



VIETNAM LEGAL UPDATE

October 2008

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Sleeping Allens – an entry in the firm's recent Holiday Spot Photo Competition (left to right: Thuy Le (Hanoi), Bich Pham (HCM), and Viet Hoa Duong (Hanoi)). This photo was taken during an Allens Vietnam retreat in 2007 in Nha Trang.



Part 1 Selected New Legal Instruments

1.1 Financial crisis – Prime Minister conclusions

Notice No. 288-TB-VPCP with conclusions of the Prime Minister of the Government Nguyen Tan Dung on measures to limit the negative impact of the current financial crisis on Vietnam's economy, dated 3 October 2008 (Notice 288)

These days, one hears two general predictions about the global financial crisis and its impact on Vietnam. One is that Vietnam is effectively sheltered from the global economic hurricane. The other is that Vietnam is being hit by a double whammy: the global financial crisis, coupled with its own internal economic crisis.

Prime Minister's view

Prime Minister Nguyen Tan Dung recently called a meeting of key ministers to discuss the impact of the current crisis on the country's economy. The meeting resulted in the issuance of Notice 288 on measures to limit the negative impact of the current financial crisis on Vietnam.

Notice 288 embodies the Prime Minister's view, falling in line with the first noted above: that Vietnam is protected somewhat from the crisis. In his words, "[T]he crisis has not yet had any direct effect on Vietnam's economy, but has had a small-scale indirect effect on the financial, currency, commercial and service sectors, and on attraction of foreign investment."

Ministries put on watch

Notwithstanding the Prime Minister's fairly positive view, he has put his Ministers on watch, assigning them to carefully monitor the current volatility and fluctuations in the global and particularly American financial markets. Instructions/requests issued in Notice 288 by the Prime Minister include the following.

- The State Bank of Vietnam (**SBV**) was asked to keep a watch on the commercial banks, instruct them to check on their deposits abroad, and withdraw their deposits or pay back loans, as appropriate; also to keep on eye particularly on their loans in real estate and securities sectors.
- The SBV and the Ministry of Finance (**MOF**) were instructed to put together a list of foreign investment banks in Vietnam so that their status back home can be checked regularly.
- The MOF was asked to direct the State Securities Commission to monitor the flows of foreign capital in and out of the country, and to resolve procedural difficulties so that the securities markets can continue to be developed in a sustainable manner.
- The Ministry of Trade and Industry was directly to instruct export entities to actively promote import and export of goods, to raise the quality and volume of production, and look into new markets such as Russia, the Middle East, Latin America and Africa, which may be less negatively affected by the crisis.
- The Ministry of Planning and Investment and the SBV were instructed to examine the status of both domestic and foreign-invested projects so that any capital problems can be resolved, and so that they can be moved forward.
- The National Finance Supervisory Committee was instructed to act as an independent information channel to the Government and to collect information from the Ministries.

1.2 Internet services – Vietnam law plays catch up

Decree No. 97/2008/ND-CP on the management, provision and use of internet services and electronic information on the internet, dated 28 August 2008 (*Decree 97*)

Old regime

The primary legal instrument previously governing the management, provision and use of internet services in Vietnam has been Decree 55/2001/ND-CP (*Decree 55*), issued on 23 August 2001, an amazingly long time ago in internet industry terms.

The failure of Vietnam law to keep up with development and practice in this area has resulted in many gaps and uncertainties in the internet-based services industry, especially when it comes to services that were either simply not around, or not prolific, in Vietnam in 2001.

The Yahoo! Controversy – example of internet 'no mans land'

The prevailing uncertainty in this area was demonstrated recently in the controversy involving Yahoo! in Vietnam. Yahoo! has attracted unwanted attention in the Vietnamese media for allegedly operating (ie conducting business) outside the permitted scope of its activities in Vietnam.

According to the media, Yahoo!'s only official presence in Vietnam is via a representative office (**RO**) of Yahoo! Southeast Asia Pte. Ltd, headquartered in Singapore. As such, its activities are very limited – it should not be 'doing business' in Vietnam.

Yahoo!'s products, aimed at the Vietnamese market, are branded as 'Yahoo! Vietnam'. These products include email, chat and news services via its main webpage www.yahoo.com.vn. All online content is predominantly in Vietnamese but is claimed by Yahoo! Singapore to be a Vietnamese version of (or link to) its Singapore site.

The provision of a variety of online services in Vietnam by Yahoo! has led to not only the media but a number of Vietnamese companies themselves (presumably competitors) accusing Yahoo! Vietnam of operating outside the scope of its RO license, as well as operating without a proper internet service license.

But is this really the case? Or is Yahoo! Vietnam operating properly, albeit in a grey - and unregulated - area.

Clarity via a new decree

Some of the answers might be found in new Decree 97, issued in August 2008, governing the management, provision and use of internet service to replace Decree 55. One can only surmise that it has taken so long for another internet law to be issued because the lawmakers have not been able to keep up with the pace of change in this rapidly evolving sector.

One major difference between Decree 97 and Decree 55 is that Decree 97 now regulates *electronic information* on the internet, in addition to internet services. There is also more detail regarding 'internet agents' and a section on 'private internet owners'.

Who is covered?

Under Article 2.1, Decree 97 applies to "organisations and individuals involved in the management, provision and use of internet services and electronic information on the internet in Vietnam". Unlike Decree 55, Decree 97 does not explicitly reference 'domestic' or 'foreign organisations'. It seems therefore to cover everyone.

Also, Article 2.2 of the decree states that where there are inconsistencies between Decree 97 and treaties signed or acceded to by Vietnam relating to the internet, then such treaties shall be applied. The provision of internet-based services here then, should be read in conjunction with Vietnam's international commitments, especially its World Trade Organisation commitments in the services sector.



'Websites' and 'General Websites'

Decree 97 interestingly differentiates between 'websites' and 'general websites'. The distinction is important because the latter requires that a licence be issued from the Ministry of Information and Communication (**MIC**) prior to operation. The former does not have such a licensing requirement.

Article 3.12 of Decree 97 defines a 'website' on the internet to mean a website or a combination of websites to serve the supply and exchange of information in the internet environment, including websites, blogs, portals and other similar forms.

Article 3.13 of Decree 97 defines a 'general website' as a website of an organisation or enterprise providing general information on politics, economics, culture and society by citing information from official sources of press agencies or websites of the Party and/or other state agencies. As such, organisations and enterprises wishing to establish general websites must obtain a licence from the MIC, presumably due to sensitivity of contents on such sites.

An explanation regarding the establishment of the general website must be included in the application dossier to obtain a license for a general website. This explanation must state principal contents of the site, including "the manner of the services used to provide or exchange information (website, forum, blog, etc)". Therefore if a blog cites information from official sources of press agencies, it will be classed as a 'general website' under Decree 97. There is no further information under Decree 97 as to what manner or level of citing or quotation from official press agencies will render a website a general website for licensing purposes.

Licences for general websites will be granted by the MIC for a term of five years, and may only be extended once, for no more than one year. If an application dossier is valid and all the conditions are met, the MIC should grant a licence for a general website after 15 working days.

'Online Social Services'

An 'online social service provider' is defined under Article 11.1 of Decree 97 as "an enterprise of any economic sector which is established under Vietnamese law to provide online social services for the public". 'Online social service' itself is defined under Article 3.14 as "a service providing a broad community of users the possibility to interact, share, store and exchange information between one another in the internet environment, including blog, forum, chat and other similar forms". It appears that online social networks would be contemplated to be included in this definition.

Under Article 19.4 of Decree 97, enterprises that wish to establish websites to provide online social services must register with the MIC. Registration is different to the requirement of a licence. The mandatory components of an application dossier for registration are less extensive and onerous than those required for a licence. The application dossier for registration, however, is also filed with the MIC. Only after the enterprise receives a notice from the MIC confirming receipt of the enterprise's valid registration dossier, will it be permitted to officially provide the online social services.

Helpful tip

If businesses intend to, or currently do, operate a website or provide online services, it is important to ascertain with certainty whether their websites/services are classified as a general website, online social service, or neither, under Decree 97. If in doubt, seek official clarification from the MIC. This will reduce the risk of public scrutiny, and in a worse case, penalties.



1.3 SOEs for sale

Decree 109/2008/ND-CP of the Government on sale and assignment of 100% State owned enterprises, dated 10 October 2008 (Decree 109)

Decree 109 replaces Decree 80/2005/ND-CP of the Government, dated 22 June 2006, covering assignment, sale and lease of State-owned enterprises (**SOEs**). Under Decree 109, SOEs can be either sold by way of auction, or sale by agreement, or can be assigned to a 'collective' of the SOE's employees.

Foreigners invited

A critical step forward in Decree 109 is that foreigners in Vietnam are now eligible to purchase part, and in some cases all, of an SOE. Foreign-invested companies may purchase, jointly with Vietnamese enterprises and individuals, part of an SOE, at a ratio not exceeding the ratios in Vietnam's international commitments on business rights of foreign investors in lines and sectors in which Vietnam has commitments. Foreign investors are also now eligible to purchase an entire SOE, in specified lines and sectors. Also, for the first time, there is a specific list of sectors where SOE purchases are *not* permitted.

Selling points

The selling price for an SOE must not be lower than the State equity, plus value of the land use right, and the purchaser inherits all outstanding debts, as with other equity purchases. If the purchaser makes a one-time payment, a discount up to 5% off the selling price (not including the value of the land use right) may be applied.

Payments for purchase of a SOE must be made in Vietnam dong. Consequently, foreign purchasers will be required to open a deposit account at a bank or payment service provider operating in Vietnam, if they do not already have one.

The lock-in period for reselling the SOE will be negotiated on a case-by-case basis and stated in the sale agreement. After the purchase of a SOE, the purchaser must reconduct the appropriate business registration procedures.

Of note, as specifically stated in Decree 109, all SOE lease contracts having a term beyond 1 July 2010 will be required to be liquidated by that day. It will be interesting to watch the mechanics of this step as they play out in two years' time.

Big step forward

In summary, Decree 109 represents a big step forwarding allowing foreign investors to purchase interests in SOEs. It also contains a clear and straightforward implementing procedure. A very welcome official 'opening up' of a previously unclear, and effectively closed, sector for foreign participation.

1.4 Finance leasing – further flexibility

Decree 95/2008/ND-CP of the Government on organization and operation of finance leasing companies, dated 25 August 2008 (Decree 95)

Since issued on 2 May 2001, Decree 16/2001/ND-CP (**Decree 16**) has been amended once in 2005 by Decree 65/2005/ND-CP (**Decree 65**) and now again with Decree 95, issued late in August. Decree 95 further clarifies the regulations on the establishment, management and operation of finance leasing companies.

Changes from prior law

The first change in the finance leasing laws is with the definition and classification of finance leasing companies themselves. Instead of being classified by the source of capital, finance leasing companies are now classified based on the type of company they are under Vietnam law, ie, one-

member-limited liability company, limited liability company with two or more members, or a shareholding company. This re-classification seems to be consistent with the new Law on Enterprises. The new decree also provides a restriction that joint ventures and 100% foreign invested enterprises are allowed to be established *only* in the form of limited liability companies, in this sector.

Secondly, to ensure the financial capacity of the foreign investors, Decree 95 adds one more condition for a foreign company participating in joint venture or 100% foreign invested finance leasing companies: the company must have the total asset value of more than USD10 billion as of the end of the year preceding submission of the application, *except* as otherwise provided in a bilateral agreement between Vietnam and the country of such foreign company.

A third change from prior law relates to management and internal structure of finance leasing companies. This matter was not mentioned in Decree 16 and Decree 65, but is now provided for very clearly in Decree 95, which requires that a finance leasing company must have a Board of Management, an Inspection Committee and a General Director, all working under the auspices of the (General Meeting of) Shareholders, the owner or the Member's Council, as the case may be.

A last noteworthy point of the new decree is that licensed finance leasing companies may be permitted in to conduct additional activities, including engaging in working capital lending and factoring, in certain conditions where the financial viability of the company is demonstrated.

1.5 Real penalties for fraud in goods and services

Decree 107-2008-ND-CP of the Government on administrative penalties for speculation and hoarding goods, over-pricing, providing false information, smuggling and commercial fraud, dated 22 September 2008 (Decree 107)

Over the course of the last year, Vietnam has experienced fluctuations of the market in all fields, including a rise in inflation and prices of various lines of goods. While perhaps not so obvious, acts of speculation, hoarding goods, over-pricing, providing false information, smuggling and commercial fraud may be causes of, or contributors to, such fluctuations. Decree 107, issued 22 September, provides administrative penalties intended to thwart such acts, be a more powerful tool for Government agencies to control these illegal acts.

Types of conduct covered

Decree 107 stipulates four types of conduct subject to administrative penalties:

- (i) conduct constituting goods speculation; hoarding goods; raising prices above the stipulated level;
- (ii) providing false information about the market or about prices of goods or services;
- (iii) conduct in breach regarding declaration of prices, registration of prices and listing of prices of goods or services;
- (iv) illegal cross-border export activities, including illegal transport of paddy, rice, petrol, oil, forest products and minerals; and
- (v) fraudulent conduct in weighing, measuring or packing, or regarding quality of goods and services.

It should be noted that where the value of the goods in question is high and there are indications of a criminal offence, administrative penalties will ordinarily not apply, but the file must be transferred to the competent prosecutor to investigate criminal liability.

The maximum fine bracket under Decree 107 is 70 million Vietnam dong. In addition, depending on each specific case and the seriousness of a breach, other forms of additional penalty shall apply.

Penalties for specific acts

- Acts of goods speculation, taking advantage of a scarcity of goods or creating a false scarcity on the market in order to buy up all available goods of a type that are on an official price stabilization list shall be subject, under Decree 107, to a fine level ranging from 3-35 million Vietnam dong. Acts act of speculation in goods such as petrol, oil, cement, construction steel, liquefied gas or chemical fertilizer being petrol, oil, cement, construction steel, liquefied gas or chemical fertilizer shall be fined at a minimum level of five million Vietnam dong.
- Acts of hoarding goods by business households without legitimate reasons shall be fined at levels ranging from 5-30 million Vietnam dong.
- The act of over-pricing shall be subject to a warning or a fine level ranging from 500,000 to 20 million Vietnam dong. In the case of illegal cross-border transportation, trading or exchange of petrol and oil, paddy, rice, forest products or minerals, the value of goods in breach shall be taken into account to provide an appropriate fine level.
- Fine levels will generally be doubled if the acts are conducted by a business enterprise or branch in Vietnam. Other additional forms of penalty shall apply to offenders, such as confiscation of goods, confiscation of funds gained from any breach and possibly withdrawal of the offender's business licence for up to 12 months.

False information

Decree 07 also provides for penalties for providing false information about the market or about prices of goods or services. The fines range from 10-20 million Vietnam dong, and shall also apply to any mass media agency or other related organization which is involved in the fabrication or dissemination of false information about the market or about prices of goods or services which causes alarm within the general public. This includes printed, oral, electronic or other forms of mass media, within society and destabilizing the market.

Customers protected against commercial fraud

A significant new provision of Decree 107 is that offenders shall be responsible to compensate to customers for any damage in cases of fraudulent conduct. If the customers concerned are not able to be identified, then the profit gained from the fraudulent conduct shall be confiscated and paid into the State budget. However, Decree 107 fails to provide clear regulations on making claims for compensation by customers.

In short, with administrative penalties and other forms of penalties prescribed, Decree 107 is expected to make a contribution to the stabilization of the market and the further development of consumer trust in the products they buy.

Part 2 Feature

In the August 2008 issue of the VLU, we featured an article on enforcement of foreign arbitral awards in Vietnam. The conclusion there was that it is not as easy as it may seem. This month, we take a look at domestic arbitral awards, with a re-print of a recent article written by Hop Dang, one of our senior Hanoi lawyers, for the Vietnam Investment Review (No. 889 dated 27 October 2008). Hop Dang recently received his D.Phil. from Oxford University, and is considered an expert in the area of Vietnam arbitration. His article appears below:

DRAFT ARBITRATION LAW TO BRING MAJOR CHANGES BUT STILL NOT SUFFICIENT

Commercial disputes arising from international trade and investment are often resolved through international arbitration. For international contracts between Vietnamese parties and foreign parties, this mostly means arbitration outside Vietnam such as in Singapore, Hong Kong or London. For a long time, there was no prospect of conducting an arbitration in Vietnam because Vietnamese law did not recognize that arbitral awards made in Vietnam were enforceable.

Sound legal backdrop

The Ordinance on Commercial Arbitration (**Ordinance**) was enacted in 2003 with the hope of changing this situation. The Ordinance, Vietnam's first comprehensive piece of legislation on arbitration, was intended to enable the resolution of commercial disputes through arbitration under Vietnamese law. It contains detailed provisions on a host of issues such as qualifications of arbitrators, how arbitral tribunals are to be set up and how arbitration proceedings are to be conducted. In particular, the Ordinance stipulates that arbitral awards are enforceable as court judgments. With such comprehensive legal regime, there were high hopes that Vietnam would see a substantial increase in the number of disputes resolved through arbitration in the country.

However, the reality has been disappointing. At a two-day workshop in Hanoi in late September, it was reported that less than 50 arbitrations had been handled by the seven existing arbitration centres for each year from 2004 to 2007. The courts are still responsible for resolving 97.5% of commercial disputes in the country. In 2007, 226 commercial disputes were heard before the Hanoi Commercial Court. 1,000 disputes were tried before the Commercial Court of Ho Chi Minh City in the same year. That means that each judge in the Commercial Court of Hanoi would hear about 32 cases and each judge in the Commercial Court of Ho Chi Minh City would hear 59 cases in that year. In stark contrast, in 2007, only 30 disputes were referred to the Vietnam International Arbitration Centre (**VIAC**) which has 123 arbitrators on its list. The average caseload for each arbitrator at the VIAC is therefore only 0.25 case per year.

Why not utilized?

While this situation can be explained by a number of reasons such as the lack of a developed legal profession and the lack of qualified arbitrators, a fundamental reason rests with the legal framework. Specifically, the Ordinance, as progressive as it is, does not yet form an adequate foundation for the arbitration profession to develop. Three main problems, amongst others, with the Ordinance were discussed in the workshop. The first relates to the nationality of arbitrators. Currently, the Ordinance requires that arbitrators must be Vietnamese nationals. Foreign arbitrators are not allowed where a dispute only involves Vietnamese parties. This makes joint venture companies and wholly foreign owned companies, being considered as Vietnamese companies, reluctant to use arbitration under Vietnamese law because, given the foreign interest in them, these companies would naturally prefer to have non-Vietnamese arbitrators on the tribunal. Therefore, these companies will continue to resort to international arbitration which they are allowed to use under the Law on Investment. In addition, this requirement for Vietnamese nationality of arbitrator under the Ordinance also means that arbitration centres in Vietnam can only have Vietnamese arbitrators on their panels. This makes Vietnamese arbitration centres unattractive to foreign parties. While in reality, some arbitration centres have tried to overcome this by admitting foreign arbitrators to their panels, the legality of this was questioned at the workshop.

The second major problem with the Ordinance is that in an ad hoc arbitration, the Ordinance does not authorize the use of an appointing authority who will appoint the arbitrator where the parties cannot agree on one. The international practice is to entrust this role to well known arbitration institutions such as, for examples, the Permanent Court of Arbitration (**PCA**) or the London Court of International Law (**LCIA**). As the appointment of an arbitrator is crucial for the resolution of a dispute, parties often entrust this task to such experienced and trusted international institutions which have the necessary capabilities and contacts to appoint the most suitable arbitrator. However, the Ordinance requires that the parties, in case of disagreement, must apply to the competent provincial court to make such appointment. In other words, the parties in an ad hoc arbitration do not have the freedom to seek such appointment from international arbitration institutions such as the PCA or the LCIA. This restriction has significantly deterred foreign parties from using ad hoc arbitrations in Vietnam.

The third problem with the Ordinance raised at the workshop is that it does not authorize arbitral tribunals to issue interim relief orders which are often essential to preserve the evidence of a case or stop a party from dissipating its assets thereby making the arbitration proceeding ultimately futile. The Ordinance currently requires parties to seek such interim relief from a competent provincial court. The likely delay in such court application may make it ultimately not worthwhile.

New draft Arbitration Law in the offing

Recognising the above and other problems with the Ordinance, the Vietnamese authorities have engaged in drafting a new Arbitration Law, which is intended to be enacted in late 2009 and to take effect in late 2010. A draft of the Arbitration Law was circulated for comments in the workshop it seems to have rectified a number of problems in the Ordinance. However, at the same time, a few other issues remain.

First, most importantly, the draft Arbitration Law recognizes that foreigners can act as arbitrators in Vietnam. This means that foreign parties will be more likely to arbitrate in Vietnam as they can have non-Vietnamese arbitrators on the tribunal. In addition, this new provision will enable Vietnamese arbitration centres to admit internationally recognized arbitrators to their panels. The second important improvement is that the draft Arbitration Law authorizes an arbitral tribunal to, on the application of a party, issue interim relief orders such as freezing the assets of a party, ordering a party to refrain from acts which may prejudice the arbitration proceeding or ordering security for costs.

Not all issues resolves

However, the draft Arbitration Law still does not allow parties in an ad hoc arbitration to agree on an appointing authority which will appoint arbitrators where the parties disagree. As in the Ordinance, the draft Arbitration Law requires parties to apply to the competent provincial court for such appointment. Unless addressed in a subsequent draft, this provision will continue to deter ad hoc international arbitrations in Vietnam. In the next decade, before Vietnamese arbitration centres develop sufficiently to win the confidence of commercial parties, foreign parties, if they choose to arbitrate in Vietnam, will be more likely to use ad hoc arbitrations. If so, they will need full flexibility in conducting their arbitrations, including particularly the freedom to appoint arbitrators or, in case they cannot agree, to entrust such appointment to an internationally recognized arbitral institution. If they do not have this freedom, parties will simply continue to resort to arbitrations outside Vietnam where such freedom is well recognized and protected.

Apart from that, a few other issues remain unresolved in the draft Law. For example, the draft Law now requires a tribunal to conduct the proceeding in Vietnamese, unless the parties otherwise agree. This is likely to be a serious inhibition to arbitrations involving foreign parties and foreign arbitrators. As another example, similar to the Ordinance, the draft Law allows the tribunal, in case of a dispute involving a foreign party, to apply foreign law if chosen by the parties but only to the extent such choice of foreign law and its application is not inconsistent with fundamental principles of Vietnamese law. Such qualification seems vague and inconsistent with international practice. Thirdly, according to the draft Law, an arbitration centre may only appoint arbitrators from its own panel. As said above, this unnecessarily fetters the flexibility of an arbitration centre.

The draft Arbitration Law is still in an early drafting stage and it will certainly keep evolving over the next twelve months. It is anticipated that, with a very highly qualified drafting committee and assistance from international experts, the above problems will be addressed in subsequent drafts so that the Arbitration Law, once enacted, will constitute a sufficiently satisfactory foundation for arbitration activities in Vietnam.

Part 3 Did You Know?

3.1 Legal representative vs. authorised representative – same, same but different?

The terms 'legal representative' and 'authorised representative' may be and often are used interchangeably in other countries. However, in the context of Vietnam's Enterprise Law, these two terms are not the same and should not be mixed up. The 'legal representative' is an individual authorised to act on behalf of an enterprise, while an 'authorised representative' is an individual authorised to act on behalf of a corporate member or a corporate shareholder of an enterprise.

Legal representative

There is no specific definition of legal representative in the Enterprise Law. However, various provisions in the Enterprise Law show that the legal representative is an individual acting on behalf of an enterprise. As an artificial person, an enterprise needs to perform its rights and obligations through various natural persons, and it is the legal representative who plays this key role. One example is the role of signing agreements, contracts and other documents on behalf of the enterprise.

The personal details such as name, date of birth and permanent address of the legal representative are recorded in the enterprise's business registration certificate or investment certificate.

Eligibility

Just who can be the legal representative of an enterprise depends on the form of that enterprise. In general, the Charter of an enterprise may provide for the General Director/Director or the Board Chairman to be the legal representative. The Enterprise Law provides in particular that the legal representative can be:

- (i) in respect of a limited liability company with two or more members, the General Director/Director or the Charman of the Members' Council;
- (ii) in respect of a limited liability with one member and that member being an organisation, the General Director/Director or the Charman of the Members' Council or the President of the company;
- (iii) in respect of a limited liability with one member and that member being an individual, the General Director/Director or the President of the company;
- (iv) in respect of a shareholding company, the General Director/Director or the Chairman of the Board of Management;
- (v) in respect of a partnership, any unlimited liability partner; and
- (vi) in respect of a private enterprise, the owner of that enterprise.

The legal representative of a limited liability company or a shareholding company is required to reside permanently in Vietnam, and in the case of his/her absence from Vietnam for more than 30 days, the legal representative must authorise in writing another person to perform his/her rights and obligations. Failure to comply with this requirement may result in a fine from VND 5 million (about US\$ 300) to VND 7 million (about US \$425). In practice, to date anyway, licensing authorities have been somewhat relaxed about this requirement.

Authorised representative

In the Enterprise Law, the term 'authorised representative' is used in the context of a limited liability or a shareholding company. Although also not defined, an authorised representative is understood to be an individual who is authorised in writing by a corporate member (in respect of a limited liability company) or an institutional shareholder (in respect of a shareholding company) to exercise its member or shareholder rights. There is no prescribed form for this written authorisation, and the



authorised representative may change from time to time, or from meeting to meeting. This the authorised may be thought of as more 'temporary' than the legal representative.

In the case of a limited liability with two or more members or a shareholding company, the appointment of an authorised representative is required to be notified to the company and the business registration body.

3.2 Automatic import permits – another hurdle or a useful market tool?

International trading rights in Vietnam have become increasingly liberal since the passage of Decree 12-2006-ND-CP in 23 January 2006, which sought to embrace and adopt many WTO principles. While foreign invested businesses still have restricted trading rights in Vietnam, avenues for importing goods have become far more numerous and flexible in recent years. The push to create a global market in an overheating economy must be curbed to an extent by the need to contain soaring inflation and an increasing trade deficit. One means of keeping inflation and the trade deficit in check is the use of automatic import permits.

Concept not new

Automatic import permits were introduced in Vietnam by the Government in 2002. They allow the Government to more easily monitor the quantities of certain imported goods to better determine any trade gaps. If significant deficits are forming, the government can set quotas or restrictions on the importation of such goods or otherwise apply certain measures such as import taxes to offset trade deficits and to reduce spending.

On 1 August 2008, the Ministry of Trade and Industry (**MOIT**) issued Decision 24-2008-QD-BCT on the issuance of automatic import permits for certain lines of goods (**Decision 24**). The stated driving influence behind this decision was - that's right - the high levels of inflation resulting from a significant increase in the importation of motor vehicles. However, Decision 24 captures a range of goods which previously did not require any form of import licence and were only subject to standard customs regulations. These goods included, food items, food by-products, toiletries, leather items, paper, cleaning products, plastics, carpet, clothes, textiles, footwear, headwear, glass, ceramics, metal articles, tools, mechanical appliances, electronic appliances, vehicles, optical items, clocks, furniture, toys and other miscellaneous manufactured items.

System faulty

While the requirement to apply for automatic import permits under Decision 24 expires on 31 of December 2008, business entities must apply for a permit *each time* they import a shipment of goods in the interim. The application process, comprising a request accompanied by supporting documentation, appears straightforward and is required to be dealt within 10 days of receipt. However as Vietnam's ports become overloaded with imported stock awaiting automatic import permits, it seems business entities are either not embracing the process or it is breaking down at some point.

Some relief

On 15 September 2008, the MOIT issued Letter 8237-BCT-XNK (**Letter 8237**) in response to both the lack of compliance with Decision 24 and the increasing crisis at ports and border gates, which are now deadlocked to the extent that even export activities are being impeded. Letter 8237 squarely places responsibility for the setback on enterprises which 'do not fully understand the details of Decision 24'.

Letter 8237 states that while inflation and the trade deficit figures remain high, they are under control and are levelling off. In view of the standstill at ports and its adverse effect on exporting activities, Letter 8237 reduces the categories of items requiring automatic import permits. The new list now only includes toiletries, plastics, glass, ceramics, metal articles, tools, mechanical appliances, electronic appliances, vehicles, and furniture.



While this means one less hurdle for importers of those items that were previously listed, it is no consolation to the importers of the remaining items, particularly if the hold-up is bureaucratic. Letter 8237 makes mention of the establishment of an additional office for processing permit applications in HCMC, imply that at least some of the delay may have been internal. Either way, while inflation and trade gaps remain significant issues in Vietnam, it is imperative that businesses and the Government work together when implementing measures to keep the market in Vietnam healthy and 'above water' in this time of global crisis.

3.3 Limited liability companies and registration issues – continued

In last month's VLU, we reported on a growing trend among certain registration bodies to request purchasers of capital interests in limited liability companies to show proof that the vendor of the capital interest had actually received payment in full. This trend stems from Decree 88's requirement that companies applying to register changes in membership arising from an assignment of capital produce 'documents evidencing the completion of the assignment'.

Common practice

A reasonably common and accepted practice when registering changes in members of a limited liability company, up until now anyway, has been to submit the relevant capital transfer documentation, but allow the purchaser to withhold payment to the vendor until the change in membership has been registered. In other words, the final condition precedent to payment for the acquisition has been the registration of the capital interest by the relevant registration body, which is, at least for Vietnamese law purposes, when 'title' to, or legal recognition of the ownership of, the capital interest passes to the purchaser.

Given the uncertainty in registration procedures and the significant amount of time these procedures can often take (even for relatively simple applications), withholding payment has generally been a sensible way to protect foreign investors and leave the allocation of the regulatory risk with the vendor, usually a Vietnamese party.

However, the recent trend to require evidence that payment has been received in full before registering the change in ownership means that this more practical approach may no longer be possible and we will see a shift in the regulatory risk to the purchaser.

How much proof is enough?

The extent of the required proof that payment had been received will depend on the relevant registration body. Some may require that bank account statements of the vendor be provided to show that the purchase price has been paid. Others may adopt a less onerous approach.

Following a recent inquiry regarding the extent of the proof required by the Business Registration Division of the Ho Chi Minh City Department of Planning and Investment (**HCMC DPI**), a HCMC DPI officer indicated that the HCMC DPI would not usually request bank statements as part of the application documents but *would* look for a document along the lines of a sample 'Agreement on Assignment of Capital Contribution'. Somewhat confusingly, this one page document is also referred to as 'minutes', so it is unclear if the document is intended to be a formal agreement or simply a record of the parties regarding the completion of capital contribution assignment.

The HCMC DPI indicated that this document was not a prescribed or required form, although it did contain the content the HCMC DPI would look for when reviewing an application to see if 'documents evidencing the completion of the assignment' had been submitted. In addition to a straightforward 'Party A sells the capital contribution to Party B' provision (which might indicate that it is an agreement), the document also contains:

- (i) an 'undertaking' by the parties that all of the procedures for the assignment of the capital contribution and payments between the two parties have been completed; and
- (ii) an acknowledgement that disputes between the two parties will not be valid after both parties sign the document.



Some tailoring possible

As the document is not a prescribed form, there should be scope to play with its wording, and room for the parties to form their own views as to what actions are required before signing the document. For example, confirming that payments between the parties have been made may not preclude the payments being made into an escrow account over which the purchaser has complete or joint control (with the release of the monies after the change in member has been registered). Nevertheless, the preference for this document it does seem to indicate that the previous practice of withholding any payment until the change in member has been registered will no longer be possible, at least with the HCMC DPI.

New issue raised

The content of point (ii) above raises a greater concern. This provision indicates that after this document is signed, the purchaser will have no further recourse against the vendor at all. As such, any later claim against the vendor by the purchaser, eg for breach of warranty, will not be valid. This is unsatisfactory and would defeat the purpose of many of the usual provisions such as warranties, indemnities, conditions subsequent, undertakings, earn-outs etc, which are negotiated in the context of the capital assignment agreement. This provision also fails to limit the scope of any dispute to the assignment itself, and if there are other arrangements between the parties, there is a risk (albeit remote) that in unrelated disputes, one of the parties may submit this document to bring into question the validity of that unrelated dispute.

Of course, as with all registration bodies, it is open to the HCMC DPI (and other DPIs in Vietnam, of course) to request whatever documents it believes necessary in the context of an application, and it may request a document exactly in the form of the sample provided to us, or go further and request the bank statements of the vendor which show that the purchase monies have been paid in full.

Seeking formal guidance

Given the uncertainty in application requirements of the registration bodies when registering change in member of limited liability companies, and the risk that payment in full prior to registration presents to foreign investors, our office is writing formally to the Ministry of Planning and Investment concerning this process. We will report on any response or clarification in a future edition of the VLU.

3.4 Prevailing language clauses – recommended, but not an end-all

When a contract is signed by the parties in two (or more) languages, it is logical that one language version should prevail, in order to resolve any differences between the two language versions. It is common for such contracts to include a provision addressing this issue, ie, usually along the lines of: "This contract has been signed in English and in Vietnamese, in the event of a discrepancy between the two language versions, the Vietnamese (or English) version will prevail".

Lost in translation

When the contract has been *drafted* in English and *translated* into Vietnamese, it is probably sensible that the English version should prevail, as any discrepancy in the Vietnamese version is likely to be the result of an incorrect translation.

Sometimes, however, the Vietnamese party to a contract that is signed in two languages will not agree to this principle. It may insist that the two language versions have 'equal validity'. A consequence of agreeing to this compromise is that it will not allow the parties to resolve any differences between the two language versions. It's a bit like 'agreeing to disagree', but where does it leave the parties?

For some contracts, namely investment-related agreements such as joint venture agreements, Vietnamese law mandates the prevailing language version to be Vietnamese (Article 4 of Decree 108/2006/ND-CP dated 22 September 2006). In such case, foreign partners need to make doubly

sure that the Vietnamese version of a contract that has been drafted and agreed in English has been accurately translated.

WTO - particular troublespot

In another interesting instance, namely that of Vietnam's WTO Commitments, Vietnam has agreed that the English language version of the accession document will prevail, by referring to English as the 'authentic' language. Specifically, in the WTO's Decision on Vietnam's accession, based on the Protocol for Accession of Vietnam to the WTO, the WTO's General Council, states that the only authentic language for the Schedule of Specific Commitments on Services is the English language.

As a number of 'translation issues' have arisen between the Vietnamese version and English version of the WTO Commitments, there are already some interesting discussions germinating between investors (and their lawyers) and the licensing authorities charged with implementing those commitments. And although English has been agreed as the prevailing language, there is disagreement as to interpretation of certain provisions of the commitments.

Take, as an example, the commitments on construction and related engineering services (CPC 511-518), where Vietnam committed as follows: for a period of two years from the date of accession, 100% foreign-invested enterprises can provide services only to foreign-invested enterprises and foreign-funded projects in Vietnam.

In the Vietnamese version of the Schedule of Commitments on Services, the word 'funded' was translated as '*tài trợ*'. WTO agreements, however, are formed from trade negotiations, ie members bargaining for their trade interests. In this context, the English wording 'funded' would be closer to the meaning of 'lent' or 'financed' rather than 'sponsored', as it was understood in the Vietnamese translation. In Vietnamese language, '*tài trợ*' may imply 'sponsored' or development 'aided', which would mean a financial support rather than an investment. However, such understanding of the Vietnamese translation has already led to the reluctance of a licensing authority to approve a project in construction services funded/financed by a foreign bank.

Another case of a translation issue with the WTO Commitments has occurred with regard to CPC 633 (maintenance and repair of equipment). The word '*equipment*' was 'overtranslated' into Vietnamese as '*máy móc, thiết bị*', which covers 'equipment and machinery'. The Vietnamese translation therefore brings the provisions imposed to 'maintenance of equipment' onto 'maintenance of machinery'.

Authentic or non-authentic? Hue-check color

These language problems would not so easily occur if the English version of the WT Commitments were read first. However, Vietnamese State officials naturally tend to read (and use) the Commitments in their mother tongue first, and refer to the English later.

Therefore, when working with Vietnam's WTO Commitments, a word of caution for investors (and their lawyers) is to check the English wording of the Commitments first, but ensure to also check the translation, i.e. the non-authentic document, later. Both may likely be relevant, even with English as the agreed 'authentic' language!

Part 4 What's New Online?

NEW 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 3,500 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:

- ➔ Decision 03 with regulations on securities trading membership, 4 January
- ➔ Decision 17 with Regulations on settlement of and payment for securities transactions, 2 April
- ➔ Decision 16 on securities depository activities, 2 April
- ➔ Decree 19 dated 28 February 2005 on employment introduction organizations as amended by Decree 71, 5 June
- ➔ Draft Decree on compulsory job loss insurance to apply to Vietnamese employees from 1 January 2009, 31 July
- ➔ Decree 90 on anti-spam (junk email and text messages), 13 August
- ➔ Decision 30 suspending the need for export permits for iron and steel, 22 August
- ➔ Letter 5559 on management of golf course projects, 25 August
- ➔ Draft 2 Law on Special Sales Tax (now expected to take effect 1 April 2009 and with increased tax rates for alcohol, cars, betting and other businesses), 25 August
- ➔ Letter 11037 suspending procurement by State agencies of vehicles and other high-value assets, 17 September
- ➔ Decree 106 with the List of projects entitled to State investment credit loans, 19 September
- ➔ Decision 129 fixing absolute duty rates on export barite and apatite ore, 19 September
- ➔ Decree 107 on administrative penalties for goods' speculation, hoarding and over-pricing, 22 September
- ➔ Decision 81 decreasing export duty from 20% to 10% on iron and non-alloy steel, 22 September
- ➔ Decision 1353 with the master plan on Vietnam's coastal economic zones, 23 September
- ➔ Decision 1354 approving equitization plan of Vietinbank (formerly Incombank), 23 September
- ➔ Decision 2131 maintaining the basic interest rate at 14%, 25 September
- ➔ Decision 2132 permitting compulsory State Bank treasury bills issued 17 March to be used in State Bank open market transactions, 25 September
- ➔ Decision 2133 increasing the interest rate from 3.6% to 5% payable to banks on their compulsory reserves for VND deposits, 25 September
- ➔ Draft Resolution amending the export tariff list, 25 September
- ➔ Decision 1373 on establishment of the management committee of Phu Yen Economic Zone, 26 September
- ➔ Directive 279 on licensing of shareholding commercial banks, 29 September
- ➔ Draft resolution on legislative program for year 2009, 30 September
- ➔ Decision 82 increasing import duty from 5% to 10% on kerosene, 30 September

- ➔ Decision 5300 opening a location in Ho Chi Minh City for applications for automatic import permits, 30 September
- ➔ Letter 6519 on exploration of additional iron ore deposits in Phu Tho province, 1 October
- ➔ Decision 133 on trade union funding payable by enterprises with foreign owned capital and business co-operation parties, 1 October
- ➔ Decision 83 increasing import duty on meat products, some vegetables and cereals, and some iron and non-alloy steel products, 3 October
- ➔ Letter 6595 on exploration of additional manganese ore deposits in Ha Giang province, 3 October
- ➔ Notice 288 on measures to minimize impact of the current US financial crisis on Vietnam's economy, 3 October
- ➔ Decision 84 decreasing export duty from 10% to 5% on iron and non-alloy steel, 6 October
- ➔ Draft Decree on issuance of international bonds, 8 October
- ➔ Decision 83 dated 3 October increasing import duty as amended by Decision 2233, 9 October
- ➔ Decree 110 stipulating minimum wage as from 1 January 2009 for Vietnamese employees in enterprises, co-operatives and other Vietnamese organizations, 10 October
- ➔ Decree 111 stipulating minimum wage as from 1 January 2009 for Vietnamese employees in enterprises with foreign owned capital, 10 October
- ➔ Decision 2316 reducing the basic interest rate from 14% to 13%, 20 October
- ➔ Decision 2317 on early payment of compulsory State Bank treasury bills, 20 October
- ➔ Decision 2318 reducing the State Bank refinancing interest rate from 15% to 14%, the discount interest rate from 13% to 12%, and the overnight lending interest rate from 15% to 14%, 20 October
- ➔ Decision 2321 increasing the interest rate from 5% to 10% payable to banks on their compulsory reserves for VND deposits, 20 October

The list above is merely a recent snapshot of the wide range of new legislation now uploaded and available on Vietnam Laws Online through October 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 legal team hails from Australia, the United States, Finland and Vietnam, with our total number of lawyers now standing at 25. In this section of the VLU, we spotlight a different lawyer from one of our office each month so readers can get to know us a bit better. This month, our featured lawyer is David Hinchey from our Ho Chi Minh City office.



David is an Australian lawyer who was seconded to Ho Chi Minh City from our Sydney office in February of this year. He joined Allens in 2006 and was previously an in-house counsel with Toyota Financial Services in Australia.

David first came to Vietnam in 2004 and loved it (particularly the food), so jumped at the chance to come back with Allens when the opportunity knocked. Since arriving, he's been working on a variety of M&A transactions, continuing with the banking and finance work he handled in Sydney and otherwise getting his head around the Vietnamese legal system.

In his spare time, David likes watching his beloved AFL team, the St Kilda Saints, on the Australia Network, running (although he's discovered that it's very difficult in a city with terrible footpaths and three million motorbikes), eating Saigon's wonderful food and travelling around Asia.

Quote from the source: "Doing business in Vietnam is a little like crossing one of its roads. Be careful, be patient, look in every direction and expect to get knocked around occasionally. Eventually you'll get to the other side, you'll have a smile on your face and you'll appreciate the journey for all it's worth."

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