October 2010 edition

contents

In brief: This month we report on two significant pieces of legislation for investment in Vietnam. Firstly we consider the new Law on Credit Institutions, particularly as it relates to investment in this sector. Secondly we consider the recently issued Decree implementing the Law on Enterprises. We also take a broad look at the sources of liability for, and potential causes of actions against, company directors as well as considering recent developments in the areas of industrial property and prudential ratios. Finally, our case commentary looks at the enforcement of a foreign court judgment in Vietnam.

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The new landscape for credit institutions

Law No. 47/2010/QH12 of the National Assembly on Credit Institutions, dated 17 June 2010 (***Law 47***)

Issued in June this year, and slated to take effect from 1 January 2011, the new Law on Credit Institutions introduces a new landscape for Vietnam's credit institutions. The new law is far more comprehensive, being over double the length of its predecessor which was enacted in 1997 and amended once in 2004.

The new law sets in stone a range of matters which have been, up till now, dealt with by lower level regulation. This means that there will be less flexibility for the Government to make regulations on certain matters without actually amending the law at the National Assembly level.

While the new law introduces a broad range of reforms, in this article we focus specifically on some key implications for investment, and in particular mergers and acquisitions, in the credit institutions arena.

Corporate Structure

The Law on Credit Institutions offers limited flexibility for corporate structuring in the banking sector. All domestic commercial banks must be in the form of a shareholding company. Domestic non-bank credit institutions may be in the form of a limited liability company or a shareholding company. A wholly foreign owned credit institution must be in the form of a single member limited liability company while a foreign joint venture credit institution must be in the form of a multiple member limited liability company.

A credit institution which is in the form of shareholding company must have at least 100 shareholders, meaning that it must also be a public company as defined in the Law on Securities and will, therefore, need to comply with the specific requirements applicable to public companies.

A credit institution in the form of a shareholding company may only issue dividend and voting preference shares and there are limitations on how these shares are structured. Dividend preference shares cannot be issued to management (ie board members, general director and other executive managers) and dividends may only be distributed annually. Voting preference shares carry the same restrictions imposed under the Law on Enterprises, including that they can only be issued to founding shareholders and have a maximum life of three years from establishment. A credit institution cannot issue any of the other types of preference shares permitted under the Law on Enterprises (for example redeemable preference shares).

Foreign Ownership

The new Law on Credit Institutions confers on the Government the power to regulate the permitted percentage of foreign ownership in a Vietnamese credit

institution, as well as the transfer and issue of shares to a foreign investor. On that basis, it seems clear that Decree 69/2007/ND-CP of the Government on the Purchase by Foreign Investors of Shareholding in Vietnamese Commercial Banks, dated 20 April 2007 (***Decree 69***), will continue to apply its current foreign ownership waterfall:

- the aggregate foreign ownership limit is 30% of charter capital;
- the limit for a single foreign 'strategic' credit institution investor is 15%, which may be extended to a maximum of 20% of charter capital with the approval of the Prime Minister;
- the limit for a single foreign credit institution investor is 10% of charter capital; and
- the limit for a single foreign investor which is not a credit institution is 5% of charter capital.

These limits include interests held by affiliates of the relevant foreign investor. There is currently no decree similar to Decree 69 relating to finance leasing and finance companies.

For those considering an investment in a Vietnamese credit institution, the new Law on Credit Institutions introduces several new provisions, including restrictions on ownership and structure, which will need to be considered

Other Ownership Restrictions

Aside from foreign ownership limits, the new Law on Credit Institutions also sets general maximum ownership levels for a single shareholder in a shareholding credit institution:

- an individual may only hold up to 5% of charter capital;
- an entity may only hold up to 15% of the charter capital, with exceptions for State shareholding, foreign shareholding pursuant to a Government decree (for example Decree 69) and shareholdings required to rescue a struggling bank as directed by the State Bank of Vietnam; and

- a shareholder and its affiliates may only hold a maximum of 20% of the charter capital.

The law also includes nominee holdings in these limits.

There are also limits for credit institutions in the form of a multiple member limited liability company. These can have a maximum of five members or owners and the maximum ownership limit that a member and its affiliate can hold is 50% of the charter capital.

Transfer Restrictions

The new Law also imposes certain restrictions on the transfer of interests in credit institutions.

- A shareholder who has a representative that is a board member, inspection committee member or a general director cannot transfer their shares during that term of office.
- Founding shareholders must hold at least 50% of the charter capital for the first five years following establishment of the credit institution. Also, entities which are founding shareholders must hold at least 50% of all founding shares for the first five years.

It should also be noted that Decree 59/2009/ND-CP of the Government on Organisation and Operation of Commercial Banks, dated 16 July 2009, provides that the State Bank of Vietnam is required to approve any transfer of share transactions of a major shareholder (holding 5% or more) or a share transaction that results in a shareholder acquiring that status.

Transitional Provisions

Given the new restrictions on organisation structures for credit institution, the new Law gives all existing institutions two years from the date the Law becomes effective to bring their organisational structure in line with the new requirements. In relation to ownership levels, the State Bank of Vietnam is empowered to make regulations on the transition arrangements permitted to ensure compliance with the new requirements.

New Enterprises Decree – but some old issues remain

Decree 102-2010-CP-ND of the Government Providing Guidelines on Implementation of the Law on Enterprises, dated 1 October 2010 (***Decree 102***)

Regular readers may recall that in our August edition we considered a draft decree implementing the Law on Enterprises that was to replace the existing Decree 139. On 1 October, the terms of that decree were finalised in Decree 102, which will take effect from 15 November this year.

In this article we will look at the detail of some of the changes introduced by the

new Decree as well as considering some existing issues which remain unresolved despite the new Decree.

Investor derivative action

As noted in the August VLU, the new Decree expressly provides members of limited liability companies and shareholders of shareholding companies the right to institute legal proceedings, in the name of the company, against the chairman of the members' council or a member of the board of management or director.

Where a director fails to properly exercise their duties or abuses their position, a member of a limited liability company can institute proceedings in either their own name or the name of the company. For shareholders in a shareholding company there are a few more hoops, firstly the shareholder (or group of shareholders) must hold at least 1% of the ordinary shares for at least six months and then they must first request the inspection committee to initiate the legal action. Only if the inspection committee fails to initiate the action can the individual shareholder (or group of shareholders) directly institute the proceedings.

Capital contribution

Decree 102 adds some clarification, but also an additional layer of complexity, to the issue of timing of payment for capital contributions. In relation to limited liability companies, the decree clarifies that a 3 year deadline applies for payment of undertaken contributions – either from the date of issue of the registration certificate or from the date of registration of any addition or change of member.

New regulations on the timing for payment of capital contributions may create problems, particular for sectors with minimum charter capital requirements

For shareholding companies, however, things are a little less clear. Decree 102 provides a new definition of 'charter capital' in the context of a newly registered shareholding company. Specifically, it states that on the date of registration, the charter capital will be the total value of shares for which founding and other shareholders have subscribed. It further provides that this entire charter capital must be paid in full within 90 days from the date of issuance of the enterprise registration certificate. The Decree goes on to provide that a shareholding company may have a number of shares which it has the 'right to issue' (being a

number larger than the charter capital) and that these shares must be issued (and presumably paid for) only within the first 3 years. This appears to be both broadly consistent with, and yet different in key respects from, the Law on Enterprises which mandates that founding shareholders must register to subscribe for only 20% of the total number of ordinary shares which may be offered for sale and pay for these within the first 90 days after establishment, with the remainder being required to be sold out within 3 years. The change in definition of 'charter capital' combined with the new 90-day payment deadline may prove to be particularly problematic for shareholding companies in sectors requiring minimum charter capital.

Also in relation to capital contribution, Decree 102 expressly recognises a new method of capital contribution in the form of intellectual property rights. Specifically, owners of recognised intellectual property rights will be permitted to use such assets for capital contribution. The Ministry of Finance is charged with providing guidelines on the valuation of this type of contribution.

The new decree considers, once again, the relevance of the level of foreign ownership on licensing and investment processes

Importance of the 49% foreign ownership threshold

Whether the level of foreign investment in a Vietnamese established entity is above or below 49% is significant under both the Law on Enterprises and the Law on Investment, as well as their implementing legislation. Unfortunately, despite multiple references to this threshold, inconsistencies across different laws as well as in the application of provisions by different authorities have resulted in a lack of certainty in this area.

As noted in our August report, Decree 102 again steps into the 49% fray, making several references to the importance of this threshold. Unfortunately, however, these references appear to raise as many questions as they answer.

The new Decree provides that investment and business conditions applicable to domestic investors will apply to any existing enterprise in which foreign ownership is 49% or less. Arguably this is a forward step from Decree 139, which referred only to the treatment of enterprises on establishment rather than post-licensing. At the same time, however, the Decree also provides that a foreign investor establishing an entity for the first time in Vietnam must follow the procedures for obtaining an Investment Certificate, seemingly regardless of the level of foreign ownership. This seems to be a backwards step compared to Decree 139, and one likely to reignite confusion as to how initial licensing processes are to be conducted. This is possibly something that will be left to be dealt with by the new decree implementing the Law on Investment, which is currently in the drafting phase.

Decree 102 also references the 49% threshold in the context of an existing foreign-invested company establishing a subsidiary. Under Decree 102, in these circumstances if the foreign investment level in the existing company (the parent) is below 49%, the subsidiary may be established under the business registration process of the Law on Enterprises, rather than following the investment procedures set out in the Law on Investment. Conversely, if the level of foreign

ownership in the parent is above 49%, the subsidiary must be established following the regulations applicable to foreign-invested entities. While clarity would be welcome concerning whether foreign-invested entities established in Vietnam are to be considered foreign or local for the purposes of determining these issues, it appears odd that the licensing procedures should differ depending on the foreign investment level in the parent, rather than the level of foreign investment in the company being established.

It remains to be seen how local authorities will interpret and implement these latest pronouncements on this complicated issue.

Liabilities of company officers, rights of investors

For individuals who are asked to take up a board position in a Vietnamese company, an obvious concern is to understand the potential sources of liability attached to such a position.

Conversely, investors in a Vietnamese company are often keen to understand their rights, and what possible actions they may take, against any perceived unfair or wrong act by a company officer.

The provisions dealing with both officer liability and sources of investor action are scattered across several legal instruments. We will now take a brief look at some of the main sources of these liabilities and rights.

The Law on Enterprises

The Law on Enterprises and its implementing legislation is the primary source to consider in determining both the liabilities of officers and rights of investors. This legislation stipulates specific sources of liability as well as providing for alternate means of investor redress.

The Law on Enterprises specifically provides a right for any member of a limited liability company to commence legal proceedings against a director of the company, should that director fail to perform fully their duties and cause damage to the interests of either the member or the company. Although, interestingly, the Law on Enterprises does not stipulate a matching specific right for members of a shareholding company, a shareholder arguably has a similar right through reliance on the Civil Code, discussed further below.

As noted above, recently enacted Decree 102 also details a 'derivative action' right, permitting investors in both limited liability companies and shareholding companies to initiate action against directors, in the name of the company.

Beyond investor-initiated actions (be they personal, or in the name of the company) the Law on Enterprises also provides a general source of liability for directors and officers of both limited liability and shareholder companies through the imposition of general duties on any 'manager of an enterprise'.

The Law on Enterprises defines a 'manager of an enterprise' by reference to several positions, including that of a member of a Board of Management or a

Members Council. The Law on Enterprises then goes on to set out the manner in which such a 'manager' must perform their duties, including that they must:

- exercise their delegated powers and perform their delegated duties strictly in accordance with the Law on Enterprises, relevant legislation, the charter of the company, and resolutions of the General Meeting of Shareholders;
- exercise their delegated powers and perform their delegated duties honestly, diligently, to their best ability and in the best lawful interests of the company and its investors;
- be loyal to the interests of the company and investors in the company; and
- not use information, secrets or business opportunities of the company, nor abuse their position and powers or assets of the company for their own personal benefit or for the benefit of other organisations or individuals.

Potential liability and causes of action are of keen interest, both to investors and to those invited to take a seat at the board table.

These requirements accord with the general principles of directors duties common in other jurisdictions. Persons committing breaches of the provisions of the Law on Enterprises, including those relating to a manager's conduct and duties, may, depending on the nature and seriousness of the breach, be subject to disciplinary action, administrative penalty or criminal prosecution and may also be required to compensate for damage caused to the interests of an enterprise, its owner, members, shareholders or creditors, or other persons.

Finally, the Law on Enterprises is also the source of investor rights in relation to breaches of particular requirements of the Law on Enterprises by directors. Specifically, the Law on Enterprises gives a shareholder the right to request that a court cancel a shareholders' resolution where the order and procedures followed for either convening the meeting, issuing the resolution or the contents of the resolution breach the law or the company's charter.

The Civil Code and Criminal Code

Vietnam's Civil Code regulates so called civil relations - the rights and obligations of individuals and legal entities arising from, among other things, business and trade. Under the Civil Code, persons in general (not just members of a board, although they would be covered) are liable to pay compensation for damage caused where there is:

- both a loss and an illegal act (defined generally as a breach of the law and, in the case of a board member, could include a breach of the duties set out in the Law on Enterprises);
- a causal relationship between the loss and the illegal act; and
- fault (either the act is intentional or the resulting damage was foreseeable) on the part of the person inflicting the loss.

As such, if a company officer causes damage to the company or any third parties or investors, the provisions of the Civil Code could potentially be used by the aggrieved party to seek compensation personally from the officer.

The Criminal Code also contains provisions, for example prohibitions on abuse of power or bribery, which may attract liability to a company officer. Depending on the value of loss resulting from the criminal act, penalties range from warnings to life in prison, and ultimately capital punishment.

D&O Insurance

The common corollary to a consideration of director liability, is the question of D&O ('Directors & Officers') insurance. For listed companies, the law expressly permits a company to take out such insurance, however approval of the insurance cover is required from the General Meeting of Shareholders and the insurance must not cover liabilities arising from breaches of law or the company's charter. While there are no such restrictions on insurance taken out by unlisted companies, public policy may prevent reliance on insurance covering liability arising, for example, from breaches of the law, particularly criminal acts.

Getting tougher on breaches of industrial property rules

Decree 97/2010/ND-CP on Penalties for Administrative Breaches in the Industrial Property Sector, dated 21 September 2010 (***Decree 97***)

For the past 4 years, breaches of the rules and regulations relating to industrial property (which includes the use of trademarks, trade names and designs) have been dealt with by Decree 106-2006-ND-CP dated 22 September 2006 (***Decree 106***). Arguably, the continued difficulties of counterfeiting and misuse of trademarks and other industrial property suggests that Decree 106 has not always been up to the mark in this important area.

Now it is hoped that the issuance of Decree 97, issued exactly 4 years to the day after its predecessor and which will take effect from 9 November 2010, will provide the necessary basis to get tougher on infringements in this sector. Some of the key changes introduced in Decree 97 are considered below.

Actionable infringements

Under Decree 106, in order to incur penalty an infringement was required to:

- occur for business purposes; and
- cause loss or damage to a consumer and to society.

The new decree sets up the potential for a double pecuniary punishment for infringing industrial property rules – imposing fines and requiring the return of any illegally obtained profits

Decree 97, however, refers only to an infringement occurring for business purposes and is silent as to the loss or damage caused to a consumer and to society. While not entirely clear, it may be that proof of such loss or damage will no longer be required before an infringement may be dealt with.

New cap on fines

Decree 97 provides that the maximum fine applicable in relation to infringing goods is VND 500 million. Under the old Decree, the maximum fine was set at five times the value of the infringing goods. This change is consistent with the fine levels stipulated in the 2008 Ordinance on Administrative Penalties.

Return of profits

For the first time Decree 97 provides that any illegal profit earned through a breach of the industrial property rules must be returned to the Government. This new measure may apply in addition to the fines already applicable.

Penalties for acts of unfair competition

Decree 97 also provides for the first time for fines for acts of unfair competition where they involve infringements of industrial property regulations. The Decree provides for the imposition of fines of up to VND 70 million on organisations and individuals conducting acts of unfair competition where the value of the infringing goods or services exceeds VND 70 million.

Given the element of unfair competition, there is potential overlap between these provisions of Decree 97 and Decree 120-2005-ND-CP on breaches in the competition sector, dated 30 September 2005 (***Decree 120***). In particular, under Decree 120, an advertisement providing false or misleading information to customers regarding the 'design, type, packaging, origin of goods…' may be subject to a maximum fine or VND 50 million. Only experience will show which decree (and therefore which maximum fine level) will be favoured in the event of breaches in this area.

Misuse of domain names

Again for the first time, Decree 97 specifically deals with infringement of industrial property through the misuse of domain names. The Decree provides for a fine of up to VND 20 million for intentional misuse of a domain name, including the registration or use of a domain name which is confusingly similar to a protected trade mark or geographical indication. The Decree also provides specifically for the revocation of infringing domain names.

The new decree on breaches of industrial property law specifically addresses electronic-based infringements, such as the misuse of domain names

Enforcement Authorities

The Decree also adds two new authorities to the list of bodies empowered to deal with breaches of industrial property laws. In addition to the existing five authorities (comprising the Ministry of Science and Technology, Market Management Offices, Customs offices, Police offices and People Committees of Provinces and cities) Decree 97 also empowers:

- Inspectorates under Ministry of Information and Telecoms; and
- the Vietnam Competition Authority (***VCA***).

While more watchdogs may provide more teeth in the enforcement process, there is also a risk that their areas of oversight may overlap or there may be an overall lessening of enforcement, as each authority assumes that others are responsible for specific breaches.

A (final) Circular 13 post-script

Circular 19-TT-NHNN of the State Bank of Vietnam amending Circular 13, dated 27 September 2010

The much debated, and ultimately amended, Circular 13-2010-TT-NHNN regulating prudential ratios for credit institutions in Vietnam, originally dated 20 May 2010 (***Circular 13***), finally came into effect on 1 October 2010.

As noted in earlier issues of the VLU, Circular 13 created considerable interest

and debate among bankers and regulators. With only a few days to spare before the Circular took effect the State Bank of Vietnam (***SBV***) issued Circular 19 amending Circular 13.

The amendments resulted from the SBV's research (mandated by the Prime Minister) into media reports of objections by the commercial banks to certain provisions of Circular 13, including with respect to the proposed increased capital adequacy ratio and the exclusion of call deposits of non-individuals and term deposits of state treasury from the total mobilised capital when calculating the lending from capital sources ratio.

While the now amended Circular 13 still requires an increased minimum capital adequacy ratio of 9% (instead of the previous 8%), the most significant amendment – one likely to be welcomed by commercial banks – concerns the calculation of mobilised capital. Specifically:

- the outstanding loan balance no longer has to take into account guarantees of the credit institution;
- term deposits of State Treasury are no longer excluded from the definition of mobilised capital; and
- 25% of call deposits of economic organisations (except for credit institutions) and money borrowed from other domestic credit institutions with a term of three or more months can now be included in the definition of mobilised capital.

These changes are expected to lessen the burden on credit institutions to achieve their maximum lending from capital source ratio, being 80% for banks and 85% for non-banking credit institutions.

Perceptions of corruption – the annual list

Transparency International's Corruption Perceptions Index, issued 26 October 2010

Transparency International has just released its latest annual index reporting on perceived levels of corruption in over 170 countries.

In this year's index, Vietnam was ranked equal 116th with a score of 2.7. The highest rank was taken by Denmark, New Zealand and Singapore with a score of 9.3 while at the other end, Somalia fared worst with a score of 1.1.

Although the rankings and scores are not directly comparable given changes in survey methodology etc, year-to-year comparisons can be used to identify significant changes in the perceived levels of corruption for a particular country. A comparison of Vietnam's results for 2010 and 2009 (where Vietnam was ranked 120th out of 180 countries with a score of 2.7) shows effectively no change in the perception of corruption.

More information about the index can be found at Transparency International's website: http://www.transparency.org/policy_research/surveys_indices/cpi/2010

Case Commentary: Choongnam Sprinning (Korea) v E&T Company (Korea)

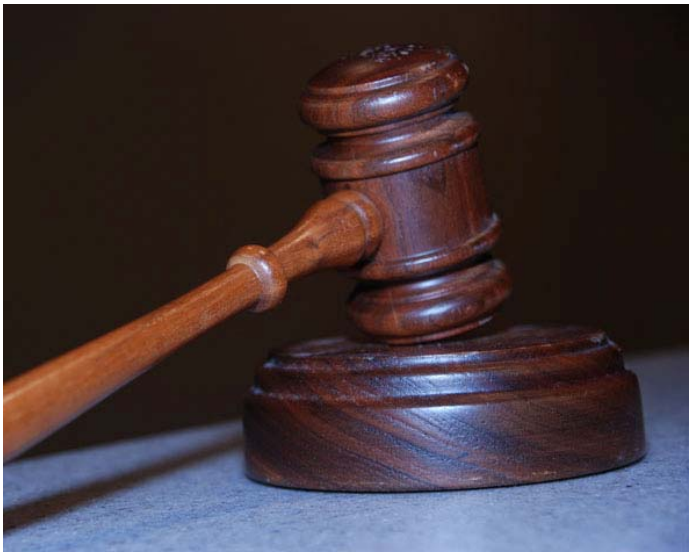
Judgment No. 62/2008/QDKDTM-PT dated 7 August 2008

The Facts

This case concerned the enforcement of a foreign court (Korean) judgment in Vietnam. Choongnam Sprinning, a Korean company, (***Choongnam***) established a joint venture company in Vietnam with a Vietnamese partner in 1992. In March 1998 Choongnam assigned a 35% interest in this joint venture company to another Korean company, Yonho, which then assigned this interest to E&T Company, also a Korean company (***E&T***). It seems that these assignments were duly licensed or registered by Vietnamese authorities under Vietnamese law.

In 2002, Choongnam went into bankruptcy in Korea. In 2005, a Korean court declared that both the assignment of the interest from Choongnam to Yonho and the subsequent assignment to E&T were voidable transactions and ordered that the interest in the Vietnamese joint venture be returned to Choongnam.

In 2007, Choongnam filed an application in the People's Court of Ho Chi Minh City for an order to enforce the judgement of the Korean court.



While the enforcement of a foreign court judgment can be viewed as a positive development, the lack of reasons for the decision combined with discretion in future cases means that this area remains uncertain

The Decision

Without giving reasons, the People's Court of Ho Chi Minh city granted Choongnam's application and ordered that the interest in the joint venture be returned to Choongnam.

E&T lodged an appeal to the Court of Appeal of the Supreme Court. The Court of Appeal dismissed the appeal, again without giving reasons, and affirmed the order to enforce the Korean court's judgment.

Commentary

This decision stands out as a rare example where a foreign court judgment has been successfully recognised and enforced in Vietnam.

In general, a Vietnamese court will enforce a foreign court judgment only on the basis of either a relevant treaty or the principle of reciprocity. In this case, neither the trial court nor the Court of Appeal referred to a treaty between Korea and Vietnam and, as such, it seems likely that there is no such treaty. Given that, the assumption (in the absence of reasons) must be that both courts' decisions were based on the principle of reciprocity - the courts' belief that Korean courts would reciprocate by enforcing judgments of Vietnamese courts.

This assumed reciprocity may give rise to hope that Vietnamese courts may be becoming more open to enforcing foreign court judgments on this basis. However, given that the decision whether to enforce a foreign judgment remains at the complete discretion of the courts, and the weight of historical decisions has been against enforcement, it remains impossible to predict, or be optimistic about, the success of any future applications for enforcement of foreign judgments.

Legal instruments recently uploaded on to the Vietnam Laws online database

Vietnam Laws online database (available at www.vietnamlaws.com) is an online searchable database containing English translations of more than 3,400 Vietnamese laws. Legislation recently uploaded includes:

- Decision 28 regulating membership of Vietnam Securities Depository, 22 April 2010
- Law 46 on State Bank of Vietnam, 16 June 2010
- Decree 85 amending Decree 14 dated 19 January 2007 on securities, 2 August 2010
- Draft Decree implementing Law on Investment (to replace Decree 108 dated 22 September 2006), 9 August 2010
- Draft Decree on retailing (to replace Decree 23 on trading and distribution by enterprises with foreign owned capital), 10 September 2010
- Letter 1250 on 25% CIT rate payable by foreign institutional investors on share transfers in non-public shareholding companies, 20 September 2010
- Draft amendments to Decree 108 dated 27 November 2009 on BOT contracts, 24 September 2010

- Circular 13 on prudential ratios in banking dated 20 May 2010 as amended by Circular 19, 27 September 2010
- Decree 102 implementing the Law on Enterprises, 1 October 2010

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