

Vietnam Legal Update

August 2006

Hanoi Branch Office
Suite 401, Hanoi Tower
49 Hai Ba Trung
Hanoi
Vietnam
Tel +84 4 936 0990
Fax +84 4 936 0984
bill.magennis@phillipsfox.com

Ho Chi Minh City Branch Office
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@phillipsfox.com

Melbourne Office
Level 21, 140 William Street
Melbourne
Australia
Tel +61 3 9274 5000
Fax +61 3 9274 5111
maureen.mclaughlin@phillipsfox.com

www.vietnamlaws.com
www.phillipsfox.com

Adelaide
Brisbane
Canberra
Melbourne
Perth
Sydney
Auckland
Wellington
Hanoi
Ho Chi Minh City

Part 1 Selected New Legal Instruments

1.1	Urban zone developments	2
1.2	Environment	3
1.3	Education	6
1.4	Foreign employees - work permits	7
1.5	International treaties	8
1.6	HCMC land rent	9
1.7	Tax in petroleum sector	9
1.8	Land documents	10

Part 2 Features

2.1	Vietnam's new investment-enterprise regime:	
	> Phillips Fox seminar - with a difference	11
	> Latest draft investment decree	14
2.2	Franchising in Vietnam	16

Part 3 Did You Know?

3.1	National Assembly update	18
3.2	Land contribution to joint ventures	19
3.3	Groundhog day - reforming backwards?	
	> Representative offices	19
	> Voting rules for joint ventures	20
3.4	Who can be general director?	21
3.5	Cap on foreign equity in Vietnamese banks	22
3.6	Anti-money laundering update	22

Part 4 What's New on www.vietnamlaws.com?

>>>	NEW laws in Vietnam Laws Online Database	
>>>	NEW search function for Vietnam Legal update	23

Visit www.vietnamlaws.com:

- >>> to subscribe to (or take a free tour of) Vietnam Laws Online Database - searchable database of 3,000 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 2006 back to 1997 - complete with index of contents and new search function
- >>> to find out more about Phillips Fox's practice in Vietnam

This publication is copyright. Except as permitted under relevant laws, no part of this publication may be reproduced by any process, electronic or otherwise, without the specific written permission of the copyright owner. ©Phillips Fox, Vietnam Laws

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

Part 1 Selected New Legal Instruments

1.1 New urban zone developments

Circular 04-2006-TT-BXD of the Ministry of Construction dated 18 August 2006 Providing Guidelines on Regulations on New Urban Zones issued with Decree 02-2006-ND-CP of the Government dated 5 January 2006

Decree 02 provides guidelines on the organization and implementation of new urban zone development projects, from project inception, through construction, to project completion. Projects may be for development of completely new urban zones or development of existing urban areas, but must cover a land area of 50 hectares or more and involve integrated development of technical infrastructure, social infrastructure, residential areas and other service works. In some cases, a new urban zone project may have less than 50 hectares of land but the minimum area must be 20 hectares.

Investors in new urban zone projects must be enterprises with business registration for property business and with capital of at least 20% of the total capital for a project. Circular 04 clarifies that such capital requirement is calculated on the basis of the most recent year's financial statements. A newly established investor must provide bank confirmation of financial capacity.

Projects using 200 hectares or more are subject to appraisal by the provincial people's committee and investment approval by the Prime Minister. Other projects are subject to appraisal and approval by the provincial people's committee. Based on the land planning, the provincial people's committees will allocate or lease land to investors in accordance with land laws.

Investors in new urban zone projects may sell or lease land lots with developed infrastructure in new urban zones to secondary corporate investors. However, Decree 02 limits the sale of 'off-the-plan' housing by investors in new urban zones: article 23.2 states "it shall be strictly prohibited to use a project for residential housing *for which investment has not yet been commenced* in order to raise or appropriate capital of the purchaser of the house in any form". Circular 04 clarifies that the capital used to build housing projects in new urban zones may be raised on several occasions in accordance with contracts (ie contracts for sale and purchase of housing) between the seller and the purchaser. However, on the first occasion, the investor may only raise such capital *when it has completed site clearance and started technical infrastructure works*. Subsequent raisings of capital may be implemented in accordance with the schedule of construction and investment. At no time may the total amount of capital to be raised from a purchaser exceed 70% of the value of the contract for sale and purchase of housing.

The sale of 'off-the-plan' housing in which investment has commenced (ie where site clearance has been completed and technical infrastructure works commenced) is regulated under Law 56 on Residential Housing dated 29 November 2005 (article 39). The purchase and sale or lease of commercial residential housing may be conducted by way of payment in a lump sum or with deferred payment or by instalments. An investor may only raise capital by way of advance payments by persons wishing to purchase or lease residential housing *where the design of the residential housing has been approved and the construction of the foundations has been completed*. The total amount of money raised before delivery of residential housing to purchasers must not exceed 70% of the value of the residential housing specified in the contract. Circular 04 is consistent with Law 56.

Circular 04 is expected to become effective by mid- to late-September 2006.

1.2 Environment

Decree 80-2006-ND-CP of the Government dated 9 August 2006 Providing Detailed Regulations for Implementation of Law on Protection of the Environment

Effective as of 1 July 2006, the new Law 52 on Protection of the Environment dated 29 November 2005 updates Vietnam's environmental regulatory framework for the first time since 1993. Decree 80 provides guidelines for implementation of various aspects of the new regime. Some important aspects are highlighted below:

> Environmental standards:

Stricter regulations apply to areas surrounding nature conservation zones, areas with sensitive ecosystems, urban areas, concentrated residential areas, and areas in which the environment is already polluted.

Investors wishing to have input into development of standards should note that the Ministry of Natural Resources and Environment ("MoNRE") guides the methods for formulation of national environmental standards and presides over co-ordination with relevant ministries and branches to determine which standards need to be promulgated, then delegates the work of formulation of such standards to the relevant ministries, ministerial equivalent bodies and Government bodies, after which the MoNRE evaluates and promulgates standards (including what environmental standards are compulsorily applicable to each region, area and industry). In formulation of national environmental standards, reference must be made to relevant international standards and to standards of countries with similar conditions to those of Vietnam.

> Environmental impact assessment reports ("EIARs"):

The types of projects for which an EIAR must be prepared (total of 102) are listed in Appendix I to Decree 80, and include: all national important projects, all projects for construction of telecommunications establishments, industrial zones & urban zones etc, many light and heavy manufacturing facilities (depending on type and design capacity), most mining projects, many large-scale agricultural projects. Specific examples include: projects for construction of tourism/entertainment zone with area of 5 or more hectares; golf courses with 50 or more holes; hotels with 50 or more guest rooms; hospitals with 50 or more patient beds.

EIARs must be prepared concurrently with the feasibility study for projects. Detailed guidelines on contents of EIARs are expected to be issued by the MoNRE soon (to replace current guidelines under Circular 490, which dates back to 1998). Project owners may prepare EIARs themselves, or hire a consultancy organization to do so (in either case, the project owner is responsible for the data and results stated in the EIAR).

To be permitted to provide consultancy for preparation of EIARs, organizations must satisfy prescribed conditions in Decree 80 (EIARs for projects in national security and defence sectors and projects involving State secrets may not be prepared by such organizations). Of note, any entity outsourcing the preparation of an EIAR is responsible to check that the prescribed conditions are satisfied by the organization.

Where there is any change in the scale, content, time of commencement, implementation or completion of a project, the project owner must produce an explanatory statement for the EIAR-approving body; where necessary, an additional EIAR must be prepared.

EIARs must be submitted for appraisal (contents of application file for appraisal are prescribed in Decree 80; detailed guidelines are still to come). The MoNRE is responsible for establishing appraisal councils for appraisal of EIARs for projects approved by the National Assembly, the Government or the Prime Minister; and also for inter-branch or inter-provincial projects (as listed in Appendix II to Decree 80). Ministries, ministerial equivalent bodies or Government bodies are responsible for establishing

appraisal councils for appraisal of EIARs for projects within their respective decision-making authority (excluding inter-branch or inter-provincial projects under the MoNRE). Provincial-level people's committees are responsible for establishing appraisal councils for appraisal of EIARs for projects located in their respective localities and within the decision-making authority of their people's council.

The EIAR-approving body must consider complaints and proposals of concerned communities of the population, organizations and individuals.

Projects for which an EIAR is compulsory may only be approved and issued with an investment license, construction permit or operational permit after the EIAR is approved.

Project owners must:

- report the content of the decision on approval of the EIAR to the people's committee of the locality in which the project will be implemented;
- display publicly information on kinds of wastes, treatment technology etc at the location of the project for the reference of the local community;
- implement properly and fully the items of environmental protection in the EIAR and the requirements in the decision on its approval;
- report on performance and make written application to the EIAR-approving body for inspection and certification.

Project works may only be commissioned after the competent body has inspected and certified the performance of all requirements.

> Environmental protection undertakings ("EPUs"):

Any manufacturing, business or service establishment which is not subject to compulsory EIAR must make a written EPU, indicating: location, form and scale of manufacturing-business-services and raw materials and fuel used, types of wastes produced, and an "undertaking to apply measures aimed at minimizing and treating wastes and to comply strictly with the provisions of the law on environmental protection".

EPUs must be registered at the district-level people's committee (where necessary, they may authorize commune-level people's committees to do so). Only after issuance of a certificate of registration of EPU (certificate contents yet to be prescribed by the MoNRE) may manufacturing-business-services be commenced.

Any organization or individual making an EPU must implement it properly and fully. The relevant people's committee must direct, examine and inspect the implementation of the items stated in the EPU.

> Protection of the environment during manufacturing-business-services:

All project owners must comply with the provisions of the law on environmental protection; take environmental protection measures stated in their EIAR or EPU and comply with environmental standards; prevent and restrict adverse impacts on the environment caused by their own activities; overcome environmental pollution caused by their own activities; disseminate, educate and enhance the awareness of environmental protection of their employees; implement the regime of environment reporting and observe the regime of examination and inspection of environmental protection; and pay environment tax and environmental protection charges.

Decree 80 entitles "environmentally-friendly" establishments to State policies on incentives, preferences and assistance. An "environmentally-friendly" establishment is defined as one satisfying the following requirements:

- complies strictly with the law on protection of the environment and has been certified as satisfying environmental standards;
- has policies for product control throughout the entire process of the existence of the products and for control of waste matter which comply correctly with law, and in which more than 70% of the volume of waste materials is recycled or reused;
- has been issued with certificate ISO 14001 on environmental control and successfully applies such certification;
- saves more than 10% of raw materials, energy, fuel and water used as compared with general consumption levels;
- participates in and has made a positive contribution to the program for increasing public awareness of protection of the general environment and of the communal environment;
- the community in the locality of the establishment does not oppose its recognition as an environmental friendly establishment.

An "environmentally-friendly" product is defined as one satisfying one of the following requirements:

- a recycled product using waste material which satisfies the environmental standards;
- a product which readily decomposes after use;
- a product which does not cause environmental pollution and is manufactured as a substitute for natural raw materials;
- an organic agricultural product;
- a product which has been issued with an ecological label by a State-recognized organization.

➤ Public disclosure of information and data about the environment:

Responsibilities are as per authority to approve EIARs. Methods of public disclosure include mass media, websites, and notification at meetings of residents.

Decree 80 is expected to become effective by mid-September 2006 and will replace Decree 175 of the Government dated 18 October 1994, as amended 12 July 2004.

1.3 Education

Decree 75-2006-ND-CP of the Government dated 2 August 2006 Making Detailed Provisions for Implementation of a Number of Articles of the Law on Education

Effective as of 1 January 2006, Law 38 on Education dated 14 June 2005 updated Vietnam's education regulatory regime, replacing the old 1998 Law on Education. Decree 75 now provides guidelines for implementation of various aspects of the new regime.

As under the 1998 Law, the system of education of Vietnam generally consists of 4 levels: (i) kindergarten education, (ii) "general education", including primary education (grades 1-5), lower-secondary education (grades 6-9) and upper-secondary education (grades 10-12), (iii) vocational education, and (iv) university education, including undergraduate and post graduate education. There are also other forms of education for specific purposes, such as remote learning, continuing education, etc.

Notable aspects of the new regime include:

- > Primary education *and* lower-secondary education are compulsory as of 2006 (previously, just primary education was compulsory). Consistent with this reform, the entrance examination from primary school to lower-secondary school has been abolished. So, now, there are only 2 main entrance examinations, ie to upper-secondary schools and universities.
- > Fees other than school fees and entrance examination fees (such as fees used to build schools, fees used to set up school funds, etc) have been abolished.
- > The Ministry of Education and Training is no longer responsible to write textbooks used in schools and universities. Such responsibility is now vested in schools and universities. The Ministry of Education and Training only promulgates the framework curricula on which textbooks must be based, and approves textbooks based on inspection.
- > Autonomy of professional high schools, colleges, universities, master and doctorate degrees has been expanded to include the direct granting of degrees (previously, the Ministry of Education and Training granted degrees).
- > Provisions on foreign investment in education remain unchanged. The Government is responsible to issue regulations on co-operation with foreign countries in education and establishment of foreign-invested schools in Vietnam. The current law on this field is Decree 06 issued on 6 March 2000. It is not yet known whether the Government will issue a new decree to replace Decree 06 - given that the provisions on foreign investment in education are unchanged, it may not do so.

Decree 75 became effective as of 23 August 2006.

1.4 Foreign employees - work permits

Official Letter 2535-LDTBXH-LDVL of the Ministry of Labour, War Invalids and Social Affairs ("MoLISA") dated 26 July 2006 on Work Permits for Foreign Employees Working in Vietnam

Under Decree 105-2003-ND-CP of the Government dated 17 September 2003 on employment and administration of foreign employees working in Vietnam, foreign employees must have (amongst other things) "highly technical skills (including: engineers and persons of a standard similar to or higher than engineers; traditional trade artisans), and be very experienced professionally in production operation or management, or in management work which Vietnamese workers are not yet able to perform".

In Circular 04-TT-BLDTBXH of MoLISA dated 10 March 2004 providing guidelines for implementation of Decree 105, it was clarified that "foreign individuals with highly technical skills, very experienced professionally in production operation and management" means:

- (a) Foreign individuals with highly technical skills = engineers; people with qualifications equivalent to engineer or higher with a university graduate degree, master's degree or doctorate appropriate for the expertise or work required by the employer;
- (b) Foreign individuals being traditional trade artisans must have written certification from the competent body or organization in the country of their nationality;
- (c) Foreign individuals with many years of professional experience in production operation or management means at least five years experience, with the ability to undertake the work required by the employer, *and they must have written certification from the competent body or organization overseas.*

In response to an official letter from a Department of Labour, War Invalids and Social Affairs requesting guidance on the issue of professional experience of foreign employees, the MoLISA has advised in Official Letter 2535 that a foreign individual will only be granted a work permit if the individual has written certification from the competent body or organization overseas *and if this written certification has been consularized in accordance with article 5.1(e) of Decree 105*. Exemption from the consularization requirement may be available under the treaty on consulates or bilateral agreements between Vietnam and other countries. The list of member countries to the treaty on consulates with Vietnam with respect to documents in the application file for granting works permit for foreign employees was recently issued in Official Letter 1247-LDTBXH-LDVL of MoLISA dated 18 April 2006.

Official Letter 1227-LDTBXH-LDVL of the MoLISA dated 13 April 2006 on Work Permits for Foreign Employees Working in Vietnam

In Official Letter 1227, the MoLISA has advised the boards of management of industrial zones and export processing zones that, where a foreign employee has a work permit issued by the relevant authority in Province A (and such permit is still valid) and works for Company X in Province A, if this employee terminates his/her employment contract with Company X and starts working for Company Y in Province B (or an industrial zone or export processing zone in Province B), the work permit issued by the Province A authority will no longer be valid and Company Y and the foreign employee are responsible for applying for a new work permit in Province B.

1.5 International treaties

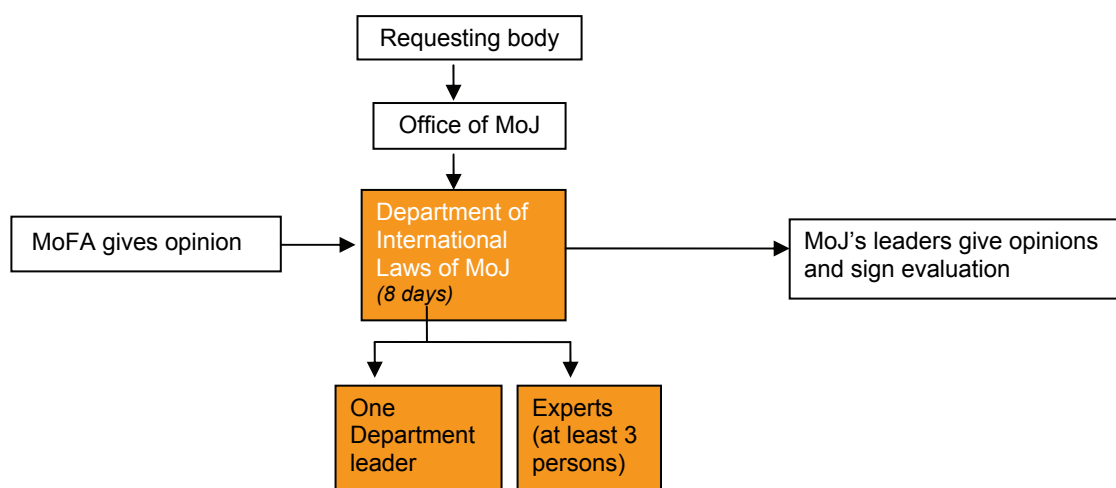
Decision 06-2006-QD-BTP of the Ministry of Justice dated 24 July 2006 issuing Regulations on Evaluation of International Treaties

As noted in our feature on [Vietnam's new investment-enterprise regime](#), international treaties are playing an increasingly important role in the development of the Vietnamese legal framework. Decision 06 deals with the evaluation of draft international treaties, including researching, reviewing, appraising the content and the form of international treaties to ensure the constitutionality thereof and the conformity thereof with Vietnamese laws; appraising the possibility of full or partial application of international treaties in Vietnam and proposing methods of amendment of, addition to, or cancellation of or issuance of new legal instruments to enforce international treaties.

The Ministry of Justice ("MoJ") is the body responsible for evaluation of international treaties upon receiving a dossier from the body requesting evaluation of an international treaty. The Minister of Justice is responsible to ensure the quality and timeframe of the evaluation of international treaties. The Deputy Minister of Justice responsible for international justice is responsible to assist the Minister in the evaluation. The Department of International Laws of the MoJ must coordinate with other relevant bodies of the MoJ to organize the evaluation. If necessary, other experts outside the MoJ may be invited to participate in evaluations.

An Evaluation Board is required to be established if (i) there are different opinions on the issue of accession as between the requesting body and the MoJ, the Ministry of Foreign Affairs ("MoFA") and relevant ministries; or (2) if the MoJ itself is the body requesting accession to an international treaty. Evaluation Boards must consider constitutionality; conformity with Vietnamese regulations; applicability of the treaty in full or in part; and need for amendment of, addition to, cancellation of or issuance of legal instruments to enforce the particular international treaty. If established, an Evaluation Board must consist of at least 7 members, including: Minister/Deputy Minister of MoJ (as Chairman of Board), Head/Deputy Head of Department of International Laws (as Secretary), and representatives of Office of Government, Office of President, MoFA and relevant ministries.

The procedure of evaluation is expressed in the following diagram:



Decision 06 became effective as of 15 August 2006.

1.6 HCMC land rent

Decision 107-2006-QD-UBND of the People's Committee of Ho Chi Minh City ("HCMC ") dated 17 July 2006 on Land Rent and Water Surface Rents in HCMC

According to the Land Law 2003, the HCMC People's Committee is required to proclaim publicly on 1 January of each year the land prices in HCMC ("Official Land Prices"). The Official Land Prices are used as the basis for calculating, amongst other things, land rent.

Under Decision 107, annual land rents range from 0.5% of the Official Land Prices for land in remote areas of HCMC (such as Nha Be, Cu Chi and Can Gio Districts) to 2% of the Official Land Prices for land in central areas of HCMC (such as Districts 1, 3 and 5).

However, Decision 107 provides for exceptions where the land rent will be calculated differently. For example, if land in Nha Be District is leased for agricultural production purposes, the land rent will be equal to 0.25% (rather than 0.5%) of the Official Land Prices.

The specific land rent for any specific case will be decided by (a) the Director of the Department of Finance of the HCMC People's Committee if the lessee is an economic organization, a Vietnamese residing overseas, or a foreign organization or individual; or (b) the Chairman of the People's Committee at the district level if the lessee is a household or a Vietnamese individual.

Water surface rents range from VND10 million to VND100 million/km²/year for projects using fixed water surface; and from VND50 million to VND250 million/km²/year for projects using unfixed water surface.

Decision 107 became effective as of 27 July 2006.

1.7 Tax in petroleum sector

Official Letter 2484-TCTTNNCN of the Ministry of Finance dated 13 July 2006 on Tax

In response to an enquiry from the HCMC Department of Taxation, the Ministry of Finance has advised in Official Letter 2484 as follows:

- > If a foreign individual does not reside in or have any commercial presence in Vietnam but has income generated in Vietnam, and this income is booked as an expense of a petroleum contract in Vietnam, the individual's income will be subject to Foreign Contractor Withholding Tax ("FCWT") in accordance with section III of Circular 05-2005 of the Ministry of Finance dated 11 January 2005 on the tax regime applicable to foreign organizations not having Vietnamese legal entity status and foreign individuals doing business or having income in Vietnam.
- > A foreign individual staying in Vietnam for less than 183 days within a tax year will be considered as a non-resident of Vietnam but will be subject to personal income tax ("PIT"). The individuals' taxable income will be the "total amount of income generated in Vietnam", irrespective of the location where the income is received is in Vietnam or overseas.

Where there is overseas income, the "total income generated in Vietnam" will be determined as follows:

$$\text{Total income generated in Vietnam} = \frac{\text{Number of working days in Vietnam}}{\text{Number of working days in a year(*)}} \times \left\{ \text{Salary/fees before PIT} + \text{Other taxable income (income before PIT) generated in Vietnam} \right\}$$

(* Total working days in a year is determined in accordance with the provisions of the Labour Code.)

- > A foreign party implementing a petroleum contract in Vietnam is recognized as a permanent establishment of a foreign organization in Vietnam. Any services provided by the head office and other group companies for the foreign party will be subject to FCWT and PIT in accordance with Circular 05.

1.8 Land documents

Inter-ministerial Circular 04-2006-TTLT-BTP-BTNMT of the Ministry of Justice and Ministry of Natural Resources and Environment dated 13 June 2006 Providing Guidelines on Notarization and Certification of Contracts and Documents on Exercise of Rights of Land Users

Circular 04 provides guidelines on the notarization and certification of a wide range of contracts and documents relating to the exercise of rights of land users ("Land Documents"). Land Documents include, amongst others:

- > contracts on exchange, assignment, donation, rent or sublease of land use rights;
- > contracts on mortgage of land use rights and/or assets attached to land; and
- > contracts on capital contribution using land use rights and/or assets attached to land.

Under Circular 04, it appears that parties concerned in a land-related transaction have greater latitude to prepare their Land Documents in their own way provided that the contents of such Land Documents do not breach Vietnamese law and are not contrary to social ethics. Sample Land Documents are issued with Circular 04 for "reference" purposes. This reform should alleviate the delays experienced by parties seeking notarization of Land Documents as, to date, the Ministry of Justice's notary has generally required Land Documents to conform to standard forms and, as a result, often required submitted Land Documents to be amended to conform with such standard forms.

Circular 04 also provides detailed guidelines on (i) application files for request for notarization of Land Documents, (ii) the order for notarization of Land Documents, and (iii) the procedures and order for certification of Land Documents in industrial zones, high-tech zones, etc.

Circular 04 became effective as of 2 August 2006.

Part 2 Features

2.1 Vietnam's new investment-enterprise regime

>>> *On 8 August in Hanoi and on 9 August in HCMC, Phillips Fox held a seminar with a difference - a mock negotiation based on Vietnam's new investment and enterprise laws. Below are the key messages from our seminar, followed by extracts from our script to highlight the importance of international treaties in Vietnam's new investment-enterprise regime. We encourage you to view the full version of our script, slides and handouts at www.vietnamlaws.com.*

Key messages:

- > Foreign and domestic investors are not equal but will become more equal over time.
- > Foreign investors face many sectors subject to conditions.
- > To identify conditional sectors and the conditions, one must become an international treaties expert: relevant provisions may soon occupy more text than the whole Investment Law and its implementing decree (see [below](#) for more).
- > Sometimes, it may be difficult to group businesses in one company due to differential conditions on joint venture ownership ratios.
- > Restaurants and some other businesses are still probably not allowed in practice although investors from non-WTO countries can argue to the contrary.
- > Do not overlook the possibility of avoiding the investment certificate regime by going down the indirect investment route.
- > Consider a structure based around the liberated management contract.
- > Watch holding company developments.
- > The 75%/65% voting regime upsets all existing joint ventures where the foreign investor has less than 65%/75% ownership.
- > The best option (apart from securing 65%/75% ownership) to neutralize the effect of 65%/75% voting rule is the shareholding company with a simple majority voting at the board level.
- > Beware members' councils may be limited to two individuals.
- > Query if a company can have licensed but un-issued capital for later expansion and query when capital must be paid up.
- > Still no land mortgages for foreign lenders.
- > More contracts can have international arbitration.
- > Foreign governing law is a clearer possibility.
- > Beware the unfortunate proposal in Draft 18 of the Investment Decree for Vietnamese language to prevail in contracts.

Extract from seminar script on international treaties in the investment context:

... a very general overview about international agreements, how they currently impact investment rights and how they potentially impact investments once Vietnam joins the WTO. We are spending a lot of time on this issue today, because we think this is an extremely important point for investors going forward.

The fundamental point is that *legally* Bill [who represented an aspiring foreign investor in the mock negotiation] might have been justified to ignore the references to international agreements quoted by Hop [who represented a Vietnamese investor] because:

- (a) technically, no such international agreement applies to the proposed investment [under mock negotiation] and
- (b) any such application can be avoided by the foreign investor incorporating in another country without any international agreements with Vietnam, such as BVI.

However, what Bill needs to understand is that technical law will not necessarily provide a solution nor give foreigners a level playing field.

I [the seminar moderator] will try and explain how the system works.

1. Vietnam is a party to international agreements that have commitments to open up sectors to international investment. These agreements include the US-Vietnam BTA, the Japan-Vietnam BTA and the Early-Harvest Agreement with the EU.
2. Already (but in most cases only theoretically) some of the commitments contained in those agreements may impact investors from other countries (eg Australia), if Vietnam has granted Australia most-favoured nation (MFN) status.
3. MFN status, simply put, means that if Vietnam gives a better deal to another country (eg the US) on a subject to which Vietnam and Australia have agreed to apply MFN, then Australia automatically gets that better deal. Vietnam has currently granted 87 countries MFN of one kind or another. Sometimes MFN only applies to import/export of goods, other times MFN may apply to investments.
4. As we are all aware, Vietnam is negotiating to become a member of the WTO. As part of its negotiations, Vietnam had to conclude bilateral negotiations with 28 WTO member countries. All of these bilateral negotiations are now finished and signed. Bilateral negotiations are in confidence and are not released to potential investors. This is interesting because, when Vietnam accedes to the WTO, the contents of these negotiations are what Vietnam will consider the “conditions” on investment. So how do investors know what conditions apply if they cannot readily access these agreements?
5. Well, when Vietnam joins the WTO, due to MFN, *all* (some 150) WTO member countries will benefit from whatever are the best terms negotiated by these 28 countries as recorded in Vietnam’s *Schedule of Concessions on Trade in Services*. This is how investors find out the conditions.
6. In relation to investment, the WTO is limited to investment arising from “Trade in Services”, so other international agreements (eg the US BTA) will continue to have some application in relation to other aspects of investment.

The complicated issue in Vietnam is this: international agreements are commitments to open up sectors. That is, they assume that there are restrictions on foreign investment in national law and the commitment contained in the international agreement is a better (or same) position than national law. However, the Investment Law and draft Decree on Investment do not contain any restrictions on foreign investment in the conditional sectors. They are silent on the conditions – and instead refer to and rely on international treaties to be the restrictions. That is, rather than an international treaty being the source of liberation of a sector, it is now a source of the restrictions on a sector. International treaty obligations are being used back to front.

As a result, a legal argument arises that because there are no restrictions in the Investment Law and because the Investment Law contains commitments to equal treatment between Vietnamese and foreign investors, then no restrictions at all apply to investors from countries that (a) do not belong to WTO or have not otherwise been granted MFN status by Vietnam and (b) do not have their own bilateral trade agreement with Vietnam that applies to sought-after investment.

In practice, we assume Vietnam will apply the “restrictions” contained in international agreements to all investors, regardless of which country they are incorporated in.

Therefore, to determine if the sector that you want to invest in is conditional, an investor must first check national laws to see if any conditions apply. Under the Investment Law and Enterprises Law, no conditions are currently specified (although this may change in the implementing decrees, but not in the drafts to date).

If there are conditions in national laws, those conditions apply to the investment provided that they are not inconsistent with any international treaty.

If there are no conditions in national laws, a foreign investor must begin an analysis of international agreements. The first issue is: does the foreign investor’s country of incorporation have an international agreement with Vietnam (this international agreement may be the WTO accession agreement after Vietnam accedes). If yes, the foreign investor has to do 2 things:

- > First, the foreign investor must look at the relevant international agreement (such as the US BTA or WTO agreement) and see if any restrictions on the sector exist.
- > Second, the foreign investor must check if the relevant country has been afforded MFN by Vietnam (via the WTO or otherwise). If it has, then all international agreements must be checked for conditions.

If the desired investment sector is listed in one of the applicable international agreements, then the investor has an enforceable right to be able to invest in that sector, subject to the conditions contained in the relevant international agreement and subject also to any requirements in national laws, (eg there may be a minimum capital requirement).

If the foreign investor’s country of incorporation does not have an international agreement, things get a little more interesting. Theoretically, the foreign investor can argue:

- > There are no conditions applicable (either in national laws or international agreements); therefore
- > Article 4.1 of the Investment Law allows the foreign investor to invest in that sector.

In practice, we assume that Vietnam will apply the conditions contained in the international agreements to all foreign investors, regardless of their country of incorporation, and regardless of whether that country has an international agreement with Vietnam.

>>> On 21 August 2006, the Ministry of Planning and Investment ("MPI") submitted its latest draft (expected to be the penultimate draft) of the proposed decree for implementation of the new Investment Law to the Government. Below we look at the major change under Draft 21 and the key comments of the MPI in its accompanying submission to the Government.

Draft 21:

The major change under Draft 21 relates to authority to approve investment projects. Back in May, the MPI clawed back quite substantial investment approval authority, both from the Prime Minister ("PM") and from provincial-level people's committees. Until Draft 10, all projects not subject to PM approval were subject to investment approval by the provincial-level people's committee or zone management committee (except, of course, those subject to simple investment registration). In Draft 10, the MPI took over investment approval authority over projects in (ii) with a capital level between VND800 and VND1500 million. In Draft 12, the MPI took back investment approval authority over all "other projects" (ie not projects in (i) and (ii) above) with a capital level over VND800 million. In Draft 12, it was proposed that provincial-level people's committees and zone management committees would have investment approval authority only over "other projects" with a capital level under VND800 million.

Investment approval authority under Draft 12, in May 2006:

<i>Prime Minister</i>	<ul style="list-style-type: none"> - Projects regardless of capital within specified sectors, such as: airports, national seaports, petroleum exploration & production, telecommunications, postal services, radio, tertiary education; and foreign invested projects for construction of houses for sale - Projects with capital over VND1,500 billion in energy, mining, petroleum processing; recreation, tourism, cultural or sports resorts; railways & roads (<i>newly added</i>), alcohol, beer & soft drink production - All projects with capital over VND3000 billion <p>(For all projects approved by the PM, MPI to issue certificate)</p>
<i>MPI</i>	<ul style="list-style-type: none"> - All 'other' projects (ie not within above) with capital over VND1,500 billion - All 'other' foreign invested projects with capital over VND800 billion
<i>People's committees/ management committees of zones</i>	<ul style="list-style-type: none"> - All projects not within authority of PM or MPI

Generally, the above hierarchy of investment approval authority was retained right up to Draft 19 at the start of August. Since then, the MPI seems to have had a massive change of heart - now, it has reverted to a pre-Draft 10 approach. Under Draft 21, once again, all projects not subject to PM approval are subject to approval by the provincial-level people's committee or zone management committee (except those subject to investment registration). The MPI has not even retained its role as a certificate-issuing body for projects within PM approval authority. Now, all investment certificates are issued by the provincial-level people's committee or zone management committee. The only exception is that line ministries retain their investment approval authority and certificate-issuing role for projects within specialized sectors (eg banking, insurance).

Investment approval authority under Draft 21, as at end of August 2006:

<i>Prime Minister</i>	<ul style="list-style-type: none"> - Projects regardless of capital within specified sectors, such as: airports, national seaports, petroleum exploration & production, telecommunications, postal services, radio, tertiary education - Projects with capital over VND1,500 billion within specified sectors, such as energy, mining, petroleum processing; railways & roads, alcohol & beer production - Projects with foreign invested capital regardless of capital within specified sectors, such as sea transportation, post and delivery services, telecommunications, press & publishing, scientific research establishments
<i>People's committees/ management committees of zones</i>	<ul style="list-style-type: none"> - All projects not within authority of Prime Minister

MPI Submission:

Key notes of the submission are:

- > With respect to the MPI's non-involvement in investment approval or certificate issuance, the MPI explains that it will focus on its function as the State administrative body for investment. The MPI will build laws and policies relating to investment and solve problems raised by the investors.
- > Outstanding issues on which the MPI seeks the Government's opinions are:

- Scope of application:

Article 47.3 of the Investment Law states that: "With respect to important national projects, the National Assembly shall decide on the policy for and shall provide regulations on the criteria for these projects, and the Government shall provide regulations on the order and procedures for evaluation and for issuance of investment certificates".

The MPI has not included any provisions relating to this issue in the draft investment decree for the reason that the MPI's position is that the Government will rely on the National Assembly's Resolution 66 to provide specific guidelines for important national projects in separate legislation.

- Definition of "foreign invested enterprises":

The MPI is aware that some commentators hold the opinion that it is necessary to determine the investment and business right of a foreign invested enterprise. If the particular ratio of capital owned by foreign investors in enterprises is not determined, the consequence is that an enterprise having capital of foreign investor accounting for only 5-10%, can also be regarded as a foreign invested enterprise, and therefore, that enterprise will be restricted in business rights in the conditional sectors applicable to foreign investors such as banking, insurance, marine, distribution, advertising, real estate business... The MPI's view is that foreign invested enterprises are defined in the Investment Law, the provision in the Investment Law should be kept unchanged, and there is no need to have an additional definition in the investment decree.

- Foreign invested shareholding companies:

The MPI is aware that some commentators hold the opinion that there should be specific requirements with respect to minimum foreign capital in the case of establishment of a foreign invested shareholding company. The MPI's view is that the provisions in the draft investment decree are satisfactory and that it is obvious that the investor will raise capital overseas (and also technology and experience in management will be considered invested capital).

- Conditional sectors:

The MPI is aware that some commentators hold the opinion that the list of sectors in which investment is conditional issued with the investment decree does not describe in detail the conditions which investors have to satisfy nor does it provide reasons why these conditions apply, with the result that investors, especially foreign investors, cannot understand clearly which measures of restriction will apply.

The MPI's view is that the list of sectors in which investment is conditional applicable to foreign investors is based on the commitments in international treaties to which Vietnam is a member and the commitment in WTO agreements. However, the MPI appears to recognize the need for more clarity. The MPI proposes that, after Vietnam becomes a WTO member, regulations on particular measures will be announced. However, in the interim prior to the official announcement of measures of market opening, investment projects will have to undertake administrative steps such as obtaining the opinion of the Ministry of Trade and specialized ministries in order to implement investment projects. The MPI and the Ministry of Trade will provide provisional guidelines on the application of international treaties but same will not be regulated in the investment decree.

2.2 Franchising in Vietnam

Since its inception some 50 years ago, the franchising concept has been described as everything from "phenomenon (and) marketing miracle" to "wonder industry (and) fiasco"¹. Franchising has allowed many companies with character and a unique culture to rapidly expand - without the onerous task of raising capital, investing time and other limited resources - resulting in outstanding sales revenues and market share. Many industries have success stories - restaurants, petroleum, hotels - that revolve around the franchising concept.

Where is Vietnam in all of this?

Only a few years ago, franchising as a concept did not even exist in Vietnam. Previously deterred by government restrictions on royalty payments for technology transfer agreements, including franchise licence agreements, foreign franchisors did not consider the commercial opportunities significant. Until 2006, there were no specific laws regulating franchising activities in Vietnam.

But all of that is changing

Consumer and economic conditions in Vietnam appear to be developing favourably for the entry of franchising into Vietnam. Home-grown franchises, Trung Nguyen (coffee), Kinh Do (bakery) and Pho 24 (restaurant), AQ Silk (retail) are developing. International franchises, Kentucky Fried Chicken, Swatch, Clinique, Baskin-Robbins, Lotteria (of Japan) and Jollibee (of the Philippines) are here, and more are on the way.

Against this background, a new legal framework specific to franchises has been introduced. It consists of:

- > Chapter 6, Section 8 of the Commercial Law 2005 (effective as of 1 January 2006);
- > Decree 35-2006-ND-CP of the Government dated 31 March 2006 Making Detailed Provisions For Implementation of the Commercial Law with Respect to Franchising Activities;
- > Circular 09-2006-TT-BTM of the Ministry of Trade dated 25 May 2006 Providing Guidelines on Procedures for Registration of Franchising Activities.

Franchisors still have to wait for issuance of legal instruments from the Ministry of Finance regulating the fees for registration of franchising activities and the tax treatment of franchise arrangements.

What do franchisors do about tax in the interim?

Officials from the Ministry of Finance have informed us they will continue to apply Circular 05-2005-TT-BTC of the Ministry of Finance dated 11 January 2005 to inbound franchises (ie where the franchisor is an offshore entity and the franchisee is a Vietnamese entity). Franchising activities are classified as "income from royalties", attracting a corporate withholding income tax rate of 10% of taxable turnover (the highest CIT rate stipulated under Circular 05). In the case of outbound franchises and domestic franchises, we assume that licence fees received under the franchise contract will be considered income of the franchisor, and taxable at the normal CIT rate of 28%. However, other aspects of the franchise agreement may attract different taxes, eg if the franchisor supplies goods to the franchisee and charges for this supply, such supply will attract VAT. This should be clarified (and may be changed) in the Ministry's circular on franchising taxes.

Still highly relevant to protect the know-how and intellectual property of franchisors are the laws on technology transfer and intellectual property, which have gone/are going through a period of revising and updating:

- > Law 50-2005-QH11 of the National Assembly dated 29 November 2005 on Intellectual Property (effective 1 July 2006);
- > Law on Technology Transfer, which is currently being re-drafted after its initial consideration at the May-June 2006 National Assembly Session and is scheduled to be approved at the October-November 2006 National Assembly Session.

Here are our top 10 points on franchising under Vietnam's new franchising legislation:

1. The franchisor must register its activities with the relevant body (the draft provision that every individual franchise contract be registered was, thankfully, not adopted). The type of franchise determines the relevant body to register the franchising activity with. In the case of foreign franchisors (and in the case of franchising from Vietnam to offshore), registration is conducted at the Ministry of Trade. In the case of domestic franchising, registration is conducted at the Department of Trade of the relevant province or city.
2. Franchisors must prepare a franchise description document, which must follow the form contained in Circular 09. This description document is used as part of the registration of activities referred to in point 1. This is a three page form requiring many details, including information about the franchisor, intellectual property rights, initial costs of the franchisee, other financial obligations of the franchisee, initial investment of the franchisee, obligations of the franchisee to buy or lease equipment, obligations of the franchisor, the market, the franchising contract and the franchising system. The current financial statements of the franchisor must also be provided. Many franchisors have their own form of a franchise description (disclosure) document that they provide to potential franchisees. It is not clear whether, as a matter of practice, the registration authorities will accept these documents (provided that the document contains all the information required by Circular 09), or whether the franchisor will have to amend their internationally applied disclosure document to follow strictly the form and structure of Circular 09. In addition, the description document must be given to potential franchisees at least 15 days before the franchise agreement is signed, unless the parties otherwise agree.
3. Even though it does not have to be registered with the authorities, the franchise contract must be in Vietnamese, unless the franchise is from a Vietnamese franchisor to a franchisee abroad. This provision has been criticized, in particular by foreign franchisors establishing a franchise system in Vietnam who want to use their international standard documents and not bear the expense of translating them.
4. If the franchise includes licensing of industrial property rights, such as use of a trademark, such licensing must be done separately and additionally in accordance with Vietnamese industrial property laws. It is advisable in such cases to have a separate licensing agreement, not just have provisions contained in the franchising agreement.
5. If the information registered via the franchise description document changes and it relates to the franchisor or the trademark/industrial property rights, such change must be notified to the relevant registration body within 30 days. Otherwise, franchisors should report annually on the information contained in the franchise description document.
6. Sub-franchising is permitted. In addition to the franchise disclosure document, a sub-franchisor must provide the sub-franchisee with certain prescribed information, including details and contents of the master franchise agreement.
7. The term of a franchise contract and the franchising fee is open to negotiation by the parties (the draft provision for a statutory minimum duration of 5 years was not adopted).
8. The franchised business system must have been in operation for at least one year, which excludes start-up companies from immediately franchising their new concept. In the case of a foreign franchisor granting a primary franchise to a Vietnamese business entity, such Vietnamese business entity must operate the franchise business in Vietnam for at least 1 year before sub-franchising.
9. The franchisee must be legally established and must have business registration appropriate for the franchise business. For example, if the franchise involves opening a restaurant, the franchisee must be permitted to do this activity.
10. The franchisee may only assign the franchise with the permission of the franchisor. However, the franchisor can only withhold its permission in certain specified situations.

>>> *Phillips Fox assisted the Ministry of Trade in relation to drafting Vietnam's new franchising legislation. For translations of Vietnam's new franchising legislation, subscribe to Vietnam Laws Online Database on www.vietnamlaws.com.*

Part 3 Did You Know?

3.1 National Assembly update

In preparation for the 10th Session of the National Assembly's Legislature XI in October-November 2006 (scheduled to commence on 17 October and run for 36 days), the National Assembly's Standing Committee ("NASC") met from 8-28 August to consider the following draft laws scheduled for promulgation:

- > Law on Residence
- > Law on Notarization
- > Law amending the Law on Organization of the National Assembly
- > Law on Amendment of and Addition to the Labour Code (in relation to strikes and resolution of strikes)
- > Law on Labour Export
- > Law on Occupational Training
- > Law on Tax Administration
- > Law on Dykes
- > Law on Organ Transplant
- > Law on Technology Transfer
- > Law on Gender Equality
- > Law on Physical Education and Sports
- > Law on Associations:

The right of association of Vietnamese citizens is enshrined in Vietnam's 1992 Constitution. Article 69 of the Constitution states "The citizens shall enjoy freedom of opinion and speech, freedom of the press, the right to be informed and the right to assemble, form associations and hold demonstrations in accordance with the law." But it's taken 11 drafts to create the proposed Law on Associations. The proposed Law provides that membership of any association and participation in its activities must be voluntary, regular, autonomous and accountable before the law; and any association must be self-financing and not-for-profit and must comply with the law and its own regulations. The not-for-profit requirement was debated by NASC delegates, perhaps due to a misunderstanding of the meaning of 'not-for-profit' (which permits the generation of profits just not the distribution of such profits for any purpose other than the activities of the association). Also debated was the scope of the law; and it was proposed that the law should regulate all types of associations, regardless of their legal entity status, but must define clearly the types of associations that must be registered. The simplification of administrative procedures for the formation of an association was also on the agenda. Of note, it was agreed that the Fatherland Front should be governed separately under a Law on Fatherland Front.

- > Code on Enforcement of Judgments:

The Code regulates enforcement of judgements in 3 different sectors: criminal, civil and administrative. It was agreed by NASC delegates that there will need to be three separate implementing laws. There was no agreement on whether enforcement of criminal judgments should remain with the Ministry of Police or whether the Ministry of Justice should be responsible for enforcement of judgments in all 3 sectors with establishment of a specialist enforcement branch under the Ministry of Justice.

3.2 When can a Vietnamese company contribute land to a joint venture?

Although the "new" Land Law 2003 has been in effect for over 2 years, there remains a great deal of confusion regarding the form of title to land that a Vietnamese company must hold in order to be able to contribute that land to a joint venture ("JV") with a foreign partner. The most common mistake is the assumption that a Vietnamese company which *leases* land from the State may contribute that land to a JV. This is usually incorrect. Usually, the land must be *allocated*, not *leased*, from the State.

In summary, according to the Land Law 2003, a Vietnamese company may only contribute land to a JV where:

- > the company has been *allocated* the land by the State and has paid *land use fees* (not *land rental*) fully in advance, with monies *not* sourced from the State budget (this last condition may be an issue for some State owned enterprises, which often hold the best land sites);
- > the company originally leased the land from the State, but *converted* such title to allocation, and paid land use fees fully in advance, with monies *not* sourced from the State budget;
- > the company originally received an allocation of the land from the State, but without any obligation to pay land use fees (eg agricultural land), and then *converted* the land use purpose (eg to commercial land) and paid land use fees fully in advance, with monies *not* sourced from the State budget;
- > the company has leased the land from the State since before 1 July 2004, and paid land rental fully in advance;
- > the company received a transfer of land use rights from a person/company to which the land had been allocated, and the transferee paid the purchase price with monies *not* sourced from the State budget.

3.3 Groundhog day - reforming backwards?

In *Groundhog Day* - a popular American movie - the lead actor, Bill Murray, wakes up every morning to find that he is living the same day, over and over again. You could be excused for feeling a little bit the same in Vietnam at the moment. Back in 1995, licenses for representative offices had a limited duration and control of joint ventures required a 2/3 majority. After some reform over the last two decades since "doi moi", we are now back to almost exactly the same situation.

> **Groundhog day - representative offices ("ROs"):**

Effective as of 14 August, the new RO regulations issued under Decree 72-2006-ND-CP of the Government dated 25 July 2006 re-impose a cap on the licensed duration of ROs. A cap on RO duration applied under the RO regulations issued with Decree 82-CP of the Government dated 2 August 1994 (and its predecessor Decree 382-HDBT of the Council of Ministers dated 5 November 1990, and its predecessor). But the cap was abolished by Decree 45-2000-ND-CP of the Government dated 2 September 2000, and that trend has been followed ever since for ROs in other sectors. But now, the cap's back. It's small comfort but at least the cap is set at 5 years, not the 3-year cap that applied pre-2000 (and was proposed to be re-applied in an early draft of Decree 72). And, as pre-2000, RO durations are extendable.

Over the page, we track the "development" of RO licensing in Vietnam...

(For more on Decree 72, see [3.4 below](#) and the July 2006 Issue of Vietnam Legal Update on www.vietnamlaws.com)

RO licensing:	1988 (Decree 199)	1990 (Decree 382)	1994 (Decree 82, as amended)	2000 (Decree 45)	2006 (Decree 72)
<i>Conditions and documents required for foreign RO applicants</i>	<ul style="list-style-type: none"> • Application • Documents on legal status • CV of RO staff • Bank letter showing capital of RO applicant 	<ul style="list-style-type: none"> • Application • Documents on legal status • Bank letter showing capital of RO applicant 	<ul style="list-style-type: none"> • Application • Documents on legal status • Bank letter showing capital of RO applicant • Must have been operating for at least 5 years 	<ul style="list-style-type: none"> • Application • Documents on legal status 	<ul style="list-style-type: none"> • Application • Documents on legal status • Financial report of most recent year • Must have been operating for at least 1 year
<i>Duration of ROs</i>	5 years	3 years	3 years	Indefinite	5 years

> Groundhog day - voting rules for joint ventures ("JVs"):

Voting majority rule	Law on Foreign Investment 1987 (as amended 1990, 1992)	Law on Foreign Investment 1996	Law on Foreign Investment 1996 (as amended 2000)	Law on Enterprises 2005
<i>Unanimous (100%)</i>	(i) Orientation of operation and business plan; (ii) Amendment of the JV's Charter; (iii) Appointing and dismissing Board Chairman, General Director, Deputy General Director and other management personnel of the JV.	(i) Appointing and dismissing General Director, first Deputy General Director, and Chief Accountant; (ii) Amendment of the JV's Charter; (iii) Approval of annual budget and finalization of project works; and (iv) Investment loans.	(i) Appointing and dismissing General Director, first Deputy General Director; (ii) Amendment of the JV's Charter.	NA
<i>75%</i>	NA	NA	NA	(i) Sale of assets valued at 50% or more of total value of assets of the JV, or smaller percentage as stipulated in the JV's Charter; (ii) Amendment of the JV's Charter; (iii) Re-organization or dissolution of the JV.
<i>2/3 or 65%</i>	For all other matters	NA	NA	(i) Orientation for development of the JV; (ii) Appointing and dismissing Chairman and General Director; (iii) Approval of annual financial report.
<i>Simple majority (51%)</i>	NA	For all other matters	For all other matters	NA

3.4 Who can be general director of a Vietnamese company?

Under the Law on Enterprises 2005, effective as of 1 July 2006:

- > Generally, a general director must have relevant professional education or practical experience. This is not required where an owner holding 10% or more interest in a limited liability company ("LLC") or shareholding company ("SC") holds the position of general director.
- > In all cases, if the general director is also the legal representative of a LLC or SC, the general director must be resident in Vietnam (not a Vietnamese citizen, just resident in Vietnam).
- > In the case of a one member LLC, the general director must not be a "related person" of the chairman of the LLC, of a member of the member's council of the LLC, or of the person authorized to appoint the chairman or the members of the members' council. (This restriction does not apply to the general director of a multi-member LLC.)
- > In the case of a SC, the general director must not concurrently be the general director of any other company in Vietnam. The term of office of the general director of a one member LLC or a SC must not exceed 5 years but may be renewed.

Under Decree 72-2006-ND-CP of the Government dated 25 July 2006 on Representative Offices ("ROs"), effective as of 14 August 2006:

- > The chief representative of a RO may not concurrently hold a number of other positions, including legal representative of a Vietnamese company. The legal representative is designated in the charter of the company and may be either the general director or the chairman of the company. So, where the general director of a Vietnamese company is also its legal representative (most common scenario), any person who is the chief representative of a RO is not eligible as general director.

For those foreign companies looking to expand their operations in Vietnam from RO to LLC or SC, this restriction is a significant obstacle. By way of example, many foreign consumer products companies initially entered the Vietnamese market by establishing a RO to manage the trading and distribution of imported finished consumer products (through local import and distribution companies). Many such companies retained their ROs even when they obtained investment licenses to establish Vietnamese companies to manufacture their products here, as their manufacturing licenses did not extend to trading their products. So their ROs continued to manage the trading and distribution of imported finished consumer products. Now, under Decree 72, such companies face an additional cost and administrative burden as they must employ 2 different people - 1 to be chief representative of their RO and 1 to be legal representative of their Vietnamese company.

(For more on Decree 72, see 3.3 above and the July 2006 Issue of Vietnam Legal Update on www.vietnamlaws.com)

>>> Stop press: Name of general director - specified or not in investment certificates?

According to Guidelines 5495 of the Ministry of Planning and Investment dated 26 July 2006, the name (and some other details) of the legal representative of a LLC or SC will be specified in its investment certificate (similar to the former "investment license", combining establishment of the company and approval for it to undertake certain specified activities only). Usually, that will be the person who is going to be the general director of the LLC or SC (or less commonly, its chairman). Reportedly, the Ministry of Planning and Investment has decided not to specify the details of the legal representative in investment certificates, despite what the law says. Perhaps this is because, if it does so specify, it would need to register every change in general director - an onerous task, especially if added to the mountain of paperwork that is already confronting the Ministry, courtesy of the current confusion and delays surrounding approval of new investment projects (and old ones that were not licensed by 30 June 2006).

3.5 Cap on foreign equity in Vietnamese banks

The wait continues for the much anticipated revision of regulations on foreign share purchases in Vietnamese banks (which was scheduled to be finalized by the end of June 2004 under Decision 109-2004-QD-NHNN of the State Bank of Vietnam dated 30 January 2004). However, Vietnam appears to be one step closer – it is reported that the State Bank submitted the draft decree to the Government for approval in mid-August. Despite recent debates and calls from foreign investors to raise foreign equity holdings, it appears that total foreign holdings in a Vietnamese bank will continue to be capped at 30% of which:

- > A strategic investor (undefined) being a foreign credit institution can take up to 20%;
- > An investor being a foreign credit institution can take up to 10%;
- > Foreign investment fund managers can take up to 5%.

Total foreign holdings in a Vietnamese bank remain capped at 30% even if the Vietnamese bank is listed. According to reported interviews with the State Bank Governor, Le Duc Thuy, the 30% limit is consistent with WTO commitments made under Vietnam's bilateral accession agreements.

3.6 Anti-money laundering update

In time for the first anniversary of Vietnam's anti-money laundering regime, which fell on 1 August 2006, the personnel (5 in total) and infrastructure for the Anti-Money Laundering Center ("AMLC") established under the State Bank of Vietnam have now been finalized and the AMLC is in operation.

Under Decree 74-2005-ND-CP of the Government dated 7 June 2005 Against Money Laundering, money laundering is defined as conduct of an individual or organization seeking a way to legalize money or assets obtained as a result of crime, via the following specific acts such as (i) participating, either directly or indirectly, in a transaction involving money or assets obtained as a result of crime, (ii) receiving, appropriating, transferring, converting, assigning, transporting, using or carrying across a border money or assets obtained as a result of crime, and (iii) investing in a project or construction works, contributing capital to an enterprise, or seeking another way to conceal, camouflage or hinder verification of the true source and nature or of the sites and process of the movement of, or of the ownership of money or assets obtained as a result of crime.

Individuals and organizations facilitating monetary or other asset transactions (including financial institutions, such as credit institutions, money brokers, securities companies, gold dealers, insurance companies, representatives of foreign financial institutions; casinos; real estate companies; lawyers, legal consultants, and law firms when conducting monetary or other asset transactions on behalf of clients, eg., through trust accounts) have a number of anti-money laundering responsibilities. Amongst other things, they must identify and report to the AMLC the following transactions (in VND, foreign currencies or gold):

- > One or more cash transactions conducted by an individual/organization in a single day with a total value of VND200 million (approx USD12,615) or VND500 million in respect of savings account transactions (approx USD31,535). These amounts may be varied by the Prime Minister for conformity with socio-economic development from time to time.
- > Other suspicious transactions (the features deemed to be suspicious are prescribed in Decree 74).

The AMLC oversees the new anti-money laundering regime. Based on information obtained about a suspicious transaction from a transacting body, the AMLC (and other relevant authorities) may covertly scrutinize a suspicious transaction as well as the individuals/organizations involved in such transaction, and may apply temporary measures (including freezing accounts and/or sealing or seizing assets) with respect to such transaction and the involved in such transaction, and may apply temporary measures (including freezing accounts and/or sealing or seizing assets) with respect to such transaction and the involved individuals/organizations.

The State Bank is still finalizing guidelines for implementation of Decree 74 - hopefully we won't need to wait until next anniversary to understand all of our "new" responsibilities.

Part 4 What's new on www.vietnamlaws.com?

>>> 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 close to 3,000 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, printed and downloaded (subject to terms & conditions).

With the introduction of Vietnam's new investment-enterprise regime on 1 July 2006, we've taken the opportunity to adjust various existing subject categories and to add some new ones.

- > We've merged investment and corporate legislation into *Investment-Corporate*. All new investment-enterprise laws can be found in *Investment-Enterprise Regime (Post-July 2006)*. For convenience, we've included several sub-categories, such as *Principal Laws* relating to investment and enterprises. All old laws on investment and enterprises can be found in *Investment-Enterprise Regime (Pre-July 2006)*. Some forms of investment (eg BOT), some special forms of enterprise (eg State owned enterprises), and now some completely new forms of enterprise (eg foreign commercial enterprises) have their own sub-category within *Investment-Corporate*.
- > Other new categories identify legislation relating to *WTO & Other Treaties, Anti-Dumping & Other Safeguards, Anti-Corruption, Franchising, Mergers & Acquisitions*, and more.

Have a browse and let us know what you think - we welcome your **feedback** at any time.

>>> UPDATED on 28 August 2006, Vietnam Laws Online Database now includes:

- > New representative office & branch office regulations, effective 14 August 2006
- > Provisional guidelines for foreign investors, 26 July 2006, pending investment decree (latest draft of which is also available - *so you can be well prepared*)
- > Law on Investment & Law on Enterprises, effective 1 July 2006
- > Law on Cinematography & Law on Securities, just passed on 29 June 2006 (*translation of other new Laws is currently in progress*)
- > New Civil Code, Commercial Law, Maritime Code & more, effective 1 Jan 2006

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



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

>>> NEW search function for Vietnam Legal Update

All issues of Vietnam Legal Update from 1997 to date are available on www.vietnamlaws.com. For your convenience, there's an index of contents of all issues of Vietnam Legal Update. Now you can search for keywords in our index. This will make it easier for you to find articles in Vietnam Legal Update on topics of interest to you.

Hanoi Branch Office
Suite 401, Hanoi Tower
49 Hai Ba Trung
Hanoi
Vietnam
Tel +84 4 936 0990
Fax +84 4 936 0984
bill.magennis@phillipsfox.com

Ho Chi Minh City Branch Office
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@phillipsfox.com

Melbourne Office
Level 21, 140 William Street
Melbourne
Australia
Tel +61 3 9274 5000
Fax +61 3 9274 5111
maureen.mclaughlin@phillipsfox.com

Adelaide Brisbane Canberra Melbourne Perth Sydney Auckland Wellington Hanoi Ho Chi Minh City