



# Indochina notes

LEGAL UPDATES ON INVESTMENT, INFRASTRUCTURE AND FINANCE

**Investment**  
**Infrastructure**  
**Banking and capital markets**

## Investment

### Foreign ownership limitations

One of the difficulties for some potential investors in Vietnam has been to establish what percentage of a company they could invest in or acquire. This difficulty has been particularly acute for those investors wishing to acquire interests in unlisted public companies. While the law itself set no cap, informal pronouncements emanating from different parts of the government set several inconsistent ones. This has now been resolved by Decision 55 dated 15 April 2009 on foreign investors' participation in Vietnam's securities market (Decision 55), which applies to the purchase and sale of securities in listed companies, public companies and other entities subject to the Securities Law. The foreign ownership limitation in respect of public companies, public investment funds and public securities investment companies has been set at 49 per cent. Our recent *Sector update on new regulations on foreign ownership of Vietnamese companies* issued in April 2009 explains this decision in more detail.

### Foreign investors in Vietnamese securities

This is not the only decision issued recently affecting foreign investors. At the end of last year, on 24 December 2008, regulations on investment activities of foreign investors in the Vietnamese securities market were issued with Decision 121 of the Ministry of Finance (MOF), after a long period of gestation. Given its scope and various registration and compliance requirements, this document has a major impact on foreign investors.

Please see our *Sector update on new regulations affecting foreigners' investment activities* issued in January 2009 for detailed comments on these regulations.

### Sale of state-owned enterprises

A few brave foreigners have attempted to buy state-owned enterprises (SOEs), but the venture was not generally something easy for a legal practitioner to encourage. Instead, a new joint venture into which SOE assets were contributed tended to be the only way of progressing with any sanity. This is unlikely to change much with the issuance by the government of Decree 109 on the sale and transfer of SOEs (likely to be confused with the older, and entirely different, Decree 109 on the equitisation of SOEs). The main problem is that the SOEs covered by the relatively advantageous provisions in this new Decree 109 are not exactly on the 'A' list: the Decree covers SOEs that (i) have been classified as available for equitisation but (ii) were unable to carry out the equitisation.

The main changes brought by Decree 109 are:

- Decree 109, unlike its predecessor, does not require a tender or auction. An acquisition can occur under a negotiated contract;
- Decree 109 allows foreign investors to acquire 100 per cent of an SOE operating in sectors not subject to caps on foreign ownership. Acquisitions by foreign investors of SOEs operating in sectors subject to reservations in Vietnam's international commitments, including WTO commitments, will be subject to the foreign ownership caps established in such commitments;

- Decree 109 repeals provisions in Decree 80 that created substantial uncertainties in relation to obligations and liabilities for the continued employment and accrued severance obligations of an SOE's (usually abundant) labour force;
- Decree 109 removes a number of the administrative issues and approvals that effectively rendered unviable the sale mechanisms set forth in prior regulations. Under Decree 109 the investor and SOE will no longer be required to obtain the approval of the prime minister; and
- the investor will have the right, under Decree 109, to continue to use land parcels occupied by the former SOE.

### **National health insurance**

Although not necessarily evident to the naked eye when entering the average hospital, the international public health community has commended Vietnam for its health care system's remarkable achievements in providing cost-effective services with relatively small disparities between the rich, poor and other vulnerable groups. Continued progress, though, requires substantial reform to the system's finance and administration.

The law on health insurance (the HI Law), effective from 1 July 2009, sets the basis for this reform by establishing a compulsory national health insurance system. Although specific details will only emerge slowly through the implementing regulations, the HI Law sets out some broad principles that will have an effect on businesses.

#### **Financial reforms: increased contributions**

Most importantly for businesses, the HI Law increases required HI contributions to a maximum of 6 per cent of the basic salary (the HI contribution). However, the salary for calculating HI contributions will be capped at 20 times the applicable minimum salary. The employer will have to contribute two-thirds and the employee one-third of the required HI contribution.

#### **Administrative reforms: cost sharing**

Under the current health care system, in theory, all covered participants are guaranteed free medical care

and treatment from approved health care facilities. The HI Law introduces cost sharing mechanisms that, depending on the type of medical care and treatment required, will require participants to pay 0 per cent, 5 per cent or 20 per cent of the medical costs, with the remaining fees being paid by the HI fund.

#### **Implementation schedule**

The HI Law establishes a four-year schedule under which the national health care system will be fully implemented.

#### **Unemployment insurance**

Unemployment is another topical subject, though in a land where underemployment merges imperceptibly into unemployment, its statistical prevalence is a matter of either arcane or superficial debate. What has been tangible for foreign investors has been the requirement, bred from the absence of national unemployment insurance, to accrue severance obligations to each employee during their years of employment. Even an employee's voluntary resignation triggered liability for the employer's payment of a severance allowance equivalent to half of a month's salary for each year of service. Termination under other circumstances (eg, under a merger, department closure or enterprise liquidation) could result in a redundancy allowance equivalent to one month's salary and benefits for each year of service.

Nearly three years ago, the National Assembly (NA) passed the law on social insurance. This introduced a national unemployment insurance programme (the UIP) starting on 1 January 2009. Three weeks before this date, on 12 December 2008, the government issued Decree 127 providing implementation guidelines for the UIP (Decree 127). The decree specifies that the UIP premium consists of a 1 per cent deduction from an employee's salary and a matching 1 per cent contribution by the employer. Another 1 per cent will be contributed by the state. As with HI contributions, the salary for calculating the UIP premium is capped at 20 times the applicable minimum salary.

Employers will remain liable for severance obligations accrued before the effective date of the UIP but thereafter such liabilities will no longer accrue.

An employee will be entitled to a monthly unemployment allowance equivalent to 60 per cent of the employee's average monthly salary used as the basis for calculating the UIP premium during the six months before starting the unemployment period.

An employee's period of entitlement (the entitlement period) to unemployment benefits will be a function of the time period UIP premiums have been paid in respect of an employee. The entitlement period will range between three months (for payment of UIP premiums for a period between 12-36 months) to 12 months (for payment of UIP premiums for a period of more than 144 months).

During the entitlement period, covered employees will also receive vocational training for a period of no more than six months, job placement assistance and health insurance without charge.

### **Technology transfer**

Many problems have bedevilled technology transfer into Vietnam over the years. On 31 December 2008 the government issued Decree 133 removing a few of them.

- Businesses are no longer specifically required to register technology transfer contracts as a condition precedent to claiming royalty payments as a tax deduction.
- To the extent registration is desired or otherwise required, such as for issuance of a certificate for 'encouraged technologies', Decree 133 simplifies the registration process and documentation.
- Decree 133 provides specific details on the various tax incentives that will be applied to promote technology transfers.

### **Foreign contractor tax**

Busy conceiving new tax regimes until the final moments of the calendar year, on 31 December 2008 the MOF issued a new foreign contractor tax circular (Circular 134). Circular 134 replaces the 2005 foreign contractor tax (the FC tax) and Circular 16 issued by the MOF on 4 February 1999 on freight taxes applicable to foreign shipping companies carrying out business transportation activities in Vietnam.

### **Applicability of the FC tax**

Circular 134 covers virtually all foreign organisations and individuals from the moment business activities are conducted in, or any business income is derived from, Vietnam. Circular 134 specifically notes a number of services subject to the FC tax that were not subject to this regime under Circular 05 including reinsurance, leasing aircraft and sea vessels and the transfer of securities.

### **Specific exclusions**

Circular 134 contains a number of specific exclusions for foreign organisations and individuals rendering services performed overseas to Vietnamese organisations or individuals including:

- repair of means of transport such as aircraft and sea-going vessels;
- repair of machinery and equipment such as transmission cables and equipment;
- advertising and marketing services;
- investment and trade promotion services;
- brokerage services for sale of goods;
- training services;
- sharing of freight (paid freight) for international post and telecommunications services performed outside Vietnam; and
- lease of transmission lines and satellite bands from overseas.

## FC tax rates

The FC tax rates have been amended in certain cases:

Types of activities	CIT rates		VAT rates	
	Circular 5	Circular 134	Circular 5	Circular 134
Trading (distribution, supply of goods)	1	1	1	exempt
Services together with provision of goods	5	2	5	3
Leasing of machinery and equipment	10	5	exempt	5
Leasing of aircraft, vessels (including components)	10	2	exempt	exempt
Transportation	2	2	2.5	3
Overseas reinsurance	N/A	2	exempt	exempt
Manufacturing and other business activities	2	2	2.5	3

### The FC tax shows its teeth

The FC tax showed its teeth on 13 January 2009 with the issuance of Official Correspondence 130 of the General Department of Taxation (OC 130). OC 130 confirmed that the FC tax applied to consultation and design services performed overseas by foreign contractors to clients for construction activities in Vietnam. However, the FC tax on the contract value would not include any CIT liability if all services provided by the foreign contractor were performed overseas. Of course, the total contract value would be subject to CIT to the extent that separation of the portions of contract value performed inside and outside Vietnam was not demonstrable.

## Infrastructure

### Telecommunications

The telecommunications sector in Vietnam has always been dynamic except in its underlying legal infrastructure, which shows all the speed of a rotary dial. Since the ordinance on post and telecommunications was issued in 2002, there has not been much substantive activity. As a result it suddenly seems as if there is a flood. On 3 December 2008, the government issued Decree 121 on investment activities in the telecommunications sectors and a draft law on telecommunications will be in front of the NA in May. We will further detail and analyse the implications of these changes in a *Sector update* as soon as the new law is passed.

### Tax on oil and gas

Oil and gas, like telecommunications, are important for the country's finances. During the boom days of the oil industry, when prices were over \$100 per barrel, the government tried to cash in by raising export taxes. This caused a bit of consternation among those producers with tax rates already agreed in their petroleum sharing contracts. It also caused confusion among those in the process of negotiating new production sharing contracts (PSCs). To fill the gap caused by the reversal of such efforts necessitated by the sudden descent in oil prices, the MOF issued Circular 32 dated 19 February 2009 on taxes applicable to oil and gas activities.

Circular 32 sets out a royalty tax regime that is based on the volume of exploited oil and gas. The royalty tax rates applicable to oil for 'encouraged projects' range from 6 to 22 per cent (previously 4 to 20 per cent), whereas the royalty tax for other projects range from 8 to 27 per cent (previously 6 to 25 per cent). The royalty tax rates applicable to natural gas are unchanged, from 0 to 6 per cent for encouraged projects and from 0 to 10 per cent for other projects.

Circular 32 also sets out for the first time a comprehensive method of calculation of the tax applicable to the transfer of an interest in a PSC, as well as technical guidance on the calculation of export taxes and corporate income taxes.

### Master zoning plan for exploitation of certain industrial minerals

The difficulties facing foreign mining companies were yet again in evidence on 17 November 2008 when the Ministry of Industry and Trade (the MOIT) promulgated Decision 41 approving the master zoning plan for the exploration, exploitation, processing and use of industrial minerals until 2015 with a vision to 2025 (Decision 41).

According to this decision, industrial minerals such as serpentine, barite, graphite, fluorite, bentonite, diatomite and talc are to serve domestic demand and, only if they are not required domestically, will they be exportable. This is reflected in the official table below that forecasts a perfect match between output and demand in the years to come. It is not completely clear whether these figures include 'redundant volumes' that could end up being exportable.

The strategy envisions the participation of foreign partners that will operate large projects that require high technology for exploration, exploitation and processing of diatomite, graphite and talc. It seems the planners are not the ones talking with the foreign investors in the field.

Detailed specifications in relation to the proposed mines, with specific capacities applicable to each mineral, are elaborated in 21 annexes to Decision 41.

### Railway transportation strategy to 2020

Travelling by train in Vietnam is a pleasurable experience for nostalgic foreigners. While no longer in the era of the steam train, the speed and movement of the trains is reminiscent of long lost days. However, the Prime Minister evidently prefers the Shinkansen. On 20 November 2008, he issued the strategy for the development of the railway transportation system of Vietnam to 2020 with a vision to 2050. The goal is for Vietnam to have put into operation high-speed railways on the North-South route, near-high-speed services on the Lao Cai – Hanoi – Hai Phong corridor and on the Hanoi – Dong Dang route. Certain urban railway routes will be built in big cities to minimise traffic jams and traffic accidents. The plan envisions that railway industrial products will have high local content. However, few Vietnamese are likely to put their car-buying plans on hold pending implementation of this plan.

### Electricity regulatory authority

The Electricity Regulatory Authority (the ERA) established under the MOIT has existed for some time but without having had a clear remit. Decision 153 of the prime minister dated 28 November 2009 sets out the powers and functions of the ERA. The ERA is tasked with assisting the MOIT in carrying out state management over regulatory activities in relation to electricity. But Decision 153 does not provide any comfort that the ERA

Type of mineral	Forecasted demand/output (thousand tons per year)				Forecasted capacity (thousand tons)	Required investment capital (billion VND)	
	2010	2015	2020	2025		For exploration	For exploitation and processing
Serpentine	300	500	600	600	37,000	35-50	110-135
Barite	250	350	400	500	26,000	120-140	190-220
Graphite	20	25	30	35	29,000	28-30	150-180
Fluorite	200	220	235	250	17,000	15-20	35-40
Bentonite	80	125	175	250	95,000	55-65	335-390
Diatomite	215	315	500	600	76,000	85-105	545-605
Talc	40	80	150	200	4,600	30-40	740-830

will have independence from the entity it regulates, EVN, or independence from the entity that effectively run both it and EVN, the MOIT.

### Project appraisal and licensing fees in the electricity sector

On 19 December 2008, the MOF issued Circular 124 on new project appraisal and licensing fees schedule applicable in the electricity sector. Although the electricity operations licensing fee rates has been reduced to a uniform VND300,000, appraisal fees have been increased and classified by the competent licensing authority (ie central vs provincial), type of electricity operation, type of power (eg thermal, hydro) and project capacity.

Below is a summary of the appraisal fee schedule (amounts in VND1,000):

#### Appraising fees applicable to projects subject to central authorities

Professional consultancy activities	10,400
Generation activities	10,600 to 28,800
Transmission activities	24,900
Distribution activities	12,100 to 21,800
Export activities	9,700 to 19,200
Wholesale activities	19,200
Retail activities	9,700 to 16,700

## Banking and capital markets

### Representative offices (ROs) of foreign securities businesses

During 2008, a number of applications for establishment of ROs of foreign securities trading organisations were pending at the State Securities Commission (SSC), languishing due to the lack of clarity relating to which organisations were qualified as securities businesses for the purpose of establishing ROs. Decision 124 of the MOF dated 26 December 2008 now sets out a legal framework for this area, as well as stricter requirements for the establishment and activities of such ROs:

- to establish a RO in Vietnam, a foreign securities business must:

- conduct a securities brokerage, underwriting, asset management or fund management business;
- be permitted in its offshore jurisdiction to establish a representative office in Vietnam or not be prohibited from doing so under the laws of its jurisdiction; and
- be either (i) licensed to conduct the securities business by its home jurisdiction’s securities regulator or (ii) allowed under its home jurisdiction’s securities regulations to provide asset management services to a limited number of investors and currently managing one or more offshore investment funds whose investment focus is Vietnam; and
- a foreign securities trading organisation’s RO is not allowed to perform asset management activities or manage investment capital for investors, including the capital in Vietnam of the head-office, or perform other securities trading activities in Vietnam.

The chief of the RO of a foreign securities trading organisation has limitations on his activities:

- he cannot act at the same time as:
  - the head of a branch in Vietnam of the same foreign securities trading organisation;
  - the head of the representative office or branch in Vietnam of another foreign institution;
  - the general director, deputy general director or employee of a securities business in Vietnam;
  - the legal representative general director or deputy general director of an enterprise incorporated under Vietnamese law; or
  - the member of the board of directors, general director, deputy general director or another person allowed to sign economic contracts and asset transaction contracts without written authorisations of the foreign securities trading organisation; and
- he may only act on behalf of the foreign securities trading organisation to enter into contracts if he has been specifically authorised in writing by the foreign securities trading organisation (ie a specific written authorisation is required on a case by case basis for each action or trade) and a copy of the written authorisation has to be sent to the SSC within 10 business days after the date of signing.

Current ROs of securities trading organisations licensed by the SSC have to re-register with the SSC.

#### **Enforcement action – securities transactions**

The Vietnam stock market has been in existence for almost a decade and in that time has boomed as well as bust. In the good times the average punter does not care too much about market oversight. But in the current less ebullient atmosphere, some questions are being asked about whether listed companies are always fulfilling their obligations, especially relating to information disclosure. Nudged on by the prime minister, the MOF issued Official Correspondence 14285 on 26 November 2008 (OC 14285) with a view to requiring a bit more compliance.

#### **Public offerings**

OC 4285 requires competent authorities to review all public offerings of shares and all charter capital increases. It would seem reasonable to presume the respective authorities were aware of this regulatory responsibility before issuance of OC 4285, which may suggest that the problem may lie in lack of trained manpower rather than lack of willpower.

#### **Stricter rules for private placements by public companies**

Public companies seeking to offer shares on a private basis must report their private placement plans to the SSC beforehand. Public companies may only start the placement if no objection is given by the SSC within 20 days. A report on the result of a private placement must be made to the SSC within 10 days of its completion.

#### **Trading of unlisted public companies on the HASTC**

All unlisted public companies used to trade (if at all) on an informal over-the-counter market created by securities companies. On 20 November 2008, the MOF issued Decision 108 with regulations on the organisation and administration of transactions of unlisted securities of public companies at the Hanoi Securities Transaction Centre (the HASTC) (Decision 108). Decision 108 is aimed at providing more liquidity and transparency in the securities market for unlisted public companies. It is expected that public companies will transact their unlisted shares on the HASTC, but so far progress is slow.

#### **Amendment to public offering requirements**

During the hay day of the local capital market boom, a number of public offerings occurred that stronger regulators might have questioned. Now that the boom is over, it is time for some closer inspection. On 26 November 2008, the MOF issued Circular 112 amending Circular 17 dated 13 March 2007 on the application file for registration of public offerings of securities (Circular 112).

One important difference is that Circular 17 required the submission of financial statements for the two years immediately preceding the registration. In practice, an auditor's reports with immaterial qualifications was acceptable for both years. Under Circular 112, the auditor's report for the year immediately preceding the registration will have to be unqualified. An auditor's report with immaterial qualification(s) will remain acceptable for the year before that.

Circular 112 also requires the following to be included in the application dossier:

- land use rights related documents;
- detailed plans on use of proceeds of the offering;
- consultancy service agreements with a securities company in relation to the public offering; and
- report on use of the funds mobilised in the previous public offering of shares.

#### **Electronic transactions in securities**

Cautious as always, the MOF has issued Decision 50 dated 16 March 2009 regulating electronic transactions in securities. Securities companies may only provide electronic trading services to investors directly and they are not allowed to entrust or hire other unauthorised institutions to do so. Securities companies are required to keep, and ensure the integrity of, electronic documents, electronic order slips, electronic data and records of the order placing calls for at least 10 years.

#### **Upgrade of the Hanoi exchange**

The conversion of the HASTC into a stock exchange, under Decision 01 of the prime minister dated 2 January 2009, is causing concern to a number of listed companies. Currently, many listed companies on the Ho Chi Minh City stock exchange do not satisfy all the

requirements for listing, especially the minimum charter capital requirements of VND80bn. These companies were expecting to move their listing to the smaller HASTC. However, with the conversion of the HASTC into the Hanoi stock exchange, such companies will have nowhere to go. This is a problem also confronting many smaller companies currently listed on the HASTC that similarly do not meet the charter capital requirements. Upon conversion, these companies will be required to de-list or to increase their charter capital. Given the current global financial crisis, many companies will seemingly have no choice but to de-list.

### **Bankruptcy of insurance, securities and other financial companies**

To date, bankruptcy cases are still rare, the 2004 Bankruptcy Law remains largely untested and for many the thought of bankruptcy proceedings raises concerns not only of financial ruin but also of criminal liability. This may change with the current global financial crisis, which is lapping at Vietnamese shores. Anticipating this, the government issued Decree 114 on 3 November 2008 to provide guidelines and procedures for bankruptcy cases involving securities, insurance and other companies in the financial sector (financial companies).

Decree 114 allows increased involvement of state administrative bodies before and during the bankruptcy of financial companies. These bodies include the MOF in the bankruptcy of insurance companies and the SSC in the bankruptcy of securities companies. The MOF and SSC will have the right to step in before the bankruptcy of a financial company and to require the company to take measures to restore its solvency and financial good standing. Failure to take or successfully implement such measures, together with the company's failure to pay its debts in the ordinary course of business, would allow a competent court to commence bankruptcy procedures.

Decree 114 also creates an exception for pre-bankruptcy transactions that ordinarily would be deemed invalid. In the case of financial companies, payment of debts, providing security for debts, payment of deposit monies on securities accounts of clients and settlement and payment of securities transactions will not be deemed invalid during the three-month period before the date on which the court accepts jurisdiction over a petition to commence bankruptcy proceedings.

### **Negotiated interest rates for consumer loans**

Since issuance of Vietnam's Civil Code in 2005 the interest rate on loans has theoretically been capped at 150 per cent of the base rate announced by the State Bank of Vietnam (SBV). In 2008 the SBV issued an official correspondence confirming that the Civil Code's ceiling did indeed apply to banks and financial institutions. This made consumer lending unattractive. With the SBV's issuance of Circular 01 dated 23 January 2009, banks are expressly permitted to apply negotiated interest rates to consumer loans.

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