



October 2004

# Indochina notes

Legal updates on investment, infrastructure and finance

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## Investment

### Bankruptcy Law

Vietnam is not short of bankrupt enterprises, but only about 150 bankruptcy cases were brought under the original Bankruptcy Law (the Bankruptcy Law 1993) and only about 45 businesses were declared bankrupt. The new Law on Bankruptcy (the new law), which became effective in October 2004, should improve creditors' rights.

The new law improves on the Bankruptcy Law 1993 in numerous ways, for example the following.

- Only one condition is required for bankruptcy, namely that a business is not able to pay a due debt upon request by a creditor. The Bankruptcy Law 1993 had two additional conditions: (i) that the business must have suffered losses for two consecutive years and (ii) that the business was unable to pay its debts after applying all necessary financial measures.
- The new law provides clearer procedures for bankruptcy petitions. It also requires a business to declare bankruptcy if it cannot meet its debts. The legal representatives of a company have personal liability if they fail to seek a bankruptcy hearing within three months after knowledge of insolvency of the business.

The new law, however, still has shortcomings.

- Creditors that fail to submit their claims within 60 days after the last day of publication of bankruptcy proceedings are deemed to have waived their rights.
- The assets of a bankrupt business will be distributed, in order of priority, to cover bankruptcy hearing costs, debts to employees, unsecured debts and

owners of the business. It is not clear where tax and other liabilities towards the state stand in the list of payment priority.

### Postal services

The government issued Decree 157 on 18 August 2004 implementing the Ordinance on Posts and Telecommunications with respect to postal services. Decree 157 authorises businesses to engage in domestic and international postal delivery if they satisfy the conditions prescribed in the Decree and if they obtain a licence from the Ministry of Posts and Telecommunications (MPT). Foreign-invested enterprises (FIEs) are not authorised to provide domestic postal delivery services. Only joint venture enterprises are permitted to engage in international postal delivery services. The ownership interests of foreign and Vietnamese parties in a joint venture providing international postal delivery services will be determined by the Prime Minister. Vietnam Post and businesses providing international postal delivery services are entitled to act as agents of foreign postal companies if they obtain the approval of the MPT.

### Tax/CIT – changes

At the end of 2003 the government passed Decree 164, which led to an outcry by manufacturing businesses because it eliminated the tax benefits of investing in industrial zones (IZs) and export processing zones (EPZs). These investments are the mainstay of foreign manufacturing growth in Vietnam. The government has now reacted to this pressure with Decree 152.

Decree 152 lowers corporate income tax (CIT) rates applicable to newly established developers and enterprises operating in IZs and EPZs:

- a CIT rate of 20 per cent will apply to service enterprises in IZs;
- a CIT rate of 15 per cent will apply to service enterprises established inside EPZs, and production enterprises established inside IZs; and
- a CIT rate of 10 per cent will apply to developers of IZs and EPZs, and export processing enterprises (the latter regardless of whether they are located inside EPZs).

Tax incentives for newly established enterprises in IZs and EPZs include:

- tax exemption for two years plus 50 per cent tax reduction for the ensuing six years for service enterprises in IZs;
- tax exemption for three years plus 50 per cent tax reduction for the ensuing seven years for service enterprises in EPZs, and production enterprises in IZs; and
- tax exemption for four years plus 50 per cent tax reduction for the ensuing seven years for developers of IZs and EPZs, and export processing enterprises (the latter regardless of whether they are located inside EPZs).

### **Tax/VAT amendment**

Another tax concern of FIEs was that under Decree 158 on VAT, services provided to export processing enterprises in EPZs were not regarded as exports and, as a result, they were subject to the applicable VAT rates rather than the 0 per cent VAT rate. Decree 148 of the Government dated 23 July 2004 has remedied this problem. Services provided to export processing enterprises are now considered to be exports with a VAT rate of 0 per cent.

### **Casino projects**

Gambling is popular in large parts of Asia, but is associated with certain vices. Even if those vices (known as 'social evils' in Vietnam) are not exactly thin on the ground anyway, on 13 August 2004 the government announced, in Official Letter 1133, that all applications for licences for casino projects would 'probably' be turned down. Even consideration of applications for foreigner-only slot machine centres would be tightened,

and operation of slot-machine centres would be put under the 'strict' supervision of provincial People's Committees (code for admission that the regulations are currently being widely breached). Gambling businesses in breach of stipulations in their investment licences, especially those letting Vietnamese gamble, will be 'strictly' punished, and their investment licences could be withdrawn.

At present, Vietnam has only one or two casinos, where gambling is only offered to foreigners and overseas Vietnamese. Other luxury hotels have been licensed to offer slot machine games with cash prizes.

### **Foreign employees – amendment of Decree 105**

FIEs have complained that Decree 105's foreign employment restrictions (3 per cent of total employees) might hinder foreign professionals from coming to Vietnam and contributing their expertise. To ease the wave of complaints, the Ministry of Labour, War Invalids and Social Affairs (MOLISA) issued Circular 4 increasing the cap on foreign staff in a company to 4.5 per cent for posts that Vietnamese employees are unable to fill. However, foreign investors are not satisfied and reiterate that Decree 105 remains a disincentive for foreign companies to enter Vietnam. In Official Letter 3638 of the Government Office dated 15 July 2004, the government requested the MOLISA to co-ordinate with the Ministry of Planning and Investment to draft and submit to the government a draft decree to increase the cap on the number of foreign staff permitted to work in a company.

### **Foreign employees – work permits**

In Official Letter 1563 of the MOLISA dated 19 May 2004, the MOLISA ruled that foreign employees of a foreign oil and gas contractor are not required to obtain a work permit. The foreign contractor only has to make a report to the local Department of Labour, War Invalids and Social Affairs.

### **Civil Procedure Code**

The National Assembly at its latest session passed the Civil Procedure Code (the Code). It comes into force on 1 January 2005 and repeals the following documents:

- Ordinance on the procedures for the settlement of civil disputes dated 29 November 1989;

- Ordinance on the recognition and enforcement of foreign civil verdicts and judgments in Vietnam dated 17 April 1993;
- Ordinance on the procedures for the settlement of economic disputes dated 16 March 1994;
- Ordinance on the recognition and enforcement of foreign arbitral awards dated 14 September 1995; and
- Ordinance on the procedures for the settlement of labour disputes dated 11 April 1996.

The Code is a substantial document that will greatly improve the settlement of civil disputes.

#### **Unification of procedural rules**

The Code unifies the procedural rules for all non-criminal and non-administrative disputes ie (i) civil disputes, (ii) marriage and family disputes, (iii) economic and commercial disputes and (iv) labour disputes.

#### **Jurisdiction**

The courts in Vietnam will continue to be divided into Civil Courts, Economic Courts and Labour Courts, each of which will have the jurisdiction to settle relevant civil cases.

The Code grants the courts new powers to determine whether or not an arbitration agreement is valid and enforceable and to settle other issues stipulated in the 2003 Ordinance on Commercial Arbitration.

Under current regulations district level courts have jurisdiction to settle all disputes except for (i) those involving economic claims of over 50m dong, (ii) those with foreign elements, (iii) claims relating to industrial property and (iv) collective labour disputes. The Code allocates specified disputes to the provincial level courts. The value of the claim is no longer a decisive factor in determining the jurisdiction of the district level courts.

Civil cases having foreign elements, the settlement of arbitration issues and the recognition and enforcement of foreign arbitral awards and foreign civil judgments in Vietnam are within the jurisdiction of the provincial level court.

#### **Limitations period**

Currently, the limitations period applicable to the settlement of economic disputes, other than disputes arising from commercial activities governed by the

Commercial Law, is six months from the date that the issue arose. The new Code stipulates that a limitations period of two years will apply to all civil cases, which is consistent with the limitations period applicable to commercial activities prescribed in the Commercial Law.

#### **Jurisdiction over civil cases having 'foreign elements'**

'Foreign elements' exist under Vietnamese law when (i) at least one party to a civil case is a foreigner, including overseas Vietnamese, (ii) the grounds for establishment, change or termination of the transaction is governed by foreign law or (iii) the assets in respect of the transaction are located overseas. The Code specifies that Vietnamese courts have jurisdiction over the following types of civil disputes having foreign elements:

- defendants who are foreign companies with management offices, branches or representative offices in Vietnam;
- defendants who are foreigners who reside or work in Vietnam for a long time, or who have assets in Vietnam;
- disputes involving foreign parties and disputes arising from transactions where the ground for establishment, change or termination of the transaction is governed by Vietnamese law or where the transaction took place in Vietnam;
- transactions between Vietnamese parties where the grounds for establishment, change and termination of the transaction is governed by foreign law or where the transaction took place overseas;
- civil cases relating to immovable assets located in Vietnam;
- disputes arising from transportation contracts if the transporters have head offices or branches in Vietnam; and
- certain marriage and family disputes and other claims stipulated by the Code.

#### **Compensation for non-contractual damages**

Vietnam is not a litigious society. A recent document of the Supreme Court will help to keep it that way. Resolution 1 of the Supreme Court dated 28 April 2004 explains the principles of liability and compensation for non-contractual damages (Resolution 1).

Liability has become harder to establish. In addition to the three existing elements of fault, damages and causation, Resolution 1 predicates damages upon the

existence of an unlawful act. This additional requirement could render claims for non-contractual damages even harder than they already are.

Resolution 1 also provides restrictive criteria on the principles for compensation and burden of evidence, including the obligation to produce 'valid vouchers or receipts' attesting to the damages suffered.

## Infrastructure

### Ports

The focus on port developments has been in the south, particularly on the move of port facilities from HCMC to the Vung Tau area. However, planners are more catholic in their tastes than business people. The Prime Minister has just approved the detailed plans for seaport development in north Vietnam until 2010, with a vision to 2020. Under this plan, the north's seaports are categorised into four main regional groups: those in Bai Chay and Cam Pha (both in Quang Ninh province), Hai Phong (including ports on the Cam, Bach Dang and Lac Huyen rivers), and seaports at other localities.

- Seaports to be upgraded in the Bai Chay area include the Cai Lan port, which will be expanded so that it can receive up to 50,000 DWT fully laden vessels. The protection of the natural environment in Ha Long Bay merits a passing nod.
- Seaports in the Cam Pha area will be developed for heavy industry purposes. Given that Cam Pha is a coal town with little else visible through the coal dust, this confirms that the planners who wrote this report were not off on flights of fancy.
- The Hai Phong main port, Dinh Vu general purpose port, and Ben Got transshipment port, such as it is, will be expanded. It is expected that by 2010, Hai Phong port will accommodate up to 10,000 DWT fully-laden vessels, and this author's favourite port, Dinh Vu, will cater to 10,000 DWT fully-laden or 20,000 DWT semi-laden vessels.

The three seaports to be given top development priority between now and 2010 will be Hai Phong, Cai Lan, and Dinh Vu ports. Cai Lan and Hai Phong ports' expansion projects will be funded from the state budget.

Decision 885 of the Prime Minister dated 12 August 2004.

## Banking and finance

### Securities regulations

If the companies listing on the Vietnam stock exchange were as voluminous as the number of regulations relating to the securities market, the securities industry would be rather pleased. The Ministry of Finance (the MOF) has just issued a plethora of legal documents implementing Decree 144 on securities and the securities market.

### Securities market – organisation and operation of securities companies

Circular 55 promulgates regulations on the organisation and operation of securities companies (Circular 55). Consistently with prior regulations, direct investment by foreign securities businesses is restricted to joint ventures with Vietnamese partners, licensed by the State Securities Committee (SSC) upon approval of the MOF. However, Circular 55 also now permits foreign securities businesses to purchase shares in local securities companies. The transfer of more than 5 per cent of the charter capital of a local securities company requires the approval of the SSC.

### Securities market – information disclosure

One of the most significant changes brought about by Decree 144 related to information disclosure requirements. Circular 57 details the information disclosure requirements for listed companies, securities companies, fund management companies and securities trading centres or stock exchanges.

Under Circular 57, disclosure has to be made of 'material changes in the business operations of an issuing or listed organisation'. A material change includes (i) suspension of business operations for more than one month, (ii) a ban on sale or recall of products with a value of 10 per cent of the capital of a business, (iii) opening or closing of subsidiaries, branches, plants and representative offices and (iv) any changes in the board of management, council of members, general director, deputy general director(s), chief accountant or inspection board.

### Securities market – trading of securities

Circular 58 implements Decree 144's provisions on trading of securities (Circular 58). Under Circular 58:

- members of the board of management, board of directors or inspection committee, and their relations, who wish to trade in shares of their own company must report in writing to the SSC and the Securities Trading Centre;
- any transaction increasing or reducing a shareholder's stake (either alone or with related persons) to above or below 5 per cent, 10 per cent, 15 per cent or 20 per cent of the capital in a listed company must be reported in writing to the SSC and the Securities Trading Centre;
- any proposal to acquire 25 per cent or more of a company's listed securities must be approved by the SSC and publicly announced; and
- the listing of a listed company must be cancelled in cases where an acquirer holds 80 per cent of the share capital in a joint stock company having capital of less than 100bn dong and 85 per cent of the share capital in a joint stock company having capital of more than 100bn dong.

#### **Securities market – listing of shares and bonds**

Circular 59 governs the listing of shares and bonds.

- An organisation must apply to the SSC if it wishes to list its securities on the Securities Trading Centre. The SSC will rule on the listing within 45 days from the date of receipt of a proper application.
- In order to list its shares, a joint stock company: (i) must have paid up charter capital of 5bn dong or more, (ii) must be of sound financial standing ie it must have no debts overdue for more than one year, and must have fulfilled all financial liabilities to the state and its employees, (iii) must have been profitable for the last two consecutive years (including the time before converting into a joint stock company, if appropriate) or, in respect of an equitised state-owned enterprise listed within a year after equitisation, for the last year preceding the year of equitisation, (iv) must require shareholders who are members of the board of management, board of directors or inspection committee to hold at least 50 per cent of their shares for a period of three years after the date of listing and (v) must sell at least 20 per cent (or 15 per cent in respect of a company with a share capital of 10bn dong or more) of the capital of the company to at least 50 shareholders outside the company.

- In order to list bonds, a company: (i) must have paid up charter capital of 5bn dong or more, (ii) must have sound financial standing, (iii) must have been profitable for the last two consecutive years (including the time before converting into a joint stock company, if appropriate) and (iv) must have at least 50 bondholders.

#### **Securities market – share issuance**

Circular 60 provides guidance on the public issuance of shares.

- A joint stock company that wants to conduct an initial public offering to at least 50 outside investors must register with the SSC. Registration with the SSC is also required for additional issuances of shares or options (including shares for payment of dividends or bonus shares). The SSC is supposed to accept such registration within 30 days from the date of receipt of a proper application.
- Circular 60 does not apply to the issuance of shares of equitised state-owned enterprises, converted FIEs and credit institutions.

#### **Securities market – bond issuance**

Circular 75 implements Decree 144's provisions on the issuance of bonds to the public by corporate issuers. Circular 75 only applies to domestic enterprises established in accordance with the Enterprise Law. To be eligible to issue bonds to the public, Circular 75 requires issuers to have (i) paid up capital of at least 10bn dong at the time of issuance of the bonds, (ii) at least one profitable year immediately prior to the time of issuance of the bonds, (iii) a feasibility business plan approved by the board of management, (iv) an underwriter and (v) a commercial bank or security company that possesses a custodian licence to act as the custodian.

#### **Clearance and settlement**

Decision 60 promulgates regulations on the registration, deposit, clearing and settlement of securities. Interestingly, pledges and releases of securities have to be made through the intermediary of deposit members. A pledge of securities requires the pledge contract to be registered with the Securities Trading Centre (presumably in addition to registration with the National Department for Registration of Secured Transactions).

## Operating lease

Financial leasing companies have been operating for some years in a legal straightjacket. The jacket was loosened by the Governor of the State Bank of Vietnam, whose Decision 731 dated 16 June 2004 allows finance leasing companies to enter into operating leases.

Finance leasing companies wishing to enter into operating leases must submit an application to the State Bank and must be capable of meeting certain conditions relating to their activities, overdue debts and facilities.

The total value of leased assets in respect of any one lessee must not exceed 30 per cent of the lessor's own capital, and the total value of all the leased assets must not be greater than five times the lessor's capital.

For further information please contact

Hanoi  
Tony Foster  
T + 84 4 8247 422  
F + 84 4 8268 300  
E [tony.foster@freshfields.com](mailto:tony.foster@freshfields.com)

Ho Chi Minh City  
Milton Lawson  
T + 84 8 8226 680  
F + 84 8 8226 690  
E [milton.lawson@freshfields.com](mailto:milton.lawson@freshfields.com)

Amsterdam Bangkok Barcelona Beijing Berlin Bratislava Brussels Budapest  
Cologne Düsseldorf Frankfurt Hamburg Hanoi Ho Chi Minh City Hong Kong  
London Madrid Milan Moscow Munich New York Paris Rome Shanghai  
Singapore Tokyo Vienna Washington