



Indochina notes

LEGAL UPDATES ON INVESTMENT, INFRASTRUCTURE AND FINANCE

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Investment

Private placements

The concept of a private placement is a relatively new one in Vietnam, which is still, though one might tend to forget, a communist country. The concept was only introduced on 1 July 2006 and it was a very low key affair. The concept was not even defined and no implementing regulations were issued shedding any further light on the matter until now. Decree 1 of the government, which took effect on 25 February 2010, thus reaffirms the old adage that with increasing wellbeing all people become aware, sooner or later, that they have something to protect.

The protection for some minority shareholders may not be extensive. To effect a proposed private placement, a company will have to:

- prepare a plan (which must spell out the qualifications required of strategic investors, if there are any);
- obtain appropriate corporate authorisations for such plan; and
- submit an application file to the authorities to register the proposed private placement.

The company can only effect the private placement after the registration has occurred. This should occur within 15 days of receipt of a 'complete' application file (but as the application file must include 'such other documents as required by the relevant law', the date of such completion is up to the authorities).

To provide shareholders with some visibility into the future, or perhaps to limit the abuses even if they are not eradicated, the time gap between any two private placements must be at least six months.

Another slight protection is that subscription funds have to be placed in a frozen account in a commercial bank until the completion of the private placement.

But Decree 1 has its limitations:

- it ducks the controversial issue of whether a valid shareholder resolution approving the private placement plan overrides individual pre-emptive rights; and
- investors participating in a private placement are subject to a one-year lock-up. Decree 1 is silent on whether or not such lock-up would remain applicable following a stock exchange listing of the company.

Investment in education

Foreign investors in the education sector are keen to enter Vietnam to satisfy significant excess demand for private and international education at all levels. Although some investors have successfully entered the market (eg the Royal Melbourne Institute of Technology University), far more have experienced regulatory delays and uncertainties.

The delays are unlikely to be overcome by the National Assembly's Law on the Amendment and Addition to the Law on Education (the Amended Education Law), which will take effect from 1 July 2010, but which does not appear to be built for speed.

Under the current regulatory scheme, the Ministry of Education and Training (MOET) makes internal comments to the provincial department of planning and investment (DPI) on licence applications for the establishment of international schools. As the licensing of education projects is conditional under domestic law (although subject to World Trade Organization (WTO) commitments), the MOET's comments generally focus on the investor's satisfaction of various conditions that are unclear and apparently haphazardly set out in a set of implementing regulations whose theoretical legal relevance is undercut by the repealed educational law regime they were issued to implement.

The regime ushered in by the Amended Education Law reflects the principles in the Investment Law. Investors will be required to obtain an investment licence and an operating licence before starting to teach.

- During the 'investment approval stage', investors will seek approval from the DPI for the establishment of a company.
- After securing an investment certificate, the new company will enter the 'education operation approval stage', which includes various quality assurance reviews and confirmations, and concludes with the issuance by the MOET of an operating licence for the company's investment project (eg international school).

Higher education

The prime minister will have final say in approving the establishment of higher education institutions.

Targets, supervision and enforcement

On a positive note, the Amended Education Law does appear to usher in positive changes to the organisation, administration and supervision of local schools throughout Vietnam. Under new rules, local schools will have to make public various academic and financial targets, as well as their academic programmes, human resources, finances, certificates and quality reviews and grades. These new rules establish the possibility of new mechanisms and institutions assuming the role of supervisor and enforcer. To date, the state, acting through the MOET or provincial education authorities, has had a monopoly on this role. The new regulations also establish procedures and criteria for suspending or closing down schools that fail to meet quality requirements.

Natural resources tax

In Vietnam, legal regimes are often replaced (lock, stock and barrel) before the legal uncertainties and interpretative riddles have started to reveal themselves in practice. Assuming that change is tantamount to progress, a gilded optimism has been known to afflict the masses when change occurs; even, sadly, some lawyers, normally oases of reason relative to the average wanderer in the regulatory morass. Unfortunately, known quantities in Vietnam's legal and regulatory systems are sometimes better than the unknown.

The 2010 Natural Resource Taxation Law, effective from 1 July 2010, does little for the optimist:

- it removes the tax exemption that was available under the old ordinance to joint ventures on natural resources contributed by a Vietnamese party;
- it removes all tax incentives available under the existing natural resource taxation regime, including those for 'encouraged investment projects', unless such tax incentives would otherwise be available under Vietnam's normal investment law regime;
- it reduces the tax ceiling applicable to minerals from 30 per cent to 25 per cent, with the exception of diamonds, which will continue at current levels; and
- it increases the tax ceiling applicable to crude oil from 30 per cent to 40 per cent.

Next up, we presume, will be the issuance by the Standing Committee of the National Assembly of specific tax rates for each kind of natural resource.

Telecoms

Over the years, the original state telecoms monopoly has faced both frontal assault and flanking attacks by the military. Viettel, a unit of the Ministry of Defence, has been aggressive and successful, particularly in mobile telephony. On 14 December 2009, the prime minister issued a decision to establish as a state corporation the 'Military Telecommunications Group', which will be known internationally as the VietTel Group (hereinafter the VietTel Group). Its charter capital will be 50 trillion dong (approximately US\$2.7bn), and it is either the sole or majority owner of more than twenty businesses of substance in Vietnam. The state will own 100 per cent of the shares in the VietTel Group.

The VietTel Group is authorised to undertake business operations:

- for the provision of telecoms services in domestic and offshore markets;
- in fields of information technology (IT), surveying, consultancy, design, installation and in the maintenance of telecoms systems; and
- in the area of 'IT works', which seems to be business activities for the production, supply, import or export of IT material and equipment.

Concrete plans for cement production

It is a rare story in Vietnam: a master plan achieves all of its aims, successfully implements its objectives in accordance with forecasts, and in so doing sews the seeds of its own sudden early demise.

Vietnam's prolonged construction boom has resulted in a voracious appetite for concrete. To reverse, or at least mitigate, the annual trade deficit, on 16 May 2005 the prime minister issued Decision 108 on the cement master plan that, in the spirit of any credible master plan, set ambitious production targets.

In Official Correspondence (OC) 6 of the Ministry of Construction (MOC), dated 5 January 2010, the MOC estimates that:

- in 2010, 13 cement production lines with a total capacity of 11.7m tonnes per year will come on line, and domestic supply will exceed domestic demand by approximately 2m tonnes;
- in 2011, 12 cement production lines with a total capacity of 9.35m tonnes per year will come into operation, and consequently domestic cement supply will exceed domestic demand by 8m tonnes; and
- in 2012, excess cement supply will reach its peak, outstripping by 15m tonnes the absorption capacity of cement demand.

The MOC therefore requested investment authorities to stop licensing new cement production investment projects until 2020.

The conundrum is why Vietnam is unable to export its excess supply to foreign markets. Poor quality and a relatively high price compared to the neighbourly Chinese?

Equitisation of Vietnam Airlines

Equitisation in Vietnam is a process and not simply a moment in time when the legal status of assets and rights

experiences a conversion from public to private. Indeed, it is possible that equitisation may constitute an era, if not several eras, in Vietnam.

Vietnam Airlines is an example of a company whose equitisation has been delayed. In Official Correspondence 2434 of the prime minister, dated 7 December 2009, the equitisation plan was once again adjusted. Vietnam Airlines and its subsidiary Vietnam Air Petrol Corporation are now required to convert into single-member limited liability companies if their equitisation is not complete by 1 July 2010.

The Equitisation OC further requires the 2010 completion of the equitisation process of three state-owned enterprises (SOEs) under Vietnam Airlines, currently providing ground commercial services at the airports at Noi Bai, Danang and Tan Son Nhat.

Golf courses

An early evaluation of Marx's and Freud's work questioned what kind of religion promised a better life in the hereafter as well as a series of five-year plans to realise that better life here and now. One must doubt whether even a super-sceptic of such standing would have anticipated a golf course master plan. Yet that is exactly what appeared on 26 November 2009 with the prime minister's issuance of Decision 1946. This contemplates the establishment of 70 new golf courses in Vietnam by 2020, with 11 located in the midlands of the north, 16 in the Red River Delta, 29 in the central coast, eight in the central highlands, 21 in the vicinity of Ho Chi Minh City and four in the Mekong Delta.

Sharing the pork evenly is always good politics. The plan provides that golf courses must be reasonably distributed throughout each region. Golf course developers are charged with ensuring the efficient use of land and further development of the economy, with an emphasis on employment, sustainability and contributions to the state budget, as well as the development of the tourism and sports industries.

The plan also establishes a number of rules of the game that, if implemented, should be well received by the critics of the current mechanics of golf course reclamation:

- land earmarked for industrial zones, urban areas and reforestation may not be used for golf courses;

- state funding may not be used for golf courses except for the development of public golf courses (of which none yet exist as far as we know);
- the maximum area for an 18-hole golf course is 100 hectares;
- golf projects must be environmentally friendly (which may be difficult, depending on one's perspective);
- each project may use up to a maximum of five hectares from a single, low productivity rice field;
- no houses for sale may be built on land intended for golf courses (which may cause some consternation to developers until they spot the work-around); houses for rent may be built so long as the area used does not exceed 10 per cent of the total area of the golf project; and
- the deadline for the completion of construction of a golf course will be 48 months from the date the project is licensed.

Work permits

Word on the street would indicate that there are too many Chinese labourers in Vietnam and too many Nigerian confidence tricksters. The result is that the Vietnamese government is becoming stricter with work permits. Decree 34 of the government, dated 25 March 2008, set strict requirements on who can apply for work permits. In a recent movement, the Ministry of Labour, War Invalids and Social Affairs issued Official Correspondence 828, dated 22 March 2010, requesting provincial people's committees to investigate companies using foreign labourers in Vietnam, and to check the expatriate recruitment process, check the existence and validity of work permits of expatriates, and enforce penalties for non-compliance. Foreign contractors that employ a large number of foreign employees will be the target of this investigation. Non-compliance could result in deportation from Vietnam.

Infrastructure

Law on telecoms

After seven years of working within the bandwidth of the Ordinance on Post and Telecommunications 2002 (the Telecoms Ordinance), telecoms businesses will face the new Law on Telecommunications (the Telecoms Law) on 1 July 2010.

Foreign investors wishing to invest in the telecoms sector have to obtain an investment certificate. This will only be issued after the licensing authority has obtained an approval from the prime minister. The foreign-invested telecoms company then has to obtain an appropriate telecoms licence from the Ministry of Information and Communications (MOIC).

Under the Telecoms Ordinance, only SOEs or enterprises controlled by the state could invest in facilities-based services. The Telecoms Law now allows foreign investors to invest in both facilities-based and non-facilities-based telecoms services by referring to Vietnam's WTO commitments. However, the Telecoms Law is silent on whether a telecoms licence may be transferred to another entity, which means that the process for converting an existing business co-operation contract (BCC) into a joint venture remains unclear.

Telecoms licences

There are two types of telecoms licences: (i) telecoms business licences, including facilities-based establishment licences and service provision licences; and (ii) specialised telecoms licences, including licences for installation of telecoms cables at sea, licences for establishment of private telecoms networks, and licences for network and telecoms services testing.

A telecoms licence may be withdrawn if, inter alia, the licensee fails to develop its project within two years of the issuance of the licence.

General Agreement on Trade in Services (GATS)

Telecommunications Reference Paper

Vietnam's WTO commitments included a commitment to comply with the principles set out in the GATS Telecommunications Reference Paper, which include, inter alia:

- having an independent regulatory body separate from, and not accountable to, any supplier of basic telecommunications services;
- maintaining appropriate measures to prevent a major supplier from engaging in anti-competitive practices; and
- ensuring transparency and public availability of its procedures for interconnection negotiations and its licensing processes.

The Telecoms Law takes a stab at providing a basis for the first of these principles by:

- providing for a specialised authority (under the MOIC) to be established to manage the telecoms sector (the TSMA). The functions of the TSMA have not been defined. Therefore there is nothing to ensure the TSMA would act as an independent regulatory authority as required in the Reference Paper. The issuance of the implementing decree for the Telecoms Law may be more revealing on this point;
- setting out certain specific competitive practices that are prohibited to telecoms enterprises in a dominant market position. It also requires the notification to the TSMA of mergers or acquisitions having a combined market share in the relevant market of 30 per cent to 50 per cent;
- requiring interconnections to the public telecoms network to be public and transparent. Entities providing essential telecoms facilities have to prepare a standard interconnection agreement and register it with the TSMA.

Power distribution companies

The electricity sector is slowly restructuring and will continue to do so for a substantial period of time under existing plans. The latest step was the prime minister's approval of the establishment of five power distribution companies in Official Correspondence 60, dated 12 January 2010 (Power Distribution OC).

- The Northern Power Corporation will be established by re-organising Power Company No. 1 and by transferring the state's capital ownership from Electricity of Vietnam (EVN) in Hai Phong Power, Ninh Binh Power and Hai Duong Power Companies to the Northern Power Corporation.
- The Southern Power Corporation will be set up by re-organising Power Company No. 2 and by transferring state capital ownership in Dong Nai Power Company from EVN to the Southern Power Corporation.
- The Central Power Corporation will be set up by re-organising Power Company No. 3 and by transferring state capital ownership in Danang Power Company and Khanh Hoa Power Joint Stock Company from EVN to the Central Power Corporation.
- The power companies in Hanoi and Ho Chi Minh City will be converted into Hanoi and Ho Chi Minh City Power Corporations.

Master plan for development of seaports

Based on the consistent complaints of foreign investors in the light manufacturing sector responsible for the vast majority of Vietnam's job creation, Vietnam's infrastructure constraints and related high transportation costs continue to be one of the primary challenges to attracting foreign direct investment. So an amendment to the 1999 seaport development master plan appeared overdue. Unfortunately, the amendment issued by the prime minister through Decision 2190 on 24 December 2009 does not seem to focus on the specific areas where foreign direct investment is concentrated.

Although the master plan purports to give priority to the construction of international-standard deep-water seaports to receive large vessels, the seaports specifically identified include, among others, the Van Phong International Transshipment terminal and the central area of Vietnam.

Although the facts would seem to indicate that shipping is concentrated in the northern and southern regions, and that ports in central Vietnam only handle 10 per cent of Vietnam's total shipping demand, the master plan calls for a 'regional approach' to the development of Vietnam's seaport system, which would include six groups:

- group one – northern group from Quang Ninh to Ninh Binh;
- group two – north central group from Thanh Hoa to Ha Tinh;
- group three – middle central group from Quang Binh to Quang Ngai;
- group four – south central group from Binh Dinh to Binh Thuan;
- group five – eastern south group in the Ho Chi Minh City vicinity; and
- group six – Mekong Delta group.

Vietnam's planners seem to believe that developing a modern port in every region, ideally each coastal province, will attract investment and thus satisfy development goals. A natural question is whether enough demand exists to justify the infrastructure investments required to develop modern shipping ports in regions outside the major economic hubs. The projected costs for the development of port infrastructure in Vietnam are not loose change. The master plan contemplates that total capital of

360-440 trillion dong (around US\$19-23bn) will be required by 2020 for the development of Vietnam's seaport system.

Banking and capital markets

Amendments to the Law on Credit Institutions and the Law on the State Bank of Vietnam are expected to be passed during the May 2010 session of the National Assembly. Pending these high-level changes, the regulators have been engaged in some mild tinkering.

Lending in foreign currency

On 15 December 2009, the State Bank of Vietnam (SBV) unveiled yet another change to the categories of onshore borrowers who can borrow from Vietnamese banks in foreign currency. Under the prior Decision 9 of the SBV, dated 10 April 2008, (Decision 9), the categories of onshore borrowers allowed to borrow in foreign currency were:

- borrowers needing to make payment to offshore parties for import of goods and services in support of production and/or business operations;
- borrowers prepaying offshore loans (provided that the new onshore loan was cheaper than the offshore loan); and
- borrowers making offshore direct investments.

This has now been amended by Circular 25 of the SBV, dated 15 December 2009, which allows loans to borrowers who will use the loan for export-oriented activities. The amendments to Decision 9 also provide that borrowers falling outside the permitted categories can still borrow in foreign currency with the 'prior written consent of the governor of the State Bank'.

Compulsory reserve ratios of credit institutions

At almost the same time as the SBV broadened the categories of permissible foreign currency lending (which will presumably lead to an upswing in onshore foreign currency loans), the SBV also reduced the compulsory reserve ratios for foreign currency deposits in Decision 74, dated 18 January 2010. The reserve ratio for short-term deposits (on-call and less than 12 months) applicable to most credit institutions has been reduced from 7 per cent to 4 per cent, while the reserve ratio for deposits of more than 12 months applicable to most credit institutions has been reduced from 3 per cent to 2 per cent.

Gold trading

Numerous gold trading floors sprang up across Vietnam in the last few years and appeared to be draining a great deal of capital into unproductive speculation. These have now been closed down. In tandem, the SBV also moved to close down the offshore gold trading activities of Vietnamese banks and enterprises in its Circular 1, dated 6 January 2010. Effective on 6 January 2010, Vietnamese banks and enterprises had to stop trading gold on offshore accounts, other than 'transactions to finalise payment and to close accounts'. From 30 March 2010, all licences previously issued by the SBV to trade gold on offshore accounts were to be terminated, though this deadline was extended for three months to provide additional time to finalise all necessary payments.

Index-tracking investment products

After the decision of the SBV to close gold trading floors, some companies who are running these floors tried to offer new investment products to offset the loss from investment in gold trading floors. These included VN-Index-tracking investment products. The rewards or risks of these investment products are offered based on the movement of the VN-Index or the movements of the index of some blue chips. Although index-tracking investment products are not new in western stock markets, they were new in Vietnam. However, the State Securities Commission promptly prohibited the offer of these products in Official Correspondence 119 on 11 January 2010.

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