

# VIETNAM LEGAL UPDATE

## September 2007

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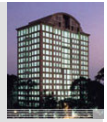
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## Part 1 Selected New Legal Instruments

### 1.1 LOE/LOI – Key questions answered by Decree 139

#### **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*)**

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 collectively opened a new era for foreign investment in Vietnam.

The LOI and LOE provide for new forms of investments in Vietnam, and were promulgated with the aim of facilitating Vietnam's 'economic integration' into the international market.

This being said, these significant laws left open a number of issues and questions, and there have been difficulties with implementing the LOI and LOE in practice. Authorities as well as investors have been frustrated with this seeming 'giant leap' forward, which has given little guidance for the 'baby steps' along the way.

Decree 139 goes a long way in clarifying some of the issues left upon by the LOI and LOE. Given the importance of this decree, this, and subsequent, issues of our VLU will focus on some of the major issues addressed, and clarifications made, by Decree 139. The questions have been obvious over the past year; now we are getting some answers, beginning with the three 'hot' questions below:

#### **Q. #1. What are restrictions on foreign ownership in Vietnamese companies?**

The LOI and LOE generally allow foreign investors to purchase shares in Vietnamese shareholding companies and make capital contributions to Vietnamese limited liability companies, provided that the sectors in which such companies operate are not 'prohibited' or 'conditional'.

This general provision when enacted, gave rise to a new mergers and acquisition practice as an alternative form of foreign investment in Vietnam, which did not exist under the previous Law on Foreign Investment. However, due to lack of detailed regulations, foreign investors have encountered various uncertainties and difficulties in conducting this form of investment in practice. One of the main issues has been the permitted level of foreign ownership in Vietnamese companies.

#### **Decree 139's reply**

Under Decree 139, foreign ownership in Vietnamese companies is subject to the following restrictions:

- (a) the ownership ratio of foreign investors in listed companies is set out in the Law on Securities;
- (b) the ownership ratio of foreign investors in specific industries is set out in the relevant industry specialized laws;
- (c) the ownership ratio of foreign investors in 100% State owned enterprises undergoing equitization or otherwise converting their form is set out in regulations on equitization and conversion of 100% State owned enterprises;
- (d) the ownership ratio of foreign investors in services companies is set out in Vietnam's commitments to the WTO on commercial services.

If the above restrictions do not apply to the sector or the Vietnamese company in which foreign investors propose to invest, foreign investors are permitted to acquire an interest in such company at an *unrestricted* level.

Decree 139 further clarifies the procedure for foreign investors to acquire shares or interests in Vietnamese companies. Depending on the corporate form of the Vietnamese

company, amendment of such company's business registration certificate or investment certificate may be required to reflect ownership of the foreign investor.

**Q. #2. Is a foreign invested company permitted to invest in other Vietnamese companies?**

Article 13.3 of the LOE provides 'enterprises' with general corporate powers to invest in other enterprises. It is unclear, however, whether this provision applies to foreign invested enterprises (**FIE**) and hence, if it allows an FIE to own shares and interests in other companies.

Furthermore, based on the practice developed under the Law on Foreign Investment, one view is that an FIE is allowed to conduct only business activities registered in its investment license or certificate. Therefore, an FIE must have the stated activity of 'holding investments in other companies' registered in its investment certificate or license in order to be permitted to invest in other companies.

**Decree 139's reply**

Decree 139 confirms that the above quoted provision of the Law on Enterprise applies to FIEs and enables FIEs to invest in other companies. It seems that the FIEs are not required to have a registered activity of 'holding investments' in order to conduct such investments.

We note that although provisions of Decree 139 clarify this fundamental issue, the decree does not answer all the questions. It remains unclear whether investment in other companies by FIEs is considered as a 'new investment project' and whether FIEs must obtain an investment certificate for such investments. Furthermore, ownership of FIEs in Vietnamese companies may be seen as 'foreign investment', may, therefore, be subject to restrictions on foreign ownership in Vietnamese companies (see below). These issues are expected to be resolved in the expected decree on foreign ownership in Vietnamese companies to be issued by the Government.

**Q. #3. What is the establishment procedure for a company in which a foreign investor has a 49% interest?**

Under the LOE, there have been two separate ways of interpreting the term 'enterprise with foreign owned capital' by investors in Vietnam. Under the first, an enterprise with foreign owned capital comprises any enterprise established by a foreign investor in order to carry out investment activities in Vietnam and any Vietnamese enterprise in which a foreign investor purchases shares, merges or acquires (Article 3.6 of LOE). Using this definition, a Vietnamese enterprise, once its shares are purchased by a foreign investor, is subject to the same conditions and regulations applicable to a purely 'foreign' company.

Flipping things over, the LOI could conversely be interpreted to mean that the same investment conditions applicable to domestic investors should apply to companies which have foreign ownership but are controlled by domestic Vietnamese interests, ie interests holding more than 51% of the charter capital of an enterprise (Article 29.4 of LOE). In other words, whether domestic or 'foreign' investment conditions apply would depend on whether the capital owned by foreign investors in an enterprise exceeds 49%.

**Decree 139's reply**

Decree 139 has drawn a clear line between enterprises with the foreign owned capital of 49% or less, and enterprises with foreign owned capital greater than 49%.

Article 9 of Decree 139 provides that if more than 49% of the charter capital of the enterprise proposed to be established is owned by a foreign investor, then there must be an investment project, with registration of the investment and establishment of an economic entity in accordance with the LOI. In such cases, the enterprise will be issued

with an investment certificate (which concurrently serves as the business registration certificate).

If foreign investors will not own more than 49% of the charter capital in the enterprise proposed to be established, then establishment of the enterprise should be implemented in accordance with the provision of the LOE. In these cases, the same regulations which apply to domestic investment projects should apply to the registration of the investment.

This provision of Decree 139 is very important, and represents welcome clarity on a previously ambiguous point of law in Vietnam. As such, the notion (represented by the first interpretation, above) that an enterprise with only a very small percentage should be considered an enterprise with foreign owned capital, and therefore subject to be approval and registration under the LOI, is no longer correct. Article 9 of Decree 139 adds that if a foreign investor purchases shares in or contributes capital to a Vietnamese enterprise, it need only register under the LOE. This should open the door to more foreign investment in domestic enterprises.

## 1.2 Logistics – Big business in Vietnam

### **Decree 140 of the Government providing detailed regulations on the Commercial Law regarding conditions for engaging in logistic services business and limitation on liability of logistic services business entities, dated 5 September 2007 (Decree 140)**

Decree 140 stipulates conditions for logistic services businesses as well as certain limitations on liability of enterprises engaging in the logistics business. It also classifies logistic services into three main groups and provides the conditions applicable to domestic and foreign investment in each service of these groups. It is noteworthy that conditions applicable to certain services are consistent with Vietnam's WTO commitments.

#### **Three subsectors**

The three main groups of logistics services under Decree 140 are the following:

#### **(a) Principal logistic services:**

An enterprise in this group must have a lawful business registration and adequate facilities, equipment and working facilities which ensure technical standards and safety criteria, as well as a team of staff who satisfy the requirements. Foreign investment in such services may be carried out only in the form of joint venture. There are restrictions on the maximum ratio of capital contribution by a foreign investor. In particular:

<b>Services</b>	<b>Restriction on capital contribution by the foreign investor</b>
Services of arranging pickup and loading of goods	- may not exceed 50%
Goods warehousing and storage services, including the business of warehousing in containers and storage for processing raw materials and equipment	- may not exceed 51%
Transportation agency services, including agency activities of conducting customs procedures and preparing plans for unloading goods	- may not exceed 51%; - removed from 2014
Other subsidiary services (including receiving, archiving and managing information about transportation and storage of goods throughout the entire logistic process, leasing out and hire purchase of containers, etc)	- may not exceed 49% - may not exceed 51% from 2010; - removed from 2014

**(b) Logistics services relating to transportation:**

Enterprises engaging in transportation logistics services must have a lawful business registration and must comply with conditions applicable to transportation businesses, as stipulated by the law. Again, there are certain restrictions applicable to foreign investment in such services. In particular:

Services	Restrictions
Sea carriage services: - Maritime transportation services - Internal waterways carriage services	- Only joint venture is permitted from 2009 and the capital contribution ratio of the foreign investor must not exceed 49% - Only joint venture is permitted and the capital contribution ratio of the foreign investor must not exceed 51% (this shall be removed after 2012).
Aviation carriage services	Conditions under the Law on Civil Aviation shall be applied.
Rail carriage services	Only joint venture is permitted and the capital contribution ratio of the foreign investor must not exceed 49%.
Road carriage services	Only joint venture is permitted and the capital contribution ratio of the foreign investor must not exceed 49%. (this restriction shall be 51% from 2010.)
Pipeline conduit services	Not permitted unless otherwise provided in the treaties to which Vietnam is a party.

**(c) Other related logistic services:**

The general rule applicable to this group is that the enterprises engaging in such services must have a lawful business registration. Similar to the above two groups, there are certain restrictions applicable to foreign investment:

- Services being technical checks and analysis: If the services are provided in order to exercise authority of the Government, they may be provided only in the form of a joint venture after three years, or in other forms after five years, as from the date on which the private enterprise is permitted to conduct business in such services. Such services are also restricted at geographical locations for reasons of national defence and security. Note that the services of acceptance testing of, and issuance of, certificates for transportation facilities are not permitted.
- In relation to post services, wholesale or retail commercial services, the relevant conditions provided by the Government in such field shall be applied.
- Other subsidiary transportation services classified in this group are not licensed to foreign investment unless otherwise provided by international treaties to which Vietnam is a party.

**1.3 Visa exemption for Viet Kieu****Decision 135 of the Prime Minister dated 17 August 2007 issuing regulations on visa exemption for Vietnamese residing overseas (Decision 135)**

Under this welcome decision, Vietnamese persons residing overseas and foreigners being the spouses or children of a Vietnamese citizen or of a Vietnamese residing overseas (**Overseas Vietnamese**) are exempted from the requirement of entry visas into Vietnam from 1 September 2007.

### Who and how?

Overseas Vietnamese must satisfy certain conditions stipulated by Decision 135 in order to be eligible for visa exemption. In order to enjoy visa exemption, Overseas Vietnamese must obtain a "visa exemption certificate" at the Vietnamese representative offices overseas or the Division for Management of Entry and Exit under the Ministry of Police in Vietnam. A visa exemption certificate will be valid for five years and will allow its holder to enter to Vietnam multiple times and stay up to three months each time. If the period of residence exceeds 90 days, the holder must apply for a visa in accordance with the prevailing regulations.

To apply for a visa exemption certificate, Overseas Vietnamese must submit photos and the following documents:

- Declaration and request for a visa exemption certificate in accordance with the standard form;
- Foreign passport or a document certifying permanent residence issued by a foreign authority which must remain valid for at least 6 months as from the date of entry.
- Document evidencing that the applicant is an Overseas Vietnamese

For this purpose, the applicant may present various documents evidencing his/her Vietnamese original or previous Vietnamese nationality.

- Document evidencing relationship of the applicant with his/her spouse or parent who is an Overseas Vietnamese, if applicant is a spouse or child of these persons (usually this is a marriage certificate, birth certificate, or certificate of relationship of spouse or child).

The relevant authority has seven working days to issue visa exemption certificate to the applicant. The fee currently appears to be USD20. The Government of Vietnam, however, reserves the right to rescind a visa exemption certificate if it is later discovered that its holder does not satisfy the conditions stipulated by Decision 135.

### Helpline

To assist Overseas Vietnamese in applying for visa exemption certificate, the Ministry of Foreign Affairs has developed a special website at <http://mienthithucvk.mofa.gov.vn/> which provides detailed guidance on the application procedure. This website also allows applicants to complete the application documents online.

## Part 2 Features

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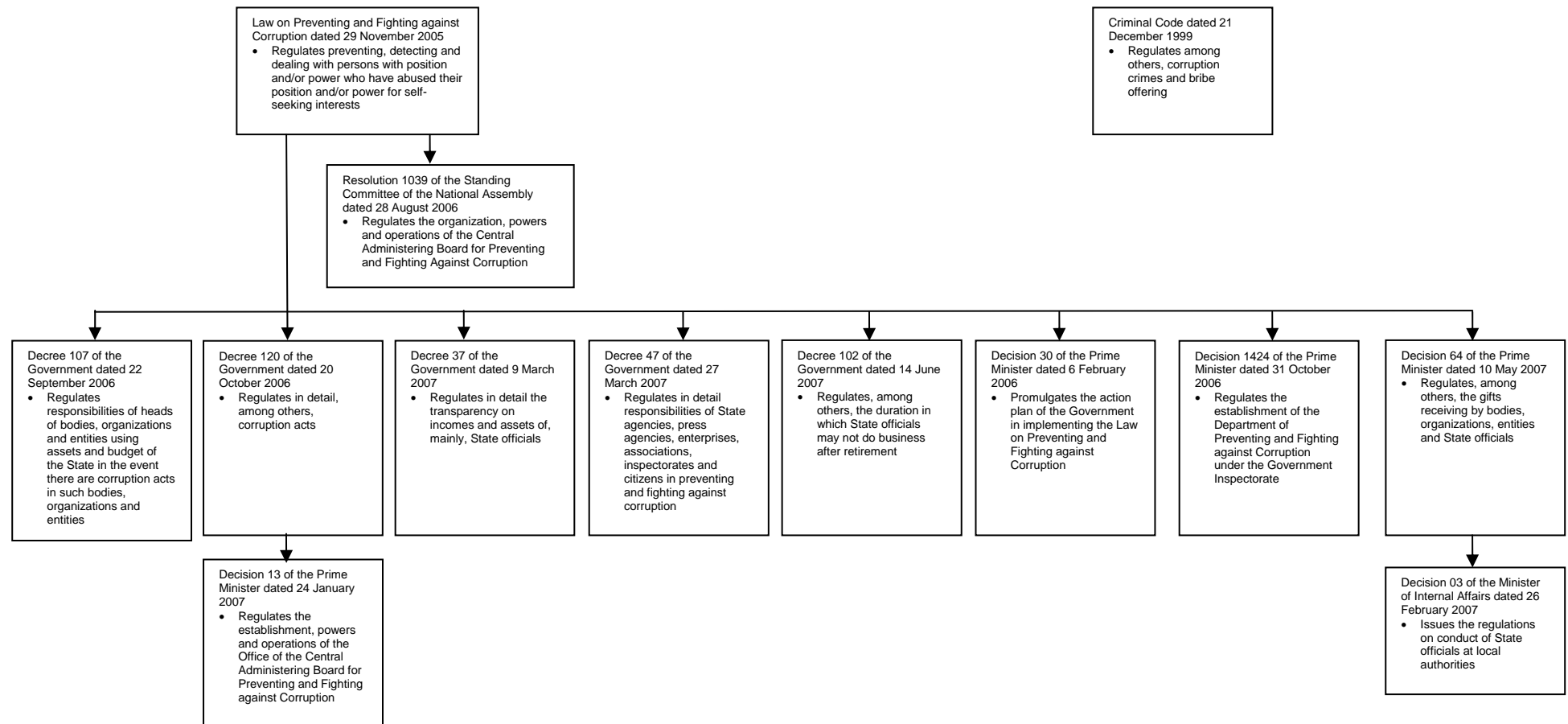
### Law Map – Anti-Corruption

In this issue of the VLU, we feature another of our popular Law Maps. This month's Law Map relates to a subject of interest to anyone doing business with government officials (which may include managers and staff of State owned enterprises, ie anti-corruption. Virtually all of the current regulation in this area has been issued since 2005.

As Vietnam is a country which has ranked consistently low during the past decade in ratings measuring transparency and anti-corruption policies, it is certainly a positive trend to see laws being put on the books in this area. More regulation is expected in this area in the coming months and years.

## Law Map – Anti-Corruption

18 September 2007



Notes:

1. In addition to the above, State bodies including ministries and people's committees also issue implementing laws on preventing and fighting against corruption.
2. It is expected that the Government will issue further decrees on (a) the body in charge of preventing and fighting against corruption under the Ministry of Police; and (b) rotating offices of the State officials.

## Part 3 Did You Know?

### 3.1 Bank equitisation and new laws update

In the spring of this year, some VLU readers may have attended a EuroCham business luncheon in Hanoi, focusing on the topic of equitization of State-owned commercial banks. Dr Le Xuan Nghia, who is the Director of the SBV Department of Development Strategy, was the speaker.

#### First out the gate for equitisation

In his remarks, Dr Nghia noted that three banks – Vietnam Bank for Foreign Trade (**VCB**), Vietnam Industry and Commerce Bank (**VICB**) and Mekong Delta Housing Bank (**MHB**) – were slated for equitization in August of this year. He notes that the next after these three bank would be the Investment and Development of Vietnam (**BIDV**). Dr Nghia noted that the banks would not be equitized all at once, with only 10% of the equity of each bank sold at a time.

#### New laws

Dr Nghia also reported that the State Bank was currently drafting the following four new laws, all of which would be discussed and passed by the National Assembly in 2008:

- (i) Law on State Bank;
- (ii) Law on Commercial Banks;
- (iii) Law on Deposit Insurance; and
- (iv) Law on Banking Supervision.

#### Current state of play

The following is an update on the progress made in connection with the developments highlighted by Dr Nghia in April:

As to equitization of the State commercial banks, the current status is as follows:

- VCB will pick up strategic investor(s) in October and carry out an IPO in November
- BIDV will be converted into a financial group before it conducts its IPO
- ICB will conduct an IPO before it converts into a financial group
- MHB will conduct an IPO in December

As to the key laws being drafted in this sector:

- (a) Draft 1 of the Law on the State Bank has been completed and comments from local and foreign experts have been incorporated into this draft. This draft is to be submitted to the Government in December and the intention is for the National Assembly to pass the law in the third or fourth quarter of 2008.
- (b) The Law on Commercial Banks has been outlined in detail and opinions from local and foreign experts are now being collected.
- (c) The Law on Deposit Insurance is just beginning to be outlined.
- (d) Draft 1 of the Law on Banking Supervision has been completed.

The plan is still for all four laws to be passed in 2008. However, the Governor of the State Bank has recently informed the Department of Development Strategy yesterday that the deadline may be extended to 2009 for the Law on the State Bank, the Law on Commercial Banks and the Law on Baking Supervisor.

### 3.2 Founding shareholder limitation – more murky waters

Many readers will be aware that a founding shareholder in a joint stock company may not transfer its shares to non-founding shareholders within the first three years after the date of establishment of the company, unless the general meeting of shareholders (**GMS**) approves such transfer (Article 84(5) of the Law on Enterprises (**LOE**)). A founding shareholder *may*, however, transfer its shares to other founding shareholders.

#### Not so straightforward

This sounds like a straightforward rule, but the trick is in the implementation. For instance, what happens when the joint stock company issues new ordinary shares and the founding shareholder subscribes to those shares? Will those shares also be subject to the lock-in period (or what is left of that period)?

#### View #1

One school of thought (based on a literal interpretation of Article 84(5)) is that a founding shareholder will retain the character of a founding shareholder even when it subscribes to newly issued ordinary shares. In this case, the remaining lock-in period would apply to the newly-issued ordinary shares subscribed by the founding shareholder.

If this literal interpretation is adopted by the authorities, however, it would clearly create difficulties for founding shareholders. There would obviously be liquidity issues, as founding shareholders would not be able to sell the original and newly-issued shares until the expiry of the lock-in period, unless prior approval of the **GMS** was given. **GMS** approval could be difficult to obtain where the joint stock company publicly offers shares or lists on the stock exchange, because shares of the founding shareholders' could be diluted in the process.

#### View #2

Another, better-reasoned school of thought is based on a contextual interpretation. Article 84(5) should not be read in isolation but rather in the context of the entirety of Article 84. Article 84, after all, was intended to cover the topic of ordinary shares of founding shareholders issued upon incorporation of the joint stock company.

Under this interpretation, Article 84(5) would not be read to mean that the lock-in period relates to newly-issued ordinary shares subscribed by founding shareholders at a time later than incorporation. The lock-in period under this interpretation would apply only to ordinary shares subscribed by the founding shareholders at incorporation.

One stated policy for Article 84(5) is ensuring that founding shareholders do not 'dump' their shares shortly after acquiring them, and that they continue to drive the success of the company during the first few years of the company's life. However, the policy must be balanced against a market-based approach where shareholders can freely deal with their assets (ie shares) as they wish.

Presently, there are no implementing regulations to resolve this ambiguous provision of Article 84(5). As such, this is one in a number of issues in the uncharted legal waters of the **LOE** which will require clarification from the relevant State authorities (and which newly-issued Decree 139 has not clarified).

### 3.3 Salary deposits no longer in cash – anti-corruption measures

#### Extracted from Vietnam News, 30 August 2007

Ha Noi - In the latest move to stem corruption, Prime Minister Nguyen Tan Dung recently asked high level agencies, people's committees, and the military in Hanoi, HCMC and other large cities in Vietnam to utilize their employees' personal bank accounts to make payment of their salaries. This program is set to expand to lower-level government bodies and to areas outside the major cities (subject to availability of banking services) over the course of the next year.

#### Greater transparency

Duong Hong Phuong, deputy director of the State Bank's Payment Department, noted that payment through personal bank accounts would ensure the transparency of the payment of all incomes from the State Budget and help prevent corruption. "Bank account payment will also reduce work and time for all parties including banks, employers and employees," Phuong said. The State Bank was the first State agency that implemented account payment a few years ago; the Finance Ministry and the Ministry of Labour, Invalids and Social Affairs followed suit at the beginning of this year.

### 3.4 Article 84 of LOE – A matter of interpretation

#### Confusion (again)

There have been various readings and interpretations of, and slight confusion over, the 90-day capital contribution rule that applies to shareholding companies, ie Article 84 of the Law on Enterprises (*LOE*).

#### The VLU's take

Our reading of Article 84 of the LOE is the following:

If the charter capital is set at VND/USD x, the shareholders must subscribe for at least the equivalent number of shares, that is x-80%. They must pay for all those shares that they subscribe for in the application for the investment certificate within 90 days of the issuance of the investment certificate.

As an example: if the charter capital of a shareholding company is VND 1,600,000,000 (USD 100,000) and par value is VND 10,000 per share, the shareholders must take up at the outset, as issued shares, at least 32,000 shares. They must pay for all of those 32,000 shares within 90 days, ie come up with VND 320,000,000 within 90 days of the date of the investment certificate.

Seeing it another way, this would mean that 80% of the shares of the charter capital can be left as unissued shares to be subscribed for later. The advantage of subscribing for only 20% of the share capital in the beginning would be that later, the company would not need to go through the process of increasing the share capital and amending its investment certificate.

Another point to note is that although 80% can be left as 'unsubscribed shares', this 80% must be subscribed for within three years. If the three years is going to be an issue or difficult for any reason, it may just be easier to increase the charter capital at the appropriate time rather than having unsubscribed shares from the beginning, since leaving some shares unsubscribed would require drafting careful charter and shareholder agreement provisions regarding the unsubscribed shares and the BOM's obligations regarding them.

New Decree 139 states in Article 15.3 that if the unsubscribed shares have not been sold within three years from the date of the investment certificate, the company must reduce the amount of

share capital and register that reduction with the authorities, which assumingly means amending the investment certificate.

This reading of the law, ie that only 20% of the shares in a shareholding company must be subscribed for at the outset, does raise some practical questions to which only experience will give answers. Would the licensing authorities have a problem with a new company having 80% unsubscribed shares? The ranks are currently divided.

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

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### **NEW subject categories in Vietnam Laws Online Database**

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### **Laws uploaded on the Vietnam Laws Online Database during August 2007 include the following:**

- ➔ Decree 133 on resolution of labour disputes, 8 August
- ➔ Draft Circular on foreign investors purchasing shareholding in Vietnamese commercial banks, made available 3 September
- ➔ Decision 145 with the master plan for Vietnam's steel industry, 4 September
- ➔ Decision 15 with the model charter applicable to listing companies, 19 March
- ➔ Decree 139 implementing the Law on Enterprises, 5 September
- ➔ Decree 140 on logistic services, 5 September
- ➔ Draft Resolution permitting foreigners to purchase residential and housing, made available 10 September
- ➔ Draft Ordinance on High-Tech with 50% tax reduction for foreign and experts and many other incentives in the high-tech sector, 10 September
- ➔ Decree 136 on entry and exit of Vietnamese citizens, 17 August

**The list above is merely a snapshot of the wide range of new legislation now uploaded and available on Vietnam Laws Online through September 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](http://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.