



# Vietnam Legal Update

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## Part 1 Selected New Legal Instruments

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### 1.1 Foreign Employees

**Circular 04-2004-TT-BLDTBXH of the Ministry of Labour, War Invalids and Social Affairs ("MoLISA") dated 10 March 2004 Providing Guidelines for Implementation of Decree 105-2003-ND-CP of the Government dated 22 September 2003 Making Detailed Provisions for Implementation of a Number of Articles of the Labour Code With Respect to Recruitment and Management of Foreign Employees Working in Vietnam**

Effective as of 7 October 2003, Decree 105 imposed a maximum limit on the number of foreign employees who may be employed by Vietnamese enterprises operating under the Law on Enterprises, by State owned enterprises and by foreign invested enterprises. No more than 3% of the total number of employees may be foreign employees - up to a maximum of 50 foreign employees. Other employers in Vietnam (including foreign representative and branch offices) are not subject to this maximum limit but the approval of the chairman of the relevant people's committee is required for the employment of foreigners (under Circular 04, such approval must be decided by the people's committee within 15 days of application by an employer).

The cap on foreign employees has been widely criticized as draconian and counter-productive to Vietnam's efforts to encourage foreign investment and improve the management experience of Vietnamese employees. But, despite the Government's Resolution 01-2004-NQ-CP of January 2004 which attempted to soften the impact of the cap, it looks like the cap is here to stay.

Circular 04 provides detailed guidelines on how to calculate the 3% limit on foreign employees. The basic formula is as follows: Permissible number of foreign employees = Total number of employees at time of need for recruitment of foreign employee(s) x 0.03.

Of note, the capped "permissible number of foreign employees" does not include:

- foreign members of a board of management and foreign general directors and deputy general directors of Vietnamese enterprises (including foreign invested enterprises);
- foreign employees entering Vietnam to resolve an emergency situation (such as a breakdown or a technically or technologically complex situation which suddenly arises and which affects, or has the risk of affecting, production or business and which Vietnamese or foreign experts currently in the country cannot resolve);
- licensed foreign lawyers.

The "total number of employees at time of need for recruitment of foreign employee(s)" includes both foreign and Vietnamese employees.

Circular 04 re-iterates that, whatever the results of calculation of the 3% limit, the maximum number of foreign employees may not exceed 50 persons and the minimum number may be 1 person.

Circular 04 clarifies that if the formula results in a decimal number, it may be rounded up. For example:

- Enterprise A has 76 current employees when the need to recruit foreign employees arises. The calculation formula results in a permissible number of new foreign employees of 2.28 persons. This may be rounded up to 3 foreign employees permitted to be recruited.
- Enterprise B has 1767 current employees when the need to recruit foreign employees arises. The calculation formula results in a permissible number of new foreign employees of 53.01 persons. In this case, the absolute limit of 50 persons will prevail.

In the spirit of the Government's Resolution 01, Circular 04 provides for a number of exceptions to the cap, including:

- If an enterprise wishes to recruit foreigners for positions for which suitable Vietnamese candidates are not yet available and this will exceed the 3% permissible limit, it may recruit 50% more than the permissible limit provided that it obtains the written permission of the local people's committee (such permission must be decided by the people's committee within 15 days of application by an employer).
- In the case of foreign invested projects which were approved prior to the effective date of Decree 105,

- they are permitted to continue to employ foreigners according to the approved personnel plan.
- In the case of enterprises which employed foreigners prior to the effective date of Decree 105, they are permitted to continue to employ them until expiry of the relevant labour contracts/work permits, however thereafter they must comply with Circular 04.

Circular 04 also provides guidelines on the types of foreign employees within the definition of "foreigners with highly technical skills, very experienced professionally, or very experienced in production operation and management" for the purpose of satisfaction of the conditions for employment of foreign employees, as well as detailed guidelines on applications for, issuance of and extension of work permits.

Circular 04 will become effective as of 2 April 2004 and repeals Circular 08-2000-TT-BLDTBXH of MoLISA dated 29 March 2000 and Decision 311-2000-QD-BLDTBXH of MoLISA dated 29 March 2000.

**Important note:** Under Decree 105, with the exception of foreign employees who are exempt from the work permit requirement, all foreign employees in Vietnam must have (or have applied for) a work permit by 7 April. Failure to do so may result in deportation (if so proposed by the local Department of Labour).

For a detailed summary of Decree 105, see the September 2003 Issue of Vietnam Legal Update.

## 1.2 Pricing

### **Circular 15-2004-TT-BTC of the Ministry of Finance dated 9 March 2004 Providing Guidelines on Implementation of Decree 170-2003-ND-CP of the Government dated 25 December 2003 Making Detailed Provisions on Implementation of a Number of Articles of Ordinances on Prices**

Circular 15 provides guidelines with respect to stabilization of prices (including prescribed limits on price increases) of the following important and essential goods and services subject to price management by the State under the Ordinance on Prices and Decree 170: petrol, oil, liquefied gas, cement, iron, steel, rice, coffee, cotton, sugar cane, salt and some medications. Circular 15 also lists the powers and responsibilities for price management of the Government and the relevant line ministries. Circular 15 will be effective as of 6 April 2004.

For a summary of Decree 170, see Part 1.2 of the January 2004 Issue of Vietnam Legal Update.

## 1.3 Tendering

### **Circular 01-2004-TT-BKH of the Ministry of Planning and Investment ("MPI") dated 2 February 2004 Providing Guidelines for Implementation of Decree 66-2003-ND-CP of the Government dated 12 June 2003 on Amendment of the Regulations on Tendering**

Further to our summary of the new tendering guidelines in Part 1.1 of the February 2004 Issue of Vietnam Legal Update, the MPI has informed us that the information disclosure obligations introduced by Decree 66 and provided for in detail in the new tendering guidelines will not be enforced by the MPI until further notice.

#### 1.4 Investment Incentives in HCMC

##### **Decision 45-2004-QD-UB of the HCMC People's Committee ("HCMC PC") dated 24 February 2004 Promulgating Regulations on a Number of Incentives in Investment with Respect to Foreign Invested Enterprises in HCMC**

Decision 45 provides for a number of incentive investment policies for foreign invested projects engaged in 15 sectors in HCMC. Of note, Decision 45 applies *only* to foreign invested projects which are licensed after 24 February 2004.

Decision 45 provides for 3 incentive investment policies as follows:

1. Establishing a land fund so that foreign investors can easily decide to choose their investment location: District people's committees must coordinate with the HCMC Department of Planning and Architecture in order to prepare detailed planning for land, especially in suburban districts.
2. Assisting foreign investors in compensation for site clearance:
  - (i) In accordance with a commitment of the foreign investor, the HCMC PC will organize compensation and carry out the site clearance on behalf of the foreign investor. After the investment license is issued to the foreign investor, the foreign investor must repay the HCMC PC for the compensation for site clearance, plus interest at the State Bank's rate.
  - (ii) In the case where the amount of compensation for site clearance is high, the HCMC PC will consider to support the foreign investor with respect to part of such compensation, but the maximum of such support must not exceed the total land rental payable.
  - (iii) If required by the foreign investor, district PCs must negotiate the compensation amount with family households where the project is to be located, and carry out the site clearance and relocation of the family households.

This policy is consistent with the foreign investment regulations (as amended) which provides for the people's committee of the province where a foreign invested project is located to organize compensation and carry out site clearance where the foreign investor leases land from the State.
3. Reform of administrative procedures: The Investment and Trade Promotion Center ("ITPC") is the coordinating authority to provide assistance services and information to foreign investors. The HCMC Department of Planning and Investment ("HCMC DPI") is the license-issuing authority. Within 3 days from receipt of request for a decision on a particular project as submitted by the HCMC DPI, the HCMC PC must reply to the HCMC DPI in relation to the project. Within 7 days from receipt of request for investment submitted by a foreign investor, the HCMC DPI must reply to the foreign investor.

As part of the above administrative reforms and in order to assist in achieving the above ambitious licensing time-limits, the HCMC DPI is launching an online investment application option for foreign investors via [www.dpi.hochiminhcity.gov.vn](http://www.dpi.hochiminhcity.gov.vn) as from 1 April 2004. Foreign investment projects in HCMC with a capital of less than USD5 million will be able to apply for their investment license by providing the information requested in an online form. The HCMC DPI will check that information and reply within 5 days. When the foreign investor presents the original docs to the HCMC DPI for cross checking, if the information is complete, the investment license will be issued immediately.

Further, the ITPC has recently initiated its Business to Government Online Dialogue System, where businesses can ask questions of various participating government departments, and receive answers online, purportedly within 5 days. Answers provided online will have legal validity, as such answers will have been reviewed by at least a deputy director of the relevant department before being posted. Questions may be asked in either Vietnamese or English (but questions in English may take longer to answer than the expected 5-day turnaround). Questions may be kept confidential and the reply will only be available to the enquirer. However, if confidentiality is not requested, the answers become part of a growing database of answered questions, fully searchable by other registered users. The agencies and departments currently available to answer questions on-line are: Southern Representative of Ministry of Planning and Investment, Southern Representative of Ministry of Trade, HCMC DPI, Department of Trade, Department of Tax, Department of Customs, Department of Urban Design and Architecture, Department of Natural Resource and Environment,

Department of Science and Technology, Department of Construction, Department of Culture and Information, and HEPZA.

## 1.5 **Banking Legislation in 2004**

### **Decision 109-QD-NHNN of the State Bank of Vietnam ("SBV") dated 30 January 2004 on Approval of Program for Formulation of Legal Documents of the SBV in 2004**

Legislation to be issued in Quarter 1 of 2004 includes:

- Regulations on currency brokerage;
- Decision on regime of statistics and reporting applicable to units under the SBV and credit institutions;
- Regulations on credit information activities;
- Decision on method of determination of total foreign loan limit
- Guidelines on forex management in respect of sale and purchase of securities, capital contribution and purchase of shares of foreign investors in Vietnamese enterprises.

Legislation to be issued in Quarter 2 of 2004 includes:

- Working regulations of the Governor of the SBV;
- Regulations on use of funds in organization of tendering and payment of Government bonds issued through SBV;
- Decision on deposit, management and payment of valuable papers of credit institutions to participate in monetary market transactions with SBV;
- Guidelines on procedures for cheque payment via payment service suppliers being organizations;
- Guidelines for implementation of Decree 159 on supply and use of cheques;
- Decision on foreign exchange transactions (replacing Decision 17-1998-QD-NHNN dated 10 January 1998);
- Regulations on purchase of shares of foreign investors in shareholding commercial banks;
- Guidelines on carrying, remittance and purchase of foreign currency to take overseas of individuals.

Legislation to be issued in Quarter 3 of 2004 includes:

- Regulations on trust transactions;
- Decision providing for cash management for clients;
- Decision on regime for accounting vouchers in the banking industry;
- Guidelines on management of gold trading activities.

Legislation to be issued in Quarter 4 of 2004 includes:

- Circular on organization and operations of joint venture banks;
- Regulations on archiving accounting documents in the banking industry;
- Regulations on ensuring safety and confidentiality of the information technology system in the banking industry;
- Circular guiding Decree on forex management.

Legislation to be issued but the time for issuance is not yet determined includes:

- Decision on amendment of and addition to Decision 1287-2002-QD-NHNN dated 22 November 2002 on promulgation of issuance of valuable papers of credit institutions to raise domestic funds (guiding article 46 of the Law on Credit Institutions after amendment by the National Assembly in May 2004);
- Decision on discount, re-discount and pledge of short-term valuable papers (guiding article 57 of the Law on Credit Institutions after amendment);
- Decision on amendment of and addition to a number of articles of the regime for delivery, preservation and transport of cash, valuable assets and valuable papers.

## 1.6 Arbitration

### **Decree 25-2004-ND-CP of the Government dated 15 January 2004 Making Detailed Regulations to Implement a Number of Articles of the Ordinance on Commercial Arbitration**

Representing a vast improvement in Vietnamese arbitration law, the Ordinance on Commercial Arbitration was passed by the Standing Committee of the National Assembly on 25 February 2003 and became effective as of 1 July 2003.

Almost one year later, detailed provisions for implementation of a number of articles of the Arbitration Ordinance have finally been issued under Decree 25 and became effective as of 6 February 2004.

Of note, Decree 25 provides for commercial arbitrators to have jurisdiction to resolve disputes arising from the commercial activities *when the parties in dispute are business individuals or business organizations*. Under the Arbitration Ordinance, commercial activities is defined widely as "the performance of one or more commercial acts by a business organization or individual, including the purchase or sale of goods or the provision of services; commercial distribution, representation or agency; bailment; leasing out or leasing; hire-purchase; construction; consultancy; technical activities; licensing; investment; finance and banking; insurance; exploration and exploitation; transportation of goods and passengers by air, sea, rail or road; and other commercial acts in accordance with law".

Decree 25 allows for disputing parties to reach an arbitration agreement before or after the occurrence of a dispute.

Decree 25 details the procedures for establishment, registration and termination of arbitration centres as well as the procedures for establishment of branches and representative offices of arbitration centres. Licensing fees are prescribed. Licensing of arbitration centres outside Hanoi, Ho Chi Minh City or Da Nang will depend on the status of socio-economic development of the relevant locality.

Decree 25 also provides in detail for the fees for arbitration; dealing with breaches; and State administration of arbitration.

With a broader range of commercial disputes able to be arbitrated in Vietnam and significantly improved procedures for arbitration of disputes involving foreign elements as well as for enforcement of awards, arbitration in Vietnam may emerge as a preferred option for dispute resolution. However, the first successful enforcement of a Vietnamese arbitration award issued by a foreign arbitrator will be the true indicator.

If you are interested in a detailed summary of the Arbitration Ordinance and Decree 25, feel free to contact [maureen.mclaughlin@phillipsfox.com](mailto:maureen.mclaughlin@phillipsfox.com).

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## Part 2 Features

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### 2.1 Construction Law

At its 4<sup>th</sup> session on 26 November 2003, the National assembly passed Law 16-2003-QH11 on Construction (the "Law"). Effective as from 1 July 2004, this is the first full Law on Construction in Vietnam. Prior to the Law, construction activities were conducted pursuant to an array of decrees, decisions, circulars and official letters. Although the Law now provides an overall structure for conducting construction activities in Vietnam, it still requires issuance of implementing guidelines to fill-in a number of sections left unaddressed by the Law.

#### Objectives

The Law governs construction activities and the rights and obligations of both domestic and foreign organizations and individuals investing in construction of works and engaging in construction activities. The Law attempts to regulate the continuity of construction planning and the responsibility for such planning. In fact, responsibility is a key theme throughout the Law; ensuring that all persons engaged in various aspects of construction activities are duly registered (where applicable), possess the requisite capabilities to undertake their respective tasks and are held accountable for their performance of such tasks. This accountability also extends to those investing in construction works and those approving construction activities. The Law provides for compensation to be paid by those who cause damage to the State or people by failing to exercise proper approval (in the case of decision-makers) or proper competence (in the case of those engaged in construction activities).

#### Definitions

As defined in the Law:

*Construction activities* comprises formulation of construction master plans, formulation of investment projects for construction of works, construction survey design of construction of works, execution of building works, supervision of execution of building works, management of investment projects for the construction of works, selection of contractors in construction activities and other activities related to construction works.

*Construction works* means a product of labor and of building materials and equipment installed in the works, attached to a fixed area of land which may include sections above and under ground or water surfaces, and which is building in accordance with a design. Construction works includes public works, residential housing, industrial works, traffic works, irrigation systems, energy works and other works.

*Execution of building works* comprises construction of the following works and installation of equipment at such works: new works; works being repaired, up-graded, relocated, rebuilt, revived or dismantled; and works under warranty or works being maintained and serviced.

*Investment project for construction of works* means a collection of proposals relating to expenditure of capital to build new works or to extend or renovate existing works in order to develop, maintain or improve the quality of the works or the quality of a product or service within a certain period of time. Investment project for the construction of works shall include an explanatory section and a preliminary designs section.

*Investor in construction of works* means a capital owner or a person assigned to manage and utilize capital for investment in construction of works.

#### A. Regulatory framework for construction activities

1. Types and levels of construction works: The Law specifies that construction works will be distinguished by type and by level; level being determined according to the scale of the works, technical requirements, materials used for construction and the expected life span of the finished works. There are to be 5 levels for each type of construction work: special, level 1, level 2, level 3, and level 4. Although the Law specifies the number of levels, it does not yet specify the types of construction works, nor details as to

what level is assigned to a particular construction works. The Law, as is the case with many provisions contained within the Law, refers to forthcoming government guidelines that will provide more specificity.

2. Regulations and standards: The Law provides that construction activities must be conducted pursuant to regulations and standards "promulgated or recognized" by the "State administrative body for construction" (recognizing that projects are administered by different authorized State bodies at different levels under the Law). The Law permits the use of foreign construction standards for construction activities provided such standards are approved by the relevant authorized State body for construction.
3. Capability: The Law requires that individuals engaging in constructions activities have a "capability for construction practice". Capability is determined based on professional training, experience, and ethics. If registration for a particular expertise is required, then such individual must also be registered. Capability for construction activities pertains to organizations, and is determined based on individuals with construction practice capability within such organization and based on the organization's experience in construction activities, financial capacity, equipment and management capability. Further, foreign organizations and individuals engaged in construction activities must be granted an operating license by the State administrative body for construction.
4. Policy of encouragement: The Law encourages construction activities to be planned to use progressive scientific technologic advances in construction; to use new building materials; to economize use of natural resources; to protect the environment; and for development in "remote and distant" areas and in flood prone regions.
5. Conduct prohibited in construction activities:
  - (a) Constructing works in areas in which construction is prohibited;
  - (b) Building works contrary to master plans or in violation of construction;
  - (c) Failing to comply with the conditions on capability for practicing as a construction contractor or capability for construction activities;
  - (d) Building works which fail to comply with construction regulations and construction standards;
  - (e) Breaching safety and environment hygiene regulations;
  - (f) Building on public space, public areas, pathways or other expanses which are already the subject of approved and proclaimed construction master plans;
  - (g) Giving or receiving bribes in construction activities.

#### B. Construction master planning

One of the essential features of the Law is its intent that construction activities be organized and planned rationally and be consistent with earlier planning. The Law provides that Construction master plans be formulated at various levels for 5 and 10 year periods to ensure "long-term developmental direction". The State guarantees to budget funding for the formulation of such master plans and will raise funds from other sources if necessary. The State has charged people's committees at all levels to formulate construction master plans within their administrative boundaries.

Construction master plans are classified into three categories as follows:

- (i) Regional construction master plans: For key areas and inter-provincial areas, the Ministry of Construction formulates the tasks, for such planning, obtains opinions of concerned ministries and then submits the plan to the Prime Minister for approval. For provinces and cities under central authority, the people's committee for such province or city ("Provincial PC") formulates the regional construction master planning and submits the plans to the People's Council for approval. The contents and requirements for such plans are set forth in the Law. Once approved, amendments to regional construction master plans are only permitted if: there is a change in the master plan for overall socio-economic development of the region, in the master plan for development of a branch in the region, or in the strategy for national defense and security; or there is a change in geographical, natural or socio-economic conditions or in population numbers.

- (ii) Urban construction master plans ("UCMPs"), including general and detailed UCMPs: The Ministry of Construction formulates general UCMPs for construction of new inter-provincial urban areas, high-tech zones and special economic zones, and submits same to the Prime Minister for approval after obtaining opinions from concerned ministries, branches and PCs. Provincial PCs formulate general UCMPs for areas of Special category, category 1, category 2, and category 3. The plans are submitted to the PC to pass and then, with the exception of category 3 plans, the plans are sent to the Ministry of Construction for evaluation and onto the Prime Minister for approval. Category 3 plans can be approved by the People's Council. PCs of districts, townships and provincial towns ("District PCs") formulate general UCMPs for urban areas of categories 4 and 5. The plans are then submitted to the District People's Council to pass and then to the Provincial PC to approve. Amendments may only be made to general UCMPs in limited circumstances prescribed in the Law.

District PCs are responsible for formulating detailed UCMPs consistent with the approved general UCMPs. The required contents of a detailed UCMP are specified in the Law. Provincial PCs have authority to approve detailed UCMPs for special, category 1, category 2, and category 3. District PCs are authorized to approve category 4 and category 5 detailed UCMPs. Amendments to detailed UCMPs can be made only in limited circumstances prescribed in the Law.

The Law contains provisions for urban design with respect to general UCMPs (eg. prescribing height restrictions for buildings) and detailed UCMPs (eg. specifying colours of works on each street route). The specific regulations on urban design are to be provided later by the Government.

- (iii) Master plans for construction of rural residential areas: Provincial PCs are required to formulate the master plan for construction in rural residential areas. The plan is submitted to the Provincial People's Council to pass and in turn submitted to the District PC to approve. Plan contents are prescribed in the Law. Again, plans may only be amended in limited circumstances, as provided for in the Law.

Once the competent State body approves a construction master plan, all level PCs (Provincial and District) have 30 days to proclaim a detailed construction master plan within their respective administrative boundaries. The contents for such proclamation are prescribed by the Law. For proclamation of regional and general construction plans, the contents of such proclamations are to be determined by the person authorized to approve the related plan. Detailed master plans must be implemented within 3 years from the date of proclamation. The person who authorized the plan is responsible to take measures to ensure implementation of such plan. Any plan not implemented within such 3 year period must be amended or rescinded and re-proclaimed again in accordance with the proclamation process described above.

Each relevant administrative body for construction is required to provide information to investors relating to the construction master plan under its authority. (Other management obligations of an administrative body for construction are detailed in the Law.)

#### C. Investment Projects for Construction of Works ("IPCW")

1. General requirements: The requirement for IPCWs vary according to their scale and nature, and the source of invested capital. A small-scale IPCW or one involving buildings for religious works (or other works as stipulated by the Government) need only formulate an eco-technical report. The contents of such report are set forth in the Law. An IPCW that entails a large investment must submit an Investment Report to the competent authority requesting permission before formulating the IPCW. The contents of the Investment Report are described in the Law.

An IPCW that uses capital of foreign investors additionally must ensure that calculations on the cost of construction comply with fixed levels and eco-technical norms issued by the relevant State administrative body for construction. An IPCW which uses ODA funding must ensure prompt reciprocal capital.

Except as noted above, an IPCW generally must contain two main elements: an explanatory statement and preliminary designs.

2. Evaluations of IPCWs and investment decisions: The Law requires that each IPCW be evaluated in accordance with Government regulations before an investment decision can be made. Important national IPCWs must first be evaluated and advocated by the National Assembly before being submitted to the Prime Minister to make an investment decision. The Law provides that forthcoming regulations will specify the process for evaluation and investment decision making with respect to all other IPCWs.
3. Management of IPCWs: May occur in one of two forms: (i) either the investor in construction of works hires a consultancy organization to manage the project; or (ii) such investor undertakes to directly manage the project. If an investor chooses the latter form, such investor must establish a management board, which will be responsible before the Law for decisions made with respect to the IPCW.
4. Construction survey: The Law sets forth the contents required in a construction survey, the required qualifications of persons who conduct construction surveys, and the rights and obligations of such survey contractors.
5. Design of construction works: The Law regulates the design of construction works and those contracted to render such design work. Among other things, the Law requires that such designs conform to the applicable general master plan, the landscape, regulations on architecture, and with the IPCW.

Design of construction works comprises three steps: preliminary designs, technical designs, and design drawings for execution of building works. The number of design steps depends on the nature and scale of the particular construction works. In a 2 or 3 step design implementation, each step must be approved before undertaking the next step.

One-step design requires only design drawing for execution of building works - applicable to construction works of small-size where only an eco-technical report is required. Two-step design requires preliminary design and design drawings for execution of building works - applicable when an IPCW must be prepared. Three-step design requires preliminary design, technical design, and design drawings for execution of building works - applicable to large scale and complex IPCWs.

The Law encourages selection of an architectural design through tender but only mandates use of such tender process if the IPCW is for headquarters of State agencies (district level and above), cultural buildings, sports buildings, and other public works (all of large scale), and special architectural works.

The Law also guarantees the copyright of the author of the selected design plan, and offers priority to such author to conduct the further design steps, if qualified by capability of practice.

6. Evaluation and approval of designs: The State administrative body for construction evaluates preliminary designs at the time it approves the IPCW. The investor in the construction works organizes evaluation and approval of subsequent design steps, not inconsistent with the preliminary designs.

#### D. Construction works

1. Construction permits: With the exception of a limited number of works (such as State secret construction works, emergency construction works, and other small-scale construction works described more particularly in the Law), an investor in construction works must obtain a construction permit prior to commencing construction works.

The Law sets forth the contents of the Application file and conditions that must be satisfied in order to obtain the construction permit.

The authority to issue construction permits depends on the size, type and location of the particular construction works, as illustrated in the chart below. Permits not issued or denied within the required time-limit are deemed to be approved.

Permit-issuing authority	Construction works	Time-limit for issuance
Provincial PC	Large scale Special architecture Religious works Works within their administrative boundaries	Within 20 days
District PC	Urban areas and commune areas within their administrative areas	Within 20 days
Commune PC	Separate dwelling houses in rural residential areas under approval construction master plan	Within 10 days

2. Site clearance: A plan for site clearance for construction works must be prepared and included with the IPCW for approval at the time the IPCW is evaluated and approved. If a site clearance plan includes resettlement, a resettlement plan must also be included. Payments for site clearance may be in one or more of the following forms: (i) payment of money; (ii) land use right; or (iii) residential housing ownership, but must be subject to the approval by a compensation council for site clearance. Persons breaching this provision to make compensation for site clearance outside the framework established by the Law risk criminal prosecution in addition to other penalties.

#### E. Execution of building works

Execution of building works is permitted to begin once:

- (a) There is a surface area for construction ready to be handed over.
- (b) There is a construction permit.
- (c) There are approved design drawings for execution of building works.
- (d) There is a building contract.
- (e) There are capital funds to ensure the building schedule in accordance with the approved building schedule in the investment project for construction of works.
- (f) There are measures to ensure safety and environmental hygiene during the construction process.
- (g) With respect to new urban areas, the whole or each part of technical infrastructure works has been completed.

All building sites must display contact information of the investor, head of building site, design contractor, and supervisor of the execution of building works. In addition, the site shall display a notice board that lists the commencement and completion dates and amount of total invested capital.

Contractors for execution of building works must provide a warranty for the constructed works. The warranty period will be determined by the Government in later guidelines.

The Law provides that in the below circumstances construction works shall be dismantled:

- (a) in order to conduct site clearance for construction of new works;
- (b) when construction works which are in danger of collapse adversely impact on the community and adjoining works;
- (c) when the construction works are built in an area in which construction is prohibited;
- (d) when the construction works are contrary to construction master plans, were built without a construction permit or are incorrect in terms of the provisions of an issued construction permit;
- (e) other circumstances as stipulated by law.

#### F. Supervision

All construction works must be under a supervisory regime that begins immediately from the commencement date of the construction of works. Investors in construction works may either conduct the supervision themselves (if he or she has the requisite capability to supervise) or hire a consultant supervisor.

#### G. Selection of contractors

The selection of contractors pursuant to the Law must also comply with the Laws on tendering but it is unclear from the Law how the laws on tendering will precisely accord with the Law. The Law provides for four forms of selecting contractors in construction activities:

- (a) Open tendering is required for selection of the contractor for execution of building works.
- (b) Limited tendering is used for selecting a construction consultancy contractor and a contractor for execution of building works with high technical requirements.
- (c) Contractors for smaller works and items of building works may be appointed by the investor in construction work or the person making the investment decision (state).
- (d) General contractors in construction activities and design contractors may be selected in accordance with the provisions set forth in the Law.

#### H. Contracts

Contracts in construction activities must be prepared in writing and must comply with the Law and all other relevant laws. The Law recognized that contracts for construction activities can be quite varied and set forth only basic items that must be contained in such contracts.

Construction bonuses and penalties on construction works funded with state capital are limited. A bonus shall not exceed 12% of the value on the profitable part of the contract and penalties cannot exceed 12% of the value of the contract that is breached.

Contract disputes are required to be settled first by negotiation before proceeding to arbitration or court action.

## 2.2 Residential Housing Projects

Below we consider the issues relevant to whether a business co-operation contract ("BCC") might be a better vehicle than a joint venture ("JV") for residential housing for-sale projects in Vietnam ("housing projects").

Can the foreign party to a BCC be issued with a land use right certificate ("LURC")? The new Land Law dated 26 November 2003 and effective 1 July 2004 ("new Land Law") stipulates that where the user of a parcel of land comprises a number of organizations, a LURC shall be issued to *each* organization which is a land co-user. Further, the new Land Law provides that foreign organizations which lease land to carry out investment projects will be issued LURCs. These provisions suggest that a LURC may be issued to each of the parties to a BCC for the land to be developed by such BCC.

However, in practice, foreign parties to BCCs for housing projects cannot be issued with LURCs. We have discussed the matter with officials of a number of relevant bodies (including Ministry of Planning and Investment, Ministry of Natural Resources and Environment, and HCMC Department of Planning and Investment) and their answer is that the LURC must remain, or be issued to, the Vietnamese party (not the foreign party).

One possible way to mitigate against the risks associated with the foreign party to a BCC for a housing project not being able to own, or have any interest in, the land use rights is to ensure that the Vietnamese party is not issued with any formal rights in respect of the land, principally the LURC. It may be possible for the land to remain with the State and for the parties to develop it in accordance with their BCC, until the State issues the land use rights directly to buyers following sales of villas/apartments. However, this model does not appear to have been accepted in practice yet, and it obviously restricts bank-financing of the development phase.

Can the foreign parties to a BCC mortgage their land use rights? Decree 24 of the Government dated 31 July 2000, as amended 19 March 2003 specifically permits foreign invested enterprises (including JVs) to mortgage land use rights and associated assets at credit organizations operating in Vietnam. And Vietnamese parties to BCCs may do so in accordance with the new Land Law. However, the fact that foreign parties to BCCs cannot hold land use rights means that they cannot mortgage them (or, effectively, any assets on the land).

Will a BCC offer a simpler process (than a JV) for transferring interest in land to the buyers? The legislation for selling villas/apartments is incomplete. In practice, a "giay hong" (certificate of house ownership and land use rights) will not be issued to buyers immediately upon completion of each sale. In practice, "giay hong" are unlikely to be issued to buyers until all the villas/apartments in a certain block or area have been sold.

Since the LURC probably needs to be in the name of the Vietnamese party, the procedure for clearing land, obtaining architecture/construction permits, and communicating with local authorities should be simpler. However, apart from these administrative advantages, there is no legal reason why the process for transferring an interest in land to buyers will be any simpler in the case of a BCC. In either case, the land use rights must revert to the State before they can be issued to buyers.

Will the parties to a BCC pay land rental before/after selling villas/apartments? In cases where the Vietnamese party to a BCC/JV has contributed capital to the BCC/JV in form of the value of land rental, the BCC/JV is not liable to pay land rental (under Decision 189 of the Ministry of Finance dated 24 November 2000 ("Decision 189")). In such cases the Vietnamese party remains liable to pay either the land rental or land tax.

Under Decision 189, land rental must be paid in respect land leased for building houses for sale up to the time that *the houses are sold*.

The new Land Law stipulates that "foreign organizations" (probably meaning JVs and 100% foreign owned enterprises) must *prepay land rental for the whole lease duration* in order to be able to build houses for sale. The new Land Law only contemplates cases of foreign invested enterprises selling residential housing where such enterprises have fully prepaid the land rental for the land on which the residential housing is constructed. Query whether housing projects where land has been contributed by the Vietnamese party will have the same

right to sell houses (*without* prepayment of land rental for the whole lease duration). The law is ambiguous and requires clarification. If the answer is yes, BCCs/JVs where the Vietnamese party contributes land will be the preferred vehicles for housing projects because they avoid the obligation to pay (i) land rental for the whole lease duration and (ii) land use fees ("LUF") (see below).

Generally, the Vietnamese party must (i) pay LUF, (ii) prepay land rental, or (iii) receive assignment of land, in order to contribute such land to the BCC/JV (according to the new Land Law).

Will a BCC have to pay LUF upon selling villas/apartments? The financial history of a parcel of land (and probably the form of investment vehicle) will affect whether LUF will be paid upon issuance of "giay hong" to the buyers. There are two circumstances to note:

- (i) If LUF was already paid prior to the BCC/JV, it is likely that there will be no liability of LUF upon issuance of "giay hong".
- (ii) If LUF was *not* paid prior to the BCC/JV, either the sellers (under Decree 71 of the Government 5 October dated 2001 ("Decree 71")) or the buyers (under Decision 189) are liable to payment of LUF upon issuance of "giay hong".

Note that all housing projects which are invested/developed by Vietnamese organizations are entitled to deduct up to either 90% (under Decree 38 of the Government dated 23 August 2000 ("Decree 38")) or 100% (under Decree 71) of LUF against *compensation costs*, while there are only a few foreign invested housing projects which qualify as incentive projects and which are eligible to deduct LUF against *already-paid land rental* under Decree 71. Since in the case of a BCC the LURC is in name of the Vietnamese party, it is arguable that the housing project is entitled to the same preferential treatment offered to Vietnamese organizations, being (i) LUF deductibility against compensation costs; (ii) reduction of LUF; and (iii) deferred payment of LUF (under Decree 38 and Decree 71). However, this may be not an advantage in cases where the Vietnamese party received an assignment of, or paid LUF for, the land prior to the BCC.

Will a BCC have any liability to the housing project after villas/apartments are sold? Is the duration of a BCC likely to be shorter than that of a JV? In most case, sellers would not wish to have any liability on housing projects after villas/apartments are sold (ie liability for land fees/taxes, infrastructure maintenance, security, etc). Given the "flexibility" and lack of legislation on BCCs, termination of a BCC after all houses are sold may be more easily accepted by the relevant authorities. A JV may, on the other hand, be required to continue its existence until expiry of its licensed duration. Ultimately, the situation will depend on the term of the contract and, more importantly, the investment license.

In respect of duration, both BCCs and JVs can be for up to 50 years. In practice, BCCs usually have a shorter duration and are terminated upon achievement of all agreed/licensed objectives.

Will the foreign parties to a BCC receive better CIT treatment than under a JV? There is no distinction between BCCs and JVs in regard to determination of CIT treatment (ie rate, and period of exemption and reduction).

How do the parties manage/operate a BCC? There is much less regulation of BCCs than JVs. BCCs can, therefore, be more "flexible" than JVs to the extent that the BCC parties are free to determine their respective rights and duties and the BCC is not required to have a charter. In practice, authority to operate a BCC is often handled by one party to the BCC but such arrangement must be agreed in detail the BCC. Decisions made by one party cannot bind the other party unless pre-agreed in the BCC.

A BCC does not have a board of management ("BOM") or a general director. But the parties may agree to establish a "coordination board" to implement the BCC. Duties and powers of the "coordination board" need to be agreed by the parties. The BCC cannot have a seal, making operation of the BCC reliant on the legal status of the Vietnamese party.

In addition to the "coordination board", the foreign party may also establish an "operating office" in Vietnam to represent itself in performing the BCC. The "operating office" may have a seal (to be used in limited circumstances), a bank account, employ employees, sign contracts and conduct business activities within the scope of rights/obligations set out in the Investment License or the BCC.

However, as a BCC has no BOM or general director, it may become difficult for foreign investor who is the majority investor to exercise any control. For large projects requiring phased development, it may be difficult to ensure that the land will be available on schedule (especially when land values increase).

Can a party to a BCC assign its capital? The parties to a BCC/JV may assign their interest/capital in the BCC/JV and such assignment is subject to approval of the licensing authorities and corporate income tax on any capital gain.

Is there a simpler process for obtaining the Investment License for a BCC? There is no significant difference.

Are there any BCCs engaged in housing projects? How do the Vietnamese authorities treat BCCs in comparison with JVs? To date, there are approximately 10 licensed BCCs and 2 licensed JVs engaged in housing projects in Vietnam. The 2 JVs are very large projects (Ciputra in Hanoi and Phu My Hung in HCMC). Apart from Thuan Kieu Plaza, the other BCCs are small/medium scale projects located in HCMC. Of these, half of the BCCs have been terminated by agreement of the parties or by decision of the licensing authority before implementation. The above statistics suggest that, at least in the past, both investors and the licensing authorities have generally preferred BCCs to JVs for housing projects. Since the BCC is not a legal entity, when it encounters difficulties, there is a risk that the authorities will not be as motivated to assist the foreign party as they would be to assist a JV.

#### Conclusion

A BCC does offer a number of "pros" including: simpler administrative procedures (eg land clearance, LURC, architecture/construction permits, communication with relevant authorities, etc); easier to terminate when all villas/apartments are sold; and possibility to obtain LUF deductibility. However, a BCC also suffers some "cons" including: disadvantage for the foreign investors in management as they have no authority over the Vietnamese party and no control/rights over the land; impossibility to mortgage land use rights; and risk of non-support by the authorities.

The cons generally outweigh the pros, but which of a BCC/JV is preferable will depend on the circumstances of each individual housing project (including capital, phasing of development and duration). As a general rule, if the duration of a housing project is short and its capital is small, the BCC may be a better vehicle for investment in a housing project. However, if the project is large and requires long term development, the JV would usually be the better choice.

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## Part 3 Did You Know?

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### 3.1 National Assembly Update

In early March, the National Assembly's Standing Committee ("NASC") met to discuss the draft Ordinance on Anti-Dumping, as well as draft Law on Electricity and draft revised Ordinance on Income Tax of High Income Earners. The NASC passed the revised **Ordinance on Income Tax of High Income Earners** in the last week of March and the official text is expected to be signed and sealed in early April.

According to Vietnamese newspaper reports, nearly all NASC delegates agreed the **Ordinance on Anti-Dumping** should be passed quickly, but many were concerned that the draft does not specify the body responsible for anti-dumping investigations or its status. Reportedly, the Ministry of Trade ("MoT") is planning to propose that a *General Department* on Anti-Dumping be established under the MoT. Currently, Decree 29 on the organizational structure of the MoT provides for a new *Department* to be established, which is expected to have responsibility for dumping, competition and MFN.

In mid-March, the NASC debated Draft 9 of the proposed **Law on Competition** in preparation for its submission to the May 2004 Session of the National Assembly ("NA") for initial consideration. The Law is scheduled for further consideration and promulgation at the NA's November 2004 Session. For brief commentary on Draft 9, see Part 3.2 of the January 2004 Issue of Vietnam Legal Update.

The May 2004 Session of the NA will be held from 11 May to 12 June. The NASC has confirmed that 7 laws will be passed, including a consolidated Civil Procedure Code, amendments to the Law on Credit Institutions (expected to allow for establishment of 100% foreign owned banks in Vietnam) and revised Law on Business Bankruptcy. In addition to the Law on Competition, 5 other draft laws will be considered at the May 2004 Session, including the Law on Electricity and amendments to the Law on Publications, the Law on Education and the Law on Forest Protection and Development.

At the NA's November 2004 Session, a revised **Commercial Law** is scheduled for initial consideration (and expected to be further considered and promulgated at the NA's May 2005 Session). The MoT is expecting to finish its 3rd draft of the revised Law in early April. The revised Commercial Law will provide in principle for foreign investment in the trading and distribution sector. The MoT has confirmed that drafting of the proposed Government Decree to provide in detail for foreign investment in the trading and distribution sector has not progressed beyond its rough sketch decree submitted to the Office of Government in 2001 (see the August 2002 Issue of Vietnam Legal Update).

In order to keep up with the NA's ambitious legislative schedule in 2004-2005, the Government has recently directed various ministries to expedite the drafting of the laws scheduled for initial consideration at the NA's November 2004 Session as follows:

- The Ministry of Health must submit its draft of the Law on Pharmacy to the Government by mid-March for submission to the regular Government meeting in April 2004 for Government approval of the draft;
- The Ministry of Transport and Communications must submit its drafts of the Law on Vietnamese Railways and the **Maritime Code (Amended)** to the Government by mid-April for submission to the regular Government meeting in May 2004 for Government approval of the drafts;
- The Ministry of Foreign Affairs must submit its draft of the Law on Signing and Implementing International Treaties to the Government by mid-April for submission to the regular Government meeting in May 2004 for Government approval of the draft;
- The Ministry of Justice must submit its draft of the **Civil Code (Amended)** to the Government by mid-May for submission to the regular Government meeting in June 2004 for Government approval of the draft.

### **3.2 Corporate Income Tax - You can't have your cake and eat it too**

Many foreign investors in Vietnam are aware that they are entitled to protection from changes in law that adversely affect the preferential treatment stated in their investment licenses (often most relevantly, preferential corporate income tax ("CIT") treatment). They are also aware that if a change in law offers more favourable preferential treatment than that stated in their investment licenses, they are entitled to treatment under the new law, subject to applying to the licensing authority for an amendment of their investment license (see Article 21a of the Law on Foreign Investment, Article 121 of Decree 24, Article 31.3 of the Law on CIT, and Article 50.2 of Decree 164 on CIT).

What many investors may not be aware of is that, according to recent cases, some licensing authorities appear to take the view that if an investor wishes to take advantage of a favourable change in law in relation to part of their CIT treatment, then that law will be applied to the whole of their CIT treatment. For instance, if an investor is currently entitled under its investment license issued in 1999 to the then standard CIT rate of 25%, but is now entitled under Decree 164 to the 20% rate for 10 years, if the investor applies for an amendment of its investment license to reflect this change, then the new standard CIT rate of 28% under Decree 164 will be stated to apply from the expiry of the 10 year period, not the former 25% rate currently stipulated in the investment license. Similarly, periods of exemption from and 50% reduction of CIT will be reassessed under the new law.

Even more surprisingly, officials at one licensing authority have apparently said that if an investor applies to amend its investment license in order to take advantage of the abolition of profit remittance tax under Decree 164 (and most existing investors would be entitled to do so), then Decree 164 will also be applied to reassess the CIT treatment stated in the investment license.

These cautionary tales suggest that it is important for any investor contemplating an amendment of its investment license to check first with the licensing authority as to the applicable CIT treatment.

According to other authorities, investors do not need to apply for an amendment of their investment license in order to take advantage of the recent abolition of profit remittance tax. Perhaps this is because such abolition is not a form of "more favourable preferential treatment" requiring license amendment in order to be enjoyed.

In any case, investors are already remitting profit this year without paying profit remittance tax. But presumably investors will want to amend their licenses to remove the reference to profit remittance tax in due course, as a matter of good corporate housekeeping. Any buyer of their business would probably query the reference to profit remittance tax.

### **3.3 Foreign Invested Shareholding Companies - Update**

The official deadline for applications for conversion of foreign invested enterprises into foreign invested shareholding companies of 25 March 2004 has now passed. The Ministry of Planning and Investment ("MPI") has confirmed that it has received 7 applications so far. For 2 of these applications, the MPI is waiting on supplementary information. All 7 applications are expected to be submitted to the Prime Minister for approval to participate in the first round of pilot conversions. The MPI is hoping to receive at least 3 more late applications before 25 May 2004 (the deadline for selection of the participants in the first round of pilot conversions). So the unofficial deadline for applications now appears to be 25 May. For a summary of the recent Circular 08 on pilot conversions into foreign invested shareholding companies, see Part 1.1 of the January 2004 Issue of Vietnam Legal Update.

### **3.4 Confidentiality Obligations of Employees**

Under Vietnam's Labour Code, disclosure of business or technological secrets of an employer may constitute a ground for dismissal of an employee. Further, an employee who has specialized or highly technical skills may be liable for payment of compensation for damage incurred from his or her disclosure of the business or technological secrets of his or her employer.

Whilst terms and conditions in relation to confidentiality of business or technological secrets are not mandatory contents of a labour contract under the Labour Code, such terms and conditions are required to be included in an employer's internal labour rules.

In Official Letter 4230 dated 26 November 2003, the Ministry of Labour, War Invalids and Social Affairs has confirmed that agreements in labour contract between employers and its employees in relation to keeping business or technological secrets confidential do not, of themselves, contradict the labour laws. Further, in the event of early termination of a labour contract, such terms and conditions will remain binding. Of note, any subsequent dispute in relation to the confidentiality terms will be a civil dispute to be dealt with by a civil court (not a labour dispute).

### **3.5 VAT - Exported services**

With the exception of machinery repair services and labour export services, other services which are provided directly to organizations and individuals in foreign countries and consumed outside the territory of Vietnam are subject to VAT at the rate of 0% as of 1 January 2004 under the new VAT regime. Under the previous VAT regime, exported services were not subject to VAT. (Official Letter 2581-TC-CST of the Ministry of Finance dated 12 March 2003)

### **3.6 State Securities Commission**

The transfer of the State Securities Commission to the Ministry of Finance pursuant to Decree 66-2004-ND-CP of the Government dated 19 February 2004 became effective as of 12 March 2004. The Commission was formerly a stand-alone Government body, established under Decree 75-CP of the Government dated 28 November 1996.

### **3.7 Obligations of land users with respect to environmental damage to land**

Under the 2003 Land Law, the 1993 Law on Protection of the Environment and implementing legislation, land users who cause environmental damage to the land may be (i) subject to administrative penalties, (ii) required to remediate the damaged land, or (iii) subject to criminal prosecution.

- (i) Administrative penalties: For agricultural and forestry land, a fine of between VND1-5 million may be imposed for discharge of waste which causes land pollution and reduces the capacity of cultivation of the land. For any kind of land, a fine of between VND2-5 million may be imposed for any act of burying or discarding toxic and harmful substances in excess of permissible limits into the soil; and a fine of between VND5-15 million may be imposed for any act of burying or discarding large quantities of toxic and harmful substances in excess of permissible limits thereby necessitating a long period of time for rectification.
- (ii) Remediation of damaged land: For agricultural and forestry land, the breaching land user is required to recover the status of land as before the land was damaged. For any kind of land, the breaching land user is required to cease the damaging act and apply the necessary measures to overcome the consequences and must pay compensation for damage.
- (iii) Criminal prosecution: Under the Penal Code, a person who buries or discards toxic and harmful substances in excess of permissible limits into the soil and who has been subject to administrative penalties but intentionally fails to apply necessary measures to overcome the consequences may be (a) fined from VND10-100 million, (b) re-educated without detention for up to 3 years, or (c) imprisoned for 6

months to 3 years. For serious breaches, an offender may be imprisoned for 2 to 7 years. For especially serious breaches, an offender may be imprisoned for 5 to 10 years.

### **3.8 Foreign Shareholder Participation in Management of Vietnamese Shareholding Companies**

Both the Law on Enterprises and Decision 36-2003-QD-TTg of the Government dated 11 March 2003 on Capital Contribution and Purchase of Shares by Foreign Investors in Vietnamese Enterprises restrict the right of foreign shareholders to participate in the management of Vietnamese shareholding companies - but the extent of the restriction is unclear. Not only is the restriction on foreign participation in management a significant disincentive to major foreign share purchases, it is of concern to all shareholders - foreign and Vietnamese, minor and major shareholders - as it restricts severely the range of foreign management expertise that Vietnamese shareholding companies may access. Hopefully, upcoming amendments to the Government's Decree 03-2000-ND-CP on Implementation of the Law on Enterprises dated 3 February 2000 will clarify the extent of the restriction. The latest information from the Ministry of Planning and Investment is that the amended decree will be passed in April 2004.

### **3.9 US-Vietnam Aviation Agreement**

With the signing of the Agreement on Aviation Transport between the United States and Vietnam on 4 December 2003, US airlines may now fly directly to Vietnam for the first time in about 30 years. Continental Airlines opened its first sales office in Vietnam at the start of March, with Traveland Joint Stock Co. acting as its sales agent. Continental Airlines is in the process of completing a code-sharing agreement with Vietnam Airlines. American Airlines opened its first office in Vietnam in February. Reportedly, from April, American Airlines will start operating daily flights from Los Angeles to Vietnam, via Japan. By Official Letter 569-VP/CP-QHQT of the Office of Government dated 9 February 2004, the Prime Minister has approved the early issuance of a license to United Airlines to open a direct air route from US to Vietnam, via Hong Kong, in June 2004.

### **3.10 Congratulations to Phuc**



Phillips Fox would like to extend its well-deserved congratulations to our colleague, Phuc Nguyen, on recently obtaining his certificate to practice as a Vietnamese lawyer. The process for getting this certificate is long and arduous. A candidate for qualification as a Vietnamese lawyer must first become a member of a Vietnamese bar association, which requires completion of a law degree and a post-graduate six-month legal training course. After becoming a member of a bar association, a lawyer candidate must then apprentice for an additional two years in a local law firm or foreign law office in Vietnam. After the completion of the apprenticeship period (which in Phuc's case was reduced to six months in recognition of his prior work experience), a lawyer candidate must then pass an additional examination before being granted his full right to practice as a Vietnamese lawyer. Having been granted his license to practice, Phuc becomes only the 495<sup>th</sup> Vietnamese lawyer in HCMC to be so licensed. We are very proud of his accomplishment and are happy to be able to share in his success. Phuc joined Phillips Fox in 2001 and works on a variety of matters relating to foreign investment, real property, intellectual property, construction, oil and gas, consumer products, labour, and commercial contracts.

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