



Vietnam Legal Update

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Part 1 Selected New Legal Instruments

1.1 Focal Economic Zones

Decision 145-2004-QD-TTg dated 13 August 2004 on the major direction for socio-economic development of the focal economic zone in the North by 2010 and vision to 2020

and

Decision 146-2004-QD-TTg dated 13 August 2004 on the major direction for socio-economic development of the focal economic zone in the South by 2010 and vision to 2020

and

Decision 148-2004-QD-TTg dated 13 August 2004 on the major direction for socio-economic development of the focal economic zone in Centre by 2010 and vision to 2020

1. *Introduction*

Decisions 145, 146 and 148 all dated 13 August 2004 provide for the major direction for socio-economic development of "focal economic zones" in the North (Decision 145), the South (Decision 146) and in the Centre (Decision 148) to year 2010 with outlook to year 2020:

Foreign investment in these zones is not specifically addressed. Set out below is our summary of various parts of the Decisions, especially relating to railways and deep water parts.

2. *The North:* Taken from Decision 145

"2.1: Regarding the development of industries:

The main product structure will comprise high value products requiring a lot of "grey matter" such as software and hardware technology; electricity technology; automation technology, manufacture of machinery; steamboat building; steel production [there is a list of seven different types of steel]; coal production; cement production; high quality building materials; agricultural, forestry and seafood processing; food production; textiles and clothing, and so forth".

"2.4: System of economic infrastructure:

To modernize the power transmission grid".

3. *The South:* Taken from Decision 146

Article 3.1 under the heading "New break-throughs":

"To build an express highway from HCMC to Vung Tau, Trung Luong and Tay Ninh; to start preparations to build an airport at Long Thanh.

To quickly develop services industries concentrating on finance, banking, tourism, entertainment, telecommunications and international cargo.

To develop the real estate market, capital market, securities market...

To build up HCMC into a high quality services centre for the whole country in telecommunications, cargo, finance, banking and tourism, all to international standard".

This decision also provides that development should concentrate on cutting edge technology, and promote a number of mainstay industries "such as production of petroleum; production of software; mechanical engineering; production of electricity, chemicals from petroleum; agricultural, forestry and seafood processing; food production; industrial textiles and clothing; leather footwear; building materials and so forth".

4. *The Centre:* Taken from Decision 148

Separate sections are devoted to Da Nang; to the Chu Lai economic zone in Quang Nam Province; to the Dung Quat economic zone in Quang Ngai Province; to the Chan May area in Hue; and to the Nhon Hoi area in Binh Dinh Province.

The accent is on conversion of industrial product structure; petrochemical refineries; seafood processing; mechanical engineering; manufacture of consumer goods and building materials.

5. *Sections dealing with railways*

5.1 *In the North:* Decision 145 at paragraph 2.4a provides: "To construct a new rail route from Yen Vien and Ha Noi to Pha Lai, Ha Long City and Cai Lan Port, and the province of Quang Ninh; and a rail route joining the Hai Phong Port to the Dinh Cu Port also in Hai Phong City".

5.2 *In the South:* Decision 146 on page 5 provides: "In the period 2004 to 2005 to upgrade the HCMC railway junction, and in 2006-2010 to investigate construction of a rail route from HCMC to Vung Tau; to build a rail system which connects to the port in the industrial zone in the Highway 51 corridor; and a rail line from HCMC to Phnom Penh, the Mekong Delta and Tay Nguyen as already planned".

5.3 *In the Centre:* Decision 148 on page 5 provides: "To upgrade rail lines running alongside roads, to build pedestrian overpasses where rail and road intersect. To invest in a system of local rail stations. To invest in specialized railways to connect seaports with the international rail system".

6. *Sections dealing with deep water ports*

6.1 *In the North:* (Decision 145 at Article 3.1 under the heading "New break-throughs")

"To research construction of a new deep water port in Hai Phong (if technical conditions permit)".

(Decision 145 at Article 3, paragraph 2.4a under the heading "System of economic infrastructure"):

"To continue synchronous development and modernization of the road, rail, sea, river and air transportation system, especially the construction of a deep water port, a network of road expressways, an internal traffic system for Hanoi, and water supply and water discharge systems for all cities".

"To continue investment in upgrading channels into Hai Phong Port to enable access by ships of 10,000 DWT. To construct some new wharves in Hai Phong Port to enable access by container ships. To continue with stage 2 construction of the Cai Lan Port, to invest in cargo loading and unloading facilities of a capacity 6.5 to 8 million tonnes per year by year 2010 (7 wharves) with the capacity to accept ships of from 30 to 50,000 DWT".

To upgrade the group of specialized [river] ports in Quang Ninh Province such as Cua Ong, Mui Chua, Van Gia, the Hon Gai tourist port, the Hon Net cargo port, Con Ong and so forth so as to achieve a total capacity of 6 to 7 million tonnes per year. To upgrade the Red River, to build a container wharf at Phu Dong - Gia Lam, a wharf at Khuyen Luong - Hanoi, and to upgrade the river routes from Quang Ninh to Hai Phong and Ninh Binh".

6.2 *In the South:* (Decision 146 at Article 3.2 under the heading "Amendments to zoning/master plans")

"To push the advantages of our system of ports by promoting domestic and international cargo services; to develop a shipping fleet by concentrating on specialist ships with a high tonnage; to promote international maritime services in regional ports at Saigon, Thi Vai and Vung Tau."

"In the immediate future, to use ports in the HCMC area effectively, namely Saigon Port and the other river ports belonging to ministries or joint ventures; and to commence construction at the appropriate level of ports at Cat Lai and Hiep Phuoc".

6.3 *In the Centre*: (Decision 148 at page 5 under the heading "System of economic infrastructure")

"Seaports: To develop a system of seaports together with other infrastructure in focal economic zones in the Centre. To upgrade the Tien Sa Port to capacity of 4 million tonnes per year by year 2010. From now to 2010, to build a new deep water port at Lien Chieu (stage 1) with an output capacity of 2 million tonnes per year and then to continue with stage II upgrading to an output capacity of 8.5 million tonnes per year in the following period. To push the construction schedule of ports at Dung Quat, Ky Ha and Quy Nhon so that they can commence operation on a large scale as early as 2005, which will be an important condition ensuring development of economic zones at Dung Quat, Chu Lai and Nhon Hoi.

"The Quy Nhon Port (Binh Dinh Province) currently has a capacity of over 2.5 million tonnes per year, and the proposal is to build more wharves to ensure a capacity of 4 million tonnes per year by year 2010. The aim is to strive hard to complete these ports by year 2010 to ensure strong development of the economic zones in the following period.

"To continue improvements to the Chan May and Quy Nhon Ports to ensure development of the economic zones in those areas, and so that these ports provide the nucleus for development in Hue and Binh Dinh provinces in particular, as well as in the whole central area."

7. *Some objectives*

Contents	NORTH (Dn145)	SOUTH (Dn146)	CENTRE (Dn148)
Basic objectives: Average annual growth rate compared to the whole country:	1.3 times the national figure in 2006-2010, 1.25 times in 2011-2020.	1.2 times the national figure in 2006-2010, 1.1 times in 2011-2020.	1.2 times the national figure in 2006-2010, 1.25 times in 2011-2020.
Basic objectives: Average annual export value per person:	US 447 in 2005, US 1200 in 2010, US 9200 in 2020.	US 1,493 in 2005, US 3,620 in 2010, US 22,310 in 2020.	US 149 in 2005, US 375 in 2010, US 2,530 in 2020.

1.2 Pricing Sanctions

Decree 169-2004-ND-CP of the Government dated 22 September 2004 providing for sanctions against administrative breaches in pricing sector

Under this Decree, sanctions against administrative violations may apply to organizations and individuals who have breached provisions on price stabilization; price negotiation; price frames, price levels fixed by competent authorities; preparing price projects; and listing price where such breaches are not serious enough for criminal prosecution.

- A fine from VND5,000,000 to VND10,000,000 may apply to organizations and individuals who have breached provisions on price stabilization such as not making reports or making false reports when the State takes measures to stabilize prices.

- For goods the price of which is fixed by competent authorities, a fine from VND5,000,000 to VND30,000,000 may apply to organizations and individuals who sell at a price different from the fixed price.
- Organizations and/or individuals who do not list prices at their business or trading place may be subject to a fine ranging from VND100,000 to VND500,000.
- Organizations and individuals who agree upon conditions on selling goods that cause a detrimental impact to the price levels, and infringe upon the interests of other organizations and/or individuals may be penalized from VND5,000,000 to VND10,000,000.
- In addition to warnings and fines, the breaching organizations and/or individuals may be subject to additional penalties such as: compensating money lost due to breaches; confiscation of the difference in the amount earned from the breaching acts, etc.

Decree 169 will take effect 15 days from its publication on the official gazette and replaces Decree 44-2004-ND-CP dated 1 September 2000.

1.3 Auditing Enterprises

Decision 76-2004-QD-BTC of the Ministry of Finance dated 22 September 2004 providing for regulations on selection of approved auditing enterprises for securities issuing, listing or trading institutions

According to this Decision, the financial statement of securities issuing and listing institutions and securities trading enterprises must be audited by auditing enterprises approved by the Ministry of Finance. The selection and approval of auditing enterprises will be conducted by the Ministry of Finance every two years. The dossier of registration for auditing by qualified auditing enterprise submitted to the State Securities Commission before 30 October of the chosen year consists of:

- Registration application for auditing participation;
- Decision for establishment or investment licenses, business registration and charter;
- List of auditors and company's management personnel; and
- Report on enterprise's financial situation and operation.

According to this Decision, approved auditing enterprises must meet the following conditions:

- have charter capital of at least 2 billion VND (applicable to domestic enterprise) and at least 300,000 USD (applicable to foreign invested enterprises);
- have at least 10 auditors qualified in accordance with law;
- have been established and operating in Vietnam for at least 5 years; and
- have at least 30 annual audited clients.

This Decision also stipulates detailed provisions on conditions of auditors and chief representative of approved auditing enterprises; procedures of selection and acceptance of auditing enterprises; cases when approved status of auditing enterprises may be suspended or revoked; rights and obligations of approved auditing enterprises.

This Decision will take effect 15 days from its publication on the Official Gazette and replaces Decision 26-2000-QD-UBCK2 dated 5 January 2000 of the Chairman of the State Securities Commission on issuance of regulations on selection of independent auditing institutions for securities issuing and trading institutions.

Part 2 Features

2.1 Liability for Non-Contractual Loss

Sources of law for non-contractual loss

In Vietnam, the general principle for liability for non-contractual loss is governed by Article 609 of the Civil Code:

A person who intentionally, or unintentionally, harms the life, health, honour, dignity, reputation, property, or other legal rights or interests of an individual, or who harms the honour, reputation, or property of a legal entity or other subject, thereby causing damage must compensate [for such damage].

Resolution 1 of the Judges' Council of the People's Supreme Court dated 28 April 2004 ("Resolution 1") provides guidelines for judges on liability and compensation in the area of non-contractual loss under article 609.

In common law systems such as England and Australia, non-contractual loss is governed by a collection of different heads of liability, generally grouped together under the body of law known as "Torts". The most well-known and litigated component of this law is the tort of negligence. However, this area of law also includes trespass, nuisance and intentional interference with trade and business. For the purpose of this article, the tort of negligence will be used as the main comparison with Article 609.

Although the notion of "strict" or "no-fault" liability is recognized in both Vietnam and common law jurisdictions, it does not arise under Article 609/Resolution 1¹ (in Vietnam) or in an action for negligence (in common law jurisdictions). This type of liability is not discussed in this commentary.

Article 609 and the Tort of Negligence

Both Article 609 and the tort of negligence require a number of conditions be satisfied before the defendant is held liable to compensate the plaintiff:

Article 609	Negligence
1) Loss	1) Duty to take reasonable care
2) Illegal Act	2) Breach of duty
3) Causal Relationship between the illegal act and the loss.	3) Breach caused loss or damage
4) Fault	

Condition 1: Loss

There must be loss suffered, which may include *material loss* and *mental suffering*. These concepts are defined to include:

Material Loss	>	Loss caused by harm to property
	>	Loss caused by harm to health
	>	Loss caused by harm to honour, dignity or reputation
Loss caused by mental suffering of an individual	>	Loss caused by harm to an individual's health, honour, dignity or reputation.

¹ Article 1, Section I of Resolution 1: "It should be noted that, in cases where it is prescribed by law that loss must be compensated notwithstanding that nobody is at fault, the liability of the person inflicting the loss to pay damages must be implemented in accordance with the provisions of **relevant legal document**". (emphasis added).

	>	Where as a result of a death, the closest relatives of a victim suffer grief, sorrow or emotional loss and their reputation is diminished or lost, or they are avoided by their friends due to misunderstandings and so forth.
Loss caused by mental suffering to organizations	>	Harm to the honour or reputation of an organization because their credibility and the trust in them is diminished or lost due to misunderstanding.

The kinds of damage recognized at common law can broadly be divided into three types – physical, psychological and economic – which are similar to the concepts defined above.

However, under common law there are important limiting concepts to the types of loss that are recoverable:

1. **Nervous Shock.** These types of psychological damage which are compensated in common law are limited to injuries such as hysteria, neurosis, depression and other recognised psychiatric illnesses and related psychosomatic effects. The law does not recognize or compensate for mere grief or sorrow caused by the death or injury to someone else. There are a number of policy reasons for this limitation. For example, such compensation would open a floodgate of claims; it is a form of purely economic loss (see below); nervous shock claims are difficult to prove and easy to fabricate; and extending liability to compensate for nervous shock is disproportionate to the fault of the defendant.

This is clearly different from the principles of Resolution 1, which recognize that grief, sorrow and emotional loss of "closest relatives" can be compensated.

2. **Purely Economic Loss:** The type of economic loss that is compensated in common law is limited to the loss that is the immediate consequence of personal injury or property damage that occurred from the negligent act of the defendant. The following concepts are clear and easy to understand: medical costs and loss of wages resulting from personal injury; costs of repair resulting from property damage. However, common law does not compensate for purely economic loss – loss that does not flow from personal injury or physical damage to the plaintiff. For example, if a negligent act damages property of an electricity generator and causes an electricity source to be cut off, a third party that uses that supply of electricity in its business cannot claim loss of profits from the defendant, because the loss suffered by third party is not proximate to the defendant's negligent act.

It is not clear whether purely economic loss would be compensated under Article 609 of the Civil Code. One argument in favour of compensation for purely economic loss is the wording of Article 612 of the Civil Code which provides that where damage is caused by an infringement of property, the damage that may be compensated includes: "*interests associated with the use and exploitation of the property*" (emphasis added).

3. **Remoteness of Damage:** A defendant does not have to compensate for damage that is not foreseeable or damage that is too remote. This is a very tricky and complicated concept but in general terms consequences are foreseeable if an ordinary person would believe that there was a real risk that the type of damage was likely to arise from the negligent act, and that the risk of the damage occurring was not far-fetched. (*Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd (Wagon Mound No. 2)* [1967] 1 AC 617. This limitation is not mirrored in either the Civil Code or Resolution 1.

Condition 2: Illegal Act

There must be an "illegal act", which is defined to mean some specific behaviour of a human being expressed in action or non-action which is a breach of the law. This requirement significantly limits the ambit of article 609 of the Code, particularly as there is also a requirement of "fault" (see condition 4 below).

There is no equivalent of this condition in common law negligence. Although an illegal act may go to prove the existence of a breach of duty, the absence of it will not be fatal to a claim of negligence.

Condition 3: Causal Relationship

The illegal act must cause the loss.

Although this is a logical proposition, factually this can be a very difficult condition to establish. Resolution 1 does not give much guidance, but merely provides that "the loss caused must be an inevitable effect of the illegal act and vice versa, the illegal act must be the cause of the loss". It is interesting that it is the illegal act that must cause the loss and that under Resolution 1 there is no direct link between the fault (see below) of the defendant and the loss; nor any link between the fault of the defendant and the illegal act.

In a common law negligence action, the plaintiff must prove that the breach of duty (or fault) by the defendant caused or materially contributed to the injury or damage that the plaintiff suffers. It does not have to be the sole cause, but it must be a contributing factor. Therefore, if there are a number of causes leading to the eventual injury, and only one of these causes is the breach of duty by the defendant, the defendant may still be liable if the "but for" test is met. That is, if the plaintiff would not have sustained his or her injuries had the defendant not breached its duties (ie "but for" the defendant's breach), a casual connection is shown.

Practically, the requirement to substantiate "inevitable effect" under Resolution 1 seems to be a higher threshold than the "but for" test in common law.

Condition 4: Fault

Under Resolution 1, there must be intentional or unintentional fault on the person inflicting the loss. The burden of proof (that one is not at fault) lays with the defendant, that is, the party liable to pay damages.

*Intentionally causing loss*² is where a person:

- (a) is clearly aware that his act will cause loss to another person but still commits such act; and
- (b) wishes that such loss or damage will occur; or
- (c) does not so wish but consciously allows such loss or damage to occur.

*Unintentionally causing loss*³ is where a person does not foresee that his act may cause loss or damage, although:

- (a) he should have foreseen or could have foreseen that damage would occur; or
- (b) foresees that his act may cause loss or damage but thinks that such loss will not occur or can be prevented.

The condition in a common law action for negligence is whether the defendant owed a duty of care to the plaintiff and then breached such duty. Broadly speaking, this requires similar concepts of foreseeability as in the definition of *unintentionally causing loss* (intentional causes of loss are generally dealt with under causes of action). However, under the tort of negligence it is the plaintiff and not the defendant that must prove that the defendant owed and breached a duty of care to the plaintiff.

COMPENSATION FOR LOSS

In the situation where parties cannot agree as to the amount of damages, Resolution 1 provides the following guidelines to article 610 of the Civil Code:

1. Where there is a claim for compensation for loss caused by harm to property, health, life, honour, dignity or reputation the relevant articles of the Civil Code must be referred to, to determine the loss. Although Resolution 1 does not specify what the relevant articles of the Civil Code are, one presumes that they are article 612 (property), article 613 (health), article 614 (life) and article 615 (honour, dignity or reputation).
2. The Court must settle damages within the prescribed time-limit (currently 4 months⁴). In cases of

² Article 1.1.4, Section I of Resolution 1

³ Article 1.1.4, Section I of Resolution 1

⁴ Article 179 of Law 24 on Civil Proceedings passed by the NA on the legislature XI, session 5 from 11 May to 16 June 2004.

necessity interim urgent measures may be applied.

No equivalent time-limit exists in common law, and the court process involved with negligence actions can drag on for a substantial amount of time.

3. The amount of damages may be reduced if the loss is due to unintentional fault and the loss is disproportionately large compared with the economic capability of the person responsible for paying damages.
4. A person may petition the court for a change in damages if the level of damages is no longer suitable due to:
 - (a) changes in the economic, social situation price fluctuations;
 - (b) due to changes in the disability or working capacity of the injured person; or
 - (c) due to changes in the economic capability of the person inflicting the loss.

It is not clear if the level of damages referred to in point 4 is the level of damages previously agreed by the parties; and/or the level of damages agreed by a court. If it is the latter then this provision allows a matter to be continually reassessed by the court as to the extent of damages payable by the defendant.

Guidelines 3 and 4 are markedly different from the assessment of damages under the tort of negligence, which is governed by two basic principles. First, the once-for-all rule: damages are assessed once, and cannot later be changed by the court. Therefore if a plaintiff suffers injury that will continue into the future (eg. continuing loss of income) the court has to assess the present value of the loss of income at trial, and this assessment cannot later be changed if it does not eventuate that the assessment was a true reflection of the loss of income suffered. Second, the compensation principle: the plaintiff is entitled to be put in the position he/she was in had the negligent act not been committed. The common law does not place any ceiling or threshold on the amount of damages awarded.

QUANTUM OF DAMAGES

Resolution 1 provides very detailed notes on what damages are included in the following situations:

Harm to Health

1. Medical costs.
2. Lost or reduced income
3. Income of caregiver during treatment period
4. Expenses of care of injured person after treatment
5. Support money for dependants of the injured person
6. Mental suffering (not exceeding 30 months' salary based on prescribed minimum⁵).

While these heads of damage are similar to common law principles, there are some interesting differences.

The calculation of lost or reduced income: in Vietnam, it is the loss of earnings that is compensated. Therefore if the injured person had no job or income before the loss occurred, no compensation is payable for loss of income. In common law jurisdictions, it is the loss of earning capacity that is compensated. The fact that the plaintiff had no job or income before the loss is relevant to the amount assessed, but it is not fatal to a claim for loss of income.

Calculation of damages "after treatment": in Vietnam, damages are only payable after treatment if the injured suffers from spinal paralysis, total blindness, paralysed legs, serious mental illness or their working capacity has declined by 81 percent or more. "After treatment" is not defined. The damages payable under this category include costs of care of the injured person, and support money for dependants of the injured person.

⁵ Currently, the State prescribes two minimum rates of salary: 1) minimum salary rate of VND290.000/month with respect of employees receiving salary from the state budget and employees in Vietnamese enterprises (article 1 of Decree 03 of the GVT dated 15 January 2003 on Adjustment of Salaries; and 2) minimum salary rate of VND487.000/month for Vietnamese employees working for FIEs (article 1 of Decision 708 of the MOLISA dated 15 July 1999 on minimum salaries).

In common law jurisdictions all injury will be compensated with future damages (including medical expenses, loss of income, support money for dependents etc). Unlike Vietnam, a threshold of the seriousness of the injury (ie, decline in capacity by 81% or more) is not imposed.

Mental suffering: as noted above, under the compensation principle, the amount of damages payable is not limited in common law.

Loss of Life

- > Burial and worship
- > Support money for dependents of the deceased
- > Mental suffering of the closest relatives of the deceased (not to exceed 60 months' salary based on prescribed minimum)

Compensation for loss arising from the death of another is also available at common law. The usual claimants are spouses or children of the deceased, but there is no specific limitation on this. However, as noted above, mental suffering is only compensated if it is a recognised psychiatric illness and/or related psychosomatic effect. The common law does not award damage for grief and suffering by relatives and dependents.

Honour, Dignity and Reputation

- > Retrieval of publications and documents and publication of corrections in the media
- > Lost or reduced income
- > Mental suffering (not exceeding 10 months' salary based on prescribed minimum).

Common law negligence does compensate for damage for injuries to property and economic loss (although not for purely economic loss). However, the concepts recognized in Resolution 1, for example, the costs of retrieval of publications and mental suffering (presumably loss of reputation of a business) is more akin to other actions in Tort, for example, defamation.

2.2 Vietnam Visa Issues

In order to enter Vietnam, a foreigner – unless he/she qualifies for exemption from this requirement (eg holders of permanent residence cards or temporary residence cards) – must be in possession of an entry visa. In addition, foreigners wishing to enter Vietnam must possess a valid passport.

1. *What are the documents required for entry into Vietnam by a foreigner and what different types of visas are available?*

There are two types of entry visas:

- (i) "Single-entry visa with validity of no more than 12 months"; and
- (ii) "Multiple-entry visa with validity of no more than 12 months".

In practice, the duration of the visa granted by the Vietnamese authorities may vary. The Immigration Department (which has the authority to decide the issuance and terms of a visa) exercises discretion in determining the period of validity of visas granted, taking into account the inviter's proposal, the purpose of entry, and any other supporting documents. Thus, 15 day or 30 day single-entry visas and 3 month, 6 month, or 12 month multiple-entry visas are commonly granted.

For ease of management, the Vietnamese authorities classify entry visas into 9 separate categories (each category has 1 code).

2. *What are the legal requirements and processes in order to obtain an entry visa for a foreigner?*

There are 2 options to obtain an entry visa:

2.1 With an inviter⁶

This is a very commonly pursued option as it is the only way to obtain a "business visa"⁷ Under this option, a foreigner needs to have an "inviter" who will write a proposal letter to the Immigration Department to seek an approval ("first process"). Based on this approval, a Vietnamese embassy/consulate abroad or an international border gate⁸ in Vietnam (nominated by the inviter/foreigner at their convenience) will issue an entry visa ("second process").

First process:

The inviter is required to make the proposal letter based on the sample form issued by the Immigration Department. According to the sample form, the inviter must state the full personal details of the foreigner, the place of issuance of the visa, the date of arrival, the port of entry, the purpose of entry, whether single or multiple entry is required, and the duration of the foreigner's stay.

In the event the foreigner needs a visa with a duration of more than 6 months, certain supporting documents may be required to evidence demand for such a long stay (eg appointment letter/decision from employer, certificate confirming status as board member or management personnel).

In addition to the above documents, the inviter must file the following documents (one time only until such corporate information has been changed) evidencing its legal status with the Immigration Department (Article II.2.a of Circular 04 dated 29/1/2002):

- (i) Establishment license;
- (ii) Certificate of registration of operation; and
- (iii) Documents introducing the seal and signature of authorized representatives of the inviter.

The Immigration Department must respond to the inviter (in the form of an approval or refusal) within 5 working days from the date of receipt of the proposal letter (and the supporting documents). The Immigration Department may refuse to permit a foreigner who falls into circumstances prescribed under the Ordinance 24 (dated 28/4/2000) to enter Vietnam. In case of approval, the Immigration Department must immediately notify the nominated Vietnamese embassy/consulate or international border gate provided that the inviter has paid the telecommunication charge (Article I.2.c and I.2.d of Circular 04).

Second process:

After the issuance of the approval by the Immigration Department, the foreigner must lodge an application (in the standard form) together with his passport to the nominated Vietnamese

⁶ An "inviter" may be a State body, foreign diplomatic office, office of an international organization, office/branch of a foreign organization, Vietnamese enterprise, foreign invested enterprise, Vietnamese organization, a Vietnamese citizen, or a foreigner who resides in Vietnam permanently or for more than 6 months (see Article 4 of Decree 21 dated 28/5/2001). Also note that the inviter shall have the responsibility to (i) ensure the purpose of entry; (ii) cooperate with Vietnamese authorities in resolving any incidents arising; (iii) bear costs or provide financial guarantees in the case where the foreigner has no financial capacity to discharge costs on-the-spot (see Article 27 of Decree 21).

⁷ While the law does not distinguish between "business" and "tourist" visas, a declaration of the purpose of a foreigner's visit must be made in the immigration form to be filled out on arrival.

⁸ Generally, a foreigner receives an entry visa at a nominated Vietnamese embassy/consulate. In the following special circumstances, he may obtain an entry visa at an international border gate in Vietnam (Article 6 of Ordinance 24):

- (a) Entry to attend the funeral of a relative or to visit a seriously ill relative;
- (b) Arrival from a country which does not have a Vietnamese representative diplomatic office or a Vietnamese consulate;
- (c) Entry on a tourist program organized by a Vietnamese enterprise conducting international tours;
- (d) Entry for emergency technical assistance for construction works or projects; entry to provide emergency aid for seriously ill people or for accident victims or to assist in cases of disaster or epidemic in Vietnam; or
- (e) Entry for any other emergency reason.

embassy/consulate or international border gate. An embassy/consulate is required to issue an entry visa in accordance with the approval within 2 working days from date of receipt of the passport and visa application of the foreigner (Article II.1.b of Circular 04). Circular 04 is silent on the time within which an international border gate may issue a visa, but in practice such visas are issued immediately upon receipt of a valid application.

In cases of emergency (ie the kinds of special circumstances listed in Footnote 6 above), the proposal letter from the inviter must be lodged to the Immigration Department at least 12 hours prior to the arrival of the foreigner at the international border gate (Article 5.3 of Decree 21).

The official fee to obtain a single-entry visa is USD25. In respect of multiple-entry visas, USD50 is charged for visas of up to 6 months validity, and USD100 for visas of over 6 months validity (Appendix II of Circular 37).

2.2 Without an inviter

A foreigner may obtain a "tourist" visa directly from Vietnamese embassies/consulates without an inviter (or an approval by the Immigration Department). In this case, the Vietnamese embassy/consulate may issue a 15 day single-entry visa within 3 working days from the date of receipt of the passport and application of the foreigner (Article II.1.b of Circular 04).

2.3 **"Permanent Residence" Status for Foreigners in Vietnam**

1. A foreigner residing in Vietnam may apply for the status of (i) Temporary Foreign Resident or (ii) Permanent Foreign Resident.
2. "Temporary Foreign Resident" means a foreigner residing for a "limited period" in Vietnam. A Temporary Foreign Resident may be issued a Temporary Residence Card having a period of up to 3 years which is extendable.
3. "Permanent Foreign Resident" means a foreigner residing, working and living for a "long period" in Vietnam. A Permanent Foreign Resident may be issued a Permanent Residence Card. "Long period" is not defined. We understand that very few Permanent Residence Cards have been issued to date.
4. A Permanent Foreign Resident (i) does not need a visa when entering Vietnam; (ii) may establish/manage a local company in his/her own name; and (iii) buy property in Vietnam in his/her own name;
5. To qualify as a Permanent Foreign Resident, a foreigner must meet one of the following conditions:
 - (a) A person who fights for the freedom and independence of the Vietnamese race, for socialism, for democracy and peace, and for science, but who is suppressed;
 - (b) A person with distinguished services contributing to the work of building and protecting the Vietnamese Fatherland; or
 - (c) A person being the spouse, child or parent of a Vietnamese citizen permanently residing in Vietnam.

Condition 5(c) is obviously the easiest to satisfy.

6. Documents needed to apply for a Permanent Residence Card with respect to condition 5(c):
 - (a) Application (prescribed form) (English, Vietnamese – 2 copies);
 - (b) Curriculum Vitae (prescribed form) (English, Vietnamese – 2 copies);
 - (c) Sponsorship paper (prescribed form) (this paper must be signed by the person sponsoring the applicant in Vietnam, eg the applicant's spouse) (Vietnamese – 2 copies);
 - (d) Certificate issued to the applicant by the competent authority of his/her country (usually, the police), confirming that the applicant has no criminal record (English, Vietnamese official translation – 2 copies);

- (e) Diplomatic note issued by the competent authority of the applicant's foreign country requesting Vietnam to permit the applicant to permanently reside in Vietnam (this appears to refer to the embassy/consulate in Vietnam of the applicant's country) (English only – one copy);
- (f) Documents evidencing that the applicant is the spouse, child or parent of a Vietnamese citizen permanently residing in Vietnam (this may be the marriage certificate, birth certificate, etc)(English or Vietnamese – one copy);
- (g) Passport of the applicant (2 copies); and
- (h) Any other relevant documents that may be required.

7. Where to submit the application file:

At the National Immigration Office or the department of immigration of the province where the applicant resides.

8. Timing to process the application file:

6 months (according to the law).

2.4 Q & A on Arbitration in Vietnam

In our Vietnam Legal Updates dated March and June 2003, we discussed the main provisions regarding the Ordinance on Commercial Arbitration dated 25 February 2003. Because of the improvements introduced by this new law, many companies have now chosen to refer their disputes to arbitration in Vietnam for resolution.

Below is a table of questions and answers describing the main issues related to domestic arbitration clauses in contracts.

No.	Questions	Answers
1	What kind of disputes does an arbitration body in Vietnam resolve?	An arbitration body may resolve disputes relating to "commercial activities" including purchase or sale of goods; provision of services; distribution, commercial representation or agency; bailment; leasing out or leasing; hire-purchase; construction; consulting; engineering; 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 Vietnamese law.
2	What are the main arbitration bodies established in Vietnam?	<ul style="list-style-type: none"> • <u>Vietnam International Arbitration Center ("VIAC")</u> (under the Chamber of Commerce and Industry of Vietnam): Hanoi and Ho Chi Minh City. • <u>Economic Arbitration Centers</u>: Hanoi, Ho Chi Minh City, Can Tho City and Bac Giang Province.
3	Limitation period to initiate an arbitration proceeding at an arbitration body?	<ul style="list-style-type: none"> • With respect to a dispute for which the law stipulates a limitation period for initiating proceedings, such limitation period shall apply (eg 6 months from the date on which the dispute arose, in the case of "economic disputes"). • With respect to a dispute for which the law does not stipulate a limitation period for initiating proceedings, the limitation period for initiating proceedings for dispute resolution by arbitration shall be two years from the date the dispute arises, except in cases of force majeure.
4	Are the parties to a dispute entitled to establish an ad-hoc arbitral tribunal?	Yes. Parties to a dispute may <u>choose an arbitration center or establish an ad-hoc arbitration tribunal</u> for resolution of their dispute.

No.	Questions	Answers
5	Can arbitration at the VIAC or Economic Arbitration Centers be in accordance with ICC or UNCITRAL rules?	<ul style="list-style-type: none"> • <u>"Domestic" disputes</u>: VIAC's or Economic Arbitration Centers' rules must be followed. • <u>"Foreign-related" disputes</u> (ie involving a foreign party, or a foreign invested enterprise): ICC or UNCITRAL rules may apply as agreed by the parties.
6	Which laws are applied in arbitration?	<ul style="list-style-type: none"> • <u>Domestic disputes</u>: Vietnamese laws. • <u>Foreign-related disputes</u>: Foreign laws may apply if the parties so agree, provided that such laws are not contrary to "basic principles" of Vietnamese laws.
7	Where does an arbitration take place?	<ul style="list-style-type: none"> • <u>Domestic disputes</u>: Vietnam • <u>Foreign-related disputes</u>: Arbitration may take place abroad if the parties so agree.
8	Can the arbitration be in English?	<ul style="list-style-type: none"> • <u>Domestic disputes</u>: No. • <u>Foreign-related disputes</u>: Yes.
9	Can the parties appoint a foreign person as arbitrator?	<ul style="list-style-type: none"> • <u>Domestic disputes</u>: No. • <u>Foreign-related disputes</u>: Yes, but such appointment must be in accordance with laws of the foreign arbitrator's country.
10	Can a relevant foreign court appoint a foreign arbitrator?	<ul style="list-style-type: none"> • <u>Domestic disputes</u>: No. • <u>Foreign-related disputes</u>: Yes, if the parties so request.
11	What is an invalid arbitration agreement?	<p>An arbitration agreement is deemed invalid in the following circumstances:</p> <ul style="list-style-type: none"> • The dispute which arises does not belong to "commercial activities" as mentioned above; • A signatory to the arbitration agreement lacks authority to enter into it pursuant to law; • One party to the arbitration agreement lacks full civil legal capacity; • The arbitration agreement fails to specify, or to specify clearly, the subjects of the dispute or the arbitration organization authorized to resolve disputes, and the parties have failed to enter into any supplementary agreement; • The arbitration agreement was not made in writing; or • A party to the arbitration agreement was deceived or threatened, and requests that the arbitration agreement be declared invalid.
12	On what basis can arbitral awards be appealed to court?	<p>Within 30 days from the date of receipt of an arbitral award, a party which disagrees with the arbitral award may file an application with the provincial court in the place where the arbitration tribunal issued the arbitral award requesting that the arbitral award be set aside.</p> <p>A court may issue a decision setting aside an arbitral award if the applicant proves that the arbitration tribunal issued the arbitral award in one of the following circumstances:</p> <ul style="list-style-type: none"> • There was no arbitration agreement. • The arbitration agreement was invalid (as discussed above). • The composition of the arbitration tribunal was, or the arbitration proceedings were, inconsistent with the agreement of the parties pursuant to the provisions of the. • The dispute was outside the jurisdiction of the arbitration tribunal. If only part of an arbitral award is outside the jurisdiction of the arbitration tribunal, that part shall be set aside. • The applicant proves that during the dispute resolution an

No.	Questions	Answers
		<p>arbitrator breached the obligations of an arbitrator stipulated in the Ordinance on Commercial Arbitration.</p> <ul style="list-style-type: none"> • The arbitral award is contrary to the public interest of the Socialist Republic of Vietnam.
13	Can one of the parties to a dispute refer the dispute to a court for resolution although they have agreed earlier that the dispute would be arbitrated?	<ul style="list-style-type: none"> • No, unless the arbitration agreement is invalid.
13	How to protect a party's rights and assets during the arbitration proceeding?	<p>If, during the course of dispute resolution by an arbitration tribunal, the lawful rights and interests of parties are infringed or are in danger of being directly infringed, the parties may apply to the provincial court in the place where the arbitration tribunal accepted jurisdiction over the dispute to take one or a number of the following measures of injunctive relief:</p> <ul style="list-style-type: none"> • To preserve evidence when it is being destroyed or is in danger of being destroyed; • To attach assets in dispute; • To prohibit disposal of assets in dispute; • To prohibit any change in the status quo of assets in dispute; • To attach and freeze assets in the location where they are held; or • To freeze bank accounts.
14	How can an arbitral award be enforced?	<p>If any party has failed to carry out voluntarily an arbitral award 30 days after the date of expiry of the time-limit for its execution, and that same party has not applied for setting aside pursuant to the Ordinance, the arbitral award creditor may apply to the provincial judgment enforcement body in the area where the award debtor has its office or residence or assets to enforce the award.</p> <p>If any party has applied to the court for the arbitral award to be set aside, the award will be enforced as from the date of effectiveness of the decision of the court not to set aside the arbitral award.</p> <p>The provisions of the law on enforcement of civil judgments apply to the order, procedures and time-limits for enforcement of arbitral awards.</p>

Part 3 Did You Know?

3.1 National Assembly Update

The 6th session of the National Assembly is scheduled to begin on 25 October 2004 and continue until 4 December 2004.

In its upcoming session the National Assembly is scheduled to pass 6 new laws: (1) the Law on Electricity; (2) Law on Promulgation of Legal Instruments by People's Councils and People's Committees; (3) Law on Amendment of Law on Publications; (4) Law on Protection and Development of Forests; (5) Law on National Security; and (6) the much awaited, eagerly anticipated Law on Competition.

During this 6th session of the National Assembly, deputies are scheduled to spend 6 days discussing socio-economic issues, 17 days working through the legislative agenda, and another 11 days focusing on other important issues.

Currently, there are 9 draft laws that are scheduled for discussion during this session. These draft laws include: (1) the Commercial Law (Amended); (2) Civil Code (Amended); (3) maritime Code (Amended); (4) Law on Pharmacy; (5) Law on Railways; (6) Law on Signing and Implementing International Treaties; (7) Law on Education; (8) Law on National Defense; and (9) Law on State Auditing. The draft Law on Land Use Rights Tax was on the program for discussion, but had to be postponed because the Government "needs more time to prepare it".

In the subsequent 7th and 8th Sessions, the National Assembly's Standing Committee has agreed to supervise 5 issues, including: (1) re-structuring of State-run Enterprises, such as business and production effectiveness and performance of several monopoly State-owned enterprises; (2) construction progress of major national projects; (3) effectiveness of land management and land use; (4) health insurance; and (5) results of the agro-forestry strategy.

3.2 Overseas Investment by Vietnamese Citizens

Since there is no specific law permitting overseas investment by Vietnamese citizens, it is likely that a Vietnamese citizen cannot legally (as a matter of Vietnamese law) invest overseas.

Decree 22 of the Government dated 14 April 1999 only refers to overseas investment by Vietnamese enterprises (subject to investment licenses). Because the legal system of Vietnam substantially relies on the principle of not permitting activities unless specifically authorized by law or license, it appears that overseas investment by Vietnamese citizens is not permitted. Officials at the Ministry of Planning and Investment have confirmed this view.

Furthermore, remittance overseas of foreign currency by Vietnamese citizens for the purpose of investment is not on the list of permitted remittances (Article 14.1 of Decree 63 of the Government dated 17 August 1998). As a result, Vietnamese citizens may not transfer money overseas to invest.

Therefore, in order for a Vietnamese citizen to invest overseas, he/she will first need to establish a Vietnamese enterprise, or obtain some kind of special permission.

3.3 Auditors' Reform Underway

Decree of the Government on Independent Auditing number 105 dated 30 March 2004 ("the Decree") regulates auditors and auditing enterprises. The Decree deals with *Auditors* being Vietnamese and Foreign persons who satisfy the conditions set out in the Decree. Foreign *Auditors* are required to:

- Have professional ethics, be honest and incorruptible
- Have a bachelor's degree specializing in economics – finance - banking or accounting – auditing and have at least 5 years' actual work experience in finance or accounting, or at least 4 years of experience as an assistant auditor with an auditing enterprise

- Speak a commonly used language and be computer literate
- Have an auditor's certificate issued by the Minister of Finance
- Have permission to reside in Vietnam for at least 1 year
- Have a labour contract to work in an auditing enterprise operating under Vietnamese law

Additionally people with an accounting and/or auditing certificate or those issued with a certificate as an auditing expert issued by a foreign or international accountancy and/or auditing organization recognized by the Ministry of Finance, must pass an examination held by the Ministry of Finance on the law in Vietnam on economics, finance, auditing and accounting and must attend annual updating courses.

An *Auditing Enterprise* may take 1 of 3 forms:

- A partnership
- A private enterprise
- An enterprise under the Law on Foreign Investment

The Decree provides that those existing Vietnamese auditing enterprises that do not take the form either of a partnership or a private enterprise, for example are currently a State Owned Enterprise or a shareholding company must convert to either a partnership or a private enterprise within 3 years.

An *Auditing Enterprise* must have on its staff at least 3 *Auditors*. The *Auditing Enterprise's* manager must be an *Auditor*. Also, one of the two signatures of auditors on an audit report by a foreign auditing enterprise established and operating in Vietnam or not yet established in Vietnam must be a Vietnamese.

The Decree also provides for foreign auditing organizations that have not established a branch in Vietnam to perform audits in Vietnam if:

- An *Auditing Enterprise* is admitted as a member – in such a case they may perform audits in the name of both organizations
- In relation to co-operation with an *Auditing Enterprise* for a one-off audit, the *Auditing Enterprise* signs the audit
- In relation to independently performing an audit for circulation in Vietnam, the Ministry of Finance grants its approval. The approval is required for each particular audit.

In relation to limitation of risk and liability of an *Auditing Enterprise*, there are 3 important provisions in the Decree:

1. the Decree provides that neither an *Auditor* nor an *Auditing Enterprise* may carry out audit services if he or it is currently conducting the work of posting entries in accounting books, preparing financial statements, conducting an internal audit, providing services of asset valuation, providing management consultancy or financial advice for/to the entity which is the subject of the audit or has done so within the previous year.
2. *Auditing Enterprises* are obliged to pay compensation for any loss and damage caused by their *Auditors* to clients while providing auditing and other related services.
3. *Auditing Enterprises* are must bear liability before the law, to clients and to people using audit results and services provided.

Circular 64 of the Ministry of Finance dated 29 June 2004 implementing the Decree ("the Circular"), states that newly established auditing firms can only be in the form of a partnership or private enterprise, ie unlimited liability. Enterprises already in existence not in these forms must be converted at the latest by 21 April 2005.

Four foreign-invested auditing firms, namely PricewaterhouseCoopers, KPMG, Ernst & Young and Grant Thornton will remain unchanged for the immediate future, Mr Bui Van Mai, head of the Ministry of Finance's Auditing and Accounting Department said, adding whereas, more than 60 domestic auditing firms will be restructured within a three year period of transformation into the two options stipulated. Mai said the four foreign-invested auditing firms will have to change their current status of limited liability into an unlimited liability immediately after the foreign investment law was amended to provide for an unlimited liability foreign

invested enterprise.

3.4 Withdrawal of Land and/or Investment License

The following legal provisions specify the circumstances in which the authorities may withdraw the land and/or investment license of a foreign invested enterprise:

1. *Under Land Law dated 26 November 2003*

Article 38.12 of the Land Law states that land will be recovered when "the State allocates or leases land in order to implement an investment project and the land is not used for a period of twelve (12) consecutive months or the actual land use schedule is twenty four (24) months behind the schedule recorded in the investment project as from the date the land is handed over on site, without permission from the competent State body which made the decision to allocate or lease the land."

2. *Under Decision 138 of the Ho Chi Minh City People's Committee dated 18 May 2004*

Article 31 of Decision 138 restates Article 38.12 of the Land Law (quoted above) (emphasizing the HCMC People's Committee's attention to this matter) as follows: "[when] the land is allocated, leased, or permitted the transfer of use purpose by the State in order to implement an investment project and the land is not used for a period of twelve (12) consecutive months or the actual land use schedule is twenty four (24) months behind the schedule recorded in the investment project as from the date the land is handed over on site, without permission from the competent State body which made the decision to allocate or lease the land, such land will be recovered."

3. *Under the Law on Foreign Investment dated 12 November 1996 (as amended 9 June 2000)*

Article 52 states "the operation of an enterprise with foreign owned capital or a business co-operation contract shall be terminated in the following cases:

- (1) Upon expiry of the operational duration stated in the investment licence;
- (2) In accordance with the conditions for termination of operation stipulated in the contract, the charter of the enterprise or the agreement between the parties;
- (3) According to a decision of the body in charge of State management of foreign investment in consequence of a serious breach of the law or a breach of any provision of the investment license;
- (4) Following a declaration of bankruptcy."

In relation to (3), the "body in charge of State management" is the Ministry of Planning and Investment or the people's committee of a province/city dependings on the size/nature of the enterprise. The breaches of law/investment license that the authorities might rely on in order to justify a termination of an FIE's operation under Article 52 above may include, for instance, its failure to carry out "administrative procedures" stipulated in Circular 12 of the Ministry of Planning and investment dated 15 September 2000, ie to publish an announcement on establishment of the Company, register its personnel with the relevant authority, open bank account(s), apply for a seal, etc.

4. *Under Decree 24 dated 31 July 2000 (as amended 19 March 2003)*

For a 100% foreign owned enterprise, Article 23.2 states "the method and schedule of legal capital contribution shall be stipulated in the charter of the enterprise. In the case where the foreign investor(s) fails, without reasonable cause, to make capital contributions in accordance with the stipulated schedule, the investment issuing-issuing body shall have the power to withdraw the investment license". See Article 15.2 for joint venture enterprises.

Normally, an FIE's charter stipulates the method and schedule of legal capital contribution. But such schedule may be heavily qualified, eg by reference to Board decision.

5. *Under Notice 60 of the Government Office dated 3 April 2002*

Article 4 states that "the licensed projects which have not been implemented in accordance with their [registered] schedule or the approved planning must be adjusted or terminated [by withdrawal of investment license]".

6. *When a delegated body has exceeded its authority*

Some investment licenses have been withdrawn or amended by the relevant state authority without specified reasons or notice to the investor. Most of these cases appear to be when a central government authority has "overruled" an investment license issued by a delegated authority (eg HCMC PC).

Examples: Zuellig Pharma Vietnam Ltd (licensed by an industrial zone authority) J.W Thompson VN (licensed by HCMC PC) and Donafrance (licensed in Dong Nai PC, but the Government Office, under Letter 1409 dated 23/6/2004, required the MPI to withdraw the investment license on the basis that the investment license was "not issued in accordance with current regulations").

3.5 Six Foreign Invested Enterprises to Go Public

The Government has allowed in principle six foreign-invested enterprises (FIEs) to convert into shareholding companies.

The six companies have met the requirements such as full paid-in legal capital and operations for at least three years, with the latest year in profit. The companies are Taya Vietnam, Austnam, International Food Processing, Taicera, Tungkuang Industrial and Royal International.

According to Phan Huu Thang, director of the Ministry of Planning and Investment's foreign investment department, the conversions will be made within six months under Government Decree 38/CP dated 15 April 2003 on conversion of FIEs.

The six FIEs are part of a pilot program for conversion of FIEs into shareholding companies, which aims to diversify forms of foreign investment, attract more capital resources and give a "fresh boost" to the stock market.

Six FIEs allowed to convert into shareholding companies				
Company and location	Investment form	Legal capital	Face value of share	Business
Taya Vietnam Electric Cable & Wire (Dong Nai province)	100% foreign-owned	VND165.2 billion	VND10,000	Electric cables and wires
Austnam (Hanoi)	Joint venture	VND17.6 billion	VND10,000	Metal roofing sheets
Interfoods (Dong Nai province)	100% foreign-owned	VND179.1 billion	VND15,712	Processed food for export
Taicera Ceramic Industry (Dong Nai province)	100% foreign-owned	VND170.7 billion	VND10,000	Tiles, ceramics
Tungkuang Industrial (Dong Nai province)	100% foreign-owned	VND105.6 billion	VND10,000	Aluminum products
Royal International (Quang Ninh province)	Joint venture	US\$21 million	US\$1	Five-star hotel, recreation

3.6 Phu My Hung - Certificates of LUR or Housing Ownership

In the scramble to buy land, apartments and houses developed by the Phu My Hung Joint Venture Corporation ("PMH") in Saigon South over the past few years, buyers have been prepared to overlook the fact that there are no laws or published guidelines defining the procedures by which such transactions are to be completed.

Quite apart from the current controversy as to whether PMH has the licensed authority to make such sales and, if so, what the applicable corporate income tax rate is (see Part 3.8 of the August issue of Vietnam Legal Update), the development and sale of property by any foreign invested enterprise ("FIE") necessarily involves some legal complications. These arise from the fact that the FIE (1) is only licensed for a defined duration, typically 30 to 50 years (so can buyers acquire rights to property in perpetuity?), and (2) is issued with a land use right ("LUR") certificate (the Vietnamese form of land title document) which the FIE cannot simply divide and assign in lots to buyers.

In a recent interview with SGT, Mr Bui Thanh Son, Deputy General Director of PMH, went some way to describing how the authorities are addressing these issues in practice. Our English translation of the interview appears below.

Is a purchaser of housing and assignee of LURs in PMH restricted by the limit of 50 years' duration for the joint venture operation in Vietnam?

The laws of Vietnam (the Civil Law, the Land Law and so forth) provide that the character of ownership of residential housing and of the right to use residential land is stable and long-term. Therefore the legal interests and obligations of a purchaser of housing and assignee of LURs in PMH are the same as those of any other purchaser of housing and assignee of LURs throughout the territory of Vietnam, and are in no way restricted by the limit on the duration of PMH.

Which agency issues certificates of ownership of residential housing and residential LURs to customers in PMH?

The People's Committee of Ho Chi Minh City ("PC") is the agency which signs any decision on recovery of land and allocation of it to a house purchaser from PMH. The Department of Construction ("DOC") and the Department of Natural Resources and Environment ("DNRE") are the agencies which sign certificates of ownership of residential housing and residential LURs for purchasers of housing and assignees of LURs in PMH.

What are the order and procedures for doing this?

After a house purchaser and an assignee of LURs completes the matters agreed in the contract of assignment from PMH, and provides all the documents stipulated by the regulations, PMH will give an application file for issuance of a certificate of ownership of residential housing and a certificate of residential land use right to the purchaser to take to the Management Board of the Phu My Hung Urban Zone ("PMHMB"). The file comprises the construction permit; minutes of completed construction work; a copy of the agreement on architectural zoning sealed by PMH; a letter of request from PMH for issuance of the above-mentioned certificates; contract of sale and purchase certified by the HCMC Notary Office; and some other documents required by the regulations from administrative offices such as copy ID card, residential registration, certificate of marital status and so forth. The PMHMB will then accept and evaluate the file, and transfer it to the DNRE to submit to the PC to sign a decision on recovery of the particular land area from PMH for transfer and allocation of the land use right to the house purchaser and assignee of the land use right.

After the parties have fully discharged their financial obligations under the regulations of the PC (namely paid all tax on assignment of LURs, land use fees, registration and administrative fees etc.), the DNRE will sign a residential land use right certificate and the DOC will sign a certificate of ownership of residential housing. Possibly the procedures will soon be changed in favour of purchasers.

3.7 Land Contributed by Vietnamese Companies

When considering financial obligations in respect of land (outside of industrial zones) in the context of foreign invested enterprises ("FIEs"):

1. An FIE that leases land from the State must pay land rental to the State at a rate determined by the provincial/municipal people's committee within the range prescribed by Decision 189 of the Ministry of Finance dated 24 November 2000 ("Decision 189") - Article 86 of Decree 24 of the Government dated 31 July 2000, as amended 19 March 2003 ("Decree 24").
2. The capital value of land use rights contributed by a Vietnamese company to a joint venture enterprise ("JVE") must be agreed by the Vietnamese and foreign parties on the basis of land rental rates determined by the provincial/municipal people's committee "within the range" prescribed by Decision 189 (Article 16 of Decree 24). Article 10.2 of Decision 189 states that the rate "must not be lower" than the range prescribed by Decision 189 (implying that it may be higher).
3. A Vietnamese company that contributes land use rights to a JVE will usually be obliged to pay to the State an amount equal to or less than the rate it has been credited as having contributed to the JVE.

In relation to point 3. above, Vietnamese companies that contribute land use rights to a JVE will usually be subject to one of three different types of financial obligation to the State in respect of such land:

- (i) Land use tax. This is payable by state owned enterprises ("SOEs") or private Vietnamese companies that have been allocated the land by the State (with payment of land use fees) or assigned the land from other organizations/individuals - Article II.II.1 of Circular 35 of the Ministry of Finance dated 25 May 2001 ("Circular 35"). In this case, the financial obligation to the State of the Vietnamese partner to the JVE will probably be less than the amount that the Vietnamese partner has been credited as having contributed to the JVE.
- (ii) Capital use tax. This is payable by SOEs that have leased the land from the State (for the purpose of capital contribution) - Article II.II.2.1 of Circular 35. In this case, the financial obligation to the State of the Vietnamese partner to the JVE will be equal to the amount that the Vietnamese partner has been credited as having contributed to the JVE.
- (iii) Land rental difference. This is payable by private Vietnamese companies that have leased the land from the State prior to the effective date (1 July 2004) of the new Land Law dated 26 November 2003 ("new Land Law"), at a "local" rate determined in accordance with Article I.III.1 of Circular 35 (which will usually be less than the rate that would be applicable under Decision 189). Such a company may contribute the rights to use such land to a JVE, provided it prepays the land rental for either (a) the entire duration of the lease, or (b) a number of years in advance provided that there is at least 5 years in the leased term and this minimum 5 year land rental is prepaid (Article II.II.2.2 of Circular 35). In addition, the land rental payable by such company to the State will be increased from the "local" rate to a rate determined in accordance with Decision 189 (Article II.II.2.2 of Circular 35). However, even with the increased rate, the total financial obligation to the State will probably still be less than the amount the Vietnamese partner has been credited as having contributed to the JVE.

Note that the new Land Law does not permit Vietnamese companies (ie SOEs and private Vietnamese companies) that leased land from the State (after the effective date of the new Land Law) to contribute land use rights to a JVE. Therefore, it is unlikely that the financial obligations described in (ii) and (iii) above will be applicable for any Vietnamese partner to JVEs established after 1 July 2004. From this date, a Vietnamese company that contributes land use rights to a JVE should have been allocated the Land and will, therefore, be obliged to pay to the State an amount less than the amount it has been credited as having contributed to the JVE.

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