



# Indochina notes

LEGAL UPDATES ON INVESTMENT, INFRASTRUCTURE AND FINANCE

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

## Investment

### Equitisation of state-owned enterprises

The equitisation of state-owned enterprises (SOEs) can be traced back to a pilot project that started in 1992 (slightly worrying news for proponents of public private partnerships (PPP), who have just seen the first draft of the regulations on PPP pilot projects). Along the way there have been countless changes of tack, some of which remind the writer of his own erratic sailing skills, which, like the writer's record at regattas, have limited substantive result. Estimates are that, by value, only about 10-15 per cent of the SOE sector has been equitised. And only three foreign strategic investors have bought into large equitised SOEs: Baoviet, PVFC and Habeco.

One of the barriers is the government's Decree 109. Decree 109, dated 26 June 2007, contains certain provisions that limit the participation of strategic investors, especially the regulations on the sale price of shares. A draft decree on the conversion of SOEs into shareholding companies was published by the government for public comment in April 2010. It proposes some positive changes in relation to strategic investors in SOEs undergoing conversion, as outlined below.

- The fundamental change proposed by the draft decree is the abolition of the requirement in Decree 109 that the sale price to strategic investors must not be lower than the average successful auction price in the sale of shares to the public. In the past, as in the Vietcombank equitisation, the public auction

price has been higher than any strategic investor was prepared to pay. Under the draft decree, strategic investors would have to meet only the approved 'reserve price' or 'lowest successful public auction price'. Those who participate in an approved 'restricted auction' or in 'direct negotiations' before the public auction need only meet the reserve price approved by the 'competent agency'. Strategic investors selected after the public auction would have to pay only the lowest successful auction price.

- Under the draft decree, certain SOEs will be entitled to select a strategic investor before the public auction. These are SOEs with state capital of more than VND500bn in the insurance, banking, post and telecoms, aviation and mining sectors, as well as parent companies of state business groups and corporations. Such entities would need the prime minister's approval on the criteria for selection, share sale methods and percentage of shares to be sold to strategic investors before the public auction.

Under the draft decree, strategic investors would be subject to a five-year lock-up period rather than the three years currently contemplated in Decree 109.

### New business registration rules

The registration of new businesses has become significantly easier over the years. It is possible to establish a new company in a matter of weeks rather than the many months it took 10 years ago. The process should be about to get even quicker. The recently issued Decree 43 dated 15 April 2010 appears to be a

rewritten version of the current Decree 88, but it does contain some amendments to be watched, including the following.

- Online business registration, which has been conducted in practice in certain provinces, such as Ho Chi Minh City, is recognised by law for the first time. This would allow applicants to submit application dossiers and conduct all procedures online. But unfortunately the detail is somewhat less perfect than the concept. Circular 14, which has been issued to guide Decree 43, already makes it clear that online registration is limited to those companies that have registered an electronic signature, which is a procedure that is hard to accomplish. Furthermore, it is unclear how to deal with the submission of notarised and legalised documents. Physical submission at the business registration authority's office may therefore still be required, at least in part.
- Decree 43 officially recognises that an enterprise needs only one code to serve as both its business registration code and its tax code.
- A new term, 'enterprise registration certificate', has been introduced by Decree 43 to replace the familiar 'business registration certificate'. The enterprise registration certificate would serve both as the business registration certificate and the tax registration certificate for the enterprise.
- The time frame for issuing an enterprise registration certificate is reduced by half, from 10 to five working days.
- Rules on business names have been clarified. Specifically, an enterprise may not use a name that is identical to, or that causes confusion with, that of another enterprise within the country (not only within the same province, as in Decree 88).

### **Procedures to arrest aircraft**

Arresting something that moves at just below the speed of sound and can swiftly cross international borders has not rated as high as police dramas in Hollywood lists. This is a pity because the subject has plenty of potential. Some of that potential in Vietnam will be lost as a result of the Standing Committee of the National Assembly's Ordinance on Aircraft Arrest Procedures, issued on 16 March 2010. This Ordinance specifies the powers and authorities of relevant authorities in an aircraft arrest, the process for arresting aircraft and the procedures for

lodging complaints against court decisions on the arrest of aircraft. The Ordinance also requires an applicant for an arrest of an aircraft to provide financial security equivalent to the loss or damage that could be caused by a wrongful application.

### **Transfer pricing**

Vietnamese tax authorities have recently begun another effort to focus on multinational entities' transfer pricing practices. The result of this is Circular 66 of the Ministry of Finance (MOF), issued on 22 April 2010 to replace Circular 117 of the MOF dated 19 December 2005. Circular 66, like its predecessor, requires corporations to maintain contemporaneous transfer pricing documents, which must be submitted to a tax authority within 30 business days of its request, and to submit an annual transfer pricing declaration form 90 days after the end of the financial year.

There are several changes in the definition of related parties. There are also a number of changes to standardise the process of calculating transfer prices.

### **Infrastructure**

#### **Oil and gas**

Far more oil has been spilled in Vietnamese water by shipping than by the oil and gas industry. So, unlike its product, the industry, although it is suffering in the Gulf of Mexico, is still in good odour in Vietnam. However, the role of Petrovietnam as both regulator and industry player has been under attack for some time. Decree 115 of the government dated 24 December 2009 amending Decree 48 dated 12 September 2000 solidifies the shift towards the Ministry of Industry and Trade (MOIT) as the industry regulator. The MOIT will lead the evaluation of petroleum contracts, issuance of investment certificates (upon the approval of the prime minister) and management of other petroleum-related issues.

Decree 115 also sets out the procedures for obtaining an investment certificate for a petroleum project. However, it lacks the level of detail of the Investment Law. For instance, Decree 115 requires 'legal documents which form the basis for negotiating the petroleum contract' as part of the application for an investment certificate. The MOIT thus has substantial leeway to determine which documents are necessary. Unless it issues implementing

regulations to clarify the issue, this promises to result in undue uncertainties and delays to investors wishing to obtain investment certificates for their petroleum contracts.

The new decree contains various amendments to the existing regulations, outlined below.

#### **Abandonment**

Decree 48 required generally that the contractor 'prepare a program for abandonment', whereas Decree 115 now fleshes out the detail of the contractor's obligation for abandonment and introduces stricter requirements, as follows:

- there is an affirmative obligation to remove the fixtures, equipment and facilities that were used for petroleum exploration and production activities, unless (i) the MOIT approves or (ii) the MOIT requests the contractor not to abandon such fixtures, equipment or facilities;
- the contractor has to prepare a programme for abandonment, which must be submitted to the MOIT for approval; and
- the contractor has an obligation to carry out the abandonment work in accordance with the programme that has been approved by the MOIT.

#### **Extension**

Decree 115 also sheds light on extending the exploration period and the duration of petroleum contracts. Under Decree 115, exploration periods can be extended for up to two years and petroleum contracts can be extended for up to five years. Any extension would require the approval of the prime minister based on a submission from the MOIT. In cases involving national defence or security, the exploration period and the petroleum contracts can be extended for longer than two years and five years, respectively, provided that the prime minister's approval has been obtained.

#### **Tendering for petroleum services**

Decree 115 requires contractors to give priority to Vietnamese petroleum service providers if the service providers are capable of providing the service. Previously, this priority was qualified by the principle of 'competitive pricing'. However, Decree 115 allows contractors to continue to follow the specific provisions on tendering in their petroleum contracts if they were signed before Decree 115.

#### **Bidder selection criteria**

Decree 115 adds a new criterion for selecting a tender winner: ie a participation ratio for Petrovietnam and its member companies in the relevant Block as a contractor.

#### **Mining**

If you are one of nature's eternal optimists, unable to be downcast even as the slings and arrows of outrageous fortune rain down, then Vietnam's mining sector would provide a good test of your mettle. But if you discover that your fortitude is not what you thought it was and decide to get out, you now have a final problem. It was always the case, under the mining law, that if you assigned your mining licence to an incoming optimist, you would face tax obligations. Until now, though, it was not clear which types of tax would be applied. Now, the MOF in its Circular 38 dated 19 March 2010 has specified that the following tax obligations apply:

- value-added tax (VAT): Circular 38 confirms that an assignment of the mining licence is not subject to VAT. If the whole project is transferred, then the value of works and infrastructure, vehicles and equipment are subject to VAT. If the assigner fails to calculate these items separately, then the total project assignment value is subject to VAT of 10 per cent; and
- corporate income tax (CIT): companies with income from the assignment of mining rights will pay CIT at the rate of 25 per cent.

#### **Trung Luong-My Thuan Highway BOT project**

A good example of where the PPP regulations, if they are ever passed, could take Vietnam is already on display. The Trung Luong-My Thuan Expressway build-operate-transfer (BOT) project is already being characterised as a PPP entitled to special preferential treatment from the government even though there are no regulations yet. The developer of this project, BIDV Expressway Development Company (BEDC), is a fascinating consortium, consisting of Vinashin (the state shipbuilding company), Petrovietnam (the state oil company), Bitexco, VNPT (the state telecoms company), Song Da Corporation and the Bank for Investment and Development for Vietnam (one of the four state-owned banks). This eccentric grouping has joined together to build a road. Surprisingly for a prime minister with a reputation for trying to keep SOEs within their core

competencies, his Decision 229 dated 8 February 2010 grants some special investment support for the road:

- *site clearance*: the responsibility for site clearance falls on the provincial people's committee of Tien Giang province;
- *capital for project implementation*: the government will provide guarantees for foreign loans borrowed by BEDC;
- *appointment of contractors*: BEDC has the right to choose contractors without tenders in order to ensure the quality, speed and efficiency of the project;
- *toll collection right*: BEDC has the right to collect tolls on the My Thuan bridge from 1 April 2010, to provide additional finance for the project;
- *service-related rights*: BEDC has exclusive rights to exploit all services relating to the expressway infrastructure and rights to advertising along the Ho Chi Minh-Trung Luong and Trung Luong-My Thuan expressways; and
- *other supporting regimes*: BEDC is exempt from providing the performance guarantees required by the BOT regulations. It is also exempt from all land use fees for operating the expressway management complexes, including the management centre and the logistics centres.

## Banking and capital markets

### Bankruptcy of credit institutions

The fallibility of credit institutions has been much in evidence around the world over the past couple of years. Vietnamese credit institutions seemed to have fared better than might be expected, unless problems have been bottled up. In case all is not rosy in the garden, the government on 18 January 2010 issued Decree 05 to provide guidelines on the application of the Law on Bankruptcy to credit institutions. Until then, it was not clear how the Law on Bankruptcy would apply to credit institutions; there was room for an argument that its provisions did not apply to credit institutions.

Decree 05 allows the involvement of the State Bank of Vietnam (SBV) before and during the bankruptcy of credit institutions. The SBV will have the right to step in before the bankruptcy of a credit institution and to impose 'special control' or require the credit institution to take measures to restore its solvency and financial

good standing. A bankruptcy court will turn down the bankruptcy application if the SBV is imposing special control on the credit institution or requiring the credit institution to take recovery measures.

If Decree 05 is silent on any matter, the provisions of the Law on Bankruptcy will be applied to the bankruptcy of credit institutions. This includes the requirement for the bankrupt credit institution to return leased or borrowed assets (which include monies and assets deposited in bank accounts, entrusted funds and assets) in the event of liquidation of the bankrupt credit institution.

Decree 05 also creates an exception for pre-bankruptcy transactions that would usually be deemed invalid. Banks can pay debts that are not due, provide security for debts, pay deposit monies and make inter-bank payments under the SBV's system during the period of special control and these would not be deemed invalid even if they occur during the normal three-month voidability period.

### Special control of credit institutions

Special control by the SBV indicates that the bank to which it relates is on the edge of the cliff. There have always been regulations on special control: Decision 215 of the SBV dated 23 June 1998 was technically applicable only to private commercial banks. The new Circular 08 of the SBV on special control over credit institutions dated 22 March 2010 applies to all types of credit institutions, including foreign-owned ones.

A credit institution may be placed under the special control of the SBV if:

- it is on the verge of insolvency – namely, on three consecutive occasions it has failed to ensure a minimum 1:1 ratio between assets in credit (capable of being paid out in the next seven days) and assets in debit (liable to be paid out in the next seven days);
- bad debts account for 10 per cent or more of outstanding lending and for 100 per cent or more of total equity for three consecutive months; or
- total accumulated losses of the credit institution exceed 50 per cent of its paid-up charter capital and funds.

The operations of credit institutions under special control are restricted. They cannot 'disperse, hide, pledge, mortgage, transfer, or perform any transactions

in relation to assets' without the SBV's approval. Circular 08 also prohibits the transfer of shares by directors and senior management without the SBV's approval. Arguably, this share transfer restriction also applies to institutional shareholders nominating such persons.

The decision to place a credit institution under special control is secret. It is not clear how counterparties to, or purchasers of shares in, a credit institution under special control are expected to protect themselves.

### **Establishment of commercial banks**

The need to issue regulations on dealing with a failing bank (see above) would be reduced if the regulation of banks was improved to the point that they did not fail in the first place. One aspect of the latter is to allow only strong banks to be set up. On 26 March 2010, the SBV issued Circular 9 on this topic. Under this Circular, in order to incorporate a domestic joint stock commercial bank, the following key conditions must be satisfied:

- the bank must have a charter capital of at least VND3 trillion (approx \$158m), at least 50 per cent of the charter capital must be collectively held by the founding shareholders and 50 per cent of the founding shareholders' shares must be owned by corporate shareholders (this is just the first step – there are plans to increase charter capital requirements to VND10bn by 2015 in the Law on Credit Institutions, which is expected to be passed by the National Assembly in June 2010);
- shareholders have to use their own money, not money borrowed from others to make capital contributions;
- there must be at least 100 shareholders, of which at least three founding shareholders must be corporate entities (this provision means the bank will be a public company on its creation);
- a non-founding corporate shareholder must operate for a period of at least three years before the year of application and be profitable during that period (this provision is intended to remove the possibility of using a 'shell' company to invest in the bank);
- a founding corporate shareholder (other than existing commercial banks) must have equity of at least VND500bn (approx \$26m) for five consecutive years before the year of application and must be profitable during that period;
- a founding corporate shareholder that is an existing commercial bank must: (i) have total assets of at least

- VND50,000bn (approximately \$2.6bn); (ii) have a non-performing loan ratio of less than 2 per cent of the aggregate outstanding loans at the date of application; (iii) have been profitable for a period of five consecutive years before the year of application; and (iv) comply with the prudential ratios set out by the SBV for the year before the year of application; and
- if an SOE wishes to contribute capital to the bank, it needs to secure the prime minister's approval.

For the first five years after the date of its business registration certificate, a founding shareholder may transfer its shares only to another founding shareholder. During the same period, a non-founding shareholder may transfer its shares only to other shareholders who are on the list of shareholders on the date of issue of the business registration certificate. The transfer must not result in a reduction of the total shareholders of the bank to less than 100 shareholders.

### **Mergers, acquisitions and consolidations of credit institutions**

The current draft decree on compulsory legal capital of credit institutions will require credit institutions to increase their legal capital to a significant level. Smaller credit institutions that cannot increase their capital as required are likely to be acquired by bigger ones. Always leading from the front, the SBV issued Circular 4 on 11 February 2010 to govern the mergers, acquisitions and consolidation of all types of commercial banks, financial companies, financial leasing companies and co-operative credit institutions established under Vietnamese laws.

To conduct a merger, consolidation or acquisition, credit institutions must comply with the conditions provided in Circular 04, including two conditions that are new to the regulatory scheme:

- the parties must ensure that the merger, consolidation or acquisition is not a prohibited economic concentration under the Competition Law; and
- after the merger, consolidation or acquisition, the credit institutions must have minimum charter capital equal to the amount of legal capital required by current law (ie commercial banks must have charter capital of at least VND3 trillion (approximately \$158m)).

To conduct a merger, the acquirer first has to obtain an in-principle approval from the SBV. Thereafter, it has

to obtain formal consent from the SBV. Circular 04 also requires the credit institutions to provide a written notice to the competition authority in certain cases.

### Operation of commercial banks

On 26 February 2010, the SBV issued Circular 06 to implement certain provisions of Decree 59 of the government dated 16 July 2009 on corporate governance, charter capital and amendments of the operating licence and charter of commercial banks. Circular 06 applies to joint venture banks and 100 per cent foreign-owned banks only to the extent that Circular 03 of the SBV dated 5 June 2007 is silent.

Any increase or reduction of the charter capital of a bank must be approved by the SBV. Reiterating provisions of Decree 59, Circular 06 provides that the SBV's approval is required for the sale of shares representing 5 per cent or more of the total voting shares of the bank or if the sale results in a change in the shareholding of shareholders holding 5 per cent or more of the total voting shares of the bank (though in practice the SBV is already interpreting this broad requirement for approval somewhat flexibly).

Circular 06 (like Decree 59) allows members of the board of management, members of the board of controllers or the general director to transfer up to 50 per cent (but no more) of their shares during the first year after appointment, provided that the SBV is notified in advance. Circular 06 goes further and gives the SBV the right to unilaterally disallow the transfer where it deems necessary. Circular 06 confirms that the lock-up requirement applicable to members of the board of management, members of the board of controllers or the general director also apply to the transfer of shares in listed banks. The share transfer restriction that applies to the above management positions also arguably applies to institutional shareholders nominating such management positions.

### Update on T+2 securities trading mechanism

The State Securities Commission (SSC) will now have the authority to adopt T+2 securities settlements under Circular 43 of the MOF dated 25 March 2010, amending the regulations on registration, deposit, clearing and settlement of securities. Under the current regulations issued with MOF Decision 87 dated 22 October 2007,

investors may resell securities only once the securities have been recorded by the Vietnam Securities Depository (VSD) in their respective trading accounts, thus requiring three days after trading to sell the securities under the current T+3 scheme (which is actually T+4 in many cases where the settlement is made at the end of the third day). Circular 43 allows the SSC to set guidelines for such 'resell' trades, subject to the consent of the MOF. Although the SSC is expected officially to adopt a T+2 rule soon, implementation may take some time.

Other major changes made by Circular 43 include:

- damages due from a depository member to a client and other relevant depository members as a result of cancellation of securities settlement are limited to 10 per cent of the cancelled transaction;
- the scope of transactions subject to 'out-of-system' settlement is expanded to cover all transactions that are not of a sale/purchase nature or cannot be settled through the trading system; and
- the amount of paid-up charter capital of a settlement bank has been increased to VND5,000bn from VND3,000bn. A bank must have at least 10 clients that are VSD members and a system that enables the retention of required data for at least one year and the provision of information to the SSC or the VSD within one day of request.

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