

VIETNAM LEGAL UPDATE

December 2007

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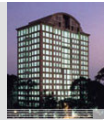
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We encourage feedback from our readers regarding the VLU. Please direct all enquiries, comments and suggestions to Lee Baker in our Ho Chi Minh City office at lee.baker@aar.com.au.

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Part 1 Selected New Legal Instruments

1.1 LOE/LOI – Further questions clarified by Decree 139 (*Part 4*)

Decree 139 of the Government dated 5 September 2007 providing detailed guidelines for implementation of a number of articles of the Law on Enterprises (*Decree 139*)

In this issue of the VLU, we close out our series of articles on Decree 139 and the clarifications it has made to the LOI and LOE. In prior issues, we have presented and answered questions on nine topics/areas where Decree 139 has de-mystified some ambiguous provisions of the LOE/LOI. Below are our final Q+As in this feature:

Q. #10. How are Board of Management (BOM) Members appointed?

Under Article 104.3 of the LOE, election of members of the BOM is to be by cumulative voting, whereby each shareholder shall have as total number of votes the total number of shares owns, multiplied by the number of members to be elected to the BOM, and each shareholder shall have the right to accumulate all his votes for one or more candidates.

It was not clear, however, whether Article 104.3 could be interpreted to mean that despite the cumulative voting procedure, a 65% majority approval of the General Meeting of Shareholders might also be necessary to elect each BOM member.

Decree 139's reply:

Decree 139 has confirmed that the system of cumulative voting applies, rather than system of straight voting. Accordingly, candidates with the most votes are elected, meaning that the 65% approval requirement does not apply.

Under straight voting, each shareholder may cast one vote per share for a BOM candidate for each vacancy to be filled. This enables a shareholder holding 65% or more of voting shares to elect all BOM members. By contrast, under the cumulative voting procedure, the number of votes to which a shareholder is entitled is the number of voting shares it holds, multiplied by the number of BOM members to be elected. The shareholder may then decide to cast all of its votes for a single candidate or distribute such votes between or among two or more candidates.

The purpose of cumulative voting is to empower minority shareholders, as cumulative voting makes it more likely that at least one candidate preferred by the minority shareholder can be elected.

Q. #11. What is the quorum for BOM meetings?

The LOE provides that a meeting of the BOM shall be conducted only when three-quarters of the total members are present. However, the LOE fails to specify what happens when this required quorum is not met.

Decree 139's reply:

Decree 139 has confirmed that the meeting of the BOM by the first notice shall be conducted when three-quarters or more of the total number of members are present. If this quorum is not met, the meeting shall be convened for a second time within 15 days of the date of the intended first meeting. In this case, a meeting shall be conducted when there are more than one-half of the total number of members of the BOM present.

Q. #12. Is the legal capital required to be maintained for the entire duration/life of the company?

Under the LOE and various industry-specific legislations, a company must have a minimum required amount of charter capital (so-called 'legal capital') in order to be

permitted to operate in some sectors (eg banking, insurance, real estate business). The LOE did not clearly regulate whether the prescribed legal capital must exist only at the time of establishment of the company, or whether legal capital must be maintained for the whole duration of the company. This uncertainty has led to the practice whereby investors deposit the required amount of the legal capital to a bank in order to obtain a bank statement showing the necessary balance only for licensing purposes, and then withdraw that balance.

Decree 139's reply:

Decree 139 confirms that the company must have the required legal capital at the time of its establishment, and that it must ensure that the actual level of its charter capital is not lower than the required legal capital during the entire duration of its the business operation.

The management personnel of the company are now set by Decree 139 to be liable for the truthfulness and accuracy of the amount certified as legal capital when establishing the company.

1.2 Further details on foreign shareholding in Vietnamese banks

Circular 07 of the State Bank of Vietnam dated 29 November 2007 providing detailed guidelines for implementation of a number of contents of Decree 69 of the Government dated 20 April 2007 on purchase by foreign investors of shareholding in Vietnamese commercial banks (Circular 07)

Following on the heels of the long-awaited Decree 69 on foreign investment in unlisted Vietnamese joint stock commercial banks (**JSCBs**), the State Bank of Vietnam (**SBV**) has now provided detailed regulations on the various formalities associated with approval of foreign investors' purchase of shares in JSCBs.

Prerequisites for foreign shareholding

A JSCB wishing to sell shares to foreign investors must satisfy the following conditions, which have now clarified by Circular 07:

- (i) the charter capital of the JSCB must be at least one thousand (1,000) billion Vietnam dong (equivalent to 62.5 million USD);
- (ii) the bad debt ratio at the time of JSCB's application to the SBV for sale of shares to foreign investors must not be greater than 3%;
- (iii) financial results for the year immediately preceding the year of application of the JSCB must show a profit;
- (iv) the JSCB's Board of Management (**BOM**) and Inspection Committee (**IC**) must have the number of members and structure specified under the law, and the BOM, IC and other executive personnel must not have seriously violated regulations relating to banking management, inspection and operation during their terms;
- (v) the JSCB's internal check and inspection and internal audit systems must be set up and operating in compliance with regulations of the SBV;
- (vi) the JSCB must not have been fined more than VND 5 million for a breach of the regulations on safety during banking operations, during a period of:
 - (A) 24 months prior to the time when the SBV receives the application for sale of shareholding (in respect of banks which have been operating for more than 24 months); or

- (B) operation (in respect of banks which have been operating for less than 24 months).

Application process

Decree 69 provides that the Governor of the SBV must grant written approval for the purchase by foreign investors of a shareholding in a JSCB. The specifics for obtaining that approval have now been set out in detail by Circular 07.

The process is effectively two-tiered, with the foreign investor first submitting an application file to the JSBC indicating the shareholding it proposes to purchase. And following this, the JSBC submits an application to the SBV (Department for Banks and Non-Banking Credit Institutions) for approval for sale of shareholding to the foreign investor.

No timing specified, unfortunately, Circular 07 does not provide a timeframe for the SBV to review and issue opinion on the application. It only requires the Department for Banks and Non-Banking Credit Institutions to consolidate opinions of the relevant departments and report to the Governor within five working days after it receives opinions from all the relevant departments.

Circular 07 also specifies the (i) documents and other information that a foreign investor must submit to the JSBC for purchase of shareholding (note that the scope of documents is different for corporate and individual investor); and (ii) documents that JSBC must submit to the SBV to obtain approval of foreign shareholding.

Public announcement

Once approval is given, Circular 07 requires the JSBC to make a public announcement regarding the same on its website, online newspaper or central newspaper within 10 working days after receiving the approval.

1.3 More securities regs - non-listed public companies

Decision 3567/QD-BTC of the Ministry of Finance regulating the over-the-counter trading of shares of non-listed public companies, dated 8 November 2007 (*Decision 3567*)

Registration and trading

Decision 3567 specifies that the shares of non-listed public companies (ie companies with more than 100 shareholders) must be:

- traded through the Hanoi Securities Trading Centre (*HSTC*).
- registered at the Vietnam Securities Depository; and
- traded via a securities company.

Trading account

A buyer of non-listed shares of public companies must open a trading account with a securities company. This account is ordinarily linked to a Vietnam dong account at a licensed bank in Vietnam. If the securities trader already has an account for listed shares at a securities company, the trader must use the same account, however, the securities company must differentiate between the type of shares. There is a +/- 20% price fluctuation range, which means that the price of the shares of a non-listed public company cannot be more than or less than 20% of the average market price of the shares to be announced by the HSTC.

Shares of a non-listed public companies are to be traded in the following sequence:

- (i) the buyer and seller agree to sell and buy shares at an agreed price through a securities company; *then*
- (ii) the respective securities companies of the buyer and seller enters the transaction through the HSTC; *then*

(iii) the settlement date is T+3.

Ownership of the shares is recorded under the securities trading code of the securities trader and is updated by the securities company with registered depository functions.

1.4 New CIT Circular

Circular 134 of the Ministry of Finance dated 23 November 2007 providing details for the implementation of Decree 24 of the Government on Corporate Income Tax (repealing Circular 128 of the Ministry of Finance dated 22 December 2003 and Circular 88 of the Ministry of Finance dated 1 September 2004) (Circular 134)

In our Vietnam Legal Update in April of this year, we provided a detailed summary of newly-issued Decree 24 on corporate income tax (*CIT*). The Ministry of Finance has now issued Circular 134 to provide further details for the implementation of Decree 24. Circular 134 follows closely the content of the prior Circulars 128 and 88 on CIT.

Highlights

Highlights of Circular 134 include the following:

- For the first time, the Circular follows international practice by only listing categories of non-deductible expenses, such that other reasonable expenses should be deductible. However we note this is not followed in the section on assignment of land use rights which lists categories of allowable expenses.
- Bonuses to employees may now be deductible.
- The range of advertising and promotional expenses has been reduced compared to the terms of prior Letter 1766 of Ministry of Finance (*MOF*), and this is in effect a retrospective change because Circular 134 applies to year 2007. The cap on advertising expenses at 10% of total expenses is maintained. Pressure may result in a further MOF Letter relaxing this provision, or taxpayers may have to wait for the new Law on CIT expected to be passed in 2008.
- The section on CIT on assignment of investment capital in a business organization which was missing from the prior circulars of the last few years has been re-introduced.
- Securities companies, securities investment fund management companies and shareholding companies formed from equitization of SOEs lose some of their CIT incentives; and FIEs lose incentives for export ratios after year 2011.

Part 2 Feature

This month's feature - in the spirit of the holiday season - is our Allens Arthur Robinson Christmas e-card, below (please click on it for the full effect if Flash is installed on your computer).

During this time of festivity and good cheer, we would like to thank you for reading our VLU and to wish all of our readers a happy and safe holiday season and prosperous new year in 2008.



Next month, we will offer as our Feature article, and as a kick-off to the new year, a detailed Foreign Investment Flow Chart focusing on the processes associated with the various forms of foreign investment under Vietnam laws.

Meanwhile, seasons greetings from all of us at AAR!

Part 3 Did You Know?

3.1 The tipping point for helmets

Excuses, excuses...

For those who have heard all the complaints and excuses over many years (it will spoil my hair; it will impair my vision; I don't know where to put it afterwards; it's too hot; it is not fashionable....), and those who have seen a traffic accident in Vietnam, the sudden take-up of helmets by motorcyclists all over Ho Chi Minh City - and in fact the entire country - is an astonishing and welcome sight.

Finally, a law taken seriously

Resolution 32/2007/NQ-CP of the Government, effective 15 December 2007, covering 'a number of urgent measurements restricting traffic accident and traffic jams' is not the first law that has been introduced in order to make the wearing of motorcycle helmets compulsory, but it is easily the most successful thus far. It no doubt helps that this time, the police are enforcing the rule with vigour, AND with helmets on their own heads! Lots of street posters and 'volunteers' standing at intersections wearing helmets also are also helping to reinforce the message.

3.2 'Registration' - what does it mean?

Foreigners and Vietnamese investing and doing business in Vietnam are sometimes confused by the meaning of the term 'registration'. This is largely because it has different meanings in different contexts, and such meanings are not always apparent on the face of the law.

Approval process...

For instance, 'registration' in the context of an application to the Department of Planning and Investment (**DPI**) for an investment licence, or an application to the State Bank in respect of a foreign loan, refers to an *approval process*. The relevant authority will evaluate the application and will only issue the license or registration document if it approves the application.

Or notification?

On the other hand, 'registration' in the context of an application to the DPI in respect of a 5% or more shareholding in a shareholding company, means in practice means a simple *notification* to the relevant authority, without even an acknowledgment by that authority, let alone an evaluation and approval.

Investors and businesspersons should take care to discern what kind of 'registration' is at play for their projects or business and what it really means.

3.3 Domain names

MIC notification required

Under Article 23 of Law on Informatic Technology (**LIT**), effective 1 January 2007, organisations and individuals in Vietnam using the domain name '.vn' for creating their websites are *not* required to notify the Ministry of Information and Communications (**MIC**). Organisations and individuals using domain names other than '.vn', on the other hand, *are* required to report to MIC.

All notifications of 'non-.vn' domain name sites are required to be done via the website of MIC specified in Decision 27 dated 11 August 2005 on management of internet resources of former Ministry of Post and Telecommunications (currently as MIC). The website address is <http://www.gtld.info.vn>

Fines for failure to notify

A 'non-.vn' domain name user may be fined from VND500,000 to VND2,000,000 if it fails to report, reports incorrectly or does not report on changes (if any) of the reported information, according to Decree 63 dated 10 April 2007 on administrative fines on informatic technology sector.

Interestingly, and contrary to a recent report, there is no time frame for notification specified in the law. One might also wonder about the MIC's practical ability to enforce this requirement, given that there are surely thousands of non-.vn domain name websites in use and operated by persons and business in Vietnam today.

In any event, another requirement to take note of.

3.4 Major shareholder reporting requirements

Rules applicable to status and transactions

Under the Law on Securities of the National Assembly dated 29 June 2006, there are major shareholder reporting requirements for listed and non-listed public companies (a public company has 100 or more shareholders, excluding institutional investors).

Major shareholders, defined as shareholders owning 5% or more of shares of a public company, must report major shareholder status to the State Securities Commission (**SSC**) and Ho Chi Minh City Stock Exchange (**HOSE**) or Hanoi Securities Trading Centre (**HSTC**), within seven days after the shareholder becomes a major shareholder.

There is also reporting requirement with respect to transactions made by major shareholders. If there is a 1% change (which includes an increase or a decrease) in the shareholding of a major shareholder, that change must also be reported to the SSC and HOSE or HSTC within seven days after the date of the transaction.

Treatment of affiliates

We note that a shareholder and an affiliate holding shares in the same public company are considered as one shareholder for the purposes of this major shareholder reporting requirement. As such, if a shareholder holds, say, 3% and its affiliate holds 2%, of the shares of a public company, they are considered together a major shareholder, and required to report this to the regulators. An affiliate includes parent-subsidary relationship and a case in which a shareholder holds 10% or more of the voting shares of a company.

Sample form

A sample form of the 'Report of Transaction by Major Shareholder' appears on the following page.

means that foreign investors may not, by law, engage in the business of purchasing housing/construction works for sale, lease or hire purchase; receiving assignment of land use right for re-assignment; leasing housing/construction works (with or without adding value) for sale, lease and hire purchase; or leasing undeveloped land (with basic infrastructure) for sublease.

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 more than 3000 Vietnamese laws relating to foreign investment and far beyond. Subscribers can search for legislation by subject category, keyword, date, issuing body, official number, legislation type, or advanced option. Translations can be viewed online, and also printed and downloaded (subject to terms and conditions).

Laws recently uploaded on the Vietnam Laws Online Database include the following:

- ➔ Circular 07 on purchase by foreign investors of shares in unlisted Vietnamese commercial banks, 29 November
- ➔ Decision 96 on underwriting universal life insurance, 23 November
- ➔ Decision 91 on conducting business of games with prizes, 8 December 2005 as amended by Decision 84 dated 17 October 2007
- ➔ Decision 40 on licensing of shareholding finance companies and shareholding finance leasing companies (known as 'shareholding non-banking credit institutions'), 2 November

The list above is merely a snapshot of the wide range of new legislation now uploaded and available on Vietnam Laws Online through December 2007.

NEW search function for Vietnam Legal Update

As regular VLU readers know, all issues of our Vietnam Legal Update from 1997 have previously been available on www.vietnamlaws.com. We are still in the process of merging our prior Phillips Fox system into the new AAR one, and hope to soon restore the ability to access back issues of our VLUs.