

VIETNAM LEGAL UPDATE

November 2007

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We encourage feedback from our readers regarding the VLU. Please direct all enquiries, comments and suggestions to Lee Baker in our Ho Chi Minh City office at lee.baker@aar.com.au.

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Part 1 Selected New Legal Instruments

1.1 PIT Law – A step forward, backward or sideways?

Law on Personal Income Tax, Draft submitted to the National Assembly, dated 20 November 2007 (*PIT Law*)

On 20 November 2007, the National Assembly passed the proposed Law on Personal Income Tax (*PIT Law*), which will take effect from 1 January 2009.

The proposed PIT Law – which is the first-ever personal income tax law passed by the National Assembly – provides unified PIT rates for both Vietnamese and foreigners, introduces personal and family allowances, and increases the diversity of the tax base.

While not effective for nearly a year, the new PIT Law has caught many of the headlines, due primarily to its expected impact on the capital markets and share trading in the long term. This and other related issues will play out over the next 12 months, as practices and policies are readjusted to account for the new tax rates and tax base.

Our English translation of the final draft of the PIT Law accompanies this issue of the Vietnam Legal Update. We expect that the published text of the Law will be available within the next week.

1.2 LOE/LOI – Further questions clarified by Decree 139 (*Part 3*)

Decree 139 of the Government dated 5 September 2007 providing detailed guidelines for implementation of a number of articles of the Law on Enterprises (*Decree 139*)

The Law and Investment (*LOI*) and Law on Enterprises (*LOE*) – two laws which together opened a new era for foreign investment in Vietnam – are nearly a year and a half old now.

While much-welcomed when issued in July of 2006, the LOI and LOE left open a number of issues and questions. Fortunately, Decree 139, which became effective 5 October 2007, has now clarified many of these. As in the prior two issues of VLU, we discuss some of these issues in 'Q+A' format below (see our September and October issues for Q+A #1-6):

Q. #7. What is the procedure for the establishment of branches of foreign invested companies? Must they be supported by a new investment project?

Under the LOE, a branch is defined as a dependent entity of a company which may carry out partly or wholly the activities of the company.

So the question has been whether the establishment of a branch will be considered as the establishment of a new investment project and, accordingly, whether the company must follow a complicated and time-consuming procedure to obtain an investment certificate? Neither the LOE nor the LOI fully answer this question.

Decree 139's reply

Article 16 of Decree 139 now clarifies that the establishment of a foreign-invested company's branch is *not* required to be supported by a new investment project.

The foreign-invested company is required to register the operations of its branches in accordance with Decree 88 of the Government dated 29 August 2006. The registration procedure is quite straightforward. The foreign-invested company will thereafter be issued with a 'certificate on registration of operations of the branch' (*not* investment certificate), and will be officially recognised.

Q. #8. Does an 'economic group' consisting of a parent company and its subsidiaries need to be registered?

The LOE defines an 'economic group' as a group of companies with 'a large scale', and stipulates that the Government will provide further guidelines regarding economic groups. Full stop. Nothing more.

So the obvious question has been whether an 'economic group' should be considered as a separate legal entity and, accordingly required to be independently registered with the licensing authority, ie, as something separate from its constituent companies.

Decree 139's reply:

Article 26 of Decree 139 now clarifies that an 'economic group' is *not* a legal entity, and thus is *not* required to be registered with the licensing authority. The members of the 'economic group' may determine the organisation and operation of the 'economic group'; but no separate and distinct official registration is required.

Q. #9. What are 'conditional sectors' and what kinds of conditions apply to them?

Conditional sectors are those areas of Vietnam's economy that are either 'off limits' to foreign investors, or somehow conditioned, in terms of investment (such as they must take the form of a joint venture instead of being fully foreign owned).

The current list of conditional sectors under the LOI and LOE consists of, among others, sectors impacting on national defence and security, social order and safety; banking and finance; culture, information, the press and publishing; aquaculture; production of tobacco; import, export and distribution business; and hospitals and clinics.

For foreign investors, conditional sectors also includes investments which are subject to Vietnam's schedule of commitments under international treaties of which Vietnam is a member, such as the WTO.

However, both the LOI and Decree No. 108-2006-ND-CP dated 22 September 2006 providing guidelines for implementation of a number of articles of the LOI (**Decree 108**) are silent on the type, nature and scope of such conditions. And therein lies the burning question: What exactly are the conditions applicable to the various 'conditional' sectors?

Decree 139's reply:

Unfortunately, Decree 139 does not answer this question; nor does it provide any sort of a 'neat' list of conditions routinely applicable to each and every conditional sector. In order to identify the conditional sectors, we still will be required to resort to the LOI and Decree 108, incomplete as they may be on the issue, as we wait for another decree.

Decree 139 does, however, pave new ground – thereby offering hope of further clarification regarding the actual conditions applicable to these businesses – in a couple of respects.

First, it has provided a definitive list of the documentation and certifications that conditional businesses will be issued in connection with their establishment. Under the LOI and LOE, there has been no guidance on this point, and conditional investments have proceeded more or less ad hoc. Certain rules attach to certain of these issued documents, and are set forth in Decree 139.

Where Decree 139 is silent as to documentation/certifications to be issued, the question remains unclear as to what documents will suffice to establish legitimacy for conditional businesses.

A second bit of 'new ground' broken by Decree 139 is that it is now clear that any restrictions or conditions placed on conditional businesses may be stipulated *only* by specialized branches of law, ordinance, decree or decision of the Prime Minister. What

this means is that investors need not look elsewhere for confirmation and guidance on whether or not their particular proposed investment is conditional.

Finally, it is interesting to note that Decree 139 also specifies that any conditions stipulated in legal instruments other than as above will become 'invalid' after 1 September 2008. It is hard to know exactly what this means (ie, how does a condition attaching to a licensed conditional business go 'invalid?'), but it shows an attempt to bring clarity to this area which has previously been somewhat mysterious. It also suggests a further decree of centralization in this area.

Correction: In last month's issue of the VLU, at Q. #6 in our Decree 139 feature, we incorrectly referred to an SLLC as a 'shareholding LLC' and an MLLC as simply a 'members LLC'. In fact, SLLC should have read 'single member LLC' and 'members LLC (b)' should have read 'multiple member LLC'. We apologise for this error.

1.3 Private offer of shares

Decree on private offer of shares, third draft, November 2007 (*Private Offer Decree*)

The Government is working overtime to fill the regulatory gaps in Vietnam's corporate and securities laws. One such initiative is the draft Private Offer Decree governing the manner in which shares of non-public companies may be offered.

The Law on Securities and its implementing regulations regulate only with respect to the *public* offer of securities and shares offered by *public* companies, ie companies with 100 or more shareholders (excluding institutional shareholders). The Law on Enterprises (**LOE**) is the general corporate law, but says little about private offer of shares. The LOE broadly provides that the offer of shares by shareholding companies must be approved by the general meeting of shareholders and board of management, and that the par value of the shares cannot be lower than the market or book value of the shares, with a few exceptions, such as if the offer is an initial offer to non-founding shareholders.

To whom will the draft decree apply?

- shareholding companies being established;
- enterprises converting to a shareholding company but not equitising State-owned enterprises;
- currently existing shareholding companies; and
- public companies.

What's a private offer?

A private offer is defined by the draft decree as an offer of shares to less than 100 investors who are not institutional investors.

More reporting and paperwork

Under the draft Private Offer Decree, there surely will be reporting and paperwork for companies undertaking private offers, as follows:

- An 'issuance plan' in a prescribed form annexed to the decree must be approved by the board of management and general meeting of shareholders. In certain cases, the issuance plan must be submitted to the relevant licensing authority as part of the application for the business registration certificate or investment certificate.
- The company conducting the private offer must give at least 15 days' written notice of the private offering to the authority which licensed the company.
- The company must also report back to the relevant licensing authority, within 10 days after the private offer is completed, regarding the outcome of the private offer.

- If the outcome of the private offer is that there will be 100 or more shareholders in the company, the company must submit a plan to the relevant authority on steps to register the company as a public company.

So what happens when the number of shares in a private offer results in the shareholding company having 100 or more shareholders? The answer in the draft Private Offer Decree is that the shareholding company must submit a plan to the relevant authority to register the company as a public company. This involves meeting a number of requirements, including having a minimum charter capital of VND10 billion. If the shareholding company is not capable of being registered as a public company, the company may register in the share registry only 99 shareholders. Query what measures shareholders 100 and higher might take in this case to protect their interests!

Marketing restrictions

Under the draft decree, the company conducting the private offer of shares may not advertise the offer via the mass media.

Fines and penalties

The draft decree proposes fines and various penalties for a breach of the draft decree. Fines ranging from VND10 million to VND30 million apply depending on the seriousness of the offence. In addition, proceeds from the private offer may be confiscated if the private offer is not conducted properly.

Clearly, more work is required if the draft Private Offer Decree is to result in a workable piece of final legislation. The State Securities Commission (**SSC**) is seeking comments on the draft decree and they should be sent via email to thangbh@ssc.gov.vn by 10 January 2008. The Vietnamese version of the draft decree is located on the SSC's website at www.ssc.gov.vn. There is an English translation for subscribers to Vietnam Laws (www.vietnamlaws.com).

1.4 Working for minimum wage

Decree 167 regulating new minimum wages applicable to Vietnamese enterprises (including state owned enterprises and cooperatives), dated 16 November 2007 (Decree 167); Decree 168 regulating new minimum wages applicable to foreign-invested enterprises, dated 16 November 2007 (Decree 168)

The minimum wage rates specified by the government of Vietnam are used to establish the pay rates for employees doing the most basic work in normal working conditions. They are also used as the basis for calculating wage scales, wage tables and all types of allowances for calculating wage rates recorded in labour contracts, and for implementing other employment-related measures formulated by companies. In many locales, pay rates are much higher than the minimum wage rates set by law.

New higher wage rates for foreign and local companies

There is still a permissible differentiation in Vietnam between the minimum wages applicable to Vietnamese enterprises and foreign-invested enterprises in Vietnam. New minimum wage rates have just been released and will be applicable from 1 January 2008.

Below is a comparison of minimum wage rates between Vietnamese enterprises and foreign-invested enterprises applicable both currently and from 1 January 2008:

Vietnamese enterprises	Foreign-invested enterprises
Current minimum wage rates	
VND450,000 per month regardless of location of enterprise:	Rates vary depending on location of enterprise: <ul style="list-style-type: none"> • VND870,000 per month for enterprises located in urban districts of Hanoi and Ho Chi Minh City. • VND790,000 per month for enterprises located in suburban districts of Hanoi, Ho Chi Minh City and urban districts of Hai Phong, Quang Ninh, Dong Nai, Vung Tau, Binh Duong. • VND710,000 per month for enterprises located in other areas.
Minimum wage rates applicable from 1 January 2008	
Rates vary depending on location of enterprise: <ul style="list-style-type: none"> • VND620,000 per month for enterprises operating in inner city districts of Hanoi and Ho Chi Minh City. • VND580,000 per month for enterprises operating in outer city districts of Hanoi and Ho Chi Minh City; in inner city districts of Hai Phong; in the city of Ha Long in the province of Quang Ninh; in the city of Bien Hoa, in the township of Long Khanh, and in the rural districts of Nhon Trach, Long Thanh, Vinh Cuu and Trang Bom in the province of Dong Nai; in the township of Thu Dau Mot and in the rural districts of Thuan An, Di An, Ben Cat and Tan Uyen in the province of Binh Duong; and in the city of Vung Tau in the province of Ba Ria Vung Tau. • VND540,000 per month for enterprises operating in all other areas. 	Rates vary depending on location of enterprise: <ul style="list-style-type: none"> • VND1,000,000 per month for enterprises operating in inner city districts of Hanoi and Ho Chi Minh City. • VND900,000 per month for enterprises operating in outer city districts of Hanoi and Ho Chi Minh City; in inner city districts of Hai Phong; in the city of Ha Long in the province of Quang Ninh; in the city of Bien Hoa, in the township of Long Khanh, and in the rural districts of Nhon Trach, Long Thanh, Vinh Cuu and Trang Bom in the province of Dong Nai; in the township of Thu Dau Mot and in the rural districts of Thuan An, Di An, Ben Cat and Tan Uyen in the province of Binh Duong; and in the city of Vung Tau in the province of Ba Ria Vung Tau. • VND800,000 per month for enterprises operating in all other areas.

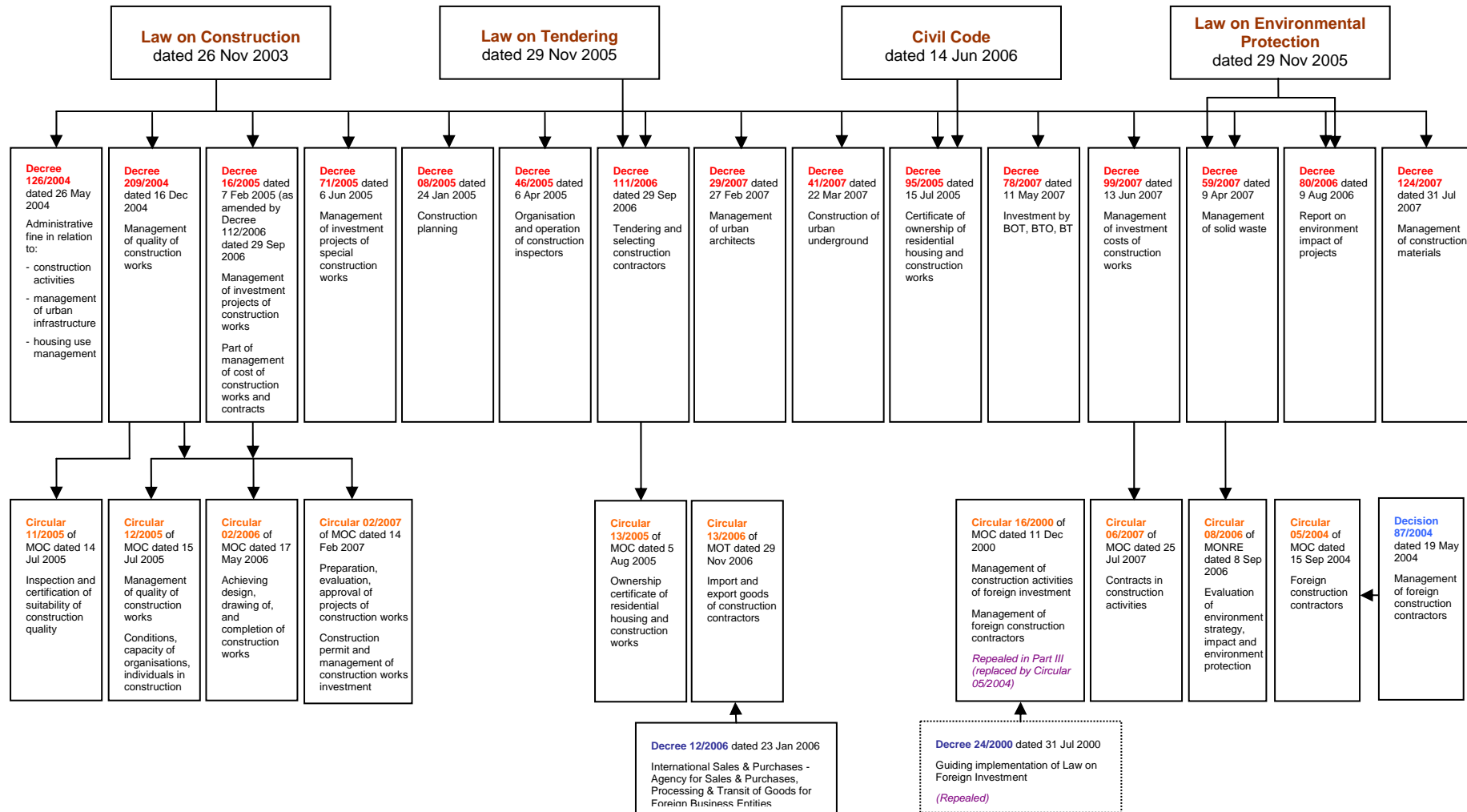
Part 2 Feature – Construction Law Map

This month's feature includes another of our Law Maps, this one covering the laws currently applicable in the construction area. The laws and regulations on construction are very important as they must be interpreted side-by-side with land and property laws; as such, they should be heeded carefully in this climate of 'real estate fever'.

The laws and regulations noted on the Construction Law Map cover all construction activities related to building, from residential houses to civil projects to industrial projects and commercial projects. The major law in this area – Law on Construction – was passed in 2003, and there were few guiding decrees and circulars promulgated until recently. Numerous new decrees and related circulars have been promulgated in 2006 and 2007.

Construction Law Map

Date 30 November 2007



Part 3 Did You Know?

3.1 Rising in the ranks

Vietnam is slowly beginning to emerge as a 'top pick' in respected polls regarding preferred trade and investment destinations in the world. Note that this says '*top*' pick; not simply 'moving up' or 'rising'. Is this what we've all been waiting for? The results of two surveys follow:

UNCTAD World Investment Prospects Survey

The United Nations Conference on Trade and Development (**UNCTAD**) has recently ranked Vietnam sixth among the 10 most attractive destinations for foreign direct investment (**FDI**) for 2007-2009. Only three years ago, Vietnam was ranked number 50. Clearly, a *huge* jump.

This survey noted that its positive outlook for Vietnam was premised on Vietnam's productivity and its reasonably priced labor force. 192 of the biggest multinationals participated in the survey, the majority of them indicating that they expected to expand their foreign investment annually over coming few years. 11% of respondents confirmed Vietnam would be their most attractive investment opportunity in the coming years.

The top 10 most attractive FDI destinations in 2007-2009, according to the UNCTAD survey, are:

- | | |
|-------------------|-------------------------------|
| (1) China | (6) Vietnam |
| (2) India | (7) United Kingdom |
| (3) United States | (8) Australia |
| (4) Russia | (9) Mexico |
| (5) Brazil | (10) Poland and Germany (tie) |

World Bank Report

In another recent report by the World Bank, 'Doing Business 2008', Vietnam ranked 91st in the world for ease of doing business. Factors used in determining the ranking were issues such as starting a business, dealing with licences, employing workers, obtaining credit, paying taxes, trading across borders, and others. The full results of the survey can be found at <http://www.doingbusiness.org/ExploreEconomies/?economyid=202>.

3.2 Beware of errors in your investment certificate!

Investors in Vietnam have generally welcomed the decentralisation of investment licensing authority from the Ministry of Planning and Investment in Hanoi to all provincial and municipal People's Committees.

Streamlined approvals

Whereas 12 years ago the MPI issued all investment certificates for foreign invested projects, now the People's Committees issue them (except for investment certificates issued by industrial zone authorities in respect of factories located in industrial zones). For some large or sensitive projects, MPI Hanoi approvals are still required, but this is an internal matter, and the investment certificate (**IC**) is always issued by the People's Committee where the project is located.

One unfortunate consequence of this shift appears to be a marked increase in the number of errors appearing in ICs. Such errors can have serious ramifications, the least of which may be delay to project implementation. It is important, therefore, for investors to check their ICs carefully as soon as they receive them.

Examples

Recent errors in investment certificates which we have seen or which have been reported include the following:

- incorrect spelling of investors' names and addresses
- incorrect spelling of the company established in Vietnam pursuant to the investment certificate
- incorrect description of the company's licensed activities
- incorrect amounts specified for investment capital and charter capital

3.3 Vietnam's Top 100

The United Nations Development Programme (**UNDP**) recently published a comprehensive report entitled 'Top 200 – Industrial Strategic of Vietnams' Largest Firms'. While the report noted that Vietnam's largest companies are – in global terms – more akin to small to medium sized businesses in other jurisdictions, they account for sizeable chunks of labor, assets, turnover and tax in Vietnam's economy.

We have pared in half the UNDP's list and list the Top 100 companies in Vietnam – based on a combination of number of employees, total, assets, turnover and tax paid – below. It is interesting to note that they are not all Vietnamese.

1. Bank for Agriculture and Rural Development
2. Viet Nam Post and Telecommunications Corp.
3. Electricity of Viet Nam
4. Bank for Investment and Development of VN
5. Vietsovpetro JV Enterprise
6. Bank for Foreign Trade of Viet Nam
7. Pouyen Viet Nam Co Ltd
8. Viet Nam Insurance Corporation
9. HCMC Post & Telecommunications
10. Viettel
11. Viet Nam Railway Corporation
12. Thai Nguyen Iron and Steel Co
13. Canon Viet Nam Co Ltd
14. The Corporation for Financing & Promoting Technology
15. Viet Nam Dairy Co.
16. Southern Steel Corporation
17. Viet Nam Mobile Telecom Services Company
18. Tae Kwang Vina Industrial Co Ltd
19. Viet Nam Paper Corporation
20. Fujitsu Viet Nam Computer Products Co Ltd
21. CP Viet Nam Livestock Co Ltd
22. Pouchen Viet Nam
23. Saigon Tobacco Co.
24. Bao Viet Life Insurance
25. Honda Viet Nam Co Ltd
26. Chang Shin Co Ltd
27. Hyundai Vinashin Shipyard Co Ltd
28. Bao Viet Insurance
29. Nidec Tosok Viet Nam Co Ltd
30. Petroleum Technical Services Company
31. Furukawa Automotive Parts Co Ltd
32. VN Construction Investment Import & Export Holding Corp.
33. Hwa Seung Vina Co Ltd
34. Vedan Viet Nam
35. Yazaki EDS Viet Nam Co Ltd
36. Saigon Tourist Holding Company
37. Dau Tieng Rubber Corp.
38. Viet Tien Garment Co.
39. Saigon Thuong Tin Bank
40. Dong Nai Rubber Co.
41. Viet Nam Airlines
42. Hanoi Public Service and Transportation Co.
43. Tainan Spinning Co Ltd
44. Asia Commercial Bank
45. Yamaha Motor Viet Nam Co Ltd
46. Saigon Beer Alcohol and Beverage Corp.
47. Hoang Thach Cement Co
48. Mabuchi Motor Viet Nam Co Ltd
49. Civil Engineering Construction Corp. No.5
50. Nissei Electric Viet Nam Co Ltd
51. Hualong Corporation Viet Nam
52. Petrolimex B12
53. Viet Nam Southern Food Corporation
54. HCMC Water Supply Co
55. Bim Son Cement Co
56. Khanh Viet Corporation
57. Prudential Viet Nam
58. Metro Cash and Carry Viet Nam
59. Nam Trieu Shipbuilding Company
60. Saigon Newport Co
61. Hanoi Textile and Garment Co
62. Dong Bac Coal Co.
63. Orion-Hanel Picture Tube Co Ltd
64. Cua Ong Coal Selecting Co.
65. Lam Thao Fertilizers and Chemicals Co
66. Petrolimex Region 2
67. Phong Phu Textile Co.
68. Chi Hung Joint Venture Co.
69. Thanh Le Commercial Import Export Co
70. Industrial and Commercial Bank of Viet Nam
71. Nha Be Garment Co.
72. Dona Pacific Viet Nam Co Ltd
73. VN Manufacturing and Export Processing Co Ltd
74. Nam Viet Co Ltd
75. Binh Long Rubber Co
76. Kim Anh Co Ltd
77. Development Investment Construction Corp.
78. Formosa Viet Nam Co Ltd
79. Construction Company No. 1
80. Sumitomo Bakelite Viet Nam Co Ltd
81. Viet Nam Ocean Shipping Co
82. PetroVietnam Gas Company
83. Southern Airport Authority
84. Construction Company No. 319
85. Bai Bang Paper Co
86. Noi Dia Coal Co Ltd
87. Phuoc Hoa Rubber Co
88. Lever Viet Nam JVC
89. Dona Victor Moulds MFG Co
90. Phu Rieng Rubber Co
91. Ha Long Shipyard
92. Bach Dang Shipyard
93. Thanh Cong Textile Co.
94. Samyang Viet Nam Co Ltd
95. Petrolimex Region 1
96. Intimex Import Export Co
97. Quang Ngai Sugar Corp.
98. Viet Nam Acecook Co Ltd
99. Viet Nam Sea Transport and Chartering Co
100. Southern Rubber Industry Co

3.4 To 'Re-' or not to 'Re-'?

This seems to be the question, according to a recent article appearing in the Saigon Times Daily (22 November 2007).

Under the LOI and LOE which took effect on July 1, 2006 (see Part 1.2 of this VLU issue), existing foreign investors were allowed to be treated like domestic enterprises and to enjoy certain business incentives, subject to re-registering by July 2008. FIEs choosing not to re-register would continue to operate within the scope of their original investment licenses.

As the July 2008 deadline gets closer, according to the article, only 78 of the 6,000 plus foreign-invested enterprises have applied to re-register to reap benefits from new business laws. Why is this the case?

One theory is that existing investors are concerned with all the ramifications of re-registering, ie, while they may receive same benefit, they are worried they might lose something else. Another possibility is that investors – especially recent ones – simply do not know about the requirement.

Regardless of the reason for not re-registering, officials have said that the potential benefits of the new laws will not apply to companies if they do not reregister on time. The MPI's foreign investment department proposed to extend the deadline, but apparently the Government has rejected this request.

So companies licensed prior to the new LOI and LOE, have little more the six months to 'fish or cut bait' in terms of re-registration.

Part 4 What's New?

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 more than 3000 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:

- ➔ Circular 22 on labour conciliation councils in enterprises, 23 October
- ➔ Decision 87 on securities registration, depository and clearance, 22 October
- ➔ Circular 9 on costs of hiring foreign construction consultants, 2 November
- ➔ Decision 167 with the bauxite master plan, 1 November
- ➔ Decision 92 amending duty rates on imported second hand cars, 1 November
- ➔ Circular 4 on coal business conditions, 22 October
- ➔ Circular 5 on export of coal, 22 October
- ➔ Decision 89 on accreditation of auditing enterprises to conduct audits of listed and other securities organizations, 24 October
- ➔ Draft Circular on issuing enterprise bonds, 30 October
- ➔ Decree 153 on real estate business, 15 October
- ➔ Decree 167 on the minimum wage rates for employees in Vietnamese enterprises, 16 November
- ➔ Decree 168 on the minimum wage rates for employees in enterprises with foreign owned capital, 16 November
- ➔ Decision 45 on establishment and management of securities investment funds (now a complete translation including all appendices), 5 June
- ➔ Letter 1210 on receipt of deposits in VND by foreign bank branches, 7 February
- ➔ Draft 3, Decree on private offers of shares, 19 November
- ➔ Circular 18 on redemption of shares and other share transactions by public companies, 13 March
- ➔ Draft (pending receipt of final text) of Law on Personal Income Tax, 20 November

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

NEW search function for Vietnam Legal Update

As regular VLU readers know, all issues of our Vietnam Legal Update from 1997 have previously been available on www.vietnamlaws.com. We are still in the process of merging our prior Phillips Fox system into the new AAR one, and hope to soon restore the ability to access back issues of our VLUs.