duc Hanh LLC with a loan which the parties agreed would be converted into shares in a shareholding company. From the judgment, it appears that the parties had intended that Duc Hanh LLC would be converted into a shareholding company and VIL

would obtain shares in that company on conversion of the loan. For reasons not explained in the judgment, this did not happen. Instead, Duc Hanh SC was set up as a new shareholding company, while Duc Hanh LLC continued to exist.

Under the agreement, over USD 1.5 million was disbursed to the borrower in several instalments up to March 1999.

On 20 October 2003, an agreement extending the term of loan was entered into between VIL and Duc Hanh LLC. Duc Hanh SC and its founding shareholders were also now added as parties to the agreement. According to this extension agreement, the loan

provided by VIL would be convertible into shares in Duc Hanh SC by no later than 1 January 2004.

On 24 January 2005, at the request of Duc Hanh LLC, the deadline was further extended to 31 March 2005 but the loan was never converted into shares in Duc Hanh SC.

On 30 May 2005, VIL brought the action against Duc Hanh LLC and Duc Hanh SC, seeking to recover the loan plus interest at penalty rates and a declaration that the founding shareholders of Duc Hanh SC be jointly and personally liable for this amount.



## The Decision

The Court found that an agreement existed between the parties and that Duc Hanh LLC and Duc Hanh SC had failed to honour their obligation to convert the loan into shares. The Court ordered Duc Hanh LLC and Duc Hanh SC to repay the loan to VIL, plus interest as claimed by VIL, in accordance with the terms of the convertible loan agreement.

However, the Court refused to grant the declaration that the founding shareholders of Duc Hanh SC were jointly liable for the debt on the basis that these people "had already contributed capital into Duc Hanh SC and Duc Hanh LLC" and were not therefore jointly and personally liable for the further debt.

## Commentary

The Court's decision that Duc Hanh LLC and Duc Hanh SC had to repay the loan plus interest is hardly surprising. However, the Court's refusal to grant the declaration that the founding shareholders of Duc Hanh SC be jointly and personally liable for the debt is harder to understand. In reaching its decision, the Court appears to have focussed only on the company law considerations, ignoring the contract law aspects of the case.

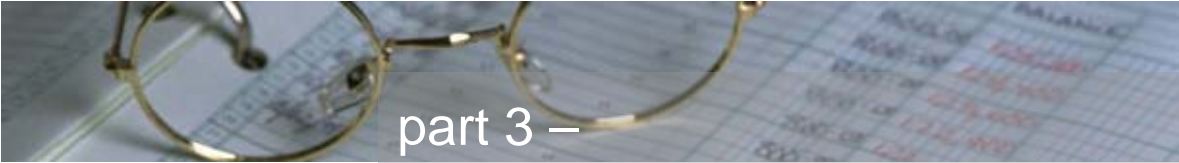
It is encouraging to see that the Court clearly separated the liability of a company from the liability of its shareholders, the principle underpinning the limited liability of a shareholding company. The Law on Enterprises clearly states that shareholders are not liable for the debt of companies in which they hold shares, beyond the capital they have agreed to contribute into the company.

However, it seems that the Court did not also consider the fact that the founding shareholders of Duc Hanh SC were also parties to the extension agreement of 2003. Relevantly, the judgment of the Court quoted several times a clause from the extension agreement which states:

"if the loan is not converted into shares by 01 January 2004, Duc Hanh LLC, Duc Hanh SC and the founding shareholders of Duc Hanh SC undertake to repay VIL the entire amount of the loan together with interest and penalty interest as provided in the agreement".

This provision appears to clearly provide for the founding shareholders of Duc Hanh SC to bear liability for the debt. Whether they are liable for the entire amount or only part of it, or whether VIL must claim against the companies before it can claim against the shareholders, depends on the actual provisions of the agreement but it is difficult to see how, given the text, one could conclude that the shareholders of Duc Hanh SC do not bear any personal liability for the amount loaned by VIL. It seems that the Court should have considered this issue by examining the actual provisions of the relevant agreements. Its failure to do so makes this aspect of the decision questionable.

It is also not clear whether the real basis of the Court's decision may have been the fact that the action was brought by VIL only against Duc Hanh LLC and Duc Hanh SC as defendants. The shareholders of Duc Hanh SC were only joined to the action as "persons with relevant rights and obligations". The Court may have considered that only those named as defendants could be found liable for the debt. However, that would be an unconvincing line of reasoning given it would clearly contradict the status of these people as "persons with relevant rights and obligations" and it also seems unreasonable to require VIL to have to start a completely separate action in order to claim against those people, since any such action would be for the same amount and on the basis of the same facts.



part 3 –  
did you know?

### 3.1 Calculating severance and redundancy allowances in light of unemployment insurance

**Circular 21-2003-TT-BLDTBXH of the Ministry of Labour, War Invalids and Social Affairs dated 22 September 2003 as amended by Circular 17-2009-TT-BLDTBXH dated 26 May 2009 implementing Decree 44 on Labour Contracts (*Circular 21*); Ministry of Labour, War Invalids and Social Affairs Official Letter 1134-LDTBXH-LDTL dated 13 April 2009 (*OL1134*); Official Letter 2001-LDTBXH-LDTL dated 11 June 2009 (*OL2001*) and Official Letter 2114-LDTBXH-LDTL on 18 June 2009 (*OL2114*)**

As previously discussed in the December 2008 issue of VLU, there have already been a number of official letters and much discussion centred around the interaction between the (old) severance and redundancy allowance provisions under Vietnam's Labour Code and the (new) unemployment insurance regime applicable to Vietnamese employees under the Law on Social Insurance that came into effect from 1 January 2009.

While a number of the issues were addressed before the unemployment insurance regime came into effect, additional queries have been raised recently as employers start to grapple with the practical implications of the new regime.

One such issue concerned the entitlement to, and calculation of, an employee's severance or redundancy allowance where an employee worked for an employer both before and after 1 January 2009.

While Decree 127, dated 12 December 2008, provided that the period during which unemployment insurance premiums are paid does not count for calculating the amount of redundancy or severance allowances under the Labour Code, it was less clear whether this period would count towards the minimum 12 month work period for entitlement to such redundancy or severance allowances.

#### **Severance allowance**

The Ministry of Labour, War Invalids and Social Affairs (*MOLISA*) has issued two official letters, OL1134 and OL2001, which address:

- calculation of the period of employment to establish entitlement to severance allowance; and
- calculation of the period of employment to determine the amount of any such severance allowance.

#### **Entitlement to severance allowance**

The official letters provide that the period of employment to establish entitlement to severance allowance is to be calculated in accordance with the Labour Code. Relevantly, Article 14 of Decree 44-2003-ND-CP of the Government dated 9 May 2003 on Labour Contracts (*Decree 44*) states that the period will be the total period of employment according to all labour contracts (including any oral labour contract) under which the employee actually worked for the employer. The calculation of the period also includes:

- any trial period or apprenticeship period;
- any period for improvement of trade or professional skills with the enterprise or organization, or where the employee is sent off for training;
- leaves of absence in accordance with the social insurance regime and holidays in accordance with the provisions of the Labour Code; and
- any period of suspension of performance of the labour contract agreed by the parties.

The official letters confirm that, irrespective of the period for which unemployment insurance premiums are paid, the total period of employment under contract will be taken into account to determine whether or not an employee has satisfied the 12 month employment period requirement to be entitled to receive a severance allowance on termination.

### Allowance amount

MOLISA has also provided guidance on how to calculate the amount of the severance allowance payable once it has been established that the employee is entitled to receive it. Circular 21 provides the following formula for calculation of a severance allowance:

$$\text{Severance allowance} = \frac{\text{Relevant working duration at the enterprise}}{\text{Relevant monthly wage}} \times \frac{1}{2}$$

For the purposes of doing these calculations, the relevant working duration will be the total working duration at the enterprise (determined in accordance with article 14.3 of Decree 44 described above) minus, pursuant to Decree 127, the period for which unemployment insurance premiums have been paid . Partial years of employment will be rounded:

- up to half a year, for periods of one full month to less than six months; and
- up to one year, for periods between six months and twelve months.

The wage used to calculate the severance allowance is the monthly wage determined using the average of the contract monthly wage for the six months immediately preceding termination of the labour contract, including any seniority and position wages and regional and position allowances.

**Illustrative example.** An employee commenced work with an employer on 1 August 2008. The employee continues to work for that employer until 1 January 2010, at which time the employee resigns. The employee's total period of service will be 1 year and 5 months. Under the new unemployment insurance regime, the employer will not be liable under the law to pay severance allowance for the period during which the employer paid unemployment premiums for such employee (taken to be from 1 January 2009 for the purposes of this example). However, the remaining period of employment of 5 months not exempt from severance allowance payment will be rounded up to 6 months and the employer will therefore be liable to pay one quarter of one month's wage as a severance allowance to the employee.

### Redundancy allowance

MOLISA OL 2114 covers calculation of the employment period and the amount of redundancy allowance payable under Article 17 of the Labour Code in the event of redundancies arising from organisational restructure or technological changes.

MOLISA applied the same approach to redundancy allowances as it adopted for severance allowance calculation, in that total period of employment is to be taken into account to determine whether or not an employee has satisfied the 12 month employment period requirement to be entitled to receive a redundancy allowance if made redundant.

OL2114 also dealt with the added twist for redundancy allowances, arising from the fact that the



Labour Code provides for a minimum redundancy allowance. Employees are generally entitled to one month's redundancy allowance for every year of service, but the Labour Code mandates a minimum 2 month's allowance for any eligible employee.

The letter deals specifically with the situation where an employee is made redundant who has worked for more than 12 months for an employer but only a small part of that period was prior to the introduction of the unemployment insurance regime

MOLISA clearly stated that the employer in such a situation is obliged

to pay the minimum allowance of two months' wages. Again, the wage used to calculate redundancy allowance is the average wage for the six consecutive months immediately preceding termination of the labour contract.

**Illustrative example.** Using the same example as above, but assuming that instead of resigning, the employee's contract is terminated on 1 January 2010 due to restructuring of the employer's business. The employee's total period of service will be 1 year and 5 months making them eligible for a redundancy allowance. Under the new unemployment insurance regime, the employer will not have to pay redundancy allowance for the period during which the employer paid unemployment premiums for the employee so the relevant working duration for the purposes of calculating the redundancy allowance is 5 months. The employer will be required to pay the employee the minimum redundancy allowance of two month's wages.

### More official letters to come...

An unfortunate side effect of the global financial crisis is the possibility of more redundancies and higher unemployment in Vietnam. This is also likely to lead to more questions from employers about how the new unemployment insurance regime operates and interacts with the existing Labour Code provisions. Stay tuned for further updates as MOLISA responds to these questions.

## 3.2 Doing Business - World Bank Rankings for 2009

The World Bank ranked Vietnam in 92nd place in terms of ease of doing business in its 2009 world rankings (down from 87th place in 2008). 181 countries were included in the survey. Singapore was ranked 1st, while the Congo was 181st.

In arriving at this overall ranking, the World Bank took into account the following rankings for Vietnam:

	Vietnam's rank
Starting a business	108
Dealing with construction permits	67
Employing workers	90
Registering property	37
Getting credit	43
Protecting investors	170
Paying taxes	140
Trading across borders	67
Enforcing contracts	42
Closing a business	124

### 3.3 The National Finance Supervisory Council

#### **Decision No. 79/2009/QĐ-TTg dated 18 May 2009 on Organization and Operation of the National Finance Supervisory Council (*Decision 79*)**

Under Decision 79, the Prime Minister has recently issued operating regulations for the National Finance Supervisory Council (**Council**). The Council, established by Decision 34/2008/QĐ-TTg dated 3 March 2008, is a body tasked with advising the Prime Minister on co-ordinating the operation of supervising the national financial market – being the banking, securities and insurance markets.

Decision 79 takes effect on 10 July 2009.

#### **What does the Council do?**

The Council's primary task is to provide independent and objective advice to the Prime Minister regarding supervision of the financial markets of Vietnam. The Council is not intended to change any of the functions or duties of existing specialised branch State administrative bodies. Rather it is intended to work in close cooperation with these bodies and with relevant ministries to assist the Prime Minister in overall supervision of the financial market. The Council is also specifically tasked with providing opinions to the State Bank of Vietnam, the Ministry of Finance and other relevant agencies on the formulation of regimes, policies and regulations for the inspection, supervision and development of the banking industry, the securities market and the insurance market.

In addition to its overall supervisory functions, the Council has specific responsibility for:

- supervision of the conditions for operational licences for credit institutions, finance institutions and other institutions operating in the banking, securities and insurance sectors;
- supervision of the application of international practice and standards on regulatory operations of specialised branch inspectorates and other regulatory bodies in the banking, securities and insurance sectors; and
- establishing a database system which collates, processes and supplies information on the Vietnamese financial market, so that the Council can analyse, make forecasts and provide warnings on the safety levels of the financial system and the risk levels faced by the national financial market.

### What is its structure?

Decision 79 sets out in detail the structure of the Council, which has a chairman and two deputy chairmen who must be appointed or dismissed from office by the Prime Minister. The Decision also specifies the duties and powers of the Chairman, who is responsible before the Prime Minister.

Under Decision 338/QD-TTg dated 29 March 2008, Mr Le Duc Thuy, former Governor of State Bank of Vietnam, was appointed by the Prime Minister to be the first chairman of the Council.

### Interaction with other agencies and bodies

As noted above, the Decision makes it clear that the Council is not intended to change the functions or duties of other specialised branch State administrative bodies.

One such body is the National Advisory Council on Financial and Monetary Policies (**NCFMP**) established on 19 November 2007 under Decision 175/2007/QD-TTg of the Prime Minister. The NCFMP's members include representatives of the Ministry of Finance and the State Bank. The key difference in the roles of the Council and the NCFMP appears to be the stated independence of the Council.



In the current economic climate, independent advice, based on analysis and research, will be more important than ever. Hopefully the Council, armed with these new operating regulations, will be able to provide the necessary assistance and supervision for the Vietnamese financial market.

## 3.4 Clarification on key personnel registration for foreign enterprises in Ho Chi Minh City

### Official Letter 1225/SKHDT-DT from the Department of Planning and Investment of Ho Chi Minh City regarding certification of key personnel of foreign invested companies and Business Cooperation Contracts in Ho Chi Minh City, dated 9 March 2009 (*Official Letter 1225*)

A recent official letter from the HCMC Department of Planning and Investment (**DPI**) has clarified their approach to registration of key personnel, including General Directors, Members of the Board of Management, Members of the Inspection Committee and legal representatives.

#### Different regimes for different enterprises

##### The old ...

Under Decree 24/2000/ND-CP, dated 31 July 2000, guiding the implementation of Law on Foreign Investment in Vietnam, a list of members of the Board of Management, General Director and Deputy General Directors of joint venture companies was required to be registered with the relevant Department of Planning and Investment or Board of Management of Industrial Zones. These licensing authorities would also issue a document certifying the key personnel of these companies. Similarly, registration of a list of (management) personnel of 100% foreign invested companies, of representatives of parties in a Business Cooperation Contract (**BCC**), of a co-

ordination board established by parties in a BCC or of an operating office of a foreign party in a BCC needed to be registered.

**... and the new**

In contrast, the Law on Investment and Law on Enterprises (effective from mid 2006) do not require companies to register their key personnel nor do they provide a procedure for issuing certification of registration of key personnel.

**Approach of the HCMC DPI**

Official Letter 1225 explains that:

- for foreign invested companies and BCCs established before 1 July 2006 and not re-registered, the DPI will only issue a certificate reflecting amendments to the legal representative, head of branch or head of representative office for companies and changes to the head of operating office of foreign parties for BCCs;
- for foreign invested companies and BCCs established before 1 July 2006 which have re-registered or foreign invested companies and BCCs established after 1 July 2006, the DPI will reject any application for registration of key personnel. It will not issue any certificate of registration of key personnel and only register changes to the legal representatives of such companies and BCCs.

## part 4 –

## what's new online?

**Subject categories in Vietnam Laws Online database**

Vietnam Laws online database on [www.vietnamlaws.com](http://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:****Prior to 2009**

- Law 21 on High-Tech, 13 November 2008
- Decision 27 on securities companies dated 24 April 2007 as amended by Decision 126, 26 December 2008

**In 2009**

- Circular 85 with further guidelines on reduction of VAT, CIT and registration fees, 28 April 2009
- Circular 91 with additional list of goods entitled to 50% reduction of VAT rate, 12 May 2009
- Decision 79 regulating the National Finance Supervisory Council, 18 May 2009
- Circular 10 on certificates of origin as between Vietnam and Japan, 18 May 2009
- Decree 49 on administrative penalties in the technology transfer sector, 21 May 2009
- Circular 21 on labour contracts dated 22 September 2003 as amended (regarding severance allowances) by Circular 17, 26 May 2009
- Circular 108 reducing import duty on mazut fuel oil, 29 May 2009
- Circular 112 on 0% VAT rate applicable to international transportation and to aviation and shipping services, 2 June 2009
- Circular 13 on import and export at auxiliary border-gates and border entry points, 3 June 2009
- Decree 51 on foreigners owning a residential apartment in Vietnam, 3 June 2009
- Decree 53 on issuance of international bonds, 4 June 2009
- Circular 119 reducing import duty on some gasoline and oil items, 10 June 2009
- Decision 803 on double tax avoidance agreement with United Arab Emirates, 10 June 2009
- Letter 2001 on job loss insurance benefits, 11 June 2009
- Letter 9833 continuing the deferment of time for payment of personal income tax for June, 15 June 2009
- Letter 9873 replacing Letter 9833 on the continued deferment of time for payment of PIT for June, 15 June 2009
- Draft Circular on foreign exchange control of foreign investors, 16 June 2009

- Decision 88 on capital contribution and purchase of shareholding by foreign investors in Vietnamese enterprises, 18 June 2009
- Decision 108 dated 20 November 2008 on trading unlisted public company shares as amended by Decision 128, 23 June 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 June 2009. To view all laws uploaded, please visit [www.vietnamlaws.com](http://www.vietnamlaws.com)

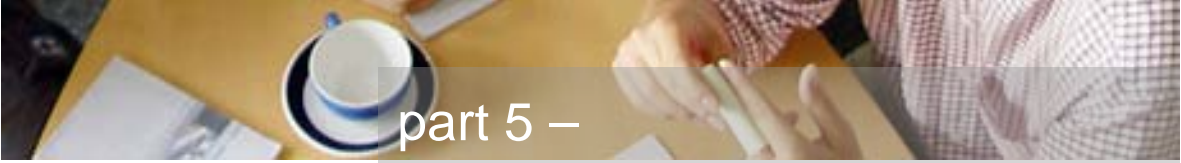
#### **Search function for Vietnam Legal Update**

All back issues of the Vietnam Legal Update from 1997 to the present are now available on [www.vietnamlaws.com](http://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](http://www.vietnamlaws.com)



## part 5 – get to know us

Allens' in-country lawyers hail from Australia, Finland and of course, Vietnam. In this section of the VLU, we shine the spotlight each month on a different lawyer from our Hanoi or our Ho Chi Minh City office, to give readers a glimpse of who we are beyond the office. This month, our featured lawyer is Mai Loan Nguyen, a lawyer in our Ho Chi Minh City office.



Mai Loan is a Vietnamese qualified lawyer, who joined Allens' Ho Chi Minh City office in 2006 after having finished her post-graduate study.

Before joining Allens, Mai Loan had also worked for four years at other foreign law firms in Ho Chi Minh City.

Mai Loan's practice focuses on foreign investment, dispute resolution, labour, corporate and commercial matters.

In her spare time, Mai Loan enjoys walking, watching TV and cooking Vietnamese food.

Quote from the source: "Wealth is nothing without health"