

VIETNAM LEGAL UPDATE

October 2007

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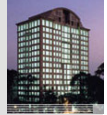
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We encourage feedback from our readers regarding the Vietnam Legal Update. Please direct all enquiries, comments and suggestions to Lee Baker in our Ho Chi Minh City office at lee.baker@aar.com.au.

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Part 1 Selected New Legal Instruments

1.1 LOE/LOI – More lingering questions clarified by Decree 139 (Part 2 of a three part series)

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)

As noted in our last issue of the VLU, 1 July 2007 marked the one-year anniversary of the effectiveness of the Law and Investment (*LOI*) and Law on Enterprises (*LOE*) – two laws which have together opened a new era for foreign investment in Vietnam.

Hailed by investors and businesspersons as a welcome move away from the former bifurcated 'foreign vs. domestic' regime, these significant laws left unanswered a number of issues and questions.....which Decree 139 has gone a long way toward clarifying.

In the September VLU, we discussed how Decree 139 had daylighted matters in three areas, related particularly to foreign investment: (i) restrictions on foreign ownership in Vietnamese companies, (ii) foreign-invested companies' rights to invest in Vietnamese companies, and (iii) establishment procedures for companies held 49% by foreigners.

This month, we take a look at three other areas where Decree 139 - which actually became effective on 5 October - has shed more light on the intention of the LOI/LOE, this time in relation to requirements applicable to key management and personnel.

Continuing with our Q&A format:

Q. #4. What are the requirements for a General Director (GD) of a company? Must he or she be resident in Vietnam?

The LOE states that the 'legal representative' of a company must be permanently resident in Vietnam. The legal representative is generally usually the GD (although sometimes it can be the Chairman). Where the legal representative is away from Vietnam for over 30 days, he or she must authorize another person in writing in accordance with the charter of the company to perform the rights and obligations of the legal representative of the company.

The term 'permanently resident' is not defined under the LOE, and therein lies the rub. What does it mean?

The Ordinance on Entry and Exit has its own interpretation of 'permanent residence', in its requirement for all foreigners wishing to have permanent residence in Vietnam to carry out the requisite (complicated and lengthy) procedures to receive a 'permanent residence card'. In our experience, however, no such card has ever been issued to a foreigner in Vietnam, resulting in the arguable position that no foreign GD has actually met the legal residency requirements for the position.

So are all foreigner General Directors in technical violation of the law?

Decree 139's reply:

Decree 139 says 'no'. It provides instead that where a foreign individual is assigned to be the legal representative of a company, he or she must stay in Vietnam for the entire term of office and must register 'temporary residence' in accordance with law. The 'permanent residence' requirement is gone.

Where the GD exits Vietnam and stays out of the country for more than 30 consecutive days, he or she must (i) authorise another person in writing to perform the legal representative's duties during the period of absence, and (ii) send, at least two days' prior to exiting Vietnam, a copy of such power of attorney to the Department of Planning and

Investment or to the management committee of the industrial zone or economic zone where the enterprise has registered its head office.

The procedure is clear now, thanks to Decree 139. and all foreigner GDs can breathe a sigh of relief!

Q. #5. Who must have a 'practising certificate' in a company which is in a sector requiring professional practising certificates? Will certificates issued in foreign countries be recognized in Vietnam?

The issue of which persons are actually required to have practicing certificates has heretofore not been clear, under the LOE/LOI, or under Decree 88, which provides guidelines for the implementation of the LOE.

Under Decree 88, practising certificates are required in respect of (i) the Director; and (ii) 'another person' being one of the following: (a) the owner of a private enterprise, (b) an unlimited liability partner of a partnership, (c) the chairman of the Members' Council, the chairman of a company or a member of the Board of Management, or (d) other managerial positions as stipulated in the charter of a company.

Under this wording, it would appear that the Director always must have a practicing certificate, and as for who else might need one, the law is somewhat vague. Who are these people, and which one(s) are actually required to possess practicing certificates?

On the issue of whether practicing certificates issued in foreign countries will be recognized in Vietnam, Decree 88 (and the LOE) are completely silent.

Decree 139's reply:

According to Article 6 of Decree 139:

- If the law requires the Director to have the practising certificate, then the Director himself must have the certificate;
- If the law requires the Director and another person to have the practising certificates, then the Director himself and another at least one other staff must have the practising certificates; and
- If the law requires a practicing certificate generally, but does not require the Director specifically to have the certificate, then at least one staff must have the certificate.

Decree 139 adds specificity and clarity where it was previously lacking, in that it now is very clear when the Director is and is not required to have the certificate, and when other persons must have one. Moreover, the qualifications of the 'other staff' required to have practicing certificates are not specified, so presumably—and on a literal reading—any staff (not merely management) will qualify. This allows new flexibility in determining who will have a practicing certificate.

Under Decree 139, practicing certificates issued in foreign countries will *not* be recognized in Vietnam unless the laws or international treaties to which Vietnam is a party state otherwise. As such, it should now be relatively easy to ascertain when foreigner certifications will be acceptable.

Q. #6. How many authorised representatives can be appointed by corporate owners to the Members' Council (MC) or the General Meeting of Shareholders (GMS)?

The LOI and LOE generally state that the corporate (as opposed to individual) owner(s) of an LLC—either a shareholding LLC (**SLLC**) a members LLC (**MLLC**)—or the corporate shareholder(s) of a shareholding company (**SC**) shall appoint an authorised representative (**AR**) to the MC or GMS. However, it is not specified clearly in the LOI/LOE how many ARs each corporate owner/shareholder is allowed to appoint.

For an SLLC, Article 67.1 of LOE states that the owner can appoint 'one or some' ARs, but there is no such clause for an MLLC or an SC and, normally, the owner(s)/shareholder(s) in this case may appoint only one AR. Given that the AR has the full rights and obligations of the owner/shareholder, however, the owner/shareholder is often uncomfortable entrusting one person with so much power. So is it, in fact, restricted to only one?

Decree 139's reply:

According to Decree 139, the number of ARs who can be appointed to the MC or the GMS is flexible. Corporate owners or shareholders have the right to decide the number of ARs by stipulating this in charter of the enterprise. The owner of SLLC can authorise as many ARs as it wishes. The owners of MLLC can decide the number of ARs of each corporate member by reference to that member's percentage of the charter capital. The number of ARs appointed by corporate shareholders of an SC also can be determined in the charter of SC (in proportion to the shareholdings).

1.2 New Decree 153: More rules on real estate

Decree 153/2007/ND-CP of the Government dated 15 October 2007 providing detailed regulations and guidelines for implementation of the Law on Real Estate Business (Decree 153)

By design or chance, the passage of the Law on Real Estate Business in 2006 (effective 1 January 2007) has coincided squarely with Vietnam's current real estate fever. Some might even say it has spawned it.

Detailed regulations needed

The Law on Real Estate Business laid the much needed groundwork for regulations in the field of law real estate business activities, rights and obligations of organisations and individuals engaged in real estate business, and real estate transactions related to real estate business in Vietnam. However, like so many top-level laws in Vietnam, it left many issues unclear, and confusion has reigned in the industry as to what the rules really are.

Decree 153 to the rescue

On 15 October 2007, Decree 153 was issued, with the goal of alleviating some of this confusion. It provides detailed regulations and guidelines on a number of topics, including:

- (a) the types of real estate permitted to be made available for trading;
- (b) the legal capital requirements applicable to organizations and individuals engaged in real estate businesses;
- (c) rules on the purchase and sale of houses and buildings in the form of advance payment;
- (d) financial capability conditions applicable to investors of real estate projects;
- (e) training of, and issuance of certificates to, real estate brokers, valuers, and managers and operators of real estate trading floors; and State administration of real estate business activities; and
- (f) other matters concerning the real estate business.

We discuss several of these below:

Types of real estate permitted to be made available (and unavailable) for trading:

It is now clear under Decree 153 which types of real estate business are open to trading, and which are 'hands-off' to traders. Some examples are below:

Available for trading:	Unavailable for trading:
<p>All types of houses and buildings as stipulated in the Law on Construction, including:</p> <ul style="list-style-type: none"> - civil works - industrial works - road traffic works - irrigation works - technical infrastructure works 	<p>Examples include:</p> <ul style="list-style-type: none"> - civil servants' residences - headquarters of State bodies - national defence and security works - works which are recognized historical and cultural sites or scenic sites owned by the State

Financial capacity requirements for an enterprise to conduct a real estate business:

Legal capital requirements generally:

The Law on Real Estate Business did not indicate the amount of legal capital required for an entity to engage in the real estate business. Decree 153 sets the legal capital requirement at six billion Vietnamese dong (approximately US\$375,000)

Special zone developers:

There are additional financial capability conditions applicable to investors of new urban zones, residential zones and industrial zone technical infrastructure projects. Under Decree 153, the capital owned by an investor means the investor's equity calculated up to the year prior to the year in which the investor implements such new urban zone, residential zone or industrial zone technical infrastructure project, and as specified in the investor's financial statements certified by an independent auditor.

Conditions for purchase and sale in the form of advance payment of houses and buildings to be built/developed in the future:

Decree 153 sets out the rules of play in the real estate business, which has clearly caught the interest of local investors in the past two years. Among the rules laid out are the following:

- (a) Advance payment must be made on a number of occasions, and the initial payment may only be collected when the investor has commenced construction of technical infrastructure. Subsequent occasions of collecting advance payments must be consistent with the schedule for construction of the house or building. Residential zone projects must also be implemented in accordance with the law on residential housing.
- (b) Investors must use advance payments from buyers for the objective of investing in the development of the real estate.
- (c) Clients making advance payments are entitled to the purchase or assignment price of the real estate as at the time of signing the contract, unless the parties otherwise agree.
- (d) Any investor who hands over the real estate to the buyer later than the scheduled date stipulated in the contract shall be contractually liable to the buyer and must pay the buyer interest on part of the advance payments for the period of delay, calculated at the commercial bank loan interest rate as at the time of handover of the real estate.

As a brand new law—in fact, not legally effective until probably mid November—Decree 153 appears to zero-in on and address many of the key areas and issues left open by the Law on Real Estate. It will be interesting in the coming months to see how its implementation plays out. Clearly, we have before us a plethora of ‘live cases’ in the real estate marketplace awaiting guidance in this area.

1.3 Overseas investment rules in the offing—stay tuned

Decision 1175/2007/QD-BKH of the Ministry of Planning and Investment providing regulations on the forms of direct overseas investment dated 10 October 2007 (*Decision 1175*)

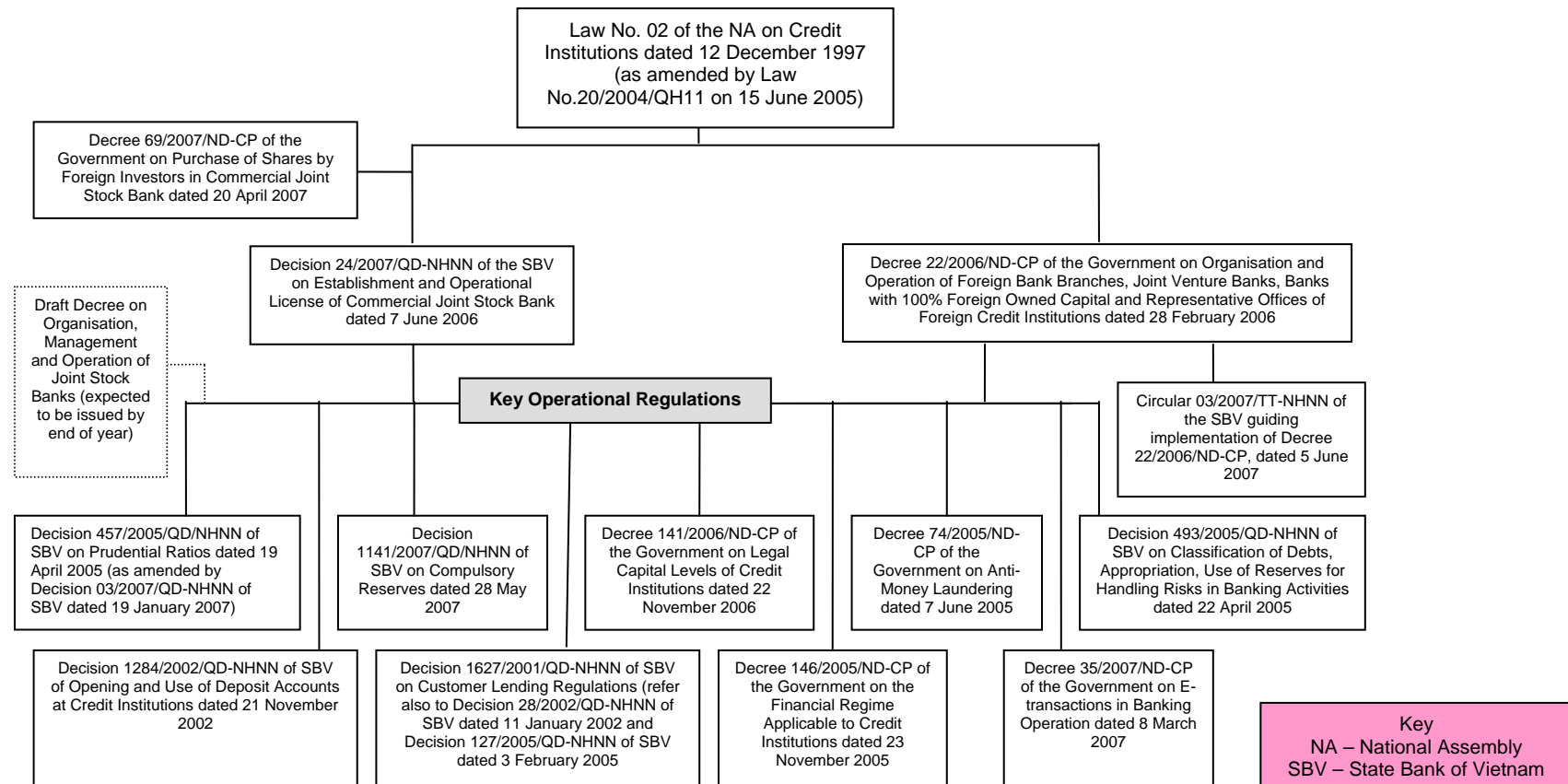
The MPI has recently issued new regulations (*Decision 1175*) on the forms of permitted direct overseas investment by Vietnamese citizens. This is a piece of long-awaited legislation and will be covered in detail in the November issue of the VLU, once it has become effective. Stay tuned as we reveal the whats, wheres and hows for Vietnamese persons and entities wishing to invest abroad.

Part 2 Features: Law Map

This month's Law Map focuses on the laws and regulations applicable in Vietnam's commercial banking sector. While the latest buzz has centered on securities and capital markets regulations, as this map indicates, the State Bank has held a steady course in terms of legislative activism in recent years. These are the major laws applicable to banks and credit institutions in Vietnam:

Law Map - Commercial Banking Institutions

31 October 2007



Part 3 Did You Know?

3.1 MOUs, LOIs, Heads of Agreement—Binding?

According to Article 54 of Decree 108 of the Government dated 22 September 2006 (**Decree 108**), a joint venture contract comes into effect when an investment certificate is issued, not when it is signed or at any other time agreed in writing by the parties.

Precursor documents – Why have they?

In this connection, what is the legal status of, and the need for, preliminary documents to the joint venture contract, such as Memoranda of Understanding, Heads of Agreement, Letters of Intent, or other such documents signed by foreign investors with their local joint venture partners?

These documents are often signed to record the parties' understanding or intention with respect to an investment project, before they proceed with detailed due diligence and negotiations. Sometimes they even include provisions stating that all or part of the document is binding on the parties. A variation that we sometimes see in Vietnam is a document called a 'Conditional Agreement'. Like an MOU, this document records the parties' intention to enter into more formal, detailed documents.

Some people like to think these types of precursor agreements are enforceable under Vietnamese law. But are they really?

Possible binding effect:

The answer is (drum roll.....) not clear. While the terms MOU and LOI, on the one hand, and 'binding', on the other, are oxymoronic in most places, in Vietnam, this might not be so. Under the Civil Code, which is the 'general law' in Vietnam, a principle rule is that the parties are free to agree their rights and obligations. Therefore, arguably—and despite Decree 108—such rule could apply to give the likes of MOUs and LOIs the status of binding agreements, in cases where the parties expressly state that they are to be binding.

Query what a Vietnamese court will decide on this one.

3.2 Issuance of new shares to a new investor at discounted price—a no-no?

Article 87.1 of the LOE provides that shares cannot be offered at a price lower than the market price at the time of offering or the most recent value recorded in the books of shares, except in the following four circumstances:

- (a) initial offering of shares to persons other than founding shareholders;
- (b) shares offered to all shareholders in proportion to their current respective percentage of shares in the company;
- (c) shares offered to brokers or underwriters. In this case, the specific amount of discount or rate of discount must be approved by the shareholders representing at least 75% of the total number of shares with voting rights;
- (d) other cases; and the rates of discount in such cases shall be stipulated in the charter of the company.

Common misconception

There is a common misunderstanding in practice that even if none of the exceptions listed above applies a company can still issue shares to a new investor at a discounted price if the General Meeting of Shareholders (**GMS**) has approved the transaction.

In order for a company to issue shares to an investor at a discounted price, under Article 87.1 of the LOE, at least one of the exceptions (a), (b), (c) or (d) must apply.

Exception (b)

Where exception (b) applies, the outcome of the company selling shares to an investor at a discounted price can only be achieved by way of each shareholder individually giving up the right or assigning the right to those shares to the investor. The company cannot simply decide to sell shares to an investor at a discounted price by vote of the GMS, even by a 100% vote (let alone a 75% vote), because the GMS resolution is a company document only. The law grants rights to shareholders to obtain shares. Any shareholder who does expressly and individually waive his right or transfer his right to the investor is entitled to shares at the discount, irrespective of any resolution or document of the GMS. Any resolution purporting to interfere with these rights is void.

Exception (d)

Where exception (d) applies, if the charter does not provide for the case where shares can be offered at discounted price, then in this case, before the deal could take place, the charter would need to be amended by 75% vote at a GMS (or such higher vote as the charter requires) to create such other case that would apply to the investor, stating the relevant discount.

3.3 Termination of the General Director—a little tricky

According to the Law on Enterprises, the General Director (**GD**) of an enterprise is appointed by Members' Council (**MC**) or Chairman of LLC, or the Board of Management (**BOM**) of a shareholding company (**SC**) and the GD shall sign a labour contract with the enterprise. Rights and responsibilities of the GD are specified in appointment decision/resolution, charter and labour contract.

The MC/BOM has the right to appoint and remove the GD at any time by a decision/resolution. However, under the Labour Code, the labour contract can be terminated in only a few instances, and if the GD/Director is removed by the MC/BOM under a decision/resolution, the only relevant one is if the employment is terminated by mutual agreement (Article 36.3, Labour Code). In this case, in addition to a decision/resolution of the MC/BOM on removal of the GD/Director, a resignation letter from the GD/Director or a 'written agreement to terminate' between the parties should be required to effect the termination of his labour contract .

What happens if the GD does not sign the resignation letter and/or the agreement to terminate? Can he or she avoid being sacked by so doing?

May be not, if a clause of condition to enter into and terminate the GD/Director's labour contract is included in the resolution/decision of appointment. Then the labour contract would be conditional: it could be signed and effective only in accordance with the decision/resolution of appointment and could be terminated when the appointment, was removed by another decision/resolution.

Perhaps more a legal than a practical issue, but something to ponder.

3.4 Vietnam elected non-permanent member of UNSC

As reported by the Vietnam News

16 October 2007, the UN General Assembly has elected Vietnam as a non-permanent member of the UN Security Council for the 2008-09 term.

In the first round of voting, Vietnam, Burkina Faso and Libya were elected to the non-permanent member seats.

Vietnam will officially begin work in the Council from January 1, 2008, replacing Qatar, and representing Asian countries.

Prime Minister Nguyen Tan Dung said "Becoming one of the 15 members of the most important agency of the largest international organisation is a great honour that also comes along with a heavy responsibility. A non-permanent member of the United Nations Security Council is responsible to take a full part in the process of drafting and building the Council's important

decisions pertaining to the most important issues relating to peace and security in various regions and the world as a whole."

3.5 What's in a name?

To have a correct business name in accordance with Vietnamese laws and regulations is not always an easy issue. Under the Law on Enterprises (**LOE**) and Decree 88/2006/ND-CP dated 29 August 2006 of the Government (**Decree 88**), a business name must be written in Vietnamese, may be followed by numbers and signs, must be pronounceable and must contain two components.

Political and legal correctness

The first component of 'correctness' is the type of enterprise. Examples include limited liability company, shareholding company, partnership, or private enterprise. This must be stated as part of the business name.

The second component is that it must contain the *proper* name of the enterprise. In respect of an enterprise with foreign owned capital, a *registered* proper name in a foreign language may be used to form part of or the whole of the proper name of such enterprise.

This provision is ambiguous and subject to inconsistent interpretations, not only for enterprises but also the authorities. A number of foreign owned companies have been denied investment certificates issued in their names, on the basis that their business names do not contain Vietnamese words in accordance with this requirement.

Changing name?

Taking an example, a company named in English 'ABC Company Limited' and written in Vietnamese as 'Cong ty TNHH ABC', would have 'ABC' as its proper name in English. 'Company Limited' would connote the type of enterprise. The authorities in this case could argue that there are no Vietnamese words in this name and refuse to issue the investment certificate. But what if ABC was a 'registered' name?

We have worked on similar cases for clients and argued as much to authorities, ie that under Article 10.1 of Decree 88, an enterprise with foreign owned capital may use a *registered* proper name in a foreign language to form part of or the whole of the proper name of such enterprise. Sometimes we've won and other times we haven't.

The lesson? Unless you're willing to register your company under a Vietnamese name (and many foreign companies have done this), there is the chance—at least under current law—that your company's own (foreign language) name might be refused. Your best bet is to have it registered somewhere else before coming to Vietnam, and deal with an authority who has good knowledge of Decree 88!

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 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, printed and downloaded (subject to terms and conditions).

Laws uploaded on the Vietnam Laws Online Database during October 2007 include the following:

- ➔ Decision 1290 with the list of 163 national projects calling for foreign investment, 26 September
- ➔ Decree 130 on the compulsory fire and explosion insurance regime, 8 November 2006
- ➔ Decision 104 on administration of representative offices and branches of foreign business entities in Hanoi, 25 September
- ➔ Decision 1289 approving the equitization plan of Vietcombank, 26 September
- ➔ Draft Decree on foreigners working in Vietnam, 29 August
- ➔ Draft 4, Decree on implementation of WTO commitments, 25 September
- ➔ Circular 001 on tobacco manufacturing and business, 30 August
- ➔ Draft 4 of the Law amending the Petroleum Law, 24 September

The list above is merely a snapshot of the wide range of new legislation now uploaded and available on Vietnam Laws Online through October 2007.

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.