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part 1 – selected new legal instruments

1.1 New regulations for BOT, BTO and BT projects

Decree 108-2009-ND-CP of the Government on Investment on the basis of Build-Operate-Transfer (BOT), Build-Transfer-Operate (BTO) and Build-Transfer (BT) Contracts, dated 27 November 2009 (Decree 108)

The Government has recently issued a new Decree regulating the sectors, conditions, order and procedures, investment incentives and rights and obligations of parties in relation to build-operate-transfer (**BOT**), build-transfer-operate (**BTO**) and build-transfer (**BO**) projects.

Decree 108, which will take effect from 15 January 2010, replaces Decree 78-2007-ND-CP on BOT, BTO and BT Contracts, dated 11 May 2007 (**Decree 78**) however any investors implementing projects which have an investment certificate that pre-dates the effective date of Decree 108 will continue to implement the project in accordance with the existing investment certificate and project contract.

We now take a brief look at some of the differences between the old and new regulations.

Minimum equity requirements

The new decree specifies new equity ratio requirements for projects.

For projects with a total investment capital of up to VND 1,500 billion (approximately USD 81 million), the minimum equity required under Decree 108 is 15% of the total investment capital, down from 20% under Decree 78.



However, for those projects with investment capital over VND 1,500 billion, they now require at least 15% equity for the first VND 1,500 billion and at least 10% for that portion of the investment capital over VND 1,500 billion. This results in an overall higher equity requirement, given that Decree 78 required only that the equity be at least 10% of the total investment capital for projects over VND 1,500 billion.

Projects proposed by investors

The regulations contemplate two general types of projects:

- projects contained on the List of Projects prepared by relevant ministries, branches and provincial People's committees; and
- projects proposed by investors and approved by the authorities.

Under Decree 108, the second type of project (those proposed by investors) must be publicly announced and, if any other investors register an interest in carrying out that project, a tender process must be conducted. This is different from the current regime under which any approved investor-proposed project is automatically negotiated with that proposing investor.

More detailed project proposals and project approvals

Under the new regulations, project proposals require a greater level of detail including in the areas of fees and charges, duration of construction and preliminary evaluation of socio-economic efficiency.

Moreover, under the new Decree a larger number of projects will require Prime Ministerial approval, including those of 'national importance' pursuant to a resolution of the National Assembly and those requiring at least 200 hectares of land.

Dispute resolution

Decree 108 also limits the ability of parties to BOT, BTO and BT projects to freely elect various forms of international dispute resolution. While Decree 78 provided that investors could agree on foreign dispute resolution forums, including a foreign court or international arbitration, the wording in Decree 108 is much narrower. While arguably a choice of international arbitration is still permitted, it seems that choice of a foreign court is no longer allowed.

1.2 Details on tax breaks for labour-intensive projects

Circular 40/2009/TT-LDTBXH of the Ministry of Labour, War Invalids and Social Affairs providing guidance on calculation of the number of employees employed on a regular basis stipulated in Decree 108/2006/ND-CP of the Government dated 22 September 2006 on implementation of the Law on Investment, dated 3 December 2009 (*Circular 40*)

Under the 2006 Decree 108 implementing the Law on Investment, projects regularly employing between 500 and 5,000 employees are entitled to certain 'investment incentives' while those projects regularly employing more than 5,000 employees are entitled to 'special' (greater) investment incentives. These incentives include special corporate income tax treatment.

Circular 40, which will become effective from 1 February 2010, provides long-awaited guidance on how to calculate the number of employees regularly employed by an enterprise for the purposes of attracting these incentives. According to Circular 40, based on the working time record of the enterprise, persons 'regularly employed' include:

- (a) employees with labour contracts of 3 full months and more (including employees absent from work on social insurance regimes);
- (b) management personnel of the enterprise; and
- (c) full-time staff of the organisations of the Communist Party and other socio-political organisations.

The number of employees regularly employed by an enterprise is determined on an average basis in the relevant month or year, with the Circular setting out detailed calculation formulae as well as several worked examples.

1.3 Legislative calendar for 2010

Resolution 31-2009-QH12 of the National Assembly on the Legislative Program for 2010 and amending the Legislative Program for Legislature XII (Years 2007 to 2011), dated 17 June 2009 (Resolution 31)

As 2009 draws to a close, we take a look at the action-packed agenda for Vietnam's National Assembly in the new year. Resolution 31 sets out the proposed 'Law Projects' (Laws to be enacted or amended) for discussion or passage at the 7th and 8th sessions of the National Assembly's Legislature XII, which are to be held in approximately May and October 2010.

Of course, the program remains subject to amendment, as evidenced by the inclusion for the May session of the Law on Commercial Arbitration, which readers may recall was originally slated for passage at the October 2009 session.

Under the Resolution, it is proposed that each of the following Laws (or amendments to existing Laws) be passed at the May session:

1	Law on State Bank of Vietnam (amendment)
2	Law on Credit Institutions (amendment)
3	Law on Housing and Land Tax
4	Law on Raising Adopted Children
5	Law on Enforcement of Criminal Verdicts
6	Law on Commercial Arbitration
7	Law on Vietnamese Territorial Waters
8	Law on Post
9	Law on Access to Information
10	Law on Cost-saving and Effective Use of Energy
11	Law on Food Safety
12	Law on Disabled Persons

At the same session, the National Assembly will consider for discussion and opinion:

1	Law on Environmental Protection Tax
2	Law on Amendment of the Law on Co-operatives
3	Law on Inspectorates (amendment)
4	Law on Amendment of the Criminal Proceedings Code
5	Law on Administrative Proceedings
6	Law on Unions (amendment)
7	Law on Civil Servants
8	Labour Code (amendments regarding minimum salary and job creation)
9	Law on Protection of Consumer Rights
10	Law on Minerals (amendment)

In the second half of the year, the National Assembly is slated to pass the 10 Law Projects discussed at the May session, as well as consider for discussion and opinion:

1	Law on Securities (amendment)
2	Law on Insurance Business (amendment)
3	Law on Independent Auditing
4	Law on Complaints
5	Law on Denunciations
6	Law on Measurement
7	Law on Prevention of Trading in Humans
8	Law on Archives
9	Law on Entry, Exit and Residence of Foreigners in Vietnam

Finally, the Resolution indicates the future areas of interest for the National Assembly, tasking it with preparing Law Projects on:

1	Law on State Budget (amendment)
2	Law on Land (amendment)
3	Law on Insurance of Savings Deposits
4	Law on Dealing with Administrative Offences
5	Law on Capital City
6	Law on Election of People's Council delegates
7	Law on Election of National Assembly delegates
8	Law on Organisation of People's Councils and People's Committees (amendment)
9	Law on Organisation of the Government (amendment)
10	Law on Organisation of the National Assembly (amendment)
11	Law on Organisation of the People's Prosecutors (amendment)
12	Law on Organisation of the People's Courts (amendment)
13	Law on Supervisory Activities of the National Assembly (amendment)
14	Criminal Proceedings Code (amendment)
15	Law on Organisation of Criminal Investigation Bodies
16	Law on Amendment of the Civil Code (sections on asset ownership and contracts)
17	Law on Dissemination of and Education about the Law
18	Law on Water Resources (amendment)
19	Law on Prevention and Fighting Tobacco Harm
20	Law on Anti-Terrorism



1.4 Apartment service fees and the Ministry of Construction's idea of a 'reasonable rate of profit'

Circular 37-2009-TT-BXD of the Ministry of Construction providing guidelines on methods of determining and controlling apartment building service fees, dated 1 December 2009 (Circular 37)

In an attempt to protect apartment building owners and lessees, the Ministry of Construction has issued Circular 37 which sets out a complex formula for the calculation of services fees for apartment buildings and multi-storey buildings with a residential component.



The general guiding principle of the Circular is that services fees are to be calculated based on 'correct and sufficient expenses, plus a reasonable rate of profit'. Some flexibility is provided by the fact that service fees may be adjusted to take into account the location of the apartment building, rising costs and the relationship between availability of, and demand for, apartment building services.

Within this general guidance, the Circular stipulates that the 'building services' to be covered by the fees include control and maintenance of infrastructure and equipment servicing common areas, security, sanitation facilities, garbage collection, landscape and

gardening, insect control and other services required to ensure the normal operation of the apartment building. In addition the overall service fee covers any expenses incurred for general management of the apartment building by the management company and management committee as well as 'direct expenses', including those incurred by management for materials, equipment, labour costs, electricity, office expenses and the like. The Circular also details certain expenses that are not covered by the service fees, including expenses for repairs and maintenance of the apartment building (which may be covered by a separate sinking fund established by the owner's committee) and individual apartment expenses for utilities (which are to be paid directly by the apartment user).

Under the Circular, a 'reasonable rate of profit' is limited to a maximum of 10% of the service expenses of the building. However, any income generated from conducting business out of the common areas of the apartment building must first be deducted from the total service expenses before calculating this reasonable profit.

Along with meeting the calculation guidelines in Circular 37, all service fees must be approved by 50% or more of the management committee members or, in the absence of a management committee, the occupants of the apartment building. However, if service fees have already been agreed in a sale and purchase contract prior to the effective date of the Circular, the agreed service fees may apply.

The Circular will come into effect on 14 January 2010.

1.5 He's making a list, and checking it twice ...

With Christmas upon us, we have decided to help Santa Claus out with preparing his list of those who have been naughty or nice in 2010 – by looking at the enforcement actions taken by the State Securities Commission (**SSC**) in the first eleven months of 2009.

Several major Vietnamese companies, including a Viettel subsidiary, Maritime Bank, Full Power and Sabeco, were among those fined.

The table below sets out an overall summary of the enforcement actions taken by the SSC from January to November 2009.

Offence	Warning	Fine below VND 25 million	Fine above VND 25 million	Remedial Order
Failure to make a lawful public offer of securities and improper conduct in the public offer process	nil	17	44	nil
Failure to report public company status and other related offences	3	50	nil	nil
Failure to report major shareholder status and trading by major shareholders and internal shareholders and their related parties	nil	21	nil	nil
Unlawful conduct in relation to the listing of securities on the relevant trading floors	nil	nil	1	nil
Commencing operations of a securities business without proper qualification and breach of charter	nil	1	nil	nil
Illegal conduct in the operations of a securities business	nil	8	1	nil
Insider trading	nil	nil	7	nil
Artificially manipulating securities price	nil	nil	2	nil
Failure to make tender or takeover offer	nil	nil	2	nil
Non-compliance with market disclosure rules	nil	26	16	nil
Non-compliance with financial and corporate reporting requirements	13	50	nil	nil

Long time readers may recall that we included a similar list in our September 2008 edition. A comparison between that list and this year's list highlights several key differences, as well as some consistency in approach.

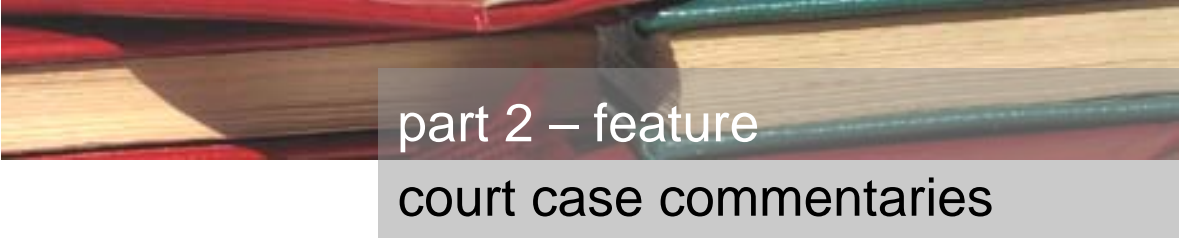
Overall, there has been a marked increase in penalties issued by the SSC this year. In the period reviewed for 2008 (being 9 months instead of 11 months) there were 80 penalties issued, while in the first 11 months of 2009, the SSC issued 262 penalties.

This year the majority of penalties were imposed for non-compliance with reporting and market disclosure rules and notably also included enforcement action for insider trading. In comparison, in

2008, most penalties arose from a failure to make a public offer according to law and no insider trading infringement actions were taken.

Despite the increase in penalties issued, the SSC has continued to fail to use its remedial powers, such as orders to unwind an illegal transaction or to confiscate revenue derived from an illegal transaction, even for serious offences such as a failure to make a requisite takeover offer or insider trading. The fines issued remain low compared to other jurisdictions, with the maximum penalty for a single offence being VND 70 million (approximately USD 3,800).

In addition to other penalties, in 13 instances where a public company made an offer of shares inconsistent with the securities laws, the SSC issued a public notice essentially encouraging shareholders to pursue their shareholder rights under the Law on Enterprises. We are not aware of any shareholder action arising from these notices. The SSC also provided the notices to the local Departments of Planning and Investment (being the general companies regulator) possibly in an attempt to prompt them to take further action under the Law on Enterprises. Again we are not aware of any specific actions arising in this way.



part 2 – feature

court case commentaries

DUC THUAN COMPANY V. DAI TAN COMPANY

Judgement No. 1009/2007/KDTM-PT dated 05 September 2007

Our final case commentary for the year demonstrates how the principles considered relevant and applied by different Vietnamese courts may vary significantly. This month we look at a decision of the People's Court of Ho Chi Minh City in which the international legal principle of 'apparent authority' (where a third party is led to believe, often by a course of action, that a person has authority to act on behalf of another, and is able to rely on that) seems to have been adopted.

The Facts

On 12 April 2006, Duc Thuan Trading & Refrigeration Technology Co. Ltd. (***Duc Thuan***) and Dai Tan Co. Ltd. (***Dai Tan***) entered into a contract under which Duc Thuan was to sell 12 air-conditioners to Dai Tan. The Contract was signed by the director of each company, each being the legal representative of that company.

On 15 April 2006, the goods were delivered to Dai Tan. The minutes of receipt were signed by Mr. Nguyen Tuong Trung, an employee of Dai Tan, and stamped with the seal of the Dai Tan. On the same day, Duc Thuan also issued an invoice for VND 61 million for the air-conditioners. The invoice was countersigned by another employee of Dai Tan, Mr. Truong Dan Tran. The next day, Dai Tan paid Duc Thuan VND 15 million.

On 29 April 2006, Duc Thuan received a fax from Dai Tan in which Dai Tan acknowledged the outstanding amount of VND 46 million, and undertook to pay that amount on 7 May 2006. The amount was never paid, and as a result Duc Thuan brought an action before the People's Court of Tan Binh District of Ho Chi Minh City. Dai Tan failed to appear to defend itself at the trial.

Decision of the lower court

On 12 April 2007, the trial court rejected the claims of Duc Thuan, primarily on the basis that Duc Thuan had failed to prove the authority of Mr. Nguyen Tuong Trung and Mr. Truong Dan Tran, being those who had signed the minutes and the invoice on 15 April 2006 acknowledging the delivery of the goods under the Contract. The Court appeared to consider that if those persons did not have authority, then Dai Tan never received the goods and never countersigned the invoice. As such, the payment obligation never arose.

The Appeal Decision

The HCMC People's Court reversed the decision of the lower court. It held that the Contract had full effect and Duc Thuan had already fully performed its obligations. The court noted that delivery had, in fact, been acknowledged by Dai Tan itself.

As such, Dai Tan was liable to pay for the goods. This view was strengthened by the Court's observation that Dai Tan had, in fact, already made partial payment.


The Court gave little weight to the issue of authority of the persons who signed the minutes and countersigned the invoice on behalf of Dai Tan and stated that the authority of such persons was the responsibility of Dai Tan and an internal issue for it. This was particularly so when both the invoice and the minutes bore the seal of Dai Tan.

Commentary

The appeal court's decision demonstrates that, in some cases, where actual authority is contested, the court may be willing to look at the wider circumstances (including the inclusion of a seal) and accept the general international notion of apparent authority, even though such authority has no basis in Vietnamese statute.

In this case, the court's view precluded Dai Tan from relying on any purported lack of actual authority to deny its obligation to Duc Thuan.

While this may appear to be a sensible and fair outcome in this case, it is worth remembering that, as evidenced by our case commentary in the August VLU, the general concepts of ostensible, implied and apparent authority have no firm basis in Vietnamese law and as such, there is no certainty that anything other than actual authority, proven by contemporaneous written evidence, will suffice to create a legally enforceable obligation.



part 3 – did you know?

3.1 Updated Mining Master Plan

Decision 11-2008-QD-BCT of the Ministry of Industry and Trade Approving Vietnam's Master Plan on Zoning Exploration Mining, Processing and Use of Gold, Copper, Nickel and Molybdenum Ore until 2015, with the Outlook to 2025, dated 6 June 2008 (*Master Plan*).

Decision 6170-QD-BCT of the Ministry of Industry and Trade, dated 8 December 2009 (*Decision 6170*)

Decision 6171-QD-BCT of the Ministry of Industry and Trade, dated 8 December 2009 (*Decision 6171*)

In June 2008, the Ministry of Industry and Trade approved the Master Plan which sets out the Government's intentions with respect to the growth and development of the gold, copper, nickel and molybdenum (**Resources**) industries.

Recently, Decisions 6170 and 6171 have both expanded the geographical areas covered in the Master Plan.

In this article we take a quick look at the key features of the amended Master Plan.

Development Objectives

Under the Master Plan, the Government aims to:

- focus exploration and mine development efforts in regions where reliable reserves of the Resources have been located;
- use effective technology to extract the Resources efficiently with minimal impact on the environment; and
- achieve specified production outputs for each of the Resources in the period from 2010 to 2025.

Required Investment Capital

For each of the Resources, the Master Plan sets out specific objectives with respect to exploration activities and mining and processing activities. In particular, the Master Plan aims to conduct targeted exploration activities with a view to increasing actual output of the Resources to specified levels. The increased output is intended to be used for domestic purposes, rather than for export.

In order to achieve these increased output goals, the Master Plan contemplates that the following additional investment capital is required:

- VND 10,484 billion (approximately USD 567 million) during the period 2008 to 2015; and



- VND 2,235 billion VND (approximately USD 121 million) during the period 2016 to 2025.

The Master Plan provides that this additional investment capital will come from the following sources:

- self-arranged capital from private enterprises;
- investment and development loans provided by the State;
- commercial loans; and
- foreign direct investment capital (of approximately VND 1,600 billion or USD 87 million).

Other Objectives of the Master Plan

In addition to increasing the output of Resources in Vietnam, the Master Plan also sets out a number of other objectives to develop the mining industry in Vietnam. These include:

- diversifying ownership and attracting domestic and foreign investment in the mining industry;
- encouraging joint venture enterprises in order to grow domestic capabilities;
- increasing the social responsibility standards of enterprises engaged in the mining industry;
- developing a domestic market for the Resources; and
- increasing the training of the local labour force to ensure appropriately skilled employees are available to help grow the industry.

Despite these clear goals, the amended Master Plan does not specify a clear framework or procedures for how these will be achieved. However, it does delegate authority to certain ministries to 'provide detailed solutions and policies' for implementing the Master Plan. It remains to be seen when these policies will be developed and what form and effect they will have.

3.2 Mobile banking and payments services

In an environment of increasingly prevalent and sophisticated technological devices, customers worldwide are expecting more modern and mobile banking and payments services, such as access to funds or payment systems from mobile phones and laptops.

With more than 80 million potential customers, Vietnam is an attractive market for investment in this growth area. However, current regulation imposes significant hurdles for foreign investment, with the nascent market populated solely by domestic players.



The first hurdle is identifying where these types of services fit within the Vietnamese legal framework. Most likely, they would be considered:

- value-added telecommunications services (being provided via the internet or mobile phones); and
- payment services.

Both of these categorisations may provide obstacles for foreign investors.

Value-added telecommunication services

Provision of telecommunications and internet services is a conditional sector for foreign investors, requiring approval from the Prime Minister. Specific licences must be obtained from the Ministry of Information and Communications, while the WTO commitments provide that investment in this field is limited in form to either a Business Cooperation Contract or joint venture. Moreover, the foreign investment in such joint venture enterprises is currently capped at 51%, although it will rise to 65% in January 2010. The WTO commitments are silent on any further permitted increase in the permitted foreign ownership levels.

Payment Services

Under Vietnamese law, the provision of payment services (including conducting domestic or international payment operations on behalf of customers) is a banking activity governed by the Law on Credit Institutions. While a non-Credit Institution can obtain a license from the State Bank of Vietnam to engage in certain banking activities, it is not clear whether a non-bank foreign invested enterprise established in Vietnam would be able to obtain the requisite licence for mobile payment services.

3.3 Doing Business 2010 – the latest rankings

The World Bank has recently published the results of its latest global look at the ease of doing business. This year, 183 countries were included in the survey, with Singapore retaining its overall number 1 ranking.

Overall Vietnam was ranked 93rd, a drop of 2 places compared with the 2009 survey, while the individual rankings in each area covered by the survey were:

Area	2010 Ranking	2009 Ranking
Starting a business	116	108
Dealing with construction permits	69	67
Employing workers	103	90
Registering property	40	37
Getting credit	30	43
Protecting investors	172	170
Paying taxes	147	140
Trading across borders	74	67
Enforcing contracts	32	42
Closing a business	127	124

In arriving at these rankings, the World Bank considered responses to its survey canvassing topics including procedures, timing, costs and licensing in these key areas.

Further details can be found at the World Bank's dedicated 'Doing Business' website at <http://www.doingbusiness.org/>

part 4 –

what's new online?

Subject categories in Vietnam Laws Online database

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

Laws recently uploaded on the Vietnam Laws online database

- Circular 04 with 6 Lists of items "able to be produced domestically" for tax exemption purposes, 23 July 2009
- Decree 88 on Certificates of land use right and residential home ownership and assets attached to the land, 19 October 2009
- Decision 2664 increasing the State Bank refinancing interest rate from 7 to 8%, retaining the discount interest rate at 6%, and increasing the overnight lending interest rate from 7 to 8%, 25 November 2009
- Decision 2665 increasing the basic interest rate from 7 to 8%, 25 November 2009
- Decision 2666 narrowing the forex trading band from 5 to 3%, 25 November 2009
- Resolution 41 approving the Ninh Thuan nuclear power project, 25 November 2009
- Decree 108 on BOT, BTO and BT contracts, 27 November 2009
- Circular 37 on apartment service fees, 1 December 2009
- Decision 11 dated 6 June 2008 with master plan on gold, copper, nickel and molybdenum ore mining, as amended 8 December 2009
- Circular 38 on management of villas in urban areas, 8 December 2009
- Draft Circular on offshore listing by Vietnamese enterprises, 10 December 2009
- Decision 2072 on Government's 2% interest rate subsidy in year 2010, 11 December 2009
- Decision 09 dated 10 April 2008 on foreign currency loans to borrowers being residents, as supplemented 15 December 2009

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

Client Updates

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

Search function for Vietnam Legal Update

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

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