



VIETNAM LEGAL UPDATE

September 2008

Part 1 Selected New Legal Instruments	
1.1 The new face of personal income tax	1
1.2 What's the capital requirement for RE companies?	2
1.3 Authentication of documents	3
1.4 Draft MPI circular getting attention	4
1.5 Business, tax and seal registrations unified	6
Part 2 Feature: Real Estate Terms and Restrictions	8
Part 3 Did You Know?	
3.1 Registration hurdles - another chapter	10
3.2 Work permits - not just for work anymore	10
3.3 Colour photocopiers - not allowed for all	11
3.4 SSC watchdog - on the watch	12
Part 4 What's New Online?	
➔ NEW laws in Vietnam Laws Online Database	13
➔ NEW search function for Vietnam Legal Update	14
Part 5 Get to Know Us	
➔ Spotlight on Hoa Nguyen	15

Visit www.vietnamlaws.com:

- ➔ to subscribe to (or take a free tour of) Vietnam Laws Online Database - searchable database of 3,500 of our English translations of Vietnamese laws regulating investment and business
- ➔ to access free translations of a selection of Vietnamese laws
- ➔ to read Vietnam Legal Update from 2008 back to 1997 - complete with index of contents and new search function
- ➔ to find out more about our practice in Vietnam

Visit www.aar.com.au to find out more about the Allens Arthur Robinson network and our international practice

Hanoi

Suite 401, Hanoi Tower
49 Hai Ba Trung Street
Hoan Kiem District
Hanoi, Vietnam
Tel +84 4 936 0990
Fax +84 4 936 0984
bill.magennis@aar.com.au

Ho Chi Minh City

Suite 605, Saigon Tower
29 Le Duan Boulevard
District 1
Ho Chi Minh City, Vietnam
Tel +84 8 822 1717
Fax +84 8 822 1818
nigel.russell@aar.com.au

Allens Arthur Robinson - a leading international law firm with offices in Bangkok | Beijing | Brisbane | Hanoi | Ho Chi Minh City | Hong Kong | Jakarta | Melbourne | Perth | Phnom Penh | Port Moresby | Shanghai | Singapore | Sydney



www.vietnamlaws.com
www.aar.com.au

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

Allens Arthur Robinson (**Allens**) is a leading regional law firm with 14 offices in South East Asia, Greater China, and Australia.

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

Allens' Vietnam practice is led by resident partners Bill Magennis, Nigel Russell and Thomas Miller. The team in Vietnam includes 25 other lawyers from Australia, the United States, Finland, and Vietnam.

We encourage feedback from our readers regarding the Vietnam Legal Update. Please direct all enquiries, comments and suggestions to Lee Baker in our Ho Chi Minh City office at Lee.Baker@aar.com.au.

For English translations of Vietnam's legislation on import/export, trade, distribution and more, subscribe to Vietnam Laws Online Database on www.vietnamlaws.com



Some members of Allens' Vietnam team during the firm's 2008 Asian Lawyers Retreat in Macau in early September. Please visit our website www.aar.com.au to learn more about Allens' Asia practice.

Part 1 Selected New Legal Instruments

1.1 The new face of personal income tax

Decree 100/2008/ND-CP of the Government on Personal Income Tax, dated 8 September 2008 (Decree 100)

In the November 2007 edition of the VLU, we reported on the passing of the new Law on Personal Income Tax (**PIT Law**), noting that it was the first-ever PIT **law** passed by the National Assembly. The PIT Law provides unified PIT rates for both Vietnamese and foreigners; it increases the diversity and breadth of the tax base; and it also introduces personal and family allowances.

Now, courtesy of Decree 100, we know more. Decree 100 has been passed by the Government as an implementing instrument of the PIT Law. While it goes some way to establishing how the PIT Law will impact on tax payers, some aspects of the PIT Law will still require further clarification and direction by way of an implementing circular, to avoid confusion or inconsistencies in application. But what questions does Decree 100 answer at this stage?

Who 'resides' in Vietnam?

Article 2 of Decree 100 defines 'personal income tax payers' as resident individuals present in Vietnam for 183 days in 12 consecutive months. It goes further to include individuals who, while not present for 183 days, have a 'regular residential location' in the form of either a registered permanent residence in Vietnam, or a leased residence with a term of more than 90 days. It is not clear if the individual must actually be the named lessee or must merely be able to access to the leased premises (thereby including leases taken out in an employer's name). Article 2 also appears to cover Vietnamese persons living and working overseas who are the registered owners of a permanent residence in Vietnam; but they may be afforded some protection by double tax treaties. Otherwise, Vietnamese nationals living and working overseas will no longer be taxed as residents.

What is taxable income?

The 10 types of taxable Income are set out in Article 3 of Decree 100 and include: income from business activities; salaries and wages; allowances and subsidies; remuneration in all forms; benefits (residential rent and costs, non-compulsory insurance premiums, membership fees and other benefits); bonuses in any form; income from capital investments; income from capital transfers; income from real property transfers; winnings and prizes; royalties; income from commercial franchises; and registerable inheritances and gifts. While Article 3 is very broad, it is actually the impact of the exemptions listed in, or rather omitted from, Article 4, which may have the most potent impact.

What is exempt and what isn't any longer?

Under existing PIT regulations, there are specified allowances and other benefits subject to concessional tax treatment. This list does not appear in either the PIT Law or Decree 100. Consequently, airfares, school fees and relocation allowances for expatriate families will no longer be tax deductible. Additionally, housing rental is likely to be taxed as a net benefit and will no longer enjoy a concessional rate. Indeed the new Law and Decree appear to take an all-or-nothing stance on income, with no concessional in-betweens.

Article 4 of Decree 100 provides for 14 circumstances in which income is fully tax exempt. These include inter-familial property transfers, inheritances and gifts; compensation; pensions; scholarships; overtime; interest from banks and life insurance policies; and certain agricultural activities. Unfortunately for expatriates there is no mention of those expenses typically incurred when living and working away from home.

Allowable Deductions

Article 6 of Decree 100 defines assessable income as 'income minus compulsory insurance premiums, family circumstances deductions and charitable or humanitarian deductions'.

The deduction for family (personal) circumstances – effectively a tax-free threshold which is incrementally adjusted for dependants – is set out in Article 12 of Decree 100. Basically an individual may deduct VND 48 million (USD2,887) - plus a further VND 1.6 million (USD96) for each dependent - per year from their income before tax. If claiming for dependants, the taxpayer must supply supporting legal documentation.

Applicable Rates

Article 14 of Decree 100 sets out the progressive tax rates, with the lowest PIT rate of 5% levied on the first VND 60 million (USD3,600) per year of an individual's assessable income. The highest rate of 35% is levied on an individual's assessable yearly income of VND 960 million (USD57,745) or above. These rates will apply to both Vietnamese and expatriates. Article 26 of the PIT Law sets the tax payable on any income earned for any work undertaken in Vietnam by a non-resident individual at 20%. As the current rate is 25%, income earners who can continue to avoid the tag of 'resident individual' are clear winners under the PIT Law.

Section 2 of Chapter II of Decree 100 sets out the processes for determining assessable income and applicable rates for income from transfers of capital; Section 3 similarly deals with income from transfers of property, and Section 4 focuses on income from an inheritance or gift.

A shift in onus

All individuals with taxable income and all income-paying entities must obtain a tax code under Article 26 of Decree 100. Article 27 requires tax-paying entities to withhold any applicable tax prior to payment of income to an individual in the form of salary, income from capital investment, income from capital transfers, winnings, royalties, or income from commercial franchises. Article 29 requires individuals to declare all their taxable income and to lodge an annual tax return. The decree therefore appears to represent a general, and perhaps overdue, shift in the onus for compliance from the employer to the employee.

Upshot?

How the new PIT Law and Decree 100 impact on income earners in Vietnam will vary according to the particular circumstances of the individual income earners and the way employers choose to implement employment packages. Taxation specialists are currently putting on their 'creative lateral thinking' caps with the aim of ensuring these new legal instruments have the capacity to meet everyone's needs. As noted as well, more legislation in the form of circular is anticipated to add further detail and clarification to the PIT Law.

1.2 What's the capital requirement for RE companies?

Official Letter 62-DXD-QLN of the Ministry of Construction providing guidelines on procedure for certifying legal capital in order to register real estate business dated 26 August 2008 (Official Letter 62)

Confusing requirement

The Ministry of Construction (**MOC**) has recently sent Official Letter 62 to the Hanoi Department of Planning and Investment in response to the department's request for clarification of the confusing requirements for legal capital of companies engaged in real estate business.

The Law on Real Estate Business and its implementing Decree 153-2007-ND-CP dated 15 October 2007 (previously reported on in the VLU) require companies conducting real estate businesses to have a legal capital (ie a minimum charter capital) of VND 6 billion (approximately USD363,636).



The above legal capital requirement applies to both newly-established and existing companies which wish to add real estate business to their business lines. When registering to operate real estate business activities, these companies must satisfy the above legal capital requirements. On 31 May 2008, the Ministry of Construction issued Circular 13-2008-TT-BXD to specify the documents which are required to be submitted for this purpose.

In respect of a newly established company, the founding shareholders or members may choose to contribute the legal capital in cash and in kind. Circular 13 requires the founding shareholders/members to deposit the amount of cash contribution with a commercial bank in Vietnam which will be disbursed only after the company is established and submits a certificate from bank on such deposit to the licensing authority. Under Circular 13, "the minimum amount of such deposit must equal the capital contribution in cash by founding members". This vaguely drafted provision has led to different interpretations as to the amount of required deposit: is it only the minimum legal capital of VND 6 billion or is it the full amount of anticipated cash contribution by the members which is required to be deposited? The lack of certainty on this question has led to difficulties in establishment of real estate companies, as every licensing authority has its own interpretation.

Clarification but not the right way...

To clear these murky waters, the MOC has issued Official Letter 62 which expressly provides that the minimum deposit amount must be **the total amount of capital to be contributed in cash by the founding shareholders/members** to the company to be established. Accordingly, the founding shareholders/members will be required to deposit the total amount of charter capital of the company to be established (which in a large number of cases will be higher than VND 6 billion) with a Vietnamese bank. Once the company is established, the deposit amount will need to be fully contributed to the company.

The above position of the MOC will definitely have a significant (negative) affect on investors in real estate business and is not likely assist in creating a favourable environment for foreign investment in this sector. As a result, foreign investors may be re-considering their investments as they understandably may not want to make any significant financial commitment by way of depositing funds with a bank in Vietnam until they have secured an investment certificate to establish their company in Vietnam. Furthermore, it does not seem at all practical to require the total amount of charter capital to be contributed to the company on day one when the company may not need that level of funding until commencement of construction.

Contrary to law?

To some extent, one may also find the clarification of the MOC in Official Letter 62 contrary to provisions of the Law on Enterprises, which allows founding members or founding shareholders to contribute charter capital over a period of time, and to stipulate a schedule of capital contribution in the company's charter. The purpose of the requirement for minimum legal capital should be to ensure that real estate companies have minimum capital to carry out its activities. Therefore, it would be more reasonable for the licensing authorities to ensure that real estate companies have the minimum charter capital (ie VND 6 billion) **after** their establishment, and allow the total amount of the charter capital to be contributed over a period of time in accordance with the schedule of capital contribution and project implementation.

It is unlikely, however, that local licensing authorities will accept the above interpretation, given the MOC's position in Official Letter 62. As such, property investors (at least for now) have one more hurdle to face in investing in Vietnam.

1.3 Authentication of documents

Circular 03-2008-TT-BTP of the Ministry of Justice implementing Decree 79-2007/ND-CP dated 18 May 2007 (Decree 79) on issuance of copies from official registers and

authentication of copies of documents and signatures, and dealing with translators, dated 25 August 2008 (Circular 03)

Circular 03 issued on 25 August 2008, sets out certain new rules on the process of authentication of copies of documents required for legal translations in Vietnam. We have all had to endure the tedious and somewhat mystifying processes of authentication, legalisation, notarisation, consularisation etc – and the rules seem different in Vietnam than other countries. Circular 03 speaks only to authentication of document copies, and indeed contains provisions unique to Vietnam.

Who can authenticate?

Under Circular 03, commune level people's committees (this includes ward and township levels) are authorised to authenticate copies of documents in Vietnamese or documents issued by an organisation in Vietnam which may have some foreign words (for example, a Vietnamese marriage certificate which notes a foreign spouse's name and address in a foreign language). For documents which are wholly or mainly in a foreign language, the Justice Office at district level (this includes rural, urban and provincial town or city levels) must authenticate the copies.

For completely bilingual documents, the applicant may choose either of the above authorities. For a package, or file of documents, some of which are in Vietnamese and some of which are in a foreign language, the applicant has two choices:

- the district level Justice Office authenticates the documents in a foreign language and the commune level people's committee handles the Vietnamese documents; or
- the district level Justice Office authenticates all documents.

Other new rules

Originals of the documents must be presented for the authentication process. Under Circular 03, re-issued originals and re-registered originals will be accepted in cases where the first original document has been lost or damaged.

Under Decree 79, certain supporting documents are required for persons wishing to have their signatures authenticated (eg identity papers and the documents to be signed). Circular 03 allows persons who are unable to sign to have their fingerprint authenticated instead.

Translators

Under Decree 79 and Circular 03, translators must be fluent in the foreign language and the subject of the translation, and must have a bachelors' degree or higher degree in that language. Alternatively, the translator must have graduated from a college or higher-level institution in the foreign country where the language is spoken. While translators are free to set their fees, Circular 03 provides that the Department of Justice is to formulate a scale for remuneration of translators to avoid overcharging.

Authentication *not* the same as notarisation

Circular 03 reiterates the distinction between authentication of copies on the one hand, and notarisation of documents, which is certification by a notary of the accuracy and 'legality' of a document or transaction, on the other. The new circular appears to require provincial people's committees to gradually transfer contracts and transactions incorrectly presented to them for authentication (ie contracts in fact requiring notarisation) to specialist notaries to ensure the legal status of such contracts and transactions. Notarisation procedures are covered by other laws in Vietnam, and were discussed in the last issue of the VLU.

1.4 Draft MPI circular getting attention

Draft Circular of the Ministry of Planning and Investment providing further clarification on the Law on Investment and Decree 108, dated 28 July 2008 (Draft LOI Circular)

With the purpose of issuing a legal instrument guiding Decree 108 implementing the Law on Investment, the working group of the Ministry of Planning and Investment (**MPI**) has prepared a draft circular to guide investment activities in Vietnam. The VLU does not ordinarily comment upon draft legislation; however this circular has been reported on in the press, and has received the attention of foreign investors seeking guidance regarding a number of still-ambiguous provisions of the LOI and Decree 108. We therefore thought we'd take a closer look at this one.

Seeking opinions

The draft version of the LOI Circular, dated 28 July 2008, is currently published on both the VIBonline and the MPI websites for the purpose of review and soliciting opinions from the public. As of 22 September 2008, the VIBonline has received approximately 800 opinions from the public, including both foreign and local individuals and organisations in Vietnam, and on 16 September 2008, a seminar specifically focused on this draft circular was held in Hanoi.

The Draft LOI Circular has raised a number of opinions. On one hand, foreign investors in Vietnam are of opinion that it creates more burdens for foreign investors in some procedures. On the other hand, others, including Mr Nguyen Duy Nghia of Law faculty of Hanoi National Institute and many other local lawyers, are of opinion that too much power continues to be given to the provincial peoples' committees, leading to the situation "everything being done at the local level" in terms of foreign licensed projects -- sometimes resulting in the omission of required necessary procedures.

The suggestion from the 16 September seminar was that more detailed and strict measures should apply for foreign investment projects. Mr Nguyen Dinh Cung, the head of the Research Department on Macro-economic Policies of the Central Institute for Economic Management (**CIEM**), has proposed that if not substantially amended, the draft circular should not be issued at all.

Some of the key measures that the Draft LOI Circular purports to address are listed and discussed below:

(i) Investment procedures applicable to Vietnamese residing overseas who invest in Vietnam (Article 2)

The nature of the three investment options set forth in this context is that Vietnamese residing overseas shall have the right to select to conduct investment procedures as foreign investors or as domestic investors.

(ii) Principles on entitlement to investment incentives (Article 4)

This article provides that a project implemented in a number of different geographical areas or operational sectors must account separately for turnover and expenses for each area or sector in order to be entitled to incentives for each area or operational sector. If it is impossible to conduct separate accounting, then the project shall apply the level of incentives of the area or sector with the **lowest** incentive conditions. On this point, there are some opinions suggesting that investor can be entitled to the **average** level of incentive conditions.

(iii) Incentives in case of re-registration (Article 5)

Investment projects which previously were in an investment incentive sector or geographical area, but were not after re-registration, shall (with some exceptions) continue to be entitled to investment incentives pursuant to their investment licence before the date of re-registration for the residual entitlement period. If re-registration supplements the operational objectives, then incentives applicable to the additional objectives shall apply in accordance with current regulations.



(iv) Investment project investment files (Article 6)

The Draft LOI Circular provides that if the investor is an economic organisation which has been established for two or more years, then the investment application file must include a copy of the audited financial statements for the most recent year. It is not clear whether the copy of the audited financial is required if the investor has established for less than two years.

This article also requires that in a case of leasing land or where allocated land is used to implement an investment project, there must be a written document from the Department of Natural Resources and Environment introducing the location. This provision introduces an additional requirement which is apparently unnecessary, and it has been suggested that it be deleted. Similarly, this provision provides the requirement of written document proving the authority of the landlord in relation to the leased area. It is not clear whether a 'written document' means the BRC or the building ownership certificate.

(v) Contribution of capital or purchase of shares in Vietnamese enterprises (Article 8)

This article provides that in cases of foreign investors contributing capital or purchasing shareholding of 49% or less of the charter capital of a Vietnamese enterprise permitted to sell its shareholding to investors, the Vietnamese enterprise shall only be required to conduct procedures to amend business registration in accordance with the LOE. Foreign investors contributing capital to or purchase shareholding of more than 49% of the charter capital of a Vietnamese enterprise permitted to sell its shareholding to foreign investor, the conditions stipulated in international commitments must be satisfied.

If there are a number of business lines which have different restrictive conditions regarding form of investment, products, scale, volume or quantity and capital contribution ratio and so forth, then the **highest** restriction shall apply. Article 8.4 further provides that if a foreign investor contributes capital or purchases shareholding of more than 49% of the charter capital of a Vietnamese enterprise as stipulated in clause 2 of this article, and the Vietnamese enterprise has one or more investment project, then the foreign investor and the Vietnamese enterprise must jointly conduct investment procedures in order to be issued with an Investment certificate. This article is silent on the case when there has been no investment project or this is the first investment. It is not clear whether this clause means that the amendment of the business registration is sufficient.

1.5 Business, tax and seal registrations unified

Joint Circular 05/2008/TTLT/BKH-BTC-BCA dated 29 July 2008 of the Ministry of Planning and Investment, Ministry of Finance and Ministry of Police guiding the regime for coordination between bodies for business, tax and seal registration applicable to enterprises set up and operating under the Law on Enterprises (*Joint Circular 05*)

Things getting easier

In accordance with Joint Circular 05, an enterprise, a representative office or a branch office is no longer required to lodge an application file with numerous relevant government bodies for the purpose of business, tax and seal registration. More specifically, instead of submission of application files to three different bodies (i.e. business registration body, police office and tax office), an enterprise, a representative office or a branch office now can lodge its application file at only a provincial Department of Planning and Investment (***Provincial DPI***) for the purpose of (i) registration of business; (ii) obtaining tax code; and (iii) obtaining seal. This is indeed a positive development.

Upon approval of an application, a certificate of business and tax registration will be issued. Each enterprise, a representative office or a branch office will be issued an 'enterprise code', which is concurrently the business and the tax code of such enterprise, representative office or branch

office. The enterprise code is used for declaration and payment of tax for all types of payable taxes, including but not limited to an enterprise engaged in different business lines or doing business in different locations.

Application documents

In relation to application file for registration of business, tax and seal submitted by a newly established enterprise, or a representative office or a branch office, (i) a prescribed declaration of information for tax registration; and (ii) other documents applicable to the relevant form of enterprise (i.e. limited liability company or shareholding company, or representative office, or branch office, etc) as required under Decree 88/2006/ND-CP dated 29 August 2006 of the Government on business registration are required to be submitted to the Provincial DPI.

An enterprise which was issued with a BRC before Joint Circular 05, is not required to immediately register the change of the enterprise code. The registration of change of the enterprise code can be carried out at the same time when such an enterprise registers any change with the provincial DPI (i.e. change of business lines, change of the legal representative, etc). In this case, the existing tax code of such enterprise shall continue to be used for the enterprise code of such an enterprise.

Timing streamlined

Under Joint Circular 05, a certificate of business and tax registration shall be issued to an enterprise within five working days from the date of receipt of the legitimate application file. This is amazingly fast, and a marked improvement over the currently law and procedure.

With respect to the seal registration, within two working days from the date of receipt of the seal, the relevant police body is required to return the seal and a certificate of seal registration to an enterprise. The enterprise is required to collect the seal and the Certificate of seal registration at the police office, and will be entitled to do so upon submission of a copy of the certificate of business and tax registration and the identity card of the representative of such enterprise to the police body.

Joint Circular 05 repeals Joint Circular 02/2007/TTLT/BKH-BTC-BCA dated 27 February 2007 and Section V, Point 1 of Circular 03/2006/TT-BKH dated 19 October 2006.

Part 2 Feature

This month, our VLU 'Feature' piece focuses on the real estate area (including real estate businesses and real estate services businesses). Although this area is not covered by the Commitments of Vietnam Government to the WTO (ie there are no particular restrictions on foreign investment in real estate other than the general ones applied to all areas), investors continue to face certain challenges, as real estate is a "conditional business sector" under Vietnam law. The following table summarises key real estate terms and restrictions and conditions that continue to exist in this sector in Vietnam law.

REAL ESTATE TERMINOLOGY AND RESTRICTION ON FOREIGN INVESTMENT IN REAL ESTATE ACTIVITIES UNDER VIETNAMESE LAW

(as at 6 August 2008)

No.	Term	Description	Restriction on foreign investment?
1	Real estate business	Activities involving the investment of capital in order to develop, purchase, receive an assignment of, and lease or hire purchase real estate in order to sell, assign, lease out or sublease out or grant a hire purchase of such real estate for profit-making purposes	<p>New foreign invested company (FIC) will be permitted to engage in real estate development without restriction; foreign investment (FI) in existing domestic company (DC) engaged in this activity may be possible without restriction, however, the business registration authority in some provinces may not accept registration of more than 49% foreign ownership in such a DC in practice</p> <p>New FIC will not be permitted to engage in real estate trading (ie purchase and sale) or in subleasing (ie lease for sublease); FI in existing DC engaged in these activities may also not be possible, however, the business registration authority in some provinces may accept registration of up to 49% foreign ownership in such a DC in practice*</p>
2	Real estate services business	Activities of assisting real estate business and real estate market, comprising (a) real estate trading floor; (b) real estate auctioneering; (c) real estate valuation; (d) real estate management; (e) real estate brokerage; (f) real estate consultancy; and (g) real estate advertising.	See 3. – 9. below
3	Real estate trading floor	A place where real estate transactions take place and where services are provided for real estate business.	<p>New FIC will be permitted to engage in real estate trading floor without restriction</p> <p>FI in existing DC engaged in this activity may be permitted, subject to an applicable cap*</p>
4	Real estate auctioneering	The public sale or assignment of real estate to the highest bidder in accordance with the procedures for the auction of assets	<p>New FIC will be permitted to engage in real estate auctioneering without restriction</p> <p>FI in existing DC engaged in this activity may be permitted, subject to an applicable cap*</p>

No.	Term	Description	Restriction on foreign investment?
5	Real estate valuation	A form of consultancy activity whereby the value of a specific item of real estate (as of a specified date) is determined	New FIC will be permitted to engage in real estate valuation without restriction FI in existing DC engaged in this activity may be permitted, subject to an applicable cap*
6	Real estate management	Activities consisting of preserving, maintaining, superintending, operating and exploiting real estate pursuant to a contract for management of real estate with the real estate owner or user. Such activities may only be conducted by an organization or individual registered to provide real estate services business	New FIC will be permitted to engage in real estate management without restriction FI in existing DC engaged in this activity may be permitted, subject to an applicable cap*
7	Real estate brokerage	Activities comprising (a) finding parties for negotiation and signing real estate contracts; (b) representing client in order to undertake work related to real estate business activities; and (c) providing information and assisting parties in relation to negotiation and signing real estate contracts.	New FIC will be permitted to engage in real estate brokerage without restriction FI in existing DC engaged in this activity may be permitted, subject to an applicable cap*
8	Real estate consultancy	Activities comprising (a) legal advice on real estate matters; (b) advice on investment in real estate business; (c) advice on real estate finance; (d) advice on real estate pricing; (e) advice on real estate contracts for purchase and sale, assignment, lease and hire purchase; and (f) advice on other matters relating to real estate.	New FIC will be permitted to engage in real estate consultancy, other than real estate market research, without restriction FI may be permitted in real estate market research under the form of joint venture company (JVC) with a Vietnamese partner, provided that foreign contribution to the JVC is subject to an applicable cap** FI in existing DC engaged in this consultancy activity may be permitted, subject to an applicable cap*
9	Real estate advertising	No specific definition is provided in the law.	FI may be permitted in real estate advertising in the form of a JVC or a business cooperation contract (BCC) with a Vietnamese partner licensed to engage in advertising business. Foreign contribution to the JVC is subject to an applicable cap*** FI in existing DC engaged in this activity may be permitted, subject to an applicable cap*

* If the existing DC is not listed on the securities market, foreign investors may hold together an interest of up to 30% of the charter capital of the DC. If the existing DC is engaged in property development, the foreign investors may hold up to 49% of the charter capital. If it is listed on the securities market, the foreign investors may hold together an interest of up to 49% of listed shares of the company.

** Prior to 01 January 2009, the foreign investors can contribute not more than 51% of legal capital of the JVC. From 01 January 2009, a 100% FIC is permitted to engage in real estate market research.

*** Prior to 01 January 2009, the foreign investors can contribute not more than 51% of legal capital of the JVC. From 01 January 2009, this restriction will be abolished.

Part 3 Did You Know?

3.1 Registration hurdles - another chapter

Last month we reported on the difficulties encountered in trying to register foreign ownership in shareholding companies. This month it's the turn of the limited liability company.

Pay before or after?

Customarily, an investor buying an interest in a limited liability company would pay the purchase price to the seller only on receipt of a Business Registration Certificate (or Investment Certificate) (**BRC**) showing the investor as a new member of the company. This timing reflected the view that, given the requirement to register the change, a new investor was not legally recognised as owning the interest until registration was evidenced by the issue of the amended BRC.

Recently, however, the registration requirements imposed by certain business registration bodies have thrown a spanner in the works.

Under Decree 88, a company applying to register a change of membership arising from the assignment of capital must produce "documents evidencing the completion of the assignment". Although no guidance is given as to what is meant by "evidence of completion", several registration bodies have suggested that they will not register a change of membership until they are shown proof that the transferor has received payment in full.

This requirement places investors in the uncomfortable position of having to pay for their investment in full, before title has transferred - a position made all the worse by the fact that the final step (registration by the relevant authority) is not within the control of the parties. Faced with this situation, investors need to consider carefully what contractual or other protections may be put in place or otherwise sought.

IZs especially vulnerable

The fact that different registration bodies have expressed conflicting views on the necessity of showing proof of payment also serves as a timely reminder of the differences investors may encounter in having registrations and other corporate matters attended to by different business registration authorities. In particular, while industrial zones often present a relatively 'hassle-free' approach when establishing a company, the relative inexperience of these particular authorities in dealing with subsequent corporate actions and changes may result in more unexpected difficulties than when dealing with more experienced licensing authorities such as municipal people's committees.

3.2 Work permits - not just for work anymore

In our previous editions of VLU, we have discussed the requirements and procedures (including required application documents) to obtain a work permit in accordance with Decree 34/2008/ND-CP dated 25 March 2008 and its implementing Circular 08/2008/TT-BLDTBXH dated 10 June 2008. A foreigner working in Vietnam must obtain a work permit unless he or she falls under any of exceptions provided by laws.

Customs requirement

In mid August 2008, ports in Ho Chi Minh City began to insist on the production of work permits for foreigners wishing to clear their incoming shipments of personal goods. The requirement of a work permit for customs clearance resulted in a few shipments sitting at port, incurring storage charges while the relevant foreigners quickly began to apply for work permits.

The requirement for a work permit is not a new requirement for customs clearance but certain ports have turned a blind eye to the regulations and have been allowing custom clearance for certain

individuals, based only on a multiple entry visa. The port in Hai Phong City still accepts a multiple entry visa, but this may change without warning.

Apply early and check your port

One of the documents included in the application dossier for a work permit is the criminal record issued in the origin country of the foreigners. It may take weeks to obtain this document in certain countries (eg we understand this is about six weeks in the United Kingdom, and about 17 weeks in Canada!).

Different ports in different cities may implement the (now seemingly enforced) requirement of a work permit differently. To avoid 'stuck' containers, and to save costs and time, foreigners planning to enter Vietnam to work should apply for their work permits **prior** to coming to here, **and** they should check with the relevant customs officials at the port their goods are expected to clear, to determine their specific requirements.

3.3 Colour photocopiers - not allowed for all

Have you ever made a colour photocopy at your office or home here in Vietnam? If so, you may have inadvertently broken the law.

Strict regulations

Many readers are not aware that the use of colour photocopiers in Vietnam is strictly regulated and must be approved by government authorities. Decree 105/2007 dated 21 June 2007 of the Government (and its implementing Circular 04/2008 dated 9 July 2008 of the Ministry of Information and Communication (**MOIC**)) (**Decree 105**) provides very strict regulations on colour photocopiers, including the requirement of a special import permit from the MOIC and the registration of the intention to use a photocopier with the local Department of Information and Communication (DOIC), and the receipt a Certificate of Registration of Colour Photocopier.

Application documents

An applicant, when applying for a permit to import a colour photocopier, must include: an application letter setting out the details of the applicant, purpose of use, name and code of the photocopier; a copy of BRC or IC of the applicant; a catalogue of the photocopier; and a statement of "regulations on management and use of the photocopier issued by the applicant".

The 'regulations' must reflect the standard regulations promulgated under the Circular 04/2008 which are not exactly user-friendly. According to these standard regulations, the colour photocopier may not be used until it is registered with the relevant authority, and the user is not allowed to transfer the machine to other party or to relocate the machine to another address without prior approval from the authorities.

Further, the name of the person "in charge of managing the machine", the supervisor and the person who will undertake the task of photocopying work must all be registered with the authority. Any changes to these roles must be reported to DOIC and the local police. The applicant user is also required to install a device to print a hidden logo or special symbol of the user on all copies produced and this logo must be registered with DOIC and the local police. The details of all documents to be copied must be recorded.

We have no information regarding the extent of compliance with these seemingly over-burdensome (some may say absurd) regulators, or the number of colour photocopiers actually in use in Vietnam. One would not think many, given the above restrictions and requirements.

Why the fuss?

So just why is there so much regulation concerning colour photocopiers. when the standard black and white photocopiers attract little or no scrutiny? The accepted understanding is that authorities believe they may be used in the illegal businesses of counterfeiting and printing of authorised certificates, and documents with red seals. As such, they are very careful to authorise only

companies and individuals whom they believe to be honourable and not likely to engage in such activities.

3.4 SSC watchdog - on the watch

On 14 January 2008, the Ministry of Finance issued Decision 02/2008/QD-BTC (**Decision 02**) to restructure the organisation of the State Securities Commission (**SSC**) to further respond to the needs of the emerging securities market. Decision 02 created a specialised Securities Supervisory Department charged with monitoring compliance with securities regulations. With more resources allocated to this watchdog, the SSC has recently been more active in imposing penalties for breach of securities regulations.

Penalties - the trends

We have tracked 80 penalties imposed by the SSC since January 2008. The key findings of this review are set out below:

- Large Vietnamese corporates have not been spared.
- No penalties have been imposed for insider trading. This reflects difficulties in proving insider trading and the lack of jurisprudence in this area.
- A maximum penalty imposed is VND 70 million (about USD4,400) was issued to construction joint stock company for failing to comply with public offer rules.
- 83% of the penalties relate to the failure to comply with public offer rules including:
 - (i) failing to publicly disclose share offers;
 - (ii) failing to obtain SSC approval for the public offer; and
 - (iii) failing to conduct the public offer within the prescribed timeframes.

What we can surmise from this is that the SSC places importance on the proper conduct of public offers to ensure that there is a level playing field by requiring due public disclosure of information to protect shareholders.

What we can further surmise is that many large corporates continue to flaunt the securities rules despite the rules not being as rigorous as those in more developed jurisdictions. Possibly because the penalties are low and merely a slap on the hand? Maybe.

- Other penalties imposed include failing to disclose annual financial reports and failing to disclose trading results of major shareholders. One securities company was fined for failing to maintain proper internal risk management, and another was fined for allowing customers to sell securities which are not owned by such customers (possibly short selling).

It is refreshing to see that there is action to promote information efficiencies in the Vietnamese securities market. However, the breaches of securities regulations thus far are consistent with poor corporate governance practices in Vietnamese companies. There are also structural issues requiring further legal reform including strengthening the jurisprudence to support determinations of insider trading and material disclosure of information.

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:

- ➔ Circular 08 on export of minerals, 18 June
- ➔ Decision 1122 dated 4 September 2001 on State commercial banks as amended by Decision 20, 4 July
- ➔ Draft Circular on Investment, 20 July
- ➔ Letter 1551 guiding Circular 09 on adjusting building contracts due to price increases, 1 August
- ➔ Decision 28 with the master plan on mining apatite ore, 18 August
- ➔ Circular 03 on authentication of copies of originals and authentication of signatures, 25 August
- ➔ Decree 16 on finance leasing companies as amended by Decree 95, 25 August
- ➔ Notice 364 on eligibility for the List of Prestigious Vietnamese Export Enterprises for year 2008 (including enterprises with foreign owned capital), 25 August
- ➔ Letter 62 on capital requirements for real estate business registration, 26 August
- ➔ Decision 115 on public disclosure of management and use of State assets, 27 August
- ➔ Decision 69 on minimum selling prices of cigarettes, 27 August
- ➔ Circular 19 dated 12 May 2005 on prohibition of tobacco advertising as amended by Circular 78, 29 August
- ➔ Decision 119 fixing the absolute duty rate on export copper ore at US 200 per ton, 29 August
- ➔ Decision 1906 maintaining the basic interest rate at 14%, 29 August
- ➔ Decision 1907 increasing the interest rate from 1.2% to 3.6% payable to banks on their compulsory reserves for VND deposits, 29 August
- ➔ Decision 71 amending import duty on printing paper, cigarette filter and other types of paper, 1 September
- ➔ Decision 4812 on foreign market information portal for the Vietnamese business community, 3 September
- ➔ Draft Resolution on application of Vietnam's WTO commitments regarding investment with a detailed list of services, the relevant commitments and law, and licensing history, 3 September
- ➔ Decision 124 abolishing the Export Assistance Fund established in 1999, 8 September
- ➔ Decision 74 amending export duty on some mineral ores, 8 September
- ➔ Decree 100 on personal income tax, 8 September
- ➔ Decision 16 announcing the opening of Hon La Seaport in Quang Binh Province, 10 September
- ➔ Decision 76 increasing import duty on gasoline from 0% to 5%, 11 September
- ➔ Circular 79 on registration fees, 15 September

- ➔ Official Letter 8237 proposing a restricted list of goods for which automatic permits will be required, 15 September
- ➔ Draft Resolution increasing royalty rates, 16 September

The list above is merely a recent snapshot of the wide range of new legislation now uploaded and available on Vietnam Laws Online through September 2008.

NEW search function for Vietnam Legal Update

We are pleased to advise that we have at last 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

In this issue of the Vietnam Legal Update, we continue with our feature spotlighting the lawyers from our two Vietnam offices in Hanoi and Ho Chi Minh City. Our in-country legal team hails from Australia, the United States, Finland and Vietnam, with our total number of lawyers now standing at 25.

Featured this month is Hoa Nguyen, a lawyer in our Hanoi office.



Hoa Nguyen is a Vietnamese qualified lawyer. She joined the Hanoi office of Phillips Fox in 2006 and has been with Allens for more than two years. Previously, Hoa has worked for Singaporean, Australian and Vietnamese law firms for nearly 10 years. Hoa's areas of expertise include corporate and commercial, real estate development, construction, M&A and labour. Hoa has also assisted clients in negotiation and resolution of disputes arising between parties in joint venture companies and business cooperation contracts.

Hoa likes teaching her son and daughter, swimming and playing badminton in her free time.

Quote from the source: "Honesty will exist forever".