



vietnam legal update

May 2009

contents

Part 1 – Selected new legal instruments	
Meeting of the National Assembly – May to June 2009	1
1.1 Change in the offering for investment laws	1
1.2 Good news for overseas Vietnamese wanting to buy houses in Vietnam	3
1.3 A new market for unlisted public companies' shares and bonds	5
1.4 Getting tough on insurance business administrative offences	5
1.5 Clarity on foreign ownership limits for non-listed public companies	7
Part 2 – Feature	
Court case commentaries	9
Part 3 – Did you know?	
3.1 Investing abroad – not as easy as you may think	12
3.2 Too bad if you can't 'bend it like Beckham'	13
3.3 Exploration and exploitation of oil and gas resources in Vietnam - production sharing contracts, farm-out and security for financing	14
Part 4 – What's new online?	
Subject categories and new laws in Vietnam online database	17
Search function for Vietnam Legal Update	17
Part 5 – Get to know us	
Spotlight on Melissa Rudd	19

The material contained in *Vietnam Legal Update* is intended to inform readers of recent legal developments in Vietnam. It is not intended and should not be relied upon as legal advice. Should readers wish further information in relation to any legal instrument or matter mentioned in this issue, they are encouraged to contact one of our Vietnam offices (details below).

visit www.vietnamlaws.com

- Bangkok
- Beijing
- Beijing IP
- Brisbane
- Hanoi
- Ho Chi Minh City
- Hong Kong
- Jakarta
- Melbourne
- Perth
- Phnom Penh
- Port Moresby
- Shanghai
- Singapore
- Sydney

- to subscribe to (or take a free tour of) Vietnam Laws online database-searchable database of over 3,400 of our English translations of Vietnamese laws regulating investment and business
- to access free translations of a selection of Vietnamese laws
- to read the Vietnam Legal Update from 2009 back to 1997 - complete with index of contents and search function
- to find out more about our practice in Vietnam

visit www.aar.com.au

- to find out more about the Allens Arthur Robinson network and our international practice

- **Hanoi**
Suite 401, Hanoi Tower
49 Hai Ba Trung Street, Hoan Kiem District
Hanoi, Vietnam
T +84 4 3936 0990
F +84 4 3936 0984
bill.magennis@aar.com.au
- **Ho Chi Minh City**
Suite 605, Saigon Tower
29 Le Duan Boulevard, District 1
Ho Chi Minh City, Vietnam
T +84 8 3822 1717
F +84 8 3822 1818
nigel.russell@aar.com.au

Allens Arthur Robinson is a leading international law firm in South East Asia, Greater China, and Australia.

With 15 offices in Bangkok, Beijing, Brisbane, Hanoi, Ho Chi Minh City, Hong Kong, Jakarta, Melbourne, Perth, Phnom Penh, Port Moresby, Shanghai, Singapore and Sydney, Allens has the most extensive network, and the most lawyers on the ground, of any law firm in Asia.

Allens' Vietnam practice is led by resident partners Bill Magennis, Nigel Russell and Thomas Miller. The team in Vietnam includes lawyers from Australia, the United States, Finland and Vietnam.

We encourage feedback from our readers regarding the Vietnam Legal Update. Please direct all enquiries, comments and suggestions to us via email at VLU@aar.com.au





part 1 – selected new legal instruments

Meeting of the National Assembly – May to June 2009

The fifth session of the 12th National Assembly of Vietnam opened in Hanoi on May 20 2009. The National Assembly will meet for one month, during which time it will consider several new laws and

amendments to existing laws on topics as disparate as public debt management, intellectual property rights and the law on cryptography.



Without doubt, one area of key interest to many readers will be how the National Assembly deals with the open question of the deferral of PIT under Circular 27 (reported on in our February issue of VLU). We are watching this with keen interest and will report on the National Assembly's decision on this matter in an upcoming issue.

In the meantime, our first 2 sections of this edition focus on some of the specific proposed law changes being considered

by the National Assembly. Of course, these draft laws remain open to amendment following debate at the National Assembly but they do give an interesting insight into the legislative drafters' intentions and the issues they are considering.

1.1 Change in the offering for investment laws

Draft Capital Construction Law on amendment to a number of articles of laws concerning investment in capital construction (*Draft Amendment Law*)

We first consider some significant changes to the laws relating to investment in 'capital construction'. These proposed changes impact on all stages of an investment project from commencement and planning to implementation and management. The principal laws governing capital construction investment include the Law on Investment, Law on Construction, Law on Enterprises, Law on Land and Law on Corporate Income Tax. The Draft Amendment Law proposes to amend various provisions in each of these Laws.

The Draft Amendment Law aims to address perceived weakness and inconsistencies in the existing laws, to address practical difficulties and to create advantageous conditions to attract and support investment in Vietnam. Although not specifically aimed at foreign investment nor to respond to effects of the global economic downturn, any improvements to the investment process will no doubt be welcomed with open arms, particularly in the current climate.

In this article we focus on some of the key proposed changes to the Law on Investment and the Law on Enterprises. It is worth reiterating, though, that the changes discussed below remain in draft form and many of the proposed amendments would require further implementing legal instruments before they would be effective in a practical sense.

The Law on Enterprises – removing the re-registration deadline

As discussed in previous editions of VLU, the Law on Enterprises set a deadline of 30 June 2008 for the 're-registration' of foreign invested companies established prior to 1 July 2006. Under current law, a foreign invested enterprise which failed to re-register by the deadline is barred from amending its authorised scope of business activities or licensed term of operation. In the wake of the economic crisis, many of these enterprises may now wish to re-register in order to expand or modify lines of business to meet the needs of a volatile market.

The Draft Amendment Law proposes to simply delete the re-registration deadline meaning that a foreign invested enterprise could opt to re-register at any time, as the need arises.

The Law on Investment – amending the definition of foreign investor

Although it is not addressed specifically in the Draft Amendment Law, we also understand that the National Assembly will be considering amending the definition of foreign investor. Under the proposed change a foreign invested enterprise will be a company in which a foreign investor owns 30% or more of the chartered capital. If such an amendment is made, companies with anything less than 30% foreign ownership may enjoy all the benefits available to purely domestic companies and potentially avoid the complicated, time-consuming and unpredictable processes applying to foreign invested companies. The proposed amendment may also provide some much needed clarity around the processes and conditions applicable to companies with varying levels of foreign investment.

The Law on Investment – changes to provisions on conditional sectors for foreign investment

The Draft Amendment Law proposes to delete the Law on Investment's list of conditional investment sectors for foreign investment. However, the proposed deletion does not appear to signal any significant shift in policy. The conditions imposed in certain sectors specified in branch laws remain applicable, but the Draft Amendment Law's amendment will simply remove the signpost. It streamlines the Law on Investment on its face but provides no practical relief for investors struggling with the myriad of laws setting conditions for different sectors. Perhaps a case of avoiding rather than dealing with a known issue.

The Draft Amendment Law also proposes deletion of Article 29(4) of the Law on Investment. This provision, which provides that domestic investment conditions apply to foreign investors with a 49% or less share in a Vietnamese enterprise, has raised questions among licensing authorities, foreign investors and lawyers as to whether it means that an investment certificate is not required for a project in which a foreign investor holds less than 49% of the capital. Again, deleting the provision rather than changing it, seems like avoiding rather than dealing with the issue. Hopefully this is being removed because the proposed change to the definition of foreign investor will clarify things. Otherwise it may simply muddy the already murky waters.

The Law on Investment – significant changes to the investment procedures for domestic investment projects

Currently most smaller domestic investment projects do not need an investment certificate rather they have a Business Registration Certificate. However, if such projects want confirmation of their applicable investment incentives, they must apply for an investment certificate which will stipulate such investment incentives. Larger domestic investment projects must perform procedures for investment registration.



The Draft Amendment Law provides that domestic investment projects will not be required to conduct procedures for the grant of an investment certificate. However, confusingly, it does not amend existing provisions which provide that certain very large domestic projects or those in conditional sectors must undergo the procedures for evaluation in order to be issued with an investment certificate. Hopefully some clarity will come out of the finally approved amendments.

The Draft Amendment Law does introduce a new alternative concept for confirmation of applicable investment incentives – in the form of a certificate of investment incentives. The application procedure for such a certificate is yet to be detailed. It remains to be seen whether these processes are in fact any easier than the current process for applying for an investment certificate.

These new procedures will be of particular interest for foreign investors holding less than 30% of the charter capital in an enterprise, if the amendment to the foreign investor definition discussed above is also implemented.

The Law on Investment – additional administrative procedures for foreign investment projects

Investment procedures for foreign investment are also undergoing change. Under the Investment Law as it stands, a foreign investor investing in Vietnam for the first time must have an investment project and apply for an investment certificate. The Law on Investment provides that the investment certificate serves concurrently as the business registration certificate.

The Draft Amendment Law proposes to abolish the dual-nature of the Investment Certificate, instead requiring a foreign investor, at least in the first instance, to obtain two certificates from different authorities: an investment certificate from the relevant investment authority and a business registration certificate from the relevant business registration authority.

It is difficult to see how this proposed amendment achieves the Draft Amendment Law's objective of making investment in capital construction more appealing when it appears to make an already onerous process ever more convoluted.

VLU Correction

While on the subject of foreign investor levels, section 1.2 of our April issue of VLU incorrectly stated that Article 9.3(b) of Decree 139 provides that establishment of an enterprise where a foreign investor will own 49% or more of the charter capital will be governed by the Law on Enterprises and Decree 88. The relevant provision in fact applies to the establishment of enterprises in which a foreign owner will own 49% or less of the charter capital. We apologise for this error.

1.2 Good news for overseas Vietnamese wanting to buy houses in Vietnam

Submission 57/TTr-CP to the National Assembly proposing amendment to the Housing Law and Land Law dated 28 April 2009 (Submission 57) and Draft Law on amendment to Article 126 of the Law on Residential Housing and Article 121 of the Law on Land (Draft Housing Amendment Law)

Existing criteria for residential housing ownership by an overseas Vietnamese



For over 3 years, the Law on Residential Housing has provided Vietnamese residing overseas the right to purchase a house in Vietnam if:

- they return to Vietnam to make a 'long-term investment';
- their work has contributed to Vietnam;
- they are a cultural activist or scientist with a requirement to return to Vietnam for regular activity aimed at serving the cause of national contribution;
- they are permitted to live stably in Vietnam; or
- they return to reside in Vietnam for a permitted duration of at least 6 months.

Perceived difficulties in taking advantage of the right to purchase a house

Perceived difficulties inherent in the existing criteria have led the Government to submit Submission 57 and the Draft Housing Amendment Law to the National Assembly for consideration in its current sitting.

Submission 57 acknowledges that, to date, the provisions relating to the purchase of residential housing by overseas Vietnamese have been used with extremely limited success. Not only have there been difficulties in interpreting and applying some of the criteria, such as 'long-term investment', 'a requirement to return to Vietnam' and 'permitted to live stably in Vietnam' but the current criteria also exclude many overseas Vietnamese who, for example, have a Vietnamese spouse and live in Vietnam. The 6 month permitted residency requirement is also inconsistent with the Law on Immigration which generally permits entry for a maximum of 3 months.

Proposed new criteria

In response to these perceived shortcomings, Submission 57 and the Draft Housing Amendment Law propose to clarify and extend the criteria for overseas Vietnamese to purchase houses.

Under the proposed changes, an overseas Vietnamese holding Vietnamese citizenship and permitted to reside in Vietnam for at least 3 months is allowed to own Vietnamese residential housing. In addition, any person of Vietnamese origin, permitted to reside in Vietnam for at least 3 months, can own residential housing in Vietnam if:

- they have a direct investment in Vietnam;
- they have contributed to the country;
- they are a cultural activist, scientist or specialist needed by Vietnam and working in Vietnam; or
- they have a Vietnamese spouse living in Vietnam.

In addition, the amendments also provide that any person of Vietnamese origin permitted to reside in Vietnam for at least 3 months who has been issued a certificate of visa exemption, is entitled to own a single residence or apartment in Vietnam.

The submission also refers to potential further criteria (such as the requirement that the overseas Vietnamese and their Vietnamese spouse share assets) which may be imposed by further government regulation or in the final approved version of the amendments.

Can an overseas Vietnamese lease their residential housing?

The proposed changes also address an inconsistency in the treatment of the rights of an overseas Vietnamese residential owner under the current Law on Residential Housing and the Law on Land. The Draft Housing Amendment Law proposes to amend the Law on Land to confirm that an overseas Vietnamese permitted to own residential housing (as opposed to those permitted only to own one house by virtue of a visa exemption) can lease out and authorise others to manage their residential housing.



1.3 A new market for unlisted public companies' shares and bonds

Decision 159/QD-TTGDHN of the Hanoi Securities Trading Centre providing regulations on the management of registered market transactions at HATSC dated 27 April 2009 (Decision 159)

Why another market?

As part of efforts to regulate the OTC (or unlisted) share and bond market, the Ministry of Finance (**MOF**), State Securities Commission and the Hanoi Securities Trading Centre (**HASTC**) have set up a new market where shares and convertible bonds of registered unlisted public companies will be traded. The Unlisted Public Companies Market, better known as UPCoM, will go live in June 2009.

A spokesperson from HASTC has indicated that UPCoM aims to provide transparent information on share prices of unlisted public companies and to ensure that those share prices do not fluctuate erratically. News reports indicate that there are about 4,000 public companies in Vietnam, of which only about 400 are listed, leaving UPCoM with a large potential client base.

The framework

The regulatory framework for UPCoM is set out in Decision 108/2008/QD-BTC of the MOF providing regulation on management of securities of unlisted public companies at the Hanoi Securities Trading Centre dated 20 November 2008 and Decision 159.

Decision 108 requires all public companies to register their securities with the Vietnam Securities Depository (**VSD**). However, the decision gives public companies the additional choice to apply for admission of their shares or convertible bonds for trading on UPCoM.



The admission criteria are simple:

- the company must be a public company as defined in the Law on Securities;
- the public company must have registered its securities with the VSD; and
- the public company must have an admissions advisor (ie securities company) which is a registered member of the HASTC.

Trading rules

Trading Rules for UPCoM are set out in Decision 159. Trading on UPCoM is conducted only via the 'put through' method. This means that the buyers and sellers will need to find each other first before entering their trades through UPCoM. Other trading rules include:

- a fluctuation range of +/-10%, where share prices cannot increase or decrease by more than 10% of the previous day's closing price;
- settlement must take place on a T+3 basis (ie day of trade + 3 trading days); and
- investors cannot buy and sell the same type of shares on the same day.

Trading in shares or bonds of a company admitted to UPCoM must be done via UPCoM unless the trade results from a public (or takeover) offer to buy shares, the issue of new shares via auction, a



merger or consolidation or a gift or inheritance. Trades that are not put through UPCoM will not settle and ownership will not pass.

Pros and cons

As the HASTC spokesperson suggested, the proposed primary advantage of UPCoM is that it will provide transparency and possibly more certainty in the trade of unlisted shares. Also, under the trading rules, a registered broker who enters an incorrect trade causing loss must compensate the aggrieved counterparty although the maximum damages will not exceed 10% of the total value of the affected trade.

Signing up is, of course, not without its disadvantages. Some members of the industry say that the trading rules are inflexible, such as the fluctuation range and the inability to buy and sell the same type of shares in one trading day, which will discourage companies from applying for admission.

From June, the practical assessment of these advantages and disadvantages will be seen in how many companies seek admission to UPCoM.

1.4 Getting tough on insurance business administrative offences

Decree 41/2009/ND-CP of the Government dated 5 May 2009 on Penalties for Administrative Offences in the Insurance Business Sector (*Decree 41*)

Decree 41 establishes a new, tougher and more precise framework for fines for administrative offences in the insurance business sector.

Out with the old

The previous framework (set out in Decree 118 of 2003) exemplified Vietnam's traditional approach to setting fines - providing a fine range applicable to each individual offence. Often in the absence of specific guidance, relevant state officials were required to set a fine within this range. Potentially

this process gave disgruntled offenders grounds to challenge a fine imposed and could also expose officials to allegations of corruption where lower level fines were imposed.



In with the new

In contrast, Decree 41's new framework provides one specific fine amount for each individual offence. This provides certainty, both for the officials imposing fines and for persons wishing to understand the relevant penalty for a particular offence.

The new framework also describes the relevant offences in considerably more detail. Again, this provides increased certainty for both participants in the insurance business sector and for state officials administering the provisions.

Finally, the level of fines in Decree 41 signal a new tougher stance. With levels ranging from VND 10 million to VND 70 million, the fines in the new Decree are six to thirty times higher than those in the predecessor Decree for similar offences. Additional penalties, such as licence revocation and measures to remedy consequences, continue to apply in addition to fines in certain cases.

1.5 Clarity on foreign ownership limits for non-listed public companies

Decision No. 55/2009/QD-TTg dated 15 April 2009 on percentage of participation of foreign investors in securities market of Vietnam (*Decision 55*)

On 15 April 2009 the Prime Minister issued Decision 55 stipulating the applicable caps on foreign investment in public shareholding companies, public investment funds and public securities companies.

The Decision, which will take effect in June, replaces Decision No. 238-2005-QD-TTg of the Prime Minister dated 29 September 2005 (Decision 238).

In this article we summarise the main points of this Decision, then ask: what has changed? and is it better or worse for foreign investors?

Who counts as 'foreign'?

In Decision 55, 'foreign investors' are defined as:

- any offshore entity (entities established and operated under the law of a foreign country);
- any branch of an offshore entity, whether in a foreign country or in Vietnam;
- Vietnamese established entities where more than 49% of the capital contribution comes from foreign parties;
- Vietnamese investment funds and securities companies where more than 49% of the capital contribution comes from foreign parties; and
- foreign individuals, whether they reside offshore or in Vietnam.

What caps apply to foreign investors?

Foreign investors may hold:

- a maximum of 49% of the total shares of a public shareholding company (unless a lower limit is provided in specific legislation);
- a maximum of 49% of the total investment fund certificates of a public securities investment fund;
- a maximum of 49% of the charter capital of a public securities investment company; and
- an unlimited percentage of bonds issued by any issuing organisation (unless the issuing organisation sets a lower limit).

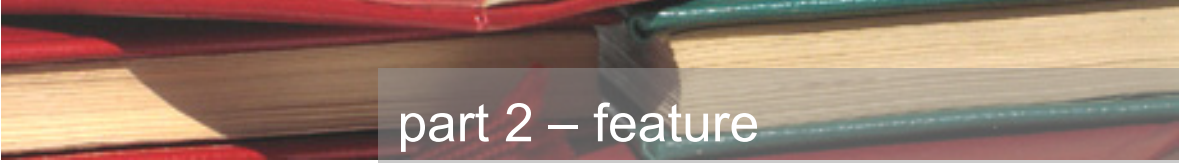
Decision 55 also imposes specific limitations on foreign investment in the establishment of a Vietnamese securities company or fund management company. While a 49% cap applies to foreign investment in both types of entities, additional qualifications must also be met by foreign investors. For a securities company, the foreign investor must themselves be a 'foreign securities business institution'. For a fund management company, the foreign investor must be either a foreign securities business institution with experience in managing securities investment funds or a foreign insurance business institution. Decision 55 does not define 'foreign securities business institution', but Decision 124-2008-QD-BTC issuing regulations on the establishment and operation of representative offices of foreign securities business institutions in Vietnam dated 26 December 2008 may provide some guidance. This Decision indicates that the types of businesses which might be a 'foreign securities business institution' include entities legally established and operating under foreign law in areas such as securities brokerage and trading, investment consultancies and fund and asset management business.

What has changed?

While all the caps previously dictated in Decision 238 have been maintained, the key change is that Decision 55 now applies a 49% cap on foreign ownership for all public shareholding companies. This includes both listed and unlisted public companies, while Decision 238 previously applied only to listed companies or those registered for trading on a Securities Trading Centre. Previous law surrounding foreign ownership in unlisted public companies was characterised by uncertainty, with various Deputy Prime Ministerial and Ministry of Finance pronouncements suggesting possible caps at 40% or 49%, leading to discrepancies in practice.

For better or worse?

The positive effect of Decision 55 is that it provides certainty for foreign investors investing in unlisted public shareholding companies. On the flipside, certainty may come at a price given that under the previous ambiguous law some foreign investors may have successfully acquired more than 49% of the shares in an unlisted public shareholding company. Fortunately for any such investors, Decision 55 includes some transitional provisions – providing that where a foreign investor's current participation exceeds the ratios stipulated, the investor is allowed to retain that existing ownership but is not permitted to purchase any additional securities. Presumably these provisions apply only where the existing ownership level was permitted under previous Vietnamese law.



part 2 – feature

court case commentaries

Continuing with our case commentary series, this month we look at the first competition law case to come before the Competition Council since the Law on Competition was enacted in 2004. Following an investigation by the Competition Administration Agency (**CAA**), the matter was considered by an Ad Hoc Committee of the Competition Council on 14 April 2009. The Committee's decision was handed down on the same day.

CASE NO. 11/QD-HDXL RE. THE SUSPENSION BY VINAPCO OF FUEL SUPPLY TO JETSTAR PACIFIC

The Facts

This case concerned the conduct of Vietnam Aviation Petroleum Company (**Vinapco**), the only aviation fuel supplier in Vietnam. On 1 April 2008 Vinapco suspended the supply of jet fuel to JetStar Pacific Airlines (**Jetstar Pacific**) due to a dispute over a service fee.

Prior to 1 April 2008, Vinapco had been supplying jet fuel to Jetstar Pacific under a contract signed on 31 December 2007. Relevantly, that contract provided for a service fee of VND 593,000 per tonne of fuel. For any change in the service fee, Vinapco had to inform Jetstar Pacific via fax. The contract also provided that if any dispute arose under the contract, the parties must negotiate to resolve the dispute. Failing such negotiations, the dispute was to be resolved by the economic court of Hanoi. Finally the contract required any amendments to be in writing, signed by the parties.

Things went smoothly until mid-March 2008 when Vinapco informed Jetstar Pacific that the service fee would increase to VND 750,000 per tonne, effective 1 April 2008. Jetstar Pacific refused to accept the new fee, essentially on the basis that the proposed fee was not equal to that charged to Vietnam Airlines, Jetstar Pacific's competitor and Vinapco's parent company.



On 28 March 2008, Vinapco sent Jetstar Pacific a written ultimatum demanding Jetstar Pacific accept the new fee or stating that their fuel supply would be suspended from 1 April 2008.

On 1 April 2008, when Jetstar Pacific still refused to accept the new fee, Vinapco suspended the fuel supply to Jetstar Pacific. The suspension caused Jetstar Pacific to cancel and delay a number of flights. Fuel supply was resumed later that day under direction from the Civil Aviation Administration Agency.

These events triggered an investigation by the CAA into whether Vinapco's actions breached the Competition Law. On 2 January 2009, the CAA recommended to the Competition Council that Vinapco, as a monopoly business in Vietnam, be found to have contravened two monopoly abuse prohibitions in the Competition Law: 'imposing disadvantageous terms on a customer' and 'abuse



of monopoly position in order to change or cancel unilaterally a signed contract without legitimate reason'.

The Decision

The Committee held that Vinapco had breached two provisions of the Competition Law.

Abuse of a monopoly position - imposing disadvantageous terms on a customer

Under Decree 116 of 2005 implementing the Competition Law, to establish this breach Vinapco must be found to have forced Jetstar Pacific to accept unconditionally obligations which caused difficulties for Jetstar Pacific in performing the contract.

The Committee held that this had been made out by the fact that Vinapco unilaterally imposed a new service fee on Jetstar Pacific without following the terms of their contract which required negotiations or a court decision to settle disputes and that any amendment of the contract must be in writing.

By unilaterally terminating the negotiations, which it was not entitled to do under the contract, Vinapco forced Jetstar Pacific to accept unconditionally the new service fee. In the Committee's view Vinapco's actions were inconsistent with the terms of the contract and caused difficulties for Jetstar Pacific, namely canceling and delaying a number of flights.

Abuse of a monopoly position - Unilateral modification or termination of contract without a valid excuse.

The Committee also found that Vinapco, by terminating the negotiations on the new service fee, had unilaterally terminated or modified the contract without complying with its requirements to negotiate disputes (or settle them in court) and to make written amendments. The Committee further held that there was no valid excuse for this unilateral modification or termination of the contract. Under the contract's terms, delayed payment was the only ground entitling Vinapco to suspend the fuel supply and there was no delayed payment in this case. Specifically disagreement over the service fee was not a valid ground for Vinapco to terminate the contract.



Orders

The Committee ordered Vinapco to pay a fine of VND 3,378,086,700, equal to 0.05% of its revenue in 2007, the year preceding the contraventions. In addition, the Committee recommended that Vinapco be separated from Vietnam Airlines, that other companies be licensed to provide aviation fuel and that state administration over this service be strengthened.

Commentary

This is a competition law matter. One would expect, therefore, that the decision of the Committee would be primarily based on whether the acts of Vinapco were in contravention of the provisions of the Competition Law. However, the Committee seemed instead to rely heavily on the fact that Vinapco had contravened the contract. This renders the decision rather questionable, in terms of both its merit and reasoning process.

In the main, the decision of the Committee rests upon the premise that Vinapco was bound under the contract to seek approval of the new service fee from Jetstar Pacific or bring the matter to

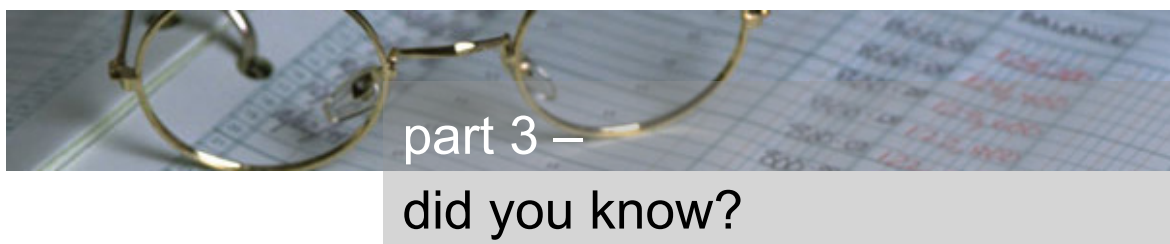
court, rather than simply terminate negotiations or supply. This premise of the decision is questionable for two reasons.

First, it overlooks the real question which is whether Vinapco was able to impose any price it wished whether consistent with market prices or not.

Secondly, the Committee's view that the contract's dispute resolution clause required Vinapco to negotiate any disagreement as to the price, or bring the matter to court if Jetstar Pacific refuses to agree, is unusual. The dispute resolution clause is one commonly seen in commercial contracts. It simply said that if any dispute arises, the parties shall negotiate and if they fail to agree, the matter can be referred to courts for resolution. To construe this clause as imposing upon a party an obligation to continue negotiating or bring the matter to court before it can exercise a right that it believes it has under the contract would take the meaning of this clause too far. Contractual performance would be driven to a halt whenever one met with a recalcitrant party who simply refused to cooperate in good faith.

Conclusion

The decision of the Committee leaves a reader with a number of questions with respect to both its merit and reasoning. It is possible that Vinapco may proceed with an appeal against this decision. If it does, it will be of enormous interest to see how these matters will be reviewed by the full Competition Council and whether they will be able to separate contractual issues from the requirements of the Competition Law.



3.1 Investing abroad – not as easy as you may think

While Vietnam makes significant efforts to attract foreign investment into the country, it appears far less encouraging of investment abroad by Vietnamese entities and individuals. According to the statistics of the Ministry of Investment and Planning (**MPI**), in mid 2008 Vietnam had 317 offshore investment projects with a total investment amount equal to approximately 2% of the total registered foreign investment in Vietnam.

The 2005 Law on Investment generally allows Vietnamese entities and individuals to make offshore investment by way of:

- direct offshore investment - investment in an investment project where the Vietnamese investor directly participates in the management of the investment; or
- indirect offshore investment - investment in shares, securities, bonds, other valuable papers, securities investment funds and other intermediary financial institutions where the investor does not participate in the management of the investment.

Under the Law on Investment, in order to conduct an offshore direct investment, the investor must have an investment project and obtain an investment certificate from the MPI. Indirect offshore investment must follow regulations on foreign exchange and securities.

Beyond these very general provisions, regulations on offshore investment remain largely undeveloped. To govern offshore direct investment, there is Decree 78/2006/ND-CP of the Government dated 9 August 2006 (**Decree 78**) and Decision 1175/2007/QD-BKH of the MPI dated 10 October 2007. As reported in the January 2008 edition of VLU, these regulations establish a time-consuming and paperwork intensive licensing process.

Offshore indirect investment, likely to be of more practical interest to Vietnamese investors, remains unregulated and therefore impossible in practice. This can lead to the exclusion of Vietnamese investors from programs such as international employee share options schemes offered by foreign companies.

In addition to the dearth of specific legislation, foreign remittance laws present another major obstacle for Vietnamese investors interested in investing offshore. For direct offshore investment, remittance laws require the investor to register a foreign currency account with a local branch of the State Bank of Vietnam together with a plan for remittance. In practice, this registration is a time-consuming process and press reports indicate that the resulting delays have caused Vietnamese investors to unintentionally breach their contractual agreements with foreign partners. For offshore indirect investment, there are no applicable remittance laws, again rendering participation impossible.

Encouraging signs

In an attempt to deal with the current shortcomings in the regulation of offshore investment, the Prime Minister recently issued Decision 236/QD-TTg of the Prime Minister on promotion of Vietnamese offshore investment, dated 20 February 2009 (**Decision 236**). In this decision the Prime Minister approved various measures for development of the legal framework and

improvement of the administrative procedures relating to offshore investment. To this end, Decision 236 assigns relevant ministries with specific tasks:

- during 2009, the MPI is to coordinate with other ministries to draft a decree amending or replacing Decree 78 in order to simplify the licensing procedures;
- by the third quarter of 2009, the Ministry of Finance is to issue a new circular on tax obligations of Vietnamese enterprises making offshore investments;
- in the third quarter of 2009, the State Bank of Vietnam is to coordinate with relevant ministries to draft regulations on indirect offshore investment for submission to the Prime Minister; and
- in the third quarter of 2009, the State Bank of Vietnam is to draft regulations on foreign exchange control in respect of offshore investment by Vietnamese enterprises and individuals for submission to the Prime Minister.

The Prime Minister's recent decision is an encouraging sign that the legal framework and procedures for Vietnamese offshore investment will improve, enabling Vietnamese enterprises and individuals to expand their business and to enable Vietnam to further integrate into the world's economy.

3.2 Too bad if you can't 'bend it like Beckham'

Recently, Vietnam has granted Vietnamese nationality to a number of foreigners, including quite a few football players. In this article, we look at the law to answer the question, who can apply for Vietnamese citizenship?

Legal requirements

Under the 1998 Law on Nationality, a foreign citizen may apply for Vietnamese citizenship if they satisfy the following conditions:

- they are at least 18 years old;
- they speak Vietnamese;
- they have resided continuously in Vietnam for at least 5 years;
- they have observed Vietnamese law; and
- they have the ability to pay for their living in Vietnam.

The applicant for the Vietnamese nationality must also apply for a Vietnamese name, and from a Vietnamese legal perspective may retain their original nationality, holding dual nationality.

From 1 July 2009, the 1998 Law on Nationality will be replaced by a new 2008 Law on Nationality, however, in terms of citizenship requirements, these conditions remain unchanged.

What if you don't meet all the requirements?

The Government of Vietnam may waive some of the citizenship conditions if there is a legitimate reason. Decree 104 of the Government implementing the Law on Nationality, dated 31 December 1998, nominates several potential legitimate reasons including:

- where the applicant is a husband, wife, father, mother or child of a Vietnamese citizen;
- where the applicant has been recognized by the Vietnamese Government for their special contribution to Vietnam; or
- where the applicant's adoption of Vietnamese nationality will bring great benefit to the development of economy, society, science or national defence and security of Vietnam.

Recently a dozen foreign soccer players in Vietnam were given Vietnamese citizenship. Local press reported that several of the usual citizenship requirements were waived for these players on the grounds that their adoption of Vietnamese citizenship will bring great benefit to the social



development of Vietnam - namely improvement in the quality of Vietnamese football as well as the ability of the national team! Conversely, we are not aware of any foreigners who have married a Vietnamese citizen successfully having any conditions waived. Looks like you should brush up your kicking skills if you want to become a Vietnamese citizen.

3.3 Exploration and exploitation of oil and gas resources in Vietnam - production sharing contracts, farm-out and security for financing

In order to explore and develop oil and gas fields in Vietnam a contractor must enter into a petroleum contract with PetroVietnam. While this contract can take various forms, the most common is a Production Sharing Contract (**PSC**).

A standard form PSC is attached to Decree 139-2005-ND-CP, which a potential contractor can amend by negotiation with PetroVietnam. Other possible types of petroleum contracts provided for in the Law on Petroleum include a Joint Operating Agreement and a Joint Venture.

Given the dominance of PSCs in the industry, this article takes a look into its finer points.

What is a PSC?

There are 2 main methods governing arrangements between host states and foreign companies in the exploration and development of oil and gas fields: the production sharing system and the



concession system. Under a concession system, foreign companies have rights to the oil in the ground, and compensate host states for taking their resources (via royalties and taxes). Under a production sharing system, a PSC leaves the oil legally in the hands of the state, while the foreign companies are compensated for their investment in oil production infrastructure and for the risks they have taken in doing so.

The benefit of the PSC system, in comparison with the concession system, in the Vietnamese context, is the flexibility that enables the oil company to enter into an agreement with the Government on a

wide range of issues, especially on financial matters. In recognition of this advantage, the production sharing system has been chosen as the basic framework for petroleum contracts in Vietnam

Under a PSC, the contractor/investor must bear all the costs of exploration and production and these costs are not reimbursable if no commercial petroleum find is made in the contract area. If a commercial discovery is made it is normally divided up into:

- cost recovery oil/gas – the amount of oil/gas a contractor can take to recover its cost for infrastructure and exploration;
- tax oil/gas – the amount of oil/gas (either taken in kind or sold) taken by the Government; and
- profit oil/gas – the amount of oil/gas which represents the contractor's return on investment.

The PSC process

The process for entering into a PSC in Vietnam, and ultimately developing an oil/gas field, follows these key steps:

- PSC – the contractor and PetroVietnam sign a PSC in accordance with the Law on Petroleum and the standard PSC (as amended, if agreed).
- Management Committee – the parties set up a Management Committee of which the specific number of members designated by each party will be agreed by both parties. The Management Committee supervises and monitors all operations in the contract area, accounting for costs and expenditures and does not itself engage in any business activity.
- Appraisal Plan – if the contractor finds a potential commercial discovery, it notifies the Management Committee and PetroVietnam as soon as practicable. Within 90 days of the notice, the Contractor presents an appraisal plan to the Management Committee. Upon the approval by the Management Committee, the Contractor submits the plan to PetroVietnam for its final approval.
- Development Area – where the potential commercial discovery is determined to be a commercial discovery, the contractor submits a proposed designated development area to the Management Committee and PetroVietnam.
- Outline Development Plan – within 90 days from the date of the establishment of any development areas, the contractor submits an outline development plan for their approval to the Management Committee and then PetroVietnam.
- Full Development Plan – once the outline development plan is approved, the Contractor submits a development plan for the commercial discovery to the Management Committee for adoption. Within 10 days of the Management Committee's adoption, the Contractor submits the adopted development plan to PetroVietnam to then on-submit the plan to the Prime Minister for approval.
- Commercial Discovery – if the contractor makes a declaration of the first commercial discovery PetroVietnam, through its wholly owned affiliate, has 90 days at its option to elect to hold a participating interest in the total rights and obligations of the contractor under the PSC. The parties review, amend if necessary and adopt a Joint Operating Agreement.
- No Commercial Discovery – where no commercial discovery is found within the exploration period provided in the PSC, the parties will terminate the PSC and PetroVietnam does not have any financial obligations to the contractor.

Farm-out of an interest in a PSC

The farm-out (or assignment) of an interest in a PSC is regulated by the Law on Petroleum and by the standard PSC.

Article 24 of the Petroleum Law

Article 24 of the Law on Petroleum permits the farm-out of a petroleum contract if:

- the assignee undertakes to comply with the terms of the petroleum contract; and
- conditions on assignment of capital and of the project pursuant to the Law on Investment are assured.

The Law on Petroleum also provides that the Prime Minister must approve any such assignment.

Article 12.2 of the standard PSC

Article 12.2 of the standard PSC provides that:

- assignment to an affiliated company of the contractor can be done by notification to PetroVietnam and with the approval of the Prime Minister; and
- assignment to a non-affiliated company of the contractor is first subject to PetroVietnam's pre-emptive right under the Law On Petroleum and any pre-emptive rights of other contracting parties and, only if any such pre-emptive rights are either not exercised or waived (for example

through negotiated agreement between the parties), the farm-out can proceed with the approval of the Prime Minister.

Using the PSC as security to borrow funds to farm-in to a PSC

Often a party farming-in to a PSC will require finance to fund its acquisition. The Law on Petroleum and the standard PSC are silent as to whether the PSC can be used as security for such financing. Given this silence the most conservative approach would be for the lender, contractor(s) and PetroVietnam jointly to agree in writing to:

- the borrower's interest in the PSC being used as security for financing the farm-in; and
- waiver of any rights of pre-emption on enforcement of security, allowing the lender to acquire rights under the PSC and to assign the PSC to a third party in circumstances where the borrower does not remedy any defaults under their loan.

Any assignment will still require the approval of the Prime Minister, which is usually expressed as a condition precedent to any farm-in, as it is unlikely that such approval will be obtained before the proposed assignment.

Of course the attractiveness of a PSC as security to a lender will depend largely on the developmental stage of the relevant oil/gas field. If the field is still in the exploration phase, any benefits from the PSC remain highly speculative because revenue from a commercial discovery is not yet guaranteed. However, if the field is in the production stage, a lender can more accurately predict the benefits which will flow from the PSC and securing rights under the PSC becomes a commercially less risky form of security for the lender.



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:**Prior to 2009**

- Law on Social Insurance, 29 June 2006
- Decision 322 with HASTC rules on disclosure of information, 9 November 2007
- Decision 353 with HASTC trading rules, 26 November 2007

In 2009

- Letter 1752 on establishment of joint venture enterprises with no more than 49% foreign ownership, 18 March 2009
- Circular 03 on management of construction works, 26 March 2009
- Circular 64 on special sales tax, 27 March 2009
- Decision 168 dated 7 December 2007 with HOSE regulations on listing securities, as amended by Decision 04, 17 April 2009
- Circular 155 on insurance business dated 20 December 2007 as amended by Circular 86, 28 April 2009
- Circular 156 on financial regime applicable to insurers and brokers dated 20 December 2007 as amended by Circular 86, 28 April 2009
- Letter 1578 on conversion of after-tax income to before-tax income for PIT purposes, 28 April 2009
- Draft Law amending Laws concerning investment in capital construction, 8 May 2009
- Draft Law amending Law on VAT, Law on CIT and Law on Tax Management, 20 May 2009
- Decree 59 dated 12 June 2006 on the Commercial Law as amended by Decree 43, 7 May 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 May 2009. To view all laws uploaded, please visit www.vietnamlaws.com

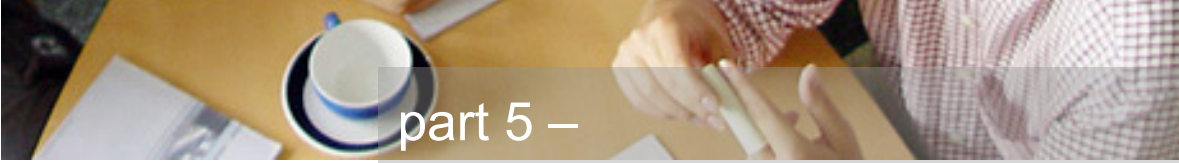
Search function for Vietnam Legal Update

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

Allens' in-country lawyers hail from Australia, the United States, 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 Melissa Rudd, a Senior Associate in our Hanoi office.



Melissa Rudd is a senior associate in our Hanoi office. She is an Australian qualified lawyer with a background in foreign investment, energy and resources projects and competition law. Melissa recently joined the Hanoi office from Tokyo where she was working as an Allens secondee with law firm Nagashima Ohno & Tsunematsu. She has had close links to Japan since going there as an exchange student in high school. She speaks Japanese fluently and enjoys making the most of opportunities to work closely with the firm's Japanese clients in Vietnam.

Melissa loves to travel and loves to eat good food, so it is no wonder that she chose to work in Japan and now Vietnam where the culture and culinary delights never cease to amaze.

Quote from the source: "I can't wait to start Vietnamese cooking classes so that I can cook for (and impress) my family and friends back in Melbourne."