

# VIETNAM LEGAL UPDATE

## March 2008

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## Part 1 Selected New Legal Instruments

### 1.1 Deadline approaching

**Decree 101 on re-registration, conversion and registration for replacement with investment certificates by enterprises with foreign owned capital pursuant to Law on Enterprises and Law on Investment, dated 21 September 2006 (Decree 101)**

#### Background

The Law on Enterprises (**LOE**) came into effect on 1 July 2006 to provide unified regulations in respect of domestic and foreign invested companies. Article 170.3 of the LOE and Decree 101-2006-ND-CP of the Government dated 21 September 2006 (**Decree 101**) entitle foreign-invested enterprises (**FIEs**) established under the old Law on Foreign Investment (**LOFI**) to opt to re-register to operate under the new LOE and the new Law on Investment (**LOI**). There is a time limit of two years after the effective date of the LOE for FIEs to re-register. As such, existing FIEs have until 1 July 2008 to carry out re-registration.

The main advantage of re-registration is that re-registered FIEs will begin to operate under the new unified sets of regulations, while FIEs which opt not to re-register will remain creatures of the old LOFI and will become a 'dying breed' as their investment licenses eventually expire.

#### Why no re-registration?

Notwithstanding the re-registration requirement, according to the Ministry of Planning and Investment's statistics, as of January 2008, only 2-3% out of 6,000 FIEs had-registered or applied to do so. This, even though there are only a few months left until the deadline, and when they have had 18 months to comply with the re-registration requirement. Why is this?

For most existing foreign investors in Vietnam, the positives of making the transition will greatly outweigh the negatives. However, the circumstances of each investment project need to be considered. In particular, re-registration may not be so straightforward for joint venture.

#### Excuses, excuses

The primary reasons for FIEs not re-registering seem to be the following:

- Although the re-registration process looks simple and straightforward, the process of preparing the documents and lodgement to the licensing authority is actually quite lengthy and time-consuming.
- With respect to joint venture FIEs, re-registration may necessitate re-negotiation of the joint venture documents, particularly provisions on management and control. This will usually not be desirable.
- Under the LOFI, certain matters must be decided by unanimous approval of the joint venture parties (which appears to include any decision to re-register). The LOE does not provide for unanimous approval, requiring only 75% approval for most important matters and 65% approval for other matters. Therefore, in practice, a conflict between the joint venture parties can arise when the minority partner in the FIE prefers not to re-register (in order to preserve its position under the unanimous approval principle), but the majority partner wishes to do so, in order to achieve more management control. Unfortunately, this conflict can be resolved only by unanimous decision of the parties.
- There are still uncertainties in relation to the rights and obligations of FIEs before and after re-registration. Although the relevant regulations provide that all investment incentives of FIEs will remain the same after re-registration, some investors are concerned that some of these rights and incentives may (in fact and in law) be affected by Vietnam's commitments to the WTO. This issue is most relevant to FIEs which currently enjoy tax incentives on the

basis of their export activities or that are licensed under the LOFI to conduct import and distribution activities.

### Consequences of failing to re-register

Existing FIEs opting not to re-register will become corporate 'dinosaurs' in the new legal system. While permitted to continue to operate in accordance within their prescribed scope of business and for the duration stipulated in their investment licenses, non-re-registering FIEs will be restricted from amending their licensed business lines/sectors or licensed duration. Amendments of other contents of the investment licenses must be made and processed in accordance with the new LOI.

Decree 101 provides for non-re-registering FIEs to retain their current names, seals, bank accounts and already-registered tax codes. In all other respects, non-re-registering FIEs will be subject to regulations of the new LOI and LOE. This gives rise to some uncertainty for these FIEs. It may require some considerable time and resources for non-re-registering FIEs to assess their rights and obligations under the new laws versus the restrictions of Decree 101 and the provisions of the old LOFI.

For example, if non-transitioning FIE 'X' has a Charter that incorporates by reference various provisions from the old LOFI (eg 'board voting must be conducted in accordance with the LOFI'), is FIE 'X' entitled to continue to conduct board voting in the 'old way' or must it adopt the 'new way' under the new LOE? This is significant because many aspects of corporate regulation (voting, in particular) are treated very differently under the old regime and the new investment-enterprise regime. (See the article at Part 3.4 of this issue of the VLU in this regard). The only way to achieve certainty on these points is for FIEs to re-register. So why not just re-register and make life easy?

### Extension possible?

From the issuance of the LOE, the business community has raised objections to re-registering, complaining that the two-year period is too tight. As the deadline approaches, the question therefore is in the air as to whether the Government will extend the deadline. There are some indications both ways, with the MPI declaring in a recent news article that the deadline would *not* be extended, but also a recent suggestion that the Government *will* extend this period for at least one more year.

In practice, if any companies carry out the re-registration after 30 June 2008, informal conversations with the DPI indicate that local authorities *should* accept the application file, however this guidance is not binding, and until a decree is issued, the official deadline for re-registration remains 1 July 2008.

## 1.2 Prime Minister calls the shots on inflation

(previously circulated to VLU subscribers on 11 March 2008)

In a rare public admission of the seriousness of the economic challenges currently facing Vietnam, principally inflation, and an indication of what the Government is doing to combat them, the Prime Minister issued Official Letter 319 on 3 March 2008, addressed to the State Bank, the Ministry of Finance, the Ministry of Planning and Investment, the Ministry of Industry and Trade, the Ministry of Construction, and the State Securities Commission.

While the language of the letter is typically 'high level' and in many instances capable of multiple meanings, there can be no mistaking its central message: the Government recognises the problems and exhorts all relevant authorities to work hard to address them.

In some cases, recognition of the problems is apparent only through the objectives or solutions proposed. Here is a sample of some of the objectives/solutions:

- (i) To improve the investment environment and eliminate public sector waste.

- (ii) To improve coordination between Ministries and other official bodies in the implementation of policies.
- (iii) To provide capital assistance for banks to ensure their solvency; to consider increasing their compulsory reserves; to continue applying the (controversial) compulsory purchase by banks of State Bank treasury bills; and to continue to facilitate interest rates that exceed the inflation rate.
- (iv) To continue implementing the 'executive policy on exchange rates' (which may suggest the VND will continue to appreciate against the USD).
- (v) To cap the growth of bank credit at 30% per annum.
- (vi) To increase the supply of land available for development, while requiring banks not to lend to State owned enterprises that speculate in property deals.
- (vii) To facilitate the recovery of the securities market; to continue initial public offerings of large State owned enterprises; to continue applying the (controversial) restrictions on lending for securities purchases; and to 'avoid creating the false impression that the State's policy is to constrain the securities market'.
- (viii) To consider allowing 100% foreign owned fund management companies in Vietnam.
- (ix) To consider increasing the percentage that foreigners may own in unlisted securities to not more than the percentage applicable to foreign ownership of listed securities (currently 49%).
- (x) To carefully control the establishment of any more securities companies or banks.
- (xi) To postpone the issuance of Government bonds overseas.
- (xii) To achieve export growth of over 25% in 2008.
- (xiii) To consider further controls on the prices of monopoly goods and services.
- (xiv) To hold a weekly briefing (presumably, to the media) on the Government's policies and measures to tackle inflation, and to avoid 'false information which could incite or create social insecurity'.

### 1.3 Digital signatures – now available

#### **Decision 04/2008/QD-NHNN of the State Bank of Vietnam issuing regulations on issuance, management, and use of digital signature, digital certificate and digital signature certification service, dated 21 February 2008 (*Decision 04*)**

A year after the February 2007 issuance of Decree 26/2007/ND-CP of the Government providing detail on the implementation of the Law on Electronic Transactions (**Decree 26**), the first digital signature 'certification service provider' has been established under the authority of the State Bank of Vietnam (**SBV**), pursuant to Decision 04.

#### **Availability limited to SBV transactions**

Under Decision 04, the digital signature certification service shall be extended initially only in connection with e-transactions involving the SBV. As such, only individuals and entities of the SBV, credit institutions, the State treasury and other related entities are qualified to become subscribers for such certificates.

Eligible subscribers for digital signature certification shall have the right to apply for issuance,

extension, suspension, restoration or revocation of the same, or for change of a key pair, via their 'subscriber managers'. Subscriber managers are the persons or entities within the SBV units responsible for organising the issuance of digital certificate.

Subscribers are required to use their digital certificates only for the correct registered purpose. They are also required to preserve and use their private keys and other data and equipment relating to their private keys in accordance with promulgated laws and policies on confidentiality. In cases where a subscriber discovers or believes that his digital certificate or private key has been somehow comprised in terms of security, he must notify the certification provider via the appropriate subscriber manager.

Certificates may be revoked in the 'usual' circumstances of expiration of the term or bankruptcy of the holder, but also by competent State authorities or the subscriber manager, if the subscriber is in breach of any provisions on management and use of the certification or private keys.

#### **Others must wait**

As stated above, under Decision 04, the digital signature certification service provider may provide its digital signature certification service only in connection with e-transactions of the SBV. Therefore, other transactions will need to await the issuance of a separate legal instrument guiding Decree 26. This is additional guidance expected soon.

### **1.4 LOE/LOI report card**

In January 2008, the Ministry of Planning and Investment (**MPI**) issued an official report on the implementation of the Law on Enterprises (**LOE**) and the Law on Investment (**LOI**) (**Report**). The Report was prompted, according to the MPI, by the continuing difficulties that investors and Government authorities alike face with the implementation of the LOE and LOI.

#### **Candid assessment**

The Report quite candidly admits that many of the difficulties have arisen from inconsistent and contradictory provisions contained in the LOE, the LOI and the various other regulations relating to investment activities. Aside from identifying this perhaps obvious problem, the Report then goes on to provide suggestions for clarification and improvement. As such, this issuance of this Report should be seen as a 'positive' for the investment environment in Vietnam.

#### **Problems identified; suggestions given**

In the Report, the MPI directs most of its focus on the regulations and administrative procedures relating to investment activities provided not only in the LOE and LOI, but also the Land Law, the Law on Environment, and Law on Construction, and their various implementing decrees. The first part discusses in some detail the inadequate 'problem' provisions of these laws and decrees; the second part, as noted, provides suggestions for amendments and/or supplemental legislation to make the current laws clear, more consistent and, in cases, more in line with practice. Several noteworthy suggestions from the Report are the following:

- separating the Investment Certificate (**IC**) and the Business Registration Certificate (**BRC**) given that their legal natures are different. The BRC certifies the establishment of a company. It can be understood as a 'birth certificate' of a company and thus, one company can and should have only one birth certificate or BRC. An IC, on the other hand, certifies an 'investment activity' of a company, and as such, a company can and should be able to have many ICs. The Report suggests that when a foreign investor establishes a company in Vietnam, it should be granted an Investment Certificate *and* a Business Registration Certificate.
- (related to the foregoing) the issuance of a new circular or decision by the MPI specifying new forms to replace current ones related to investment registration and business registration;

- amending Decree 108 to (i) make it the 'master' decree regulating all the matters relating investment activities, including the administrative procedures related to environment, land lease or/and land assignment and construction in relation to investment procedures; or (ii) removing from Decree 108 the provisions related to construction, environment and land issues.

#### **First of its kind**

This Report is the first of its kind and is encouraging in that it reveals the MPI's awareness of issues and trouble spots investors have faced in attempting to follow the terms of these two major laws. The indication is that there will be similar reports to follow. A copy of this Report can be obtained from either of Hanoi or Ho Chi Minh City offices.

### **1.5 Trading and distribution rights – the continuing saga**

**Report on trading and distribution workshop on Circular 09 implementing Decree 23, in turn implementing the Commercial Law regarding trading and distribution activities by enterprises with foreign owned capital in Vietnam, conducted by the Ministry of Trade, with assistance from STAR Vietnam on 20 March 2008.**

This month, the Ministry of Trade (**MOIT**) conducted an official workshop on trade and distribution activities. In particular, this workshop addressed some of the questions brought to the attention of MOIT by STAR Vietnam during a meeting on 25 January 2008 between the American Chamber of Commerce in Vietnam (**AmCham**) and MOIT.

As mentioned in our January 2008 issue of the VLU, Circular 09 does not appear to be 100% in line with Vietnam's WTO commitments. In particular, under Circular 09, a foreign trader importing goods into Vietnam is permitted to sell each group of imported goods to only one business entity which is registered to trade or has the right to distribute such group of goods. In addition, such foreign investor is required to register this one business entity with the relevant authority.

Highlights of topics covered at the workshop include the following:

#### **'Trading rights' and 'distribution services'**

In the workshop, representatives of MOIT attempted to reply to AmCham's question regarding the distinction between trading rights and distribution services under Circular 09. They explained that the concept of 'trading rights' includes the right to export and to import, but *excludes* the right to distribute. This interpretation was confirmed by representatives of the Multilateral Trade Policy Department, Domestic Trade Policy Department and Foreign Investment Department of MOIT. As such, foreign organisations and individuals having the right to import are not *automatically* allowed to distribute in the domestic market.

MOIT contended that this principle was implemented in Article 3.1.d of Circular 09, which provides that foreign enterprises and individuals are permitted to sell *one* group of imported goods to only *one* distributor. But it does not appear that the workshop effectively answered, the question of 'why only one distributor?'

The MOIT representative to the workshop also confirmed that licensed foreign manufacturing enterprises in Vietnam *are* permitted to have distribution rights, but that they should clearly distinguish distribution rights in relation to products produced by enterprises from distribution rights for general business purposes.

#### **ENT – a different acronym**

In the January MOIT- AmCham meeting, AmCham asked MOIT to clarify the definition of the "economic needs test" (**ENT**). According to MOIT, the main criteria behind the ENT are the following:

- (i) the number of existing suppliers in a particular geographic area;

- (ii) the stability of market; and
- (iii) the geographic scope

MOIT indicated it had studied zoning practices in other jurisdictions and criteria used to allow or prohibit establishment of wholesalers or retailers in a specific area. For instance, the threshold set out by Japan is 120,000 inhabitants for one supermarket. The MOIT again emphasized that it will discuss further and will give more details on ENT test at a later date.

#### **New definitions**

Apparently MOIT plans to introduce an amendment to Circular 09 providing defined criteria for a company's 'involving itself in domestic distribution network' and a company's 'organising a distribution network itself'. It will be deemed the latter if it: (i) sets up distributions outlets itself; and (ii) hires distribution organisations/individuals to distribute its goods. It will be deemed to be the former if it:

- fixes the selling price for distributors;
- instructs distributors to sell goods with its trademarks;
- appoints the parties to the distributors;
- makes decision on the allocation of market shares among the distributors; and
- sets up conditions for distributors upon distributing its products.

#### **More work needed**

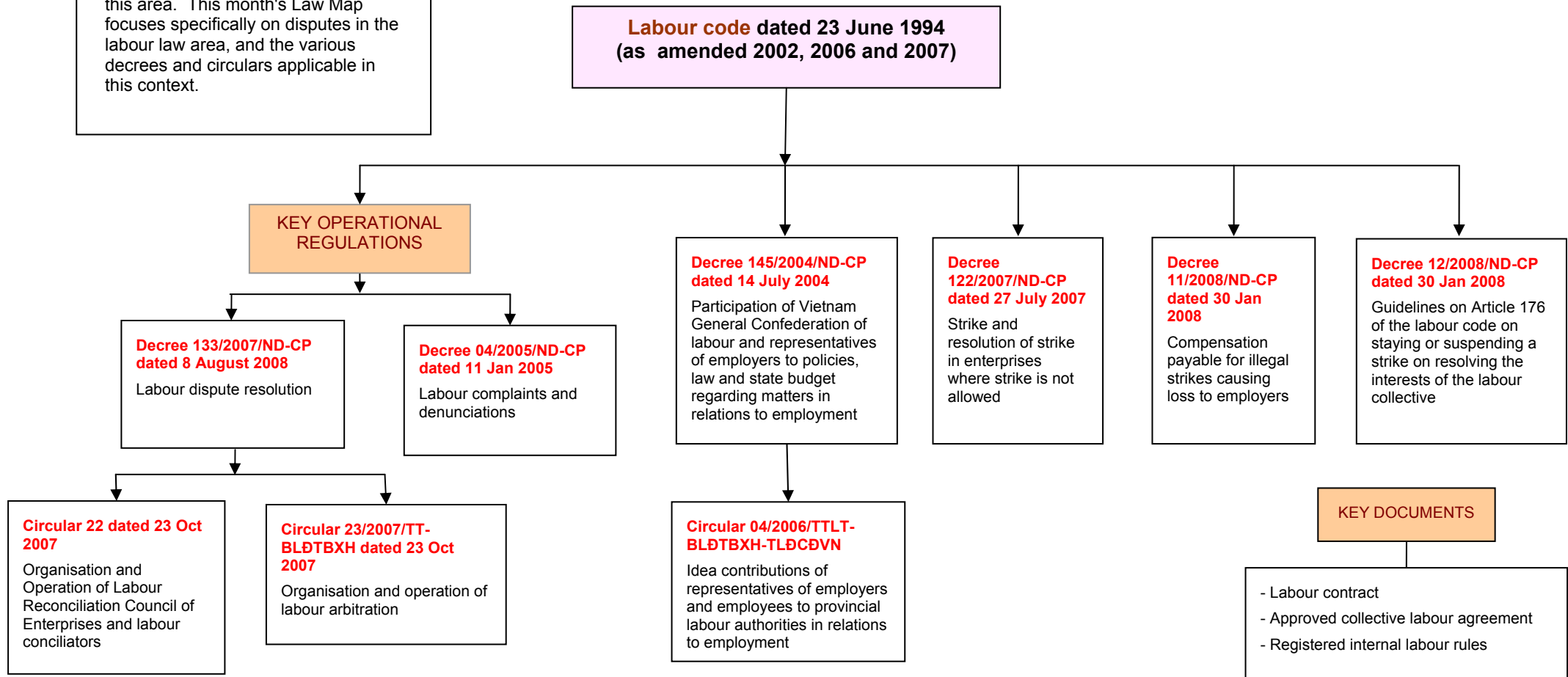
While the workshop indicated a continuing open dialogue on the topic, it is clear that the door for foreign investors is not so widely open as understood, or indeed required, under Vietnam WTO's accession agreement in terms of trading and distribution activities.

Part 2 Feature

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**LABOUR DISPUTE RESOLUTION LAW MAP**

Last month's VLU spotlighted several specific labour law topics, and we included a general Labour Law Map covering all major laws applicable in this area. This month's Law Map focuses specifically on disputes in the labour law area, and the various decrees and circulars applicable in this context.



## Part 3 Did You Know?

### 3.1 Public Offers - Vietnam style

For those of us working in the securities sector in other countries, there can be no doubt that a public offer in Vietnam 'ain't exactly what we expect it to be'. In this VLU piece, allow us to share with readers our 'top five' important differences:

- (i) An IPO is commonly understood to mean a first offering on the stock exchange; hence the acronym's origin: Initial Public Offering. However, in Vietnam the concept of an IPO means the first public offering to more than 100 investors which are not institutional investors. Therefore, an IPO is not necessarily associated with a stock exchange listing.
- (ii) Lawyers in Vietnam are rarely involved in advising in an IPO. Issuers instead rely on Vietnam-licensed securities companies with advisory capabilities to advise them on the structuring and regulatory issues, and on stock exchange filing and registration.
- (iii) The Vietnam regulators take a 'tick the box' mentality when assessing an application for a public offer. As long as the prospectus and the application file mirror the model documents issued by the Ministry of Finance, the application is almost always approved. There is no looking beyond the documents.
- (iv) The materiality principle, such as the 'reasonably informed investor' test for public disclosures in relation to a public offer, is yet to be developed.
- (v) Share prices are set at a relatively high price.

When, or whether, IPOs in Vietnam will begin to look like IPOs in developed securities markets is anyone's guess.

### 3.2 Unlisted companies – another conundrum for foreigners

2007 saw a significant increase in the purchase of shares and other equities in Vietnamese enterprises, particularly by foreign investors, resulting in an escalation both in the quantity and value of shares of domestic companies. Since Vietnam's accession to the WTO on 11 January 2007 more foreign investors are clearly choosing Vietnam as a lucrative investment destination; however, the laws currently governing foreign investment, particularly in unlisted Vietnamese enterprises, remain unclear and inconsistent.

#### Changing tide

Prior to the implementation of both the 2005 Law on Enterprises (**LOE**) and the 2005 Law on Investment (**LOI**), Decision 36/QD-TTg dated 10 June 1999 (**Decision 36**) permitted foreign investor to buy a maximum of 30% of the shares or equity in unlisted Vietnamese enterprises operating in certain sectors.

The LOE and the LOI, in contrast, generally treat foreign investors and Vietnamese investors equally in terms of their rights to invest in, make capital contributions to and purchase shares in unlisted enterprises. Decree 139 implementing the LOE (**Decree 139**), issued in the fall of last year, further hammers home the change in prior law by allowing foreign investors to make capital contributions and to purchase shares in unlisted enterprises 'without limit,' **subject (only) to** ownership ratios set forth in industry-specific laws (such as banking); in cases of equitisations of State owned enterprises: and in the WTO schedule and conditional sectors listed in the LOI.

#### Confusion reigns post-LOE and LOI

The 'subject tos' noted above are significant, and clearly qualify Decree 139's 'general application' to foreign investment, but it is the impact of subsequent legal instruments promulgated by State bodies at lower levels that is resulting in the current confusion and

uncertainty regarding foreign investment in unlisted local companies. As examples:

- On 8 November 2007, the Ministry of Finance issued Decision 3567/QD-BTC (**Decision 3567**) regarding the organization and management of trading of securities in unlisted public enterprises. This decision purports to limit foreign ownership in unlisted public companies to the same percentage as listed companies, ie 49%.
- On 3 March 2008, the Prime Minister published Official Letter 319/TTg-KHTH (**Official Letter 319**) concerning anti-inflammatory measures generally, but including the setting of a cap on foreign investment in unlisted public enterprises at 'up to but not exceeding 49%.'
- This same cap was specified at 40% in Official Letter 63/TB-VPCP on 11 March 2008 (**Official Letter 63**), reflecting an agreed action item arising from a recent meeting between the Government and several State bodies.

#### Clarity needed

Ultimate clarity on this issue will only be achieved once Decision 3567, Official Letter 319 and Official Letter 63 - and perhaps other local-level pronouncements - are reconciled and codified into a decree, circular or other appropriate legal instrument amending or at least distinguishing itself from Decree 139.

In the interim, and technically speaking, the Law on the Promulgation of Legal Instruments dated 12 November 1996 requires lower level instruments inconsistent with higher level instruments to be repealed or suspended from implementation. However, convincing lower level DPI officers to ignore recently published Government letters presents an interesting challenge to foreign investors.

### 3.3 Update on Advance Payments

As discussed in the January 2008 edition of the VLU, the practice of developers requiring substantial advance payments toward the purchase price for apartments/villas was officially forbidden with the passage of the 2005 Law on Residential Housing (**LRH**).

#### Law is clear

Article 39.1 of the 2005 LRH allows developers to receive advance payments only after the project design has been approved and the foundation has been completed further. Article 14.1 of Decree 153 of the Government dated 15 October 2007 (implementing the 2006 Law on Real Estate Business) further requires a developer to have commenced construction of the infrastructure when the project forms part of a development complex.

Even if the above requirements are satisfied, the developer is still only entitled to receive advance payments of up to 70% of the value of the villa/unit being sold.

So why do we continue to see and read in the newspapers stories of developers taking deposits from long lines of would-be purchasers at empty development sites?

#### Deliberate by-pass

Developers been clever in by-passing these restrictions over the past year by employing elaborate tactics and nomenclature such as 'security deposits', 'preferential ticketing' and 'booking fees' as alternative means of acquiring funding for projects. The Department of Construction in Ho Chi Minh City, however, officially opined in November 2007, in relation to several well-publicised (and successful) projects, that these types of deposits and fees substantially amount to advance payments. The developers of these projects were instructed to refund such the payments to buyers, under threat of their project approval being revoked. The Department also advised that re-offending developers could face suspension. Whether these or any other sanctions are actually being enforced is an open question.

### **Bonds - a legitimate end run?**

There may be a legitimate alternative avenue available to developers, in their efforts to raise the necessary funding for projects. This is through the issuance of bonds. An option available only to State-owned enterprises prior to the 2005 Law on Enterprises (**LOE**), bond issuance is now a viable and permitted method for joint stock companies and limited liability companies seeking to mobilise capital.

As reported in Vietnam News on 18 March 2008, Sai Gon Thuong Tin Real Estate issued bonds in January 2008 at a value of VND 500 million each for a six-month period with interest. These bonds give their holders a preferential right to buy apartments in the Phu Loi project at a 5% discount. This follows a similar successful bond issuance by Vincom Joint Stock Company late last year of VND 1 trillion in bonds.

### **Will popularity spawn restriction?**

Unlike the questionable methods used by some developers to date, the right of companies to issue bonds is legally enshrined and complies with both the LOE and the 2006 Law on Securities. However, it remains to be seen whether the authorities might also challenge the issuance of bonds by developers as yet another means of circumventing the restriction on advance payments in the LRH, particularly if they become 'too popular'.

## **3.4 Who's got the vote?**

Since the introduction of the first Law on Foreign Investment in Vietnam (**LOFI**) in 1987, there have been several changes regarding the requirements for passage of resolutions by the management bodies of foreign-invested joint venture companies (**JVs**).

### **LOFI – simple majority...the majority of the time**

At all times up to 1 July 2006 (the effective date of the current Law on Enterprises (**LOE**) which, together with the Law on Investment, replaced the LOFI), there were certain matters which required unanimous approval of the board of management. The LOFI set out a list of such matters, which (in the last version of this law) included amendments to the Charter and appointment and dismissal of the General Director or Deputy General Director of the JV. Under the LOFI, then, a Vietnamese partner holding only a 5% interest in a JV could veto such matters.

For most of the time prior to 1 July 2006, the LOFI provided that all *other* matters could be decided by the JV's board of management members attending a meeting, on the basis of a simple majority. (Before this, it had required a two-thirds majority for approval of other matters.)

### **LOE - steps forward or back?**

The LOE, which was designed to provide a level playing field for foreign-invested and purely 'local' companies in terms of establishment and management, took what many perceived to be a step backward in terms of voting requirements. Although the requirement of unanimity was abolished, the LOE requires certain limited important matters (such as amendments to the Charter, re-organisation of the company and sale of assets valued at 50% or more of its total assets) to be decided by the management body on the basis of at least a 75% majority vote. All other matters are decided by at least a 65% majority vote.

No more simple majority, as had existed under the LOFI and, more significantly, as now required under Vietnam's commitments to the WTO.

To deal with a number of WTO related issues, including the issue of the LOE's minimum voting requirements' being inconsistent with the commitments of Vietnam to the WTO, the National Assembly passed Resolution 71-2006-QH11 on 29 November 2006 (**Resolution 71**). But does Resolution 71 do the trick?

**Resolution 71 – the fix?**

Amongst other matters, Resolution 71 provides that notwithstanding the voting provisions of the LOE, limited liability companies and shareholding companies (meaning the investors in these companies) have the right to stipulate the following matters in their company charters:

- (i) quorum requirements and methods of passing resolutions
- (ii) matters within the decision-making authority of the management body (either Members Council or Shareholders Meeting), and
- (iii) the requisite majority of votes (including a simple majority) needed to pass resolutions.

Resolution 71 thereby effectively amended the LOE on the voting point.

These voting concessions in Resolution 71 were not expressed to be applicable solely to companies whose investor(s) are from WTO-member countries.

We reported in the February VLU on the general issue of WTO benefits generally being made available to foreign investors from non-WTO countries. As noted therein, an exchange of Official Letters between the Ministry of Trade (**MOT**) and Ministry of Planning and Investment (**MPI**) in October and November of 2007 initially suggested that both Ministries were of the view that non-WTO member country investors should be eligible to enjoy WTO concessions, at least in respect of trading activities in Vietnam. However, in late November 2007, the MOT, in respect of an application to the DPI by a BVI company for the conduct of trading and distribution activities, concluded that the application should *not* be considered, as the BVI is not a member of WTO. This demonstrated a narrower interpretation of application of WTO benefits.

On 26 December 2007, the Working Group on Implementation of the LOE and LOI issued Official Letter No. 771-BKH-TCT on the application of Resolution 71 (Official Letter 771). Official Letter 771 reflected an even narrower interpretation regarding the concessions to management and voting issues for JVs dealt with in Resolution 71, stating that, in order to be able to freely regulate these matters, the JV must operate in the sectors in respect of which Vietnam has made WTO commitments. It goes on to state that the provisions of the LOE apply to all other JVs (whether existing or yet to be established). (Please see our discussion of Official Letter 771, also in our February VLU.)

Under Resolution 771, then, the parties to a JV investing in property development or cement manufacture, for instance, may not provide for simple majority voting by relying on Resolution 71; it appears they must adopt the 65/75% voting requirements under the LOE. And this would be regardless of the place of incorporation of the foreign party to the JV – in a WTO-member country or otherwise.

**And then, what about re-registrations?**

To take this line of reasoning further, whether or not a JV engaged in activities not covered by Vietnam's WTO commitments re-registers under the LOE by the current deadline of 30 June 2008, the voting requirements of the LOE may apply, as Article 20 of Decree 101/2006 on re-registration provides that companies which do not re-register "shall operate in accordance with the Law on Enterprises, the Investment Law and other legal provisions."

The re-registration process generally is discussed in Part 1 of this issue of the VLU.

**Proceed with caution**

Given this restrictive interpretation (and in the hope that clarification of this issue will be in favour of majority investors), care needs to be taken when drafting charters for new JVs and on re-registration of a JV so that the 65/75% voting requirements (and other matters dealt with in Resolution 71) are not 'locked in' to the document, and that the majority investor can take advantage of any future favourable clarification of the law.

## Part 4 What's new on [www.vietnamlaws.com](http://www.vietnamlaws.com)?

### NEW subject categories in Vietnam Laws Online Database

Vietnam Laws Online Database on [www.vietnamlaws.com](http://www.vietnamlaws.com) is an online searchable database of English translations of more than 3,500 Vietnamese laws relating to foreign investment and far beyond. Subscribers can search for legislation by subject category, keyword, date, issuing body, official number, legislation type, or advanced option. Translations can be viewed online, and also printed and downloaded (subject to terms and conditions).

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

- ➔ Decision 479 maintaining the basic interest rate in VND at 8.75%, 29 February
- ➔ Notice 29 maintaining the refinancing and discount interest rates of the State Bank, 29 February
- ➔ Official Letter 305 permitting banks to conduct their own equitisation of member units (without Prime Ministerial decisions), 28 February
- ➔ Draft Law on Corporate Income Tax (Amended), 21 February
- ➔ Decision 504 widening the forex trading band from 0.75% to 1.00%, 7 March
- ➔ Official Letter 319 of the Prime Minister on increasing anti-inflationary measures, 3 March
- ➔ Draft Regulations on trading securities in unlisted public companies (commonly referred to as trading on the OTC market), 27 February
- ➔ Decision 13 increasing duty on brand new imported cars, 11 March
- ➔ Decree 71 on management of seaports, 25 July 2006
- ➔ Official Letter 1658 on amendment of the Regulations on electronic games with prizes for foreigners, 17 March
- ➔ Draft Law on Value Added Tax (Amended), 5 March
- ➔ Circular 14 on land use rights (applicable to economic organizations with 100% foreign owned capital), 31 January
- ➔ Decision 14 increasing import duty on second-hand cars, 11 March
- ➔ Official Letter 352 permitting an investor to establish the one project management board to manage a number of projects of such investor as well as projects of other investors, 10 March
- ➔ Supervisory Council, 3 March

**The list above is merely a recent snapshot of the wide range of new legislation now uploaded and available on Vietnam Laws Online through March 2008.**

### NEW search function for Vietnam Legal Update

As regular VLU readers know, all issues of our Vietnam Legal Update from 1997 have previously been available on [www.vietnamlaws.com](http://www.vietnamlaws.com). We are still in the final stages of merging our prior Phillips Fox system into the new Allens one, and IT glitches keeping to a minimum, hope to soon access to back issues of our VLUs for readers.

## Part 5 Get to know us

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In this issue of the Vietnam Legal Update, we continue a new feature, spotlighting lawyers from Allens' Hanoi and Ho Chi Minh City offices. Our Vietnam legal team hails from Vietnam, Australia, the United States, Finland and South Korea, with our total number of lawyers based in Vietnam now standing at 25, and rising.

The second lawyer to be featured in our new 'Get to know us' section of the VLU is Minh Duong, a lawyer in our Ho Chi Minh City office.



**Minh Duong** is an Australian qualified lawyer who joined Allens' Ho Chi Minh City Office over a year ago. Minh's practice is focused in the securities, banking and finance, corporate and commercial areas. He has advised on the establishment of several high-profile private equity and listed funds collectively raising over USD2 billion, and also on the establishment of several Vietnam fund management companies, as well as offerings of new securities products for Vietnam.

In his free time, Minh enjoys travelling, listening to music and reading books given to him by visiting friends - the type of books one can't get in Vietnam.

Quote from the source: "Anh có thắng chứng khoán chưa anh?"  
(Literal interpretation: "Big brother, have you won on the securities"?)