



# Vietnam Legal Update

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Hanoi Branch Office  
Suite 401, Hanoi Tower  
49 Hai Ba Trung  
Hanoi  
Vietnam  
Tel +84 4 936 0990  
Fax +84 4 936 0984  
bill.magennis@phillipsfox.com

Ho Chi Minh City Branch Office  
Suite 605, Saigon Tower  
29 Le Duan Boulevard  
District 1, Ho Chi Minh City  
Vietnam  
Tel +84 8 822 1717  
Fax +84 8 822 1818  
nigel.russell@phillipsfox.com

Melbourne Office  
Level 21, 140 William Street  
Melbourne  
Australia  
Tel +61 3 9274 5000  
Fax +61 3 9274 5111  
maureen.mclaughlin@phillipsfox.com

[www.vietnamlaws.com](http://www.vietnamlaws.com)  
[www.phillipsfox.com](http://www.phillipsfox.com)

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## Part 1 Selected New Legal Instruments

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### 1.1 Foreign shareholdings

On 29 September, VN Express reported that, according to the Deputy Chairman of the State Securities Commission, the Prime Minister signed a decision increasing the cap on total foreign shareholdings in Vietnamese companies from the current 30% to 49% on 28 September.

>>> We have not been able to confirm this report yet.

### 1.2 Competition

#### **Decree 116-2005-ND-CP of the Government dated 15 September 2005 on Implementation of the Law on Competition**

Vietnam's new Competition Law came into force on 1 July 2005. It imposes a number of restrictions on the market practices of businesses in the Vietnamese market, in particular those with a 30%+ market share. The Competition Law regulates two broad categories of competitive practices:

- > Practices in restraint of competition:
  - Agreements in restraint of competition (such as price-fixing agreements between competitors);
  - Abuse of dominant market position (such as predatory pricing and minimum resale-price fixing) or monopoly position;
  - Economic concentration (such as mergers and acquisitions); and
- > Unfair competitive practices (such as misleading and deceptive advertising and illegal multi-level selling, also known as pyramid selling).

Decree 116 provides more detail with respect to:

- > How to determine the relevant market and market share (with special provisions for insurance companies and credit institutions);
- > What constitutes the various types of agreement in restraint of competition;
- > What constitutes the various practices in abuse of dominant market position or monopoly position, and how to determine "capability to substantially restrain competition";
- > How to determine whether an acquisition results in "controlling or governing all or one of the trades of another enterprise" and amounts to an economic concentration (again, with special provisions for insurance companies and credit institutions);
- > Procedures for exemption from competition prohibitions;
- > Competition complaints and competition legal proceedings;
- > Competition fees (for evaluation of exemption applications and hearing of competition cases);
- > Evidentiary rules;
- > Administrative preventive measures available during competition legal proceedings;
- > Competition decisions and appeal avenues.

Decree 116 follows on the heels of Decree 110 on Multi-Level Selling issued on 24 August (for a summary, see the August 2005 Issue of Vietnam Legal update on [www.vietnamlaws.com](http://www.vietnamlaws.com)). The anticipated Decree on Administrative Offences in the Field of Competition is understood to have been finalized by the Ministry of Trade, reviewed by the Ministry of Justice and submitted to the Government in July, but has still not been

issued by the Government. As for the implementing legislation with respect to the Vietnamese competition authorities (which will take the form of a Government Decision), the Ministry of Trade is understood to still not have even finalized its draft!

To date, the only infrastructure for implementation of the Competition Law is the new Competition Administration Department under the Ministry of Trade. In the absence of a Competition Commission (to consider applications for exemptions from the Competition Law and to investigate competitive practices, amongst other things) and a permanent Competition Council (to deal with competition cases concerning practices in restraint of competition, after completion of investigations by the Competition Commission), how can the Competition Law and Decree 116 be enforced?

>>> For more information on Vietnam's new Competition Law and competition offences, go to [http://www.vietnamlaws.com/other\\_legal\\_updates.aspx](http://www.vietnamlaws.com/other_legal_updates.aspx)

>>> For English translations of Vietnam's new Competition Law and Decree 116, subscribe to [Vietnam Laws Online Database](#) on [www.vietnamlaws.com](http://www.vietnamlaws.com)

### 1.3 **Imports of fixed assets by foreign invested enterprises**

**Circular 16-2005-TT-BCN of the Ministry of Trade dated 16 August 2005 on Addition to Circular 22-2000-TT-BTM Guiding Implementation of Decree 24-2000-ND-CP Providing Detailed Regulations on Implementation of the Law on Foreign Investment in Vietnam With Respect to Using Accrued Amortized Value in Calculation for Import of Equipment, Machinery and Means of Transportation to Form Fixed Assets by Enterprises with Foreign Owned Capital**

Circular 22 provides that, when a foreign owned enterprise ("FIE") imports items to form fixed assets, it must do so in accordance with its import plan. A FIE's import plan must be consistent with its investment license and its eco-technical explanatory statement (or feasibility study), in particular with respect to the amount of invested capital allocated for import of fixed assets. Circular 22 requires approval from the Ministry of Trade where an import plan is inconsistent with the FIE's investment license and feasibility study, except where the value of the imported goods will only be 10% more than the sum of invested capital allocated in the import plan and where the absolute value of the imports is not over \$10,000 (in such case, approval is not required).

Circular 16 now adds another concession for FIEs. When calculating the capital required for imports to form fixed assets, FIEs are now permitted to use accrued amortized capital.

>>> For an English translation of Circulars 22 and 16, as well as a wide range of other relevant legislation, subscribe to [Vietnam Laws Online Database](#) on [www.vietnamlaws.com](http://www.vietnamlaws.com).

### 1.4 **Equitization**

**Decision 2592-QD-BTC of the Ministry of Finance dated 4 August 2005 issuing Procedures for Co-ordinating Equitization of State Owned Enterprises and Listing or Registration for Share Trading at Securities Trading Centres**

Decision 2592 prescribes:

- A.** Procedures for co-ordinating the equitization of State owned enterprises ("SOEs") and the listing of its shares at the Securities Trading Centre ("STC") of Ho Chi Minh City or the registration for share trading at the STC of Hanoi:
1. Issuance of a decision on equitization of a SOE which satisfies all conditions for listing at the HCMC STC or for registration for trading at the Hanoi STC (where the decision specifies that equitization must be conducted in association with listing/registration).
  2. Preparation of data file and valuation of the SOE. Of note, a SOE must sign a contract for consultancy regarding the application for permission for listing shares with a securities company. The SOE must prepare a prospectus and also a plan on organization of a system of disclosure of information aimed at discharging the obligation of any company which lists or registers for

trading to make regular disclosures of information. A charter on organization of operations of the shareholding company must also be drafted.

3. Formulation of a plan for and implementation of equitization:
  - For SOEs which will list immediately after equitization, the plan for equitization of the SOE must include the proposed ratio of shares which will be sold to the public. (The criteria for listing are: at least 50 external shareholders holding more than 20% of the freely convertible shares of the company; or, for a company with capital of VND100 billion or more, 15%.) For SOEs which will register to trade at the Hanoi STC, they must have at least 50 current shareholders.
  - To list at the HCMC STC, an application file for permission must be submitted to the Ministry of Finance's State Securities Commission; to register for trading at the Hanoi STC, a file for permission must be submitted. Application contents are prescribed in Decision 2592.
  - Of note, SOEs which are dependent accounting members of a corporation and which apply for registration for trading at the Hanoi STC in association with equitization are exempt from the condition requiring that business or production operations in the year immediately preceding the year of registration must be profitable.
  - Prior to implementing the plan on sale of shares, an enterprise must disclose information (including prospectus, plan on issuance of shares and other relevant data) on the mass media and at stipulated locations in order that investors may have a basis for making investment decisions. The announcement of the sale of shares must specify that the shares will be listed at the HCMC STC or registered for trading at the Hanoi STC.
4. Completion of procedures for conversion of SOE and for listing/trading:
  - After completion of distribution of shares, the new shareholding company must hold a general meeting of shareholders in order to pass its charter and to elect the board of management and executive apparatus, and then conduct business registration.
  - Relevant data which was not in existence before equitization must be added to the application file for permission to list or register for trading (such as register of shareholders, new business registration certificate, undertakings from board members etc to hold at least 50% of the shares they own for a period of 3 years from the date of listing, and other documents noted in Decision 2592).
  - After the company receives its listing permit from the State Securities Commission, it must register and deposit its shares with the HCMC STC. A company registered for trading at the Hanoi STC must complete procedures for depository and trading after it receives its certificate of registration for trading.

**B.** Procedures for co-ordinating the sale of State-held shares in equitized enterprises and the listing/registration for share trading:

1. Issuance by the body representing the portion of State owned capital and approval by the competent State Body of a decision to sell State owned shares in the equitized SOE in association with listing at the HCMC STC or registration for trading at the Hanoi STC.
2. If the State shareholder is still deemed to be a founding shareholder and it is proposed that it will hold less than 20% of the shares, a general meeting of shareholders must vote on and pass a decision to sell State shares and to list/register.
3. Preparation of data file, valuation of shares, and plan for public sale of shares. If the volume of State held shares for sale is over VND10 billion, there must be an auction at a STC. Otherwise, the shares may be sold at a STC or via an intermediary organization. The plan for distribution of shares must contain a provision on the ratio to be sold to the public being investors external to

the enterprise (which ratio must comply with the criteria for listing/registration at an STC, as in A.3 above).

4. A company which applies for permission for listing must sign a contract with a securities company to provide consultancy on listing of the securities. This organization may be the same organization which has signed a contract for valuation, to conduct an auction or to underwrite the issue, and to distribute the shares.
5. To list at the HCMC STC, an application file for permission must be submitted to the Ministry of Finance's State Securities Commission; to register for trading at the Hanoi STC, a file for permission must be submitted. Application contents are prescribed in Decision 2592. A SOE which undergoes equitization within a period of one year from the date of its establishment may provide, in lieu of audited financial statements, the decision on valuation of the enterprise from the competent authority if an independent auditing organization participated in such valuation. Any SOE which, prior to equitization, was a dependent accounting member of a corporation and undertakes the sale of State held shares within a period of one year from the date of equitization in association with registration for trading at the Hanoi STC will be exempt from the condition requiring that its production or business operations for the year immediately preceding the year in which it registers for trading must be profitable.
6. Prior to implementing a plan on the sale of shares, the company must disclose information on the mass media and at the locations stipulated in A.3 above.
7. Upon completion of the issuing tranche, the company applying for permission for listing must lodge any extra data which was missing in its earlier application file, such as: the results of the issuing tranche; a chart of the shareholding structure of shareholders; a list and summarized curriculum vitae of the board members, etc. A company applying for registration for trading at the Hanoi STC must lodge additional documents, such as the results of issuance of shares, and a chart showing the structure of shareholding.
8. After the company has received its listing permit from the State Securities Commission, the listed company must register for listing and depository of shares with the HCMC STC; and a company registering for trading at the Hanoi STC must complete procedures for depository and trading after it receives its certificate of registration for trading.

## 1.5 **Pharmacy law**

### **Law 34-2005-QH11 of the National Assembly ("NA") dated 14 June 2005 on Pharmacy**

Effective as of 1 October 2005, the Law on Pharmacy addresses a number of important issues in the pharmaceutical industry, including State policy, the State body responsible for administration of the industry, what administration of pharmaceutical businesses and pharmaceuticals will comprise, quality control of pharmaceuticals, and pricing of pharmaceuticals. In particular, the Law on Pharmacy regulates:

- > business in pharmaceuticals;
- > registration and circulation of pharmaceuticals;
- > use of pharmaceuticals;
- > information about and advertising of pharmaceuticals;
- > clinical testing of pharmaceuticals;
- > administration of addictive pharmaceuticals, psychotropic drugs, pre-substances used to manufacture pharmaceuticals and radioactive drugs; and
- > quality standards of pharmaceuticals and verification testing of pharmaceuticals.

In general, the Law on Pharmacy encourages both domestic and foreign organizations and individuals (including overseas Vietnamese) to develop scientific research into pharmaceutical technology and biological technology aimed at the production of new pharmaceuticals; investment in the production of raw materials for the manufacture of pharmaceuticals and finished products which comply with the treatment framework for, and the pharmaceutical use requirements of the citizens.

The Law enshrines the right of enterprises to fix their own prices. But this right is limited by the State's power to take measures to stabilize market prices of pharmaceutical drugs in order to ensure health care.

Of note, the new Law abolishes the statutory discrimination between State and private pharmaceutical businesses (previously enshrined in the former Ordinance on Private Pharmaceutical Practice).

Below, we focus on three of the main areas of regulation: conduct of business in pharmaceuticals, registration and circulation of pharmaceuticals, and information about and advertising of pharmaceuticals.

> Business in pharmaceuticals

This is a business line subject to conditions. In addition to a certificate for business registration (in the case of local companies) or investment license (in the case of foreign invested enterprises), companies conducting the business in pharmaceuticals must obtain a certificate of satisfaction of conditions for conducting business in pharmaceuticals ("eligibility certificate"). There are six forms of business in pharmaceuticals, including:

- 1) manufacture,
- 2) import and export,
- 3) wholesale selling,
- 4) retail selling,
- 5) preservation services, and
- 6) services of testing pharmaceuticals.

A company may only conduct the form(s) of business in pharmaceuticals which is(are) stipulated in the eligibility certificate. If it wishes to engage in a form of business in pharmaceuticals other than the form(s) already stipulated in the eligibility certificate, the company must apply to have the eligibility certificate amended.

Of note, current foreign investment laws generally do not allow foreign invested enterprises to engage in the forms of business (2), (3) and (4) above.

In order to obtain an eligibility certificate, companies must satisfy the following conditions:

- (a) They must have material and technical facilities and personnel with the professional qualifications necessary for the particular form(s) of business in pharmaceuticals;
- (b) The person managing professional pharmaceutical matters must have been issued with a pharmacy practising certificate ("practising certificate").

The Ministry of Health is responsible to issue eligibility certificates with respect to the forms of business (1), (5) and (6) above and to issue Practising Certificates for persons working in foreign invested enterprises. Provincial-level Departments of Health are responsible to issue eligibility certificates with respect to the forms (2), (3) and (4) above and to issue practising certificates for persons working in other entities. The Law on Pharmacy provides for the procedures and documentation to obtain eligibility certificates and practising certificates to be specified in an implementing decree to be issued by the Government.

> Registration and circulation of pharmaceuticals

In order to be circulated in Vietnam, all pharmaceuticals, whether locally manufactured or imported, must meet the following conditions:

- (a) They must achieve the quality standards which have been registered;
- (b) They must satisfy fully the requirements on labeling of goods being pharmaceuticals in accordance with relevant laws;
- (c) Wrapping and packaging materials must satisfy requirements for ensuring quality of pharmaceuticals;
- (d) The pharmaceutical must have a registered number;
- (e) The price of the pharmaceutical must be declared in accordance with the Law; and, if the pharmaceutical is imported, its price must not be higher than the current price of imported pharmaceuticals in regional countries with similar health and commercial conditions as Vietnam.

With respect to (d) above, the registration for a number/code is based on (i) results of clinical testing regarding the effectiveness and safety of the pharmaceutical, (ii) technical data about the pharmaceutical, and the national policy of Vietnam regarding the pharmaceuticals industry. However, in the case of imported pharmaceuticals, the clinical testing is not required if the pharmaceuticals have already been in legal circulation for at least five years in the foreign country; the pharmaceuticals have already been used widely for many patients and the competent State body of the country manufacturing the pharmaceuticals certifies them as safe and effective; and the pharmaceuticals have the same use, the same content and the same medical designation in Vietnam as in such foreign country.

> Information about and advertising of pharmaceuticals

The advertising of pharmaceuticals must comply with the regulations on advertising. In addition, the Law prohibits the advertising of prescribed pharmaceuticals (ie pharmaceuticals classified as "prescribed" in a list to be issued by the Ministry of Health.) to the public in any form whatsoever. Non-prescribed pharmaceuticals are permitted to be advertised on advertising media, with the following proviso: to be permitted to be advertised on radio or television, non-prescribed pharmaceuticals must contain chemical agents on the list of items permitted to be advertised on radio or television as issued by the Ministry of Health and have a currently effective registered number in Vietnam.

>>> For an English translation of the Law on Pharmacy, subscribe to [Vietnam Laws Online Database](http://www.vietnamlaws.com) on [www.vietnamlaws.com](http://www.vietnamlaws.com).

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## Part 2 Features

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### 2.1 Recent banking reforms

*Below we discuss the main regulatory reforms in the banking sector in Vietnam over the past 12 months.*

In order to promote domestic and foreign investment, Vietnam has gradually developed its banking and finance regulatory framework since the introduction of its "doi moi" (renovation) policy in the late 1980s. Despite a number of reforms precipitated by the Asia financial crisis and moves towards joining the WTO, Vietnam's banking and finance sector remains tightly controlled.

As Vietnam integrates deeper into the global economy, the need for regulating the banking sector and restructuring State owned commercial banks has become a stated high priority for the Government. The number of reforms in the past 12 months indicates that the momentum for change is growing. This report reviews the main reforms that have taken place during this period.

Despite the efforts of the Government, progress has been slow. The general consensus is that liberalization has been moving positively, but slowly. Indeed compared with all reform agendas for WTO accession, Klaus Rohland, Country Director of the World Bank in Vietnam, recently commented "banking is the area where reforms have been the slowest" (Vietnam News Agency (28/12/2004). 'Viet Nam's economic growth remains strong in 2005, WB official says' site: [www.vna.com.vn](http://www.vna.com.vn)).

#### **PART A: Form and establishment**

##### **1. Law on credit institutions**

The National Assembly's amendments to the 1997 Law on Credit Institutions ("LCI") became effective as of 1 October 2004. The five primary amendments to the LCI were:

- > Compliance with international agreements regarding forms of establishment – the LCI now allows 100% foreign invested banks to operate in Vietnam; and foreign credit institutions are permitted to contribute capital to and purchase shareholdings in banks operating in Vietnam.
- > Enhanced decision-making autonomy of credit institutions – the amendments widen the range of the types of deposits permitted; banks may more freely make unsecured loans and more autonomy is given to State banks to make credit decisions.
- > Improved safety and soundness of credit institutions – the range of functions to be performed by the board of supervisors has been expanded.
- > Improved auditing process.
- > Separation of policy and commercial lending.

The State Bank of Vietnam has recognized that these amendments are inadequate and that, despite these reforms, the LCI still does not meet international standards for banking, supervision and monetary policy. It has been the conclusion of a number of parties involved in the drafting process (including the National Assembly, existing banking institutions and the State Bank) that a comprehensive overhaul of the legal framework for the sector is still needed, starting with a revision of the LCI and the 1997 Law on the State Bank. The State Bank has predicted that such revisions will not happen for several years due to both the time necessary for considering proposed changes and the complex legislative process.

A number of the new rights under the LCI (eg the right to establish a 100% foreign invested bank) will not become operative in practice until the Government has issued implementing regulations.

## 2. Foreign credit institutions

To implement the LCI reforms relating to forms of establishment, a new decree is required to replace Decree 13-1999-ND-CP of the Government dated 17 March 1999 on organization and operation of foreign credit institutions and representative offices of foreign credit institutions in Vietnam.

A draft of the proposed new decree was released for public comment at the end of 2004 and it was expected that the new decree would be issued and become effective in the first quarter of 2005. Consultations and different opinions over content have extended this timeline (not unusual in Vietnam). Recent discussions with the State Bank indicate that the final draft will now be submitted to the Government for approval in the first week of September 2005. Taking an optimistic view, we hope to see the new decree issued by the end of September. More conservatively, it may take until the end of the year or longer, depending on feedback and views of the Government.

The draft released for public comment has been criticized as not meeting Vietnam's commitments under the US-Vietnam Bilateral Trade Agreement ("BTA"), in particular with respect to national treatment. Reportedly, instead of entitling foreign credit institutions to provide the same products and services which domestic banks are currently permitted to provide, the draft provided for the State Bank to issue permits to foreign banks on a discretionary case-by-case basis. The draft also imposed a number of restrictions on foreign credit institutions which do not apply to domestic credit institutions eg. foreign bank branches must have legal capital of VND20 billion; 100% foreign owned banks must have legal capital of VND10 billion.

A welcome reform in the draft was the deregulation of the ratio of a foreign party's capital contribution in a joint venture bank. However, only domestic banks (not other domestic non-banking organizations) would be permitted to partner with foreign banks in joint venture banks.

In accordance with the BTA, the operational network of foreign bank branches (ability to open branches and transaction offices) will be restricted under the new decree. This restriction is seen by the Government as an important safeguard to protect the development and competitiveness of Vietnamese banks against the threat of competing foreign banks.

## 3. Foreign shareholdings

To implement the LCI reforms allowing foreign credit institutions to contribute capital to and purchase shareholdings in Vietnamese banks, revision is required of regulations issued with Decision 228-QD-NH5 of the State Bank dated 2 December 1993 on foreign shareholdings in Vietnamese banks. An officer from the State Bank's Shareholding Division has confirmed that the revision is still in progress and that, for the present time, the State Bank is approving share purchases by foreign credit institutions on a case-by-case basis only. This ad-hoc approval recently occurred when the State Bank approved Australian bank ANZ to buy shares in the Vietnamese bank Sacombank. Several major foreign banks have sought State Bank approval to buy shares in Vietnamese banks but their cases have not yet been decided.

The State Bank's revision of Decision 228 is also expected to abolish the cap on the shareholding of any one foreign investor in a Vietnamese bank. Currently, the maximum shareholding of any one foreign investor is capped at 10% of the charter capital. No change in the 30% cap on total shareholdings of foreign investors in a Vietnamese bank is anticipated. But the abolition of the 10% cap would allow one foreign investor to hold the full 30% maximum total foreign shareholdings. This reform would mirror the abolition in mid-2003 of the cap on any one foreign investor's shareholdings in a listed Vietnamese company. A 30% shareholding is more appealing to institutional investors, allowing them greater participation in management.

On 6 September 2005, in VNECONOMY, Kieu Huu Dung, director of the State Bank's Department of Banks and Non-Banking Credit Institutions, announced that the cap-lifting reform was being finalised and is scheduled to be effective by the end of 2005.

We now anticipate that the reform allowing foreign credit institutions to contribute capital to and purchase shareholdings in Vietnamese banks will be introduced at the same time.

#### **4. Microfinance institutions**

From 30 March 2005, micro-finance organizations may now be established by social, political and trade organization, charitable and social funds and non-governmental organizations under Decree 28-2005-ND-CP of the Government dated 9 March 2005. The objective behind Decree 28 is to enable "small-scale finance activities" to be provided to low income people and households. To be licensed, a micro-finance organization must have a minimum legal capital of VND500 million (or VND5 billion if savings services are offered).

#### **5. Vietcombank equitization**

It is expected that Vietcombank, the largest State owned bank, will be equitized into a commercial joint stock bank in 2006. In March and June 2005, the State Bank submitted official proposals that the Prime Minister approve Vietcombank's equitization. In June 2005, the Prime Minister issued Official Letter 3120-VPCP authorising Vietcombank to hire an international consulting firm to appraise the corporate value and issue bonds to increase capital. On 21 September 2005, the official equitization decision (which is required by law) was issued by the Prime Minister under Decision 230-2005-QD-TT.

### **PART B: Products and services**

#### **1. VND deposit limits**

As of 1 March 2005, an EU foreign bank branch may now accept VND deposits from Vietnamese legal entities with which it does not have a credit relationship up to 400% of its charter capital and from Vietnamese natural persons with which it does not have a credit relationship up to 350% of its charter capital. This increase puts EU foreign bank branches on equal footing with their US counterparts (who already enjoyed such increase under the BTA). Non-EU and non-US foreign bank branches remain subject to a 50% cap.

#### **2. Interest rates on deposits**

Effective from 1 September 2005, Decision 1247-2005-QD-NHNN of the State Bank dated 26 August 2005 takes the maximum interest rates for USD deposits to new all-time highs. For USD on-call deposits, the maximum interest rate is now 0.5% per annum (up from 0.3% per annum). For USD term deposits up to 6 months, it is now 1.2% per annum (up from 0.7% per annum). And for USD term deposits over 6 months, it is now 1.5% per annum (up from 1.0% per annum). This is the second rate increase this year, following the first increase in April 2005 under Decision 272-2005-QD-NHNN of the State Bank dated 21 March 2005.

#### **3. Cheques**

The use of cheques is not popular in Vietnam, partly because of the risk of non-payment. To reduce this risk, and encourage use, Circular 05-2004-TT-NHNN of the State Bank dated 15 September 2004 has been issued, and sets out measures that can be applied when a cheque is not honoured.

#### **4. Factoring**

A legal framework authorizing credit institutions to undertake factoring activities (the process of purchasing commercial accounts receivable (invoices) from a business at a discount) was introduced by Decision 1069-2004-QD-NHNN of the State Bank dated 6 September 2004. A number of restrictions and exclusions apply. To undertake factoring activities, a credit institution must:

- > have approval from the State Bank;
- > have overdue debts of less than 5% of its total loan balance;
- > not be in violation of any regulations on banking safety;
- > not be under any investigation;
- > (if import-export transactions are involved) have a permit to deal in foreign exchange.

## 5. Foreign currency trading

Now, under Decision 648-2004-QD-NHNN of the State Bank dated 28 May 2004 commercial banks are free to agree with their customers on the forward exchange rate between VND and US dollars so long as it does not exceed a prescribed limit (according to a prescribed formula); and are free to agree with their customers on the forward exchange rate between VND and other foreign currencies or as between different foreign currencies without the above limit.

Long overdue, Decision 1452-2004-QD-NHNN of the State Bank dated 10 November 2004 updates the regulation of foreign exchange transactions by credit institutions in Vietnam, replacing Decision 17-1998-QD-NHNN7 of the State Bank dated 10 January 1998. As well as regulating spot, forward and swap transactions, Decision 1452 introduced regulations for the new commodity of "option to conduct a foreign exchange transaction" (limited to transactions between foreign currencies, not involving VND) and other foreign exchange transactions as permitted by the State Bank. Decision 1452 has significantly simplified the foreign exchange controls of authorized banks in Vietnam. Authorized banks are no longer required to satisfy prescribed conditions and obtain specific licenses from the State Bank to conduct spot, forward and swap transactions. The mandatory contents of transaction contracts are no longer prescribed; transacting parties are now free to agree on the contents of the transaction contract. However, authorized banks must still comply with the foreign currency position specified by current State Bank regulations, but they may maintain a total value of options without corresponding transactions at a maximum of 10% of their equity. Authorized banks are no longer permitted to collect transaction fees for spot, forward and swap transactions; but are permitted to do so for options to conduct a foreign exchange transaction provided fees are specified in the transaction contract. The term applicable to forward and swap transactions between VND with a foreign currency may now be anything from 3 to 365 days. And there is no term restriction on such transactions between foreign currencies or on options to conduct a foreign exchange transaction. However, transacting parties must fix and record in the transaction contract the date of maturity for payment and transfer of monies.

## 6. Offshore loans

New guidelines for borrowing and repayment of offshore loans by enterprises (including credit institutions) in Vietnam were issued under Circular 09-2004-TT-NHNN of the State Bank dated 21 December 2004. Under Circular 09, the foreign loan controls include:

- > Mandatory prescribed conditions (eg conditions as to loan purpose and amount) apply to the borrowing of short-term and medium to long-term loans.
- > Medium to long-term loans must be registered with the State Bank in all cases (within 30 working days from the date of signing a foreign loan agreement, and prior to initial drawdown).
- > Short-term loans must be registered with the State Bank if the loan is extended and the total loan term (original term plus extended term) is more than 1 year. (Previously, short-term loans were only required to be registered if the extended term was more than one year.)
- > State Bank is required to issue certification of loan registration.
- > Drawdown and repayment of foreign loans must be carried out through authorized banks, except in prescribed cases.

## 7. Finance and operating leasing

A number of reforms have been introduced to encourage the development of the finance and operating leasing sector. The major reforms include:

- > Existing finance leasing companies are allowed to undertake operating leasing activities under the Provisional Regulations on Operating Lease Activities by Finance Leasing Companies issued with Decision 731-2004-QD-NHNN of the State Bank dated 15 June 2004.
- > A suite of amendments improved Decree 16-2001-ND-CP of the Government dated 2 May 2001 on Organization and Operation of Finance Leasing Companies, including: new criteria for recognizing

leasing transactions; new provisions for the purchase-back of leased assets (including tax exemptions); addition of new activity of operating lease services; and new provisions on recovery of leased assets.

- >>> See the July 2005 Issue of Vietnam Legal Update on [www.vietnamlaws.com](http://www.vietnamlaws.com) for a more detailed summary of these reforms.

## **PART C: Regulatory supervision**

### **1. Prudential ratios**

Decision 457-2005-QD-NHNN of the State Bank dated 19 April 2005 issuing Regulations on Prudential Ratios in Operations at Credit Institutions is an important step in the State Bank's reform process and it regulates the following areas:

- > Minimum capital prudential ratios: Credit institutions must maintain a minimum ratio of 8% of their equity over their total assets in credit at risk (foreign bank branches are not subject to this requirement). This is consistent with the previous regulation, but importantly, Decision 457 introduces new calculations for adjustment of assets in credit, which are more sophisticated and more closely comply with the principles of the Basel I Accord.
  - > Credit limits for customers: A number of new lending limits to customers have been introduced. Credit institutions (except for foreign bank branches) must formulate an internal policy (which must be continually assessed every 6 months) regarding calculation of these limits.
  - > Payment ability ratio: Credit institutions must maintain certain minimum liquidity ratios.
  - > New maximum ratio of short-term capital funds which a credit institution is permitted to use to provide medium and long-term loans are introduced. For commercial banks – 40%, for other credit institutions – 30%.
  - > Limit on capital contribution and share purchase: Credit institutions may use up to 40% their charter capital and reserve funds to make commercial investments (with a maximum of 11% for any particular investment).
- >>> See the Banking Update – New Prudential Regulations on [www.vietnamlaws.com](http://www.vietnamlaws.com) for a detailed summary of Decision 457.

### **2. Rescheduling loans, reclassifying overdue debt**

Decision 1627-2001-QD-NHNN of the State Bank dated 31 December 2001 was amended on 3 February 2005 by Decision 127-2005-QD-NHNN of the State Bank. Decision 127 introduces a number of changes, but the most noteworthy relate to the rescheduling of loans and the reclassification of overdue debt.

Now, credit institutions can restructure loans by allowing a change to schedule of repayments. This change can extend the maturity date of the loan (extension of loan term), or only affect particular repayments and not the final maturity date of the loan (adjustment of payment schedule). The length of the extension is at the discretion of the credit institution (previously, the maximum period of extension was 12 months for short term loans, and half of the loan term for medium and long term loans).

Interestingly, Decision 127 provides that where a loan has been restructured, all outstanding loan principal is regarded as an overdue debt and must be classified from group 2 to group 5 as provided under the regulations on classification of debts by the State Bank (see Decision 493 in C.3 below).

Subsequently, on 31 May 2005, the State Bank issued Decision 783-QD-NHNN amending Decision 127. Now, the requirement is that the outstanding loan principal is classified into "appropriate groups of debt as provided for by the State Bank". That is, the credit institution may classify it as a standard debt (see category 1 under Decision 493 in C.3 below) and does not have to classify it as an overdue debt.

### 3. Risk provisioning

Loan loss reserves are now regulated by Decision 493-2005-QD-NHNN of the State Bank dated 22 April 2005, effective 5 May 2005, which replaced Decision 488-2000-QD-NHNN5 of the State Bank dated 27 November 2000 and Official Letter 354-CV-CNH dated 10 July 2002.

Under Decision 493, debts are grouped into 5 categories to which different risk-weighted percentages are applied, as follows:

- > Category 1: undue debt
- > Category 2: debts requiring attention (overdue debts < 90 days)
- > Category 3: under qualified debt (overdue debts > 90 and < 180 days)
- > Category 4: doubtful debt (overdue debts >181 and < 360)
- > Category 5: bad debt (overdue debts >360)

Alternatively, the State Bank may approve an internal qualitative credit rating system if the credit institution satisfies specific criteria listed in Decision 493. Consequently, rather than grouping debts based on the number of days they are overdue (as listed above), a credit institution may group debts into the 5 categories above based on its own assessment and criteria.

The ratios of reserves to be established for the above 5 categories are 0%, 5%, 20%, 50% and 100% respectively. Foreign bank branches may use the risk provisioning issued by their parent banks, with specific approval by the State Bank. Credit institutions must establish a general reserve equal to 0.75% of the total debts of categories 1 to 4 by 15 May 2010. Credit institutions must also establish a specific reserve based on the value of debts minus the value of secured assets.

Credit institutions must issue an internal credit rating system to support the classification of debts and management of credit quality in accordance with their operations by 15 May 2008.

### 4. Deposits reserves

Under Decision 796-2004-QD-NHNN of the State Bank dated 28 June 2004, the compulsory reserve ratios for deposits are:

- > For Vietnamese dong deposits on call and less than 12 months: 5%<sup>1</sup>
- > For Vietnamese dong deposits between 12 and 24 months: 2%
- > For foreign currency deposits on call and less than 12 months: 8%
- > For foreign currency dong deposits between 12 and 24 months: 2%

From 5 August 2004, the interest rate on the compulsory reserves at the State Bank is 1.2% for compulsory reserves in VND and 0% for foreign currency deposits. The interest rates on surplus above the compulsory reserve level is 1% (Decision 923-2004-QD-NHNN of the State Bank dated 20 July 2004).

1 A lower percentage applies to the Bank for Agricultural and Rural Development (4%), rural commercial shareholding banks, the Central People's Credit Fund and co-operative banks (2%).

## 5. Deposit insurance

Deposit insurance was introduced in Vietnam under Decree 89-1999-ND-CP of the Government dated 1 September 1999 in order to protect the lawful rights and interests of individual depositors, contribute to the stability of credit institutions and ensure the secure and healthy development of banking activities. Decree 109-2005-ND-CP of the Government dated 24 August 2005 amends Decree 89. Decree 109 is expected to become effective as of the end of September 2005.

Participation in deposit insurance remains compulsory for credit institutions and any other institutions which are permitted to carry on the banking activity of receiving VND deposits from individuals. Deposit premiums remain payable at the rate of 0.15% per annum of the average deposit balance of individuals at the institution participating in deposit insurance. All institutions participating in deposit insurance must still display publicly notification of their deposit insurance at their head offices and transaction places. If an institution participating in deposit insurance is in danger of insolvency, but not to the extent of being put under special control, Vietnam Deposit Insurance may assist it by providing loans to support payment of the insured deposits, by providing guarantees for special loans to fund payment of the insured deposits, or by purchasing debts in cases where such debts are secured by property.

Reforms introduced under Decree 109 include:

- > The maximum amount of insurance proceeds payable for all deposits (including principal and interest) of any one individual at any one institution participating in deposit insurance has been increased to VND50 million (from VND30 million under Decree 89).
- > If an institution participating in deposit insurance is required to terminate operations pursuant to a decision of a competent State body in order to commence liquidation procedures or pursuant to a decision of a court on commencement of liquidation procedures, there is now a time-limit for payment of deposit insurance proceeds to depositors. The time-limit is 60 days from the date of any such decision.

## 6. Money laundering

For the first time in Vietnam, Decree 74-2005-ND-CP of the Government dated 7 June 2005 Against Money Laundering introduces as of 1 August 2005 an anti-monetary laundering regime, imposing obligations on individuals and organizations involved in monetary transactions, such as credit institutions, insurance companies, real estate companies and lawyers (transacting bodies). Decree 74 also applies to foreign individuals and organizations operating in Vietnam.

Under Decree 74, transacting bodies are required to identify and report to the Anti-Money Laundering Centre under the State Bank the following transactions:

- > One or more cash transactions conducted by an individual/organization that in one day has a value of more than VND200 million (approx USD12,615) or in the case of saving account transactions more than VND500million (approx USD31,500).
- > Other suspicious transactions (listed in Decree 74, to be supplemented from time to time by the State Bank).

The State Bank is understood to be finalizing guidelines for implementation for Decree 74. As yet, personnel and infrastructure for the Anti-Money Laundering Centre has not yet been arranged.

>>> See Vietnam Legal Update June 2005 on [www.vietnamlaws.com](http://www.vietnamlaws.com) for more on anti-money laundering.

## 7. Reporting obligations

Under Decision 1407-2004-QD-NHNN of the State Bank dated 1 November 2004, joint stock commercial banks must now publish audited financial reports to shareholders and customers on a quarterly (optional) and annual basis. The annual financial report must be certified by independent auditors. The information in the annual finance statements must be disclosed at the offices of the joint stock commercial bank and in 3 consecutive issues of central and local newspapers within 120 days after the end of a fiscal year.

## PART D: LEGISLATIVE PIPELINE

### 1. Foreign currency regulation

Foreign currency is currently regulated under various decisions and implementing documents issued by the State Bank. An Ordinance on Foreign Exchange was scheduled to be drafted (only) in 2005. Now, in order to expedite promulgation of legislation necessary for WTO accession, the Ordinance (which is waiting in draft form) will be promulgated by the National Assembly's Standing Committee in October 2005 (not in 2006 as previously expected).

### 2. Law on Bills of Exchange

The Law on Bills of Exchange (previously titled the Law on Negotiable Instruments) is designed to create a legal framework for securing financial and banking transactions relating to credit bills, debit bills and cheques.

The draft law is scheduled to be approved by the National Assembly in its October/November session this year, and is expected to be effective from 1 July 2006.

### 3. Land use rights as collateral for offshore loans

Legislative reforms to allow foreign invested enterprises to use land use rights as collateral for loans provided by offshore banks have been deferred indefinitely. A proposal to introduce this reform was submitted by the State Bank to the Government early in 2003 and was reportedly supported by the Government. It was widely anticipated that the revised land law would introduce this reform. The Ministry of Planning and Investment had also planned to provide for this reform in the foreign investment laws. However, the 2003 Law on Land failed to provide for the use of land user rights as collateral for offshore loans. Reportedly, the Government is considering allowing the introduction of this fundamental reform on a trial basis, but no legal instrument enabling a trial has been issued as yet.

## 2.2 Investment Law update

In the August 2005 Issue of Vietnam legal Update (available on [www.vietnamlaws.com](http://www.vietnamlaws.com)) we discussed Draft 13 of the proposed new Law on Investment, focussing on Vietnam's move from investment licensing towards investment registration. Draft 13 was the end product of the first review of the proposed legislation by the National Assembly's Standing Committee ("NASC"). As we noted last month, this is an evolving piece of legislation. After review by the Government, the proposed new Law on Investment is now up to Draft 16. (In the interim, Draft 15 has come and gone - and we never even saw or heard of Draft 14!) The NASC reviewed Draft 16 earlier this week - and made so few changes (in fact, only two) that the end product is still numbered Draft 16 by the Ministry of Planning and Investment ("MPI", which is in charge of the drafting process). Our information from the MPI is that the post-NASC Draft 16 is the official draft that will be submitted to the NA for consideration and passing at its upcoming October-November Session.

The changes from Draft 13 to Draft 16 (and Draft 15 before it) are significant. Regrettably, the changes are not encouraging. Rather than narrowing the broad exceptions in Draft 13 to the norm of investment registration, it is the class of investment projects entitled to (true) investment registration that has been narrowed in Draft 16. And rather than the two alternatives of "investment registration" and "investment licensing", Draft 16 offers a hybrid category of "certification of investment registration". To this extent at least, Draft 16 is inconsistent with Vietnam's bilateral and international commitments.

>>> Of particular note, one of the NASC's two contributions this week was to insert the proposed (and much anticipated) date of effectiveness of the new Law on Investment. 1 July 2006 is the NASC's proposed date for change-over from the current dual investment regimes to the (alleged) common investment regime.

Of concern, hope for substantial improvements to the proposed new Law on Investment is fading. The Law will be considered by the National Assembly at its next Session, which is expected to commence on 18 October (and run until 30 November) - that will be the final opportunity to amend the current draft. But, as the new Law is scheduled to also be *passed* at the October-November Session, that opportunity will be severely constrained by time. So, now is the eleventh hour - just over two weeks remain for constructive representations to be made to the MPI, the Government and the NASC.

Below is a summary of Draft 16's approach to investment formalities:

	Who is entitled?	What investment process applies?	What investment document is issued?	What time-limits apply?
<b>Investment registration article 46</b>	Domestic investment projects with invested capital below VND15 billion (USD943,990) ** Excluding projects in investment sectors subject to conditions ("conditional projects")	Registration of investment on sample form at provincial State administrative body for investment	No "investment" document issued - projects may be implemented in accordance with registered items  (Registered items are presumed to be as stated in business registration certificate issued under the Law on Enterprises)	None  (Time-limit for issuance of business registration certificate under Law on Enterprises is presumed to apply)
<b>Investment certification article 47</b>	> Domestic investment projects with invested capital from VND15 billion to below VND300 billion  > Foreign invested projects with invested capital below VND300 billion (USD18,880,000)  ** Excluding conditional projects	Registration of investment on sample form at provincial State administrative body for investment.  (Draft 16 expressly states that investors will not be required to supplement their application with any other documents - but it still uses the language of "application!")	Investment certification in "investment - business registration certificate"  (Draft 16 provides for "investment - business registration certificate" to contain business registration items and investment project registration items.)	7 working days from date of receipt of application for registration
<b>Investment evaluation article 48</b>	> Conditional projects	> Submission of project file, comprising: - Letter registering investment; - Explanatory statement of conditions which project must satisfy.  > Items to be evaluated: - Project's satisfaction of conditions	Investment certification in "investment - business registration certificate"	30 days from date of receipt of complete and valid application file (extendable to up to 45 days in undefined "necessary cases")
	> Projects with invested capital of VND300 billion (USD18,880,000) or more	> Submission of project file, comprising: - Letter registering investment; - Eco-technical explanatory statement (particularizing any conditions for investment which project must satisfy; legal entity status or personal details; objectives of investment, location and land use requirement; output capacity; main technological and technical solutions; invested capital and capital sources; implementation schedule, and		

		<p>environmental standards)</p> <ul style="list-style-type: none"> <li>&gt; Items to be evaluated:             <ul style="list-style-type: none"> <li>- Compliance with master planning/zoning; land use requirements; project implementation schedule; environmental solutions; and</li> <li>- Project's satisfaction of any conditions</li> </ul> </li> </ul> <p>** Applicable to all projects subject to investment evaluation which are foreign invested or based on BCC, BOT, BTO or BT contract: relevant contract and charter of enterprise must be included in project file</p>	
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Under Draft 16 (article 29), "conditional projects" comprise projects in the following sectors:

- > Sectors impacting on social order and safety;
- > Sectors impacting on financial policy and the national currency;
- > Sectors impacting on public health;
- > Culture, information, the press and publishing;
- > Entertainment services;
- > Real estate business;
- > Survey and mining of natural resources; the ecological environment;
- > Education and training;
- > A number of other sectors in accordance with law.

For foreign investors, the range of "conditional projects" is wider still. Any foreign invested project in a sector which is subject to conditions on market access under an international treaty of which Vietnam is a "conditional project", and those conditions on market access (including the schedule for opening of the sector) will apply.

The list of conditional sectors will be regulated by the Government "based on the requirements for socio-economic development in each period and consistent with the undertakings in international treaties of which Vietnam is a member". The Government will also stipulate separately the conditions applicable to the establishment of economic organizations, the forms of investment, and the opening of sectors to foreign investors.

Other concerns arising under Draft 16 include:

- > Investors are still not permitted to mortgage land use rights and assets attached to land in favour of offshore lenders.
- > Government guarantee principles and authority are weak.
- > The definition of "indirect investment" does not provide for the investor to participate directly in the management of the investment - business activity.
- > Incentives will not be documented for all investment projects:
  - Projects subject to investment registration and projects entitled to investment certification will self-assess their entitlement to incentives. They will be required to "negotiate" the granting of each incentive to which they are entitled with each relevant State body, without their entitlement being confirmed in any document other than legislation.
  - Projects subject to investment evaluation will have their entitlements confirmed in the business - investment registration certificate.

So, whereas now foreign investors have to "negotiate" with tax and other bodies to have implemented the incentives stipulated in their investment licences, under Draft 16 they'll have to "negotiate" their actual entitlement to incentives with those bodies.

- > Investment evaluation process is lacking in transparency. Draft 16 provides no criteria for investment evaluation. Investors will have to wait for implementing regulations to know the true investment environment.

Draft 16 is littered with "exceptions" applicable to foreign invested projects. In its essence, Draft 16 fails to achieve the stated aim of "unification" of the domestic and foreign investment regimes. All it achieves is "unification" of the two investment laws. There are still two investment regimes, now they're just in one law.

*>>> Phillips Fox is pleased to assist the MPI with translation of the draft Law on Investment. Our translations have been submitted by Vietnam as part of its WTO negotiations. The latest Draft 16 will be available on Vietnam Laws Online Database on [www.vietnamlaws.com](http://www.vietnamlaws.com) next week.*

## Part 3 Did You Know?

### 3.1 National Assembly update

The National Assembly's Standing Committee ("NASC") is currently in session (from 26 September to 7 October) in preparation for the upcoming October-November Session of the National Assembly ("NA").

Laws on the program for review by the NASC include:

- > Laws to be passed at the NA's October-November Session (having already been considered at the NA's May-June 2005 Session):
  - Law on Tendering;
  - Anti-Corruption Law
  - Law on Bills of Exchange
  - Law on Intellectual Property
  - Law on Protection of the Environment (Amended)
  - Law on Electronic Transactions
  - Law on Youth
  - Law on Residential Housing
  - Law on the People's Police
- > Laws to be *considered and passed* at the NA's October-November Session:
  - Law on Enterprises
  - Law on Investment
  - Law on Amendment of the Law on VAT and Law on SST (a single law to cover amendments to two existing laws - a first in Vietnam)
  - Law on Amendment of the Law on Complaints and Denunciations
  - Law on Practising Thrift to Reduce Expenditure.

The NASC has already debated the proposed new Law on Enterprises, Law on Investment, Law on Tendering, and Law on Residential Housing (see [Part 3.2](#) below).

Draft 16 of the proposed new Law on Investment was approved by the NASC for submission to the NA subject to only two changes (discussed in [Part 2.2](#) above).

- > Laws to be *considered only* at the NA's October-November Session (and expected to be passed in May-June 2006):
  - Law on Lawyers
  - Law on Prevention of HIV/AIDS
  - Law on Social Insurance
  - Law on Real Estate (see [Part 3.4](#) below)
  - Law on Information Technology
  - Law on Registration of Real Estate
  - Law on Cinematography
  - Law on Civil Aviation of Vietnam (Amended)
  - Law on Personal Income Tax
  - Law on Securities

The NA's October-November Session is tentatively scheduled to commence on 18 October and run until 30 November.

*National Assembly Laws effective as of 1 October 2005:*

- > Law on Pharmacy dated 14 June 2005 (see [Part 1.5](#) above)
- > Law on Amendment of 1996 Mineral Law dated 14 June 2005

### 3.2 **"Residential for sale" projects**

Do you know 8 main issues of which a developer of a "residential for sale" housing project should be aware?

1. *Official land prices:* Provincial and municipal people's committees publicly proclaim the official land prices for land within their province/city on 1 January each year. Such land prices are used as the basis for calculating: (a) land use taxes and income tax payable on assignment of land use rights; (b) land use fees and land rent for allocation or leasing of land without an auction of land use rights or tendering for projects which will use land; (c) the value of land use rights for allocation of land without collection of land use fees, registration fees, or compensation when the State recovers land; and (d) compensation payable by persons in breach of the laws on land causing damage to the State.
2. *100% foreign owned enterprises:* 100%FOEs licensed to construct and engage in the business of residential housing and being leased land by the State with one-off payment of rent for the entire term of the lease have the right to sell or lease residential housing.

Such 100%FOEs must pay the State the difference between land use fees and land rent already paid to the State as follows:

- (a) Land use fees are calculated at the official land price at the time of payment of the difference;
  - (b) With respect to villas, the difference must be paid at the time of sale of the villa;
  - (c) With respect to apartments, the difference must be paid at the latest at the time of completion of the project.
3. *Joint venture enterprises:* In the 2003 Land Law, JVEs do not have the express right to sell or lease residential housing where the land is contributed by Vietnamese parties. Instead, such JVEs have the right to "assign the land use right and architectural buildings and constructed infrastructure attached to the land" and "lease the land use right and architectural buildings and constructed infrastructure attached to the land". In practice, it appears that JVEs where the land is contributed by Vietnamese parties will be permitted to develop and sell residential housing.  
  
Generally, JVEs where the land is contributed by Vietnamese parties are not subject to payment of land rent and land use fees. It is therefore very unlikely that JVEs for residential housing will be required to pay any land rent or land use fees (as opposed to the case of 100%FOEs for residential housing leasing land from the State).
  4. *Sale of land lots:* Assignment of land use rights in the form of sale of land lots on which residential housing has not yet been constructed is prohibited.
  5. *Contribution of land use rights:* Any contribution of land use rights must be registered with the relevant authorities.
  6. *Compensation and land clearance:* The State is supposed to organize compensation, support, resettlement and ground clearance. Foreign organizations investing in Vietnam are not supposed to pay for compensation, support and resettlement, but if they do pay such compensation, and the investment vehicle is a 100%FOE, it is arguable that such payment will reduce the amount of land rental payable by the 100%FOE.
  7. *Land recovery by the State:* If the land is allocated or leased by the State in order to implement an investment project and the land is not used for 12 consecutive months or the actual land use schedule is 24 months behind the schedule recorded in project documentation (as from the date on which 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 by the State.
  8. *Administrative offences relating to land use:* Offences include: using land other than for the approved purpose; encroaching on or appropriating land; deteriorating land; causing obstacles to the use of land of others; dealing with land use rights illegally or other than in accordance with administrative

procedures; intentionally failing to register the correct type of land or upon change of purpose of use; delay in payment of land compensation, land use fees, land rent; intentionally causing obstacles to the allocation, leasing or recovery of land; failing to return land to the State in accordance with a recovery decision; moving the landmarks of zoning or safety corridor; interfering with land documents; and other acts relating to the provision of land management/use services.

On 28 September, VN Express reported on the NASC's debate of the Law on Residential Housing, noting the NASC's agreement to the following principles:

- > There should be only one certificate of ownership for a parcel of land with residential housing in urban areas;
- > Warranty periods for new apartments should be 60 months for 9 or more storey high rises and new buildings funded by the State budget; 36 months for high rises of from 4 to 8 stories; and at least 24 months for the remaining categories. This compares to the current normal warranty period of only one year.
- > Overseas Vietnamese must reside in Vietnam for at least 6 months before they will be eligible to be the owner of a house or apartment. Despite the fact that there have been only 60 cases of overseas Vietnamese purchasing residential housing since 2001, the NASC agreed with the imposition of this condition in order to prevent overseas Vietnamese forcing up house prices.

### 3.3 **"On demand" performance bonds**

Did you know that there is a real risk that a performance bond issued by a Vietnamese bank will not be enforceable against the bank on an "on demand" basis, even though the bond is properly drafted as payable "on demand", properly issued and enforceable in all other respects?

A performance bond issued by a Vietnamese bank to a Vietnamese entity (such as a foreign invested enterprise) must be governed by Vietnamese law. Under article 2.10 of the Regulations on Bank Guarantees issued with Decision 283 of the State Bank dated 25 August 2000 (as amended to 11 February 2003), a "contract performance guarantee" (ie a performance bond) is defined as a bank guarantee that a credit institution must honour "if the client fails to perform fully and properly the obligations under the contract". This suggests that a bank that issues a performance bond is not obliged to honour its obligations under the performance bond until it is proven that there has been a breach of the underlying contract. However, article 25.1 of the Regulations on Bank Guarantees states that proof of breach of the underlying contract will only be a condition of the obligation to pay the amount called under a bank guarantee if the guarantee document stipulates such condition. So there lies the contradiction - the first article requires proof of breach, the other does not (unless the bank guarantee states that such proof is required). This inconsistency presents, in our view, a real risk that a bank might rely on the article 2.10 definition to deny its obligation to pay a performance bond "on demand". (Of course, there may also be other grounds, eg technical non-compliance with many of the procedural requirements under the Regulations on Bank Guarantees, why it would deny such obligation.)

### **3.4 Real estate law**

A Law on Real Estate is scheduled to be considered by the National Assembly at its October-November Session and passed at its May-June 2006 Session. Under the draft which was submitted to the Standing Committee of the National Assembly for review in August 2005, Vietnamese individuals/businesses would be permitted to engage in all forms of real estate activities, comprising:

- > "real estate business": development of real estate for sale/lease; purchase, sale and lease of real estate; assignment of real estate for profit making; and
- > "real estate related services": brokerage, organization of transaction floor, consultancy, valuation, auction, advertisement, and management of real estate.

In contrast, foreign invested enterprises would only be permitted to: (a) invest in development of housing/construction works for sale/lease; (b) provide brokerage services; and (c) provide real estate management services.

The draft Law stipulates that individuals/businesses engaged in real estate business may only conduct real estate business on licensed "transaction floors". This provision has been the subject of recent controversy in the local media. Most real estate businesses protest against it.

Pre-sale of real estate will be formally recognized. Under the draft Law, pre-sale properties must have approved construction designs and real estate developers must only use the buyers' advances for development of the pre-sale properties. The draft Law does not state any restriction on payment milestones or how much real estate developers may receive in advance from buyers. It is expected that the implementing decree will deal with this issue.

The draft Law stipulates that all contracts relating to real estate activities (including related services) must follow standard forms to be prescribed by the Government. Notably, the notarization/certification of sale/lease contracts will only be required if agreed by the parties and subject to other laws. The new 2005 Civil Code (effective 1 January 2006) stipulates that residential housing sale contracts and long-term lease contracts must be notarized/certified, unless otherwise provided by law (currently, the 1995 Civil Code requires *all* such contracts to be notarized/certified). Our interpretation of these provisions of the draft Law is that they leave room for the implementing decree to permit sale/lease contracts of real estate developers to be exempt from notarization/certification. This notarization/certification procedure is currently a significant hurdle for real estate developers. The public notary generally refuses to certify pre-sale contracts and sales contracts which are inconsistent with the prescribed form. Any exemptions from the notarization/certification procedure will be welcomed.

### **3.5 Vietnam's global competitiveness ranking slips**

According to the World Economic Forum's Report "2005 Competitiveness Rankings", Vietnam's economy has become comparatively less competitive over the past year. Vietnam is ranked in 81st position for 2005, compared to 77th position for 2004. By comparison, Thailand is ranked 36th and China 49th. Finland is ranked 1st, and the USA 2nd. The rankings are drawn from a combination of hard data, publicly available for each of the economies studied, and the results of an Executive Opinion Survey, a comprehensive evaluation conducted by the World Economic Forum, together with its network of partner institutes (leading research institutes and business organizations) in the countries covered by the Report. For more information, go to [www.weforum.org/gcr](http://www.weforum.org/gcr)

### 3.6 **Supreme Court Decisions 2000-2004**

For the first time ever, at the start of July 2005, Vietnam published all judicial review decisions made by the Council of Judges of the Supreme People's Court in the years 2000-2004 in civil, commercial and labour cases (Volume 1) and criminal and administrative cases (Volume 2) - a total of 103 decisions. This is a significant step for Vietnam, not only in terms of transparency (a key WTO requirement), but also in terms of providing precedents to lower courts as well as investors and their lawyers looking for indications of how laws might be interpreted and applied (although how much certainty can be derived from these decisions is not yet tested). Below, and in future issues of Vietnam Legal Update, we will look at selected decisions.

*Dispute over advertisements – Council of Judges of Supreme People's Court Decision 20/2003/HDTP-DS dated 23 June 2003*

*Facts:* Company K produced mattresses. Company K placed newspaper advertisements which referred to features of 2 types of mattresses ("Advertisements"). The 2 types of mattresses were not produced by Company K. Companies T and V produced the types of mattresses which were referred to in the Advertisements. Companies T and V requested Company K to place in newspapers a statement correcting the Advertisements and apologizing to Companies T and V.

*Principal issue:* Whether the Advertisements infringed the regulations on advertising.

*Preliminary decisions:*

- > At first instance, the People's Court of District 11 of Ho Chi Minh City decided that Company K did not infringe the regulations on advertising.
- > On appeal, the People's Court of Ho Chi Minh City ordered Company K to place in newspapers a statement correcting the Advertisements and apologizing to Companies T and V.
- > Upon review of the appeal decision, the Civil Court of the Supreme People's Court upheld the appeal decision ordering Company K to place in newspapers a statement correcting the Advertisements and apologizing to Companies T and V.
- > The Director of the Supreme People's Procuracy requested a review of the review decision of the Civil Court of the Supreme People's Court.

*Decision of Supreme People's Court:* The Council of Judges of the Supreme People's Court upheld the review decision of the Civil Court of the Supreme People's Court on the basis that Company K infringed the regulations on advertising, in particular the regulation prohibiting advertisements comparing goods and services with goods and services of the same type of another business entity.

*General lesson:* There is a clear precedent for advertisements comparing goods and services with goods and services of the same type of another business entity to be held in breach of the regulations on advertising.

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

**Vietnam Laws Online Database** on [www.vietnamlaws.com](http://www.vietnamlaws.com) celebrated its 1st anniversary on 1 July 2005.

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

### >>> NEW keyword search option >>>

In October, we will launch our new keyword search option. This will allow subscribers to search keywords in our descriptions of legislation. So, now, subscribers can search by subject category, date, issuing body, official number, legislation type, and keyword - or do an advanced search, combining two or more of these search options.

**Feedback:** So we can continue to improve Vietnam Laws Online Database, we would appreciate if subscribers could spend a few minutes completing the feedback form available on the Vietnam Laws Online Database Welcome Page. But, always keep in mind, we welcome all feedback at any time.

### >>> What's new on Vietnam Laws Online Database?

The October 2005 update of Vietnam Laws Online Database will include, amongst others:

- > Decree 116 on competition
- > Decree 110 on multi-level selling
- > Draft 16 of the Law on Investment (replacing Draft 13 from August)
- > Civil Code 14 June 2005 (translation in progress)

The September 2005 update included, amongst others:

- > Commercial Law 14 June 2005
- > Law on Customs 14 June 2005
- > Law on Pharmacy 14 June 2005
- > Law on Amendments to Mineral Law 14 June 2005

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



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

**Hanoi Branch Office**  
Suite 401, Hanoi Tower  
49 Hai Ba Trung  
Hanoi  
Vietnam  
Tel +84 4 936 0990  
Fax +84 4 936 0984  
[bill.magennis@phillipsfox.com](mailto:bill.magennis@phillipsfox.com)

**Ho Chi Minh City Branch Office**  
Suite 605, Saigon Tower  
29 Le Duan Boulevard  
District 1, Ho Chi Minh City  
Vietnam  
Tel +84 8 822 1717  
Fax +84 8 822 1818  
[nigel.russell@phillipsfox.com](mailto:nigel.russell@phillipsfox.com)

**Melbourne Office**  
Level 21, 140 William Street  
Melbourne  
Australia  
Tel +61 3 9274 5000  
Fax +61 3 9274 5111  
[maureen.mclaughlin@phillipsfox.com](mailto:maureen.mclaughlin@phillipsfox.com)

Adelaide Brisbane Canberra Melbourne Perth Sydney Auckland Wellington Hanoi Ho Chi Minh City