



Vietnam Legal Update

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for the New Year**

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Part 1 Selected New Legal Instruments

1.1 Labour Contracts

Official Letter 348-LDTBXH-CSLDVL of the Ministry of Labour, War Invalids and Social Affairs ("MoLISA") dated 11 February 2003 on Use of Labour Contracts ("Official Letter 348")

By Official Letter 348, the MoLISA has advised South Vietnam Crop Seed Shareholding Co. of HCMC as follows:

- Despite the amendments to the Labour Code which came into force as of 1 January 2003, Decree 198-CP of the Government dated 31 December 1994 Providing for Implementation of the Labour Code With Respect to Labour Contracts ("Decree 198") will remain effective until the Government issues an updated implementing decree on labour contracts to replace Decree 198.
- Under article 2 of Decree 198, any labour contract in writing must be made in accordance with the model labour contract published by the MoLISA.
- The MoLISA is currently making submissions to the Government to amend the above requirement in article 2 of Decree 198. However, pending issuance of the updated implementing decree on labour contracts, article 2 of Decree 198 must continue to be implemented.

Official Letter 351-LDTBXH-CSLDVL of the MoLISA dated 14 February 2003 on Labour Contracts and Social Insurance ("Official Letter 351")

By Official Letter 351, the MoLISA has advised Foster's Vietnam Co. Ltd. of HCMC as follows:

- For employees whose jobs are stable and who work continuously for a period of three or more months, a written labour contract must be entered into and compulsory social insurance must be paid.
- For employees whose jobs are temporary, who work for non-continuous periods and each period is less than three months, a labour contract for less than three months must still be entered into but social insurance contributions which are payable may be included in salary so that the employee can participate in social insurance on the basis of voluntary contributions or self-responsibility for insurance.

1.2 Bank Guarantees

Decision 112-2003-QD-NHNN of the State Bank of Vietnam ("SBV") dated 11 February 2003 Amending a Number of Articles of the Regulations on Bank Guarantees Issued with Decision 283-2000-QD-NHNN14 of the SBV dated 25 August 2000 ("Decision 112")

Decision 112 provides for the following amendments to the Regulations on Bank Guarantees issued with Decision 283-2000-QD-NHNN14 of the SBV dated 25 August 2000 ("Guarantee Regulations"), applicable to guarantees provided by joint venture banks and foreign bank branches as well as other Vietnamese credit institutions:

(a) Entities which may be provided with bank guarantees (article 4):

Previously, the Guarantee Regulations stipulated the entities which may be provided with bank guarantees. Now the amended Guarantee Regulations provide that all domestic and foreign organizations and individuals may be provided with guarantees (provided that they satisfy prescribed conditions discussed in (b) below) and only stipulates the exceptions to this general rule.

Exceptions, being persons to whom a credit institution may not provide guarantees, comprise:

- (i) Members of the board of management or inspection committee or the general director or deputy general director of the credit institution;
- (ii) Officials and staff of the credit institution which undertakes the task of evaluating and making a decision to provide a guarantee;
- (iii) Parents, spouses or children of the persons listed in (i) above;
- (iv) Parents, spouses or children of the director or deputy director of a branch of a credit institution (at the discretion of the credit institution).

A credit institution may not provide guarantees without security or with preferential treatment to the following persons: its auditor (audit company or individual auditors), its chief accountant, inspectors, major shareholders, or any enterprise in which any person listed in (i) above owns more than 10% of the charter capital. The total amount of any guarantee made to these persons is restricted to 5% of the equity of the credit institution.

The above exceptions are consistent with the Law on Credit Institutions and the Regulations on Lending by Credit Institutions issued with Decision 1627-2001-QD-NHNN of the SBV dated 31 December 2001 ("Lending Regulations"), which became effective as of 1 February 2002.

(b) Conditions for bank guarantees (article 8):

The conditions to be satisfied by an entity seeking to be provided with a bank guarantee have been relaxed. Such entities are no longer required to have (i) a good credit rating with the bank or (ii) a feasible and effective investment project or production/business plan. Foreign economic organizations seeking to be provided with bank guarantees are no longer required to be authorized to conduct investment or business or to participate in tendering in Vietnam (although the regulations on control of foreign loans are still applicable).

The above conditions have been replaced with the more general requirements that (i) the purpose for which the guarantee is provided must be lawful and (ii) the entity must have the financial capacity to discharge the guaranteed obligation within the time-limit promised.

This relaxation of conditions is consistent with the greater decision-making authority enshrined in the Lending Regulations.

(c) Joint guarantees (article 14):

Detailed procedural requirements for joint guarantees are no longer stipulated. Joint guarantors must now comply with the Regulations on Co-Financing by Credit Institutions issued with Decision 286-2002-QD-NHNN of the SBV dated 3 April 2002, which became effective as of 18 April 2002.

(d) Security:

Whether or not security will be taken for a bank guarantee is now at the complete discretion of the bank and its client (except in the cases referred to in (a) above). This relaxation is consistent with the greater decision-making authority enshrined in the Lending Regulations.

This is the third set of amendments to the Guarantee Regulations, following amendments on 11 April 2001 and 29 October 2001.

Decision 112 was effective as of 26 February 2003.

1.3 Loan Interest

Official Letter 446-TCT-NV5 of the Ministry of Finance ("MoF") dated 27 January 2003 on Tax on Loan Interest ("Official Letter 446")

By Official Letter 446, the MoF confirmed to the HCMC Branch of Hong Kong Shanghai Banking Corp. that:

1. Under Circular 169-1998-TT-BTC of the MoF dated 22 December 1998 and Decisions of the State Bank 324-1998-QD-NHNN1 dated 30 September 1998, 284-2000-QD-NHNN1 dated 25 August 2000 and 1627-2001-QD-NHNN1 dated 31 December 2001, interest received from loan contracts entered into as from 1 January 1999 is subject to corporate income tax ("CIT").
2. The extension of the term of a medium or long-term loan entered into prior to 1 January 1999 by a period up to (but not exceeding) 50% of the original loan term will not be deemed to create a new loan contract. Accordingly, interest arising after the expiry of the original loan term will not be subject to CIT.
3. The extension of the term of a medium or long-term loan entered into prior to 1 January 1999 by a period exceeding 50% of the original loan term will be deemed to create a new loan contract and any interest arising after the expiry of the original loan term will be subject to CIT.

1.4 Tax Payments

Official Letter 801-TC-TCT of the Ministry of Finance dated 22 January 2003 on Dealing with Exchange Rate Differences on Tax Payments to the State Budget ("Official Letter 801")

In response to a number of enquiries from foreign invested enterprises, Official Letter 801 advises provincial and municipal Tax Departments as follows:

1. If an enterprise prepares its accounts in a foreign currency and declares and pays tax to the State Budget in the foreign currency, then any reduction or refund of tax (or other payments) paid to the State Budget will be calculated in VND and then fixed on the basis of converting foreign currency to VND at the actual average buying and selling price on the inter-bank foreign currency market as announced by the State Bank at the date of the decision of the competent body to reduce or refund tax.
2. Where a decision on reduction of tax has been made or tax has already been refunded from the State Budget prior to the date of Official Letter 801, even if exchange rate differences were dealt with other than in accordance with Official Letter 801, no adjustments will be made.

1.5 Overseas Foreign Currency Accounts

Official Letter 78-NHNN-QLNH of the State Bank of Vietnam ("SBV") dated 21 January 2003 on Opening Foreign Currency Accounts Overseas ("Official Letter 78")

Official Letter 78 notifies the general directors of all credit institutions authorized to conduct foreign exchange transactions that any credit institution which already has (i) a license to conduct foreign exchange business (including international payment services and the purchase and sale of foreign currency overseas) and (ii) a permit to open and use a foreign currency account overseas may open an additional foreign currency account overseas at the discretion of the general director, subject only to registration of the account at the SBV's Department of Foreign Exchange Control and Department of Banks within 15 working days from the date of opening of the additional overseas account. Any such credit institution must continue to comply with the reporting regime stipulated in Official Letter 1247-NHNN-QLNH of the State Bank dated 15 November 2002. The standard form for registration of an additional overseas foreign currency account is issued with Official Letter 78.

1.6 Development of Banking Sector

Decision 42-2003-QD-NHNN of the State Bank of Vietnam ("SBV") dated 13 January 2003 on Action Plan for International Economic Integration in the Banking Sector ("Decision 42")

Further to the Government's November 2002 Action Plan for Implementation of Resolution 07-NQ-TW of the Politburo on International Economic Integration, the SBV has issued its Action Plan for International Economic Integration in the Banking Sector ("Banking Action Plan") under Decision 42.

The aim of the Banking Action Plan is to build a banking system which customers regard as reputable, which is competitive, which operates effectively and safely, which is able to raise capital better than other capital sources in society, and which is able to expand investment to meet the country's requirements for industrialization and modernization.

The Banking Action Plan focuses on:

- Education: Disseminating and introducing State and Party policies and information about the banking system in general and about international economic integration in the banking sector in particular, as part of the curriculum of the Banking Institute and via seminars and the mass media.
- Legal framework from 2003 to 2006:
 - Continuing to check the current laws on banking operations against Vietnam's undertakings in multilateral and bilateral agreements; to submit to the Government to in turn recommend to the National Assembly new laws on currency and on banking operations which conform with the requirements of the WTO and other international economic and trade institutions to which Vietnam belongs; to repeal inconsistent laws;
 - Expanding the legal framework for the operation of credit institutions ("CIs") and introducing a system for assessing and classifying CIs according to international standards so as to ensure that Vietnam will be able to participate fully in international and regional economic organizations in the finance and banking sector;
 - Reforming the foreign exchange control system in the direction of liberalizing current transactions and controlling selectively capital account transactions, in particular short-term remittances of capital overseas and foreign loans, whilst controlling and limiting the use of foreign currency in Vietnam.
- Overall strategy for international economic integration: Formulating an improved overall strategy which specifies the time schedule for integration and the level of the commitments to be made to each type of international economic organization, so as to show the direction of the process of international economic integration in the banking sector. On the basis of that strategy, to draft a plan for improving the competitiveness of Vietnam's CI system on both the domestic and the international market.

- Financial and monetary regimes and policies from 2003 to 2005:
 - Renovating the monetary policy in the direction of making use of indirect policy instruments and improving the open market; liberalizing the regime of VND and foreign currency interest rates with indirect regulation by the State; formulating an international standard payment system and a modern financial and monetary information system; restructuring the system of inspecting and supervising CIs;
 - Improving the competitiveness of CIs in Vietnam, regionally and internationally, in terms of financial capacity, technology standard and management; expanding the types and quality of financial services that CIs provide based on market supply and demand;
 - In the case of State commercial banks ("SCBs"), cleaning up their finances on the basis of debt restructure and their asset balance sheets; taking measures to ensure no new bad debts are incurred; resolving inefficient investment debts and loans; divesting SCBs of credit policy activities (for transfer to social policy banks); improving lending decision-making; modernizing banking technology; implementing international accounting standards; re-training management personnel;
 - In the case of commercial shareholding banks, setting standards for restructuring finances and management practices to enable them to participate in the secondary monetary market, provide refinancing and be members of the SBV's payment system.
- WTO accession: Finalizing a negotiating plan for the finance and banking services sector by 2005, in preparation for WTO negotiating sessions.
- Personnel training: Formulating a strategy for training personnel both medium and long term, aimed at strengthening and raising the quality of banking staff, in particular with respect to understanding banking and related products, fluency in foreign languages, and work practices and discipline, with special emphasis on personnel participating in negotiations and signing of international contracts or accession to multilateral organizations, inspectors or supervisors, and personnel responsible for international law work.
- Market expansion and taking advantage of investment and technical assistance from other countries and from international organizations:
 - Continuing to strengthen and develop the co-operative relationship with international financial and monetary organizations such as IMF, World Bank, ADB, OPEC Fund, and others; co-ordinating the relevant ministries and branches in fulfilling undertakings to IMF, World Bank and ADB in order to expedite implementation of projects already agreed and take advantage of other funds available for industrialization and modernization;
 - Elevating the importance of international and regional economic integration in such multilateral economic organizations as ASEAN, APEC, WTO, and so forth, and also in the bilateral relationship with the Central French Bank, the French Co-operation and Development Organization PROPARCO, the Japanese Bank for International Co-operation, the American EXIMBANK, the Chinese People's Bank, the Laotian Central Bank, the Cambodian Central Bank, the Cuban National Bank, the Malaysian Central Bank, the Iranian Central Bank, the Central Bank of Luxembourg, and others;
 - Taking advantage of funds for technical assistance provided by international organizations and Central Banks to (i) research and collate information from the experience of other countries for the negotiations to enter WTO, and (ii) to improve the system of laws applicable to Vietnam's credit institutions.

1.7 Foreign Investment in Hanoi

Decision 176-2002-QD-UB of the Hanoi People's Committee ("HPC") dated 20 December 2002 issuing Regulations on State Administration of Foreign Direct Investment ("FDI") Activities in Hanoi ("Decision 176 Regulations")

The Decision 176 Regulations update the regime for State administration of FDI projects in Hanoi in accordance with the mid-2000 amendments to the Law on Foreign Investment in Vietnam ("LFI"), Decree 24-2000-ND-CP of the Government dated 31 July 2000 Implementing the LFI ("Decree 24") and Circular 12-2000-TT-BKH of the Ministry of Planning and Investment ("MPI") dated 15 September 2000 Providing Guidelines on FDI Activities in Vietnam ("Circular 12").

The HPC has authority to issue investment licenses for FDI projects in Hanoi with capital up to USD5 million (in the case of certain manufacturing projects, this capital limit does not apply).

With respect to FDI project application files, matters for investment evaluation, post-licensing requirements and license amendments, the Decision 176 Regulations summarize and/or incorporate by reference the relevant provisions of Decree 24 and Circular 12.

In an effort to create a favourable environment for investment by foreign investors in Hanoi, the Decision 176 Regulations stipulate the following time-limits:

- The HPC undertakes to reply to investors within 7 working days of receipt of official letters expressing interest in a project outside the HPC's official list of projects calling for investment.
- In the case of projects subject to investment evaluation which have capital below USD5 million, are not technically complex and are not sensitive from a socio-political perspective, the Hanoi Department of Planning and Investment ("DPI") must collate the written opinions from the relevant agencies and branches and submit them to the HPC to issue an investment license within 15 working days of receipt of a valid application file.
- In the case of manufacturing projects subject to investment evaluation which have capital of USD5 million or more, the DPI must organize an evaluation and collate a report for submission to the HPC to issue an investment license within 20 working days of receipt of a valid application file.
- In the case of projects subject to investment registration (ie licensing without project evaluation), the DPI must consider them and submit them to the HPC to issue an investment license within 10 working days of receipt of a valid application file. Where a project subject to investment registration has similar goals to an already licensed project, the time-limit is reduced to 7 working days.
- In the case of projects within the investment licensing authority of the MPI, the HPC must contribute its evaluation opinion within 10 working days of receipt of a copy of the valid application file.
- For projects within the licensing authority of the HPC, a decision on license amendments must be made within 15 working days of receipt of a valid application file. For other projects, the HPC must provide its written opinion to the MPI within 7 working days of receipt of a valid application file (excluding any time taken for investors to provide supplementary material).

In an effort to improve administrative procedures, the Decision 176 Regulations also stipulate the following responsibilities of municipal departments and branches:

- Every quarter, municipal departments and branches must attend a briefing meeting on promoting FDI and resolving problems, chaired by the HPC.
- The Department of Planning and Architecture must:
 - Within 20 working days of receipt of an application, introduce investors to land which is available for construction and issue planning certificates as a basis for preparation of FDI projects;

- Within 12 working days of receipt of an application, fix building line markers and issue data on urban infrastructure;
- In the case of projects with capital above USD5 million and investment in areas with strict requirements for master planning, agree on total surface master planning and on a plan for the preliminary design of a building within 12 working days of receipt of an application.
- The Department of Finance and Pricing must:
 - Within 5 working days of receipt of a valid project application file together with a letter of proposal, fix the land rental for a FDI project and submit it to the HPC to issue a decision;
 - Where a Vietnamese joint venture party is a State owned enterprise managed by the HPC, value any assets being used for capital contribution.
- The Department of Trade must approve import plans within 10 working days of receipt of an application.
- The Department for Land and Housing must, within 10 working days of receipt of a land leasing file, evaluate the file and submit it to the HPC or to the Prime Minister to issue a decision.
- The Department of Construction must:
 - Within 20 working days of receipt of an application file, evaluate technical designs of small-scale Group A projects (where the value of construction and installation work is below 10% of the total investment capital but not higher than USD10 million) and of Group B projects, and submit them to the HPC to issue a decision (not applicable to BOT, BTO and BT projects);
 - Issue contractor's licences to foreign contractors to implement tender packages for Group B projects and for Group A projects with the value of construction and installation work below USD10 million.
- The Department of Science, Technology and Environment must evaluate technology, industrial property and environmental impact assessment reports and issue letters of approval within 7 working days.
- The Department of Labour, War Invalids and Social Affairs must issue work permits for foreigners within 7 working days of receipt of a valid and complete application file.
- The Tax Department must fix tax rates for FDI projects within 7 working days of receipt of file.
- The Municipal Steering Committee for Land Clearance must:
 - Within 7 days of receipt of an investment project file, or decision on issuance of land or investment funding (certified by the bank where the project has its bank account), issue a notice assigning a district people's committee to recover land and to establish a council to settle compensation for recovered land;
 - Direct prompt resolution of issues arising when investors pay compensation for recovered land.
- District people's committees must establish councils and working groups to settle compensation for recovered land within 5 working days of receipt of a notice from the municipal Steering Committee for Land Clearance; guide investors on the requirements relating to compensation, land recovery, residential re-settlement and labour recruitment when land is recovered for a project; and assist investors with any difficulties when they pay out compensation for recovered land.

The Decision 176 Regulations require the HPC to consider revocation of the investment licence of any FDI project which remains unimplemented (especially where legal capital has not been contributed) within 6 months of the date of licensing without a legitimate reason.

The Decision 176 Regulations were effective as of 4 January 2003 and replace the outdated Decision 14-QD-UB of the HPC dated 23 March 1999.

Part 2 Features

2.1 Phillips Fox - 10 Years in Vietnam

Phillips Fox is proud to celebrate 10 years of legal practice in Vietnam.

Phillips Fox first became involved in Vietnam shortly after the introduction of Vietnam's "Doi Moi" policy. In December 1992, Phillips Fox was the first foreign law firm to be granted a license by the Government of Vietnam to operate an official representative office in Hanoi. The office was officially opened in February 1993.

In February 1996 Phillips Fox was in the first group of foreign law firms to be granted a full branch license by the Ministry of Justice. We now have offices in both Hanoi and Ho Chi Minh City.

Phillips Fox is the sixth largest law firm in the Asia-Pacific area, with offices in Australia, New Zealand and Vietnam.

Phillips Fox is ranked by independent rating publications (Asia-Pacific Legal 500, 2001-2002; and Chambers Global, 2001-2002) as one of the leading law firms in Vietnam.

The Phillips Fox Vietnam team has more years of "Vietnam experience" between them than any other foreign law firm operating in Vietnam. Bill Magennis is the firm's senior partner in Vietnam, based in Hanoi, with partner Nigel Russell based in HCMC, and senior associate Maureen McLaughlin based in Melbourne - between them, over 30 years Vietnam experience. Lawyers Craig Thomas (over 7 years Vietnam experience) and Brinsley Laird (over 3 years Vietnam experience) are based in HCMC, lawyer Dang Xuan Hop (qualified in Vietnam and Australia) is based in Hanoi, and senior associate Phillip Sweeney (over 5 years Vietnam experience) is based in Melbourne. In 2003, we welcomed two new lawyers Joshua Magennis and Louisa Gibbs to our Hanoi office. Our lawyers are assisted by an enthusiastic and dedicated local staff of 15, including legal assistants, translators and support staff.

Phillips Fox advises on all aspects of investing and doing business in Vietnam, including:

- Foreign investment
- Banking and finance
- Foreign currency controls
- Contracts
- Construction
- Trading and distribution
- Intellectual property
- Labour
- Property and leasing
- Arbitration and Litigation

Phillips Fox has been involved in most of the largest foreign investment projects in Vietnam to date.

Our clients range across all industries in Vietnam, including petroleum, electricity, telecommunications, heavy and light manufacturing, automotive, mining, brewing, banking, insurance, distribution, advertising, education, aid, and many others.

Phillips Fox has a close relationship with Vietnamese authorities, particularly the Ministry of Planning and Investment, who frequently request our assistance and advice. Phillips Fox has been engaged to advise Vietnam on a number of important laws and legal reforms, including:

- Reform of the foreign investment law to cater for large projects
- Reform of the Commercial Law
- Equitization of State owned enterprises
- Development and reform of the Mineral Law
- Development and reform of BOT regulations

Phillips Fox is an active member of the Private Sector Forum, which comprises a group of foreign lawyers and private corporations present in Vietnam which provide advice to the Vietnamese Government on the changes necessary for the development of the private sector, including promotion of foreign investment in Vietnam.

In addition to its ranking as a leading law firm in Vietnam, Phillips Fox is widely regarded as the premier provider of legal translation services in Vietnam.

Since 1992, Phillips Fox has prepared and published the official English translations of Vietnamese laws on foreign investment. From a single hard back volume, our "Foreign Investment Laws of Vietnam" has expanded to a 12 volume loose-leaf subscription service, updated quarterly. "Foreign Investment Laws of Vietnam" is now available on CD-ROM. For further information on Phillips Fox publications, [see Part 4](#).

To assist our lawyers and clients, Phillips Fox maintains an extensive database of English translations of Vietnamese laws on a range of subjects, prepared over the last decade by our dedicated translation team.

Phillips Fox looks forward to our continuing association with you and your organization over the next 10 years in Vietnam and beyond.

2.2 Competition Law Update

Following is a review of the main features of the latest draft of the proposed Competition Law (Draft 7) released by the Ministry of Trade on 31 January 2003. The Competition Law is not expected to be enacted until 2004.

The Competition Law will govern competitive practices during the course of business (defined as one, several or all stages of the investment process from production to distribution of goods or provision of services in the market for profit) and other practices which may impact on competition in the territory of the Vietnam.

The Competition Law will apply to:

- Business organizations and individuals ("enterprises") as well as professional and trade associations operating in the territory of Vietnam;
- Enterprises and associations overseas when they engage in business activities with Vietnamese parties in a contract which affects competition in the territory of Vietnam;
- Enterprises engaged in public utility activities and to enterprises conducting business in State monopoly sectors;
- State administrative bodies.

Where provisions relating to competition in other laws are different from the Competition Law, the provisions of the Competition Law will prevail. Currently, the Law on Credit Institutions, the Law on Insurance and Decree 48 on Securities and Securities Market, amongst others, contain provisions relating to competition, expressly prohibiting unlawful promotions, publication of misleading information, coercion, and speculation or conspiracy for the purposes of market control.

The latest draft of the Competition Law retains two alternative options for State administration of competition (as in previous drafts). The first option is for the Government to establish a new and separate ministerial-level body to be known as the National Competition Commission. The second option is for the Ministry of Trade to assume responsibility for State administration of competition. For the purposes of this review, we will refer to the "State Competition Body".

The Competition Law entitles all enterprises to compete freely in business on the basis of the following principles: good faith; not infringing the national interest, the public interest, nor the lawful rights and interests of other enterprises and consumers; and compliance with other provisions of the law.

The following activities are proposed to be prohibited:

(a) Agreements which substantially restrict competition:

An agreement which substantially restricts competition is defined as any written, oral or other form of agreement between enterprises, between enterprises and professional or trade associations, between professional or trade associations, or within the one professional or trade association, which is able to restrict competition in the relevant market ("anti-competitive agreements").

The following are deemed to be anti-competitive agreements:

- Price fixing agreements;
- Agreements to share consumer markets or sources of supply of goods and services;
- Agreements to limit the volume of production of products, the volume of goods purchased or sold, or the volume of services provided;
- Agreements to impose on other enterprises conditions for signing contracts for the purchase and sale of goods and services, or to force other enterprises to accept obligations not directly related to the subject matter of the contract;
- Agreements to prevent, impede or not allow entry into the market by other enterprises.

Anti-competitive agreements will be prohibited if they substantially restrict competition. Only agreements between parties holding a combined market share of 25% or more of the relevant market may be deemed to substantially restrict competition.

To determine whether an agreement actually substantially restricts competition, the State Competition Body may also consider the following factors: the method of distribution of goods and provision of services to other enterprises and consumers; the price, quality and volume of goods and services which are offered or sold in the market; the current conditions which facilitate or hinder market access or market expansion by competitors or by future competitors in the relevant market.

The State Competition Body may grant an exemption for a prohibited anti-competitive agreement where it considers that the benefits for the economy and for consumers outweigh the disadvantages of the substantial restriction of competition. Exemptions must be in writing.

The Competition Law provides for the Government to issue detailed regulations on the methods for determining whether an agreement substantially restricts competition and on the criteria for exemption.

Any collusion to award a tender to a particular bidder(s) for the supply of goods and services is also deemed to be an anti-competitive agreement and is strictly prohibited, irrespective of whether it substantially restricts competition. No exemption is available in this case.

(b) Abuse of dominant or monopoly market position:

An enterprise (or group of enterprises acting together) will be deemed to hold a dominant market position if such enterprise/group is/are capable of controlling prices, quality, volumes or trading conditions in the relevant market for a substantial period of time.

To be deemed to hold a dominant market position, an enterprise must hold a market share of 30% or more of the relevant market. To determine whether an enterprise actually holds a dominant market position, the State Competition Body may also consider the following factors: the financial strength of the enterprise; its distribution networks and ability to access sources of supply of goods and services; whether it acts together with other enterprises; its ability to prevent competitors from effectively competing or ability to exclude competitors from the relevant market; and its ability to change supply and demand of goods and services in the relevant market.

The Competition Law provides for the Government to issue detailed regulations on the criteria for assessment of dominant market position.

An enterprise will be deemed to be in a monopoly market position if it has no competitors for the goods that it trades or for the services that it provides. A number of enterprises may be deemed to be in a group monopoly market position if they are the only business players, or the only ones to which the State has assigned business in the relevant market and there is no competition between those enterprises in the course of business.

Any enterprise in a dominant or monopoly market position is prohibited from carrying out the following practices aimed at maintaining or strengthening such market position:

- Deliberately (either directly or indirectly) increasing prices or temporarily reducing prices to below production cost;
- Limiting production, restricting the market, or impeding technical development;
- Applying dissimilar commercial conditions to the same transactions with different enterprises, thereby creating a competitive disadvantage;
- Imposing conditions on other enterprises signing contracts for the purchase and sale of goods and services, or forcing other enterprises to agree to obligations which are not directly related to the object of the contract;
- Preventing market entry by new competitors;
- Interfering in the business activities of other enterprises;
- Refusing to transact with another enterprise without a legitimate reason;
- Other conduct taking advantage of dominant or monopoly market position which causes other restrictions on competition.

No exemptions are available.

In addition to the above prohibited practices, any enterprise operating in State monopoly sectors is prohibited from: imposing unfavourable conditions on other enterprises and consumers; breaching contracts already signed with other enterprises and consumers; or discriminating against different enterprises without a legitimate reason.

(c) "Concentration of economic power" which substantially restricts competition:

"Concentration of economic power" comprises mergers, consolidations, acquisitions and other forms of conduct of an enterprise which is directly or indirectly aimed at changing the rights of ownership or use of all assets, rights and obligations of another enterprise or of sufficient part of the assets, rights and obligations of another enterprise so as to control or direct that enterprise.

Any "concentration of economic power" which substantially restricts competition in the relevant market is prohibited, except where an exemption is granted by the State Competition Body.

Exemptions may be granted on the following bases:

- The benefits for the economy and consumers outweigh the disadvantages of the restriction of competition;
- One or a number of the parties to a "concentration of economic power" is/are currently in danger of being dissolved or declared bankrupt and, as a result, competition will be lessened or restricted unless there is a "concentration of economic power".

To determine the level of restriction of competition, the following factors must be considered:

- The effect of the "concentration of economic power" on the structure of the market for the goods and services of all of the enterprises participating in such concentration, including: the number of business enterprises and the barriers to entering the relevant market; the ratio of market share between the participating enterprises and other enterprises operating in the relevant market; and other necessary factors;
- The ability of the participating enterprises to control: prices, quality and quantity of goods and services; channels of distribution or other business conditions at present and in the future.

The Competition Law provides for the Government to issue detailed regulations on criteria for granting exemptions.

Participating enterprises must notify the State Competition Body of any proposed "concentration of economic power" 30 days in advance (except where the resulting enterprise is only a small or medium sized enterprise).

Within a time-limit of 30 days of receipt of an application file (with contents as prescribed in the Competition Law), the State Competition Body must advise the applicant in writing whether or not the proposed "concentration of economic power" may proceed. In complex cases, this time-limit may be extended, but no more than three times, and for no more than 30 days on each occasion.

Failing any response by the State Competition Body within the prescribed time-limit, the proposed "concentration of economic power" will automatically be permitted to proceed.

(d) Acts of unhealthy competition:

Unhealthy competition is defined as any conduct by an enterprise which causes loss and damage to the lawful rights and interests of another enterprise, lowering its ability to compete in the relevant market, or causes loss to the legitimate rights of consumers.

The following acts of unhealthy competition are prohibited:

- Falsification of commercial instructions;
- Infringement of business secrets;
- Acts of bribery, inducement or coercion in business;
- Defamation of other enterprises;
- Disruption of the legitimate business activities of other enterprises;
- Enticement of a competitor's staff;
- Advertisements and promotions aimed at unhealthy competition;
- Discrimination by an association;
- Illegal multi-level selling of goods.

Of note, disruption of the legitimate business activities of another enterprise includes: using radio transmitters or other facilities to disrupt or block the legal information and communications of a competitor; and damaging a website of a competitor.

The provisions on multi-level selling (also commonly known as pyramid selling) are a new addition to the latest draft of the Competition Law. Multi-level selling is only permitted under prescribed conditions. The Competition Law provides for the Government to issue detailed regulations on supervision of multi-level selling operations.

Other notable features of the Competition Law include:

- The State Competition Body is required to maintain information on enterprises holding a dominant or monopoly market position and on exemptions granted under the Competition Law and to disclose such information upon request by any State body, organization or individual. Any decision on exemption must be publicized by the State Competition Body within 30 days.
- The State Competition Body and any other concerned State administrative bodies are prohibited from disclosing any business secrets or confidential information obtained during the process of consideration of applications for exemptions from the competition regulations.
- Dissatisfied applicants for exemptions have the right to appeal to the State Competition Body or to institute legal proceedings at the competent court.
- Any professional or trade association, consumer association, enterprise which has a related interest, competent State body, or other organization or individual has the right to lodge a complaint with the State Competition Body about a breach of the Competition Law. The complainant bears the burden of proof that conduct is in breach and is harmful.

- Upon receipt of a complaint or on its own initiative, the State Competition Body will conduct a preliminary inquiry into the conduct complained of or the suspected offence. Where an offence is found, a confidential official inquiry will be conducted. The length of an official inquiry is limited to 40 days, except in complex cases where it may be extended to a maximum of 120 days. The State Competition Body may require production of documentation and written information and may carry out on-site investigations. Any enterprise or association which is the subject of an official inquiry has the right to see the evidence brought against it and to lead argument on such evidence, to present its own evidence, and to protect its own lawful interests. During an official inquiry, temporary orders suspending the business practices complained of or imposing other necessary measures may be made by the State Competition Body. Interested enterprises or associations may lodge an appeal against such temporary orders. Appeals must be dealt with within 3 days. Where a temporary order is unlawful and causes loss, compensation will be payable by the State Competition Body.
- Offenders may be subject to administrative penalty or criminal prosecution and, where necessary, compulsory re-organization of an enterprise (in the case of unauthorized mergers, consolidation and acquisitions), compulsory public correction of false information, removal of unlawful terms and conditions from contracts or transactions, and any other measures necessary to remedy the effects of restriction of competition. Compensation will be payable for any loss caused to the interests of the State or any enterprise, association or individual. Penalty decisions must be publicized. Any interested party may lodge an appeal against the penalty decision to the State Competition Body or at the competent court.
- State administrative bodies are prohibited from taking advantage of their authority to interfere in the activities of enterprises thereby causing restricting competition in the market. In particular, they are prohibited from:
 - Forcing an enterprise to buy or sell goods or services to or from an enterprise nominated by the State administrative body;
 - Hindering the legal business activities of enterprises;
 - Discriminating between enterprises within the branch or locality which the State administrative body manages;
 - Forcing professional and trade associations or enterprises to associate with each other aimed at excluding, restricting or hindering other enterprises from participating in competition in the market.

2.3 Advertising Law Update

Ordinance 39-2001-PL-UBTVQH10 on Advertising was passed by the Standing Committee of the National Assembly on 16 November 2001 ("Advertising Ordinance") and came into force as of 1 May 2002. The Advertising Ordinance governs all Vietnamese and foreign organizations and individuals conducting advertising activities and providing advertising services in Vietnam.

The Government is yet to issue a decree providing detailed regulations for implementation of the Advertising Ordinance ("Advertising Decree"). The most recent draft of the Advertising Decree was published by the Ministry of Culture and Information on 25 November 2002. There is currently no indication when the Advertising Decree will be officially issued by the Government. When issued, the Advertising Decree will replace the former Decree 194-CP dated 31 December 1994 on Advertising and Chapter III of Decree 32-1999-ND-CP dated 5 May 1999 on Commercial Advertising.

Foreign advertising branch offices

The Advertising Ordinance provided, for the first time, for foreign advertising service providers to establish branch offices and directly engage in advertising activities.

Under the current draft of the Advertising Decree, to establish a branch office, a foreign advertising service provider (organization or individual) must satisfy the following conditions:

- have valid business registration in accordance with its foreign law;
- have operated for at least 5 years as from the date of its business registration; and
- have had a representative office in Vietnam for at least 7 years.

The current draft of the Advertising Decree clarifies that the 7 year representative office period will be calculated from December 2001. If the current draft of the Advertising Decree is adopted, the licensing of foreign advertising branch offices will be delayed until December 2008 at the earliest.

The current draft of the Advertising Decree includes detailed provisions on application files for and issuance of licenses for foreign advertising branch offices as well as the scope of activities of branch offices. The Ministry of Culture and Information has authority to issue, amend or revoke foreign advertising branch office licenses. A branch office must commence operations and provide written notice to the licensing body of its office address and the numbers of both Vietnamese and foreign employees within 45 working days from the date of licensing. Any change in name or nationality, name of the representative, number of foreign employees, office address, or contents of operation must be notified to the licensing body. The grounds for license revocation and termination of operation are also specified in the current draft of the Advertising Decree.

The Government is required to issue specific regulations on foreign advertising branch offices, but this will not be done until the Advertising Decree has been issued.

Foreign advertising representative offices

The current draft of the Advertising Decree includes detailed provisions on application files for and issuance of licenses for representative offices of foreign advertising businesses. Representative offices are not permitted to conduct business. Provincial and municipal people's committees have authority to issue, amend and revoke representative office licenses. A foreign representative office must commence operations and provide written notice to the licensing body of its office address and the numbers of both Vietnamese and foreign employees within 45 working days from the date of licensing. Any change in name or nationality, name of the representative, number of foreign employees, office address, or contents of operation must be notified to the licensing body. The grounds for license revocation and termination of operation are also specified in the current draft of the Advertising Decree.

Foreign co-operation with Vietnamese advertising service providers

The Ordinance provides for foreign organizations and individuals to co-operate with domestic advertising service providers to invest in the Vietnamese advertising market.

The current draft of the Advertising Decree elaborates as follows:

- Foreign direct investment may only be conducted in the form of a business co-operation contract (BCC) or a joint venture. (Foreign investment may be implemented indirectly via branches or representative offices in Vietnam, as discussed above.)
- Only domestic advertising service providers with a business registration certificate issued by a provincial-level Business Registration Office are permitted to co-operate with foreign investors.
- BCCs and joint ventures must be licensed in accordance with the Law on Foreign Investment in Vietnam. Investment licenses will be issued by the Ministry of Planning and Investment or the provincial or municipal people's committee, depending on the scale of investment.
- During the foreign investment evaluation process, the opinion of the Ministry of Culture and Information (in the case of a project within the license-issuing authority of the Ministry of Planning and Investment) or the Department of Culture and Information (in the case of a project within the license-issuing authority of a people's committee) must be obtained. The items to be evaluated include:
 - the degree to which the project complies with advertising master planning;
 - the technical and technological standard of the advertising by the foreign investor;
 - the socio-economic benefits;
 - the scope and sector of advertising.

Advertising permits

Advertising permits are required to be issued prior to placement of any advertisement. The Ministry of Culture and Information is responsible to issue advertising permits for advertisements on computer information networks, radio and television and in print media. Local Departments of Culture and Information are responsible to issue advertising permits for advertisements on billboards, placards, panels, banners and screens placed in public places, on objects radiating or appearing in the air or underwater, on means of transportation or on other mobile objects.

The current draft of the Advertising Decree sets a time-limit of 10 working days (from date of application) for issuance of advertising permits.

The current draft of the Advertising Decree also prescribes a number of prior conditions to be satisfied for advertisements of the following: products to which Vietnamese, industry or other standards compulsorily apply; medical drugs, raw materials for making up medical drugs, cosmetics, vaccines, biological immunizing products, medical instruments and equipment, medical services and foodstuffs; biological products servicing plant cultivation and livestock breeding, feed for livestock, veterinary drugs, plant protection agents, fertilizer, seed and seedlings.

Of particular note, the current draft of the Advertising Decree omits the requirement (which appeared in an earlier draft) for a certificate confirming legal import to be submitted in order to obtain a permit to advertise foreign goods imported into Vietnam.

Specific regulations on advertising permits are required to be issued by the Ministry of Culture and Information, but not this will not be done until the Advertising Decree has been issued.

Prohibited advertising activities

Prohibited advertising activities are specified in more detail in the current draft of the Advertising Decree, and include:

- Advertising in the nature of discrimination against the Vietnamese people or racial discrimination, or of violation of freedom of religious belief or religion;
- Advertising which arouses violence, which is shocking or which uses unhealthy language;
- The use of images of leaders of the Party or the State of Vietnam;
- Advertising which is incorrect in terms of the quality of goods and services, or incorrect in terms of the address of the manufacturing, trading or services establishment;
- Coercive advertising in any form;
- Advertising which restricts the vision of people taking part in traffic; which adversely impacts on seriousness at working locations of State bodies; which uses sound causing noise levels beyond the permissible limits under the Vietnamese standards;
- Advertising which speaks ill of, makes comparisons or causes confusion with another manufacturing, trading, goods or services establishment; which uses the name of another organization or individual without consent;
- Advertising prescription medicines, unregistered or suspended medicines, prohibited medical equipment, instruments or services.

Restrictions on advertising

The current draft of the Advertising Decree provides in more detail for the restrictions on the various forms of advertising, including:

- Restrictions applicable to advertising in newspapers include:
 - Advertisements in newspapers must be on separate sections or separate pages and must specify the purpose of the information which is advertised.
 - Advertisements may not appear on the front cover or first page of newspapers, periodical publications, magazines, special issues or supplements, with the exception of specialized advertising newspapers.
 - A permit from the Ministry of Culture and Information is required for any advertising supplement in a newspaper. Advertising supplements may not exceed the number of pages of the newspaper and may not be included in the selling price.
- Restrictions applicable to advertising on radio or television include:
 - Advertisements on radio or television must include an announcement or notice of the purpose of the information which is advertised and are not permitted immediately after signature tunes or icons of radio and television programs (except for programs presenting films, or cultural, sporting or entertainment games).
 - Each round of broadcasting of a radio or television advertisement is limited to 8 days, except in the case of sponsored advertising connected with an event which continuously takes place for more than 8 days or advertising of non-profit-making services aimed at implementing social policies associated with an event which continuously takes place for more than 8 days.

- Radio and television advertisements are limited to 10 minutes, otherwise they will be classified as a "specialized advertising program" subject to a permit from the Ministry of Culture and Information.
- During any feature film program on television, there may only be 2 advertising breaks, for a maximum 5 minutes each. During an entertainment game on radio or television, there may only be 4 advertising breaks, for a maximum 4 minutes each.
- In a single advertising break on radio or television, one advertisement or one advertising business may not take up more than 50% of the duration of that break.
- Restrictions applicable to advertising on computer information networks include:
 - Any advertising business providing advertising services on a computer information network/internet must have a license issued by the Ministry of Culture and Information and must have a business registration certificate for the business of advertising services.
 - Any advertisement which will appear on a computer information network must be forwarded to the Ministry of Culture and Information at least 10 working days in advance. If the Ministry does not respond within 5 working days, the advertisement may appear.
 - Any advertisement which will appear on a screen in a public place must be forwarded to the local Department of Culture and Information at least 10 working days in advance. If the Department does not respond within 5 working days, the advertisement may appear.
- Restrictions applicable to other forms of advertising include:
 - Advertisements on billboards, placards, panels, picture screens, banners, illuminated objects, airborne or underwater objects or other mobile objects and on other similar forms which hang or are placed or affixed or erected in outdoor areas or in public places are not permitted to obscure more than 10% per cent of the area of any earlier advertisement the permit for which has not yet expired or be placed in front of or at a distance of 200 metres from or at right angles to the earlier advertisement. They may not be placed in the safety corridors of traffic, on dike embankments, or in the safety corridors of national power grids. They may not obscure warning notices, traffic signal lights or notices with instructions to the public. Outdoor advertisements with a large area which are inconsistent with urban master planning, the safety of society, aesthetics, the landscape and the environment are restricted in urban areas.

The duration of permits for advertisements on placards, billboards, panels and means of transportation is 3 years, but extensions are available.

The number and duration of the advertising permit and the name of the permit-holder must be stated on any advertising billboards, placards, panels, banners or the like. The number of the publishing permit, the name of the permit-holder, the name of the printer and the quantity printed must be stated on any advertising posters.
 - Advertisements at festivals, conferences, seminars, artistic performances, cultural exchanges and sporting and physical education events may not be hung, placed, affixed or erected equal to or higher than the logo or name of such program; and the size of the text of the advertisement must be smaller than the size of the letters of the name of such program.
 - Advertisements on other advertising means, such as parasols, trolleys, packaging, awnings, ribbon flags and other objects, will not require a permit but must comply with the laws on advertising and other relevant provisions of the law.

State administration of advertising

Whilst the Ministry of Culture and Information is responsible for overall State administration of advertising in Vietnam, it must co-ordinate with:

- The Ministry of Trade, with respect to advertising of commercial goods and services;
- The Ministry of Health, with respect to advertising of medical drugs, raw materials for making up medical drugs, cosmetics, vaccines, biological immunizing products, medical instruments and equipment, medical services and foodstuffs;
- The Ministry of Agriculture and Rural Development, with respect to advertising of biological products servicing plant cultivation and livestock breeding, feed for livestock, veterinary drugs, plant protection agents, fertilizer, seed and seedlings;
- The Ministry of Science and Technology, with respect to intellectual property rights.

Advertising Regulations in HCMC

At the end of the third quarter of 2002, the HCMC People's Committee issued its own sub-regulations providing for implementation of the Advertising Ordinance despite the fact that the Government has not yet issued the Advertising Decree. The Regulations on Advertising Activities in the HCMC Area issued under Decision 108-2002-QD-UB of the HCMC People's Committee dated 25 September 2002 ("the HCMC Advertising Regulations") became effective as of 10 October 2002.

In large part, the HCMC Advertising Regulations repeat the provisions of the Advertising Ordinance, but also provide for detailed restrictions on advertising which were criticized by advertisers in HCMC as impractical and excessive, including:

- Any fixed advertising means with an area over 12m² is subject to design evaluation by the competent State administrative body and issuance of a construction permit.
- Any advertisement printed on a canvass or of neon light characters affixed onto a house wall may not exceed 30% of the area of that wall.
- Any neon lighting or advertising signs attached to restaurants, cafés or business places may not exceed 1.2 x 8m.
- Only one neon light box or advertising sign may be affixed at any one place.
- Banners advertising fairs or exhibitions, cultural or artistic programs, sports or physical culture events, and advertising sponsors of social or charitable activities or of competitions may not be hung for longer than 10 days and may not exceed 1.2 x 8m.
- All advertisements must be placed at a distance of 100m from the centre of intersections and 200m from the centre of roundabouts.

The HCMC Advertising Regulations provide for advertising permits to be issued by the Department of Culture and Information (or the district people's committee, in some cases). Permit application procedures are prescribed. Permits will only be issued in accordance with the master planning for advertising in the HCMC area. The time-limit for processing a permit application depends on the proposed duration of the advertisement (if duration is 3 or less months, 5 day time-limit; if over 3 months, 10 day time-limit). Permits are valid for 1 year, subject to the condition that the advertisement must be conducted within 30 days of the permit date. Any permit issued prior to the date of effectiveness of the HCMC Advertising Regulations remains valid until the expiry date stipulated in that permit.

When the Advertising Decree is officially issued by the Government, the HCMC Advertising Regulations may require amendment for consistency.

Part 3 Did You Know?

3.1 Foreign Investment Regulations

Amendments to Decree 24-2000-ND-CP of the Government dated 31 July 2000 Providing Detailed Regulations on Implementation of the Law on Foreign Investment in Vietnam ("Decree 24") were first drafted by the Ministry of Planning and Investment in July 2002, and then revised in August 2002. Government consideration of the proposed Decree 24 amendments has long been delayed, reportedly due to the ministerial restructure in the second half of 2002 and then to the National Assembly session in November 2002.

The proposed Decree 24 amendments have now been considered by the Government and a final draft was prepared by the Ministry of Planning and Investment in February 2003. The February 2003 draft is substantially the same as the August 2002 draft (featured in the August 2002 Issue of Vietnam Legal Update), with only minor revisions. The Ministry of Planning and Investment anticipates that the February 2003 draft of the proposed Decree 24 amendments will be approved by the Government in early March 2003. We look forward to featuring the final Decree 24 amendments in next month's Vietnam Legal Update.

3.2 National Assembly Update

The Law on Accounting, the Law on Statistics, and the Law on Supervisory Activities of the National Assembly ("NA") were considered by the NA at its November 2003 Session. Although approved in principle, the Laws were scheduled for further revision prior to promulgation. From 18 to 15 February 2003, the Standing Committee of the NA met to debate whether to accept the draft revisions. The Laws are scheduled to be promulgated by the NA at its May 2003 Session.

STOP PRESS: The Standing Committee of the NA passed the Ordinance on Commercial Arbitration on 24 February. We look forward to featuring the new Ordinance in next month's Vietnam Legal Update.

3.3 Limited Liability

A joint venture enterprise ("JVE") established under the Law on Foreign Investment in Vietnam is a limited liability company. Each joint venture party is liable for the debts of the JVE up to the amount of legal capital it has undertaken to contribute to the JVE, not just the amount that it has actually contributed as at the time of the bankruptcy or liquidation of the JVE. This principle applies equally to foreign investors in a 100% foreign owned enterprise (which is also a limited liability company). This is consistent with the 1999 Law on Enterprises which governs other limited liability companies established in Vietnam.

3.4 Accounting Standards

The second batch of Vietnamese accounting standards based on International Accounting Standards was released by the Ministry of Finance on 31 December 2002. Effective as of 1 January 2003, the six new standards comprise: general standard on accounting (Standard No. 01); lease of property (Standard No. 06); impact of changes in foreign exchange rates (Standard No. 10); constructions contracts (Standard No. 15); financing costs (Standard No. 16); and cash flow statements (Standard No. 24).

The above follows the release of the first batch of Vietnamese accounting standards on 31 December 2001. Effective as of 15 January 2002, the first four standards comprised standards on inventories (Standard No. 02); tangible fixed assets (Standard No. 03); intangible fixed assets (Standard No. 04); and revenue and other income (Standard No. 14).

3.5 Refinancing Loans

Under the former Regulations on Lending by Credit Institutions to Clients issued with Decision 284-2000-QD-NHNN1 of the State Bank of Vietnam ("SBV") dated 25 August 2000 ("the former Lending Regulations"), credit institutions in Vietnam were prohibited from providing a loan for the purpose of repayment of loan principal and interest to another credit institution (article 9.2(b)).

For the last 12 months it has been unclear whether the above prohibition on refinancing loans remains in force.

The former Lending Regulations were replaced by the Regulations on Lending by Credit Institutions to Clients issued with Decision 1627-2001-QD-NHNN of the SBV dated 31 December 2001 ("new Lending Regulations"), effective as of 1 February 2002.

The new Lending Regulations no longer specify the repayment of loan principal and interest to another credit institution as one of the purposes for which loans may not be provided by credit institutions in Vietnam. Now, the prohibited purposes are more general, comprising (article 9.1):

- For the procurement of assets and for costs which will form assets the purchase and sale, transfer or disposal of which is prohibited by law;
- For making payments for transactions which are prohibited by law;
- For satisfying financial requirements of transactions which are prohibited by law.

The new Lending Regulations provide in principle for credit institutions in Vietnam to conduct loan restructuring but only in accordance with specific regulations of the SBV (article 9.2). No such specific regulations have been issued by the SBV.

Our informal enquiries with the SBV have revealed that:

- The opinion of the SBV is that credit institutions in Vietnam remain unable to make loans for the purpose of refinancing loans from other credit institutions pending issuance of specific SBV regulations on loan restructuring.
- There is some Government opposition to allowing credit institutions in Vietnam to make loans for the purpose of refinancing loans from other credit institutions and so it is unlikely that specific SBV regulations on loan restructuring will be issued in the near future.

Like many matters in Vietnam, the provision of refinancing loans by credit institutions in Vietnam (including foreign bank branches and joint venture banks) is in a legal vacuum - although there is no longer any express prohibition, there is no enabling legislation.

The provision of medium and long-term (ie over 12 months) loans by offshore foreign banks for the purpose of refinancing appears to also be in a legal vacuum. Although offshore foreign banks are not subject to the new Lending Regulations (as the new Lending Regulations only apply to foreign bank subsidiaries established in Vietnam), any foreign loan provided by an offshore foreign bank to a Vietnamese borrower is subject to regulation under Decree 90-1998-ND-CP of the Government dated 7 November 1999 on Control of Foreign Loans and Loan Repayments and Circular 03-1999-TT-NHNN7 of the SBV dated 12 August 1999 (as amended 16 November 2001) Providing Guidelines for Borrowing and Repayment of Foreign Loans by Enterprises ("Circular 03").

Circular 03 sets out the conditions which must be satisfied for foreign loans to be entered into by Vietnamese borrowers being enterprises. Where any contents of a medium and long-term foreign loan are regulated under Vietnamese law, Circular 03 requires that the contents of the foreign loan must be consistent with the applicable provisions of Vietnamese law. As onshore loans for the purpose of refinancing are regulated by Vietnamese law (even though no specific regulations have been issued), offshore foreign loans for the purpose of refinancing loans must be consistent with Vietnamese law. The legal vacuum under Vietnamese law preventing onshore loans for the purpose of refinancing appears also to prevent offshore medium and long-term foreign loans for the purpose of refinancing loans.

Circular 03 only permits short-term (ie less than 12 months) foreign loans to be entered into by Vietnamese borrowers being enterprises for the sole purpose of satisfying working capital requirements for production and business. Presumably, this prohibits short-term refinancing loans to be obtained from offshore foreign banks.

3.6 Recognition of Foreign Arbitration Awards - Appeal Successful

The mid-2002 judgment at first instance of the HCMC Supreme People's Court recognizing two foreign arbitration awards as enforceable in Vietnam has been overturned on appeal.

As reported in Part 3.3 of the July 2002 Issue of Vietnam Legal Update, the two foreign arbitration awards related to a dispute between Tyco Services Singapore PTE Ltd. ("Tyco Singapore") and Hai Van Thiess Constructors and Consulting Ltd., now known as Leighton Contractors (Vietnam) Ltd ("Leighton Contractors"), with respect to a contract entered into in October 1995 concerning the development of the Indochina Beach Hotel in Da Nang ("the contract"). The dispute was referred to arbitration in Queensland, Australia (as provided in the contract) and two arbitration awards were made in Tyco Singapore's favour in April 2000. Tyco Singapore commenced proceedings to recognize and enforce the awards in Vietnam in the HCMC Supreme People's Court in August 2001 (as Leighton Contractors' head office was located in HCMC). Following a hearing in late May 2002, the HCMC Supreme People's Court ruled that there was no legal basis to not recognize and enforce the foreign arbitration awards in Vietnam. It was the first time that a HCMC court had recognized a foreign arbitration award.

In January 2003, the HCMC Supreme Court heard an appeal by Leighton Contractors against the judgment at first instance. The appeal was allowed on a number of grounds, including:

- Under the Ordinance on Recognition and Enforcement of Foreign Arbitration Awards in Vietnam dated 14 September 1995 ("1995 Arbitration Ordinance"), a Vietnamese court may deny recognition and enforcement of a foreign arbitration award in Vietnam if such award is deemed to be contrary to the basic principles of the laws of Vietnam.

For the purposes of this case, the relevant basic principles of Vietnamese law were considered to be those enshrined in the 1992 Constitution of the Socialist Republic of Vietnam and the Ordinance on Economic Contracts dated 25 September 1989, including: the State strictly prohibits illegal business activities; an economic contract must not be contrary to law; an economic contract must not be entered into for an illegal purpose.

The contract was held to be contrary to the above basic principles of the laws of Vietnam for a number of reasons, including that Tyco Singapore did not have the capacity to enter into the contract as it had not been issued with a foreign construction contractor license by the Ministry of Construction as required by law at that time.

- Under the 1995 Arbitration Ordinance and Order 453 of the President of the State of Vietnam dated 28 July 1995 in relation to the ratification of the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitration Awards, the scope of "foreign arbitration award" is limited to arbitration awards relating to disputes arising from "commercial relations".

In light of the narrow definition of "commercial relations" under Vietnamese law at the time of the contract, the contract was held not to give rise to commercial relations between the parties. As such, the dispute between the parties was a non-commercial dispute and not within the scope of applicability of the 1995 Ordinance. Accordingly, there was no legal basis for recognizing an award relating to the contract.

- Tyco Singapore had not paid tax for which it was liable and had thereby damaged the interests of the State of Vietnam.

The official version of the appeal decision has not yet been released.

3.7 Trademark Licensing

Although frequently ignored by owners of international trademarks and Vietnamese distributors of products bearing those trademarks in Vietnam, Vietnamese regulations on trademarks require that the "use" of a trademark in Vietnam be carried out pursuant to a trademark licensing agreement which has been registered with the country's National Office of Industrial Property.

Decree 63 of the Government on Industrial Property dated 24 October 1996 (as amended 11 February 2001) defines "use" of a trademark as any one of the following acts:

- attaching a protected trademark or appellation of origin of goods to commodities, packaging of commodities, means of service, documents used for transactions in business activities;
- putting into circulation, advertising, offering and storing for sale commodities bearing a protected trademark or appellation of origin of goods;
- importing commodities bearing a protected trademark or appellation of origin of goods.

In the absence of a specific complaint, the Vietnamese authorities are unlikely to take action and impose penalties for the failure of the owners of international trademarks and their Vietnamese distributors to execute and register a trademark license agreement.

Nevertheless, significant disadvantages may arise from failing to comply with the law, including:

- (i) A trademark infringer may argue that the trademark owner has also not complied with the law, and thereby, at the very least, delay any action by the authorities to stop the infringement; and
- (ii) Failure to "use" a registered trademark during a period of five years constitutes grounds for invalidating the registration of a trademark. The requirement of use within a five year period will only be satisfied by use of the registered trademark by a licensed user. Where only unlicensed users have used the trademark in a five year period, its registration may be vulnerable to invalidation.

3.8 Enforcement of Judgments in HCMC

On 18 February 2003, the VN Express reported that over the last 10 years 50,000 court judgments in HCMC were not enforced. The VN Express article was based on a report issued by the HCMC Department of Justice ("Report").

Two reasons were given for the large number of unenforced judgments.

The first reason is that the Sheriff's Office is reportedly overworked. The Ministry of Justice emphasized that over the same 10 year period the Sheriff's Office has successfully enforced 200,000 judgments.

The second reason given for the large number of unenforced judgments was a lack of support from courts and police. The VN Express article cited cases in which the Sheriff's Office had sought clarification of judgments from the court.

The commissioning of the Report indicates that the HCMC Department of Justice is, at least, aware of the difficulty litigants face in having a court judgment enforced. Hopefully this awareness will translate into further resources being dedicated to the Sheriff's Office and greater support from the relevant supporting bodies.

However, in the interim there are a number of steps that investors can take to increase the likelihood of recovery:

1. Wherever possible investors should structure commercial transactions so that enforcement can occur offshore via a standby letter of credit with a reputable offshore lending institution. (For further information on letters of credit, see our December 2001 Issue of Vietnam Legal Update).

2. If judgment is obtained in Vietnam it is important to monitor the progress of the application once the application for enforcement is lodged to ensure that it does not get "lost" amongst the pile of applications.

3.9 Signing Contracts

A reminder to always check the signatories on contracts. A contract may be invalid and unenforceable if it is not signed by the proper representative of an organization.

The Ordinance on Economic Contracts dated 25 September 1989 and implementing Decree 17-HDBT on Economic Contracts dated 16 January 1990 strictly prescribe who has the power to sign economic contracts.

An economic contract is any written agreement or exchange of documents between legal entities or between a legal entity and the registered proprietor of a business ("contracting parties") relating to production, exchange of goods, provision of services, research and application of scientific and technical know-how; or any other agreement between such contracting parties which is commercial in nature and which clearly sets out the rights and responsibilities of each party.

Only 3 types of person have authority to sign an economic contract:

- The legal representative of a legal entity (ie the person appointed or elected to and holding the highest position of authority, usually the General Director);
- The registered proprietor of a business (ie the person who has been granted the business license, where applicable, and in whose name business registration has been carried out); or
- A person holding a power of attorney to sign the economic contract on behalf of the legal representative of a legal entity or the registered proprietor of a business. (An attorney's powers are limited as follows: he or she may only sign an economic contract within the scope of the power of attorney; may not sign where the contract is constituted by an exchange of letters or is a type which is required by law to be registered; may not delegate his or her power to anyone else.)

Where an economic contract is signed by a person without proper authority, in addition to the significant risk to the contracting party of the contract being found to be invalid and unenforceable in full or in part, the person signing without proper authority may be subject to administrative penalty or prosecution for criminal responsibility.

Part 4 Phillips Fox Publications

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| <input type="checkbox"/> | Commercial Law of Vietnam 1997 (English) | US\$20.00 |

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