



September 2009

contents

Part 1 – Selected new legal instruments	
1.1	Conditions and qualifications for construction activities 1
1.2	More tax breaks – for some 3
1.3	Expanded operations for foreign-invested tourism operators 4
1.4	Pharmaceutical advertising 5
1.5	Getting tough on foreign employee labour law infringements 6
1.6	Transfer of land PIT loophole closed 7
Part 2 – Feature	
	Court case commentaries 9
Part 3 – Did you know?	
3.1	Liquidated damages – not a sure thing in Vietnam 11
3.2	Who is in control? 12
3.3	Differing views on professional advisers 15
Part 4 – What's new online?	
	Subject categories and new laws in Vietnam Laws online database 16
	Client Updates 17
	Search function for Vietnam Legal Update 17
Part 5 – Get to know us	
	Spotlight on Bill Magennis 18

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

visit www.vietnamlaws.com

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

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

visit www.aar.com.au

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

▪ **Hanoi**
Suite 401, Hanoi Tower
49 Hai Ba Trung Street, Hoan Kiem District
Hanoi, Vietnam
T +84 4 3936 0990
F +84 4 3936 0984
bill.magennis@aar.com.au

▪ **Ho Chi Minh City**
Suite 605, Saigon Tower
29 Le Duan Boulevard, District 1
Ho Chi Minh City, Vietnam
T +84 8 3822 1717
F +84 8 3822 1818
nigel.russell@aar.com.au
thomas.miller@aar.com.au

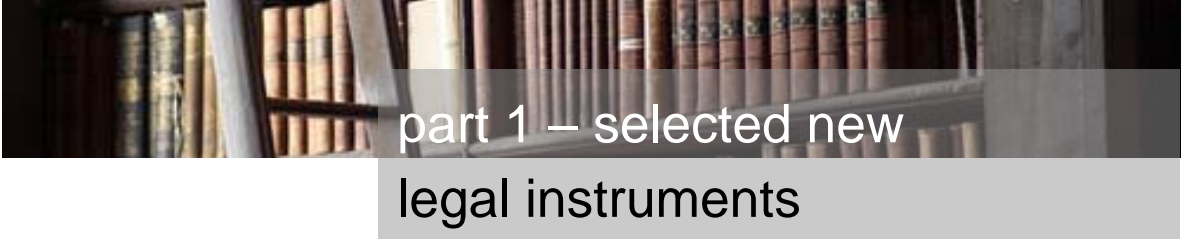
Allens Arthur Robinson is a leading international law firm in South East Asia, China and Australia.

With 15 offices in Bangkok, Beijing, Brisbane, Hanoi, Ho Chi Minh City, Hong Kong, Jakarta, Melbourne, Perth, Phnom Penh, Port Moresby, Shanghai, Singapore and Sydney, Allens has an extensive network in Asia.

Allens' Vietnam practice is led by resident partners Bill Magennis, Nigel Russell and Thomas Miller. Our in-country team consists of international and local lawyers and legal translators.

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





part 1 – selected new legal instruments

1.1 Conditions and qualifications for construction activities

Circular 12/2009/TT-BXD of the Ministry of Construction providing detailed guidelines on issuance of construction practising certificates, dated 24 June 2009 (*Circular 12*)

Circular 22/2009/TT-BXD of the Ministry of Construction providing detailed guidelines on conditions of capability on construction activities, dated 6 July 2009 (*Circular 22*)

As we reported in the March 2009 VLU, in February this year the Government issued Decree 12/2009/ND-CP on management of investment projects for construction works (**Decree 12**). Decree 12 ushered in a new, clearer regime for the regulation of construction projects in Vietnam.

Decree 12 has now been followed by Circulars 12 and 22 which set out detailed guidelines for the conditions, capabilities and qualifications required of both entities and individuals operating in this important sector.

What kind of activities are subject to conditions?

Both organisations and individuals conducting any of the following broad range of construction activities must satisfy the relevant conditions:

- formulation of construction investment projects;
- management of construction investment projects;
- design of construction master plans;
- construction design;
- construction survey;
- general construction;
- supervision of construction of works;
- specialised construction tests or experiments;
- inspection of construction works quality; and
- certification of construction weight bearing safety and certification of construction quality consistency.

Conditions for entities carrying out general construction activities

Under Decree 12 and Circular 22, the conditions applicable to enterprises will vary depending on the 'group' and 'level' of the relevant construction project. Broadly, the construction laws classify all construction projects into:

- 3 groups (A, B and C) depending on the importance of the project and the investment capital involved; and
- 5 levels (Special, I, II, III and IV) depending on the scale of the construction.

In turn, entities are divided into 2 classes, with Class 1 being permitted to conduct projects in any group and at any level, while Class 2 is permitted only to conduct projects in groups B or C or at levels II, III and IV.

In order to tender for projects requiring a 'Class 1' status, an entity must:

- have at least 10 to 30 architects, engineers, urban engineers or quantity surveyors appropriate for the project – the exact number will depend on the specific construction activity;
- have a 'Class 1 Project Manager'; and
- have conducted at least 1 Group A project or 2 Group B projects.

In order to tender for projects requiring 'Class 2' status, construction entities must:

- have at least 5 to 20 architects, engineers, urban engineers or quantity surveyors appropriate for the project – the exact number will depend on the specific construction activity;
- have a 'Class 2 Project Manager'; and
- have conducted at least 1 Group B project or 2 Group C projects of the same type as that for which the entity is tendering.

Conditions for specialised construction tests and experiments

Conditions for this specialised work are set out in Decision 11/2008/QĐ-BXD, dated 1 July 2008. Under this decision, these tasks may only be carried out by licensed specialised construction laboratories. Licensing of these laboratories is evaluated by the Ministry of Construction in accordance with Vietnam Construction Standard TCXDVN 297-2003. In addition, the staff of these laboratories must hold relevant practising certificates and the equipment must pass specific inspections.

Conditions and qualifications for individuals in the construction sector

As noted above, one of the key conditions for entities is having the appropriately qualified and certified personnel. Often these conditions require relevant individuals to hold a relevant practising certificate, as well as demonstrate necessary experience.

In the case of both a Class 1 and Class 2 Project Manager, the individual will need an appropriate practising certificate as well as consecutive years of experience (7 years in the case of Class 1 and 5 years in the case of Class 2) and experience on the appropriate level and group projects.

Practising Certificates

Previously, regulations on practising certificates were spread across various legal instruments issued by the Ministry of Construction. Helpfully, all the construction practising certificate requirements are now covered in Circular 12.

Under Circular 12 there are 3 types of practising certificates:

- architect practising certificates;
- construction engineer practising certificates; and
- practising certificates for supervision of execution of building works.

For each type of certificate there is a requirement to hold a relevant university or



post-graduate qualification as well as demonstrated work experience in the relevant speciality. For example, to obtain an architect practising certificate an individual must have at least 5 years experience in design work and have participated in the architectural design of at least 5 building works or 5 approved construction master plans.

Can a foreigner obtain a construction practising certificate in Vietnam?

A foreigner may be issued with a practising certificate if they have a valid residency permit and otherwise satisfy the relevant certificate qualifications and conditions. A practising certificate issued in a foreign country may also be recognised by Vietnamese authorities if the certificate is valid (not expired) and has been 'legalised' by the Vietnamese authorities in its country of issue and translated into Vietnamese by a Vietnamese notary public. In practice, these requirements can be difficult to meet, for example where the foreign practising certificate (such as a certificate of membership of a professional construction organisation) does not specify particular permitted construction activities as the Vietnamese certificates do. In these situations it is sometimes possible, although by no means simple, to have this recognised by the Vietnamese authorities by providing a legalised and consularised Vietnamese translation of both the membership certificate and the charter of the professional organisation.

1.2 More tax breaks – for some

Circular 176-2009-TT-BTC of the Ministry of Finance guiding reduction of personal income tax for individuals working in economic zones, dated 9 September 2009 (*Circular 176*)

The Ministry of Finance has recently issued Circular 176 which details specific reductions in Personal Income Tax (*PIT*) for individuals (both Vietnamese and foreigners, and both resident and non-resident) who work directly in economic zones.

A 50% reduction

Under Circular 176, eligible employees are entitled to a 50% reduction in the amount of PIT payable on their salary and wages income. Importantly, the reduction does not extend to all PIT payable by eligible employees, for example any PIT payable on investment or other non-salary income will still be at the full rate, subject to any other relevant exemptions or reductions.

Who is eligible?

In order to be eligible for the reduction, the key nexus is the location of the individual's work. As such, employees working for an entity whose office is not within an economic zone, may still be eligible for the reduction in PIT if they have been appointed to work within the zone, for example to perform economic contracts signed by the entity with an entity within the zone. Conversely, even if an employer has a business establishment within an economic zone, an employee must also actually work within the area of the economic zone in order to be eligible for the PIT reduction.

Individuals who have been issued with a business registration certificate in an economic zone and who have taxable income from activities of production or business in the zone, are also entitled to a 50% reduction in the PIT on that business income.

Implementation

Although Circular 176 does not come into full force until late October 2009, it will apply to reduce the amount of PIT payable by eligible individuals with income accrued in economic zones from 1 January 2009.



1.3 Expanded operations for foreign-invested tourism operators

Guideline 498/TCDL-LH of the Vietnam National Administration of Tourism regarding procedures for joint venture tourism enterprises to provide outbound services to Vietnamese citizens and foreigners residing and working in Vietnam, dated 4 August 2009 (Guideline 498)

In our July edition of the VLU we reported on Official Letter 4581-VPCP-KTHH which set out several new policies designed to stimulate the tourism sector in Vietnam and empowered various government departments to draft regulations implementing these policies. As noted at the time, one of the significant policies announced was to allow foreign-invested tourism operators to provide 'outbound' (or offshore) tourism services to both Vietnamese and non-Vietnamese living and working in Vietnam (**Outbound Services**).



The National Administration of Tourism has now issued Guideline 498 which establishes a pilot program under which foreign-invested tourism operators can provide these services. Under the pilot program, approved foreign-invested tourism operators will be permitted to provide Outbound Services during the period from 10 August 2009 to 31 December 2010. At the end of this trial period, the pilot program will be evaluated and the Ministry of Culture, Sport and Tourism will determine whether the program will continue.

Under the Guideline, before a foreign-invested tourism operator can provide Outbound Services, they must first get an approval from the Department of Tourism. In order to get the approval, the operator must have:

- a valid Investment Certificate;
- a business plan for travel business operations and tour programs for international tourists;
- managerial personnel with at least 4 years experience in the travel business sector;
- at least 3 tour guides who have been issued with international tourist guide cards;
- lodged the necessary security deposit with the relevant governmental authority;
- a specific plan for the provision of the proposed Outbound Services;
- tour programs suitable for each destination in which they will provide Outbound Services; and
- proof of sufficient personnel to provide the proposed Outbound Services.

The aim of the initial policy was to promote the tourism industry and the Guidelines do provide a basis to expand Outbound Services by opening up a level playing field for all tourism operators. However, given the initial program will only run for a limited period of time, it remains to be seen how many operators will take up this offer (particularly given the need to apply for yet another approval) and therefore how successful the pilot program will be in its aim of stimulating the Vietnamese tourism sector.

1.4 Pharmaceutical advertising

Circular 13-2009-TT-BYT of the Ministry of Health on information and advertisement of medicines, dated 1 September 2009 (*Circular 13*)

In general, regulations concerning the advertisement and promotion of medicines are currently governed by the Ordinance on Advertisement dated 16 November 2001 and its implementing regulations, including Decision 2557-2002-QD-BYT of the Ministry of Health (**MOH**) dated 4 July 2002 (**Decision 2557**).

Back in January 2004 the Ministry of Culture and Information and the MOH jointly issued Joint-Circular 01-2004-TTLT-BVHTT-BYT (**Circular 01**) which, among other things, assigned the MOH with the task of amending Decision 2557 to ensure consistency with the Ordinance on Advertisement and Circular 01. After more than five years, the MOH has finally issued Circular 13, which will replace Decision 2557 from the middle of October 2009. In this article, we highlight some of the key provisions and changes introduced by Circular 13.

Registration for advertising: a 2-step process

Any medicine manufactured locally or imported into Vietnam must be registered for circulation with the Drug Administration Department of the MOH (**DAD**). This process of medicine registration is commonly referred to in the pharmaceutical sector as 'visa' registration. On registration, a medicine will be issued with a registration (or visa) number that is generally valid for 5 years, and which may be renewed.

In determining visa registration, the DAD considers the manufacturing process, quality standards and test methods as well as samples of the proposed labelling and instructions for use.

Once a particular medicine is approved for circulation, if someone wishes to advertise it to the public, a second registration process must be completed, namely the registration of the advertisements with the DAD.

The basics of pharmaceutical advertising registration

An application for advertising registration may only be made by the 'owner' of the medicine's visa registration, or someone authorised by them in writing.

Any DAD approval for advertisement is approval of the specific advertisement contents contained in the application. Any changes to the advertisement contents must be registered with and approved by the DAD.

Interestingly, despite its 5 year gestation, some inconsistencies between Circular 13 and Circular 01 remain, for example Circular 13 retains a 15 working day time period for approval, while Circular 01 requires this to be completed within 10 working days.



Permitted forms of advertising

When a medicine is visa registered, the DAD will determine whether it is a 'prescribed medicine' (being one which could endanger life or health if not used correctly in accordance with the instructions of the person prescribing it and which, therefore, must be dispensed or sold only in

accordance with a prescription) or a 'non-prescribed medicine' (which may be dispensed, sold or used without a prescription).

Prescribed medicines may not be advertised to the public in any form. Generally, non-prescribed medicines may be approved for advertising in media such as newspapers, magazines and flyers but only medicines containing certain main ingredients will be considered for advertising on the television or radio.

Circular 13 also specifically addresses newer forms of advertising such as electronic newspapers and websites. Under the new regulations, advertisements whose contents have already been approved for publication in magazines, newspapers or on television or radio, may be used on websites without need for a separate approval. However, a pharmaceutical company may advertise only its own medicines on its website and medicines may only be advertised on the website of an advertising company if that company is appropriately licensed to provide internet communications services and advertisement services.

Providing information to health professionals

Under the new regulations the provision of information to healthcare professionals, such as doctors, is considered a separate activity to advertising and is subject to different rules. Under Circular 13, the content of information about medicines given to health professionals does not need to be registered with DAD if that information has already been approved by DAD as part of the visa registration process, for example information contained in the label or instructions for use. Moreover, medicines that have not yet been visa registered in Vietnam, but have been permitted for circulation in foreign countries, may also be introduced to health professionals through information seminars.

Penalties for non-compliance

Unlike its predecessor, Circular 13 also introduces specific penalties for violation of its provisions. These include a possible warning letter from the DAD or a refusal to accept further pharmaceutical advertising registration applications from the offender for a period of up to 12 months, depending on the severity of the violation. The DAD may also publish information concerning violations on its website and inform other relevant authorities who may impose other remedies, such as administrative fines, in accordance with the law.

1.5 Getting tough on foreign employee labour law infringements

Official Letter 3353-LDTBXH-VL from the Ministry of Labour, War Invalids and Social Affairs to the People's Committees of Provinces and Cities under Central Authority regarding foreign employees working in Viet Nam, dated 9 September 2009 (*Official Letter 3353*)

Draft Decree on Administrative Penalties for Breaches of the Law on Labour, dated 4 August 2009 (*Draft Decree*)

A recent official letter and proposed new penalties for breaches of the Labour Law both indicate that Vietnam is looking to get tough on those who breach the labour rules, particularly the regulations concerning foreign employees.

In Official Letter 3353, the Ministry of Labour, War Invalids and Social Affairs (**MOLISA**) urges provincial people's committees to disseminate and publicise Vietnam's rules relating to foreign employees and to 'regularly remind' people of their obligations in this regard. The letter also tasks the authorities with preparing a quarterly report on matters relating to foreign employees within their area.

Not just content with spreading the word and reporting, MOLISA also requests that the relevant authorities follow up with regular inspections and take a tough stance regarding any breaches discovered through these inspections. The Official Letter reminds the authorities that all breaches

should be dealt with strictly, noting in particular that individuals failing to satisfy all conditions for working in Vietnam should be deported.

Meanwhile, the Government has prepared a draft decree on Administrative Penalties for Breaches of the Law on Labour, which is broadly consistent with this new, tougher stance on breaches of the laws concerning foreign employees. Once enacted, the Draft Decree will replace Decree 113-2004-ND-CP on Administrative Penalties for Offences under the Labour Laws, dated 16 April 2004 (**Decree 113**).

The current text of the Draft Decree follows a similar format to Decree 113 but introduces a new, higher maximum fine for certain offences. The new maximum fine of 30 million VND (approximately \$US1700), up from 20 million VND in Decree 113, applies for the most part to breaches involving 500 or more employees and may also be imposed where a 'succeeding employer' (after a merger etc) fails to formulate, or follow, a labour usage plan for those employees who are not able to be utilised.

In the context of rules relating to foreign employees, the new maximum fine level may be levied where:

- a foreigner infringes the honour and dignity of another employee but not at a level comprising a criminal offence; or
- an employer recruits a foreigner without first notifying the employer's need to recruit employees or without notifying the Department of Labour as required.

The potential fines for breaches relating to work permits have also been raised in some cases and more specific forms of breach have been targeted, such as the failure to conduct procedures for the extension or reissue of work permits in the manner required. The Draft Decree also reiterates the provisions from Decree 113 which provide for deportation of any foreign employee who works in Vietnam for 3 months or more without a work permit or uses an expired work permit.

1.6 Transfer of land PIT loophole closed

Official Letter 3929/TCT-TNCN of the General Department of Tax regarding Circular 161 on Personal Income Tax, dated 24 September 2009 (Official Letter 3929)

On 12 August 2009, the Ministry of Finance issued Circular 161/2009/TT-BTC providing guidelines on the PIT payable on real property transactions (**Circular 161**). Together, the PIT law and Circular 161 provide that PIT will be payable by the transferor on any transfer of real property. The tax amount is 25% of the 'taxable income' (being the difference between the price paid for the property (the 'prime cost') and the price for which it is sold (the 'transfer price'), less certain expenses) or, in cases where the taxable income is not able to be determined, 2% of the sale or assignment price.

Until recently, there had been uncertainty about whether PIT was payable on the transfer of 'pre-sold' real estate, such as not-yet-finished apartments or villas in new developments.

It is common practice for developers in Vietnam to sell apartments or villas 'off-the-plan'. Because such 'sales' are made before the apartment or villa is completely constructed, no residential housing ownership certificate is issued. It has also

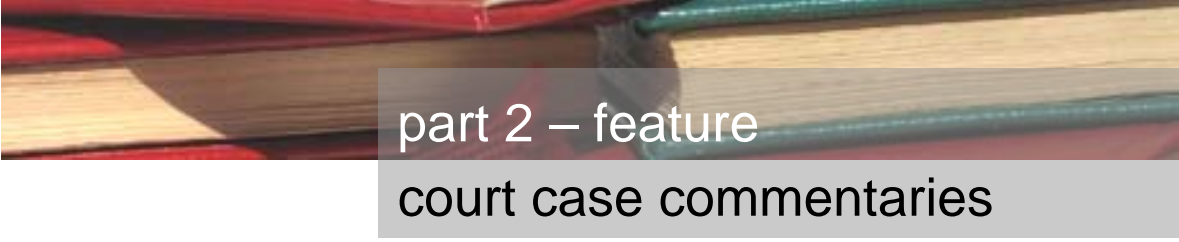


been common practice for the 'buyers' of such pre-sold real estate to then on-sell or transfer that property before the residential housing ownership certificate is issued.

Because no residential housing ownership certificate has been issued, under Vietnamese law the buyer cannot legally sell the property and register the sale with the relevant authority. While Vietnamese law was silent as to how these transactions were to be effected, in practice the transfer process was often achieved by the original buyer requesting that the property developer cancel the original contract and enter into a similar contract with the new buyer. The new buyer would pay the original buyer for the property (after deducting any remaining instalments owed to the developer) and the property developer would charge a fee for the change of the contract.

Although not clear, it was thought that the original buyer would not pay any tax on the profit made on the transfer because there was no transfer of a housing ownership certificate.

Now, Official Letter 3929 from the Tax department has clarified the position and put a stop, as of 26 September 2009, to the PIT loophole. The Official Letter provides that, on and from 26 September 2009, PIT in accordance with Circular 161 will be payable on the profits made on such transfers, even though there is no transfer of a housing ownership certificate.



part 2 – feature

court case commentaries

This month, we look at another decision of the Hanoi People's Court. The judgment indicates that aggrieved contractual parties will need to act quickly to ensure that their right to take action for contractual breach is not lost.

A&B BEVERAGE LTD V TRAN THI HUONG

Judgment No. 64/2006/KDTM-ST dated 17 August 2006

The Facts

On 1 February 2005, the plaintiff, A&B Beverage Ltd Company (**A&B**), entered into a commercial contract with Ms Tran Thi Huong under which Ms Huong agreed to act as a sales agent for A&B with a commitment to sell a specific quantity of A&B's beverages each month in the period from 1 February 2005 to 31 January 2006.

Ms Huong performed her obligations under the contract for the first 4 months and in May 2006, Ms Huong wrote to A&B requesting a temporary suspension of the contract as she had had a baby. On 1 June 2005 A&B replied informing Ms Huong that she was required to perform her sales commitments for both May and June in accordance with the agreed contract.

By the end of June 2005, Ms Huong had met the required sales volume for June but not for May. On 27 June 2005 Ms Huong attempted to contact A&B concerning the matter, but did not receive a response. The Court understood that both parties ceased performing their obligations under the contract at the end of June 2005.

On 27 April 2006, 11 months after Ms Huong had failed to reach the sales target, A&B commenced proceedings against Ms Huong in the Hanoi City People's Court, claiming VND 212,520,000 in compensation for breach of contract.

The Decision

The Court dismissed A&B's action on the basis of Article 318.3 of the Commercial Law, which prescribes a 9 month time limit for 'lodging complaints'. According to the Court, because A&B did not 'lodge a complaint' within 9 months of May 2005 (when Ms Huong allegedly failed to perform her contractual obligations) A&B's action should be dismissed.

Commentary

The legal reasoning of the Court in reaching its decision raises considerable questions concerning the nature and purpose of the 9 month time limit prescribed by Article 318.3 of the Commercial Law for 'lodging complaints'. This is particularly the case given that there is a separate provision, in Article 319 of the Commercial Law, which prescribes a 2 year limitation period for the initiation of legal action.

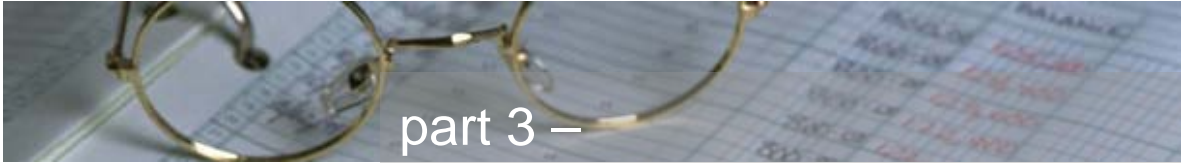
The Commercial Law clearly prescribes 2 different time limits (9 months and 2 years) for 2 different actions (lodging a complaint and initiating action). Despite this, in dismissing A&B's action, the Court's decision effectively equated the two concepts, applying the first time limit (9 months) to the second action (initiating legal action). Another way of interpreting the decision is that the Court

considered that fulfilment of the first action within the stated time period is a necessary precondition to exercising rights under the second. There is nothing in the Commercial Law that directly invites such an interpretation.

Unfortunately, the Court's decision does not make any reference to the 2 year statute of limitations period in Article 319 of the Commercial Law, nor does it provide any clear explanation as to why it considered that the failure to make a complaint within the 9 month period meant that A&B could not initiate legal proceedings, despite being well within the 2 year period.

More generally, the decision raises questions as to the purpose of the 9 month period for lodging complaints. On the one hand, it seems nonsensical for the Commercial Law to limit a party's ability to 'lodge a complaint' (which may result in a mediated or negotiated settlement of the matter) after a certain period, instead forcing them into litigation. On the other hand, it is possible that the provision is intended to ensure that aggrieved parties at least 'show their hand' by lodging a complaint within a reasonably short time-frame, rather than simply ambushing the defendant with a law suit right at the end of the 2 year statute of limitations period. The reasoning of the Court in this case makes no attempt to address any of these issues.

The practical lesson from this decision, at least, is clear. An aggrieved contractual party should not delay in 'lodging a complaint' where it believes there has been a breach of contract. Unfortunately, the judgment is not clear as to the precise nature of complaint required within the 9 month period in order to 'keep alive' a plaintiff's rights to initiate legal proceedings within the 2 year period. It may be that, in this case, a simple letter informing Ms Huong that A&B was reserving its right to take action for the alleged breach would have been sufficient, but this cannot be determined from the Court's decision nor does the Commercial Law provide any guidance.



part 3 – did you know?

3.1 Liquidated damages – not a sure thing in Vietnam

Parties to a contract will often agree to include a 'liquidated damages' clause. Under such a clause, the parties predesignate in their contract an amount payable by a party if they breach certain provisions of the contract. Although the amount of the liquidated damages is often determined by reference to an estimate of the likely loss suffered by the other party as a result of the breach, the actual amount is pre-agreed and does not depend on the aggrieved party demonstrating the amount of loss actually suffered.

While liquidated damages clauses are frequently seen in Vietnamese contracts, the validity and enforceability of such clauses is less than certain, particularly as such clauses are likely to be unfamiliar to members of the Vietnamese judiciary.

Monetary remedies available under Vietnamese statute

Vietnam's Commercial Law contemplates only 2 types of monetary remedies (or damages) for breach of contract:

- penalty for breach; and
- damages for loss.

As the name suggests, the first type of remedy is punitive in nature, a sum fixed in advance which becomes payable on the occurrence of a breach, regardless of the seriousness or consequences. The monetary limit of such a penalty is strictly limited by Vietnamese law in most cases to no more than 8% of the value of the contractual obligation which is the subject of the breach.



The second recognised form of monetary remedy, damages for loss, are intended to

be compensatory in nature, compensating the aggrieved party fully for the actual damage suffered as a result of the breach. As such, the amount cannot be determined in advance by the parties.

As a remedy, liquidated damages is neither punitive nor does it compensate for actual loss. While it is compensatory, and may reflect an educated assessment of likely damage, by its nature it is distinct from the actual loss suffered by the aggrieved party.

Why can't we agree to a third type of monetary remedy?

As a matter of general principle there is no reason why a Vietnamese court should not enforce a liquidated damages clause which has been agreed between consenting contractual parties. Fundamentally, Vietnamese contract law upholds the free will of contracting parties and the Commercial Law even specifically permits parties to agree 'other remedies provided that such

remedies are not contrary to the fundamental principles of the laws of Vietnam'. It is this proviso that may constitute a 'fly in the ointment'. This is because the precise meaning of the phrase 'fundamental principles of the laws of Vietnam' is far from clear.

Given the tendency of Vietnamese courts to apply only the express provisions of Vietnamese statute and their reluctance to consider broader principles, it is possible that a Vietnamese court may consider that it is a 'fundamental principle' of Vietnamese law that there are only 2 types of permitted monetary remedies, being those set out in the statute. On this basis there is a risk that a Vietnamese court would not enforce an agreed liquidated damages.

3.2 Who is in control?

Although foreigners wishing to invest in Vietnam are increasingly being permitted to establish 100% foreign owned entities, joint ventures between foreign and Vietnamese investors remain a popular form of investment in Vietnam. These joint ventures take the form of either a Multiple Member Limited Liability company (**MLLC**) or a Shareholding Company.

In many of these joint ventures, for a myriad of commercial reasons, a foreign investor ends up owning a 'simple' majority of the interests or shares (that is, more than 50%) but less than 65%. Foreign investors in this situation may assume that, as a 'majority' interest holder, they will be able to 'control' the entity. Unfortunately, as this article explores, this is unlikely to be the case and even with considerable effort, such a result may not be able to be achieved.

Who controls a Vietnamese entity?

The highest decision-making authority in an MLLC is the Members' Council. Conceptually, the Members' Council is a cross between a shareholders meeting and a board of directors. It is made up of representatives of each of the persons holding an interest in the entity. While a member can choose to appoint more than one representative, the aggregate weight of the vote of each member's representatives together will be proportionate to the appointing member's interest in the charter capital of the MLLC.

For a Vietnamese Shareholding Company, the highest decision-making authority is the General Meeting of Shareholders (**GMS**). Similar to the Members' Council, the weight of each shareholder's vote at the GMS is proportional to the percentage of shares they own in the Shareholding Company. Below the GMS, a Shareholding Company also has a Board of Management, similar to a board of directors in other jurisdictions.

65% - the magic number

The Law on Enterprises provides that general decisions of the Members' Council and the GMS will be passed when approved by at least 65% of the votes cast. A higher threshold of 75% applies for certain important decisions, such as amendment to the Charter.

As such, a member or shareholder will need to hold at least 65% of the interests or shares in a company in order to be able to 'control' the entity by passing ordinary resolutions of the Members' Council or GMS. Over 75% will be required if a member or shareholder wishes to control all decisions of the Members' Council or GMS.

Can a different threshold be set?

While the Law on Enterprises enables entities to specify a higher threshold in their Charter, entities are not generally allowed to specify a lower approval threshold, such as a simple majority.

One limited exception to this general rule, however, was introduced as a result of Vietnam's accession to the WTO. In response to concerns raised during Vietnam's process for accession to the WTO, Vietnam's representative confirmed that, notwithstanding the thresholds set out in the Law on Enterprises, newly established joint ventures operating in sectors in respect of which Vietnam had made WTO commitments would be allowed to set their own approval thresholds for



decisions of the Members' Council and GMS, including setting a simple majority of 51%. The representative further confirmed that existing joint ventures between Vietnamese investors and investors from a WTO Member state would, within a 2 year period, be permitted to similarly modify their requisite approval thresholds.

These commitments were encoded into Vietnamese law by Resolution 71-2006-QH11 of the National Assembly, dated 29 November 2006 (**Resolution 71**). Resolution 71 also appeared to extend the availability of this choice to all limited liability and shareholding companies, irrespective of the sector in which the company operates, the nationality of its investors or the time period of its establishment.

However, the newly enlarged scope in Resolution 71 was narrowed again by Official Letter 771-BKH-TCT of the Working Group on Implementation of the Law on Enterprises and the Law on Investment, dated 26 December 2007 (**Official Letter 771**). Official Letter 771 opined that only joint ventures newly established in those services sectors in which Vietnam had made commitments had the right to stipulate a lower threshold. The Official Letter also reiterated that applicable existing joint ventures only had until 1 July 2008 (being 2 years from the effective date of the Law on Enterprises) to make any changes.

After Official Letter 771 was issued, several draft regulations were circulated which suggested that the ability to set a lower threshold may be (again) extended beyond the narrow group of entities covered in Official Letter 771. While there is no certainty that such a change will be forthcoming, joint venture parties currently excluded under the terms of Official Letter 771 may wish to agree in advance to change their thresholds, if and when the law allows them to do so.



What other options are available?

Assuming, however, that the 65% and 75% thresholds set out in the Law on Enterprises cannot be lowered, there are several options which may, in certain circumstances, provide further comfort or a limited level of control to a member or shareholder holding a 51% interest. As will be seen, however, none of these options provides the 'perfect' solution and foreign investors would be well-advised to understand the potential limitations on their ability to control a Vietnamese entity, despite holding a simple majority of its shares or interests.

Preference shares

As readers may recall from our January 2009 VLU, in a Shareholding Company it is possible to increase a foreign investor's voting position through issuance of non-voting dividend preference shares to the Vietnamese investors. This has the effect of increasing the foreign investor's voting percentage at the GMS. The downside of this approach (for the foreign investor) is that dividend preferences will have to be granted to the other investors and there remains the possibility that a Vietnamese court, which would likely be unfamiliar with such a structure, may question the bona fides of such an arrangement.

Another option for the foreign investor to enhance their GMS voting power is for them to be issued with 'voting preference shares', which carry more votes than an ordinary share. Again, this would have the effect of increasing the foreign investor's voting power at the GMS. This solution, however is not a long-term one as voting preference shares may only be held by founding

shareholders and are valid for a maximum period of 3 years, after which they revert to being ordinary shares.

Standing powers of attorney or voting agreements

Without changing the level of their shareholding or interest in the company, a foreign investor could also seek de-facto control over the Members' Council or GMS by entering into contractual arrangements with the other investors. For example, the Vietnamese investor could appoint the foreign investor as its attorney, empowering the foreign investor to exercise the Vietnamese investor's voting rights at the Member's Council or GMS. Alternatively, the Vietnamese investor could contractually agree to vote on certain matters in a pre-agreed way (for example, voting in favour of the appointment of the foreign investor's nominees for the Board of Management).

Unfortunately, such arrangements are unlikely to be foolproof guarantees of control, particularly if the Vietnamese investor fails to act in accordance with the pre-agreement, or seeks to vote at a Members' Council or GMS meeting despite the power of attorney. In practice, it is possible that the licensing authorities would reject a decision of a GMS or Members' Council attended by only the foreign shareholder, in spite of the power of attorney. This is even more likely if the Vietnamese investor raises an objection. There is also a risk that a Vietnamese court may refuse to enforce a contractual voting agreement on the basis that the agreement unreasonably fettered the Vietnamese investor's rights under the Law on Enterprises as a member or shareholder.

Obtaining majority control of the Board of Management and maximising its powers

Although not a way of delivering control of the GMS, for shareholding companies a different form of control may be obtained through control of the second decision-making body, the Board of Management. Votes of the Board of Management are determined by simple majority, with the Chair carrying a casting vote. Accordingly, an investor controlling a simple majority of the Board of Management (and the Chair if the casting vote is likely to be relevant) has control over all decisions of the Board of Management.

Of course, given that appointments to the Board of Management are determined by a complex 'cumulative' vote of the GMS, obtaining majority control of its members is not a straight-forward matter. Holding 51% of the shares will entitle the foreign investor to nominate up to 5 candidates for the Board of Management, but they will likely need to rely on the votes of the other investors at the GMS to ensure that a sufficient number of their candidates are appointed. To this end, they may seek pre-agreement from their fellow investors to vote in favour of their nominated candidates although such agreements would suffer from the same limitations as discussed above.

Assuming an investor does obtain control of the Board of Management and the Chair, that investor should also seek to maximise the decisions able to be made by the Board of Management without needing reference to the GMS. The fact that the Law on Enterprises reserves certain matters for the GMS alone further limits the overall level of control delivered by this means.

It is also worth noting that all members of the Board of Management are under a statutory obligation to exercise their duties in accordance with the legitimate interests of the company, rather than those of their nominating shareholder, and that in some circumstances related party rules may exclude certain members of the Board of Management from voting on certain transactions.

Making your nominee the General Director and maximising their powers

In both MLLCs and Shareholding Companies the General Director (who may also be the Chair of the Board of Management or Members' Council as well as the company's legal representative) controls the day-to-day decisions of the company, including any matters not specifically reserved by law or the charter to the Members' Council or GMS or, in the case of a shareholding company, the Board of Management.

Accordingly, if the General Director is a nominee of a 51% foreign investor, that foreign investor will gain de-facto control over these day-to-day decisions, subject to the General Director complying with their statutory duties.

In the case of a Shareholding Company, the General Director is appointed by the Board of Management. In the case of an MLLC, the General Director is appointed by the Members' Council, so pre-agreed voting arrangements may need to be relied upon to ensure appointment of the foreign investor's preferred candidate.

Again, this approach does not change the fact that a foreign investor holding 51% cannot control the GMS or Members' Council, but does provide a degree of control over the everyday decisions of the company.

3.3 Differing views on professional advisers

Foreign investors and lenders are often surprised to learn that their Vietnamese partners do not have any professional advisors assisting them on a joint venture or financing deal. They are often concerned that the absence of investment, legal and tax advice will delay the due diligence process and the negotiation and consummation of their deal in Vietnam.

They are also often surprised, and frustrated, when they learn that the business in which they are interested in investing is mixed in with other businesses conducted by the Vietnamese corporate group. Very few Vietnamese corporate groups separate their businesses, for example through separate companies and holding company arrangements. This necessitates carving out the chaff at the outset, which costs both time and money.

On the flipside, Vietnamese partners may be surprised to learn how many consultants and legal layers are typically involved in investment activities in developed jurisdictions. This extract from 'The Economist' (September 12 2009, page 71) highlights the point:

A member of a pension fund relies on trustees to manage the scheme. Those trustees pick a consultant, who selects fund managers who might buy structured products from an investment bank. If those products include mortgage-backed securities, then lenders, brokers, property valuers and estate agents will also be involved.

As the volume of international transactions continues to increase in Vietnam, it will be interesting to see if there is any change in either camp's views on this issue.

part 4 –

what's new online?

Subject categories in Vietnam Laws Online database

Vietnam Laws online database on www.vietnamlaws.com is an online searchable database of English translations of more than 3,400 Vietnamese laws relating to foreign investment and far beyond. Subscribers can search for legislation by subject category, keyword, date, issuing body, official number, legislation type, or advanced option. Translations can be viewed online, and also printed and downloaded (subject to terms and conditions). For English translations of Vietnam's legislation, past and current, subscribe to Vietnam Laws online database on www.vietnamlaws.com

Laws recently uploaded on the Vietnam Laws online database

- Circular 12 on safety of chemicals, 22 December 2006
- Decision 2435 with the master plan for development of the beer, spirits and soft drink industry, 21 May 2009
- Law 35 on liability of the State to pay compensation for loss caused by illegal acts of public servants, 18 June 2009
- Decision 96 on 50% VAT reduction, and CIT exemption for year 2009, for investment in residential housing for lease to students, for lease to workers in industrial zones, or for sale or lease to low-income earners, 22 July 2009
- Notice 232 on restructuring the electricity industry, 31 July 2009
- Decision 1315 approving the Plan for implementing the Framework Convention on Tobacco Control, 21 August 2009
- Circular 19 on foreign exchange control applicable to trading Government bonds denominated in foreign currency, 24 August 2009
- Decision 1399 with details of the legislative program for Year 2010, 28 August 2009
- Decree 72 on conditions for order and safety applicable to a number of conditional lines of business, 3 September 2009
- Draft Law on House and Land Tax, as discussed by the National Assembly Standing Committee, 9 September 2009
- Letter 3353 on deportation of foreign employees without work permits, 9 September 2009
- Decision 112 regulating functions and powers of the State Securities Commission, 11 September 2009
- Decision 1199 establishing Job Loss Insurance, 22 September 2009

The list above is merely a recent snapshot of the wide range of new legislation now uploaded and available on Vietnam Laws online through September 2009. To view all laws uploaded, please visit www.vietnamlaws.com

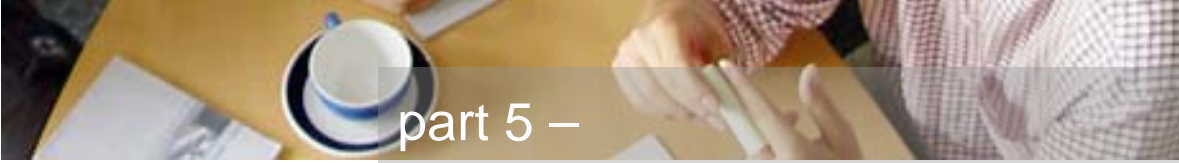
Client Updates

Several Client Updates are also available on the Vietnam Laws website. The most recent update covers the long-awaited Decree 53/2009/ND-CP on Issuance of International Bonds, which will, for the first time, allow Vietnamese companies to issue foreign currency denominated bonds in the international market. To read more, go to the Client Update at www.vietnamlaws.com

Search function for Vietnam Legal Update

All back issues of the Vietnam Legal Update from 1997 to the present are now available on www.vietnamlaws.com. There are two pages to the website's section on the VLU:

- Monthly VLU (for issues from April 2007); and
- Monthly VLU Archive (for issues prior to April 2007, back to September 1997).



part 5 – get to know us

In this section of the VLU, we shine the spotlight each month on a different lawyer from our Vietnam practice, to give readers a glimpse of who we are beyond the office. This month, our featured lawyer is Bill Magennis, the managing partner in our Hanoi office.



Bill has worked as a lawyer in Asia for almost 20 years, resident in Hong Kong and Vietnam. He has represented major foreign investors in the biggest projects in Vietnam and been involved with ground breaking transactions in direct investment and financing. He acts on both the foreign and the Vietnam side of transactions.

He lives in Hanoi with his wife Maureen who now divides her time between Hanoi and Melbourne.

They have one son Joshua, an Allens alumnus, who now works in London.

Bill is a regular attendee at rowing team reunions in Melbourne and is contemplating upgrading his current walks around West Lake to on the water excursions.

Quote from the source: "In the late 1980s, working in China from Hong Kong, I became fascinated with the concept of preparing international quality 'bankable' documents at the intersections of East meets West, Capitalist meets Communist and Developed meets Developing. Returning to Australia post Tiananmen I hooked up with a Vietnamese refugee, a former lawyer, and we came to a UNDP investment conference in HCMC in 1991. The seven hundred potential investors (and only a handful of lawyers) buzzing (some in a manic state) around Reunification Palace were a perfect kick-off platform to grow the China experience into a viable Vietnam legal practice. From the outset we partnered with the government to produce lovely plain English translations of business laws and since 1992 we steadily built up to a sixty person team, surviving the Asia Financial Crisis, SARS and Bird Flu. The GFC knocked us back a bit but signs of recovery abound and we look forward to continuing our exciting, cutting-edge legal involvements in the next phase of legal profession development in Vietnam."