



VIETNAM LEGAL UPDATE

November 2008

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Part 1 Selected New Legal Instruments

1.1 New PIT laws – further clarity but more concerns

Circular 84-2008-TT-BTC of the Ministry of Finance on Personal Income Tax, dated 30 September 2008 (Circular 84)

With just over one month until the new personal income tax (**PIT**) regime comes into effect, the Ministry of Finance (**MOF**) has issued Circular 84, providing increased practical detail and explanation to the previously issued PIT Law (reported on in our November 2007 edition) and implementing Decree 100 (reported on in our September 2008 edition).

Like Decree 100 before it, Circular 84 repeats provisions of the PIT Law (and Decree 100) and goes on to provide additional regulation and guidance in the form of clarifications, more detailed explanations (for example, for each type of taxable income) and practical requirements. The Circular also contains useful examples of fictional taxation scenarios to demonstrate the application of the new regime to different types of income.

Below, we consider some of the more interesting specific matters dealt with in Circular 84. Of course, our summary is necessarily general in nature and the impact and application of the Circular will depend on an individual's or entity's personal circumstances. Particularly given the untested nature of the new regime, this general information should not be relied upon as a substitute for specialist personal advice in determining how the new regime applies.

Clarifications and illustrative examples

Examples of clarifications contained in Circular 84 include the following:

- that a person will be deemed to have a 'leased residence' – and therefore be a 'tax resident' resident for Vietnam tax purposes so long as the total number of leased days is 90 days or more – irrespective of whether the individual is the lessee or the employer leases the premises on behalf of the employee. Circular 84 also makes clear that the provisions apply where a person leases a number of residences, and that 'leased residences' includes hotels, working offices and other types of premises;
- that bonuses in the form of securities are taxable income in the form of non-monetary bonuses, being a form of 'income being salary'. The Circular provides specific measures for how to determine the market value of share certificates paid as bonuses; and
- that the exemption for "income being interest on money deposited at a bank or credit institution" does *not* apply to interest paid on deposits with an organisation which is not a credit institution established and operating in accordance with the Law on Credit Institutions.

Circular 84 also provides further examples of what kinds of income qualify each type of taxable income specified in the PIT laws. For example, the Circular makes it clear that the reference to 'income being salary' includes benefits such as services for individuals in healthcare activities and entertainment, expenses for consultancy and tax declaration services and expenses for domestic workers. The specific references to these sorts of benefits remove from doubt that these are now subject to tax under the new regime.

Worryingly, the Circular contains further details on the allowances and subsidies specifically permitted to be deducted when assessing taxable income from salary which confirm that these remain extremely limited. Permitted deductions include allowances for persons having contributed to the revolutionary cause, allowances stipulated in the Labour Code (for example for toxicity and danger applicable to trades) and certain allowances stipulated in the Law on Social Insurance.



Practical, but not so easy, requirements

Circular 84 also provides detail on the administrative and practical side for persons operating under the new tax regime.

For example, the Circular lists the required contents for applications to determine tax-exempt income, such as the evidence and documentation required to establish an entitlement to tax exemption on a real property transfer to a family member.

The Circular also sets out the specific circumstances in which individual must make either (i) a monthly declaration on tax, or (ii) a declaration of tax finalisation, and the timeframes for making such declarations.

Many of the procedures detailed in the Circular will be time-consuming for both taxpayers and income-paying entities, particularly in the initial stages when all parties will be unfamiliar with the new system. One such example is where a taxpayer earning salary income wishes to be granted the allowable deduction for dependents. This process involves the taxpayer's declaring their dependants to their employer and then providing evidence of such dependency to the tax office. The employer is then required to submit any such declaration form to the tax office and also to provisionally make the resulting deduction (in accordance with the declaration) prior to assessing the amount of tax to be withheld for that taxpayer. There are strict timeframes for all of these processes.

Further detail still to come?

While Circular 84 provides significant further detail on the new PIT regime, it is not all encompassing and does not address all outstanding issues. For certain matters, the Circular notes that further specific regulation will be provided by the General Department of Taxation (**GDT**). In addition, the final article of the Circular notes that "If any difficulties arise during implementation, they should be promptly reported to the MOF (GDT) for resolution". It remains to be seen, beginning 1 January 2009 – when the new regime goes 'live' – just how many difficulties remain and how responsive the Ministry will be in addressing any such issues.

Post-script: MOF Decision 102

Following the issuance of Circular 84, MOF has just passed (on 12 November) Decision 102-2008-QD-BTC on Issuing Standard Forms for Receipts for Personal Income Tax (**Decision 102**). Decision 102 provides further practical assistance for the new PIT regime in the form of standard forms for use by individuals paying personal income tax directly at the tax office as well as certificates of withheld personal income to be used by income-paying entities (such as employers) who deduct tax at the source for individuals.

1.2 Minimum salaries – some same-same, some different

Decree No. 110/2008/ND-CP of the Government dated 10 October 2008 providing minimum area salaries for employees at Vietnamese enterprise, cooperatives, farms, households, individuals or other organisations (Decree 110), and Decree 111/2008/ND-CP of the Government dated 10 October 2008 providing minimum area salaries for employees at foreign invested enterprises, foreign and international organisations and foreigners in Vietnam (Decree 111)

Background – principles of broad protection

Article 55 of the Labour Code allows the salary of an employee to be negotiated and agreed by the employer and employee but the salary must not be lower than the minimum salary regulated under the laws. This regulation is one of ways the Government protects benefits of Vietnamese employees working for all employers within Vietnam.

The Labour Code and its implementing decree contain the bases upon which the minimum salary is set, that is, labour supply and demand, economic capacity and the cost of living. These

considerations ensure that an employee doing the simplest job in normal working conditions is appropriately compensated. Of note, the minimum salary may be applied only to 'untrained' employees. An employee with even basic training, including internal training, is entitled to a salary which is at least 7% more than the relevant minimum salary.

The Government has promulgated both a general minimum salary and a minimum salary for each geographical region and for each group of employers. These minimum salaries may be adjusted from time to time when the price index increases. All employers are encouraged to apply their own minimum salaries if they are higher than the relevant minimum salaries promulgated by the Government.

General minimum salary

The current general minimum salary of VND 540,000 per month has been in effect since 1 January 2008 and was established under Decree 166/2007/ND-CP dated 16 November 2007 (**Decree 166**).

Decree 166 provides a list of entities to which this general minimum salary:

- (i) state agencies, armed forces, political organisations and socio-political organisations;
- (ii) non-business units of the State; non-business units of political organisations and socio-political organisations; and non-public non-business units which are set up and operate according to law;
- (iii) companies which are set up, organised, managed and which operate under the Law on State Enterprises;
- (iv) one-member limited liability companies with 100% charter capital owned by the State, which are organised, managed and which operate under the Law on Enterprises;
- (v) enterprises which are set up, organised, managed and which operate under the Law on Enterprises; and
- (vi) Vietnamese cooperatives, cooperative unions, cooperative groups, farms, households, individuals and other organisations that employ laborers.

Decree 166 specifically states that this minimum salary does *not* apply to foreign-invested enterprises, foreign agencies and organisations, international organisations and foreign individuals in Vietnam.

However, the application of this general minimum salary is not straightforward. According to Decree 110/2008/ND-CP dated 10 October 2008 (**Decree 110**), the groups listed in (iii) to (vi) above, must apply a regional minimum salary when it is higher than this general minimum salary.

The general minimum salary is used as the basis for determining the maximum social insurance contributions of both employees and employers, including foreign-invested employers.

Regional minimum salaries – increases under new laws

The current regional minimum salaries are specified by Decree 167/2007/ND-CP dated 16 November 2007 (Decree 167) for employees working for Vietnamese employers, and Decree 168/167/2007/ND-CP dated 16 November 2007 (**Decree 168**) for employees working for foreign invested employers. Under these decrees, there are three levels of regional minimum salaries applicable for employees working for each of Vietnamese employers and foreign-invested employers.

Due to an increase in the official cost of living index, on 1 January 2009, Decree 167 and Decree 168 will be replaced by Decree 110 and Decree 111, respectively. These decrees not only increase the regional minimum salaries but also re-categorise the areas and the salary level. There will be four levels of minimum salaries for employees working for each of Vietnamese employers and foreign-invested employers, instead of the prior three:

Below is a summary of the **new** minimum area salaries in each area:

Areas	Minimum area salary for employees working at local Vietnamese enterprises (VND/month)	Minimum area salary for employees working at foreign invested enterprises, foreign and international organisations and individuals (VND/month)
Area I (inner city Hanoi and HCMC)	800,000 (from 620,000)	1,200,000 (from 1,000,000)
Area II (specified outer districts of Hanoi and HCMC)	740,000 (from 580,000)	1,080,000 (from 900,000)
Area III (specified provinces and districts)	690,000 (from 540,000)	950,000 (from 800,000)
Area IV (all remaining areas)	650,000	920,000

'Foreign' designation carries potentially heavy price tag

'Foreign-invested employers' includes 'enterprises with foreign-invested capital'. Unfortunately however, there is no definition of enterprises with foreign-invested capital under the Labour Code and its implementing legislation. According to the Law on Investment, an enterprise with foreign-invested capital comprises 'any enterprise established by a foreign investor in order to carry out investment activities in Vietnam', and also a Vietnamese enterprise in which a foreign investor purchases shares, merges or which it acquires. Consequently a Vietnamese enterprise with 1% foreign investment could be considered as an enterprise with foreign-invested capital and, if so, will be obliged to apply with the relevant minimum regional salary specified for foreign-invested employer.

This is significant for any Vietnamese enterprise in receipt of a contribution from a foreign investor – no matter how small – as this contribution could trigger significant increases in the company's labour costs.

The minimum area salary is the basis for enterprises to make their salary scales. An enterprise whose payroll does not comply with the new minimum area salaries should revise its salary scales from 1 January 2009.

Wages still low in comparison

Although the new minimum salary increases range from about 20% to 29%, the new minimum wages are still quite low in comparison with Vietnam's neighbouring countries, and while keeping Vietnam an attractive investment destination, they could be regarded as still inadequate for employees in this climate of rising cost of living. Upward adjustments in the future? Highly likely.

1.3 Bankruptcy of Finance Enterprises – a looming prospect

Decree 114/2008/ND-CP of the Government providing guidelines for the implementation of the Law on Bankruptcy applicable to enterprises conducting business in insurance, securities and some other finance sector, dated 3 November 2008 (Decree 114)

Since securities, insurance and other finance enterprises (*Finance Enterprises*) have begun to play an increasingly important role in Vietnam's financial sector in recent years, the bankruptcy of these enterprises could potentially have a larger impact to the stability of the economy than other enterprises. Couple this with the currently global financial crisis and one realises that there is an imperative for more specific regulation, and a heightened involvement of Vietnam's State administrative bodies, in this area. Decree 114 is an example of a response to this need.

Involvement of State administrative bodies

Under Decree 114, the most important difference in bankruptcy procedures applicable to Finance Enterprises, as opposed to other companies, is the involvement in nearly all steps of the process of State administrative bodies. These bodies include (i) the Ministry of Finance (*MOF*), in case of bankruptcy of an insurance enterprise, (ii) the State Securities Commission (*SSC*) in case of bankruptcy of a securities enterprise, or (iii) the enterprise owner in cases of Finance Enterprises which have not been licensed by the MOF.

Under Decree 114, these State administrative bodies also have the right to step in *before* the bankruptcy of a Finance Enterprise, and to require the enterprise to take measures to restore its solvency and financial good standing, in cases where they believe that an enterprise is in danger of becoming insolvent. Failure to take or successfully implement such measures, together with the enterprise's initial failure to pay its normal course-of-business debts, form two conditions for a competent court to declare the commencement of bankruptcy procedures.

Special Rules

Due to the specific characteristics of operations of Finance Enterprises, Decree 144 adds specific measures to restore solvency of these enterprises. In a case where an insurance enterprise is in danger of becoming insolvent, the MOF may require the enterprise to assign insurance contracts to other enterprises. With respect to securities enterprises, under the request of the SSC, such enterprise must handover to a replacement enterprise all rights and obligations regarding funds and/or temporarily seal up a part or all of the bank and securities accounts of clients, as well as all internal accounts. The SSC may also issue a warning to such securities enterprise in accordance with the Law on Securities.

A last noteworthy point of Decree 114 is an exception for pre-bankruptcy transactions which ordinarily, and in the case of other company bankruptcies, would be deemed invalid. In the case of Finance Enterprises, payment of undue debts, securing debts by mortgaged or pledged assets, payment of deposit monies on securities accounts of clients, and settlement and payment of securities transactions will *not* be deemed invalid if the enterprise took measures to restore solvency during the period of three months prior to the date on which the court accepts jurisdiction over a petition to commence bankruptcy proceedings. This seems to be an exception to the notion of voidable transactions in the lead-up to bankruptcy, and is quite a significant departure from normal bankruptcy principles.

1.4 Notarisation fees increased significantly

Circular 91/2008/TTLT-BTC-BTP providing guidelines on the certain amount, collecting regime, submission, management and use of notarisation fees, dated 17 October 2008 (Circular 91).

Investors investing and doing business in Vietnam are familiar with the cumbersome procedures of notarisation and related difficulties (see our article on notarisation generally in the June 2008 VLU). Now they need to be advised of new and significant increases in the fees for notarisation under newly issued Circular 91. Does the phrase 'adding insult to injury' come to mind?

Dizzying increase

The new notarisation fees are applicable to both public and private notary offices. They took effect from 20 November 2008. And as Circular 91 replaces a quite old circular providing guidelines on the same subject matter (Circular 93/2001/TTLT/BTC-BTP dated 21 November 2001 on the collecting regime, submission, management and use of notarisation and certification fees (**Circular 93**)), the new notarisation fees are significantly higher than the ones stipulated in Circular 93.

Like Circular 93, Circular 91 covers two types of notarisation fees: one is based on the value of properties, contracts or transactions to be notarised, and the other is not so-based, but rather is more an ad-hoc fee, applicable to each individual case of requested notarisation.

Under Circular 93, the minimum notarisation fee was VND 10,000/case and the maximum was VND 2 million, for notarisation fees based on the value of properties, contracts or transactions. Under Circular 91, notarisation fees of this kind (fee based on the value of properties, contracts or transactions) range from a minimum fee of VND 100,000/case to a maximum fee of VND 10 million. With this increase, notarisation fees in this context have increased by a factor of 5-10.

Additionally, one of the most important changes to the new Circular 91 is notarisation fees associated with inheritance documents related to the division of a deceased estate. Notarisation fees for these types of agreements were a flat VND 50,000 per case under Circular 93, with no regard to the value of the estate. However, from now on, under the terms of Circular 91, the value of the estate will be used to calculate relevant notarisation fees. The valuation of a estate will be based on 'documents of the competent authorities providing guidelines on defining the price of the estate.' But no one really knows that this means yet.

Fees on top of fees

In addition to the fixed notarisation fees stipulated in the new Circular, public and private notary offices may also charge other fees in accordance with Article 31 of Law on Notarisation dated 29 November 2006. Consequently, the actual notarisation costs can be, and often are, higher than the officially posted ones. So bring your wallet if a notarisation is in your future!

Part 2 Feature: Vietnam Court Case Commentaries

This November VLU marks the beginning of our case commentary series dedicated to familiarising our readers with decisions of Vietnamese courts on a number of important legal areas. From a constitutional law perspective, decisions of Vietnamese courts do not create precedent, nor do they purport to interpret Vietnamese law. Vietnamese courts may only *apply* law as is the case in other civil law jurisdictions. Therefore, the purpose of our case commentary series is to provide readers with a practical insight into how certain Vietnamese legal principles are applied by courts.

This series has been made possible by the publication of cases on the licensed website <http://e-awreview.com>. Previously, it was almost impossible for the public to access court judgements, as these were regarded 'private'. This recent policy change is believed to be a direct consequence of commitments made by Vietnam when it acceded to the World Trade Organisation. Specifically, Vietnam committed to ensuring transparent judicial decisions within certain WTO areas. A limitation in many of the judgements is that the legal reasoning is minimal and therefore it may be difficult to properly understand how courts apply the law. However, as more cases are published, judges will hopefully begin to step up to ensure that they provide adequate reasoning to their decisions so that they will withstand public scrutiny.

HOW BANKS USE COURTS TO RECOVER DEBT

To kick off our case commentary series we look at how banks use courts to recover bad debt. This is a timely examination, given the recent steep increases in credit growth and credit availability in Vietnam. The extension of credit by Vietnamese banks has been predominantly for securities and real estate investments. In fact, according to the State Bank of Vietnam (**SBV**), property loans amount to US\$6.8 billion which is about 9.15% of outstanding loans in the banking system. With the dramatic downturn in share and property prices from mid-2008, many banks are finding that borrowers are defaulting on loans.

Vietnam courts unattractive as vehicle for enforcement

According to a World Bank 2009 Doing Business Survey, Vietnam is ranked 42 out of 181 economies in the enforcement of contracts, including credit contracts. This survey also reveals that it takes, on average, about 295 days to enforce a contract in the courts. Therefore, banks' using the court system in Vietnam to recover debts is often the very last resort. Anecdotally, banks tend to use informal means of recovering debts, which involves shaming the defaulting borrower in the community, and in some instances seeking assistance from the local police.

The legislative bases for banks to terminate a loan contract, call a loan and realise secured assets are set out in the Law on Credit Institutions and the Civil Code. We note that the cases reviewed unfortunately do not illuminate us on legal principles in this area. Rather we can glean from the cases that banks use courts to formally recognise a default and identify assets that have been properly secured. More importantly, banks will use courts to obtain an order such as to trigger assistance from the enforcement agency to realise any secured assets.

VP Bank v. Lien Anh Thanh

In the matter of VP Bank and Lien Anh Thanh International Construction Investment Joint Stock Company (39/2007/KDTM-ST), the bulk of the judgement by the Hanoi City People's Court is in relation to recognition and assessment of the repayment default by Lien Anh Thanh. The Court found that VP Bank and Lien Anh Thanh were validly existing entities under Vietnamese law, that the parties had executed two valid loan contracts pursuant to law and that Lien Anh Thanh had breached the contracts by failing to meet the repayment obligations. The Court accepted that VP Bank could impose a late payment penalty and penalty interest (not more than 150% of the loan interest rate). In addition, the Court recognised that the VP Bank loan was secured by a guarantee of real property, which was constituted by a properly notarised guarantee agreement.

The Court assessment in this case also revealed a fundamental flaw of the Vietnamese legal psyche, which is the obsession with form. The loan contracts must be in a form consistent with the lending policy set by the SBV and the guarantee agreement in respect of real property must be in the form set out in the

implementing regulations of the Law on Land and acceptable to the notary public. Therefore, any deviation from form attracts the risk that a document will not be recognised by the courts.

Agribank v. Hoang Nguyen

It is this obsession with form which the defence usually takes advantage of to argue the case in its favour. In the matter of Agribank and Hoang Nguyen Industrial and Commercial Co Ltd (227/2006/KDTM-ST), the Ho Chi Minh City People's Court did not accept the defence's argument that the loan from Agribank was not a loan to Hoang Nguyen but instead a loan to Ms Loan who is the deputy director of Hoang Nguyen, as Ms Loan had signed the loan contract and used the proceeds for her own personal purposes. The Court held that Hoang Nguyen had passed proper resolutions approving the loan from Agribank and authorised Ms Loan to sign the loan contract. Therefore, Hoang Nguyen could not renege on its obligations in respect of the loan contract.

In the matters of Agribank and VP Bank, where the loans were secured by real property, the court granted the plaintiffs the right to request the enforcement agency to realise the secured assets if the relevant default amounts were not been repaid by the time the decisions of the courts became effective (ie exhaustion of any appeals process). Decree 163/2006/ND-CP of the Government on Security Transaction dated 29 December 2006 allows parties to agree on the process for enforcement and realisation of secured assets, with the 'default' position being public auction, should no agreement be reached on this point. There is also a requirement to provide advance notice in order to kick-start an enforcement proceeding. Vietnamese law offers banks a power of sale upon an event of default; however, should the borrower become uncooperative, banks will need to seek the blessing of the court to obtain assistance from the enforcement agency.

Mekong Housing Bank v. Saigon Roads Construction

Banks which provide unsecured loans find greater difficulty in recovering their debts and would join the unsecured priority queue in a bankruptcy proceeding. In the matter of Mekong Housing Bank and Saigon Roads Construction Company (636/2006/KDTM-ST), Mekong Housing Bank asked the Ho Chi Minh City People's Court to grant it priority in payment from the assets of Saigon Roads Construction Company, as the Company had defaulted on its repayment obligations. This was properly rejected by the court, as the loan given by Mekong Housing Bank was unsecured and may not have a special priority.

Useful tips

As part of our case commentary series, we also like to offer 'tips' to assist readers in managing their legal affairs in the borrowing or lending context, especially if they ever find themselves headed for, or involved in, a legal proceeding in Vietnam. In this case commentary, we have the following such tips:

- Tip 1:** Always ensure that parties to a contract have the requisite authority to sign loan contracts (or any other contracts). If in doubt, check the charter or shareholder, members council or board resolutions, as the case may be. Normally in other jurisdictions, banks may rely on the representations and warranties of the borrower; however, not having the requisite signatory authority may invalidate a contract.
- Tip 2:** Ensure that loan contracts contain mandatory provisions set by the SBV and do not violate any lending guidelines of the SBV.
- Tip 3:** Security documents should be properly registered and/or notarised. For instance, registration of certain security with the National Agency for the Registration of Secured Transactions ensures priority of payment.
- Tip 4:** Review bank lending policies to ensure that proper due diligence and review is conducted of the borrower, and depending on the business relationship, require the borrower to provide regular updates on business performance.
- Tip 5:** Enforcement procedures should be logically set out and agreed with the borrower in the loan documentation.

Part 3 Did You Know?

3.1 Unfair business practices?

Vietnam's transformation from a centrally-planned economy, dominated by State-owned monopolies, to a market economy began with the implementation of the 'doi moi' reforms commencing in 1986. In many industries, the economic reforms have encouraged a business environment in which private Vietnamese-owned and foreign-owned businesses compete with each other and the enduring State-owned enterprises on a reasonably level playing field.

Some sectors still closed

On the other hand, in key industries such as electricity, aviation and telecommunications, State-owned enterprises still predominate, with market shares in excess of 80%. In many other heavily regulated industries – such as cement, sugar, minerals, banking and petroleum - there are a few foreign or private-sector participants, but these sectors are generally dominated by a State-owned oligopoly of several large firms with substantial market shares.

Competition laws spurred on by WTO and US-BTA

The introduction of a competition law regime came about, to a certain extent, as a result of Vietnam's Bilateral Trade Agreement with the United States and the country's efforts to accede to the World Trade Organisation. The Vietnam Government has also indicated that the development of competition laws is intended to achieve a number of domestic policy outcomes, including:

- controlling State monopolies;
- integrating the Vietnamese economy with the global economy; and
- creating an equitable business environment in Vietnam.

Vietnam's Law on Competition and its two implementing decrees (Decree 5 and Decree 6, both promulgated in 2006) create two competition authorities: the Vietnam Competition Administration Department (**VCAD**) and the Vietnam Competition Council (**VCC**). The Ministry of Trade (**MOT**) is responsible for State administration of competition.

Powers of VCAD and VCC

VCAD was established by Decree 6 as an authority of the MOT (now the Ministry of Industry and Trade) with administrative roles in competition, anti-dumping and anti-subsidy, application of 'self-protective' trade measures, consumer protection, and international trade co-operation on dumping and subsidies. Its competition law responsibilities include:

- accepting complaint files;
- conducting investigations of competition cases concerning practices in restraint of competition and unfair business practices;
- assessing exemption requests and forwarding files to either the Minister of Trade or the Prime Minister for their decision;
- controlling the process of economic concentration (ie assessing mergers and acquisitions); and
- imposing certain penalties.

The VCC was established by Decree 5 and is responsible for:

- dealing with competition cases concerning practices in restraint of competition after investigation by VCAD;
- establishing case-specific competition panels of VCC members to hold hearings into competition cases; and

- imposing penalties.

The VCC's founding members were appointed by the Prime Minister and were all serving officials of Vietnamese ministries when appointed.

Live cases under investigation

Three recent cases indicate that the VCCAD may have begun 'flexing its muscles' after an initial period of inactivity following its formation. The first relates to the ongoing dispute between Pacific Airlines and the sole aviation fuel supplier in Vietnam, Vietnam Air Petrol Co., Ltd (**Vinapco**) (which is wholly owned by Vietnam Airlines). On 1 April 2008, Vinapco refused to refuel a Pacific Airlines domestic carrier which reportedly resulted in the delay of some 30 Pacific Airlines flights, affecting more than 5,000 passengers. This resulted from a fuel pricing disagreement between the two parties involving allegations that Pacific Airlines was being discriminated against by being charged higher prices than its competitor, Vietnam Airlines. We understand that this case is still being investigated by VCCAD.

In a second instance of VCCAD 'activism', it has been reported that local steel manufacturers are facing an investigation by VCCAD in respect of price fixing in an environment of declining world steel prices (in the past few months, there has been a close to 50% drop in the price of steel billets). It has been reported that members of the industry body, the Vietnam Steel Association (**VSA**) agreed at a conference in October not to lower prices despite the global price drop and oversupply of steel. VCCAD has announced that unless VSA can prove that such a decision does not violate the Competition Law and its implementing decrees, it will conduct 'appropriate measures' to maintain market stability and protect consumers.

The most recent case is the decision by VCCAD last week to initiate an investigation into a number of insurance companies which allegedly agreed at a CEO's meeting in September to increase certain premiums and to keep them uniform. The insurers, which reportedly include foreign invested insurance companies, apparently signed an agreement to this effect. It has been reported that the head of the Association of Vietnam Insurers has confirmed this practice.

VCCAD can impose penalties for offences concerning unfair business practices (which includes price fixing) and impose additional penalties of confiscation and public retraction without referring the matter to the VCC.

3.2 Long-term leases to foreigners valid?

In the past few years, readers may have heard about property developers having 'sold' 50 year leases of apartments to foreign individuals/organisations. In these cases, the 'buyers' of these apartments have entered into a long-term lease contracts with the developers, under which they are called 'lessees' and granted the rights to transfer the lease or extend the lease for further terms without paying any additional rent.

Vietnam law silent

In fact, Vietnamese law is silent on whether a foreign individual/organisation can lease an apartment on a long term basis. It simply stipulates that foreign individuals/organisations are permitted to lease residential houses if they are permitted to enter Vietnam for a consecutive period of three or more months (Article 131 of the Law on Residential Housing).

GDT – no apparent objection

The Ministry of Construction (**MOC**), the primary authority authorised to regulate the real estate business (including housing), likewise has not issued any guidelines or legal opinion on this issue. The General Department of Taxation (**GDT**), however, has recently issued at least three official letters relating to the long term lease issue. In these letters, it does not seem to object to the entering into the long-term leases between foreign individuals/organisations and the developers, provided the foreign lessees are granted with a three or more month visa or operational license.



Interestingly, one of the letters (ie Letter 3140 dated 20 August 2008) was addressed to the MOC, and another letter (ie Letter 3677 dated 2 October 2008) mentions that it has received opinion from the MOC. But we could not find the reply document from the MOC to the GDT.

Proceed, but with caution

In the absence of such a specific regulation and further guidelines on this long-term lease issue, one may argue that the law does not prohibit it, and therefore the parties may enter into such a long-term lease contract, so long as the lessee has obtained a three or more month visa or an operational license. But, there are still some risks for the lessee, especially if Vietnam happens to restrict a long-term lease to a term of less than 50 years.

3.3 99% foreign invested not 'feasible'

When Vietnam acceded to WTO in January 2007, it did so on the basis of a lengthy schedule of commitments which it agreed to implement and enforce (***Vietnam's WTO Commitments***). Vietnam's WTO Commitments included the elimination or reduction of foreign investment restrictions in certain stipulated service sectors.

Restricted services

A common restriction on foreign investment in some service sectors is the requirement that a foreign investor join with a Vietnamese investor in order to establish a company to engage in or perform 'restricted' services. For example, advertising services are open to foreign investment, *provided that* the foreign investment is in the form of a joint venture with a Vietnamese party. There is the additional restriction that the foreign investor's capital contribution must be less than 51% of the total equity contributed to the joint venture company.

However, many of these capital contribution limitations on foreign investors were intended to be phased out over time. In the case of advertising services, again, the 51% foreign capital contribution limitation is scheduled to disappear as of 1 January 2009. It is clear that the joint venture requirement remains in this case, but it is an open question whether a foreign investor will be permitted to hold as much as 99% of the joint venture's capital contribution, with the Vietnamese party taking only a minimal interest in the company.

A reasonable interpretation of Vietnam's WTO Commitments suggests that such arrangement should be permitted, and is in fact, was intended. Equity contributions, in other words, are commercial matters left to negotiation between investors. More importantly, had Vietnam wanted a minimum restriction to continue, it easily could have, and presumably would have, specified such restriction (in terms of percentage (%) or otherwise) in Vietnam's WTO Commitments.

MOIT says no to 99% foreign holding

On 25 July 2008, however, the Ministry of Industry and Trade (***MOIT***) put the brakes on such interpretation when it issued Official Letter No. 6446-BCT-KH responding to questions of the Ho Chi Minh City Department of Planning and Investment (***HCMC DPI***) in various official letters to the MOIT (***Official Letter 6446***).

One of the questions posited by the HCMC DPI was in connection with the HCMC DPI's rejection of an actual application to establish a joint venture in distribution services, where the capital contribution ratio was 99% (foreign) and 1% (Vietnamese). Foreign investment in distribution is currently limited to the form of a joint venture but without limitation on foreign capital contribution. And, as from 1 January 2009, 100% foreign investment in distribution services is allowed.

Legal basis?

The MOIT agreed with and upheld the HCMC DPI's rejection of the application, stating merely that "such structure in order to implement a project between investors is '*not feasible*' (italics added), because the difference between the contributions of the two parties is so disparate that it '*does not express the correct spirit of business co-operation*' (italics added)".

We note that although Official Letter 6446, like other official letters, does not have official legislative authority, it is nonetheless persuasive in guiding the practices of government departments.

The MOIT provided no further legal basis to support its reasoning and conclusion and has taken the position that a 'less disparate' capital contribution ratio must be agreed in order to make a project 'feasible' and reflective of 'the correct spirit of business co-operation'. What ratio will, in fact, suffice to meet this ambiguous criteria is, of course, uncertain.

Regression to earlier days?

With this decision, the MOIT has seemingly taken a step backward in what has become generally a more transparent and 'commercial' investment environment in Vietnam. It harkens back to an earlier day in Vietnam's development when the rules were less clear and decisions were left largely to the discretion of the licensing authorities. Is this form of 'regression therapy' really what Vietnam needs now?

3.4 Traffic fines by TT

A new method for payment of road traffic fines has been launched by local authorities in with the issuance of Joint Circular 100 dated 6 November 2008 (**Joint Circular 100**). Accordingly, Vietnam has joined the rest of the world in allowing road traffic offenders to arrange for payment of fines via methods of than cash, specifically, auto-debit or wire transfer from their bank accounts. Transfers are made to a temporary account of a local financial authority opened at a State Treasury.

Payment of road traffic fines via TT or autodebit is applicable only in cases where the fine in question is over 200,000 VND. If opting for this method, Joint Circular 100 requires the offender to pay the fine within 10 days from the date of receipt of the offence, or suffer another penalty. If the offender's licence was taken, or his vehicle impounded in connection with the offence, he will be required to show the order for TT payment or autodebit in order to get back the licence or vehicle.

The offender's bank is responsible for transmitting the payment for the fines in time and as requested by the offender. Joint Circular 100 took effect last week.

Part 4 What's New Online?

Subject categories and new laws in Vietnam Laws Online database

Vietnam Laws Online Database on www.vietnamlaws.com is an online searchable database of English translations of more than 3,500 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:

- ➔ Letter 7836 with procedures for registration of shareholders owning 5% or more of a shareholding company, 24 October 2006
- ➔ Letter 6446 on licensing foreign invested projects in the commercial sector, 25 July
- ➔ Decree 97 on Internet services, 28 August
- ➔ Decision 1121 with standard forms for assessing tenders for procurement of goods and for construction and installation, 3 September
- ➔ Circular 16 on certification of weight-bearing capacity and quality conformity of construction works, 11 September
- ➔ Circular 84 on personal income tax, 30 September
- ➔ Circular 12 on procedures for market management bodies to deal with infringements of intellectual property rights, 22 October
- ➔ Circular 93 on State Budget allocation of taxes paid by contractors and sub-contractors in the petroleum sector, 22 October
- ➔ Decision 88 increasing import duty from 0% to 5% on jet fuel, 22 October
- ➔ Decision 69 dated 27 August on minimum selling prices of cigarettes, as amended 24 October
- ➔ Decision 92 decreasing export duty from 5% to 0% on iron and non-alloy steel, 28 October
- ➔ Decision 1622 on price rates of telecom enterprises in a dominant market position, 29 October
- ➔ Decision 94 reducing export duty from 20% to 10% on crude oil, 29 October
- ➔ Decision 95 increasing import duty on petroleum oils other than crude oil, 29 October
- ➔ Letter 9647 requiring banks to report bad debts arising from their lending activities, 29 October
- ➔ Letter 9699 on foreign exchange agencies, 30 October
- ➔ Decision 2559 reducing the basic interest rate from 13% to 12%, 3 November
- ➔ Decision 2560 reducing compulsory reserves ratios of banks, 3 November
- ➔ Decision 2561 reducing the State Bank refinancing interest rate from 14% to 13%, the discount interest rate from 12% to 11%, and the overnight lending interest rate from 14% to 13%, 3 November
- ➔ Decree 114 on bankruptcy applicable to insurance, securities and some other finance enterprises, 3 November
- ➔ Decision 2635 widening the forex trading band from 2% to 3%, 6 November

- ➔ Joint Circular 100 on payment of road traffic fines via offenders' bank accounts, 6 November
- ➔ Decision 99 increasing import duty on petroleum oils, 7 November
- ➔ Letter 9895 permitting export processing enterprises to make payment in foreign currency, 7 November
- ➔ Decision 100 increasing the import duty rate from 0% to 5% on LPG, 10 November
- ➔ Notice 318 on 50% tax reduction for 2 years for companies which first listed within the 3 year period 2004 to 2006, 13 November
- ➔ Decision 102 with standard form receipt for personal income tax to be issued to taxpayers paying tax directly to the tax office, and standard form certificate of withheld tax to be issued by income-paying entities to taxpayers, 14 November
- ➔ Decision 105 increasing import duty on gasoline and other types of fuel, 14 November
- ➔ Decision 106 on fees for registration of franchising activities, 17 November
- ➔ Decision 2809 reducing the basic interest rate from 12% to 11%, 20 November
- ➔ Decision 2810 reducing the State Bank refinancing interest rate from 13% to 12%, the discount interest rate from 11% to 10%, and the overnight lending interest rate from 13% to 12%, 20 November
- ➔ Decision 2811 reducing compulsory reserves ratios on VND deposits of banks, 20 November

The list above is merely a recent snapshot of the wide range of new legislation now uploaded and available on Vietnam Laws Online through November 2008. To view all laws uploaded, please visit www.vietnamlaws.com

Search function for Vietnam Legal Update

We are pleased to advise that we have completed the merger of the prior Phillips Fox VLU database into the current Allens one. As such, readers may now find all back issues of the VLU from 1997 to the present, at www.vietnamlaws.com.

There are two pages to the website's section on the VLU, as follows:

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



Part 5 Get To Know Us

Allens' in-country Vietnam lawyers hail from Australia, the United States and Finland as well as Vietnam, with our total number now standing strong at 25. In this section of the VLU, we have spotlighted a different lawyer from our Hanoi or our Ho Chi Minh City office each month, to enable readers to get to know us a little bit better. This month, our featured lawyer is Nam Nguyen from our Hanoi office.



Nam started working for Allens in 2005 as a librarian when he was a junior at Hanoi Law University. He is now an associate and his practice is focused on investment, corporate and commercial matters. Nam will take a LLM course in international commercial laws in the US next year under the Fulbright Scholarship and will be back with the firm in 2010.

In his free time, Nam enjoys travelling, listening to music and playing with his cat.

Quote from the source: "I get much inspiration and motivation from the challenging work at a top law firm. Thank my dear colleagues".

VLU Extra Allens' HCMC Charity Committee Formed

Michael Rose, the Managing Partner of Allens Arthur Robinson, noted earlier this year that as a firm, Allens wants to make a difference, not only in law and business. We recognise we have broad responsibilities to the communities in which we live.

In late October 2008, the HCMC office of Allens established a Charity Committee comprised of a large component of our legal and general staff. The aim of this committee is to identify ways in which we can provide practical, material and financial assistance to local charitable organisations and individuals.

Our first project is Tu Tam Nhan Ai, a centre for homeless people located in Tan Uyen village in Dong Nai Province which is 90 minutes from HCMC. The centre caters to the elderly; the disabled; and single mothers and their children. It functions as a co-operative with residents making practical contributions to the day-to-day operations of the centre. The centre was created by Mr Nguyen Minh Man, who uses income received from his rental properties and personal savings to finance it. Mr Man established the centre in 2005 and its population is expanding rapidly. The current accommodation is not sufficient to house the 60 odd residents so Mr Man is constructing another building with the assistance of material and labour donating by the local community.



The Centre's needs range from basic, such as donations of newspapers and other reading material for residents, to significant, such as financial assistance to complete the new building and to renovate the existing residence. The Allens HCMC Charity Committee has already donated food and clothing to the centre and plans to continue this with monthly visits. We are also considering ways to raise funds to assist with construction costs.

To all readers:

Please note that Vietnam Posts and Telecommunications Group (**VNPT**) have changed all telephone and fax numbers in Hanoi and Ho Chi Minh City by adding a '3' at the beginning of the current numbers.

Please note our change in telephone and fax numbers for your records.

Hanoi office: Telephone: +84 4 3936 0990

Fax: +84 4 3936 0984

HCMC office: Telephone: +84 8 3822 1717

Fax: +84 8 3822 1818