

**VIETNAM LEGAL UPDATE**

May 2008

<b>Part 1 Selected New Legal Instruments</b>	
1.1 <a href="#">Foreigners working in a foreign land - the saga continues</a>	1
1.2 <a href="#">Fluctuation rule for shares</a>	2
1.3 <a href="#">Consumer protection - gaining importance</a>	3
1.4 <a href="#">Security service business open to foreigners</a>	4
1.5 <a href="#">More to the story on fixed-price contracts</a>	4
1.6 <a href="#">New tendering law - stayed tuned</a>	6
<b>Part 2 Feature: <a href="#">Trading and Distribution Law Map</a></b>	7
<b>Part 3 Did You Know?</b>	
3.1 <a href="#">A capital idea</a>	8
3.2 <a href="#">Representative offices - no longer non-taxpayers</a>	9
3.3 <a href="#">Doing a runner post-training</a>	10
3.4 <a href="#">More efforts to clarify distribution sector</a>	11
<b>Part 4 What's New?</b>	
➔ <a href="#">NEW laws in Vietnam Laws Online Database</a>	13
➔ <a href="#">NEW search function for Vietnam Legal Update</a>	13
<b>Part 5 Get to Know Us</b>	
➔ <a href="#">Spotlight on Veera Maenpaa</a>	14
<b>VLU Extra: <a href="#">Extract from Focus - Foreign Participation in Vietnam's Telecoms Sector</a></b>	14

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## Part 1 Selected New Legal Instruments

### 1.1 Foreigners working in a foreign land – the saga continues

#### **Decree 34-2008-ND-CP of the Government on the employment and administration of foreigners working in Vietnam, dated 25 March 2008 (Decree 34)**

As reported in the April edition of our VLU, on 25 March 2008 the Government issued Decree 34, significantly altering the guidelines for foreign workers in Vietnam. The good news story, as reported, was that after years of criticism from the foreign investment community, Decree 34 abolished the 3% cap on foreign workers within an organisation.

However (and this is a big one...), the changes introduced by Decree 34 also increased the burdens on organisations employing foreigners in two notable and unwelcome ways:

- (i) certain persons formerly exempt from needing work permits are no longer exempt; and
- (ii) in the case of persons exempt from the work permit requirements, Decree 34 imposes on their employers new obligations which are almost as burdensome as the permit requirements, particularly in terms of documentation.

#### **Who's 'lost' their exemption?**

Previously, people on the Members' Council of a limited liability company, as well as anyone holding the position of General Director or Deputy General Director, were exempt from the work permit requirement.

Under Decree 34 only the 'owner' of a single member LLC (**SLLC**) or the members of a multiple member LLC (**MLLC**) are still exempt. In the ordinary case where the 'owner' of an SLLC or the 'member' of an MLLC is a corporate entity, that entity's representative on the Members' Council will need a work permit, unless he or she falls within one of the other exemptions (as detailed in the April VLU).

#### **More administrative burdens**

As for the other nasty surprise hiding behind the good news of Decree 34, there is now more workload associated with exempted employees. Where 'no work permit' would ordinarily equate to 'less' paperwork and less administrative filings, employers of foreigners *not* needing work permits must now provide to the local Department of Labour the following items for these employees:

- specified details of such employees in advance of their employment; and
- certain specific documents, such as a criminal record check, standard form curriculum vita, health certificate and proof of specialist or highly technical qualifications, or documents from an 'authorised body' in the employee's home country certifying their minimum five years specialised experience.

Also, many of the required documents must be notarised and consularised, which has been a source of aggravation for employers in the past, often resulting in significant delays in getting people working in Vietnam.

#### **Other potential practical difficulties**

Decree 34 does not provide any transitional provisions directly applicable to foreign persons already working in Vietnam, who were previously exempted from the work permit requirement. Although not entirely clear, it would seem that people in this position have until October this year to obtain their permits or possibly risk deportation.

A final complication at this stage is that per normal practice in Vietnam's lawmaking, no circular has yet been issued. From past experience, the lack of implementing regulations is likely to impede the

authorities' effective dealing with these matters, making an already frustrating registration process even more difficult.

### **The verdict: better or worse?**

While the abolition of the unreasonable (and practically unworkable) 3% limit is welcomed, the removal of previous exemptions and the addition of unwieldy documentation requirements, even where permits are not required, definitely appears to exemplify the adage of 'one step forward and two steps back'.

## **1.2 Fluctuation rule for shares**

### **Official Letter 528/UBCK-PTTT on changes to the fluctuation band on Ho Chi Minh City Stock Exchange and Hanoi Securities Trading Centre, dated 3 April 2008 (Official Letter 528)**

Official Letter 528 allows the Ho Chi Minh City Stock Exchange (**HOSE**) to increase the fluctuation band from +/-1% to +/-2%, and the Hanoi Securities Trading Centre (**HASTC**) to increase the fluctuation band from +/-2% to +/-3%. The new bands took effect on 7 April 2008.

### **Basis of the rule**

As some readers may know, the fluctuation rule for securities trading on Vietnam's two exchanges is set forth in Decision 124/QĐ-SGDHCM of the HOSE, dated 9 October 2007, and Decision 353/QĐ-TTGDHN of the HASTC, dated 26 November 2007. According to these decisions, the permissible fluctuation range for securities prices is set by the Directors of HOSE and the HASTC, subject to approval of the State Securities Commission (**SSC**).

The only stated exceptions to the fluctuation rule occur:

- (i) on the first day of trading of IPO shares;
- (ii) on the first day of trade after a 30-day (for HOSE) or 25-day (for HASTC) suspension of trading of the shares; and
- (iii) in other circumstances as determined by the HOSE or the HASTC.

There is no doubt that the fluctuation rule is a key market control mechanism currently being used by the SSC, especially now, when the market is in a critical adjustment phase.

### **Not always a good thing**

However, the rule also may adversely impact sale of shares to strategic investors. Following the fluctuation rule, a listed company currently may not issue new shares at a price more than 2% (for HOSE-listed companies) or 3% (for HASTC-listed companies) above or below the closing price of the shares on the day immediately prior to their issue. It will be quite difficult for parties to make a decision on the transaction price, as it will be determined just before the date of closing of the transaction.

One solution for parties to such a share transfer is to provide in the subscription agreement that if the desired price (as agreed by the parties) cannot be achieved because of the fluctuation rule, the issue of the shares will be postponed until such time as it can be settled. However the difficulty with this approach is that, depending on the time delay between the execution of the documents (being the time that the market price is determined) and the issuance of the shares, and the change in market price during this period, there may be a considerable gap of time before the desired market price comes within 2% (or 3%) of the market price, such that the shares may issued.

### **Official or ad-hoc exceptions?**

As to whether there might be exceptions to the fluctuation rule, we have recently spoken on an informal basis with an officer at HOSE. He indicated that, in certain specific market conditions, HOSE may permit a listed company to issue shares to strategic investors or employees at a price



which is outside the permissible band set by the fluctuation rule. Significantly, however, any such permission to issue shares beyond the prescribed fluctuation band would also need the approval of the SSC. The possibility of an ad-hoc exception modifying the fluctuation rule, however, does appear to exist. But with no official guidelines on this matter, the granting of such exceptions or exemptions will be subject to the discretion of the official handling the request.

As usual, more guidance is needed.

***At the time this article was written, the HOSE had been closed for three consecutive days, due to 'technical reasons'. Trading was resumed on 30 May, amidst speculation as to whether there were reasons other than 'technical' for the suspension of trading.***

### 1.3 Consumer protection – gaining importance

#### **Decree 55-2008-ND-CP of the Government making detailed provisions for implementation of the Ordinance on Protection of Consumers' Rights dated 24 April 2008 (Decree 55)**

On 24 April 2008, Prime Minister Nguyen Tan Dung signed and issued Decree 55, with 6 chapters and 36 articles, intended to reinforce protection of consumers' rights in Vietnam. Accordingly, the Vietnamese Government affirmed:

'The protection of consumers' rights is the common responsibility of the whole of society. Any organisation or individual in breach of the law on protection of consumers' rights shall be subject to administrative penalty or criminal prosecution in accordance with law; and if the breach causes loss and damage then full compensation must be paid in accordance with law'.

Decree 55 provides a list of prohibited activities and responsibilities of organisations and individuals conducting business in goods and services with respect to consumers.

#### **Procedures for consumer complaints**

Any consumer who discovers his/her rights have been infringed may directly, or via a representative, make a complaint in any form (unless the law prescribes a specific form of complaint). Any entity conducting business in goods and services against whom a consumer complaint is made must issue a written acknowledgment of the complaint and carry out resolution of the complaint for the consumer within 7 business days. Where the subject matter of the complaint is goods or services impacting on the life or health of consumers, or in other urgent cases, the time limit is 3 business days.

Under Decree 55, authorized government bodies are obliged to carry out formal conciliation if:

- the consumer and the business entity against whom the complaint is made agree on such conciliation;
- the business entity against whom the complaint was made fails to resolve it within the stipulated time-limit; and
- the consumer disagrees with the results of such resolution by the relevant business entity.

The Department of Industry and Trade is responsible to assist the chairman of the provincial people's committee to conduct a conciliation of a consumer complaint within the locality managed by such people's committee. Further, the Competition Management Department must assist the Ministry of Industry and Trade in conducting conciliation of a consumer complaint when such complaint is considered complex, relates to a number of industries and sectors, or involves a 'serious' breach.

#### **Organisations for the protection of consumers' rights**

Decree 55 also permits and regulates 'organisations for the protection of consumers' rights' which may be established on the basis of the principles of voluntariness, fairness and non-discrimination, and shall be for the purpose of protecting consumers' rights in accordance with law. The Draft of



Law on Associations will provide more guidance on the operation of such organisations, once issued (currently it is only in draft form).

Decree 55 came into effect as from 21 May 2008 and replaces Decree 69-2001-ND-CP dated 2 October 2001. It has definitely progressed the protection of 'consumers' rights'.

In all cases, a consumer now has the right to institute proceedings before a competent court at any time during the complaint resolution process, in order to request the court to protect his or her lawful rights and interests.

#### 1.4 Security service business open to foreigners

##### **Decree 52/2008/ND-CP of the Government on management of security services businesses dated 22 April 2008 (Decree 52)**

Since 2001, pursuant to the terms of Decree 14/2001/ND-CP issued on 25 April 2001, the security services sector in Vietnam was not open to foreign participation. Decree 52 of the Government, promulgated late last month, has taken the first steps to change this landscape, allowing foreigners to engage in the security services business, albeit on a limited basis.

##### **Limited investment**

Under Decree 52, a foreign security services business may jointly invest with a domestic security services company in cases where high-tech ability and technology are needed by the Vietnamese party. Although the capital contribution of the foreign party is capped at under 50% (meaning no possibility of control), the fact that the door has been opened for foreign participation indicates the government's recognition of the need for foreign high-tech capability and capacity in this important sector.

##### **Open, but conditional**

A number of other conditions are applicable to foreign parties intending to invest in this sector, including having been in the security services business for at least 5 consecutive years, and having a total asset value of USD500,000 or more. Another noteworthy point in Decree 52 is the generally stricter set of requirements for establishing and operating enterprises in this sector.

##### **Back to school?**

Of particular interest is Decree 52's requirement that 'heads' of security services businesses, including founding members, directors, deputy directors, heads of branches and representative offices, must have tertiary education certificates in law or economics. Decree 52 also requires that all existing security services businesses must, within 12 months from the decree's effective date, satisfy all requirements specified in said Decree 52. Query whether heads of these previously established security companies, who do not have tertiary education certificates in law or economics, must now obtain such certificates?

#### 1.5 More to the story on fixed-price contracts

##### **Circular 09-2008-TT-BXD of the Ministry of Construction guiding the adjustment of construction contracts and construction prices due to changes in cost of raw materials, fuel and building materials dated 17 April 2008 (Circular 9)**

We reported in the April 2008 VLU that on 22 February 2008, the Ministry of Construction issued Circular No. 05/2008/TT-BXD (**Circular 5**). The purpose of Circular 5 was to address the difficulties experienced by contractors under fixed price contracts due to the recent and unexpected price increases affecting construction materials. As a result of rising inflation, under Circular 5, parties to construction contracts were allowed to adjust the costs of building materials and convert pricing forms of construction contracts. Circular 5, however, was unclear as to the scope of its application, and particularly, as to whether it applied to privately-funded projects as well as

construction projects funded by the State. Circular 5 also failed to stipulate in any detail which specific construction materials fell within its scope.

### Quick action

The legislative machinations of Vietnam can sometimes move with surprising expedience and these ambiguities were resolved on 17 April 2008, when the Ministry of Construction issued Circular 9 to replace Circular 5.

### Government Funded Projects only

What is very clear now is that Circular 9 applies only to construction projects implemented during or after 2007 which are funded by the Government or State-owned enterprises (**Government Funded Projects**). As such, the adjustment of construction prices used in construction projects funded with Official Development Assistance (**ODA**) or other private investment money will continue to be determined by the contractual agreements between the parties and other applicable laws.

### Particulars of Circular 9

Under Circular 9, when construction material prices increase or decrease dramatically and unpredictably, parties to the Government Funded Projects may adjust the contractual pricing arrangements by:

- adjusting the costs of building materials - this approach is applied to tender packages which have commenced implementation or which are currently being implemented in the forms of package contract prices and contract prices pursuant to fixed unit prices; or
- converting the form of contract price from a package contract price or fixed unit contract price to an adjusted contract price which factors in the overall increase in the price of building materials.

Moreover, the prices of *only* the following materials may be adjusted under Circular 9: gasoline, petroleum, iron and steel, asphalt, cement, sand, stone, gravel, brick, electric wire and cable, wood and glass. For all other materials, the parties must obtain the approval of a minister, the chairman of a province or the chairman of a State-owned corporation to adjust the price.

Circular 9 enables contractors for Government Funded Projects to receive payment *in advance* for the difference between the agreed price and the adjusted price for materials required in work yet to be performed. Contractors are also entitled to receive immediate payment of up to 90% of the difference between the agreed and adjusted price of materials for work already implemented without waiting until the contractual pricing arrangements are officially adjusted.

### Comparative legal analysis

As noted, Circular 9 governs only contracts implementing State funded projects. Accordingly, a party suffering from rising prices under such contracts may enjoy what is known in legal jargon as 'administrative relief' for its contract performance. For non-Government Funded Projects, such relief remains unsettled, because Vietnamese law appears not to anticipate such a situation. The concept of 'hardship provisions' may offer a more appropriate means or relief for contract parties.

### Civil Code

Article 283 of the Vietnam's Civil Code dated 14 June 2005 (**Civil Code**) stipulates that a party having a civil obligation such as an obligation under a contract, must perform such obligation, *inter alia*, as 'strictly as undertaken' and 'in a spirit of cooperation'. Article 412 of the Civil Code reiterates the requirement of 'cooperation, and the binding nature of the agreed terms, by requiring that a civil contract 'be performed in accordance with the agreement on the object, quality, quantity, category, time limit, methods and other agreement'.

In most cases, practically speaking, the 'contract value' clause in contracts for non-Government Funded projects can be interpreted to mean that the price is fixed and unchangeable during the contract term. The only arguable relief from this obligation in the Civil Code could be the provisions

on force majeure at Article 161. But to call an increase in prices an event of force majeure in quite a stretch.

### **PICC**

Looking at the international playing field, the 'hardship provisions' in the Principles of International Commercial Contract (**PICC**) of the UNIDROIT could provide a more appropriate and flexible avenue.

The PICC provisions on hardship state first that even if the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligation. However, Article 6.2.3 of the PICC allows for an exception in the case of hardship, described as 'a situation where the occurrence of events [meeting the criteria specified] fundamentally alters the equilibrium of the contract, either because the cost of a party's performance has increased or because the value of the received performance has diminished'. In the case of hardship, the disadvantaged party is entitled to request renegotiation, and upon failure to reach agreement, a court may, if reasonable, either terminate the contract, or amend the contract, with a view to restoring its equilibrium.

### **20% inflation in Vietnam – a 'hardship'?**

From the above criteria, one could argue that price fluctuations, with respect to construction materials, which are due to Vietnam's current unprecedented inflation, should be viewed as a hardship situation. Accordingly, the disadvantaged party in a non-Government Funded Project should be entitled to relief pursuant to the PICC. But this is novel legal territory in Vietnam. Consider it food for thought for the time being.

## **1.6 New tendering law – stayed tuned**

### **Decree 58/2008/ND-CP guiding the implementation of the Law on Tendering and selection of constructional contractor in accordance with the Law on Construction dated 5 May 2008 (Decree 58)**

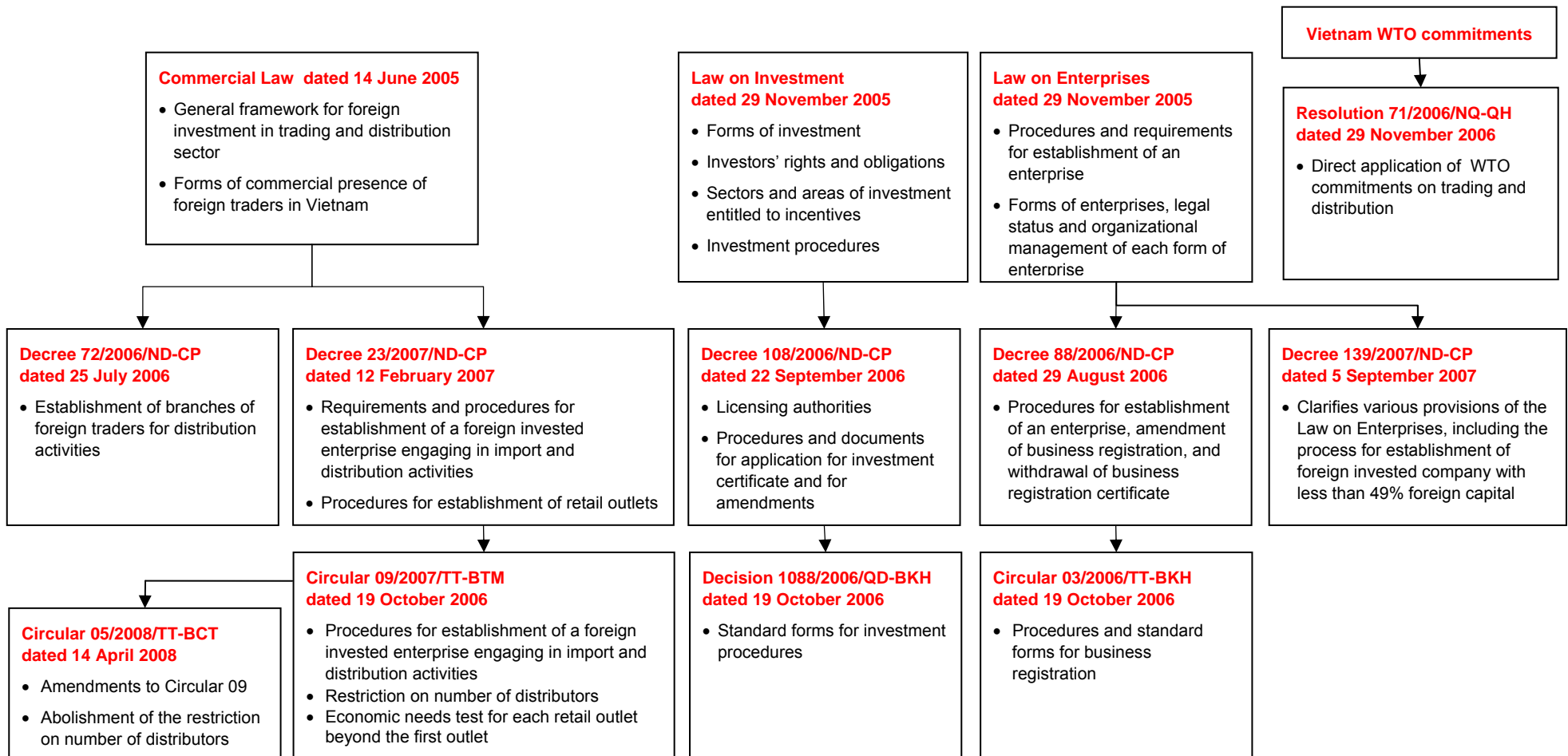
Decree 58 on tendering was issued earlier this month and replaces Decree 111 covering the same subject. A number of new points are covered in Decree 58. And these are already continuing interpretations of its provisions a foot. The VLU will provide an in-depth analysis of this new and important law next month.

**Part 2 Feature**

Recent issues of the VLU have highlighted various changes to the legislation on trading and distribution as Vietnam prepares to lift further restrictions on foreign investment in this sector, effective 1 January 2009. To summarise and recap the saga in diagrammatic form, this month's Law Map covers the laws and regulations foreign investors intending to conduct trading and distribution in Vietnam need to consider.

**TRADING AND DISTRIBUTION LAW MAP**

29 MAY 2008



## Part 3 Did You Know?

### 3.1 A capital idea

As previously reported in the VLU, Circular 03 of the State Bank of Vietnam (**SBV**), issued 25 May 2004 governs foreign exchange control in respect of capital contribution and the purchase of shares by foreign investors in Vietnamese enterprises (**Circular 3**). Under Circular 3, in order to contribute/transfer capital or subscribe for/purchase shares in an unlisted Vietnamese company, a foreign investor must open a Vietnam dong capital contribution and share purchase account at a commercial bank permitted to conduct foreign exchange activities in Vietnam. This is known commonly in Vietnam as a 'Capital Account'.

#### Purpose and scope

The purpose of such Capital Account is to monitor (and presumably control) the flow of foreign currency in and out of the country. A foreign investor is allowed to receive and make payments through its Capital Account only after the account is registered with the SBV.

In particular, the following transactions must be performed through the specified Capital Account:

- contributing capital;
- purchasing and selling shares;
- transferring capital contributions;
- receiving and using dividends or profit distributions;
- repatriating profits;
- purchasing foreign currency from authorised banks for remittance abroad; and
- all other activities relating to capital contribution in the Vietnamese entities.

In order to repatriate funds derived from or otherwise relating to unlisted Vietnamese entities, a foreign investor must also present a document from the relevant tax authority certifying that the investor has discharged its tax obligations to the State of Vietnam.

In short, to legitimately conduct any activity relating to capital with unlisted Vietnamese entities, a foreign investor will need to establish a Capital Account.

#### 'Accidental' non-compliance - is ignorance of the law an excuse?

Occasionally, a foreign investor without knowledge of the law may acquire interests in unlisted Vietnamese companies without properly establishing or remitting funds through a registered Capital Account. In such instances, and in order to ensure that funds can be repatriated offshore, the foreign investor should remedy the situation and endeavour to establish the required Capital Account sooner rather than later.

The SBV informally advised as follows when recently queried on this issue:

- (i) that the foreign entity should proceed to register its Capital Account as soon as possible;
- (ii) that the foreign entity should submit an explanation of how the interests in the relevant Vietnamese entities were purchased, together with its application for registration;
- (iii) that the SBV will review the application and explanation, and if the explanation is acceptable, will consider acknowledging the payment by the foreign entity for the interests in the Vietnamese entities 'as if having been made through the newly registered Capital Account'; and
- (iv) that there may be some risk of administrative fines for not complying with foreign exchange regulations.

Based on these comments, the foreign investor should be prepared to offer up a thorough analysis of the underlying acquisition of the shares in the unlisted Vietnamese companies in question to ensure that an accurate story is provided to the SBV. If so, it seems likely that the situation can be fairly quickly, and easily rectified.

#### **Grey areas of foreign ownership**

Such a happy outcome is less certain, however, in a case where the share (for a shareholding company) or capital (for a limited liability company) ownership does not appear in the relevant company's shareholder or register. In such cases, there may be a presumption (valid or invalid) that the investment is illegal, due to foreign ownership limits or other restrictions. In this case, straightening - out a missing Capital Account is not likely to be quite so straightforward.

Best advice: invest in Vietnamese companies legally and set up your Capital Account from the outset.

### **3.2 Representative offices – no longer non-taxpayers**

A resident representative office (**RO**) is defined as a 'dependent unit of the foreign parent company having the function to promote commercial opportunities for the parent'. An RO is not allowed to engage directly in profit-making activities, including the sale and purchase of goods or services. As a result, an RO does not have any income/profit subject to corporate income tax and is not entitled to any VAT deduction. This said, ROs *are* responsible to pay personal income tax to the Government on behalf of their employees. This is the same rule applicable to employers across the board under Vietnam's tax laws.

#### **No tax payable = no registration requirement**

Given this backdrop, and until recently, there was no provision of law requiring an RO to register for its own tax code. Only the chief representative and staff of the RO were required to obtain individual tax codes to pay personal income tax for themselves.

All of this changed in 2007, with the Law on Tax Management (effective from 1 July 2007) which required tax payers, *including organisations responsible for deducting and paying personal income tax on behalf of others*, to carry out the tax registration procedures to have a tax code. An RO is one such organisation.

Putting some teeth into this law - at least Ho Chi Minh City, the Ho Chi Minh City Department of Taxation issued Official Letter No. 2957/CT-TNCN dated 24 March 2008 (**Official Letter 2957**) requiring all ROs in Ho Chi Minh City to register and obtain tax codes for themselves for the 'expeditious declaration, payment and finalisation' of personal income tax of their employees.

#### **Process to obtain a tax code**

In order to receive a tax code, an RO must submit an application dossier, including the tax registration form, establishment license and list of tax registration documents, to the Department of Taxation. The tax registration form may be obtained at the Department of Taxation, but is also available at the website of the General Department of Taxation ([www.gdt.gov.vn](http://www.gdt.gov.vn)).

Under Official Letter 2957, an RO must carry out the procedures for tax registration within 10 days from the date it is issued its establishment license. Any delay in registration may subject the RO to an administrative sanction of up to VND 1,000,000 (if the delay period is less than 20 days) or VND 2,000,000 (if the delay period is 20 days or more).

Official Letter 2957 also requires all ROs previously established (and therefore not issued with tax codes) to carry out the tax registration. Interestingly, the regulation does not set out any deadline for such registration procedures for existing ROs. Hopefully, more guidance will follow on this point.



### Good or bad?

The new tax registration procedures will certainly help the tax authorities keep better tabs on ROs, and assist them with their tax management functions. But it creates yet another administrative burden for ROs, which have traditionally been the simplest and easiest form of foreign 'business' in Vietnam.

## 3.3 Doing a runner post-training

### The Labour Code – very clear

Under Vietnam's Labour Code and its implementing regulations, an employee who attends training courses sponsored by his/her employer must thereafter work for the employer for a certain agreed period of time. If the employee unilaterally terminates his/her labour contract before completing the training course, or before completing the agreed term of work post-training, he/she is required to compensate the employer for the expenses of the training course.

### But then there's reality

In practice, and pursuant to the other labour laws, employers should not realistically expect to be reimbursed for such costs by employees. Why is this? The law apparently, and maybe inadvertently, provides a way for employees to avoid application of this provision?

### 'Justifiable reason'

Under Article 13 of Decree 44/2003/ND-CP dated 9 May 2003 of the Government on labour contracts (**Decree 44**) and Article III of Circular 21/2003/TT-BLDTBXH dated 22 September 2003 of the Ministry of Labour, War Invalids and Social Affairs (**Circular 21**), if the employee presents 'justifiable reasons' and provides advance notice of his/her intention to terminate the labour contract, he/she will not be required to repay the training fees. An accepted example of a 'justifiable reason', as stated in the law, is 'real personal or family difficulties, as the result of which the employee is unable to continue performing the contract.'

Even in cases where the employee admits responsibility for repaying the training fees, but is not able to afford such repayment, it appears that the non-ability to pay may also amount to a 'justifiable reason'.

While employees have the obligation under the law to prove the 'real personal or family difficulties' or other 'justifiable reason', these are very subjective criteria, and depending on the decision-maker, could easily result in the employee's avoiding his/her obligation to pay for the training costs.

### Why not deduct from wages?

One might wonder why, as a practical matter, an employer could not simply deduct the training costs from the salary of the employee who is leaving prematurely. The answer is that legally, employers may not do this *unless* the employee consents. This is set forth in Decree 114/2002/ND-CP on Salary (dated 31 December 2002). Therefore, there is little chance for the employers to deduct the training fees from an employee's final payment. In the cases where the training fees are *more than* the final salary amount payable to the employee (which is often the case), there is, of course, no ability to recover the entire training costs, even if the employee agrees.

### Dispute resolution

In cases where the outstanding amount of the training fees, cannot be recovered by an amicable settlement, the employer has the right to bring the dispute to the courts, but the costs and time associated with bringing such a proceeding will need to be balanced against the amount in question and the chances of success. In addition, even if the employer wins the case, in practice, the court's decision may not be enforceable if the employee has limited assets.

Perhaps taking these facts into consideration, Vietnam's Code of Civil Procedure requires that the parties first attempt 'amicable settlement' between themselves or refer the matter to the



Reconciliation Committee of the enterprise and/or by a qualified labour reconciliatory (which is required to be established in accordance with Article 4 of Decree No. 133/2007/ND-CP dated 8 August 2007 of the Government on labour dispute resolution (**Decree 133**). The resolution of the dispute also must strictly follow the procedures set out in Article 5 of Decree 133. If the dispute cannot be resolved by the Reconciliation Committee, only then may the employer bring the case to the relevant court.

### **Due for revision**

The laws in this area are clearly inadequate and inconsistent, both with spirit and the letter of the Labour Code and its implementing regulations. Employers cannot be expected to invest in training costs which they cannot recover when employees unilaterally and prematurely terminate their labour contracts post-training. Improving knowledge and professional skills of employees by professional training courses is clearly needed; but employers must also be protected by the law when things go wrong.

## **3.4 More efforts to clarify distribution sector**

On 14 May 2008, the Vietnam Association of Foreign Invested Enterprises conducted a half-day seminar on import and distribution at the Ministry of Planning and Investment in Hanoi. Mr Vu Van Quyen, Deputy Director at the Ministry of Industry and Trade, the sole speaker at the seminar, spoke briefly on Decree 23 of the Government dated 12 February 2007 implementing the Commercial Law on sale and purchase of goods and activities directly related to sale and purchase of goods of foreign invested enterprises in Vietnam (**Decree 23**), Circular 9 of the Ministry of Trade dated 17 July 2007 implementing Decree 23 (**Circular 9**) and Circular 5 of the Ministry of Industry and Trade dated 14 April 2008 amending Circular 9 (**Circular 5**).

We have discussed all of these legal instruments at length in prior issues of the VLU, and they are referred to in this issue's Law Map (see Part 2). Many questions were raised in the Q & A session. Below is a snapshot.

**Question # 1.** Does a foreign-invested enterprise with less than 49% of its charter capital contributed by the foreign party need to have a business licence in order to carry out distribution activities?

(Readers will recall that Decree 23 and Circular 9 generally mentions that, apart from an investment licence/investment certificate, a foreign-invested enterprise must obtain a business licence in order to carry out distribution activities unless the distribution activities have been included in the investment licence/investment certificate. However, Decree 139 of the Government dated 5 September 2007 implementing the 2005 Law on Enterprises (**Decree 139**) no longer requires a foreign-invested enterprise with less than 49% of the charter capital contributed by the foreign party to obtain an investment certificate. Does this mean that this type of foreign-invested enterprise may carry out distribution activities the same as domestic enterprises, ie. without a business licence?)

**Answer #1.** A foreign-invested enterprise, even with 1% of the charter capital contributed by the foreign party, still must obtain a business licence in order to carry out distribution activities. Decree 139 is meant to merely simplify investment procedures, not to change the law. While a foreign-invested enterprise with less than 49% of its charter capital contributed by the foreign party is subject to the same procedures for establishment as a domestic enterprise, that does not mean that such an enterprise can do business as a domestic enterprise.

**Question #2.** If a foreign-invested company such as Sony imports accessories to be used for Sony's warranty activities, does this mean that Sony is distributing the accessories?

**Answer #2.** No. If the accessories are to be used only for warranty service only, this activity does not constitute distribution. However, if Sony imports accessories for sale, this would be distribution.

**Question #3.** If foreign-invested supermarkets sell alcohol, notebooks, recorders, etc, is this activity a breach of Appendix 4.B, the schedule for distribution of goods which is attached to Decision 10 of the Ministry of Trade (promulgating the schedule for implementation of the activities of sale and purchase of goods and activities directly related to sale and purchase of goods) (*Decision 10*).

**Answer #3.** Existing foreign-invested supermarkets which were licensed to carry out distribution activities on a pilot basis some time ago (such as Big C or Metro) are *not* subject to Decision 10. Therefore, they are grandfathered to sell these goods in their supermarkets. New foreign invested supermarkets however are subject to Decision 10, ie they may distribute these goods only according to the schedule in Decision 10.

## 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:

- ➔ Decree 55 on protection of consumers' rights, 24 April
- ➔ Joint Circular 03 dated 10 January 2007 on fees for obtaining information about security transactions, amended 29 April
- ➔ Decision 76 establishing the National Lawyers' Association, 16 January
- ➔ Decision 13 on the operational network of commercial banks, 29 April
- ➔ Joint Circular 01 on criminal prosecution of infringements of intellectual property rights, 11 April
- ➔ Circular 09 of the State Bank dated 5 August 2003 on internet services, as amended on 10 March
- ➔ Decree 58 on tendering, 5 May
- ➔ Decision 1098 raising the refinancing interest rate of the State Bank to 13.0% and the discount interest rate to 11.0%, 16 May
- ➔ Decision 1099 raising the basic interest rate in VND to 12.0%, 16 May
- ➔ Decision 53 with the plan for development of Southern Phu Yen Economic Zone, 28 April
- ➔ Decision 54 establishing Southern Phu Yen Economic Zone, 28 April
- ➔ Circular 13 on real estate business, 21 May
- ➔ Circular 6 on labour complaints, 7 May
- ➔ Decision 16 on commercial interest rates, 16 May
- ➔ Decision 23 increasing import duty on second-hand cars, 8 May
- ➔ Decision 02 on criteria for a 5 star hotel, 27 April 2001

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

### NEW search function for Vietnam Legal Update:

We are pleased to advise that we have at last completed the merger of the prior Phillips Fox VLU database into the current Allens one. As such, readers may now find all back issues of the VLU from 1997 to the present, at [www.vietnamlaws.com](http://www.vietnamlaws.com). There are two pages to the website's section on the VLU as follows:

- ➔ 'Monthly VLU' (for issues from April 2007)
- ➔ 'Monthly VLU archive' (for issues prior to April 2007)

## Part 5 Get To Know Us

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In this issue of the Vietnam Legal Update, we continue with our newest feature, spotlighting lawyers from our two Vietnam offices. Our Ho Chi Minh City and Hanoi-based legal team hails from Vietnam, Australia, the United States and Finland, with our total number of lawyers now standing at 26.

Featured in this month's 'Get To Know Us' section is Veera Maenpaa, a Senior Associate in our Hanoi office.



*Veera is an English qualified solicitor, and a Finnish national, who joined the Allens' Hanoi office in November 2006. Prior to this time, she was an associate with Clearly Gottlieb Steen & Hamilton, an American law firm, working in their London office. Veera's areas of expertise in Vietnam include lending and secured transactions, corporate and commercial matters, and mergers and acquisitions.*

*In her free time, Veera enjoys sports, travelling and cinema.*

*Quote from the source: "Vietnam is changing rapidly, but it is still intriguing and exotic. These are the characteristics that made me stop in my tracks two years ago and decide to move here, and they continue to drive me today!"*

## VLU Extra: Extract from Focus - Foreign Participation in Vietnam's Telecoms Sector

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Our experienced regional legal team regularly publishes articles and updates on a wide range of legal topics. The following article is reprinted from Focus, a regular newsletter which Allens sends to clients and interested business persons. To subscribe please go to <http://www.aar.com.au/general/subscribe.htm> and enter your details on our subscription list.

### FOREIGN INVESTMENT IN STATE-OWNED TELECOMMUNICATIONS ENTERPRISES

***In brief:** As a result of the Vietnamese Government's continuing economic reform agenda foreign investors are likely to be given the opportunity to become strategic investors in major Vietnamese State owned enterprises in the telecommunications industry as part of the country's 'equitisation' process. Senior Associate Ian Stewart and Lawyer Daniel Allender who both acted for Vietnamese insurer Bao Viet in 2007 in the first equitisation involving a strategic foreign investor comment on the current state of play and potential further developments.*

#### Background

As part of Vietnam's political and economic renewal agenda, referred to as doi moi (or 'renovation'), the Vietnamese Government is converting thousands of State-owned enterprises (**SOEs**) into shareholding companies (a process known as 'equitisation'), thereby creating opportunities for investment in these equitized entities by parties other than the State. Historically, SOEs have dominated many key business sectors in Vietnam, including the banking, insurance and telecommunications industries.

The process of converting SOEs into shareholding companies is currently regulated by Decree 109, which was passed by the Vietnamese Government in August 2007. To date, the equitisation process has generally involved the majority of shares in each newly established shareholding company being retained by the State, with a small portion sold at public auction.

In addition, Decree 109 permits the allocation of shares by private placement to 'strategic investors'

(among others). Under Decree 109, strategic investors are defined broadly to mean foreign and domestic investors with financial and enterprise management capability who are capable of transferring benefits to an enterprise and whose long-term interests are connected with that enterprise.

On 13 September 2007, Vietnam Insurance Corporation (more commonly known as Bao Viet) created history when it became the first Vietnamese SOE to open its doors to strategic foreign investment, entering into an agreement with HSBC to acquire a 10 per cent stake in the insurer (a transaction which to date remains one of the largest M&A transactions completed in Vietnam). As part of the deal, HSBC obtained rights to increase its stake over time and secured representation on the Bao Viet board in exchange for the provision of various technical and advisory support.

The equitisation of Bao Viet, the leading insurer in Vietnam and one of that country's largest SOEs, attracted enormous interest from potential foreign investors looking to capitalise on the opportunities presented by a country with a large, relatively young population (of approximately 85 million) and very high levels of economic growth.

Since HSBC's investment in Bao Viet, however, the aggressive timetable set by the Government for the equitisation of numerous other SOEs has been revised because of delays in finalising existing equitisations (such as the Vietcombank equitisation) and amid concerns that the original timetable could result in a glut of newly established businesses that the market would be unable to support.

The Government has, however, reaffirmed that it is proposing to press on with a number of equitisations during the next 12 months, including in respect of mobile phone operators Vinaphone Telecommunication Services Co. (*Vinaphone*) and Vietnam Mobile Telecommunication Services Co. (more commonly known as *MobiFone*). There are also suggestions that it may look to make foreign investment as part of the equitisation process more attractive.

#### **Vietnamese telecommunications industry**

At present, operating licences in the telecommunications sector cannot be obtained by foreign entities, and foreign entities are not otherwise permitted to invest directly in Vietnamese telecommunications service providers. Accordingly, to date, foreign investment in the telecommunications sector in Vietnam has been limited to business co-operation contracts entered into between investors and local telecommunications service providers.

Despite restrictions on foreign investment, growth in the telecommunications sector in Vietnam is reported to have reached 30 per cent per annum in 2007. Within this industry, MobiFone and Vinaphone are reported to be the second- and third-largest mobile phone operators in Vietnam respectively, with more than 25 million registered users between them. Given Vietnam's large population, coupled with relatively low market penetration in the telecommunications sector to date, the potential equitisation of these SOEs has, for some time, been attracting significant interest.

#### **Foreign investment through the equitisation process**

While the equitisation of MobiFone and Vinaphone may provide foreign investors the opportunity to invest in two of the largest telecommunications service providers in Vietnam, investment through the equitisation process (as it currently stands) does present a number of challenges.

#### **Price**

Decree 109 provides that strategic investors must pay not less than the average successful auction price paid by members of the public under the public auction conducted as part of the equitisation process. While there is an argument that this price matching requirement can be waived by the State in certain circumstances, to date the price matching requirements have been strictly followed.

This has a number of potential consequences. Most obviously, it provides a second pricing hurdle for a potential strategic investor who must not only contend with the offers of other bidders, but also be prepared to match a price determined by members of the general public (who are of course investing on a much smaller scale). Significantly, it has recently been reported that State officials are now considering a change to allow strategic investors to acquire a stake at a discount to the public auction price.

And amid concerns that a number of equitized SOEs have previously been overvalued in terms of reserve or 'floor' prices (resulting in reduced investor interest at the time of public auction), it has also been suggested that strategic investors may even be given an opportunity to assist in setting the floor price for shares offered to the public.

**Process**

Furthermore, the price matching requirement has to date caused procedural complications, for while SOEs have sought to engage in negotiations with potential strategic investors before completion of the public auction, this has resulted in investors being asked to make commitments without knowledge of the final price they may be required to pay for their stake. Understandably, investors have resisted doing so until the final auction price is determined, which can sometimes take several months, thereby extending the overall timeline for the deal's completion.

Recent comments made by State officials have also indicated that strategic investors may in the future be permitted to acquire their stake prior to the public auction occurring. These proposed changes (both in relation to pricing and process) would, if implemented, make investment through the equitisation process more attractive to foreign investors.

**Technical support**

Finally, the ability to provide technical support is a requirement for investors seeking to be considered a 'strategic investor' under Decree 109. Decree 109 does not provide detailed guidance regarding what is required of investors in relation to technical support. Accordingly, potential strategic investors cannot rely on Decree 109 in order to determine the form and content of the technical support which they may be required to provide. As a practical matter, such support is likely to involve arrangements for the secondment of employees with skills in particular areas in which the particular business operates and the provision of extensive training, both industry specific and aimed at improving general corporate governance.

In the context of the upcoming equitisation of MobiFone and Vinaphone, while existing telecommunications operators may find it easier to put together a technical support package that specifically addresses matters relevant to telecommunications providers, other investors should not see this requirement as an inevitable roadblock to investment via the equitisation process.

**Conclusion**

For potential foreign strategic investors who are equipped to negotiate the various challenges posed by investment through the current equitisation process in Vietnam, the proposed equitisations of Vinaphone and MobiFone over the next 12 months provide an opportunity to invest directly in the rapidly growing telecommunications sector in Vietnam.