

Vietnam Legal Update

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Best wishes to all our readers for a happy and healthy New Year		
Next Issue of Vietnam Legal Update will be January-February 2006 Issue.		

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The material contained in Vietnam Legal Update is intended to inform you of recent legal developments in Vietnam. It is not intended, and should not be relied upon, as legal advice. Should you wish further information in relation to any legal instrument or matter mentioned in this issue, please do not hesitate to contact one of our offices.

Part 1 Selected New Legal Instruments

1.1 VAT and special sales tax

Law 57-2005-QH11 of the National Assembly dated 29 November 2005 on Amendment of and Addition to a Number of Articles of the Law on Special Sales Tax ("SST") and the Law on Value Added Tax ("VAT")

and

Decree 156-2005-ND-CP of the Government dated 15 December 2005 on Amendment of and Addition to Decrees Making Detailed Provisions for Implementation of the Law on SST and the Law on VAT

and

Circular 115-2005-TT-BTC of the Ministry of Finance dated 16 December 2005 Providing Guidelines for Implementation of Decree 156

Effective as of 1 January 2006, Law 57 amends:

- > Law 05 on SST dated 20 May 1998 for the second time, following amendments under Law 08 dated 17 June 2003;
- > Law on VAT dated 10 May 1997 for the fourth time, following amendments under Law dated 3 September 1999, Law dated 27 October 2000, and Law 07 dated 17 June 2003.

Law 57 represents the first time in Vietnam that a single law has introduced amendments to two existing Laws. Not previously on the legislative agenda for 2005, Law 57 was considered for the first time *and promulgated* at the National Assembly's October-November 2005 Session.

Decree 156 amends:

- > Decree 149 on SST dated 4 December 2003 for the first time;
- > Decree 158 on VAT dated 10 December 2003 for the second time, following amendments under Decree 148 dated 23 July 2004.

And Circular 115 amends:

- > Circular 119 on SST dated 12 December 2003 for the second time, following amendments under Circular 18 dated 8 March 2005;
- > Circular 120 on VAT dated 12 December 2003 for the second time, following amendments under Circular 84 dated 18 August 2004.

Together, Law 57 and (the very promptly-issued) Decree 156 and Circular 115 introduce the following reforms to promote domestic production and regulate consumption as of 1 January 2006:

- > Adjustment of SST rate applicable to (both locally produced and imported) automobiles of 5 seats or less, automobiles of 6 to 15 seats, and automobiles of 16 to under 24 seats to 50%, 30% and 15% respectively (down from 80%, 50% and 25% respectively).
- > Adjustment of SST rate applicable to spirits of 40 degrees or more to 65% (down from 75%).
- > Adjustment of SST rate applicable to cigarettes in 2006-2007 and from 2008 (with or without filter) down to 55% and 65% respectively.
- > Adjustment of SST rate applicable to draught beer and barrel beer up to 40% from 2008.
- > Adjustment of VAT rate applicable to preliminarily treated cotton down to 5%.
- > Plant and animal products, aquaculture and sea products which are not processed or preliminarily treated are not subject to VAT.

1.2 Pyramid selling

Decision 92-2005-QD-BTC of the Ministry of Finance dated 9 December 2005 on Fees for Registration of Multi-level Selling

and

Circular 19-2005-TT-BTM of the Ministry of Trade dated 8 November 2005 Providing Guidelines for Implementation of Decree 110-2005-ND-CP of the Government dated 24 August 2005 on Supervision of Multi-level Selling

Of all the significant matters regulated under Vietnam's new Competition Law (such as mergers and acquisitions, abuse of dominant market position, anti-competitive agreements) which became effective as of 1 July 2005, the very first implementing decree issued by the Government was Decree 110 on Supervision of Multi-Level Selling dated 24 August 2005. This reflected the Government's concern to control as quickly as possible the increasingly popular trend of pyramid selling which has been emerging in Vietnam in recent years.

Multi-level selling is a well-known concept in developed economies. It is a method for retailing products via a network of participating sellers at different levels, with products marketed and sold not at the regular selling location of the enterprise or participating sellers but at the home or workplace of the consumer, with the participating seller enjoying commission and bonuses on sales by him or her or by lower-level participating sellers introduced into the network by the participating seller. As at mid-2005, it was estimated that around 30 enterprises were employing this retailing method in Vietnam.

Since 1 July 2005, multi-level selling has been regulated under the Competition Law as one of a number of unfair competitive practices. Multi-level selling is not banned per se. Enterprises are prohibited from conducting the following acts aimed at obtaining illegal profit from recruitment of new participants to a multi-level sales network:

- > Requiring persons who wish to participate to pay a deposit, to buy an initial fixed quantity of goods, or to pay an amount of money in order to have the right to participate in multi-level selling of goods;
- > Failing to undertake to re-acquire the goods sold to a participant at at least 90% of their original price;
- > Allowing participants to receive commissions, bonuses and/or other economic benefits essentially only from their enticing other participants into the network for multi-level selling of goods;
- > Providing untruthful information about the benefits of participation in the network for multi-level selling of goods, or untruthful information about the quality and use of goods in order to entice other participants into the multi-level selling network.

Circular 19 provides guidelines for implementation of a number of aspects of Decree 110, in particular, registration of multi-level selling schemes, multi-level selling participation contracts and multi-level selling networks. According to Decision 92, the fees for registration for multi-level selling are: VND300,000 for certificate issuance, VND200,000 for certificate amendment, and VND100,000 for certificate re-issuance. Of interest, any enterprise having its registration withdrawn will not be permitted to apply for re-registration during a one year period after withdrawal. Where an enterprise develops its network in provinces and cities beyond that in which its head office is located, it must inform the Department of Trade in those other provinces or cities of the expansion.

Circular 19 requires enterprises engaged in multi-level selling to issue multi-level selling member cards for participants within seven working days from the date of signing the multi-level selling participating contract.

The main contents of a contract for multi-level selling activities as stipulated in Circular 19 are:

- > Name, head office, legal representative of multi-level selling enterprise;
- > Name, permanent residential registration (or temporary residential registration in case of a foreigner); ID number (or passport number in case of a foreigner) of participants of the multi-level selling network;

- work permit number of participant being a foreigner;
- > Origin, type, quality, price, usage and instruction for use of goods; re-sale price, guarantee conditions and scope (if any);
 - > Methods for calculation of commission, bonus or economic benefits for primary participants from their marketing activities and for secondary participants in the network;
 - > Rights and obligations of multi-level selling enterprise and participants, including obligation of enterprise to indemnity users or participants;
 - > Contract termination and liquidation.

Circular 19 became effective as of 1 December 2005 and Decision 92 becomes effective as of 31 December 2005.

>>> For more on Decree 110 on multi-level selling, see August 2005 Issue of Vietnam Legal Update on www.vietnamlaws.com

>>> For English translations of Vietnam's competition legislation, subscribe to Vietnam Laws Online Database on www.vietnamlaws.com.

1.3 **Mining - environment protection**

Circular 105-2005-TT-BTC of the Ministry of Finance dated 30 November 2005 Providing Guidelines for Implementation of Decree 137-2005-ND-CP of the Government dated 9 November 2005 on Fees for Environment Protection for Mineral Exploitation

and

Decree 137-2005-ND-CP of the Government dated 9 November 2005 on Fees for Environment Protection for Mineral Exploitation

Effective as of 1 January 2006, organizations and individuals engaged in mining of stone, gravel, clay, plaster, sand, soil, coal must pay fees for environment protection as prescribed in Decree 137 and Circular 105. Decree 137 stipulates different fee rates for each mineral type, as well as the regime for collection, payment, control and use of environment protection fees. The highest fee rate applies to slab stone and fine handicraft stone (VND50,000 per cubic metre) and the lowest rate applies to levelling soil (VND1,000 per cubic metre). Fee payers must register for payment of environment fees within 10 days of issuance of their mining license and make monthly declarations of fees payable at the tax office within 10 days of the following month. Fee payers are responsible for the accuracy of their declarations. Fees must be finalized at tax office within 60 days of the end of the year or the conclusion of mining.

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1.4 Food production - safety and hygiene conditions

Decision 39-2005-QD-BYT of the Ministry of Health dated 28 November 2005 Issuing Regulations on General Hygiene Conditions for Food Production Facilities

Two years after Ordinance 12-2003-PL-UBTVQH11 on Food Hygiene and Safety dated 26 July 2003 came into force and imposed strict hygiene and safety requirements on all Vietnamese and foreign organizations and individuals manufacturing or trading food within the territory of Vietnam, Decision 39 details the necessary hygiene conditions which must be maintained for food production facilities, equipment and tools, and persons coming into contact food during production.

Under Ordinance 12, food includes any fresh, raw, processed or preserved foodstuffs which people eat or drink. Amongst other things, Ordinance 12 imposes specific obligations on food producers and Decision 39 now details those obligations, including:

- > Food production facilities must be in areas which satisfy the conditions for ensuring hygiene and safety of foodstuffs. They must be located far from polluted environments and industrial or residential areas which may contaminate food and far from areas subject to flooding, and so forth.
- > Food production facilities must be designed, built, installed and operated so as to satisfy the requirements for food hygiene and safety. Eg they must be designed on the basis of the one-way principle from the input materials to the finished products with the aim of avoiding contamination. Storage and preservation warehouses must be designed as appropriate to the specific food product in order to avoid the penetration of harmful insects and animals.
- > Every measure must be taken to ensure that food will not be contaminated or dirty, and not infected with germs which are transmittable to people, animals and plants.
- > Food production procedures must be consistent with the provisions of the laws on food hygiene and safety.
- > If the surface of equipment and instruments directly contacts food during production, then only equipment and instruments made from materials which satisfy the requirements for food hygiene and safety may be used. Such materials must not cause poison or contamination to the food products. Equipment and instruments must be designed and manufactured safely and as appropriate to the specific food products and must be easy-to-clean/decontaminate/maintain.
- > Only containers and packets which satisfy the requirements for food hygiene and safety and which do not contaminate the food may be used.
- > Water used in food production must meet stipulated standards.
- > Only safe washing detergents, sterilizing agents and disinfectants which do not harm people's health and lives and which do not cause environmental pollution may be used.

Ordinance 12 also deals with preservation and transportation of food, import and export of food, proclamation of quality standards, advertising and labelling of food, and prevention and remedying of food contagions.

Decision 39 prescribes the health standards and requirements on knowledge about food hygiene and safety applicable to persons who directly participate in food production and trading. Such persons must obtain a certificate of participation in a training course on food safety and hygiene issued by a competent authority. And they have to update this knowledge every year. In addition, such persons must obtain a certificate of health as provided for by the Ministry of Health. Persons with infectious diseases included on the Ministry of Health's list are not allowed to participate directly in food production.

Under Decision 39, food producers which comply with the conditions for food safety and hygiene for 2 or more consecutive years may request issuance by the competent medical authorities of a certificate of good hygiene practice, which will be valid for 2 years from its date of signing. Under Ordinance 12, certification of

satisfaction of food hygiene and safety conditions is compulsory for producers of high risk food (as prescribed on a Government list).

Inspections of food hygiene and safety are conducted by the specialised Inspectorate of Food Hygiene and Safety. Any food producer which commits a breach of the laws on food hygiene and safety will, depending on the nature and seriousness of the breach, be subject to administrative penalties or be subject to criminal prosecution; and if they cause damage, they must compensate for it in accordance with law.

Decision 39 is expected to become effective as of mid-January 2006.

>>> For English translations of Vietnamese legislation on food quality and safety, subscribe to [Vietnam Laws Online Database](http://www.vietnamlaws.com) on www.vietnamlaws.com.

1.5 **Credit institutions - financial regime**

Decree 146-2005-ND-CP of the Government dated 23 November 2005 on Financial Regime Applicable to Credit Institutions

After 6 years, the Government has updated its regulations on financial regime of credit institutions in Vietnam. Decree 146 replaces Decree 166-1999-ND-CP of the Government dated 19 November 1999. Credit institutions must ensure their real charter capital does not fall below the legal capital requirements. They are entitled to use capital (including owners equity, mobilized capital and other capital) for trading provided that they uphold the principles of capital conservation. Credit institutions are not permitted to use over 50% of their first level equity for investment in construction or purchase of fixed assets. Credit institutions have the right to contribute capital, participate in joint ventures, buy shares, and lease, pledge, mortgage, dispose of and liquidate assets, subject to prescribed conditions. However, a credit institution is not permitted to contribute capital to or buy shares in any other enterprise having as a manager, executive or majority owner any relative of any member of that credit institution's board of management, board of controllers, directors or chief accountant. Of note, the limit on the percentage of capital which can be contributed or shares which can be purchased by a credit institution has been abolished; and capital contribution, share purchases and joint ventures by a credit institution no longer requires the approval of the State Bank Governor. Decree 146 sets out the liabilities of the board of management and the directors of a credit institution. The accounting and auditing of credit institutions is also regulated. Audit results and financial statement of credit institutions must be submitted to the State Bank and disclosed within 120 days of the end of the financial year.

Decree 146 became effective as of 16 December 2005.

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Part 2 Features

2.1 Vietnamese contract law enters the 21st century

As of 1 January 2006, one of the most confusing and misunderstood areas of Vietnamese law - contract law - enters the 21st century. The shackles of Vietnam's socialist history will be broken with the repeal of the 1989 Ordinance and 1990 Decree on Economic Contracts by the new 2005 Civil Code. The three overlapping and often conflicting bodies of contract law in Vietnam will be streamlined down to two. From next year, Vietnamese contract law will just comprise (principally):

- > 2005 Civil Code (replacing the 1995 Civil Code), the general provisions of which are applicable to all types of contracts (subject to specific provisions regulating specific types of civil contracts in the 2005 Civil Code or commercial contracts in the 2005 Commercial Law or other contracts in other laws) and
- > 2005 Commercial Law (replacing the 1997 Commercial Law), applicable to contracts relating to commercial activities by and between businesses (by way of exception to or in addition to the 2005 Civil Code).

Of note, the 1989 Ordinance and 1990 Decree on Economic Contracts represented one of the earliest reform measures introduced as part of the "doi moi" (economic renovation) policy back in 1986 - in that they allowed State owned enterprises to engage in contracts directly with suppliers and purchasers of commodities, whereas previously all their commercial transactions had been regulated by periodical State plans. And now, the repeal of those laws represents the next major reform in Vietnamese contract law.

Below we look at Vietnamese contract law post-1 January 2006 in comparison with pre-1 January 2006:

Subject	Post-1 Jan 2006	Pre-1 Jan 2006	Comment
	2005 Civil Code 2005 Commercial Law	1995 Civil Code 1997 Commercial Law 1989 Ordinance on Economic Contracts ("OEC")	
<i>Definition of civil contract</i>	Art 388 - 2005 CC	Art 394 - 1995 CC	No change.
<i>Principles of entering into civil contracts</i>	Art 389 - 2005 CC	Art 395 - 1995 CC	No change.
<i>Offers to enter into contracts</i>	Art 390 - 2005 CC	Art 396 - 1995 CC Art 51.1 - 1997 CL	<p>The 2005 CC explicitly defines what "an offer to enter into a contract" is (Art 390.1). And clarifies that compensation is payable where an offeror contracts with a third party during any time-limit for acceptance of the offer by the designated party/parties (Art 390.2). An offer is no longer required to contain principal contents of contract - a significant improvement (see also comments on Article 402 of the 2005 CC).</p> <p>To make the 2005 CC more general to cover all types of contracts, all articles on offers to enter into contracts no longer use the word "civil contracts" as in the 1995 CC. The 2005 CL no longer contains provisions on offers to enter into contracts.</p>
<p>>>> For English translations of Vietnam's old and new Civil Code and Commercial Law, subscribe to Vietnam Laws Online Database on www.vietnamlaws.com</p>			

Subject	Post-1 Jan 2006	Pre-1 Jan 2006	Comment
<i>Point of time when offer to enter contract becomes effective</i>	Art 391 - 2005 CC	-	New provision may help to reduce disputes between the offeror and the offeree in some cases as to whether a contract has been established or not.
<i>Modification or withdrawal of offers to enter into contracts</i>	Art 392 - 2005 CC	Art 399 - 1995 CC	<p>No material changes. 2005 CC is more open for the offeror, i.e. the offeror can still modify or withdraw the offer when the offeree receives the offer and the notice on modification or withdrawal of the offer at the same time.</p> <p>In relation to the offeror modifying the offer, the 2005 CC restructures the articles a bit but the substance does not change. The 1997 CL does not mention the modification made to the offer by the offeror.</p>
<i>Cancellation of offers to enter into contracts</i>	Art 393 - 2005 CC	-	<p>New provision in favour of the offeror. The consequence of cancellation of an offer is not different from withdrawal of an offer.</p> <p>Under the 1995 CC, the offeror could only withdraw an offer in certain circumstances specified in the offer (Article 398). Under 2005 CC, the offeror can cancel an offer at any time for any reason prior to the offer being accepted if the offer has so provided. However, it is not clear if the intention of the draftsmen is that the circumstances in which an offer can be cancelled must be specified in the offer.</p> <p>The 1997 CL does not provide for offer withdrawal by the offeror.</p>
<i>Period of liability of offerors and acceptors of offers</i>	No provision	Art 53 - 1997 CL	No longer specifically provided for in 2005 CC or 2005 CL. The 2005 CC provides for certain time for acceptance of an offer if a time-limit is specified in the offer, otherwise an acceptance or rejection of the offer must be communicated to the offeree instantaneously. (See also our comments on Art 397.2 of the 2005 CC.)
<i>Termination of offers to enter into civil contracts</i>	Art 394 - 2005 CC	Art 399 - 1995 CC	2005 CC is wider and clearer. Importantly, it adds an open provision for the offeror and the offeree to agree on termination of offer within the time-limit for the offeree to reply.
<i>Modification of offers as proposed by offeree</i>	Art 395 - 2005 CC	Art 399 - 1995 CC Art 52 - 1997 CL	<p>2005 CC retains 1995 CC provision, such that ANY condition or modification to an offer by the offeree will constitute a new offer.</p> <p>It's an improvement that Art 52 of the 1997 CL is not retained as it was unclear as to what constituted amendment of or addition to the principal contents of an offer and what constituted immediate rejection by the offeror.</p>
<i>Acceptance of offers to enter into contracts</i>	Art 396 - 2005 CC	Art 51 - 1997 CL	1995 CC did not define acceptance of offer. The definition in the 1997 CL is now adopted in the 2005 CC.
<i>Time-limit for accepting offers to enter into contracts</i>	Art 397 - 2005 CC	Art 397 - 1995 CC Art 54 - 1997 CL	<p>Still some contention as to what constitutes an instantaneous rejection by the offeror (para 2 of Art 397.1 of the 2005 CC). And still no clarification of "other means" for direct communication re. offers (Art 397.2 of the 2005 CC).</p> <p>Art 397.3 of the 1995 CC re. acceptance by mail is not adopted in the 2005 CC so it is unclear under the</p>

Subject	Post-1 Jan 2006	Pre-1 Jan 2006	Comment
			2005 CC when an acceptance occurs if it is communicated by mail (as it is presumed that mail is not considered direct communication under Art 397.2 of the 2005 CC).
<i>Where offeror to enter into contract dies or loses capacity for civil acts</i>	Art 398 - 2005 CC	-	New provision: if death or loss is after the offer has been accepted by the offeree, the offer to enter into the contract is still effective. Query what if the offeror/offeree is an entity? Query what if an agreement is not yet established because it has to be entered into in writing (Art 404.4 of the 2005 CC) - how are the liabilities between the parties dealt with? (see also our comments on Art 404 below).
<i>Where offeree dies or loses capacity for civil acts</i>	Art 399 - 2005 CC	-	
<i>Withdrawal of acceptance of offer</i>	Art 400 - 2005 CC	-	New provision allowing the offeree to withdraw the acceptance of an offer if the withdrawal arrives prior to or upon the time at which the offeror receives the acceptance of the offer to enter into the contract.
<i>Formalities for civil contracts</i>	Art 401 - 2005 CC	Art 400 - 1995 CC	A great improvement - the 2005 CC expressly provides that contracts will no longer be invalid for failure to comply with the CC formalities unless the law expressly provides for such invalidity. This new provision reflects the principle of respecting the will of the parties regardless how it is expressed. It has been common practice in Vietnam that the formality of a contract must be strictly complied with. Many contracts have been rendered invalid for not complying with formalities. Hopefully, the courts will now relax their strict view.
<i>Contents of civil contracts</i>	Art 402 - 2005 CC	Art 401 - 1995 CC Art 50 - 1997 CL	Under the 1995 CC, the OEC and 1997 CL, a contract MUST contain prescribed principal contents. A contract without such contents (even if omission has become a custom between the parties) may be rendered invalid. Now 2005 CC offers guidance only as to contents, reflecting new respect for the agreement between the parties.
<i>Places for entering into civil contracts</i>	Art 403 - 2005 CC	Art 402 - 1995 CC	No change, except the 2005 CC promotes the principle of respecting the agreement between the parties (principle in Art 4 of the 2005 CC), failing which 'place for entering' will be residence of individual/head office of legal entity having made the offer
<i>Time at which civil contracts are entered into</i>	Art 404 - 2005 CC	Art 403 - 1995 CC Art 55 - 1997 CL	Potential for confusion remains (arguably, increased) as the 2005 CC provides separately for (but does not clarify what differentiates) 'civil contract', 'contract', 'oral contract' and 'written contract'. Difference between 'when offeror receives the acceptance' and 'when the last party signs the contract' may be great. Art 404 of 2005 CC no longer refers to time of registration/notarization of a contract but a number of other articles of the 2005 CC do require certain contracts to be registered/notarized and these contracts will only take effect as from the time of registration/notarization (Art 124, 168, 439, etc.).
<i>Effectiveness of civil contracts</i>	Art 405 - 2005 CC	Art 404 - 1995 CC	No change in substance. Contract lawfully entered into will be effective from the time at which it is entered into, unless otherwise agreed or stipulated by law.

Subject	Post-1 Jan 2006	Pre-1 Jan 2006	Comment
			Old Art 404.1 of the 1995 CC now reflected in Art 4 of the 2005 CC which provides that lawfully entered into commitments and agreements are binding on the parties.
<i>Principal types of contracts</i>	Art 406 - 2005 CC	Art 405 - 1995 CC	The 2005 CC adds one more type of civil contract, i.e. 'contracts with conditions', to list of 'bilateral contract', 'unilateral contract', 'principal contract', 'ancillary contract', and 'contract for the benefit of a third party'.
<i>Standard form contracts</i>	Art 407 - 2005 CC	Art 406 - 1995 CC	<p>No change to definition of 'standard form contract' as "contract containing terms and conditions which are prepared by a party based on a standard form requiring the other party to reply within a reasonable period of time. If the offeree accepts, it shall be deemed to have accepted the entire contract provided by the offeror."</p> <p>Retains protection that "where a standard form contract contains terms and conditions which are unclear [no mention is made of failure to include terms and conditions.], such terms and conditions shall be interpreted in a manner favouring the offeree".</p> <p>New clause 3 of Art 407 of the 2005 CC offers extra protection to the offeree of a standard form contract. Where such contract removes liabilities of the party which gives the ... contract or increases liabilities or eliminates legitimate interests of the other party, it shall not be effective, unless otherwise agreed. The rider "unless otherwise agreed" detracts from the protection offered, as once the standard form contract has been signed (ie 'agreed'), the offending provision(s) will become effective.</p> <p>In practice, the chance of an offeree of a standard form contract (eg in telecoms sector) being able to change any of its provisions is slim!</p>
<i>Appendices to contracts</i>	Art 408 - 2005 CC	Art 407 - 1995 CC	Clause 2 of Art 408 of the 2005 CC resolves the query under Art 407 of the 1995 CC as to what happens when the appendices contradict with the contract. Now, the contract prevails over the appendices "unless otherwise agreed".
<i>Interpretation of civil contracts</i>	Art 409 - 2005 CC	Art 408 - 1995 CC	<p>No change. Where contract term is unclear, mutual intention of parties looked at. Where different interpretations possible, that which best benefits the parties and which is most appropriate to the nature of the contract will be adopted. Customary practice of the place where the contract was entered into will also be considered to interpret words which are difficult to understand. Terms not included in a contract will be assumed in accordance with customary practice (as above). Contract terms interpreted in context of entire document.</p> <p>2 new provisions reflect the principles of free and voluntary undertaking and agreement and of equality:</p> <ul style="list-style-type: none"> - Where there is a contradiction between the mutual intentions of the parties and the wording used in a contract, the mutual intentions of the parties shall be used to interpret the contract.

Subject	Post-1 Jan 2006	Pre-1 Jan 2006	Comment
			- Where the party in a powerful position put into a contract contents disadvantageous to the weaker party, the contract shall be interpreted in a manner favouring the weaker party.
<i>Invalidity of civil contracts</i>	Art 410 - 2005 CC	-	<p>2005 CC provides that a civil transaction shall be invalid when it does not satisfy one of the conditions for an effective civil transaction. There were 4 conditions under the 1995 CC but now compliance with formalities is no longer a condition (unless expressly required by law, eg registration of ownership of immoveables).</p> <p>As under 1995 CC, civil transactions in breach of the law or social morals are invalid. Art 128 defines these terms for the first time. 1995 CC provisions on invalidity of civil transactions due to falsification; invalidity of civil transactions established and implemented by minors, by persons who have lost their capacity for civil acts or who have had their capacity for civil acts restricted; invalidity of civil transactions due to misunderstandings, etc. are retained in 2005 CC.</p> <p>Limitation period to petition a court for declaration of invalid is now 2 years (Art 136), consistent with other recent Vietnamese legislation.</p> <p>Now, invalidity of a principal contract shall terminate an ancillary contract, unless the parties agree that the ancillary contract can replace the principal contract. This provision shall not apply to the measures to secure the performance of civil obligations.</p> <p>New clause 3 of Art 410 contradicts with Art 135 on Partially Invalid Civil Transactions, which provides that "A civil transaction is partially invalid when a part of it is invalid and the remaining parts are valid." Under Art 135, if an ancillary contract is an integral part of the principal contract and that part is invalid, the remaining part will still be valid. Under Art 410.3, if it is integral, the invalidity of the ancillary contract will terminate the validity of the principal contract.</p>
<i>Invalidity of civil contracts due to impossibility of performing subject matter</i>	Art 411 - 2005 CC	-	New article. Yet another basis for invalidity of contract is where it is impossible to perform the subject matter of the contract due to an objective reason. Any party which knew/should have known of impossibility at time of entering contract must compensate, unless all parties knew/should have known. Where only part of contract is impossible, the rest remains valid.
<i>Principles for performance of civil contracts</i>	Art 412 - 2005 CC	Art 409 - 1995 CC	No change, except 2005 CC emphasizes strict compliance with the contract rather than just contract performance in good faith...
<i>Performance of unilateral contracts</i>	Art 413 - 2005 CC	Art 410 - 1995 CC	No change.
<i>Performance of bilateral contracts</i>	Art 414 - 2005 CC	Art 411 - 1995 CC	No change, except addition of new provision dealing with (not very clearly) obligations which cannot be performed concurrently

Subject	Post-1 Jan 2006	Pre-1 Jan 2006	Comment
<i>Right to postpone performance of bilateral contracts</i>	Art 415 - 2005 CC	Art 412 - 1995 CC	Addition of one more justification for postponement of bilateral contract may be postponed - not only if property of other party has substantially decreased in value, but now also if the party which is required to perform its obligation first has not yet performed its obligation when the obligation falls due.
<i>Lien on property in bilateral contracts</i>	Art 416 - 2005 CC	-	New article defines lien on property and creates legal basis for the obligee to protect his/her legitimate rights (which rights and obligations are stipulated). One ground for termination of lien (if party which has lien does not take care or preserve the property in its custody) may be difficult to enforce - who determines failure to take care?
<i>Obligations which cannot be performed due to fault of the obligee</i>	Art 417 - 2005 CC Art 312 of 2005 CL	Art 413 - 1995 CC Art 235 - 1997 CL	No change in CC. Article 417 of the 2005 CC clearly states (as previously) that, in a bilateral contract, a party has the right to cancel the contract and demand compensation for damages if unable to perform its obligations due to the fault of the other party. It is still unclear if a party may cancel a contract if it can only perform part of its obligation due to the fault of the other party or if a party may cancel part of a contract. Slight change. Where as 1997 CL provided that the aggrieved party could cancel a contract if the parties had agreed that the breach committed by the other party is a condition for cancellation, the 2005 CL provides for cancellation also for a material breach of the contract.
<i>Obligations which cannot be performed not due to fault of the parties</i>	Art 418 - 2005 CC Art 294 - 2005 CL	Art 77 - 1997 CL	New article in CC. Its application is clear where a force majeure event occurs. In other cases, it may be difficult to determine if any parties are at fault. Article 294.1 of the 2005 CL expands on Art 77 of 1997 CL with respect to circumstances when the parties are free from liability for breach if an obligation cannot be performed. If a contract is categorized as a commercial contract, the wider Art 294.1 applies. For other contracts to which the 2005 CC applies, apart from the occurrence of a force majeure event or where an obligation cannot be performed due to the fault of one party (see Art 417-418 of the 2005 CC), it is unclear if the parties can agree in the contract on liability-free events or will be free from liability if an obligation cannot be performed due to the decision of a competent State body (this last provision is new in 2005 CL).
<i>Performance of contracts for benefit of third parties</i>	Art 419 - 2005 CC	Art 414 - 1995 CC	No change.
<i>Unilateral suspension of performance of contracts</i>	Art 420 - 2005 CC Art 421 - 2005 CC	Art 415 - 1995 CC Art 416 - 1995 CC	No change.
<i>Performance of contract which contains agreement on penalty for</i>	Art 422 - 2005 CC Art 301 - 2005 CL	Art 29 - OEC Art 228 - 1997 CL Art 378 - 1995 CC	Under the 2005 CC, penalty for violation is no longer a type of security for performance of civil obligations (as it was under the 1995 CC). The agreement on penalty for violation is now part of the contract. The 7 types of security provided for in the 1995 CC now

Subject	Post-1 Jan 2006	Pre-1 Jan 2006	Comment
<i>violation</i>			<p>remain in the 2005 CC with the penalty for violation replaced with "security by trust".</p> <p>The amount of liquidated damages is to be agreed by the parties. There is no longer any cap under the 2005 CC. Liquidated damages may be an alternative to or in addition to compensation. If no agreement on compensation, then only liquidated damages will apply. (Under the OEC, liquidated punitive damages and compensatory damages both applied in all cases.)</p> <p>Under the 2005 CL, there is still a cap on liquidated damages, set at 8% (previously 5% under the 1995 CC) of the value of the obligation which is the subject of the breach. The range in the OEC was from 2% to 12%. The new CC provision is preferred as it is often difficult to determine the value of the obligation which is the subject of the breach when a dispute has arisen and the parties no longer have goodwill toward each other. The 2005 CC provision also best reflects the principle of freedom of contract.</p> <p>Under the 2005 CL (Art 307), the aggrieved party may only demand compensation and liquidated damages if the contract has provided for both.</p>
<i>Amendment of civil contracts</i>	Art 423 - 2005 CC	Art 417 – 1995 CC	No change.
<i>Termination of civil contracts</i>	Art 424 - 2005 CC	Art 418 – CC	Just a slight change in wording.
<i>Cancellation of contracts</i>	Art 425 - 2005 CC	Art 419 - 1995 CC	<p>No change.</p> <p>Neither the 2005 nor 1995 CC mentions the cancellation of part of a contract. The 2005 CL provides that a commercial contract can be cancelled in part, in which case the remaining part is still effective.</p>
<i>Unilateral termination of performance of civil contracts</i>	Art 426 - 2005 CC	Art 420 - 1995 CC	<p>Slight changes, without any substantial effect.</p> <p>The 2005 CC uses the word "termination" instead of "suspension", which is better wording. The 2005 CL still uses the word "suspension", but it has the same meaning with the word "termination" used in the 2005 CC.</p>
<i>Limitation period</i>	Art 427 - 2005 CC	-	<p>Limitation period to request the court to resolve a civil contract dispute is 2 years as from the date on which the legal rights or interests of an individual, a legal entity or another entity are infringed. The 1995 CC did not actually mention the period, it only mentioned the definition, types of limitation period, methods for calculating limitation period, etc. and these provisions remain in the 2005 CC.</p>

2.2 How Vietnam's Lawscape has changed in 2005

2005 has seen Vietnam's National Assembly ("NA") change the legal landscape forever with the promulgation of many significant new Laws in anticipation of WTO accession (now deferred until 2006).

The 8th Session of the NA's Legislature XI concluded on 29 November with the approval of the following 14 Laws:

- > Law 48-2005-QH11 on Practising Thrift to Reduce Expenditure (effective 1 July 2006)
- > Law 49-2005-QH11 on Negotiable Instruments (effective 1 July 2006)
- > Law 50-2005-QH11 on Intellectual Property (effective 1 July 2006)
- > Law 51-2005-QH11 on Electronic Transactions (effective 1 March 2006)
- > Law 52-2005-QH11 on Protection of the Environment (effective 1 July 2006; replaces 1993 predecessor)
- > Law 53-2005-QH11 on Youth (effective 1 July 2006)
- > Law 54-2005-QH11 on People's Police (effective 1 July 2006)
- > Law 55-2005-QH11 on Anti-Corruption (effective 1 July 2006)
- > Law 56-2005-QH11 on Residential Housing (effective 1 July 2006)
- > Law 57-2005-QH11 on Amendment of the Law on VAT and Law on Special Sales Tax (effective 1 January 2006, see [1.1](#) above)
- > Law 58-2005-QH11 on Amendment of the Law on Complaints and Denunciations (effective 1 July 2006)
- > Law 59-2005-QH11 on Investment (effective 1 July 2006)
- > Law 60-2005-QH11 on Enterprises (effective 1 July 2006)
- > Law 61-2005-QH11 on Tendering (effective 1 April 2006)

>>> For English translations of Vietnam's new Law 59 on Investment and (soon) all of the above new laws, subscribe to [Vietnam Laws Online Database](http://www.vietnamlaws.com) on www.vietnamlaws.com

Over the coming months we look forward to featuring many of the above new Laws in Vietnam Legal Update. For now, we highlight some of them below:

> **Law 49 on Negotiable Instruments**

Law 49 creates a more sophisticated legal framework for securing financial and banking transactions relating to bills of exchange, cheques and promissory notes. It provides for individuals to issue bills of exchange (not just enterprises, as currently). Law 49 will replace 1999 Ordinance on Commercial Papers.

> **Law 51 on Electronic Transactions**

Originally scheduled as an ordinance, the proposed new legislation on e-commerce was elevated to Law status at the start of 2005. Drafted by the Ministry of Trade, Law 51 is based on the UNCITRAL Model Law. To facilitate e-commerce, Law 51 recognizes the legal validity of electronic transactions, of data messages and of electronic signatures; protects the lawful interests of organizations and individuals, of the State and of the public; and ensures equality and safety in e-transactions. The

Ministry of Trade is currently collecting comments from business and authorities on its draft decree on e-commerce.

> **Law 55 on Anti-Corruption**

Previously considered at the NA's May-June 2005 Session, Law 55 responds to Vietnam's growing problem with corruption (acknowledged by Vietnam's Government Inspectorate as having increased in level of severity, expanded in scope, and become more complicated and difficult to detect due to, amongst other things: low salaries of civil servants; vague job descriptions for government staff; uncoordinated corruption-fighting approaches taken by different agencies; no enforced accountability for civil servants regarding declaration of income and assets; and inadequate investigation measures). In response, Law 55 introduces the following methods for fighting and preventing corruption: increased disclosure and transparency requirements in State and public procurement, investment and sectors; compulsory declaration of State employees' assets and income, including spouses and children in the same household; stricter accountability of heads of organizations and agencies; practical administrative and managerial reforms. Of note, Law 55 provides for the creation of a national level steering committee to conduct oversight and investigate corruption; and encourages "whistle-blowers" within State and public bodies.

> **Law 56 on Residential Housing**

Previously considered at the NA's May-June 2005 Session, Law 56 is one of a number of new Laws being introduced to regulate the predicted residential real estate boom in Vietnam (a Law on Real Estate Business and a Law on Registration of Real Estate are scheduled to be promulgated next year). Law 56 recognizes the right of every citizen to have residential housing which is enshrined in Vietnam's Constitution. Law 56 regulates the use and transfer of residential housing by organizations and individuals as well as State administration of residential housing and development of the real estate market. The range of entities entitled to own residential housing in Vietnam has been expanded. Domestic organizations and individuals are permitted to own residential housing anywhere in Vietnam, irrespective of their place of business registration or place of permanent residence registration. Foreign organizations and individuals are permitted to invest in construction of (and then own) residential housing for lease in Vietnam. Law 56 provides for management of housing complexes. Amongst others, overseas Vietnamese having long-term investments in Vietnam and overseas Vietnamese returning to Vietnam to reside for 6 months or more are entitled to own residential housing. Law 56 provides for certification of ownership of residential housing separately from certification of land use rights. Principles enshrined in Law 56 include ensuring that residential housing development provides accommodation for citizens suitable with the earning capacity of different people and the socio-economic conditions of the country and each locality; and promoting the establishment and development of a real estate market. Transfer of residential housing is also regulated under Law 56.

> **Law 59 on Investment**

Considered for the first time *and promulgated* at the NA's October-November 2005 Session, Law 59 attempts to introduce a 'common' regime for investment by domestic investors and foreign investors. More accurately, it is a 'single' law governing both domestic and foreign investment, with (still) different rules applicable. Law 59 covers both direct and indirect investment. Unexpectedly, the real losers were domestic investment projects over VND15 billion (or any smaller domestic projects which want certification of its entitlement to investment incentives) as they will have the extra administrative burden of investment registration. Contrary to expectations, the final (but unsigned) version of Law 59 suggests that, for domestic investors, business registration and investment registration are 2 separate processes.

Below is a snapshot of the new investment procedures:

	<i>Who is entitled?</i>	<i>What investment process applies?</i>	<i>What investment document is issued?</i>
<i>Business registration (only)</i>	Domestic investment projects with invested capital below VND15 billion (USD943,990), excluding conditional projects	None, unless recording of investment incentives is desired (in which case, investment registration/certification must be carried out)	None, business registration certificate issued under Law 60 on Enterprises
<i>Investment registration/certification</i>	Domestic investment projects with invested capital from VND15-300 billion; Foreign investment projects with invested capital below VND300 billion (USD18,880,000); excluding conditional projects	Registration of investment on sample form, accompanied by prescribed documentation (more onerous for foreign projects)	For foreign projects, investment certificate (which is also business registration certificate in the case of initial establishment of economic organization to undertake first investment project); For domestic projects, investment certificate, if requested (business registration must be carried out separately)
<i>Investment evaluation/certification</i>	Conditional projects in: - Sectors impacting on national defense and security, social order and safety; - Banking and finance sector; - Sectors impacting on public health; - Culture, information, the press and publishing; - Entertainment services; - Real estate business; - All aspects of natural resources; the ecological environment; - Development of education and training; - A number of other sectors in accordance with law (For foreign investors, the range of "conditional projects" is wider still, depending on conditions in Vietnam's international treaties); All projects with invested capital of VND300 billion (USD18,880,000) or more	Application for investment evaluation and approval, with prescribed contents varying according to sub-category of project: (i) projects below VND300 billion which are in conditional sectors, (ii) projects over VND300 billion which are in conditional sectors, and (iii) projects over VND300 billion which are not in conditional sectors. Criteria for evaluation only stated in general in Law 59, but to be detailed in implementing regulations.	For foreign projects, investment certificate (which is also business registration certificate in the case of initial establishment of economic organization to undertake first investment project); For domestic projects, investment certificate (business registration must be carried out separately)

>>> For more on Vietnam's new investment law, see November 2005 Issue of Vietnam Legal Update on www.vietnamlaws.com

> Law 60 on Enterprises

First submitted to and promulgated at the NA's October-November 2005 Session, Law 60 unifies Vietnam's 'company law' for domestic and foreign invested enterprises for the first time. Law 60 is the twin of Law 59 on Investment above - together, they revolutionize Vietnam's business environment, replacing the Law on State owned Enterprises, the 1999 Law on Enterprises, the Law on Domestic Investment and the Law on Foreign Investment. From 1 July 2006, domestic and foreign investors alike will be permitted to choose their desired form of enterprise. Of note, Law 60 permits one individual to establish a limited liability company (previously, a minimum of two individuals was

required) and recognizes the legal status of partnerships and corporate groups for the first time. Law 60 simplifies procedures for business registration. Law 60 raises the cap on foreign ownership of domestic enterprises to 49% (from 30%), beyond which an enterprise is deemed to be a foreign invested enterprise. The provisions on organization and management of enterprises increase and consolidate the rights of enterprise members and shareholders, in particular protecting the rights and interests of minority members and shareholders. Disclosure and transparency requirements are strengthened. The duties of managers and controllers are clarified. For foreign invested joint ventures which convert to operation under Law 60, it will no longer be necessary to have a deputy general director (which means that the foreign investor can effectively control the day-to-day management of the joint venture through its nominated general director, as he/she will no longer need to consult with a deputy nominated by the Vietnamese party). Existing foreign invested enterprises are entitled to choose to re-register for operation in compliance with Law 61 (over a 2 year transition period) or to continue operation in compliance with their existing investment license without re-registration. The period for State owned enterprises to convert their operations for compliance with Law 61 is 4 years.

> **Law 61 on Tendering**

Originally scheduled as an Ordinance on Tendering to be promulgated sometime in 2005, the proposed new legislation on tendering was elevated to Law status by mid-2005. First debated at the NA's May-June 2005 Session, Law 61 consolidates the current three decrees on tendering, in an attempt to ensure more efficient use of State funding and a reduction in 'negative conduct' by State officials. In those respects, Law 61 represents yet another reform to facilitate WTO negotiations. Unfortunately for foreign investors, Law 61 retains the current requirement for investment projects with 30% or more State capital to comply with Vietnamese tendering rules. So, as now, business co-operations and joint ventures with State owned entities holding 30%+ interest must hold tenders and follow the tender rules in (now) Law 61. One positive aspect of Law 61 is that it extends the right to appoint a contractor (considered a form of tendering under Vietnamese law) to regular goods procurement packages valued at less than VND100 million (approx. USD6,300) and to procurement packages for repair and maintenance equipment or for expansion of capacity of existing equipment which must be purchased from a nominated contractor to ensure compatibility. Foreign donors to State projects have greater rights to request appointment of contractors or limited tendering.

>>> For more on Vietnam's current tendering regulations, see our Vietnam Laws Updates on www.vietnamlaws.com

At its 7th Session held from 5 May to 14 June 2005, the NA's Legislature XI achieved the impressive task of approval of 15 laws - 4 more than scheduled - including:

> **Civil Code**

Effective 1 January 2006. Law 33-2005-QH11 replaces its 1995 predecessor. Abolishes the distinction between pledges and mortgages on the basis of whether the security assets are moveable or immovable. Introduces new basic civil rights relating to human organ and corpse donation and sex change. Reforms existing provisions on land-use, IP rights, technology transfer. For the impact of the 2005 Civil Code on Vietnamese contract law, see [2.1](#) above.

> **Law on Pharmacy**

Effective 1 October 2005. Under Law 34-2005-QH11, pharmaceutical business remains a conditional line of business. Pharmaceuticals remain subject to registration, quality standards, and labelling and packaging rules. Law 34 also deals with pricing and distribution of pharmaceuticals. For a review of Law 34, see September 2005 Issue of Vietnam Legal Update.

> **Commercial Law**

Effective 1 January 2006. Law 36-2005-QH11 replaces its 1997 predecessor. New provisions on foreign trading and distribution rights (see [3.1](#) below), as well as commodity exchange, franchising.

Implementing decrees are yet to be issued by the Government. For the impact of Law 36 on Vietnamese contract law, see [2.1](#) above.

> **Law on Education**

Effective 1 January 2006. Law 38-2005-QH11 replaces its 1998 predecessor. Most notably, primary education *and also now* lower-secondary education are compulsory. For a review of Law 38, see August 2005 Issue of Vietnam Legal Update.

> **Maritime Code**

Effective 1 January 2006. Law 40-2005-QH11 replaces its 1990 predecessor. Regulates Vietnamese and now also foreign seagoing ships. Allows a broader range of maritime activities for foreign ships, including inland transportation in prescribed cases. Allows registration of (inter alia) foreign ships leased by a Vietnamese entity under bareboat charter/finance lease. In principle, provides for foreign investment in seaports.

A flotilla of implementing decrees have been drafted by the Ministry of Transport and issued in time for the 1 January 2006 debut of the new Maritime Code, including new regulations on sea protests, salvaging, maritime collisions, and registration of sea-going ships.

> **Law on Conclusion of, Accession to and Implementation of International Treaties**

Effective 1 January 2006. Law 41-2005-QH11 governs the process of Vietnam's ratification of international treaties, including its WTO accession package, and the enactment of implementing legislation.

> **Law on Amendment of Law on Customs**

Effective 1 January 2006. Law 42-2005-QH11 amends 2001 Customs Law. Brings Vietnamese customs law in line with WTO standards. Codifies shift to a single method of duty calculation based on contract valuation. Provides for modernization of customs administration, in particular providing for e-transactions and e-customs clearance procedures (now expressly encouraged). Provides for transition to a system of minimized customs inspection and increased reliance on post-entry auditing. Imposes strict prohibitions on smuggling, commercial fraud, bribery on both customs declarers and State customs officers. For a review of Law 42, see July 2005 Issue of Vietnam Legal Update.

> **Law on Tourism**

Effective 1 January 2006. Law 44-2005-QH11 replaces 1999 Ordinance on Tourism. Retains requirement for a security deposit to be payable by tour companies to ensure funds are available to cover unexpected contingencies and cancellation of tours. New provisions on international travel business and policies to attract investment into the hospitality industry.

> **Law on Export and Import Duties**

Effective 1 January 2006. Law 45-2005-QH11 replaces its 1991 predecessor (as amended 1993 & 1998). Codifies shift to a single method of duty calculation based on contract value. Enshrines principle of conducting tax declarations in parallel with customs procedures. Unifies all regulations on tax exemption and reduction for foreign and domestic investors alike.

> **Amendment of Law on Minerals**

Effective 1 October 2005. Law 46-2005-QH11 introduced minor amendments only. Complete review of the 1996 Mineral Law has been deferred until the next NA Legislature XII (2008-2013). For a review of Law 46, see August 2005 Issue of Vietnam Legal Update.

(Laws 44, 45 and 46 were only scheduled for consideration at the NA's May-June 2005 Session, but were also approved at that Session.)

Part 3 Did You Know?

3.1 Distribution sector - open to all?

For foreign investors:

As of 1 January 2006, Vietnam's new 2005 Commercial Law allows foreign companies to establish foreign invested commercial enterprises (as well as representative offices and branch offices, as currently) to undertake solely commercial activities (eg import-export and distribution of consumer products), independently of any associated manufacturing activities.

Interested investors have been waiting since mid-2005 for the necessary decree to implement this reform to be issued by the Government. It was expected to be issued before the 1 January 2006 introduction of this important reform, but that has not eventuated. The Ministry of Trade is up to Draft 4 of the proposed implementing decree. Of note, as expected, Draft 4 favours investors from countries with which Vietnam has entered into trade agreements with commitments to open the trading-distribution sector, ie currently, investors from the US, EU and Japan. For those investors, the establishment of foreign invested commercial enterprises will be licensed in accordance with the terms and timetable in the respective trade agreements. For US investors, the sector is open already (even without any implementing legislation!). For investors from other WTO member countries, foreign invested commercial enterprises will be licensed in accordance with Vietnam's WTO commitments. At Vietnam's 10th Working Party in Geneva in September 2005, Vietnam offered to commit to provide full trading rights to foreign companies and individuals no later than 1 January 2007.

A number of new decrees (being drafted by the Ministry of Trade but to be issued by the Government) to implement various aspects of the 2005 Commercial Law were expected to be issued in December 2005 in time for the 1 January 2006 debut of the 2005 Commercial Law, but none had been issued as at 26 December.

>>> For more on the opening of the distribution sector to foreign investors and the proposed implementing decrees, see August 2005 Issue of Vietnam Legal Update on www.vietnamlaws.com

For domestic investors:

Once the sole domain of State owned enterprises, private domestic enterprises have been enthusiastic players in Vietnam's trading-distribution sector since first allowed into the game in the late 1990s. Now, domestic investors must prepare to relinquish their monopoly over Vietnam's lucrative consumer markets.

On 5 December 2005, 'Youth Online' reported that the Ministry of Trade is about to select from 15 to 20 large goods distributors to "contribute to the formation of a strong and stable network for goods' circulation and distribution", "act as the pillars for development of the domestic market" and "increase Vietnam's competitiveness during the integration process". The Ministry of Trade's Department for Market Policies confirmed that three categories of distributors will be eligible for selection: big State owned corporations (such as Vinasteel, Vietnam Cement Corporation, Vina Food) to be specialized industry distributors, big commercial enterprises (such as Hanoi Commercial Corporation and HCMC Commercial Corporation) to be general distributors, and a number of supermarkets, commercial centres, co-ordinators for market wholesalers and trading floors. Reportedly, the Ministry of Trade will assist the selected enterprises to become distribution groups with development policies and business strategies; with assistance in staff training; with priority resolution of difficulties with debts and losses. The Ministry will facilitate the enterprises in establishing business subsidiaries; will give incentives on tax and import duty on equipment and technology; and will provide credit facilities etc. The objective is to improve the capacity of domestic enterprises so that they are better able to compete with global distribution giants entering the Vietnamese market from now on.

3.2 How to name a company in Vietnam?

Local companies

Under Article 24 of the current 1999 Law on Enterprises, the name of a local company (not a foreign invested company, see more below) must satisfy the following criteria:

- (1) It must not be the same as, or cause confusion with, the name of another company already registered;
- (2) It must not contravene national historical traditions, ethics, culture and fine customs;
- (3) It must be written in Vietnamese. The name in one or more foreign languages can be added in a smaller font size under the Vietnamese name; and
- (4) It must indicate the form of company. For example: If it is a limited liability company, the name must read "Công ty TNHH [proper name]". If it's a shareholding company, the name must read "Công ty cổ phần [proper name]".

Criteria (1), (2) and (4) are self-explanatory.

With respect to criterium (3), Article 9 of Decree 109 of the Government dated 2 February 2004 on Business Registration provides further details on foreign names of local companies. The foreign name of a local company must be an exact translation of its Vietnamese name. If the Vietnamese name comprises a proper name, it can be either translated or remain untranslated.

- > Example 1: "Công ty TNHH Hoa Hồng" can be translated as "Hoa Hồng Company Ltd" or "Rose Company Ltd" because the proper name "Hoa Hồng" is translatable.
- > Example 2: "Công ty TNHH Liên Khương" can only be translated as "Liên Khương Company Ltd" because the proper name "Liên Khương" is not translatable.

In the market, a company often has a trading name that is different from its company name. Vietnam's Law on Enterprises does not regulate the use of a trading name at all. In particular, it does not regulate if the trading name must be the same as or may be different from the company name.

If a trading name is adopted by a local company, the company may protect that trading name under Vietnam's trademark regime. This requires a separate procedure in addition to the business registration procedures to establish the company. A local company may register multiple trademarks, and thereby protect multiple trading names.

As of 1 July 2006, when the new 2005 Law on Enterprises becomes effective, criteria (1) - (4) above remain applicable.

Foreign invested companies

The current 1996 Law on Foreign Investment in Vietnam (as amended 2000) does not have specific regulations on names of foreign invested companies.

As of 1 July 2006, when the new 2005 Law on Enterprises becomes effective, criteria (1) - (4) above will be applicable to foreign invested companies as well as local companies.

3.3 Securities market - looking back at 2005

The fifth anniversary of the opening of Vietnam's securities market was celebrated in mid-2005. Just shy of five years after the first Securities Trading Centre opened in HCMC in July 2005, Vietnam opened its second Securities Trading Center in Hanoi in March 2005. The purpose of the opening of the Hanoi Securities Trading Centre is to establish a new market for trading securities in small and medium enterprises.

Optimistic expectations in 2003 were that the number of securities listed in Vietnam would reach 30-40 in 2004, 80-100 in 2005 and 700-800 by 2010 (<http://www.stockmarket.vnn.vn> dated 9 October 2003). To date, those expectations have not been realized. As at 21 December 2005, the total number of listings on the HCMC Securities Trading Centre is only 32. And only 9 companies are registered to trade on the Hanoi Securities Trading Centre. After more than 5 years old, total capitalization is only VND 5.95 trillion (USD375 million).

2005 saw the first foreign invested enterprise to be licensed to list on Vietnam's securities market. But 100% foreign owned Taya Vietnam Electric Wire & Cable Co. (an affiliate of Taiwan's Taya Electric Wire & Cable Group) is yet to make its debut.

Foreign investors continue to be concerned about the slow emergence and quality of listed companies on Vietnam's securities market. Rudimentary financial and company information prevents investors making informed investment decisions. There are few strictly enforced guidelines to assist investors in determining the accuracy of available information - international auditing standards for listed companies in Vietnam remains on the wish-list.

And looking forward to 2006... A Law on Securities is currently being drafted by the state Securities Commission (under the Ministry of Finance) and is expected to be considered by the National Assembly at its May-June 2006 Session and then passed at its October-November 2006 Session. Reportedly, the latest draft makes publication of financial information mandatory, so wishes may come true in 2006.

3.4 Intellectual property disputes

On 7 December 2005 the U.S.-Vietnam Trade Council, in co-ordination with the General Sciences Library of HCMC, organized a half-day workshop on settlement of intellectual property rights ("IPR") disputes in Vietnam.

According to statistics presented by Judge Nguyen Hoang Dat, Tribunal Vice President of HCMC Civil Court, only 12 cases on copyright and 10 cases on industrial property rights were filed during the period from 2000 to 2005 in Vietnam. Judge Dat attributed the low number of cases to the inefficiency of Vietnamese courts in the process of IPR protection. At present, in Vietnam, an IPR owner may seek assistance in resolving an IPR dispute from the competent court in accordance with civil procedures or from the police or market management authorities in accordance with administrative procedures. As, upon discovering that its IPR is infringed, the IPR owner always wants to stop such infringement as soon as possible, he/she will choose the fastest and most efficient method of IPR protection. So, in most cases, the IPR owner refers the dispute to the police and market management authorities.

Among the shortcomings of Vietnamese court procedures for IPR protection, Judge Dat acknowledged problems relating to the availability of preliminary injunctive relief for prevention of further infringement (such as seizure of infringing goods), calculation of the security deposit to be paid by the plaintiff, and examination by experts in IP cases. Amongst the practical concerns of IPR owners in Vietnam raised by Mr. Thomas J. Treutler from Baker & McKenzie were how very time consuming Vietnamese court proceedings are and how very low compensation is in comparison with actual losses incurred by plaintiffs.

Illustrating the above problems, the following court case was discussed: Company A (IPR owner) sued Company B for infringement of Company A's famous trademarks. Company B had used Company A's trademarks on Company B's signboards, business cards, packages, invoices and shop interior. Resolution of the case took 4 years. Despite the National Office of Industrial Property and the local Department of Science and Technology implementing administrative measures in respect of Company B during the first 2 years,

Company B continued to infringe Company A's trademark. So Company A instituted court proceedings against Company B. It took more than 19 months for the court to issue its decision, which held:

- > Company B was in violation of provisions of Vietnamese laws on IPR, therefore Company B must stop the infringement and destroy infringing products and articles.
- > Company A's claim for USD15,000 as compensation for damage to Company A's reputation was rejected by the court as unreasonable. Under Article 615 of the Civil Code, as interpreted by the Supreme Court in its Resolution 01, compensation for damage to reputation is limited to a maximum of 10 months' minimum wages. Company B was ordered to pay to Company A VND2,900,000 (approximately USD182) as compensation for damage to its reputation.
- > Company A's claim for legal fees of USD18,000 was rejected by the court as unreasonable (despite valid invoices as evidence). Company B was ordered to reimburse Company A VND2,168,000 (approximately USD136) for its expenses of purchasing articles and travel.
- > Company A was obliged to pay court fees of approximately USD558.

So, when Company A's total of USD318 for compensation and expenses re-imburement is compared to its USD558 court fees, Company A's pursuit of court proceedings to protect its *undisputed* IPR rights cost Company A USD240 - let alone USD18,000 in legal fees - and not even calculating damage to reputation!

With the promulgation of the 2005 Law on Intellectual Property by the National Assembly (see [2.2](#) above), we hope (as did the workshop speakers and participants) hope to see great improvement in IPR protection in Vietnam from 1 July 2006.

3.5 **Residential housing sector - HCMC pushes for reforms**

The HCMC People's Committee is urging the Prime Minister and the Ministry of Natural Resources and Environment ("MONRE") to permit housing developers to "assign projects" or "assign land use right in projects" to other developers in order to reduce the current difficulties they are facing (Official Letter 7624 of the HCMC People's Committee dated 24 November 2005).

Currently, under the 2003 Land Law and its implementing decrees, housing developers are prohibited from assigning land use rights without associated housing - that is, they are prohibited from subdividing and selling off vacant land lots. This means that, as developers must invest capital to build houses/villas, the buyers must pay higher prices for a land lot with house/villa. As many domestic buyers can't afford those higher prices, many housing developers are unable to secure capital to complete their residential land projects.

In its Official Letter 7624 (which, of note, does not explicitly refer to foreign invested developers), the HCMC People's Committee proposes that a developer which has been "allocated" land for a residential housing project should be permitted to either "assign the whole project" or "assign land use right of part of the site of the project" to other developers if the following conditions are satisfied:

<i>Conditions to assign the whole project:</i>	<i>...to assign land use right of part of the project site:</i>
<ul style="list-style-type: none"> > The assignor developer has invested a prescribed level of funds for the project; > The assignor developer is currently unable to carry out the project; > The assignee developer must undertake to comply with the approved master plan and implementation schedule. <p>The assignment should be subject to permission of the relevant authorities following an evaluation of the level of project completion (ie land clearance, levelling, and infrastructure construction) and the compliance of the assignor developer with the law.</p>	<ul style="list-style-type: none"> > The assignor developer has completed infrastructure construction and paid land use fees; > The assignee developer must undertake to comply with the approved master plan and implementation schedule. <p>It is unclear whether it is proposed that this assignment should be subject to any permission of the relevant authorities (probably not).</p>

The HCMC People's Committee has also suggested that this reform, if approved, should be included in the 5 amending decrees on land currently being considered by the Prime Minister. Vnexpress.net has quoted the Vice Minister of the MONRE, Mr Dang Hung Vo, as saying that the upcoming amending decrees will permit developers in cities to "assign their projects" and developers in other provinces to "sell and purchase land plots". However, the Prime Minister's final approval is still pending.

As noted above, Official Letter 7624 is silent as to foreign invested developers. So, even if this proposed reform is approved, it is not certain that foreign invested enterprises engaged in residential housing projects will be entitled to it along with Vietnamese enterprises.

3.6 Recent court case - impact of business registration on contract validity

In July 2005, for the first time ever, Vietnam published all judicial review decisions made by the Council of Judges of the Supreme People's Court in the years 2000-2004 in civil, commercial, labour, criminal and administrative cases - a total of 103 decisions. This was a significant step for Vietnam, not only in terms of transparency (a key WTO requirement), but also in terms of providing precedents for how laws are interpreted and applied. How much certainty can be derived from these decisions is not yet tested, but below we look at another selected decision to see what general lessons we can learn.

Facts: In September 1997, Company A (a Vietnamese company engaged in food processing) and Company B (a Vietnamese company engaged in auto-mechanical activities) entered into an economic contract for the manufacture and installation of two processing plants ("Contract"). Company B installed and commissioned the two plants and Company A accepted hand-over of the plants. Company A paid approximately 90% of the contract value but did not settle the remaining amount of the contract value because it did not accept the total costs (which included optional cost of some items outside of the Contract). Company B instituted court proceedings claiming for payment of (1) the remaining amount of the contract value and (2) the optional cost.

Preliminary decision: The decision of Dak Lak People's Court at first instance ruled that the Contract was valid and Company A was required to settle the remaining amount of the contract value and the accrued interest (but not the optional cost) to Company B.

On appeal: The Court of Appeal of the Supreme Court in Da Nang held that the Contract was wholly invalid because Company B did not have business registration for the line of business of "designing and building mechanical products used in industrial and agricultural fields" before entering into the Contract or before the dispute. Consequently, the Court ordered Company A to return the two installed plants and Company B to return the paid amounts because the two installed plants were "unused".

Decision of the Council of Judges of the Supreme Court: The Council of Judges of the Supreme Court upheld the Court of Appeal's finding of invalidity of the Contract. As Company B had not registered the business activities that it would provide under the Contract (before or after entering into the Contract until the time of the dispute), under Article 8.1 of the Ordinance of Economic Contracts, such non-compliance constitutes ground for declaring the Contract wholly invalid.

However, the Council of Judges amended its order for resolution as follows: Because the two installed plants were in fact "used", Company A could not return them to Company B even though the Contract was found wholly invalid. Therefore, Company A must settle the remaining amount of the contract value (but not the accrued interest nor the optional cost) to Company B (in accordance with Article II.1.b1 of Resolution 04 of the Council of Judges of the Supreme Court dated 27 May 2003).

General lessons: Validity of a contract depends on, amongst other things, the registered business activities of the parties. A contract will be considered invalid if the subject of such contract falls outside the scope of registered business activities of either/both parties. However, even after entering into a contract (but before a dispute arises), if the parties register supplemental business activities consistent with the purposes of the contract, the contract will be valid and of full effect.

If a contract is held wholly invalid, if the moveable assets have been used, they will not be returned to the delivering party, and the receiving party must pay for such assets at the price agreed in the contract.

Part 4 What's New on Vietnam Laws Online Database?

Vietnam Laws Online Database on www.vietnamlaws.com is an online searchable database of English translations of close to 3,000 Vietnamese laws relating to foreign investment and far beyond - the most extensive online Vietnamese law library in the world. Various search options are available. Translations can be viewed online, printed and downloaded (subject to terms & conditions).

>>> NEW keyword search option >>>

In October, we launched our new keyword search option. This allows subscribers to search keywords in our descriptions of legislation. So, now, subscribers can search by subject category, date, issuing body, official number, legislation type, and keyword - or do an advanced search, combining two or more of these search options.

Feedback: We welcome feedback at any time. So we can continue to improve Vietnam Laws Online Database, we would appreciate if subscribers could spend a few minutes completing the feedback form available on the Vietnam Laws Online Database Welcome Page.

>>> What's new on Vietnam Laws Online Database?

In December 2005, Vietnam Laws Online Database was updated with translations of, amongst others:

- > Law on Investment 2005 (final but unsigned version)
- > Decree 134 on foreign loans
- > Decree 133 on auditing
- > Draft 5 of proposed franchising decree
- > Maritime Code 2005
- > Law on Tourism

Above is just a snapshot of the wide range of legislation available.

Soon to come are the new Laws just passed by the National Assembly (see [2.2](#) above)



Phillips Fox was proud to accept the **Business Innovation Award** at the Australian Business Awards in Vietnam 2004, in recognition of our innovative work in developing www.vietnamlaws.com and our **Vietnam Laws Online Database**.

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