



Vietnam Legal Update

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Part 1 Selected New Legal Instruments

1.1 Certificates of building ownership

Decree 95-2005-ND-CP of the Government dated 15 July 2005 on Issuance of Certificates of Ownership of Housing and Other Construction Works

In Vietnam, all land is owned by the people and subject to exclusive administration by the State. Ownership of land by an individual or organization is not permitted. Individuals and organizations are able to own the right to use land ("LUR") which is obtained by way of allocation from the State or by lease from the State. Ownership of buildings and other assets attached to land is permitted.

Land is allocated to Vietnamese individuals or households for residential and agricultural purposes. It may be allocated to State owned enterprises and private domestic businesses for agricultural purposes and residential/infrastructure purposes. Land allocation is for a definite period, up to 50 years. Or subject to *stable and long term use* - in the residential context, this is considered to be indefinite use.

Land is leased to State owned enterprises and private domestic businesses for production and business purposes. Leases are for a fixed period, up to 50 years. Land is also leased to foreign invested enterprises.

In the case of investment projects with large capital but a slow capital recovery rate and investment projects in areas with difficult socio-economic conditions or specially difficult socio-economic conditions which require a longer period of land allocation or land lease, the period may be as high as 70 years.

In the past, LUR was evidenced by a land use right certificate ("LURC"), commonly known as a *red book*. A LURC traditionally related solely to the land. This is consistent with the concept of buildings being owned, rather than the subject of a use right. A pink book was issued to the owner of a house and it evidenced the ownership of *both* the LUR and the house attached to that land.

Circular 01 of the Ministry of Natural Resources and Environment dated 13 April 2005 provides for the ownership of a house to be recorded in the same document as the land on which it stands, but in the LURC, or so called *red book*, not the pink book as before. Since Circular 01 was publicized, the Prime Minister has expressed his opinion that the ownership of a house should be recorded in a separate certificate from the LURC. This approach has been adopted by the Government in Decree 95.

Under Decree 95, the former system of red and pink books is replaced. Now, certification of ownership of housing and construction works will be completely independent from certification of ownership of the land on which they stand. Certificates of ownership of housing and construction works will be issued by the Ministry of Construction. The Ministry of Natural Resources and Environment will issue the LURC in respect of the land on which such housing and construction works stand. Certificates of ownership of housing and construction works will be the legal basis for owners to exercise their rights with respect to such buildings.

To be eligible for a certificate, an owner being an individual must fall in one of the following categories: (i) Vietnamese citizen living in Vietnam; (ii) Vietnamese citizen living abroad but permitted by law to own housing or construction works in Vietnam; (iii) a foreign citizen permitted by law to own housing or construction works in Vietnam. To be eligible for a certificate, an owner being an organization must satisfy the following conditions: (i) have legal entity status, established and operating under Vietnamese law and (ii) lawfully own housing and construction works by way of investment in construction, purchase, acceptance of gift, donation, acceptance of inheritance, transfer.

In the case of owners being (domestic and foreign) organizations, certificates will be issued by the Department of Construction of the relevant provincial-level people's committee. In the case of individuals, certificates will be issued by the people's committee at the relevant district level (after submission of applications to the people's committee at the level of the commune, ward or township where the land is situated). Certificates will only be issued after payment by the owner of the fees payable.

Certificates will not be issued in respect of temporary housing; housing and construction works under the whole people's ownership; housing and construction works in respect of which a decision or notice on clearance, destruction, withdrawal of land or prohibited from construction.

The Ministry of Construction proposes to issue guidelines for implementation of Decree 95 in August.

Decree 95 replaces Decree 60 of the Government dated 5 July 1994 and will become effective as of 10 August 2005.

1.2 **Foreign employees**

Decree 93-2005-ND-CP of the Government dated 13 July 2005 on Amendment of and Addition to a Number of Articles of Decree 105-2003-ND-CP of the Government dated 17 September 2003 Providing Detailed Regulations and Guidelines on Implementation of a Number of Articles of the Labour Code With Respect to Employment and Administration of Foreign Employees Working in Vietnam

After such a long wait for Vietnam to right the wrongs of Decree 105, Decree 93 is disappointing. Unskilled labour may be cheap in Vietnam (see [Part 3.4](#) below) but labour issues, in particular bureaucracy and dismissal grounds (see [Part 3.2](#) below) are a continuing source of headache for investors.

Effective as of 7 October 2003, Decree 105 imposed a cap on the number of foreign employees who may be employed by foreign invested enterprises ("FIEs") as well as domestic Vietnamese enterprises and State owned enterprises. No more than 3% of the total number of employees or a maximum of 50 employees, whichever is the lower, can be foreign employees (subject to the proviso that all such employers may employ 1 foreign employee). For a detailed summary of Decree 105, see the September 2003 Issue of Vietnam Legal Update on www.vietnamlaws.com.

The cap on foreign employees seemed to come out of nowhere at the time and was (and continues to be) widely criticized by the foreign business community as draconian and counter-productive to Vietnam's efforts to encourage foreign investment and improve the management experience of Vietnamese employees. The Ministry of Planning & Investment ("MPI") was understood to support the abolition of the cap.

In response to this criticism, and in the spirit of the Government's Resolution 01-2004-NQ-CP of January 2004 which attempted to soften the impact of the cap, the Ministry of Labour, War Invalids & Social Affairs ("MoLISA") allowed for a number of exceptions to the cap in its implementing Circular 04-2004-TT-BLĐTBXH dated 10 March 2004. For a summary of Circular 04, see the March 2004 Issue of Vietnam Legal Update on www.vietnamlaws.com. Then, by Official Letter 3668-VPCP-VX of the Office of Government dated 15 July 2004, Deputy Prime Minister Pham Gia Khiem on behalf of the Prime Minister directed the MPI and the MoLISA to co-ordinate to investigate and submit to the Government an amendment to Decree 105 in the direction of an increase in the percentage of foreign employees working in enterprises in all economic sectors in Vietnam. Throughout the rest of 2004 until now, there were murmurings that the Decree 105 cap would be abolished. But nothing eventuated, until now.

Regrettably, Decree 93 does not abolish the 3% cap on foreign employees. However, it does introduce the following reforms:

- > The maximum of 50 foreign employees has been abolished. This is only good news for employers with a very large workforce (around 1,700 or more), who can now employ foreign employees up to the full 3% of total employees. For example, if an employer has a workforce of 2,000, under Decree 105, they could only employ a maximum of 50 foreign employees but under Decree 93 they will be able to employ up to 60 foreign employees (ie the full 3% of 2,000). For all other employers, this reform is of little comfort. An employer with a workforce of 30 can still only employ 1 foreign employee.
- > Exemption from the 3% cap is now available in the following circumstances:
 - If a higher number of foreign employees is stipulated in the license of the employer; or
 - If approved in writing by the chairman of the provincial or municipal people's committee where the employer's head office is located. Such approval must be based on the "actual needs" of

the applicant enterprise. It appears that only enterprises which are in (undefined) special sectors with a small number of employees or in the early stages of investment with unstable production and which have a need to employ foreign employees in excess of the 3% cap may seek and be granted an exemption. However, this is not entirely clear. It may be that any employer can apply for an exemption and that the interpretation of "the actual needs" of the applicant is at the total discretion of the chairman of the people's committee.

- > As previously under Decree 105, the 3% cap does not apply to employers being (amongst others):
- foreign contractors;
 - representative offices and branches of foreign companies;
 - representative offices of: economic, trade, financial, banking, insurance, scientific and technological, cultural, sporting, educational, and medical health organizations;
 - offices of foreign or international projects in Vietnam;
 - branches of foreign law firms.

Now also, the 3% cap does not apply to the operating office of the foreign party to a business co-operation contract and Vietnamese law firms (both of which are now permitted to employ foreign employees).

In the above cases where the 3% cap does not apply, the approval of the chairman of the people's committee is still required for the employment of foreigners.

Given Decree 93's failure to abolish the 3% cap, it looks like the current situation - of employers not complying with and authorities not enforcing the cap - will continue.

The only significant reform with respect to work permits is a backward step. Under Decree 93, a foreigner who is a member of the board of a FIE or domestic Vietnamese enterprise or a member of the members council of a domestic Vietnamese enterprise remain exempt from the work permit requirement (amongst others). But a foreigner who is the general director or deputy general director of an enterprise (and who had been exempt under Decree 105) no longer enjoys exemption from the work permit requirement. The motivation for this backward step is unknown. It had been expected that the work permit exemptions would be widened (as the Department of Justice under the MoLISA was understood to have suggested the abolition of the work permit requirement for foreign contractors - but obviously this was not approved at higher levels), so this backward step of abolishing the exemption for general directors and their deputies is totally unexpected.

Decree 93 will become effective as of 7 August 2005.

1.3 Anti-dumping and anti-subsidies measures

Decree 89-2005-ND-CP of the Government dated 11 July 2005 Making Detailed Provisions for Implementation of a Number of Articles of the Ordinance on Measures Against Subsidized Goods Imported into Vietnam

and

Decree 90-2005-ND-CP of the Government dated 11 July 2005 Making Detailed Provisions for Implementation of a Number of Articles of the Ordinance Against Dumping of Imported Goods Into Vietnam

The Anti-Dumping Ordinance and the Anti-Subsidies Ordinance completed the trilogy of legislation to regulate imports in anticipation of the opening of Vietnam's markets under the terms of the US-Vietnam Bilateral Trade Agreement and its accession to the World Trade Organization. Following the Ordinance on Self-Protection in Import of Foreign Goods into Vietnam (which regulates imports in excessive volumes) promulgated in May 2002 and effective as of 1 September 2002, the Anti-Dumping Ordinance was promulgated in April 2004 and became effective as of 1 October 2004 and the Anti-Subsidies Ordinance was promulgated in August 2004 and became effective as of 1 January 2005.

The Anti-Subsidies Ordinance provides for application of anti-subsidy measures (imposition of anti-subsidy duty or requirement for anti-subsidy undertaking) where subsidized goods are imported into Vietnam and are the cause of serious loss to a domestic manufacturing industry. Decree 89 provides in detail for the following matters:

- > Bases on which "volume, quantity or value of subsidized goods imported into Vietnam" will be deemed insignificant (in which case, under the Anti-Subsidies Ordinance, an investigation will be terminated).
- > Basis for determination of a "major proportion of the total volume, quantity or value of similar goods manufactured domestically" and "direct relationship between domestic manufacturers manufacturing similar goods and any organization or individual exporting or importing goods which are the subject of the request for application of anti-subsidy measures" (which are relevant under the Anti-Subsidies Ordinance in determining whether a group of domestic manufacturers constitutes a "domestic manufacturing industry" for the purpose of determining whether serious loss has been caused to such industry by importation of subsidized goods).
- > Composition of the anti-subsidy commission under the Ministry of Trade (comprising the investigative body and the council for dealing with anti-subsidy cases) and its duties and powers; qualifications of investigators and council members and their duties and powers.
- > Types of persons participating in anti-subsidy proceedings (including domestic applicants, overseas respondents, their respective lawyers, and other interested persons) and their rights and obligations.
- > Application files requesting anti-subsidy investigation; procedures for commencement of investigation; matters to be investigated and verified; conclusions of investigations; procedures for application of anti-subsidy measures.

The Anti-Dumping Ordinance provides for application of anti-dumping measures (imposition of anti-dumping duty or requirement for anti-dumping undertaking) where imported goods are dumped (ie sold at a price lower than the "normal price") into Vietnam, the dumping margin is significant, the volume/quantity/value of dumped goods is significant and the dumping directly causes, or threatens to cause, significant loss to a domestic manufacturing industry. Decree 90 provides in detail for the following matters:

- > Basis for determination of a "major proportion of the total volume, quantity or value of similar goods manufactured domestically" and "direct relationship between domestic manufacturers manufacturing similar goods and any organization or individual exporting or importing goods which are the subject of the request for application of anti-subsidy measures" (which are relevant under the Anti-Dumping Ordinance in determining whether a group of domestic manufacturers constitutes a "domestic

manufacturing industry" for the purpose of determining whether serious loss has been caused to such industry by dumping).

- > Composition of the anti-dumping commission under the Ministry of Trade (comprising the investigative body and the council for dealing with anti-dumping cases) and its duties and powers; qualifications of investigators and council members and their duties and powers.
- > Types of persons participating in anti-dumping proceedings (including domestic applicants, overseas respondents, their respective lawyers, and other interested persons) and their rights and obligations.
- > Application files requesting anti-dumping investigation; procedures for commencement of investigation; matters to be investigated and verified; conclusions of investigations; procedures for application of anti-dumping measures.

Decree 89 and 90 are almost mirror images of each other. And both Decrees 89 and 90 will become effective as of 4 August 2005.

- >>> See the May 2004 Issue of Vietnam legal Update on www.vietnamlaws.com for a detailed summary of the Anti-Dumping Ordinance.
- >>> For an English translation of the Anti-Dumping Ordinance and the Anti-Subsidies Ordinance and a wide range of relevant legislation, subscribe to Vietnam Laws Online Database on www.vietnamlaws.com.

1.4 **Anti-money laundering**

Decision 1002-QD-NHNN of the State Bank of Vietnam ("SBV") dated 8 July 2005 on Establishment of Centre for Prevention of and Fighting Against Money Laundering

Decision 1002 provides for the Centre for Prevention of and Fighting Against Money Laundering (which we refer to as Anti-Money Laundering Center or "AMLC") to be established under the auspices of the SBV as of 1 August 2005. Of note, as yet, personnel and infrastructure for the AMLC have not been arranged - the SBV Governor hasn't even issued the necessary regulations on organization and operation of the AMLC (required under Decision 1002).

The AMLC will oversee the implementation of Decree 74, which introduces as of 1 August 2005 an anti-money laundering regime for the first time in Vietnam.

Under Decree 74, organizations and individuals facilitating monetary or other asset transactions (such as banks, securities companies, insurance companies, casinos and law firms, to name a few; known as "transacting bodies") are required to identify and report to the AMLC the following transactions:

- > One or more cash transactions conducted by an individual/organization in a single day with a total value of VND200 million (approx US\$12,614.32) or VND500 million in respect of savings account transactions (approx US\$31,535.79); and
- > Other suspicious transactions (defined in Decree 74).

Based on the information obtained about a suspicious transaction from a transacting body, the AMLC and other relevant authorities may covertly scrutinize the suspicious transaction as well as the individuals/organizations involved in such transaction, and may apply temporary measures (including freezing accounts and/or sealing or seizing assets) with respect to such transaction and the involved individuals/organizations.

The SBV is understood to be finalizing guidelines for implementation of Decree 74. Lawyers in particular will be looking for some guidance on how to balance their obligations under Decree 74 with their competing obligations of client confidentiality.

- >>> See the June 2005 Issue of Vietnam legal Update on www.vietnamlaws.com for a summary of Decree 74.
- >>> For an English translation of Decree 74 and a wide range of relevant legislation, subscribe to Vietnam Laws Online Database on www.vietnamlaws.com.

1.5 Self-declaration of tax - pilot expanded

Decision 161-2005-QD-TTg of the Prime Minister dated 30 June 2005 on Extension of Applicability of Pilot Self-Declaration and Payment of Special Sales Tax in Domestic Production Stage, Royalty Tax, Housing and Land Tax, Income Tax of High Income Earners and Business Registration Tax by Production and Trading Entities

Decision 161 extends the pilot test of reforms in declaration and payment of taxes which commenced on 1 January 2004 (at the same time as the last round of substantial tax reforms) pursuant to Decision 197-2003-QD-TTg of the Prime Minister dated 23 September 2003.

Under Decision 197, selected production and trading establishments in HCMC and Quang Ninh province pilot-tested the following:

- Self-declaration and payment of VAT on a monthly basis (no annual VAT finalization required);
- Self-declaration and payment of CIT provisionally payable on a quarterly basis as well as self-declaration of annual CIT finalization.

Participants in the pilot test were selected by the Ministry of Finance (in consultation with relevant ministries and localities) from amongst production and trading establishments which declare and pay VAT by the tax credit method.

The stated objectives of the pilot test include: to increase the awareness of production and trading establishments of voluntary implementation of tax laws and for them to accept responsibility before the law for discharge of their tax obligations; to reform administrative procedures in the tax sector; to facilitate restructure of the tax management apparatus so that it operates more intensively, tightly and effectively; and to gradually modernize the work of tax management. A central tenet of the self-declaration policy is that production and trading establishments will bear responsibility before the law for the truthfulness and accuracy of their tax declarations.

Under Decision 161, the pilot has been extended to permit self-declaration of the following taxes:

- > Special sales tax in the domestic production stage and royalty tax: For these taxes, production and trading entities must make monthly self-declarations, then pay their tax bill in full no later than the 25th day of the following month. As for VAT (see above), no annual tax finalization is required.
- > Land and housing tax, personal income tax and business registration tax: For these taxes, production and trading entities must self-declare and pay their tax bills in accordance with the time-limits prescribed in the current relevant tax legislation.

Decision 161 became effective on July 2005.

1.6 Customs

Law 42-2005-QH11 of the National Assembly dated 14 June 2005 on Amendment of and Addition to a Number of Articles of the 2001 Law on Customs

Vietnam's 2001 Law on Customs introduced a number of WTO based policies and measures, including customs valuation based on transaction pricing, amongst other things. Effective as of 1 January 2006, Law 42 will introduce a raft of new reforms aimed at modernizing Vietnam's customs administration and bringing Vietnamese customs law further in line with WTO standards.

In particular, Law 42 provides for:

- > E-transactions and e-customs clearance procedures (in fact, Law 42 now expressly encourages them), reflecting the conclusion of a successful two-year pilot of customs e-declarations. It is not expected that this reform will be available to all on 1 January 2006. Decision 49 of the Prime Minister dated 20 June 2005 provides for rollout of the new e-customs system in 3 stages from 2005 to 2007. The first stage is to be carried out in 2005 in the HCMC and Hai Phong Customs Departments for sea-borne

goods. It will then be extended to other enterprises, such as manufacturers in export processing zones, before being made available in other localities during January-August 2006. The final phase (trial reporting and reviewing) will last from September 2006 to February 2007. To implement this reform, the Ministry of Finance is understood to have already submitted to the Government a draft Decree on Electronic Customs Clearance.

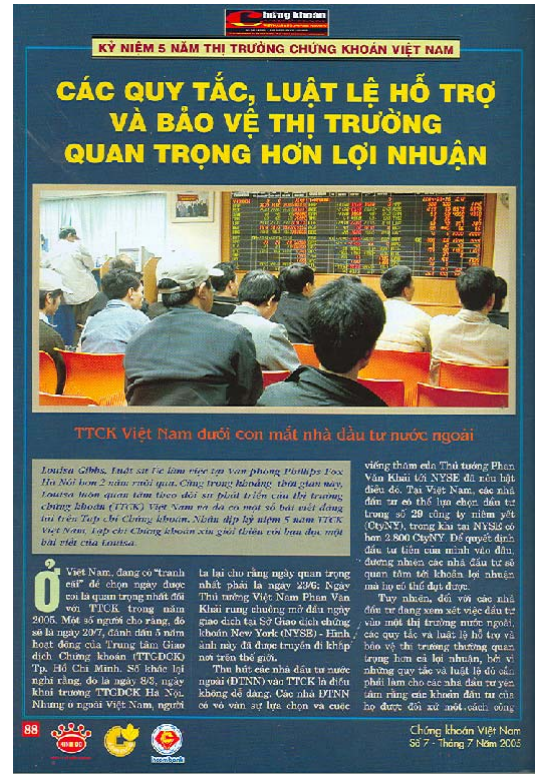
- > Implementation of obligations under the WTO Customs Valuation Agreement, Agreement on Pre-Shipment Inspection, Agreement on Rules of Origin, Agreement on Trade Related Aspects of Intellectual Property Rights, and other international laws. As part of its bid for WTO accession by the end of 2005, Vietnam is looking to implement in full the first three agreements before the end of 2005 in time for the entry into force of Law 42.
- > Transition to a system of minimized customs inspection and increased reliance on post-entry auditing. Of note, Law 42 enshrines the principle that customs procedures (in particular customs inspection) are to be conducted on the basis of an analysis of information and an assessment of compliance with law by the goods owner and the level of risk of a breach of the law on customs. Imports and exports will be exempt from actual inspection if they fall within one of the following categories: goods being exported, except goods being exported which were manufactured from imported raw materials and goods being exported subject to conditions (previously, only exported agricultural or aquatic products were exempt from inspection); goods from overseas brought into free commercial zones, transit ports and customs bond warehouses (as previously); goods in transit; emergency relief goods; specialized use goods directly servicing national defence and security; humanitarian aid goods; goods temporarily imported for re-export within a specified time; and goods being imported which are machinery and equipment to form fixed assets and which are tax exempt as part of an investment project. In addition, as previously, goods being imported or exported of goods owners with good observance of the law of customs and goods in other special categories pursuant to a decision of the Prime Minister will also be exempt from inspection of actual goods. Where there are indications of a breach of the law of customs (either with respect to goods of a goods owner who has breached the law of customs on a number of occasions or goods exempt from inspection), an inspection of actual goods will occur. Otherwise, actual inspection will only be conducted where an analysis of information from the database processing system and from a reconnaissance by Customs and information from bodies, organizations, individuals and Customs in other countries establishes that there is a possibility of a breach of the law of customs. Importantly, the former requirement for random inspection of 10% of any consignment which is not otherwise exempt from inspection appears to be abolished, *however* Law 42 does provide for the Government to "issue specific regulations on the level of inspection" of goods subject to actual inspection.
- > Extension of time-limits for making customs declaration and their validity for purpose of customs clearance: for imported goods, customs declaration may now be made prior to arrival of the goods at a bordergate (up to 15 days in advance of customs clearance) as well as up to 30 days after arrival of goods (and the customs declaration remains valid for customs clearance procedures for 15 days after registration); for exported goods, customs declaration may now be made up to 15 days prior to export but (as before) no later than eight hours prior to the departure of the means of transportation.
- > Strict prohibitions on smuggling, commercial fraud, bribery on both customs declarants and State customs officers (in the case of the latter, they are expressly prohibited from causing inconvenience or creating difficulties during customs clearance procedures). In an important step forward for transparency in the customs sector, customs declarants now have the right to request the customs office to provide written verification of any requirement to present or add to a customs file or to provide documents other than those required by the laws on customs.

Part 2 Features

2.1 Vietnam's securities market in 2005 - what foreign investors see

Below we reproduce an article written by Louisa Gibbs, a lawyer in our Hanoi office since the start of 2003, for Vietnam Securities Review, the monthly magazine of the State Securities Commission. A Vietnamese translation of this article was prepared by Nguyen Hai Ha, one of our legal assistants in the Hanoi office. The Vietnamese translation of this article is published in the July 2005 issue of Vietnam Securities Review - a special issue to mark the 5th anniversary of Vietnam's securities market. This article is the only foreign contribution selected for publication in this special issue of Vietnam Securities Review.

Within Vietnam, there is some strong competition for what will be considered the most significant date for the securities market in 2005. Some people will argue that it is 20 July, marking five years' operation of the HCMC Securities Trading Centre. Others will argue that it is 8 March, the date that the Hanoi Securities Trading Centre was opened. But outside Vietnam, the most significant date is arguably 23 June: the date when a powerful image was broadcast around the word of Vietnam's Prime Minister Phan Van Khai ringing the bell to open the day's trading at the New York Stock Exchange (NYSE).



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Attracting foreign investors to a securities market is not easy. Investors have a world of choices and Prime Minister Khai's visit to the NYSE highlighted this. In Vietnam, investors have a choice of 28 listed companies to choose from, whereas there are over 2,800 companies listed on the NYSE.

In deciding where to invest their money, investors will naturally look at the profits that they can expect to make. However, for investors looking to invest in a foreign jurisdiction, the rules and regulations that support and protect the market are often a more important factor than profit, because these rules and regulations need to provide investors with comfort that their investment is treated fairly and securely. Happily, foreign investors will see that Vietnam's regulators are in the process of reviewing the market and responding to calls from investors to regulate how the market operates.

For example, the State Securities Commission is considering revising regulations on publication of information for auctions. Some investors are calling for changes to let them know in advance the number of investors attending auctions, the total shares that investors have registered to purchase, and other necessary information to help them make investment decisions. Others have pointed out that, according to the current regulations, investors must register five days *before* an auction, thereby creating a window of opportunity for insider trading by staff of the Securities Trading Centre who have access to relevant information. However, some investors believe that publicizing such auction information could be harmful to the investment climate; removing the shield of anonymity for some investors and possibly causing inexperienced investors to misinterpret such information (eg., where the demand for a certain share is reported to exceed the supply, potential investors may not register to purchase).

Changes are also being implemented in response to reviews of Vietnam's securities market over the past five years by academic and aid sectors. Consultants have spent time examining and providing advice on ways of improving the securities market to appeal more to foreign investment.

The manner in which the State Securities Commission chooses to regulate the securities market and operate the Securities Trading Centres in HCMC and Hanoi will be central in whether foreign investors become interested. Some of the key areas of regulation that foreign investors will be looking for are those which:

- > provide a framework of good corporate governance. Foreign investors look favourably upon initiatives such as clear rights for shareholders to access information about the companies they have invested in, and increased reporting measures that promote transparent transactions and efficient operation of the market.
- > expand the sectors in which foreign investment is permitted. Currently, domestic Vietnamese companies can only issue shares to foreign investors if they operate in one of only 35 business sectors. Although many countries place restrictions on foreign investment in sensitive areas, there are still many sectors in Vietnam that can be opened to investment without entering into sensitive areas.
- > promote more Vietnamese companies to list on the securities market. Currently only 28 companies are listed (with two more companies having obtained their licenses and expecting to list in mid-July 2005). Whilst foreigners are permitted to invest in non-listed Vietnamese companies, the higher standards of corporate governance that apply to listed companies tend to appeal to foreign investors. Therefore, the greater the number of companies listed on the securities market, the greater the interest that can be raised from foreign investors. However, many Vietnamese companies are discouraged from listing, as it is far easier for them to operate outside the strict corporate governance regime that applies to listed companies. Vietnamese companies would be encouraged to list if there were more incentives to list, or if the accountability provisions that apply to listed companies were also extended to cover unlisted companies.

In the past five years, the regulations pertaining to Vietnam's securities market have been amended in ways that have improved effective regulation and promotion of foreign investment. The on-going law review is important for creating a better environment for foreign investment.

Supplementing all of these structural decisions to attract foreign investment is the publicity of Vietnam's securities market overseas. Prime Minister Khai's attendance at the NYSE generated a positive image to increase understanding around the world of Vietnam's approach to securities trading. Perhaps we can look forward to the next five years bringing a reciprocal visit by the President of the USA, posing for a photo at the HCMC or Hanoi Securities Trading Centre?

2.2 Finance and operating leases

Julia Howes, a lawyer in our Hanoi office for over a year now, has been following closely the development of Vietnam's finance and operating leasing sector. Below she looks at some of the recent sector reforms that have been introduced to overcome a number of perceived problems with the finance leasing regime of 2001. Giang Nguyen, a Vietnamese lawyer in our Hanoi office, has contributed a summary of the taxation regime as it applies to finance leases compared to operating leases.

Finance leasing companies were actively encouraged by the Government and were expected to be very popular when the Government issued Decree 16 on Organization and Operation of Finance Leasing Companies on 2 May 2001. In particular, Decree 16 was expected to assist the development of small and medium sized enterprises in Vietnam. However, 4 years after Decree 16, Vietnam has only 10 finance leasing companies: 7 are State owned and 3 are foreign invested.

Decision 731 and the introduction of operating leasing

One of the criticisms of Decree 16 is that it did not allow a finance leasing company to enter into operating leases.

Under an operating lease arrangement, the lessee requires an asset for a shorter period of time than its useful life. The lessor retains a significant interest in the residual value of the asset at the end of the lease term and may lease the asset again or sell it in the second-hand market.

To address this problem, on 15 June 2004, the State Bank of Vietnam ("SBV") issued Provisional Regulations on Operating Lease Activities by Finance Leasing Companies under Decision 731. The Decision 731 Regulations enable a finance leasing company to conduct operating lease activities if it obtains written approval from the SBV. To obtain such approval, the finance leasing company must satisfy the following requirements:

- > There must be a need to conduct operating lease activities;
- > The finance leasing company must have been operating for at least 2 years and must be operating profitably;
- > The overdue debt ratio of the financing leasing company at the end of the last quarter must be below 5% and the financing leasing company must never have been in breach of the SBV's operational safety regulations; and
- > The finance leasing company must ensure that it has adequate technical and material infrastructure to carry out operating lease activities, such as warehousing facilities and facilities for maintaining the leased assets.

Decree 65 and the amendment of Decree 16

Effective as of 11 June 2005, a number of amendments of Decree 16 were introduced by the Government under Decree 65 dated 19 May 2005.

- > Clarification of finance lease:

Under Decree 65, a finance lease must satisfy *one* of the following conditions:

- (a) Upon expiry of the lease duration under the contract, ownership of the leased assets is transferred to the lessee or the lessee continues to lease the assets as agreed by the two parties;
- (b) Upon expiry of the lease duration under the contract, the lessee has the preferential right to purchase the leased assets at a par price less than the actual value at the time of [such] acquisition;
- (c) The lease duration of each leased asset must be at least 60% of the period required for amortization of the leased asset;

- (d) The total lease payments for each asset set out in the finance leasing contract must be at least equivalent to the value of such asset at the time of signing of the contract.

The third criterion (c) is new. And Decree 65 now clarifies that, to be categorized as a finance lease, the contract only has to satisfy *one* of the above criteria.

The above approach is inflexible and restrictive. A better method of categorization is found in Decision 165 of the Ministry of Finance dated 31 December 2002 (pursuant to which the Ministry of Finance issued a batch of new Vietnamese Accounting Standards). Under Decision 165, the categorization of leases as finance or operating is based on the nature of the contract and the extent to which risks and rewards associated with the ownership of a leased asset is transferred from lessors to lessees. Decision 165 provides a number of examples of cases that will lead to a finance lease - it does not provide for automatic categorization as a finance lease upon satisfaction of a particular criterion. As finance and operating leases can be applied in a myriad of situations and circumstances, the more flexible, case-by-case approach of Decision 165 is preferred. It will be interesting to see if, in practice, the new definition in Decree 65 is actually applied in this more flexible manner.

> Introduction of operating leases:

Now, under Decree 65, an operating lease is recognized. "Operating lease" is defined as:

A form of leasing assets under which the lessee uses the leased assets of the lessor for a fixed duration [and] returns such assets to the lessor upon expiry of the lease duration. The lessor retains ownership of the leased assets and receives lease payments in accordance with a leasing contract.

Decree 65 allows finance leasing companies to conduct operating lease services, but only in accordance with the SBV's regulations (currently, only the provisional regulations issued under Decision 731).

> Greater enforcement:

One of the biggest problems with finance leasing is the perceived struggle to recover property if a lessee defaults under the contract. Although assets leased remain *in the ownership* of the finance leasing company, the assets are *in the possession* of the lessee - if a dispute occurs between the leasing company and the lessee, it is very difficult for the finance leasing company to recover the assets without lengthy court procedures. Decree 16 stipulates that a finance leasing company is entitled to recover the leased assets if the lessee breaches the contract. However, it did not specify the conditions for recovery of leased assets nor how to deal with conduct that prevents recovery of the assets nor how the recovered assets may be dealt with.

This problem is addressed in Decree 65. Now, finance leasing companies have the right to recover the leased assets on 30 days' notice *without obtaining a court decision* when a lessee defaults on a lease contract. The lessee in default is now specifically prohibited from detaining, withholding or using leased assets without returning them to the lessor.

Upon recovery of the leased assets, the lessor must complete realization of the leased assets (within 60 days) to pay all items outstanding (including the costs of realization). Any excess funds from realization must be repaid to the lessee. If the lessee repays all sums owing to the finance leasing company *before* realization of the asset, then the finance leasing company must transfer ownership to the lessee the same as upon completion of the leasing contract.

Unfortunately, this amendment requires implementing guidelines to be issued jointly by the SBV, the Ministry of Policy and the Ministry of Justice and therefore may take some time to be implemented.

> Greater protection:

A finance leasing company's position is further improved by an amendment to article 19 of Decree 16 providing that if finance leased assets are seized by a State body due to a breach of law by the lessee, then the finance leasing company is entitled to receive back the leased assets in order to continue to lease them. However, to take advantage of this new provision, the assets must be registered with the National Registration Agency for Secured Transactions.

> Taxation exemption for sale-and-lease back?

Early drafts of Decree 65 introduced a tax exemption for the transfer of property ownership when a leasing company buys property from a customer and leases it back to them (sale-and-lease-back). The rationale is that, in the absence of a tax exemption, the finance company would factor the tax into (and thereby increase) the rental fees payable by the lessee, and this would not encourage development of the market.

In its final form, Decree 65 has not introduced the tax exemption. It has, however, provided for this issue to be dealt with in separate regulations of the Ministry of Finance. No such regulations have yet been issued.

> Scope of activities of finance leasing companies:

In addition to allowing operating lease services, Decree 65 allows finance leasing companies to sell items receivable from finance leasing contracts in accordance with SBV regulations. Again, these regulations have not yet been issued.

> Clarification of lease payments:

A new definition of "lease payments" has been added, clarifying that lease payments are the purchase price of the leased asset plus reasonable leasing fees and interest (as specified in the leasing contract).

> Licensing fees:

Previously, licensing fees differed for a foreign invested leasing company and a Vietnamese leasing company (including State owned). Now, under Decree 65, licensing fees are uniformly applied in accordance with the regulation on fees and charges.

> Registration of ownership – more flexibility:

Another difficulty of finance leasing arises in relation to registration-bound property. Previously, finance leasing companies had difficulties registering ownership of leasehold property, as it generally had to be completed in the specific locality where the leased asset (ie lessee) resides. For finance leasing companies that operate nationwide, this was a burden.

Now, Decree 65 specifically allows a finance leasing company to register leased assets at the location where the finance leasing company is located or has a branch or where the lessee reside or operates. Again, an implementing guideline is still to be issued jointly with the Ministry of Policy, Ministry of Justice and the Ministry of Transport and Communications.

Circular 03 and the new guidelines on overdue debts

Effective as of 16 July 2005, the SBV's Circular 03 dated 25 May 2005 provides new guidelines for finance leasing companies on changing repayment dates under finance leases, extending repayment terms for principal or interest and converting expired leases into overdue debts.

If a lessee cannot make lease repayments in time, the finance leasing company may either:

- restructure the term of the debt; or
- restructure the term of the debt and transfer it to overdue debts.

The restructure of the term of the debt may occur by either extending the term of a particular repayment only, or by extending the term of the entire lease contract.

If a finance company decides not to grant an extension of the finance lease (on the basis that the lessee does not have the capacity to repay the debt), then the finance company must convert the balance of the debt owed under the contract into an overdue debt.

Irrespective of whether the lease is extended or not, the finance company must classify the outstanding principal into the appropriate class of debt in accordance with the SBV's prudential regulations.

In comparison with the SBV's Circular 01 dated 28 January 2003 (which Circular 03 replaces), the restructuring of the finance lease does not need to be made on the request of lessee, and there is no limitation on the length of extension (previously, a finance lease could not be extended for a period equal to or more than one-half of the original term).

Taxation - differences between finance and operating leases

The taxes applicable to finance leases and operating leases are different, reflecting the differences in nature of the two types of lease. The table below sets out a comparison of the taxes applicable to finance leases and operating lease by finance leasing companies in Vietnam (including foreign invested companies).

Tax	Finance lease	Operating lease
Value added tax	Finance leases are not subject to VAT. However, if input VAT is not credited or refunded, input VAT will be charged to the lessee and then the lessee can claim the input VAT from the tax office.	Operating leases are subject to VAT at the rate of 10%
Corporate income tax	Tax rate of 28%	Tax rate of 28%
Import duty	Depends on the lessee's entitlement to import duty: - if the lessee is not entitled to exemption from import duty, then import duty is paid in accordance with the Law on Import and Export Duties and its implementing regulations; - if the lessee is entitled to exemption from import duty, eg. the leased assets are leased to a foreign invested enterprise to form fixed assets or a local company entitled to import duty exemption, then no import duty will be payable.	Depends on the lessor's entitlement to import duty: Decision 731 (above) provides that taxes with respect to operating leases must be fulfilled in accordance with current regulations and guidelines. Currently, there is no specific regulation on the taxation of operating leases, therefore general principles apply as per finance leases, except the relevant inquiry is whether the lessor is entitled to an exemption.

For reference:

Decree 158 of the Government dated 10 December 2003 implementing the Law on VAT (as amended).

Circular 120 of the Ministry of Finance dated 12 December 2003 implementing Decree 158.

Circular 24 of the Ministry of Finance dated 20 March 2002 on tax obligations with respect to finance leasing activities.

Decision 731 of the State Bank of Vietnam dated 15 June 2004 issuing Provisional Regulations on Operating Leases by Finance Leasing Companies.

Official Letter 540 of the General Department of Taxation dated 4 March 2004.

>>> For an English translation of all the above laws relating to finance and operating leasing (and a wide range of other legislation), subscribe to [Vietnam Laws Online Database](http://www.vietnamlaws.com) on www.vietnamlaws.com.

Part 3 Did You Know?

3.1 National Assembly update

The National Assembly's Standing Committee was in session throughout the last week of July to discuss the draft laws to be submitted to the next National Assembly Session, tentatively scheduled for 18 October to 30 November 2005.

Amongst other things, a briefing on the proposed new Law on Enterprises (unifying Vietnamese company laws) and the proposed new Law on Investment (unifying Vietnamese investment laws) was provided to the National Assembly's Standing Committee. To support Vietnam's bid for WTO accession in December 2005, these two major new laws will be passed at the October-November 2005 National Assembly Session. When they will enter into force is still undecided. See the June 2005 Issue of Vietnam legal Update on www.vietnamlaws.com for excerpts of a recent slideshow presentation on the proposed common Law on Investment by Nigel Russell, managing partner of our Ho Chi Minh City office.

At its May-June 2005 Session, the National Assembly voted to expedite its legislative program in an attempt to achieve promulgation in 2005 of important laws necessary to support Vietnam's bid for WTO accession by the end of 2005. Resolution 42-2005-NQ-QH of the National Assembly dated 14 June 2006 on Adjustment of the Program for Formulation of Laws and Ordinances in 2005 provides for the following legislation to be added to the 2005 legislative program:

- > Laws to be considered *and passed* at the 8th Session in October-November 2005:
 - Law on Enterprises (as noted above);
 - Law on Investment (as noted above);
 - Law on Amendment of the Law on VAT and Law on SST (a single law to cover amendments to two existing laws - a first in Vietnam);
 - Law on Amendment of the Law on Complaints and Denunciations; and
 - Law on Practising Thrift to Reduce Expenditure.
- > Laws to be considered *only* at the 8th Session in October-November 2005 (and expected to be passed in May-June 2006):
 - Law on Lawyers (replacing existing Ordinance on Lawyers);
 - Law on Prevention of HIV/AIDS.
- > Ordinances to be passed in 2005:
 - Ordinance on Standardization;
 - Ordinance on Foreign Exchange;
 - Ordinance on Signing and Implementation of International Agreements.

National Assembly Laws effective as of 1 July 2005:

- > Law on Competition dated 3 December 2004
- > Law on Publishing dated 3 December 2004
- > Law on Electricity dated 3 December 2004

3.2 **Employment - dismissal grounds**

Under Article 85 of the 1994 Labour Code of Vietnam (as amended 2002), an enterprise may only dismiss an employee on the following grounds:

- (a) Where an employee commits an act of theft, embezzlement, disclosure of business or technology secrets, or other conduct which is seriously detrimental to the assets or well-being of the enterprise;
- (b) Where an employee who is disciplined by extension of the period for wage increase or transfer to another position re-commits an offence during the period when he is on trial or re-commits an offence after he is disciplined in the form of removal from office;
- (c) Where an employee takes an aggregate of 5 days off in one month or an aggregate of 20 days off in one year at his or her own will without proper reasons.

While grounds (b) and (c) are self-explanatory, an enterprise must be careful in dismissing its employee on the grounds in (a) because, amongst other things, there are conflicting interpretations of what constitutes "conduct which is seriously detrimental to the assets or well-being of the enterprise" and therefore a lawful ground for dismissal.

First, the grounds for dismissal in (a) must be stipulated in an enterprise's labour rules. Labour rules are compulsory for all enterprises (including foreign invested enterprises) with 10 or more employees; and must be registered with the provincial or municipal labour department, under article 82 of the Labour Code. Decree 44 of the Government dated 6 July 1995 (as amended 2 April 2003) clearly stipulates that enterprises are responsible for specifying in detail each type of breach, the seriousness of each breach, the penalties imposed for breaches in its labour rules, amongst other things. Of interest, Official Letter 2178 of the Ministry of Labour, War Invalids and Social Affairs ("MoLISA") dated 25 July 2001 stipulates that it is consistent with law if an enterprise's labour rules prescribe acts of theft as a ground for dismissal without specifying the value of the stolen asset. So, on the basis of the above legislation, an enterprise may dismiss its employee on grounds in (a), such as theft, provided that its labour rules specify such grounds as a breach and such labour rules are registered with the relevant labour authority.

But now, according to a recent official letter by the MoLISA, there is a second hurdle for employer's to get over before they can lawfully dismiss an employee on grounds under (a). According to Official Letter 1593 of the MoLISA dated 27 May 2005, even if an enterprise's labour rules specify conduct which is, in its nature, seriously detrimental to the assets or well-being of the enterprise as a ground for dismissal of an employee, the dismissal will not be lawful if such conduct is not, in practice, seriously detrimental to the assets or well-being of the enterprise. This raises the bar for lawful dismissal on grounds in (a) very high.

3.3 Competition law update

Vietnam's Competition Law came into effect on 1 July 2005. Contrary to our expectations (see Part 3.3 of the June 2005 Issue of Vietnam Legal Update on www.vietnamlaws.com), the following items of implementing legislation have still not been issued by the Government (even though they are understood to have been finalized by the Ministry of Trade and reviewed by the Ministry of Justice):

- > Decree Making Detailed Provisions for Implementation of the Law on Competition;
- > Decree on Administrative Offences in the Field of Competition.

At this rate, even if they are issued in early August, they are not likely to come into effect until September.

As for the following items of implementing legislation, the Ministry of Trade is understood to still not have finalized its drafts, so they are not expected to be issued until late August at the earliest:

- > Decree on Competition Authorities;
- > Decree on Illegal Multi-Level Selling.

All of the above legislation to implement the Competition Law was originally expected to be issued in mid-June in time to come into effect with the Competition Law on 1 July 2005. But businesses must continue to wait for details of how Vietnam's new competition law regime will impact on their market practices.

So, with no implementing legislation and no competition authorities yet established, the question remains, did the Competition Law really come into effect on 1 July 2005?

- >>> For more information on Vietnam's new Competition Law and competition offences, go to <http://www.vietnamlaws.com/otherupdates>
- >>> For English translations of Vietnam's new Competition Law (now) and two of its implementing decrees (drafts only), subscribe to [Vietnam Laws Online Database](http://www.vietnamlaws.com) on www.vietnamlaws.com

One of the many queries about Vietnam's new competition regime is how the new Competition Law interrelates with the existing (very general) prohibition of unlawful competition in the 1997 Commercial Law. This issue will be resolved as of 1 January 2006 when the recently passed new Commercial Law becomes effective. The 2005 Commercial Law does not regulate competition, not even just in principle (except to prohibit anti-competitive promotions and advertising). Competition will be regulated solely under the Competition Law. Any industry-specific legislation which deals with competition must be consistent with the Competition Law. Of note, the basic principle of consumer protection has been retained from the 1997 Commercial Law, pursuant to which the 1999 Ordinance on Consumer Protection was issued. At the request of and in co-operation with the Ministry of Trade, Phillips Fox is currently finalising the official translation of the 2005 Commercial Law.

3.4 Minimum wages

From mid-1999, as part of the Government's push to 'de-dollarize' the Vietnamese economy, minimum wages for Vietnamese employees (performing basic level work) of joint venture enterprises and 100% foreign owned enterprises (together referred to as foreign invested enterprises, "FIEs") were denominated in Vietnamese dong ("VND"), under Decision 708 of the Ministry of Labour, War Invalids and Social Affairs ("MoLISA") dated 15 June 1999. Previously, under Decision 385 of the MoLISA dated 1 April 1996, such minimum wages had been denominated in United States dollars ("USD"). Based on the 1 July 1999 USD:VND exchange rate, the new VND-denominated minimum wages equated to the previous USD-denominated wages. However, since mid-1999, as the VND has devalued against the USD, the VND-denominated minimum wages for FIE employees have in effect decreased against the 1996-level USD-denominated minimum wages.

Of note, Decision 708 provides for the Minister of the MoLISA to adjust the minimum wages prescribed in Decision 708 when the consumer price index increases by more than 10%. Despite the economic and other changes in the 6 years since Decision 708, our informal discussions with the Deputy Head of MoLISA's Department of Wages and Salary reveal that Vietnam's interest in remaining competitive within the region and attractive to foreign investors continue to outweigh the interests of workers in higher wages. However, there has been a recent petition to improve minimum wages from the Trade Union Federation of Vietnam to the Prime Minister. In response, the MoLISA has been delegated by the Prime Minister with the task of

formulating a submission on the issue of minimum wages. We'll have to wait and see whether any increase in the level of minimum wages eventuates.

Interestingly, the minimum wages for Vietnamese employees of 'other foreign organizations' (eg NGOs) did not change in mid-1999. They remain denominated in USD, and set at the Decision 385 levels of 1996 (this was confirmed in Circular 14 of the MoLISA dated 30 May 2003). So, as the VND has devalued, the real levels of minimum wages for FIE employees and of minimum wages for employees of 'other foreign organizations' have diverged, with the latter coming out in front. According to the Department of Justice under the MoLISA, the simple justification for the different treatment is that, whereas FIEs are a type of Vietnamese entity and therefore subject to the policy that Vietnamese entities should pay wages in VND, 'other foreign organizations' are foreign entities and not subject to that policy. Due to the low number of minimum wage employees in 'other foreign organizations', the MoLISA has no intention of changing the current situation. So employees in 'other foreign organizations' will remain subject to USD-denominated minimum wages.

The table below illustrates how the minimum wages for FIE employees in urban districts of Hanoi and HCMC have effectively decreased since mid-1999 and how they have diverged from the minimum wages of employees of other foreign organizations:

	FIE employees	Employees of 'other foreign organizations'
1 July 1996 USD1 : VND11,016	<u>USD45 / VND495,720</u> (Decision 385)	<u>USD45 / VND495,720</u> (Decision 385)
1 July 1999 USD1 : VND13,910	USD44.97 / <u>VND626,000</u> (Decision 708)	<u>USD45 / VND626,400</u> (Decision 385)
1 July 2005 USD1 : VND15,870	USD39.45 / <u>VND626,000</u> (Decision 708)	<u>USD45 / VND714,150</u> (Decision 385)

(Underlining indicates statutory minimum wage)

FIE employees in suburban districts of Hanoi and HCMC are even worse off compared to their counterparts in 'other foreign organizations' in the same districts. Prior to mid-1999, such FIE employees were entitled to the highest level minimum wage (to which their counterparts remain entitled). Since mid-1999, their suburban location has cast them into a separate category entitled to the second-highest level of minimum wage.

The table below illustrates their suburban dilemma:

	FIE employees in urban districts of Hanoi and HCMC	FIE employees in suburban districts of Hanoi and HCMC
1 July 1996 USD1 : VND11,016	<u>USD45 / VND495,720</u> (Decision 385)	<u>USD45 / VND495,720</u> (Decision 385)
1 July 1999 USD1 : VND13,910	USD44.97 / <u>VND626,000</u> (Decision 708)	USD39.94 / <u>VND556,000</u> (Decision 708)
1 July 2005 USD1 : VND15,870	USD39.45 / <u>VND626,000</u> (Decision 708)	USD35.03 / <u>VND556,000</u> (Decision 708)

(Underlining indicates statutory minimum wage)

So a minimum wage employee of a FIE in Ngo Quyen Street in Hanoi's Hoan Kiem urban district is in a better position than her FIE counterpart in Thang Long Industrial Zone in Hanoi's Dong Anh suburban district, but not in as good a position as her counterpart at the NGO next-door in Ngo Quyen Street. Likewise, a minimum wage employee of a FIE in Le Duan Boulevard in HCMC's urban District 1 is in a better position than his FIE counterpart in South Saigon in HCMC's Binh Chanh suburban district, but not in as good a position as his counterpart at the NGO next-door in Le Duan Boulevard.

For reference:

- > Hanoi's 9 urban districts are: Ba Dinh, Cau Giay, Dong Da, Hoan Kiem, Hai Ba Trung, Hoang Mai, Long Bien, Tay Ho, Thanh Xuan;
- > HCMC's 19 urban districts are: Districts 1 to 12, Go Vap, Tan Binh, Phu Nhuan, Binh Thanh, Thu Duc, Tan Phu, Binh Tan.

3.5 Buying and leasing houses and apartments in Vietnam - main contractual issues

Following a similar checklist in the May 2005 Issue of Vietnam Legal Update, below is a checklist of the main contractual issues to consider when buying (in the case of Vietnamese people) or long-term leasing (in the case of foreigners) houses and apartments developed by residential housing companies in Vietnam. Keep in mind that the recommendations below are *general* only. Each specific case must be considered closely to determine any *specific* recommendations. All issues can/should be negotiated and agreed with the seller/lessor and specified in the sale/lease contract.

	Main contractual issues	Comments	Recommendations
1	The buyer/lessee is required to deposit a significant proportion of the contract price.	The buyer/lessee will be in a reduced bargaining position when negotiating the main contract with the seller/lessor.	Ensure that the deposit is reasonable.
2	A deposit contract is signed. The sale/lease contract is not provided to the buyer/lessee at the time of the deposit contract.	If the buyer/lessee does not then agree to sign the sale/lease contract prepared by the seller/lessor, the buyer/lessee may incur some financial loss.	Options: <ul style="list-style-type: none"> > sign a sale/lease contract or agreement to buy/lease, rather than a deposit contract, the legal status of which is unclear; > agree with the seller/lessor on the contents of the sale/lease contract and annex it to the deposit contract before you pay the deposit; > agree in the deposit contract that the deposit is refundable if the terms of the sale/lease contract are not able to be agreed.
3	The price may increase subject to certain conditions.	It is difficult for the buyer/lessee to ascertain these conditions.	The price should be fixed or subject to a maximum percentage increase.
4	Instalment payments are made in accordance with specified dates.	This exposes the buyer/lessee to the risk that if the project falls behind schedule, the buyer/lessee will still be obliged to pay each successive instalment.	Instalment payments should be made in accordance with milestones of the project, and as certified by an independent engineer.
5	Payment is made in foreign currency.	Payment must be made in VND, except for some specified cases. Otherwise, the entire contract could be found to be invalid and unenforceable.	Payment should be made in VND.
6	The lessee's right to renew the contract is not specified.	It may be difficult for the lessee to negotiate with the lessor to renew the contract upon the expiry of the contract.	The lessee's right to renew the contract and the calculation of the new rent should be specified.
7	Management fees are not specified.	The failure to specify the management fees may lead to later disputes between the buyer/lessee and the lessor.	Management fees should be specified in the deposit contract and the main contract.
8	The signatory to the contract on behalf of the lessor is not the legal representative of the lessor or his/her attorney.	This issue may render the contract wholly invalid.	Obtain the documentation evidencing the authority of the signatory, such as the business registration certificate (for local companies), charter, and power of attorney.

3.6 Supreme Court Decisions 2000-2004

For the first time ever, Vietnam has published all judicial review decisions made by the Council of Judges of the Supreme People's Court in the years 2000-2004 in civil, commercial and labour cases (Volume 1) and criminal and administrative cases (Volume 2) - a total of 103 decisions. The 400 page book was published on 5 July 2005. Phillips Fox attended a workshop to introduce the new publication on 19 July. This is a significant step for Vietnam, not only in terms of transparency (a key WTO requirement), but also in terms of providing precedents to lower courts as well as investors and their lawyers looking for indications of how laws might be interpreted and applied (although how much certainty can be derived from these decisions is not yet tested). Decision 49 of the Politburo dated 2 June 2005 dealing with legal reform requires that Supreme Court judgments must be published from now on. In the future, publication may be extended to decisions of the Appeal Court of the Supreme People's Court and even selected decisions of provincial-level courts. Below, and in future issues of Vietnam Legal Update, we will look at selected decisions of the Supreme Court.

Dispute over credit agreement - Decision 03-2004-HDTP-KT dated 26 February 2004

Facts In 1999, the plaintiff (a Vietnamese bank) and the defendant (a limited liability company) entered into a credit agreement for VND800 million, with interest at 0.85% per month and overdue interest at 125% per month. The security for the loan was a guarantee by property over premises in HCMC ("HCMC Premises"). The guarantee by property was given by Mr C under an authorization contract by Mr C's ex-wife (Mrs M), the owner of the HCMC Premises. The defendant defaulted on the loan.

The authorization contract entitled Mr C on behalf of Mrs M to obtain issuance of the certificate of land use right and house ownership relating to the HCMC Premises; after which, Mrs M has the right to manage, use, sell, mortgage or assign the HCMC Premises; in the case of mortgage, if Mr C cannot make payment, Mrs M agrees for the bank to realize the HCMC Premises; within the scope of authorization, Mr C can formulate relevant documents, sign relevant papers and implement other statutory rights and obligations.

Principal issue: Whether the guarantee of property by Mr C was valid and enforceable. The obligation for the defendant to repay the loan (plus interest) was not contentious.

Preliminary decisions: At first instance, it was ordered that the HCMC Premises be realized. On first appeal, it was held that the guarantee contract was invalid.

Before the Supreme Court: The People's Supreme Inspectorate argued that Mrs M voluntarily gave the ownership rights relating to the HCMC Premises to Mr C and Mr C is not restricted in exercising any of the property ownership rights provided for in the Civil Code. Therefore, the guarantee using the HCMC Premises by Mr C did not exceed the scope of authorization by Mrs M. The validity of the guarantee contract should be recognized.

Decision of Supreme Court: The Supreme Court upheld the appeal decision. The guarantee contract was held to be invalid on the following bases: The authorization contract referred only to mortgage not guarantee using property. Mr C had exceeded the scope of the authorization contract when he guaranteed the defendant's loan using the HCMC Premises. Further, in the first instance and appeal hearings, Mrs M declared that she did not know about the guarantee by Mr C; supported by absence of Mrs M's signature from the guarantee contract. The legal validity of a letter dated 3 January 2001 from Mrs M to the plaintiff in which it was purported she gave Mr C full ownership of the HCMC Premises was questionable (only a photocopy was available). Further, pursuant to a first instance criminal judgment in 2002, Mrs M had voluntarily handed over the HCMC Premises to another Vietnamese bank to realize for recovery of a debt on behalf of her brother. That judgment was legally enforceable and Mr C made no appeal.

General lesson: When dealing with a mortgage/guarantee using assets attached to land (or using land; or using other assets), carefully check the ownership documents and the scope of any authorization to verify that the realization (if any) of the assets will be enforceable.

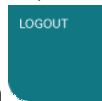
Part 4 What's New on Vietnam Laws Online Database?

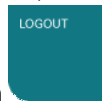
Vietnam Laws Online Database on www.vietnamlaws.com celebrated its 1st anniversary on 1 July 2005.

Vietnam Laws Online Database is an online searchable database of English translations of close to 3,000 Vietnamese laws relating to foreign investment and far beyond - the most extensive online Vietnamese law library in the world. Various search options are available. Translations can be viewed online, printed and downloaded (subject to terms & conditions).

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Feedback: So we can continue to improve Vietnam Laws Online Database, we circulated by email a feedback form to subscribers. Thankyou to those subscribers who have provided their feedback. To other subscribers, if you could spend a few minutes completing the feedback form (which is now available on the Vietnam Laws Online Database Welcome Page), we would really appreciate it. But, always keep in mind, we welcome feedback at any time.

What's new on Vietnam Laws Online Database?

Translations included in the 1 July update of Vietnam Laws Online Database:

- > Draft decree on implementation of Competition Law
- > Draft decree on competition offences
- > Decree 79 on customs clearance agents 16 June 2005
- > Decree 74 on anti-money laundering 7 June 2005
- > Circular 03 on restructuring finance leases 25 May 2005
- > Decree 65 on amendments to finance leasing regulations 19 May 2005
- > Decree 63 on health insurance 16 May 2005
- > Circular 09 on construction permits 6 May 2005
- > Circular 01 on foreign invested mail delivery businesses 6 May 2005



Phillips Fox was proud to accept the **Business Innovation Award** at the Australian Business Awards in Vietnam 2004, in recognition of our innovative work in developing www.vietnamlaws.com and our **Vietnam Laws Online Database**.

Above is just a snapshot of the wide range of legislation available.

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