



Vietnam Legal Update

July 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	Representative offices & branches	2
1.2	Securities	4
1.3	Lawyers	6
1.4	Auditing	7
1.5	Bank guarantees	8

Part 2 Feature: New investment-enterprise regime

>>>	Provisional guidelines for foreign investors	9
>>>	Phillips Fox seminar - with a difference	13
>>>	Latest draft investment decree	14

Part 3 Did You Know?

3.1	National Assembly update	16
3.2	Transparency in real estate market	16
3.3	Definition of "key national project"	17
3.4	What must you do as a shareholder in Vietnam?	17
3.5	Competition council convenes	18
3.6	Vietnam's first credit rating organization	18
3.7	New business registration system	18
3.8	Investment control - how to get it (back)?	19

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

>>>	NEW laws in Vietnam Laws Online Database	
>>>	NEW search function for Vietnam Legal update	20

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 Foreign representative offices & branches

Decree 72-2006-ND-CP of the Government dated 25 July 2006 on Representative Offices and Branches of Foreign Business Entities in Vietnam

Investors have been waiting for over 6 months now for legislation implementing articles 16-23 of the 2005 Commercial Law (effective as of 1 January 2006) with respect to representative offices ("ROs") and branches of foreign business entities. Finally, the new decree has been issued. Unfortunately, its sister legislation on foreign invested commercial enterprises ("FICES", permitted to invest solely in trading and distribution of goods, not associated with manufacturing) is still in draft (see January-February 2006 and August 2005 Issues of Vietnam Legal Update for more information).

Decree 72 sets out the conditions and procedures for the establishment of ROs and branches in Vietnam as well as their rights and obligations; and the obligations of the responsible State bodies (Ministry of Trade and local Departments of Trade) in relation to the administration of ROs and branches. Decree 72 replaces the current provisions on ROs and branches issued under Decree 45-2000-ND-CP of the Government dated 2 September 2000.

Reform of outdated legislation is always welcome. However, the cost and effort for existing investors to ensure compliance with new statutory requirements detract from the benefits of reform. Decree 72 requires re-registration of ROs and branches which were established prior to Decree 72 so that their RO licenses or branch licenses can be re-issued in accordance with the provisions of Decree 72. The transition period for re-registration under the new regime is 6 months from the date of effectiveness of Decree 72 (expected to be end of August 2006). Whilst an improvement over the 2 month time-limit proposed in earlier drafts, a 6 month period is still a relatively short period for the many existing ROs and branches to become informed of and comply with this re-registration requirement. Especially when the Ministry of Trade's proposed circular implementing Decree 72 which will set out the procedures for re-registration is still in draft. Re-registration requirements for already-approved investment projects, businesses and offices is becoming a common feature of the Vietnamese regulatory landscape as WTO reforms are adopted in domestic legislation (see point 5 of this month's [Feature](#) for re-registration requirements for foreign invested enterprises) - Vietnamese legislators and State administrators must ensure that re-registration procedures are straightforward and expeditious.

- > With respect to ROs, positive reforms under Decree 72 include:
- There is no longer a cap of only 1 RO in any one province or city (as had been proposed in earlier drafts).
 - It is no longer compulsory to notify the licensing body of the number of staff or to seek a license amendment when there is an increase in the number of expatriate staff (as required under current regulations). However, of note, Decree 72 does require the number of foreigners working in a RO to be consistent with Vietnamese labour laws and Vietnam's international undertakings.
 - The circumstances which will result in license withdrawal have been softened.

Negative reforms under Decree 72 include:

- The mandatory conditions for a foreign business entity to establish a RO have been expanded in comparison to current regulations from (just) having lawful business registration in accordance with the law of the foreign country to (also) having been in operation for at least 1 year. (This extra condition disqualifies foreign start-up companies from testing Vietnam's investment-business waters through a RO.)
- The establishment of sub-offices of a RO is prohibited.

- The duration of RO operation has been re-capped at 5 years (extendable). The cap on duration was abolished by the current regulations in 2000 and that trend has been followed ever since for ROs in other sectors. It's little comfort but at least the 3 year cap proposed in an early draft has been adjusted.
- > With respect to branches, positive reforms under Decree 72 include:
 - The narrow range of permitted activities of branches under the current regulations has been abolished. Under Decree 45, only the following goods could be purchased in Vietnam for export: handicrafts; processed agricultural products and agricultural products (except for rice and coffee); vegetables and fruit; industrial consumer goods; meat of livestock and poultry, and processed foodstuffs. And the foreign currency derived from such exports (no more and no less) could only be applied to import and sale of the following goods in Vietnam: machinery and equipment serving exploitation of minerals, processing of agricultural and aquatic products; raw materials for production of medicines for medical treatment for humans and for production of veterinary medicines; and raw materials for production of fertilizer and insecticide. As to be expected, the above restrictions have resulted in very few branch offices being established in Vietnam to date.

Under Decree 72, branch offices will be permitted to conduct trading activities and activities directly related to trading of any goods. It is not expressly stated but it is expected that the scope of commercial activities of branches will be limited to import-export and exclude distribution (with the result that a FICE will need to be established to conduct distribution in Vietnam).

Of note, the right of branches to conduct trading will only be available as scheduled in Vietnam's international undertakings. This is yet another case of giving with one hand and taking away with the other. Until the Minister of Trade announces when branches may be opened in particular goods and services sectors (as per schedules in international treaties), the right to open a trading branch under Decree 72 is an illusion only. This reliance on international treaties will also shape the introduction of FICEs (based on drafts to date) and the opening of conditional sectors under the new Investment Law ([see below](#)).
 - License withdrawal: as for ROs above.

Negative aspects of Decree 72 include:

- The mandatory conditions for a foreign business entity to establish a branch still include having been in operation for at least 5 years, as well as having lawful business registration. (The third condition that currently applies, ie must deal in a narrow range of prescribed goods, is omitted as it is now redundant, see above).
- The duration of operation has been capped at 5 years (extendable). There is no cap on duration under the current regulations.
- > ROs and branches of foreign business entities which operate in special commercial sectors (banking, finance, legal services, culture, education, tourism or other sectors in accordance with laws) are regulated by other specific legal instruments. In contrast, Decree 45 also regulated tourism-related ROS and branches.

1.2 Securities

Law 70-2006-QH11 of the National Assembly dated 29 June 2006 on Securities

As of 1 January 2007, Vietnam's securities market will be governed by Law 70 on Securities. Law 70 regulates public issues and trading of securities as well as establishment and operation of securities investment funds. It applies to both foreign and domestic investors and players in the securities market.

Law 70 represents the second update of the legislation regulating Vietnam's securities market since it commenced operation in mid-2000. The original legislation establishing the securities market was Decree 48-1998-ND-CP of the Government dated 11 July 1998, which was replaced by Decree 144-2003-ND-CP of the Government dated 28 November 2003.

Law 70 provides:

- > Public offering: A public offer means an offer to sell securities via the mass media (including the internet), to at least 100 investors excluding institutional investors (up from 50 in Decree 144) or an offer to a number of undefined investors.
- > Conditions for listing securities:
 - Offering shares to the public: the minimum required level of paid-up charter capital for an issuing organization is VND10 billion (up from the current VND5 billion).
 - Offering bonds to the public: the minimum required level of paid-up charter capital remains VND10 billion.
 - Offering certificates of securities management funds to the public: the minimum total value of issued investment fund certificates is VND50 billion (10 times higher than the current requirement). The requirement for a minimum number of certificate holders of 50 has been abolished.

Of note, the Law no longer distinguishes whether the issue of shares or bonds is initial or not.

- > Prospectus: For the first time, the Law introduces the requirement for a prospectus for public issues of shares, bonds and investment fund certificates. The main contents for a prospectus are prescribed in Law 70. The Ministry of Finance has been delegated the task of creating a sample form prospectus. The prospectus must be signed by the chairman of the board of management/members' council, the general director, the financial director/accountant (only in the case of public issues of shares and bonds) and the legal representative of the underwriter.

- > Public companies:

The concept of a public company is introduced. A public company is a shareholding company with any of the following characteristics:

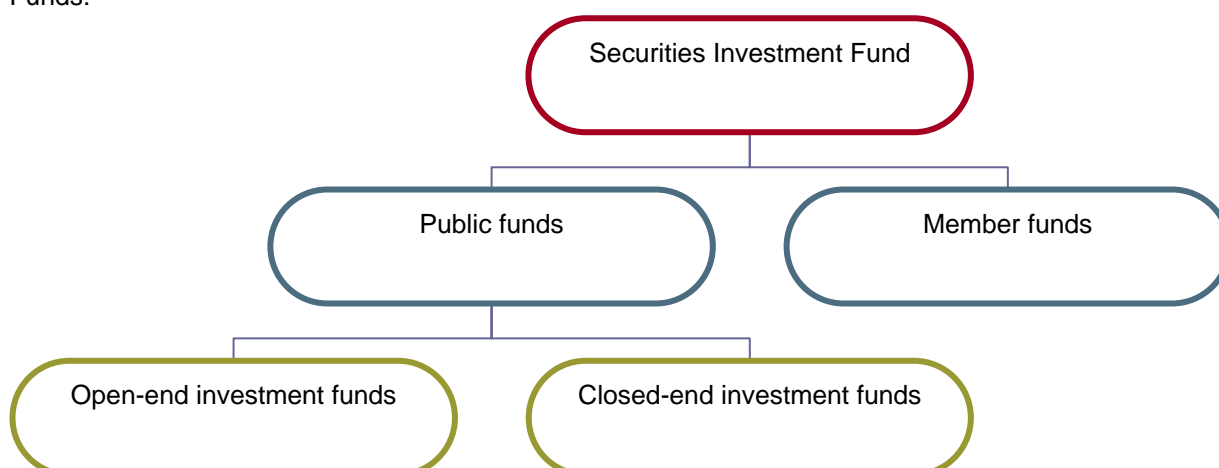
- shares issued to the public;
- shares listed on the Stock Exchange or Securities Trading Centres;
- shares owned by 100 or more investors (excluding professional securities investors) and with paid-up charter capital of VND10 billion or more.

The State Securities Commission ("SSC") is responsible for publishing information about public companies on its network.

- > Major shareholders: A major shareholder is defined as a shareholder that directly or indirectly (undefined) holds 5% or more of the voting shares of an organization. Major shareholders of a public company must report when any acquisition occurs in a public company to the SSC and the Stock Exchange/Securities Trading Centre where the shares of the public company are listed. The

information that must reported is not extensive, only details of the investor (name, address) and details of the shares (number, percentage). However, important changes to this information, including a change of the number of shares in excess of 1%, must also be reported.

- > Public offer to acquire: An offer to purchase 25% or more of the voting shares in a public company must be made by a "public offer to acquire". The public offer to acquire must be registered with and approved by the SSC (the Law does not detail any criteria or basis for the approval) and must be announced in the mass media. Of note, if after implementation of the public offer to acquire, the acquirer holds 80% or more in the public company, the acquirer will be obliged, if the remaining shareholders so request, to continue to acquire the remaining shares of the same class at the announced price of the offer to acquire.
- > Foreign invested securities companies: May be established in the form of (as now) joint ventures or (new) 100% foreign owned companies and may be either limited liability companies or shareholding companies.
- > Securities investment companies: For the first time, Law 70 introduces a new form of securities investment company, being a legal entity established solely for the purpose of investment in securities.
- > Funds:



A securities investment fund is a fund established from the capital contribution of an investor in order make a profit from investment in securities or other property. Importantly, the investors must not have day-to-day control over the investment decision-making of the fund.

A public fund is a fund which makes a public offer of certificates in the fund.

A members fund is limited to 30 contributing members, all of whom must be legal entities.

In an open-end investment fund investors have the right to require the fund to redeem their fund certificates; in a closed end fund they do not.

- > Underwriting versus brokering: An underwriter may be either (a) a securities company authorized to underwrite an issue of securities; or (b) a commercial bank approved by the SSC to underwrite an issue of bonds, on conditions regulated by the Ministry of Finance. Underwriting is defined as an undertaking to an issuing organization of a public issue of shares to complete procedures prior to the offer for sale of securities, receive some or all of the securities of the issuing organization for re-sale, or purchase the amount of the remaining undistributed securities of the issuing organization or assist the issuing organization to distribute the securities to the public. In comparison, securities brokering is defined as acting as an intermediary in the purchase or sale of securities on behalf of a client.

Importantly, the SSC is prohibited from expressing any opinion on the quality of any type of securities.

1.3 Lawyers

Law 65-2006-QH11 of the National Assembly dated 29 June 2006 on Lawyers

Effective as of 1 January 2007, the Law on Lawyers enshrines the principles for practice of law; the necessary qualifications for lawyers; the basic conditions, forms and scope of practice of legal practices (both domestic and foreign); and provisions on remuneration and payment of costs, amongst other things. The Law will introduce a number of reforms in the legal services sector in Vietnam. Generally, the Law creates a more favourable environment for the activities of lawyers and legal practices.

The Law provides for domestic "legal practising organizations" to be established in the form of lawyer's offices and law companies. A lawyer's office may be established by one lawyer in the form of a private enterprise. Of note, under the 2001 Ordinance on Lawyers (the new Law's predecessor), a lawyer's office can be established by one or more lawyers (one of whom must be the head of the office). A law company may be established in the form of a law partnership (as now under the Ordinance) or in the form of a limited liability company (either with one member or with two or more members). A law partnership must be established by at least two lawyers. Members of a law company must be lawyers (the Law has not gone as far as reforms in some other jurisdictions which now allow non-lawyers to invest in law firms). A lawyer will be permitted to establish (alone or jointly with other lawyers) one legal practising organization only and it must be established in the locality of the bar association to which the lawyer belongs. Under Resolution 65-2006-QH11 of the National Assembly dated 29 June 2006 on Implementation of Law 65 on Lawyers, existing domestic legal practices must complete any necessary steps for conversion for compliance with the new Law by 1 July 2007 (failing which, they must terminate their operations).

For the first time, lawyers will be permitted to practice in their individual capacity (ie not in a legal practising organization). Commonly known as a sole practitioner in other jurisdictions, an individual lawyer in Vietnam must register for legal practice at the Department of Justice of the locality of the bar association to which the lawyer belongs, may register for one transaction place only, will have no seal and will bear unlimited liability for their legal services to the full extent of their assets.

Under the new Law, a Vietnamese citizen desiring to be a lawyer must obtain a bachelor degree of law, undertake a lawyer practice training course (6 months, as now) and undergo a lawyer probation period (18 months, down from 24 months currently).

Foreign legal practices may be established in the form of a branch office or a limited liability company. Limited liability companies may be established in the form of an 100% foreign owned limited liability company (established by one or more foreign law firm) or a joint venture limited liability company (established by one or more foreign law firm and Vietnamese legal practising organization). Under current regulations (Decree 87-2003-ND-CP of the Government dated 22 July 2003), a foreign legal practice may be established in Vietnam in the form of a branch, an 100% foreign owned law firm or a partnership with a Vietnamese legal practising organization - all of which forms are unlimited liability. In contrast to domestic legal practices, existing foreign legal practices in Vietnam will not be required to convert their form for compliance with the new Law (Resolution 65 above). This has been confirmed in our discussions with officials from the Ministry of Justice. So, existing 100% foreign owned law firms and foreign-Vietnamese law partnerships will have the option to convert into limited liability companies under the Law or to remain in their existing forms (this is purely academic in the case of foreign-Vietnamese law partnerships, as none has been established to date.)

A welcome reform under the new Law - and one that will make the domestic legal sector more competitive - is the introduction of equal treatment of all forms of domestic legal practices. Under the Law, any legal practising organization may co-operate with foreign law firms. Currently, under the Ordinance, a lawyer's office may not co-operate with foreign law firms.

A more significant reform under the new Law - and one that reflects Vietnam's WTO commitments - is the introduction of equal treatment of domestic and foreign legal practices with respect to participation in legal proceedings in Vietnam (well, really only 'more equal' treatment, given that some restrictions on foreign legal practices will still remain). Under the Law, Vietnamese lawyers working in foreign law branch offices or 100%

foreign owned/joint venture law company will be permitted to participate in civil legal proceedings in Vietnam as counsel for clients. This is more liberal than the current regulations which prohibit Vietnamese lawyers working for foreign law firm branches and 100% foreign owned law firms from participating in any type of legal proceedings (civil or criminal). However, the following restrictions will remain: (i) foreign lawyers are prohibited from appearing before Vietnamese courts in (civil or criminal) legal proceedings; and (ii) Vietnamese lawyers working for foreign law firm branches and 100% foreign owned law firms are prohibited from participating in criminal proceedings.

1.4 **Auditing**

Circular 60-2006-TT-BTC of the Ministry of Finance ("MoF") dated 28 June 2006 Providing Guidelines on Criteria and Conditions for Establishment and Operation of Auditing Enterprises

Provision of auditing services in Vietnam is regulated under Decree 105-2004-ND-CP of the Government dated 30 March 2004 on Independent Auditing (as amended by Decree 133-2005-ND-CP of the Government dated 31 October 2005).

Decree 133 introduced the following significant reform to Decree 105: Auditing enterprises may now be established and operate in the form of a limited liability company as well as (as previously) the forms of partnership, private enterprise, or foreign invested enterprise. Also, now, an auditing enterprise must publicly announce its form during the process of its trading and operating. Of note, since Decree 105, an auditing enterprise may not be established in the form of a State owned enterprise ("SOE") or shareholding company. Any State owned auditing enterprise or shareholding auditing company which was established and operating prior to the date of effectiveness of Decree 105 (ie 21 April 2004) is required (under Decrees 105 and 133) to convert to one of the above forms of enterprise within 3 years after the date of effectiveness of Decree 105 (ie by 21 April 2007). Decree 133 made the MoF responsible to provide specific guidelines on the criteria and conditions for establishment of a limited liability auditing company (permissible since Decree 133) or an auditing partnership (permissible since Decree 105).

To implement the reforms under Decree 133, which became effective as of 22 November 2005, the MoF has now issued its specific guidelines on the criteria and conditions for establishment and operation of auditing enterprises in the form of limited liability companies, partnerships and private enterprises (as well as for conversion of SOEs and shareholding companies) under Circular 60, including:

- > All auditing enterprises must have at least 3 certified practising auditors, 1 of whom must be the general director of the firm.
- > To be a member of an auditing enterprise, individuals and organizations must satisfy prescribed criteria (such as professional qualifications and experience, minimum capital investment, etc).
- > Auditing enterprises established and operating in the form of limited liability company must have no less than 2 members, no more than 50 members. Members may be individuals or organizations (the latter must contribute at least 10% of the charter capital and must appoint an authorized representative who satisfies the prescribed criteria in Circular 60).
- > Auditing enterprises established and operating in the form of partnership must have no less than 2 individual capital-contributing partners, who must have auditor's certificates. In addition, there may be other capital contributing members (either organizations or individuals).
- > The owner of a private auditing enterprise must act as its general director.
- > To act as the general director of an auditing enterprise (whether in the capacity as an individual member or the authorized representative of an organization member), a person must have an auditor's certificate and at least 3 years actual work experience thereafter; must contribute at least 10% of the charter capital; and must not at the same time hold a managerial or executive position within/be contracted to another organization or body.
- > Restrictions apply to the transfer of equity in auditing enterprises to persons who do not satisfy the prescribed criteria.

> The deadline of 21 April 2007 for conversion of SOEs is restated.

Circular 60 supplements the current guidelines under Circular 64-2004-TT-BTC of the MoF dated 29 June 2004. Circular 60 was effective as of 22 July 2006.

1.5 **Bank guarantees**

Decision 26-2006-QD-NHNN of State Bank of Vietnam ("SBV") dated 26 June 2006 issuing Regulations on Bank Guarantees

Following Decree 134-2005-ND-CP of the Government dated 1 November 2005 on foreign loans (see November 2005 Issue of Vietnam Legal Update), the SBV has now updated its regulations on bank guarantees under Decision 26. Decree 134 retained the policy of close control by the SBV of borrowing, guarantee and repayment of foreign loans by the State of Vietnam, the Government and resident Vietnamese organizations (including foreign invested enterprises), so it is no surprise that Decision 26 maintains tight regulation of bank guarantees.

The Decision 26 Regulations apply to guarantees provided by joint venture banks, foreign bank branches and other Vietnamese credit institutions. Bank guarantees include guarantees for loans (with no longer any distinction between domestic and foreign loans), for payments, for tender participation, for contract performance, for product quality, and for refunds of advances; cross-guarantees; guarantee certification; and other guarantees not prohibited by law and consistent with international practice. Guarantees may relate to part of or the whole of obligations, eg guarantee of payment of principal, interest or other costs of a loan; guarantee of payment for materials, goods, machines, equipment and other expenditures for the implementation of projects; guarantee of payment of tax or other financial obligations to the State.

Banks have significant discretion over granting bank guarantees, including with respect to whether or not security will be required and (now also) what fees will apply (which now must be consistent with the expenses of the credit institution and the risks of the product; but are not subject to a publicly announced schedule of fees). Bank guarantees are expressly required to be in writing and may take the form of a guarantee contract, letter of guarantee, or "other type of guarantee not prohibited by law and consistent with international practice". Of note, parties may agree for a foreign law to govern and for a foreign court or arbitrator to conduct the resolution of a dispute arising about a guarantee transaction (this reform is subject to the common but troublesome proviso that such agreement between the parties must not be contrary to the law of Vietnam).

Entities seeking bank guarantees are subject to general conditions, such as (a) the purpose for which the guarantee is provided must be lawful and (b) the entity must have the financial capacity to discharge the guarantee obligation within the time-limit promised. Decision 26 clarifies that, if a client is a foreign organization or individual, in addition to the prescribed conditions, the client must also implement the regulations on foreign exchange control of Vietnam. All domestic and foreign organizations and individuals may be provided with guarantees, except for the (i) members of the board of management or inspection committee or the general director or deputy general director of the credit institution; (ii) officials and staff of the credit institution who undertake the task of evaluating and making a decision to provide a guarantee; (iii) parents, spouses or children of the persons listed in (i) above; (iv) parents, spouses or children of the director or deputy director of a branch of a credit institution (at the discretion of the credit institution). The limit on the total amount guaranteed by a credit institution for a single client remains 15% of the equity of the credit institution (in the case of a foreign bank branch, it is 15% of the equity of the foreign parent bank). A credit institution may not provide guarantees without security or with preferential treatment to its auditor, its chief accountant, inspectors, major shareholders, or any enterprise in which any person listed in (i) above owns more than 10% of the charter capital (the total amount of any guarantee made to these persons is restricted to 5% of the equity of the credit institution).

The Decision 26 Regulations became effective as of 17 July 2006 and replace the former regulations issued under Decision 283-2000-QD-NHNN14 of the State Bank of Vietnam dated 25 August 2000 (as amended by Decision 386-2001-QD-NHNN of the State Bank of Vietnam dated 11 April 2001, Decision 1348-2001-QD-NHNN of the State Bank of Vietnam dated 29 October 2001, and Decision 112-2003-QD-NHNN of the State Bank of Vietnam dated 11 February 2003).

Part 2 Feature: Vietnam's new investment-enterprise regime

>>> Provisional guidelines for foreign investors

Vietnam's new 2005 Investment Law and Enterprises Law took effect on 1 July 2006. But, not uncommonly in Vietnam, the new investment-enterprise regime commenced without any implementing legislation. Many issues that are unclear under the Laws remain so - not just theoretical issues, but practical issues that investors need to deal with now.

The pressing need for implementing legislation is not lost on Vietnamese authorities, but they have been struggling to decide on the best approach - should they keep nutting out the details of the investment decree (now up to [Draft 17.2](#), see below) or issue provisional regulations for implementation of the Investment Law pending the investment decree? In the month of July, the Government appeared to choose its course, veer slightly off-course, then change course completely, then double-back on itself with a twist. On 18 July, the Government favoured issuing provisional implementing regulations applicable to both domestic and foreign investors. Such regulations had been duly drafted by the Ministry of Planning and Investment ("MPI"), and translated by our Hanoi office for public release. On 24 July, the Government instructed the MPI to stick with the provisional route - but rather than proceed with provisional regulations applicable to both domestic and foreign investors, it instructed separate provisional guidelines for foreign investors only to be issued. Then in the morning of 25 July, the Government decided that the MPI should concentrate on the investment decree and instructed the MPI to shelve its provisional regulations. But by the afternoon of 26 July, the Government had thought better of it and decided some provisional measures (albeit only for foreign investors) were indeed required. So don't fear if you feel like you're tied in knots over the new investment-enterprise regime, you're definitely not alone.

Below we run through the hot-off-the presses Official Letter 5495-BKH-DTNN of the MPI dated 26 July 2006 and its Provisional Guidelines on Focal Body for Dealing With, Orders and Procedures for Foreign Direct Investment, which is effective immediately:

1. Focal authority to deal with investment projects (provisional only, pending investment decree which will provide for further delegation of authority to local authorities):
 - > Investment projects in special sectors (such as insurance): Authority is as per specialized branch laws.
 - > Investment projects not in industrial zones, export processing zones, high-tech zones and economic zones ("zones") and on the scale below USD20 million or VND300 billion and not on the list of conditional sectors: Provincial people's committees will carry out investment registration/evaluation (as the case may be) and issue investment certificates. Local Departments of Planning and Investment will receive application files and act as the focal body in evaluation and submission to the provincial people's committees to make a decision.
 - > Investment projects in zones and on the scale below USD20 million or VND300 billion or on the scale below USD40 million or VND600 billion: Management committees of zones will receive application files and carry out investment registration/evaluation (as the case may be) and issue investment certificates.
 - > All other investment projects: MPI will act as the focal body.
2. Investment procedures:
 - > Investment registration/issuance of investment certificate:
Application file must comprise:
 - (i) Investment registration;
 - (ii) Report on financial capability of investor;

- (iii) Joint venture contract (for joint venture economic organization with foreign invested capital) or business co-operation contract ("BCC");
- (iv) If initial foreign investment project in Vietnam, business registration file corresponding to the particular form of enterprise (see 3 below).

The investment certificate-issuing body will consider: validity of contents of application file; validity of items for business registration (if any); sector and location for incentives for purpose of recording investment incentives in the investment certificate.

- > Investment evaluation/issuance of investment certificate for projects on a scale of below USD20 million or VND300 billion and on the list of conditional sectors:

Application file must comprise (ii), (iii) and (iv) above, as well as:

- (v) Request for issuance of investment certificate;
- (vi) Explanatory statement on conditions that the investment project must satisfy.

The investment certificate-issuing body will consider: compliance with conditions; validity of application file for business registration (if applicable).

- > Investment evaluation/issuance of investment certificate for projects on a scale of USD20 million or VND300 billion or more:

Application file must comprise (ii), (iii), (iv) and (v) above, as well as:

- (vii) Document certifying legal entity status of investor (a copy of establishment decision or business registration certificate or equivalent documents with respect to investor being organization; a copy of passport or ID card with respect to investor being individual);
- (viii) Eco-technical explanatory statement with the following main items: objectives, location for project implementation; land use requirements; investment scale (production and business capacity); investment capital, project implementation schedule; technology and environmental solutions.

If the project is in a conditional sector, the project's satisfaction of conditions will be evaluated. Official Letter 5495 does not expressly state that (vi) above is required to be submitted as part of the application file, but it is expected that (vi) will be required (see below that "compliance with conditions (if any)" will be considered during evaluation; and also, (vi) was required in the MPI's draft provisional implementing regulations applicable to domestic and foreign investors).

The investment certificate-issuing body will consider: compliance with master plans for technical infrastructure, for land use, for construction, and for use of minerals and other natural resources; land use requirements; project implementation schedule; environmental solutions; compliance with conditions (if any); validity of application file for business registration (if applicable).

3. Business registration application:

- > Partnership:

- (a) *Draft charter* (>>> This is a welcome acknowledgement that the enterprise is still in the proposal stage when the investment application is submitted. A MPI official has informed us that the final charter will be registered *after* the investment certificate is issued to a foreign investor.)
- (b) List of members; copy of ID card or passport or other lawful personal identification of each individual;
- (c) Copy of any practising certificates required by law; document certifying legal capital if statutory requirement applies.

- > Limited liability company or shareholding company: (a), (b) and (c) above.

If any member or shareholder is an organization, a copy of the establishment decision, business registration certificate or other equivalent document of the organization; power of attorney plus a copy of the ID card or passport or other lawful personal identification of the authorized representative. If a foreign organization, the copy business registration certificate must have been certified not less than three months prior to the date of submission of the application file.

4. Procedures for issuance of investment certificate:

- > Investment registration:

1 set of application file to be submitted. Processing time-limit of 15 days from submission of valid application file for issuance of the investment certificate. Copies of the investment certificate to be sent to Ministry of Finance, Ministry of Trade, Ministry of Natural Resources and Environment, State Bank of Vietnam, line ministry, provincial people's committee, relevant management committee.

- > Investment evaluation for projects under MPI's authority:

10 sets of application file (1 original) to be submitted. If valid file, MPI will send to relevant ministries, branches and provincial people's committee for their opinions; then MPI will decide on basis of opinions or submit file to the Prime Minister for approval. No processing time-limit is specified (however, a MPI official has informed us that the MPI will observe the time-limit in the Investment Law).

If application refused, reasons must be provided in writing to foreign investor. If issued, copies of the investment certificate to be sent to Ministry of Finance, Ministry of Trade, Ministry of Natural Resources and Environment, State Bank of Vietnam, line ministry, provincial people's committee, and relevant management committee.

- > Investment evaluation for projects under authority of management committees of zones:

4 sets of application file (1 original) to be submitted. Processing time-limit of 30 days from submission of valid application file for issuance of the investment certificate. If application refused, reasons must be provided in writing to foreign investor. If issued, copies of the investment certificate to be sent to MPI, Ministry of Finance, Ministry of Trade, Ministry of Natural Resources and Environment, State Bank of Vietnam, and relevant line ministry.

Of note, where the investment certificate serves concurrently as the business registration certificate, the investment certificate-issuing body is responsible for disclosure of information on business registration to the tax office, statistics office, other competent State bodies at the same level, people's committee of the district, town or provincial city and people's committee of the commune, ward or township where the enterprise will have its head office. Such role is normally performed by the local business registration office.

5. Procedures for amendment of pre-1 July 2006 investment licenses:

- > Re-registration under new Investment Law and Enterprises Law:

Existing foreign invested enterprises ("FIEs") have the "option" to re-register to re-organize their management and operation under the new Investment Law and Enterprises Law. (The option is only available for a 2 year period, until 1 July 2008.) The option is not available where the investors have undertaken to transfer the FIE project to the State without any compensation upon expiry of its duration.

- > Non-re-registration under new Investment Law and Enterprises Law:

Existing FIEs that do not re-register are allowed to operate within the scope of lines of business and the duration of operation specified in their issued investment license and will continue to enjoy investment incentives in accordance with regulations of the Government (but their capacity to grow or adjust their business may be severely limited by proposed restrictions on amendment of issued investment licenses in the MPI's draft decree on re-registration).

Authority to consider any amendment of issued investment licenses of non-re-registering FIEs is as per 1 above. Official Letter 5495 provides that, if such FIE implements a new project within the scope of lines of business specified in its investment license, it shall carry out application procedures at the investment certificate-issuing body of the locality where the new project is implemented (this is a surprising provision as it suggests that a non-re-registering FIE may undertake additional projects to the originally licensed project, which is inconsistent with the proposed restrictions on amendment of issued investment licenses in the MPI's draft decree on re-registration.)

6. Investment certificates:

- > Investment certificates will specify: name and address of the investor; location for implementation of the investment project; the land area to be used; objectives and scale of the investment project; total invested capital; duration of and schedule for implementation of the investment project; determination of investment incentives and support (if any).
- > The initial investment certificate issued to a foreign investor will also specify business registration details (except in case of BCCs, under which no separate legal entity is created).

7. Investment incentives:

Investment certificate issuing-bodies will rely on the conditions for entitlement to investment incentives regarding corporate income tax, import duty and land rent as stipulated in Decrees of the Government Nos. 164-2003-ND-CP, 152-2004-ND-CP, 149-2005-ND-CP and 142-2005-ND-CP in order to record investment incentives into an investment certificate.

8. Dealing with projects for which application files have already been received:

- > In the case of an investment project for which an investor has already submitted an application file but an investment license has not yet been granted, the investment certificate-issuing body will consider the application file as submitted and guide the investor to add the necessary items of business registration and will then rely on the new Investment Law and Enterprises Law and the Official Letter 5495 guidelines to issue an investment certificate.
- > If MPI has received an application but the investment project now falls under the authority of a provincial people's committee or management committee of a zone, the MPI will discuss and agree with the relevant provincial people's committee or management committee on the transfer of the application file in order for the latter to deal with it in accordance with its authority and to notify the investor.

9. Standard forms for the following documents are appended to the Official Letter 5495 guidelines:

- > Investment registration/evaluation application:
 - (i) In the case where an investor establishes an economic organization with foreign owned capital for the implementation of the investment project;
 - (ii) In the case where an investor invests in the form of a BCC;
 - (iii) In the case where an already-established economic organization implements a new investment project.
- > List of founding members and shareholders:
 - (iv) List of founding members of a limited liability company with two or more members;
 - (v) List of founding shareholders of a shareholding company;
 - (vi) List of members of a partnership.
- > Investment certificate: as per (i), (ii) and (iii) above, as well as certificate of amendment of investment license (applicable to FIEs issued with an investment license prior to 1 July 2006).



Practical application

As most investors in Vietnam are aware, the new Laws on Investment and Enterprises usher in a new era of investment and corporate regulation in Vietnam. But what does this really mean for investors? Has anything really changed? Putting new terminology and application procedures aside, how do these laws affect the establishment and running of your company in Vietnam?

This seminar is not an introduction to or review of the new laws. It is intended to give you a practical understanding of what these laws are really about and how they will affect your investments in Vietnam.

Mock negotiation

Two of Vietnam's best legal minds will go head-to-head negotiating a hypothetical Members'/Shareholders' Agreement and Charter for a joint venture under the new Law on Enterprises.



In the blue corner, for the foreign investor, is **Bill Magennis**, a seasoned veteran of foreign investment in China in the 1980s and in Vietnam since the early 1990s. Bill has advised on the negotiation and establishment of over 100 joint ventures in Vietnam and was the lead external legal adviser to BP on the Nam Con Son gas project and Phu My 3 BOT power project.

In the red corner, for the Vietnamese investor, is **Dang Xuan Hop**, representing the new generation of Vietnamese lawyer, with 9 years' practical experience and dual admission as a lawyer in Vietnam and Australia, a former lecturer in commercial law at the National University of Singapore, and currently a PhD student in arbitration at Oxford University.



Moderator Julia Howes will outline the statutory requirements under the Law on Enterprises for a Members'/Shareholders' Agreement and Charter and will pose the facts of the hypothetical project. Then Bill and Hop will negotiate the issues, including form of investment, capital contributions, management control, deadlock, default, governing law, and dispute resolution.



8 August 2006
Hilton Opera Hanoi
4 to 6pm

- ❑ Free seminar and reception
- ❑ 3.30pm registration
- ❑ 4.00pm seminar start
- ❑ 6.00pm cocktail reception
- ❑ Numbers strictly limited
- ❑ Seminar repeated in HCMC on 9 August 2006
- ❑ Please register your place with Ms Thuy at Phillips Fox on +84 4 938 0990 or thuy.le@phillipsfox.com

>>> **Latest draft investment decree**

Over recent months, we have been tracking closely the successive drafts of the proposed decree for implementation of the new Investment Law ("investment decree") drafted by the Ministry of Planning and Investment ("MPI"). The very latest Draft 17.2 was released on Friday 28 July (right on the heels of the MPI's provisional implementing guidelines, see [above](#)). Below we outline some of the positive developments over the last month and note some of the unresolved issues still remaining.

- > July was another good month for merger and acquisition controls. Finally, all of the competition control provisions proposed in earlier drafts of the investment decree have been dropped. Earlier drafts had 'extra' merger and acquisition hurdles to those prescribed under the Competition Law, such as: the obligation for merging or acquiring companies to continue to employ 60% of the current employees for at least 3 years from the time of the merger or acquisition; and the requirement for foreign investors (not also domestic investors) wishing to merge or acquire more than 10 enterprises in a year to submit an explanatory statement to the investment certificate-issuing body for its consideration prior to issuance of an investment certificate. Happily, now, competition issues will be regulated only in their rightful place - in Vietnam's Competition Law.
- > Controls over offshore bank accounts have been relaxed in a fashion. Offshore accounts are still subject to approval from the State Bank, but that approval is no longer only available 'in special cases'. And offshore accounts are no longer restricted to just 'loan accounts.'
- > Authority to approve investment projects is now as follows:

<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 (<i>newly added</i>) - 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 (<i>newly added</i>) - All projects with capital over VND3000 billion <p>(For all projects approved by the Prime Minister, MPI issues 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 MPI or Prime Minister

- > List of sectors in which foreign investment is subject to conditions:

<i>Investment Law</i>	<i>Investment decree</i>
<ul style="list-style-type: none"> - Sectors impacting on national defense and security, social order and safety - Banking and finance sector - Sectors impacting on public health - Culture, information, the press and publishing - Entertainment services - Real estate business - Survey, prospecting, exploration 	<ul style="list-style-type: none"> - Broadcasting and television - Production, publishing and distribution of cultural products - Investment in fields of insurance, banking, brokerage, trading of securities, monetary and other related services - Exploration and exploitation of minerals - Construction, installation, operation and maintenance of telecommunication equipment - Construction and operation of river ports, sea ports and airports - Transportation of goods and passengers by railway, airway, roadway and sea and waterways - Aquaculture

<i>Investment Law</i>	<i>Investment decree</i>
and mining of natural resources; the ecological environment - Development of education and training - A number of other sectors in accordance with law	- Production of tobacco - Real estate business - Import, export and distribution business - Education and training (<i>newly added</i>) - Other investment sectors specified in international treaties of which Vietnam is a member, committing to restrict the opening of the investment market to foreign investors.

Unfortunately, the Investment Law and the investment decree do not provide investors with much certainty or clarity as to the exact boundaries of the sectors that are conditional. Eg the last category under the Investment Law, ie "a number of other sectors in accordance with law", is extremely broad and could allow for the principle of investor freedom to invest to be greatly eroded.

> Conditions applicable to sectors in which foreign investment is subject to conditions:

What conditions will be applied to the above types of projects? Eg will there be restrictions on the form of investment (eg joint venture or 100% foreign owned) and/or on the form of enterprise (eg shareholding company or limited liability company); will there be a maximum foreign shareholding, etc?

The investment decree does not state the applicable conditions (as earlier drafts also failed to do). But the latest draft sheds a little more light. First, the draft decree provides that investors must comply with the conditions stipulated in the Investment Law and "relevant laws". Then, it provides that the conditions will be specified by the relevant line ministry/branch on the basis of "relevant laws"; and, if no conditions are specified by law, the project will be considered as "unconditional".

Of note, a fleeting proposal (into Draft 17 out by Draft 17.2 a few days later) was that if an investment project related to "undertakings to open the market in international treaties pending Vietnam's official membership of the [WTO] and the current law does not provide specific provisions on conditions which the investment project must satisfy, the investment certificate-issuing body shall obtain opinions from the Ministry of Trade prior to issuing an investment certificate". (Amongst other things, how the obtaining of opinions from the Ministry of Trade would have fitted in with the prescribed time-limits for application processing was not clarified.)

Unfortunately, the failure to specify investment conditions in the Investment Law or investment decree does little to aid transparency and predictability for investors. Over reliance on international treaties (not known for their clarity of expression) as the source of conditions makes implementation tedious and complicated, as all must trawl through those international agreements and interpret their often confusing provisions. Hopefully, the latest draft really is moving towards stipulation of conditions in domestic legislation.

- > Provisions on branches and representative offices of Vietnamese enterprises (including foreign invested enterprises) have been dropped.
- > There remains no required debt to equity ratio for foreign invested enterprises, as applicable under the former investment law. We are still concerned that a requirement may 'slip in' to lower investment legislation or that a de-facto ratio requirement may become a matter of practice (authorities might not licence a project unless the debt equity ratio is 70:30)?
- > The latest draft retains the principle that the Vietnamese version of an enterprise's charter and other establishment documents must prevail over the foreign language version, if any. The parties cannot agree that the foreign language prevails, even if the documents have been drafted, negotiated and agreed in English (for instance) and then translated into Vietnamese. This is a particularly strange requirement for an investment project 100% owned by a foreign investor.

Part 3 Did You Know?

3.1 National Assembly update

At the conclusion of the 9th Session of the National Assembly's Legislature XI on 29 June 2006, 10 new Laws were promulgated. All 10 Laws will become effective as of 1 January 2007:

- > Law 62-2006-QH11 on Cinematography: Introduces new provisions for protection of copyright and national film examination process. Relaxes restrictions on foreign direct investment in sector. Strict regulates content (including Vietnamese/foreign content balance). Licensing requirements and import-export restrictions remain. Replaces predecessor *1995 Decree on Cinematography (as amended 2000 and 2002)*.
- > Law 63-2006-QH11 on Real Estate Business: Regulates development of real estate projects and sale/purchase and leasing of real estate, as well as real estate services such as property management, brokerage, consultancy, valuation, auction, advertisement (see September 2005 Issue of Vietnam Legal Update)
- > Law 64-2006-QH11 on HIV/AIDS Prevention and Fighting: Replaces predecessor *1995 Ordinance on Prevention of HIV/AIDS*
- > Law 65-2006-QH11 on Lawyers: see [1.3](#) above
- > Law 66-2006-QH11 on Civil Aviation of Vietnam: Aims to improve State administration of civil aviation and to standardize regulations on professional qualifications, health requirements and liability of aircraft pilots, flight controllers, and other aviation personnel. Replaces *1991 Law on Civil Aviation (as amended 1995)*
- > Law 67-2006-QH11 on Information Technology
- > Law 68-2006-QH11 on Standards and Technical Norms: Regulates standards, technical requirements and management requirements of products, commodities, services and socio-economic development to ensure hygiene and health and protect fauna and flora and national and consumer interests
- > Law 69-2006-QH11 on Legal Assistance
- > Law 70-2006-QH11 on Securities: see [1.2](#) above
- > Law 71-2006-QH11 on Social Insurance: Provides for compulsory social insurance (for illness; maternity leave; occupational accident or disease; retirement and death), voluntary social insurance (top-ups for retirement and death), and unemployment insurance (for unemployment; apprenticeships; job-seeking) support. Originally provided for in the Labour Code amendments passed by the National Assembly in 2002 and effective as of 1 January 2003, the national unemployment insurance scheme will be introduced on a compulsory basis with effect from 1 January 2009.

3.2 Transparency in Vietnam's real estate market

In Jones Lang LaSalle's 2006 Real Estate Transparency Index, Vietnam is rated very poorly. The 2006 RETI is based on a survey of the openness and fairness of real estate transactions in 56 countries. Issues considered include access to market data and financial information, enforceability of contracts and property rights, clarity of tax obligations and regulation of real estate, reporting and governance standards, ethical standards of service providers during the transaction process. Vietnam scores the lowest of all 56 countries. It is ranked last in the bottom group of 3 'opaque' countries: Vietnam, Venezuela and Egypt. Vietnam, along with Thailand and the Philippines, has not experienced any meaningful improvement since the 2004 RETI. On a like-for-like basis, the 2006 RETI actually suggests that Vietnam and the Philippines are slightly less transparent than two years ago. Vietnam is considered a clear stand-out at the low end of the scale and

continues to have substantial property rights issues, beleaguered information flow within the market and few regulations regarding public reporting. The growing offshore interest in Vietnam's real estate market is acknowledged and its likely effect of promoting transparency is earmarked. The most improvement in transparency scores from the 2004 RETI was enjoyed by Brazil, Italy, Japan, Mexico and Romania.

3.3 **Definition of "key national project"**

In the June 2006 Issue of Vietnam Legal Update we reported on the National Assembly's recent resolution on the criteria for key national projects. That report was based on the information available on the official websites of the National Assembly and Vietnam's Communist Party. Now we have an original copy of Resolution 66-2006-QH11 of the National Assembly dated 29 June 2006 and can confirm its contents (somewhat different from as reported online). Effective as of 1 October 2006, if an investment project (irrespective of whether domestic or foreign invested) satisfies one of the following criteria, it will be considered a "key national project" and must be approved by National Assembly:

- > project having investment capital of VND20 trillion or more (up from VND10 trillion under current criteria), with 30% or more of such capital funded from the State Budget;
- > project dramatically affecting or posing a serious potential risk to the environment;
- > project involving displacement and resettlement of 20,000 residents or more in mountainous areas or 50,000 residents or more in other areas;
- > project taking place in a special important area for national defense and security or in an area having a national monument of specially important value in history and culture;
- > project requiring application of a special regime and policy to be decided by the National Assembly.

Resolution 66 also stipulates the contents of application files for national key projects and the procedures for evaluation of such projects. It replaces Resolution 05-1997-QH10 dated 29 November 1997.

3.4 **What must you do as a shareholder in a Vietnamese shareholding company?**

As of 1 July 2006, what are the main requirements when you buy shares in a Vietnamese shareholding company under the new Law on Enterprises 2005? Irrespective of whether you are a Vietnamese or foreign organization or individual, after you acquire shares in a Vietnamese shareholding company, you must do all of the following:

- (a) Be registered in the company's register of shareholders. However, the law does not specify how such registration is made. In practice, if a buyer purchases shares in a *listed company* through a securities company, it is likely that the securities company will liaise with the listed company to register the buyer in the register of shareholders of the listed company. If a buyer purchases shares in an *unlisted company*, the buyer must present the necessary evidence of ownership of the shares of the company in order for the company itself to register the buyer in its register of shareholders.
- (b) Be registered with the competent business registration body if you've acquired 5% or more of the (*listed or unlisted*) company's total shares. Registration must be completed within 7 working days from the date of acquisition. The law is silent as to whether the company or the buyer (or both) is required to carry out such registration. In our view, the best approach is for the buyer to work with the company to carry out registration, so as to ensure that the buyer's rights associated with the acquired shares are fully enforceable.
- (c) Report in writing to the State Securities Commission, the Securities Trading Centre and the company itself if you (either alone or with related buyers) have acquired 5%, 10%, 15% or 20% of the share capital in a *listed company*. Registration must be completed within 3 working days from the date of the transaction resulting in any of such ratios. It is likely that a report should also be made within this time limit in the event a transaction leads to an increase or reduction to any of these ratios.
- (d) Appoint one or more authorized representatives to exercise your rights as a shareholder if you are an organization.

3.5 Competition council convenes

Appointments to the Vietnam Competition Council ("VCC") have now been approved by the Prime Minister. The VCC is responsible inter alia:

- > To organize dealing with competition cases concerning practices in restraint of competition (ie agreements in restraint of competition, abuses of dominant market or monopoly position, mergers and acquisitions) after investigation by the Vietnam Competition Administration Department;
- > To establish case-specific competition panels of at least 5 VCC members to hold hearings into competition cases;
- > To resolve complaints regarding competition cases concerning practices in restraint of competition.

11 VCC members have been appointed under Decision 843-2006-QD-TTg of the Government dated 12 June 2006. VCC members will serve a 5 year term of office (renewable). All appointees are serving officials of Vietnamese ministries. The VCC Chairman is Mr. Phan The Rue, Deputy Minister of Trade. The 2 Deputy Chairmen are Mr. Dinh Trung Tung, Deputy Minister of Justice, and Mr. Truong Chi Trung, Deputy Minister of Finance. Along with 3 other appointees from the Ministry of Trade, there are appointees from the Ministry of Transportation, Ministry of Industry, Ministry of Agriculture and Rural Development, Ministry of Planning and Investment and Ministry of Construction. The VCC met for the first time on 4 July 2006 and plans to issue operational regulations in August so that it can commence operation. A secretariat will be established to assist the work of the VCC.

3.6 Vietnam's first credit rating organization

In early July, the State Bank approved the commencement of operation of its Credit Information Centre ("CIC"). The CIC's role is to analyse the credit rating of Vietnamese enterprises with the aim of strengthening State administration of risks in the banking system and assessing capability of enterprises as well as offering a service which helps commercial banks assess lending risks. The CIC will look at credit rating of enterprises from every economic sector, comprising State owned enterprises, limited liability companies, shareholding companies, private enterprises, foreign invested enterprises, and partnerships. The CIC will provide its credit rating analysis to State Bank entities, to credit institutions, to enterprises wishing to use credit rating information (about themselves only) when applying for loans or making other self-assessments, and to selected other organizations, but not to third parties. The CIC's website is www.creditinfo.org.vn.

3.7 New business registration system

In the same boat as the new 2005 Investment Law (see [above](#)), the new 2005 Enterprises Law is yet to be supported by implementing legislation. All that Vietnam's business community has to rely on is the recent Official Letter 4957-BKH-PTDN of the Ministry of Planning and Investment ("MPI") dated 4 July 2006, which attempts to fill the void while detailed regulations on the new business registration system are being devised.

Not very helpfully, the MPI instructs that business registration must comply with the new Enterprises Law from 1 July 2006 *but*, pending a new decree on business registration, the old provisions in Decree 109-2004-ND-CP of the Government dated 2 April 2004 and its sub-guidelines must be provisionally applied *provided that* such application doesn't result in anything contrary to the provisions of the new Enterprises Law.

A simpler aspect of the new business registration system for the MPI to deal with is the fee applicable for business registration. Pending a new fee tariff, the fee for issuance of a business registration certificate which is prescribed in Decision 83-2000-QD-BTC of the Ministry of Finance dated 29 May 2000 and Decision 95-2001-QD-BTC of the Ministry of Finance dated 1 October 2001 will continue to be applied - no chance of inconsistency on that one.

3.8 Investment control - how to get it (back)?

A longstanding issue for foreign investors in Vietnam has been how to ensure control of their investment projects. 100% foreign ownership was (is) the straightforward solution, but that option wasn't (isn't) available in all sectors. Under the old investment-enterprise regime, for joint ventures, nomination of the general director was seen as a key to day-to-day control of an investment project; and agreement of 51% of board members was sufficient for board control, except for 2 subjects (charter amendments and appointment/dismissal of general director and first deputy general director) which required board unanimity. (Of interest, under the original investment-enterprise regime, agreement of 75% of board members was required for board control and there was a wider range of subjects requiring unanimous board resolutions.)

So what is required as of 1 July 2006 for control of an investment project under the new investment-enterprise regime? Nomination of the general director is still key to day-to-day control. As to voting control, there is no longer any specific provision regulating foreign invested projects in the new Investment Law. The new Enterprises Law is the source of general corporate regulation now. For voting control of a limited liability company with two or more members (the most likely vehicle for joint ventures), votes representing at least 65% of the aggregate capital of attending members of the Members' Council are required, except in a number of cases where 75% is prescribed. One would have expected a simple majority of 51%. Certainly most of Vietnam's international trade and market access agreements have been based on the presumption that a simple majority is the benchmark for management control of a joint venture in Vietnam.

Currently, foreign lawyers and embassies in Vietnam are working together with Vietnam's WTO working party representatives to try and resolve this problem, so that investors are no worse off under the new investment-enterprise regime and Vietnam enjoys the fruits of its WTO accession. Proposals for resolution include:

- (1) amendment of the new Enterprises Law by the National Assembly to restore the 51% threshold for control of all companies (with the option of higher percentages by agreement of members/shareholders); and
- (2) amendment of the proposed decree implementing the Enterprises Law to dilute the offending provisions of the Enterprises Law by providing *explicitly* that international agreements will prevail over the Enterprises Law with respect to voting control.

It is arguable that the Enterprises Law's provision for international treaties to prevail over it already achieves the desired result, but foreign lawyers and embassies are wary of relying solely on that provision and cautious to ensure that the benchmarks for management control are transparent. International agreements are not well-known for their clarity of expression. Identifying the applicable provisions to a particular set of facts is often troublesome. How long will it take and how much will it cost (in legal fees alone) to convince Vietnamese partners and authorities that Treaty W allows Investor X from Country Y to have 51% voting control in Sector Z? For the same reasons, proposal (2) is not desirable. Proposal (1) is the only truly workable solution - but we may have to wait until the next National Assembly Session in October-November 2006 to see it materialize.

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)*. 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 31 July 2006, Vietnam Laws Online Database now includes:

- > 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*)
- > Circular 60 on Auditing, 28 June 2006
- > Decision 26 on Bank Guarantees, 26 June 2006
- > EVN restructure decisions, 22 June 2006
- > New Civil Code, Commercial Law, Maritime Code & more, effective 1 Jan 2006

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

>>> 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.



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**.

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