



Vietnam Legal Update

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Part 1 Selected New Legal Instruments

1.1 Bonds

Decree 52-2006-ND-CP of the Government dated 19 May 2006 on Issuance of Enterprise Bonds

Decree 52 regulates the issuance of bonds by shareholding companies, State owned entities in the process of conversion into limited liability companies or shareholding companies, and foreign invested enterprises in Vietnam ("company bonds"). It does not apply to company bonds guaranteed by the Government or public bond issues.

An enterprise wishing to issue company bonds must satisfy the following conditions:

- > Being one of the above types of enterprise;
- > Having been in operation for at least 1 year;
- > Having audited financial reports for the year preceding the year of bond issue;
- > Having made profit in the year preceding the year of bond issue;
- > Having an approved plan for bond issue.

Bond issues must be based on the principles of self-lending, self-paying and self-responsibility for the efficient use of loan. Monies collected from a bonds issue must be used for implementation of investment projects, re-structure of medium and long term loans, or expansion of operating capital scale. Funding for payment of bond principal and interest to bondholders is to be "from sources of basic depreciation of the investment project [or] project works and from other legal capital sources of the enterprise".

Purchasers of company bonds may be Vietnamese organizations and individuals; Vietnamese residing overseas; foreign organizations and individuals. Company bonds may be freely assigned, donated, bequeathed and inherited, or discounted, mortgaged and pledged in credit relationships in accordance with current regulations.

Company bonds are issued and paid for in Vietnamese dong. Bonds may be issued in the form of certificates, record entries or electronic data with the nominal value of at least VND100,000 or another nominal value being a multiple of VND100,000 (as decided by the issuing enterprise). Bond interest rates are also at the decision of the enterprise, based on the prestige of the enterprise, the efficiency of the investment project, and the financial and monetary situation. Interest rates may be fixed for the whole period or floating.

The plan for a bond issue must be approved as follows:

- > A plan for issue of convertible bonds must be approved by the general meeting of shareholders;
- > A plan for issue of non-convertible bonds must be approved by the Board of Management, Member's Council or representative of the owner's capital;
- > A plan for issue of bonds to supplement the equity of State credit institutions or for issue of bonds of State owned entities (including State companies, State shareholding companies, one member State limited liability companies, and State limited liability companies with two or more members during conversion) must be approved by the Ministry of Finance.

Types of bonds:

- > Convertible bonds may be issued by shareholding companies;
- > Non-convertible bonds may be issued by State owned entities, shareholding companies, limited liability companies and foreign invested enterprises.

Both convertible and non-convertible bonds can be either secured or non-secured.

Methods for securing bonds comprise: guarantee for payment by financial or credit institutions; guarantee using property of the issuing organization; guarantee using property of a third party. The Ministry of Finance will provide specific guidelines on security for payment of bonds.

Underwriters of bond issues can be securities companies and other financial institutions. The Ministry of Finance will provide and publish annually the criteria for underwriters. Decree 52 envisages banks underwriting issues.

Securities companies, credit institutions and other financial institutions may be agents for a bond issue. The Ministry of Finance will stipulate the criteria for organizations being agents for bond issue.

The responsibilities of State management bodies and representatives of owners of enterprises include the following:

- > Ministry of Finance:
 - Carry out State management over company bond issues;
 - Supervise the limit of debt safety with respect to State owned entities within the total debt safety limit of the State;
 - Consider and approve bond issues by State credit institutions and State owned companies;
 - Suspend bond issues by enterprises in breach of State regulations on bond issues.
- > State Bank:
 - Consider and decide on bond issues by credit institutions;
 - Co-ordinate with the Ministry of Finance to guide credit institutions on being underwriters and agents for bond issue;
 - Carry out State management over use of company bonds for trading on the monetary market; discount, mortgage or pledge of bonds in credit relationships between credit institutions and owners of bonds.
- > Representatives of owners of enterprises:
 - Approve plans for bond issues of the enterprises under their management;
 - Supervise the issue, use and payment of principal and interest of bonds when due.

Decree 52 will be effective as of 1 July 2006.

1.2 Tendering

Official Letter 2820-BKH-QLDT of the Ministry of Planning and Investment ("MPI") dated 21 April 2006 on Implementation of Law on Tendering

Vietnam's new Law on Tendering was passed on 29 November 2005 and became effective as of 1 April 2006. For foreign investors in projects with 30% or more State capital, the new Tendering Law has brought little joy. Such projects remain subject to the requirement to conduct tendering in accordance with Vietnamese tendering rules. One welcome reform is that the tendering process for foreign invested projects is no longer subject to "external" State intervention in the form of State consent or approval of any steps of the tendering process. The tendering process for 100% State invested projects remains subject to requirements for approval by the authorized person of almost all steps, including approval of the contents of contracts signed with foreign tenderers.

According to the MPI in Official Letter 2820 (and consistent with our own discussions with officials from the MPI), a draft of the proposed decree providing detailed regulations for implementation of the Tendering Law has been submitted to the Government - but, as yet, the Government has not approved the final decree. The result is that parties needing to conduct tenders and parties wishing to participate in tenders in Vietnam find themselves in a vacuum, without guidelines to interpret the new Tendering Law.

In Official Letter 2820, the MPI provides the following temporary guidelines on conduct of tendering work, pending promulgation of the implementing decree and based on the directive of the Prime Minister in Official Letter 2025-VPCP-CN dated 17 April 2006:

- > As from 1 April 2006, tendering work must be based on the Tendering Law and, until there is a decree implementing the Tendering Law, reference should be made to the relevant contents in the Regulations on Tendering issued with Decree 88-1999-ND-CP of the Government dated 1 September 1999, as amended by Decree 14-2000-ND-CP dated 5 May 2000 and Decree 66-2003-ND-CP dated 12 June 2003 and their guiding Circulars, ensuring they are not inconsistent with the provisions in the Tendering Law.
- > If tender invitation documents (for open tendering) or other tender documents (for limited tendering) were issued before 1 April 2006, assessment and approval of the results of tendering shall be implemented in accordance with the Regulations on Tendering and the applicable guiding Circulars. Other items approved before 1 April 2006 but not yet implemented shall be implemented in accordance with the new Tendering Law.

Official Letter 2820 will remain effective until the date of effectiveness of the implementing decree (which will be 15 days after the decree is published in Vietnam's Official Gazette).

For foreign parties in particular, continuing reference to the Regulations on Tendering over the 1999-2003 period is troublesome. The old framework was already confusing and contradictory - trying to interpret the new Law on such basis will lead to greater confusion and uncertainty.

>>> For more on Vietnam's new tendering law, go to March 2006 Issue of Vietnam Legal update & for more on Vietnam's old tendering regulations, go to April 2005 & June 2003 Issues on www.vietnamlaws.com

>>> For English translations of Vietnam's tendering legislation and much more, subscribe to [Vietnam Laws Online Database](http://www.vietnamlaws.com) on www.vietnamlaws.com

1.3 Intellectual property

Law 50-2005-QH11 of the National Assembly dated 29 November 2005 on Intellectual Property

As of 1 January 2006, the fundamental principles of intellectual property ("IP") rights - the nature of IP rights, the basis of IP rights and the transfer thereof - are governed under Part VI of the new Civil Code 2005. As of 1 July 2006, IP rights will be regulated in detail under Law 50 on IP. This new IP regime replaces the IP provisions of the Civil Code 1995, implementing Decree 76-CP of the Government dated 29 December 1996 on Copyright, and Decree 63-CP of the Government dated 24 October 1996 on Industrial Property (as amended by Decree 06-2001-ND-CP of the Government dated 1 February 2001). The new regime now reflects international rules and practice - one of Vietnam's key commitments in its WTO accession package.

The Ministry of Science and Technology ("MoST") is the primary Government body responsible for administration of Vietnam's IP regime. The MoST has jurisdiction over industrial property rights. The Ministry of Culture and Information ("MoCI") has jurisdiction over copyright. The Ministry of Agriculture and Rural Development has jurisdiction over rights to plant varieties.

> Copyright:

Protection is available for copyright in literary, artistic and scientific works (including architectural works) and in performances, sound recordings, visual recordings, broadcasts and satellite signals carrying coded programmes. An author's moral rights (to title a copyright work, to put the author's name or pseudonym to it, and to protect such work) are protected indefinitely. The moral right to publish a copyright work and the economic rights (eg to copy a copyright work) are protected as follows:

- cinematographic works, photographic works, dramatic works, works of applied art and anonymous works are protected for 50 years as from the date of first publication;
- other works are protected for the whole life of the author and for 50 years after his/her death (in case of co-authored works, 50 years after the death of the last surviving author).

Works of foreign individuals and organizations are protected, including (i) works first published or disseminated in Vietnam, (ii) works published or disseminated in Vietnam within 30 days of publication in another country, (iii) works created and taking a definite form in Vietnam, and (iii) works protected in Vietnam under international copyright conventions of which Vietnam is a member. Effective as of October 2004, the Berne Convention on Copyright Protection for Literary and Artistic Works applies in Vietnam. The Berne Convention requires Vietnam to provide copyright protection for literary and artistic works from other member nations (and offers reciprocal protection for Vietnamese works in other member nations).

Registration is not a compulsory condition for enjoyment of copyright, but registration certificates will constitute proof of copyright ownership in disputes (unless rebutted). Registration applications are processed by the Copyright Office under the MoCI. Registration certificates are valid throughout Vietnam and will be recorded in the national register of copyright and related rights.

Assignment and licensing of copyright is also regulated in detail in the Law on IP. Copyright assignment and licensing contracts must be in writing and include prescribed contents. New regulations on copyright royalties are expected to be issued shortly, to replace the current copyright royalties rules in Decree 61-2002-ND-CP of the Government dated 11 June 2002.

> Industrial property:

Protection is available for industrial property rights in inventions, industrial designs, designs of semi-conducting closed circuits, trade secrets, marks (trademarks & service marks), trade names, geographical indications, and rights to plant varieties. The conditions for protection and the grounds for ownership of industrial property rights are prescribed in detail in the Law on IP. The contents of and procedures for application for certificates of protection are also set out.

Registration of industrial property rights is the basis for ownership and protection in Vietnam. The right to register an invention, industrial design or circuit design belongs to the creator thereof or to the investor in the creation thereof. The right to register a mark or trade name belongs to the organization or individual producing the relevant goods or providing the relevant services. The right to register a Vietnamese geographical indication belongs to the State, and the State allows producers of goods bearing such indications to exercise such right to register (but they do not become the owner thereof).

The registration system is based on the first-to-file principle. Registration applications are processed by the National Office for Industrial Property ("NOIP") under the MoST.

Certificates of protection (eg patents in the case of inventions) are issued to recognize ownership of industrial property rights. Certificates of protection are valid throughout Vietnam as follows:

- Invention patents: for 20 years from the filing date;
- Utility solution patents: for 10 years from the filing date;
- Industrial design patents: for 5 years from the filing date (renewable for two consecutive terms, each of 5 years);
- Certificates of registered circuit designs: for the earliest of 10 years from the filing date, 10 years from the date the designs were first commercially exploited anywhere in the world by persons having the registration right or their licensees, or 15 years from the date of creation of the design;
- Certificates of registered marks: for 10 years from the filing date (renewable for multiple consecutive terms, each of 10 years);
- Certificates of registered geographical indications: for indefinite validity from the issuance date;
- Certificates of protection of plant varieties: for 25 years in the case of timber trees and vines or 20 years for other plant varieties, calculated from the date of issuance.

Industrial property rights of foreign individuals and organizations are protected where a certificate of protection has been issued for such rights.

Issuance of certificates of protection, the principal contents thereof, any amendment, termination or invalidation thereof, and registration of any transfer contracts are all recorded in a national register of industrial property by the NOIP. Fees are payable to maintain validity of certificates of protection. Since 31 January 2005, a single pricing structure has applied to registration fees for domestic and foreign industrial property owners alike.

Assignment and licensing of industrial property rights is regulated in detail in the Law on IP. Contracts for transfer of industrial property rights must be registered with the NOIP. The Law on IP provides for the right to use an invention to be restricted due to prior user rights or compulsory licensing.

> IP enforcement:

Protection and enforcement of IP rights (the main aspect of Vietnam's IP regime which lagged behind international standards) is now expressly dealt with in the Law on IP. Civil, administrative and criminal remedies are available. Civil remedies are provided for in detail in the Law on IP. Administrative remedies (including customs intervention) are also provided for, but penalties will be detailed in implementing legislation. Criminal IP violations are dealt with in accordance with Vietnam's Criminal Code.

Technology transfer is also regulated under Part VI of the Civil Code 2005, but is not dealt with in the Law on IP. A separate Law on Technology Transfer is scheduled for consideration at the current National Assembly Session and for approval at the October-November 2006 Session.

>>> For English translations of Vietnam's intellectual property laws and much more, subscribe to [Vietnam Laws Online Database](http://www.vietnamlaws.com) on www.vietnamlaws.com

1.4 Residential housing

Law 56-2005-QH11 of the National Assembly dated 29 November 2005 on Residential Housing

The Law on Residential Housing is one of a raft of new and very significant Laws which will become effective as of 1 July 2006. The issuance of the Law on Residential Housing is a remarkable development with respect to the laws regulating residential housing matters in Vietnam. Below are our top 10 main points of the Law on Residential Housing:

1. Entities entitled to buy and own residential houses now comprise (a) domestic organizations and individuals (regardless of places of business registration/registration of permanent residence), (b) Vietnamese residing overseas, in certain prescribed cases, and (c) foreign developers of residential houses for lease in Vietnam.
2. A *certificate of ownership of residential house and residential land use rights* will be issued to (a) an owner of a residential house which is also the user of the attached residential land and (b) an owner of an apartment in an apartment building. A *certificate of ownership of residential house* will be issued to an owner of a residential house.
3. Foreign developers of residential houses for *lease* in Vietnam will be issued with a certificate(s) of ownership "with respect to" such residential houses. Foreign developers of residential houses for *sale* in Vietnam will not be issued with such certificates; instead, such certificates will be issued to buyers of residential houses of that developer.
4. Ownership certificates will be issued by (a) a provincial people's committee if the owner is an organization or (b) a district people's committee if the owner is an individual.
5. The construction of new residential houses in projects for development of residential houses must satisfy the minimum requirements on the area of apartments. In particular, apartments must account for at least (i) 60% of the total floor area with respect to urban areas in the special category, (ii) 40% of the total floor area with respect to urban areas in I and II categories, and (iii) 20% of the total floor area with respect to urban areas in III category.
6. If the design of residential houses has been approved and the construction of the foundations has been completed, the developer may raise capital up to 70% of the value of the residential house by way of payments made in advance by persons wishing to purchase or lease that residential house.
7. The developer of residential houses for sale is responsible for warranty of residential houses for at least (i) 60 months with respect to apartment buildings with 9 storeys or more and other types of residential houses the construction of which is funded from the State Budget, (ii) 36 months or more with respect to apartment buildings with 4 to 8 storeys, and (iii) 24 months with respect to other residential houses.
8. Contracts on sale and purchase, lease, hire-purchase, donation, exchange, mortgage, lending, permission to reside with the owner, or authorization to manage a residential house must be notarized by the notary public or certified by the relevant people's committee, except for certain prescribed cases (including the case where the seller or lessor is an organization which has the function of conducting residential housing business).
9. Selling prices and rents may be agreed by the parties, but are subject to the limits stipulated by the State (if any).
10. An apartment building must have a management committee which is the representative to protect the lawful rights and interests of owners and users during the process of use of the apartment building.

>>> For more on Vietnam's emerging real estate market, see [3.1 below](#)

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

Foreign investors: new corporate structure options & new management rules

>>> *Below we look at the new corporate structure options open to foreign investors when Law 59-2005-QH11 on Investment ("New LI") and Law 60-2005-QH11 on Enterprises ("New LE"), both dated 29 November 2005, become effective as of 1 July 2006.*

Until 1 July 2006, the main corporate structure open for foreign direct investment ("FDI") has been limited to the 'special FDI vehicle' of a limited liability company with recognition of ownership of proportions of legal capital contribution only and subject to corporate regulation under the Law on Foreign Investment in Vietnam 1996 (as amended 2000) ("Old LI"). In the case of joint venture enterprises ("JVEs"), a certain proportion of capital contribution was owned by the foreign investor(s) and a certain proportion owned by the Vietnamese investor(s). In the case of 100% foreign owned enterprises ("100%FOEs"), 100% of capital contribution was owned by the foreign investor(s). JVEs and 100%FOEs were the 'form of investment'; the special FDI vehicle was the 'form of enterprise/corporate structure'. Another corporate structure option was the pilot foreign invested shareholding company, being a special FDI vehicle as converted into a shareholding company and subject to corporate regulation under the old Law on Enterprises 1999 (for the latest on this pilot structure, see [3.3](#) below).

As of 1 July, the above corporate structures are no longer options for new foreign investors. Existing investors may choose to retain the above corporate structures. They have until 30 June 2008 to make their choice. After then, they will become frozen in time and unable to change their corporate structure, not to mention having limited opportunities to change other aspects of their investment project. They will terminate upon expiry of the limited duration stipulated in their investment license. (For more on what happens to existing investors as of 1 July, see the April 2006 Issue of Vietnam Legal Update).

As of 1 July, new and (subject to some restrictions) existing foreign investors have the corporate structure options of:

- > Limited liability company ("LLC") with one or more members, suitable where there are only one or two investors, and/or do not anticipate listing or issuing securities; and
- > Shareholding company ("SC"), suitable where there are at least three or more investors, and/or anticipate listing or issuing securities.

Eg A new joint venture between 3 or more investors may establish itself as a SC. But if there are only 2 investors, it can only establish itself as a LLC. There are some other possible corporate structures under the New LE, such as partnerships, but these will not generally be applicable.

Of note, the New LI no longer distinguishes between the forms of investment of JVE or 100%FOE (or business co-operation contracts, see [3.9](#) below). However, the proposed Decree Making Detailed Provisions for Implementation of the New LI does so distinguish, providing for 'joint venture economic organizations' and 'economic organizations with 100% capital of investors'. It will be the case (as now) that FDI in certain sectors, eg distribution, will be restricted to a prescribed form of investment, eg joint venture. In turn, this will influence which form of enterprise/corporate structure is adopted, ie LLC or SC.

Whereas both the form of investment and the form of enterprise/corporate structure of FDI projects were regulated under the Old LI, as of 1 July 2006, the form of investment will be regulated under the New LI and the form of enterprise/corporate structure will be governed under the New LE.

The following table sets out the main distinctions between LLCs and SCs:

Issue	LLC		SC
	LLC with 1 member	LLC with 2 or more members	
<i>Required number of members/shareholders (foreign or domestic legal entities or individuals)</i>	One member	2 or more members, but not exceeding 50 members	At least 3 shareholders; no restriction on maximum number of shareholders
<i>Issuing shares</i>	A LLC may not issue shares		A SC may issue shares
<i>Listing on securities market</i>	A LLC cannot be listed		A SC can be listed provided the listing conditions are satisfied
<i>Management structure</i>	<p>(a) The member appoints:</p> <p>(i) one authorized representative to serve as the Chairman; and</p> <p>(ii) 1 to 3 controllers.</p> <p>The Chairman then appoints or employs a General Director.</p> <p>or</p> <p>(b) The member appoints / nominates:</p> <p>(i) a Members' Council (comprised of several authorized reps),</p> <p>(ii) the Chairman of the Members' Council and</p> <p>(iii) 1 to 3 controllers.</p> <p>The Members' Council then appoints or employs a General Director.</p>	<p>All LLCs with 2 or more members must have a Members' Council, a Chairman of the Members' Council, and a Director/General Director.</p> <p>An LLC with 11 or more members must also have a Control Board.</p>	<p>All SCs must have a General Meeting of Shareholders, a Board of Management, a Chairman of the Board of Management, and a General Director.</p> <p>An SC with 11 or more individual shareholders, or an SC that has a corporate shareholder holding more than 50% shares of the SC, must also have a Control Board.</p>

The following table summarizes and compares the management rules applicable to JVEs under the Old LI against the management rules that will apply to LLCs with 2 or more members and SCs established (or converted from existing foreign invested enterprises) as of 1 July 2006 under the New LE. In general, management rules for SCs are more onerous than those applicable to LLCs, but other provisions may offer some advantages where foreign investors hold less than a 65% interest in the company.

Issue	Old LI	New LE		
	JVE	LLC with 2 or more members	SC	
<i>Management structure</i>	A JVE must have a board of management ("BOM"), a Chairman of the BOM, a General Director and a Deputy General Director(s).	A LLC must have a Members' Council ("MC"), a Chairman of the MC, and a Director/General Director. No Deputy General Director is required. A LLC with 11 or more members must also have a Control Board.	A SC must have a Shareholders' Meeting ("SM"), a BOM, a Chairman of the BOM and a General Director. No Deputy General Director is required. A SC with 11 or more shareholders, or a SC with a corporate shareholder holding more than 50% shares of the SC, must also have a Control Board.	
<i>Composition of management body</i>	BOM: Highest management body. Comprises members appointed by each of the parties to the JVE in proportion to their respective legal capital contributions (provided that, in a two-party JVE, each party has at least 2 BOM members).	MC: Highest management body. Comprises all members of the LLC. Members can be individuals or corporate entities. If member is corporate entity, it must appoint an authorized representative to participate in the MC.	SM: Highest management body. Comprises all shareholders holding voting shares. If shareholder is corporate entity, it must appoint one or more authorized representative(s) to participate in the SM.	BOM: Body managing the SC, with full authority to make decisions in the name of the SC, except for issues which fall within the authority of the SM. Consists of between 3 and 11 members, appointed and dismissed by the SM. A BOM member need not also be a shareholder.
<i>Term of office of members of management body</i>	BOM members appointed for maximum 5 year term, but may be re-appointed.	No restriction for members of the MC.	No restriction for shareholders of the SM.	BOM members appointed for maximum 5 year term, but may be re-appointed.
<i>Chairman of management body</i>	BOM Chairman appointed by the parties to the JVE; responsible for convening and chairing BOM meetings and monitoring execution of BOM resolutions.	MC Chairman appointed by the MC from among the members; responsible for, inter alia, convening and chairing MC meetings and monitoring execution of MC resolutions.	SM is chaired by the BOM Chairman or by another person appointed in accordance with the SC charter or the law.	BOM Chairman appointed by the SM or the BOM in accordance with the charter; responsible for, inter alia, convening and chairing BOM meetings and monitoring execution of BOM resolutions.
<i>Meetings of management body</i>	BOM must hold ordinary meetings at least once a year. Extraordinary meetings may be convened at request of (i) Chairman, (ii) two-thirds of BOM members, or (iii) the General Director or (iv) the first Deputy General Director.	MC must hold ordinary meetings at least once a year. Extraordinary meetings may be convened at request of (i) Chairman, (ii) 1 member or group holding more than 25% of charter capital, or (iii) if a member holds more than 75% of charter capital, the remaining minority of members.	SM must hold meeting at least once a year. Extraordinary meetings may be convened by BOM in prescribed circumstances, including, inter alia, requests of (i) 1 shareholder or group holding more than 10% of total ordinary shares for consecutive period of 6 months or more, and (ii) Control Board.	BOM must hold ordinary meeting at least once per quarter. Extraordinary meetings must be convened at the request of (i) Control Board, (ii) General Director or 5 other management personnel, (iii) 2 BOM members or more, or (iv) in any circumstance stipulated in charter.

Issue	Old LI	New LE		
	JVE	LLC with 2 or more members	JVE	SC
<i>Quorum of meeting of management body</i>	BOM: 66.66% of BOM members representing the parties to the JVE.	MC: Either (i) members representing at least 75% of charter capital for 1 st convening, (ii) members representing at least 50% of charter capital for 2 nd convening, or (iii) members present at meeting (regardless of number) for 3 rd convening.	SM: Either (i) shareholders representing at least 65% of voting shares for 1 st convening, (ii) shareholders representing at least 51% of voting shares for 2 nd convening, or (iii) shareholders present at meeting (regardless of number) for 3 rd convening.	BOM: 75% of BOM members.
<i>Powers and duties of management body</i>	BOM: Mainly agreed by the parties in the charter.	MC: Specifically regulated by the law and as agreed by the parties in the charter. Matters specified by law include decisions on or approval of: > annual business plans and development strategies of LLC; > investments valued at over 50% of total assets; > marketing, technology transfer; and loan agreements and contracts for sale of assets valued at 50% or more of total assets; > appointment/ dismissal and salary/benefits of Chairman, General Director, Chief Accountant and other managers; and > financial statements.	SM: Specifically regulated by the law and as agreed by the parties in the charter. Matters specified by law include decisions on or approval of: > "the orientation of development" of SC; > classes of shares, number offered, share redemptions exceeding 10% of shares issued; and dividends (unless Charter stipulates otherwise); > appointment/ dismissal of BOM members; > investments and sale of assets valued at 50% of total value of assets or more (unless charter stipulates "other" percentage); > financial statements; and > "consider and deal with" breaches by BOM... which cause damage to SC and its shareholders.	BOM: Specifically regulated by the law and as agreed by the parties in the charter. Matters specified by law include decisions on or approval of: > "medium term development strategies, plans", and annual business plans of SC; > marketing, technology transfer; loan agreements and contracts for sale of assets valued at 50% or more of total assets; > appointment/ dismissal of General Director and other key managers. In addition, the BOM is authorized to make recommendations to the SC in relation to certain specified matters.

Issue	Old LI	New LE		
	JVE	LLC with 2 or more members	JVE	SC
<i>Passing decisions or resolutions of meetings</i>	Resolutions of BOM may be passed by simple majority, except with respect to those matters requiring unanimous approval of those members present at BOM meeting, ie appointment/ dismissal of General Director and first Deputy General Director, amendment of JVE charter, and any other matters stipulated in JVE charter as requiring unanimous approval. The Old LI does not provide for the Chairman to have a casting vote.	<p>> A decision of MC is considered as passed at MC meeting if:</p> <p>(a) Such decision is approved by votes representing at least 75% of total capital of participating members for decisions on (i) sales of 50% or more of total assets, (ii) amendment of charter, and (iii) reorganization or dissolution of LLC; or</p> <p>(b) Such decision is approved by votes representing at least 65% of total capital of participating members for decisions other than decisions on matters set out in (a) above.</p> <p>> A decision of MC is considered as passed by a circular resolution (ie written decision without meeting) if approved by members representing at least 75% of charter capital. The New LE does not provide for MC Chairman to have a casting vote.</p>	<p>> A decision of SM is considered as passed at SM meeting if:</p> <p>(a) Such decision is approved by shareholders representing at least 75% of total votes of participating shareholders for decisions on: (i) type and number of shares, (ii) amendments of charter, (iii) reorganization or dissolution of SC, or (iv) investment or sale of 50% or more of total assets (unless SC charter specifies "different" percentage); or</p> <p>(b) Such decision is approved by shareholders representing at least 65% of total votes of participating shareholders for decisions other than decisions set out in (a) above.</p> <p>> A decision of SM is passed by a circular resolution if approved by shareholders representing at least 75% of total votes.</p>	A decision of BOM is considered as passed if it is approved by a simple majority of BOM members attending the BOM meeting. The BOM Chairman has a casting vote.
<i>General Director</i>	Appointed/ dismissed by BOM.	Appointed/ dismissed by MC.	Appointed/ dismissed by BOM. Term of office of the General Director must not exceed 5 years but may be renewed. The General Director must not concurrently be a general director of another company.	
<i>Powers and duties of General Director</i>	Not prescribed in detail in Old LI, but must be stipulated in JVE charter.	Specifically regulated by the law and may be stipulated in LLC charter and the employment contract between the General Director and the LLC. Matters specified by law include: (a) organizing the implementation of MC resolutions; and (b) making decisions on all matters relating to day-to-day business	Specifically regulated by the law, and may be stipulated in SC charter and determined by BOM. Matters specified by law include: (a) organizing the implementation of BOM resolutions; and (b) making decisions on all issues relating to day-to-day operation of the SC which don't require BOM resolution.	

Issue	Old LI	New LE	
	JVE	LLC with 2 or more members	SC
		operation of the LLC.	
<i>Legal representative of company</i>	General Director is legal representative of JVE, unless charter stipulates otherwise. No residency requirement for General Director of JVE, but either General Director or Deputy General Director must be Vietnamese citizen residing in Vietnam.	General Director or MC Chairman is legal representative of LLC as stated in its charter. Legal representative must be resident in Vietnam. If absent from Vietnam for more than 30 days, he/she must authorize in writing another person in accordance with LLC charter to carry out powers and obligations of legal representative.	General Director is legal representative of SC, unless SC charter stipulates BOM Chairman of is legal representative. Legal representative must be resident in Vietnam. If absent from Vietnam for more than 30 days, he/she must authorize in writing another person in accordance with SC charter to carry out powers and obligations of legal representative.
<i>Approval of contracts and transactions</i>	Old LI does not specify which contracts and transactions must be approved by BOM of a JVE in order to be effective.	New LE specifies related party contracts and transactions that must be approved by MC in order to be effective, ie contracts and transactions between LLC and following persons: (a) Members, authorized representative of member, General Director, legal representative of LLC and related persons thereof; and (b) Managers of parent company, person authorized to appoint managers of parent company and related persons thereof.	New LE specifies related party contracts and transactions that must be approved by SM or the BOM in order to be effective, ie contracts and transactions between SC and following persons: (a) Shareholders, authorized representative of shareholders holding more than 35% of ordinary shares of SC and related persons thereof; (b) BOM members, General Director and related persons thereof; (c) Companies in which BOM members, Control Board members, General Director and other managers of SC own contributed capital or shares; and (d) Companies in which related persons of BOM members, Control Board members, General Director and other managers of SC jointly own or separately own contributed capital or shares of more than 35% of charter capital.

Investment decree

>>> As featured in the April 2006 Issue of Vietnam Legal Update, the Ministry of Planning and Investment ("MPI") has released for public comment its draft Decree Making Detailed Provisions for Implementation of the New LI. Since last month, Draft 9 and 10 of the proposed Investment Decree have come and gone; and Draft 11 never saw the light of public scrutiny. Below we take a brief look at the MPI's latest Draft 12, only just released to the public.

Notable changes in May 2006 to the Investment Decree include:

- > The scope of the Investment Decree is now expressly stated to be to provide guidelines for implementation of the New LI "in relation to investment activities for business purposes; rights and obligations of investors; guarantees for legitimate rights and interests of investors; encouragement and investment incentives; State administration of investment in Vietnam".
- > The definition of "investment assets" has been clarified as *tangible or intangible* assets owned or managed by an investor in order to perform its investment project, including eg shares, debts and other forms of borrowing, contractual rights (such as rights pursuant to turn-key contracts, construction contracts, management contracts, and production/revenue sharing contracts), intellectual property rights, concessional rights (such as rights to exploration and exploitation of natural resources).
- > As under earlier drafts, investment approval authority is vested in the Prime Minister for (i) a wide range of projects irrespective of capital level (from sea ports to telecommunications - and almost everything in between) and (ii) a wide range of projects above a prescribed capital threshold (from car manufacturing to real estate). In Draft 10, the capital threshold for projects in (ii) was increased from VND800 billion to VND1500 billion. (Note, as before, the MPI issues the investment certificate for projects approved by the Prime Minister).

The month of May has seen the MPI claw back investment approval authority both from the Prime Minister and from provincial-level people's committees. Until Draft 10, all projects not subject to Prime Ministerial approval were subject to investment approval by the provincial-level people's committee (except, of course, those subject to simple investment registration). In Draft 10, the MPI took over investment approval authority over projects in (ii) with a capital level between VND800 and VND1500 million. Now, in Draft 12, the MPI takes back investment approval authority over all "other projects" (ie not projects in (i) and (ii) above) with a capital level over VND800 million. So now it is proposed that provincial-level people's committees have investment approval authority over only "other projects" with a capital level under VND800 million.

- > The list of sectors in which investment is subject to conditions is found in Appendix D to the Investment Decree, which distinguishes between:
 - (a) Sectors in which both foreign and domestic investment is subject to conditions, such as explosives manufacture, advertising, telecommunications, horse racing, and many more. In Draft 10, a number of new sectors were added, including: health care services; traditional pharmaceutical or medical services; art performance services; production of films in co-operation with foreign parties; "a number of other sectors in accordance with the laws stipulating investment restrictions". And the following sectors were removed: NPK fertilizer, beer and cigarettes; manufacture and assembly of automobiles. In Draft 12, a number of sectors were added, including: exploitation and processing of petroleum, rare and precious minerals; transportation by air, railway or sea; public transportation of passengers; construction of ports and airports; business of maritime or air services; dog racing; non-technical consultancy services; "projects in industries which require uniform State planning". And the following sectors were removed: real estate business in development of infrastructure attached to land for sale/lease; purchase of shares in State owned enterprises.
 - (b) Sectors in which just foreign investment is subject to conditions, such as transportation, tourism, trading and distribution, real estate business (in general), and other prescribed sectors in international treaties. There has been no change in this section of Appendix D under Drafts 10 and 12.

- > May was a good month for mergers and acquisitions. First, the obligation for merging or acquiring companies to continue to employ 60% of the current employees currently for at least 3 years from the time of the merger or acquisition disappeared from the proposed Investment Decree. Then, out went the outrageous provision that foreign investors (not also domestic investors) wishing to merge or acquire more than 10 enterprises in the year in which the transactions of merged or acquisition are conducted were required to submit an explanatory statement to the investment certificate-issuing body for its consideration prior to issuance of an investment certificate. Hopefully, the remaining competition-related clauses proposed to go in the Investment Decree (see below) will also disappear, and competition issues will be regulated only in their rightful place - in Vietnam's Competition Law.
- > The conversion of forms of foreign invested enterprises is now provided for - both the conversion of existing foreign invested enterprises (after re-registration under the proposed decree on re-registration, featured in April 2006 Issue of Vietnam Legal Update) and the conversion of post-1 July foreign invested enterprises. However, the Draft 12 provisions dealing with conversion need further close attention by the MPI. No surprise, the Investment Decree reminds us that the permissible form of foreign invested enterprises must comply with Vietnam's undertakings in relevant international treaties (eg foreign invested enterprises in the distribution sector must be in form of JVE until end of 2008).

Many issues remain unaddressed by the MPI, including:

- > **Overlap and redundancies:** There are substantial provisions in the Investment Decree which are matters that are governed by other legal instruments, dealing with a range of subjects such as land, credit, import-export, advertising, taxation, environmental protection, etc. This gives rise to a serious risk of inconsistencies. Even if currently there are no inconsistencies between the Investment Decree and the current subject-specific laws, inconsistencies may arise in the future when the subject-specific laws are amended and replaced.
- > **International treaties:** The international treaties of which Vietnam is a member appear to be being used as a shield, paving the way for the *maximum* treatment that Vietnam will extend, rather than being used as a minimum standard. Eg article 11.2 of Draft 12 provides: "A foreign investor cannot contribute capital or purchase shareholding *in excess of the undertakings on percentage purchase, forms of investment and schedules stipulated in international treaties of which Vietnam is a member*" (our italics for emphasis). Treaty commitments are usually made on the basis that Vietnam will create a regime that is "no less favourable than" a certain standard. Vietnam should keep open the option to vary upward from the minimum standards that it has committed to in international treatment. This consideration applies to a number of articles of the Investment Decree.
- > **We know the conditional sectors but not the conditions:** Neither in the body of the Investment Decree nor in the Appendix D list of sectors in which investment is conditional can investors find out the relevant conditions for such sectors. Eg will there be restrictions on the form of investment (eg JVE or 100%FOE) and/or on the form of enterprise (eg SC or LLC); will there be a maximum foreign shareholding, etc? Investors need to know.
- > **Purchasing shares in, merger and acquisition of enterprises:** Article 79 of Draft 12 is a concern. The clause itself does not specify whether it applies only to foreign investors but, in the context of the section in which it is found (titled: Additional Files Applicable to Foreign Investment Projects), it must be assumed that it does only apply to foreign investors. Under article 79, foreign investors wishing to purchase shares in, merge or acquire an enterprise in the form of direct investment are required to "explain" to the relevant investment certificate-issuing body various matters, including:
 - Name and address of the enterprise or branch thereof to be equitized or sold; the decision of the members' council on sale of shareholding or sale of the enterprise; and business sector;
 - Names and addresses of the proposed parties to the transaction, including contact information and general information on the branch or sector of the transaction;
 - Brief description of the transaction;

- Explanatory statement analysing the effect of the transaction on the Vietnamese market.

The second item may be cumbersome in the context of a shareholding company with potentially an unlimited number of investors. The third and fourth items seem unnecessary and a burden to foreign investors. In relation to potential competition issues, these are adequately and justifiably covered by the Competition Law. Other than competition issues, why should foreign investors be subject to such a requirement? And how does this requirement fit with the Investment Decree's provision that all investors will "be entitled to equal treatment without any discrimination with respect to the purchase of shareholding, merger and acquisition of enterprises" (article 11)?

- > Joint venture contracts: Article 77 of Draft 12 prescribes the contents of a joint venture contract, which is required to be included in certain dossiers such as the file for investment registration and investment evaluation. This creates two issues. First, the terminology is inappropriate. It should be a members' agreement (for a limited liability company), a shareholders' agreement (for a shareholding company) or a partnership agreement (for a partnership). Second, it should be up to the members, shareholders and partners (as the case may be) to have the freedom to decide if they need such a document. The requirement should not be mandatory. There is no mention of such a document in the Enterprises Law. Its inclusion in the Investment Decree appears to be a hangover from the Old LI, and creates an obligation to produce more paperwork than is necessary.
- > There is no required debt to equity ratio for foreign invested enterprises, as applicable under the Old LI. Will a requirement 'slip in' to the New LI's implementing circular? Will a de-facto ratio requirement become a matter of practice (authorities might not licence a project unless the debt equity ratio is 70:30)?
- > The Vietnamese version of an enterprise's charter and other establishment documents must prevail over the foreign language version, if any (article 4). 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.

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>>> For more on Vietnam's new investment-enterprise regime, see recent issues of Vietnam Legal Update and our other legal updates available on www.vietnamlaws.com

>>> For English translations of the new Law on Enterprises, Law on Investment, and implementing legislation, subscribe to [Vietnam Laws Online Database](http://www.vietnamlaws.com) on www.vietnamlaws.com

Part 3 Did You Know?

3.1 National Assembly update

The National Assembly's Legislature XI is currently in Session. Its 9th Session opened on 16 May and is scheduled to run until 27 June 2006.

- > 11 Laws are scheduled to be passed, including Law on Real Estate:

Under the proposed new Law, real estate activities comprise "real estate business" (development of real estate for sale/lease; purchase, sale and lease of real estate; assignment of real estate for profit making) and "real estate related services" (brokerage, organization of transaction floor, consultancy, valuation, auction, advertisement, and management of real estate).

Vietnamese individuals/businesses would be permitted to engage in all forms of real estate activities. Foreign investors (ie foreign invested enterprises) would only be permitted to: (a) invest in development of housing/construction works for sale/lease; (b) provide brokerage services; and (c) provide real estate management services.

The draft Law requires individuals/businesses engaged in real estate business to conduct real estate business on licensed "transaction floors". The rationale for this provision is understood to be to ensure transparency, publicity and a healthy market. Of note, this provision was criticized as too restrictive during debate of the draft Law on 20 May at the current National Assembly Session (VNExpress 22 May). Anecdotally, most real estate businesses protest against this provision.

Pre-sale of real estate is expected to be formally recognized. Under the draft Law, pre-sale properties must have approved construction designs and real estate developers must only use the buyers' advances for development of the pre-sale properties. The draft Law does not state any restriction on payment milestones or how much real estate developers may receive in advance from buyers. It is expected that the implementing decree will deal with this issue. Pre-sale of real estate was another aspect of the draft Law debated at the current National Assembly Session, with delegates concerned that it enabled foreign investors to use domestic capital to fund their investment project (instead of foreign capital).

The draft Law stipulates that all contracts relating to real estate activities (including related services) must follow standard forms to be prescribed by the Government. Notably, the notarization/certification of sale/lease contracts will only be required if agreed by the parties or if required by other laws. The new 2005 Civil Code (effective 1 January 2006) requires residential housing sale contracts and long-term lease contracts to be notarized/certified, unless otherwise provided by law. Our interpretation of these provisions of the draft Law is that they leave room for the implementing decree to permit sale/lease contracts of real estate developers to be exempt from notarization/certification. Such exemption would be very welcome, as the notarization/certification procedure is currently a significant hurdle for real estate developers. The public notary generally refuses to certify pre-sale contracts and sales contracts which are inconsistent with the prescribed form.

Another aspect of the draft Law debated at the current National Assembly Session was the proposal to require real estate brokers to be issued practising certificates by provincial people's committees. Delegates queried how to ensure provincial people's committees issued practising certificates correctly given their lack of training and experience in real estate. Delegates also called for clarification of the roles of the Ministry of Finance, the Ministry of Natural Resources and Environment, and the Ministry of Construction.

- > Consideration of the proposed Law on Registration of Real Estate has been deferred, so only 12 Laws will be considered at this May-June 2006 Session (and then approved at the October-November Session).

3.2 New forex rules

Effective as of 1 June 2006 (a few months short of the 50th anniversary of Vietnam joining the International Monetary Fund on 21 September 1956), Vietnam's foreign exchange controls have been updated to embrace core IMF principles. Ordinance 28-2005-ND-CP of the Standing Committee of the National Assembly dated 13 December 2005 plays a key role in Vietnam's efforts to join WTO.

Amongst other things, Ordinance 28 enshrines Vietnam's (only recent) acceptance of the obligations under Article VIII, Sections 2, 3 and 4 of the IMF's Articles of Agreement not to impose restrictions on the making of payments and transfers for current international transactions and not to engage in or permit any of their fiscal bodies to engage in any discriminatory currency arrangement or multiple currency practice, except with IMF approval. Residents and non-residents are permitted to buy foreign currency at banks to meet current transactions. The requirement for a permit for purchasing, transferring and remitting foreign currency out of the territory of Vietnam by individuals has been repealed. In its place, a regime of verification of documents at the authorized credit institutions is provided for. Residents and non-residents are permitted to remit foreign currency out of the territory of Vietnam upon presentation of proper documents. The procedures for issuance of permits for a number of specific current transactions have been simplified.

With respect to capital transactions, as before, foreign currency capital for indirect investment must be exchanged into Vietnamese dong and any profits in Vietnamese dong must be exchanged into foreign currency for remittance abroad; and all this must be conducted through specialized accounts at authorized credit institutions.

Ordinance 28 does not liberalize the restrictions on foreign currency transactions within the territory of Vietnam. Transactions in foreign currency must still be conducted only through banking entities authorized to conduct foreign currency exchange. Direct foreign currency transactions remain prohibited, except in limited prescribed cases. All transactions, payments, displaying prices, advertising of residents and non-residents must be carried out in Vietnamese dong.

With respect to foreign exchange services of credit institutions and other organizations, Ordinance 28 provides for the State Bank to permit other organizations to conduct foreign exchange activities, such as security companies and insurance companies. The procedures of issuance of licenses for foreign exchange activities have been simplified, as follows: licensed credit institutions are now automatically permitted to provide foreign exchange services (a separate license is no longer required); non-banking credit institutions may register with the State Bank to provide foreign exchange services; other organizations must obtain a license from the State Bank to do so.

Of note, with respect to State management of foreign exchange activities, Ordinance 28 reserves the right for the Government to apply prudential measures in certain necessary circumstances, including restrictions on purchase, carrying, transfer, payments with respect to current and capital transactions; imposition of obligations to sell foreign currency on residents being organizations; other economic, financial and monetary measures.

3.3 Pilot of foreign invested shareholding companies

As the first step in Vietnam's effort to unify the laws governing foreign and domestic investment and the respective corporate structure options, a pilot round of conversions of foreign invested enterprises ("FIEs") into foreign invested shareholding companies ("FISCs") was introduced. The Prime Minister approved 10 FIEs to participate in the FISC pilot. 7 of the 10 participants have actually proceeded with conversion: Taya, Royal International, Austnam, Interfoods, Taicera, Tung Kuang, and Full Power. The remaining 3 have not: Chang Yih Ceramic, Viet Cans, and Ural-Trac Construction. Taya listed on Vietnam's securities market in February 2006, after its mid-2005 IPO. Full Power has held its first share issue and is understood to be preparing for its second (expected to be conducted via the securities market). Interfoods and Royal International are understood to be planning to launch their IPOs at the HCMC Securities Trading Centre in mid-2006. There is not expected to be any more pilot FISCs due to the introduction of the new investment-enterprise regime as of 1 July 2006 (see [Part 2](#) above).

3.4 WTO accession coming ever closer

Putting Vietnam firmly on the path to WTO accession in 2006, on 14 May, Vietnam concluded its bilateral negotiations with the United States, the last of the 28 WTO members with which it has conducted bilaterals. The terms of the US-Vietnam WTO market access agreement are understood to provide for:

- > Lowering of trade barriers (in particular, lower import duties) for a wide range of US industrial products (eg construction equipment) and agricultural products (eg soybeans).
- > Commitment to open key service sectors, such as telecoms, distribution, financial services.
- > Elimination of export subsidies for Vietnam's textile & garment industry.
- > Recognition of Vietnam's status as a non-market economy for trade remedy purposes (so, eg non-market methodology will be used to resolve anti-dumping cases) for 12 years after WTO accession or until Vietnam is no longer considered to be a non-market economy, whichever is the earlier.

The next step is for the US Congress to authorize Permanent Normal Trade Relations (PNTR) with Vietnam. It is expected that this will be achieved before Congress' August recess.

At Vietnam's end, the next step in its accession bid is to finalize its multilateral negotiations with its WTO Working Party so that the critical Working Party Report and Protocol of Accession (documenting Vietnam's market access commitments) can be finalized for submission to the WTO's General Council. A two-thirds majority of WTO Members must agree (either at a WTO Ministerial Conference or at a meeting of the WTO General Council) to accept Vietnam's accession package and to issue a decision inviting Vietnam to accede as a member of the WTO. WTO accession must be ratified by Vietnam's National Assembly. Vietnam will become a WTO Member 30 days after its ratification is notified to the WTO Director General. Vietnam is aiming to complete the WTO accession process by November 2006 when it hosts the APEC Summit in Hanoi. Legislation implementing Vietnam's "upon accession" commitments, as well as other necessary legislation to enable its other commitments, must be enacted.

3.5 Foreign arbitral awards

In 2002-2003, we followed with great interest a rare attempt to have a foreign arbitral award formally recognised and enforced in Vietnam (see July 2002 and February 2003 Issues of Vietnam Legal Update on www.vietnamlaws.com). In mid-2002, at first instance, the HCMC Supreme People's Court ruled in favour of recognition and enforcement of 2 foreign arbitral awards obtained in Australia in 2000 by a Singaporean company against a construction company in Vietnam in relation to a contractual dispute concerning development of a beach resort in Da Nang. That was the first time that a HCMC court had recognized a foreign arbitration award. The excitement was short-lived. In January 2003, on appeal, the Court ruled against recognition and enforcement of the 2 foreign arbitral awards on the basis that they were "contrary to the basic principles of the laws of Vietnam" (a ground enshrined in the then applicable 1995 Ordinance on Recognition and Enforcement of Foreign Arbitration Awards). The findings leading to this ruling included: that the Singaporean company did not have the capacity to enter into the contract as it lacked the foreign construction contractor license required by Vietnamese law at that time; that such company had not paid tax for which it was liable and had thereby damaged the interests of the State of Vietnam; that the dispute was a non-commercial dispute and not within the scope of applicability of the 1995 Ordinance.

At that time, we believed that only a handful of proceedings for recognition of foreign arbitral awards had ever been brought in Vietnam. In fact, our recent investigations have revealed that only one earlier case had been heard in Vietnam. On 18 December 2001, the provincial court of Lam Dong province ruled in favour of recognition and enforcement of a foreign arbitral award obtained in Switzerland earlier in 2001 by Kyunggi Silk Company (Korea) against Viseri Company (Vietnam) for payment of USD425,900 in relation to a dispute between the parties in Vietnam. The decision of the Lam Dong provincial court does not appear to have been appealed by Viseri. We have been unable to confirm whether Kyunggi recovered all the monies due.

Of note, there has been no attempt to have a foreign arbitral award formally recognised and enforced in Vietnam since 2003.

3.6 Vietnamese contract law

There is no single, universal body of "contract law" in Vietnam. Rather, there are 2 general laws: the Civil Code and the Commercial Law, and a plethora of laws regulating specific contracts. With the revision of the Civil Code and Commercial Law in 2005, the laws regulating "economic contracts" were repealed as of 1 January 2006. The following table lists various contracts that are the subject of specific regulation in Vietnam.

<i>Specific type of contract</i>	<i>Relevant law</i>
Contracts for sale and purchase of property	Civil Code and Commercial Law
Contracts for sale and purchase of houses	Civil Code
Contracts for exchange of property	Civil Code
Contracts for gifts of property	Civil Code
Contracts for loan of property	Civil Code
Contracts for lease of property	Civil Code
Contracts for lease of houses	Civil Code
Contracts for borrowing property	Civil Code
Service contracts	Civil Code and Commercial Law
Contracts for transport of passengers	Civil Code
Contracts for transport of property	Civil Code
Processing contracts	Civil Code and Commercial Law
Contracts for bailment of property	Civil Code
Insurance contracts	Civil Code and Insurance Law
Authorization contracts	Civil Code
Promises of rewards and prize competitions	Civil Code
Contracts for mortgage and pledge of property	Civil Code
Technology transfer contracts	Civil Code (and Technology Transfer Law to come)
Loan contracts	Civil Law and Banking Regulations
Trademark licensing contract	Civil Code and Intellectual Property Law
Contracts for purchase and sale of goods	Commercial Law
Service contracts	Commercial Law and Civil Code
Contracts for provision of promotional services	Commercial Law
Commercial advertising service contracts	Commercial Law
Service contracts for display and introduction of goods and services	Commercial Law
Contracts for representation of business entities	Commercial Law
Contracts for sale and purchase authorization	Commercial Law
Agency contracts	Commercial Law
Processing contracts	Commercial Law and Civil Code
Service contracts to hold an auction of goods	Commercial Law
Logistics services contracts	Commercial Law
Contracts for transiting services	Commercial Law
Franchise contracts	Commercial Law
Labour contracts	Labour Code
Construction contracts	Construction Law
EPC contracts	Construction Law and Tendering Law
Land lease/sublease contracts	Land Law
Joint venture contracts	Foreign Investment Law
Capital assignment contracts	Foreign Investment Law

Generally, the above specific regulations are highly prescriptive. For instance, labour contracts must be "in accordance with" the form prescribed by law. And construction contracts must contain certain required contents. This kind of highly prescriptive regulation raises the question: what happens if a labour contract is not strictly "in accordance with" the prescribed form, or if a construction contract does not contain all of the contents required by law, etc? Do such inconsistencies with the law mean that the contracts are invalid? Unenforceable? Illegal?

3.7 Foreign shareholding in Vietnamese banks

Currently, foreign shareholding in Vietnamese joint stock commercial banks is regulated under Decision 228 of the State Bank dated 2 December 1993. Under Decision 228, any one foreign shareholder (either organizations or individuals, but interpreted as excluding foreign credit institutions) is allowed to hold a maximum of 10% of the chartered capital of a Vietnamese bank and the maximum aggregate shareholding of all foreign shareholders is capped at 30%. Decision 228 was slated for revision in 2004, but this did not occur. Then the Law on Credit Institutions was amended, and the reform allowing foreign credit institutions to purchase shares in Vietnamese banks was introduced, effective as of October 2004. However, as we approach mid-2006, the draft new decree to replace Decision 228 is still not finalized.

The State Bank released on 10 May its latest draft of the proposed new decree on foreign credit institutions purchasing shareholding in Vietnamese joint stock commercial banks (not only private commercial banks but also now equitized State owned banks). Of particular note (and contrary to news reports referred to in the April 2006 Issue of Vietnam Legal Update), the 10% cap on shareholding by any one foreign credit institution in a Vietnamese bank remains in place, as does the 30% cap on the aggregate shareholding of all foreign investors in any one Vietnamese bank. As proposed in the State Bank's December 2005 draft, "strategic investors" may own a maximum shareholding of up to 20% of the charter capital of the bank. Happily, in this latest draft, "strategic investor" has been defined by the State Bank, as "a foreign bank or financial group with strong financial capacity and banking managerial capability; which gives an undertaking to the State Bank to provide assistance regarding technology, training, and new banking products and services; and which is very closely connected with long-term strategic interests in banking business".

The above caps are being widely criticized by both domestic and foreign investors. The Vietnamese Association of Foreign Investors has proposed that the cap on total foreign shareholding should be increased to at least 35% and the cap on any one foreign shareholder should be increased to 25% in the case of shares in equitized State owned commercial banks; and should be increased to 49% and 30% respectively in the case of shares in other joint stock commercial banks. Of note, the Financial Express (UK), 20 May 2006, reported that Vietnam's WTO commitment was to allow any one foreign investor to hold shares up to 30% of capital.

Other restrictions proposed in the draft decree include:

- > Any one foreign credit institution is permitted to purchase shareholding in not more than two Vietnamese banks.
- > A foreign credit institution is only permitted to assign its shares after 3 years (if it participates on the board of the Vietnamese bank) or after 2 years (if it does not participate on the board). This is an improvement over Decision 228 which restricted share assignment by *any* foreigner for 5 years.
- > To be permitted to sell shares to foreign credit institutions, a Vietnamese bank must satisfy prescribed conditions, as proposed in the December 2005 draft. But now, the latest draft invests in the State Bank the discretion to propose that the Prime Minister approve share sales which do not strictly satisfying the conditions.
- > To be permitted to buy shares, foreign credit institutions must satisfy prescribed conditions. As reported in the April 2006 Issue of Vietnam Legal Update, the first of the three conditions has been modified. But it is now simply: having assets worth USD20 billion (not also the alternative of "being one of the top 500 banks in the world"). Application to the State Bank for approval to purchase shares is required by the latest draft.

A curious aspect is that the draft decree regulates the purchase of shares in Vietnamese banks by foreign credit institutions only, not also by other foreign investors. Foreign credit institution is defined as comprising: foreign banks, foreign financial groups and other types of foreign credit institution. It is not clear whether the exclusion of foreign entities other than foreign credit institutions from purchasing shares in Vietnamese commercial banks is intended or is an oversight. In either scenario, other legislation will need to be issued to

deal with share purchases by foreign entities other than foreign credit institutions - the prospect of more overlapping and potentially inconsistent rules is far from appealing.

Also of note, the draft decree regulates purchases of shares in unlisted Vietnamese commercial banks only, not also Vietnamese banks listed on Vietnam's securities market. According to the draft decree, when a Vietnamese bank is listed on the securities market, the sale of shareholding to foreign credit institutions must comply with the law on securities and the securities market Bank (which now allows up to 49% of shares in listed Vietnamese companies to be held by foreign investors) and with guidelines of the State Bank.

At present, 4 Vietnamese banks (Sacombank, ACB, Techcombank and VP Bank) have sold 10% of shares to foreign banks (ANZ, SCB, HSBC and OCBC, respectively); and at least 3 more share sales to foreign banks are understood to be under negotiation.

The State Bank has informed us that its latest draft is not its last draft, so watch this space!

3.8 Financial reporting by Vietnamese banks

A welcome reform for foreign financial institutions looking to purchase shares in Vietnamese banks (and for other foreign investors if they are also allowed to do so) is the requirement for Vietnamese joint stock commercial banks ("JSCBs") to announce publicly their financial statements. This reform was introduced under Decision 1407-2004-QD-NHNN of the State Bank dated 1 November 2004 with the objective of assisting JSCB investors and customers to understand the actual operations of JSCBs so they can evaluate JSCBs and economic relationships they may wish to establish with JSCBs.

The types of financial statements and the main information to be published include:

- > Quarterly accounting balance sheet (publication is optional);
- > Annual accounting balance sheet and report on business operation (publication is mandatory, within 120 days from the last day of the fiscal year).

JSCBs listed on Vietnam's securities market must, in addition to the information above, also announce publicly any other information required under the law on securities.

Annual financial statements must be announced publicly at the head office premises; and also, in 3 consecutive issues of central and local newspapers. Within 10 days from the date of public announcement, JSCBs must send the financial statements (original or certified copy) to the local State Bank branch, the State Bank's Department of Banks, and the State Bank Inspectorate. Publication of information on websites and in hard copy is at the discretion of JSCBs.

Decision 1407 was amended by Decision 09 of the State Bank dated 20 February 2006. New Forms for quarterly and annual accounting balance sheets were issued.

3.9 What about BCCs after 1 July 2006?

As of 1 July 2006, the forms of enterprise in Vietnam will be regulated by the Law on Enterprises 2005 and the forms of investment will be regulated by the Law on Investment 2005. But which law will regulate business co-operation contracts ("BCCs") - a form of investment by a Vietnamese party(ies) and a foreign party(ies) without establishing a separate new legal entity? Neither of the new Laws mention BCCs. So how do BCCs fit into Vietnam's new investment-enterprise regime? We have been informed by an official of the Legal Department of the Ministry of Planning and Investment that, after 1 July 2006, BCCs will be regulated by the Law on Investment 2005 and the proposed Investment Decree (see [Part 2](#) above). In the latest draft of the Investment Decree, the provisions on BCCs are little different from the current provisions on BCCs in Decree 24 on Foreign Investment. The main difference is that the current Decree 24 prescribes the compulsory contents of a BCC whereas the draft Investment Decree does not mention the contents of a BCC at all. The good news may be that, as of 1 July 2006, BCC parties may have more flexibility as to the terms of their co-operation.

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

>>> NEW subject categories in Vietnam Laws Online Database

Vietnam Laws Online Database on www.vietnamlaws.com is an online searchable database of English translations of close to 3,000 Vietnamese laws relating to foreign investment and far beyond. Subscribers can search for legislation by subject category, keyword, date, issuing body, official number, legislation type, or advanced option. Translations can be viewed online, printed and downloaded (subject to terms & conditions).

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

- > We've merged investment and corporate legislation into *Investment-Corporate*. All new investment-enterprise laws can be found in *Investment-Enterprise Regime (Post-July 2006)*. For convenience, we've included several sub-categories, such as *Principal Laws* relating to investment and enterprises. All old laws on investment and enterprises can be found in *Investment-Enterprise Regime (Pre-July 2006)*. Some forms of investment (eg BOT), some special forms of enterprise (eg State owned enterprises), and now some completely new forms of enterprise (eg foreign commercial enterprises) have their own sub-category within *Investment-Corporate*.
- > We now distinguish between *Civil Code 2005* and its predecessor *Civil Code 1995*: and between *Commercial Law 2005* and its predecessor *Commercial Law 1997*.
- > 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 22 May 2006, Vietnam Laws Online Database now includes:

- > Latest draft decrees (*so you can be prepared*) on investment ([2](#) above) & foreign credit institutions buying shares in Vietnamese banks ([3.7](#) above), amongst others
- > Law on E-Transactions, effective 1 March 2006
- > Law on Investment & Law on Enterprises, effective 1 July 2006 ([2](#) above)
- > 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**.

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