
**June 2010 edition**

# contents


| | |
|---|---|
| More details on enterprise registration – but still a lot of holes | 1 |
| Listing foreign invested companies in Vietnam – a long, hard road | 3 |
| Taxing times for miners | 7 |
| The case against Megastar – one to'watch' | 8 |
| New tougher rules for bank listings | 11 |
| More rumblings in the great 'pre-payment' debate | 14 |
| New legal instruments | 15 |


In brief: This month we cast our eye over some recent legislation on enterprise registration and mining royalties and some proposed guidance for banks seeking to list on the stock exchange. We also take a look at the legal framework for the listing of foreign invested enterprises including why this is largely untrodden ground, as well as looking at Vietnam's competition law landscape in the context of a recent test-case. We also revisit the ongoing debate on developer pre-payments.



**Visit www.vietnamlaws.com**

- subscribe to (or take a free tour of) Vietnam Laws online database – a searchable database of over 3,400 of our English translations of Vietnamese laws regulating investment and business
- access free translations of a selection of Vietnamese laws
- read the Vietnam Legal Update from 2010 back to 1997 - complete with index of contents and search function
- find out more about our practice in Vietnam

**Visit www.aar.com.au**

- find out more about the Allens Arthur Robinson network and our international practice

Allens Arthur Robinson (Allens) is a leading international law firm in South East Asia, Greater China, and Australia.

With 15 offices in Bangkok, Beijing, Brisbane, Hanoi, Ho Chi Minh City, Hong Kong, Jakarta, Melbourne, Perth, Phnom Penh, Port Moresby, Shanghai, Singapore and Sydney, Allens has an extensive network in Asia.

Allens' Vietnam practice is led by resident partners Bill Magennis, Nigel Russell and Thomas Miller. Our in-country team consists of international and local lawyers and legal translators.

We encourage feedback from our readers regarding the Vietnam Legal Update. Please direct all enquiries, comments and suggestions to us via email at VLU@aar.com.au.

# More details on enterprise registration – but still a lot of holes

Circular 14-2010-TT-BKH of the Ministry of Planning and Investment guiding application files, order and procedures for enterprise registration in accordance with Decree 43-2010-ND-CP dated 15 April 2010 on enterprise registration, dated 4 June 2010 (***Circular 14***)

As reported in the April 2010 edition of VLU, on 15 April 2010 the Government issued Decree 43 on enterprise registration (***Decree 43***). Now, the Ministry of Planning and Investment (***MPI***) have provided further guidelines on the implementation of the provisions in Decree 43, in the form of Circular 14 which will become effective from 20 July 2010.

In discussing some of the key points of Circular 14 this article shows that despite the additional guidance, there is still a long way to go in improving enterprise registration mechanisms in Vietnam.

## Online registration

As noted in April, while Decree 43's references to online registration sounded appealing, potential practical difficulties tempered our enthusiasm. Unfortunately, while Circular 14 provides further guidelines on online registration, again the inherent practical difficulties suggest that this may not be the breakthrough advance in ease of registration that people may have hoped.

At a high level, Circular 14 provides that an electronic registration application will be submitted via the national enterprise registration information portal and will consist of all documentation required for an application in hard copy, converted into electronic form. Enquiries suggest that black & white, readable scanned documents will suffice, at least at the outset. However, Circular 14 further provides that the online registration process will differ depending on whether the applicant has an approved 'digital signature':

- if the applicant already has a compliant digital signature, they submit the application documentation via the portal and then pay the registration fee to the provincial business registration department. The business registration department may request further amendments to the application
- if the applicant does not already have a compliant digital signature, the application can still be submitted online. In such case, after the business registration department is satisfied that the application is valid, it will ask the tax office to create a code for the enterprise and issues a request to the applicant asking them to confirm the submission of the application by signing and returning the letter. The applicant must send the signed request, together with the full application in hard copy to the business registration department, within 15 days from the date of receiving the request.

 

On its face, Circular 14 suggests that there is little, if anything, to be gained from submitting an application electronically if you do not already have a compliant digital signature. Ultimately the applicant still needs to send a full hard copy of the application to the registration department, in addition to the time taken for the business registration department to internally process the original electronic documentation and make request to the Tax Department.

**Requirements to ultimately provide a full hard-copy application seem to negate any positives of the new online registration process**

Moreover, the position in relation to digital signatures appears no better. Firstly, there are extremely limited service providers in Vietnam who can issue a formal, dual-key encrypted 'digital signature'. In addition, we understand that of those digital signatures, not all will necessarily be compliant with the national business registration portal. Most damning, however, are the indications that business registration departments will, despite no reference in Circular 14, also eventually require a hard copy of the application file to be sent or filed, even where a compliant digital signature is used, in order to comply with the Law on Enterprises. This requirement would largely negate any point in using the online system.

## Business lines

In terms of describing the business lines for a new enterprise, Circular 14 refers back to Decree 43 which only allows business lines to be selected from the 'Vietnamese economic industries system' or business lines stipulated in other legal instruments. In assessing any application for a business line not listed in these documents, the relevant business registration body must notify the General Statistics Office of MPI, to consider adding a new code for the new business line. We would anticipate that this process could take considerable time, potentially adding significantly to the total time required for issuance of an enterprise registration certificate.

## Enterprise Registration Certificate

As also discussed in our earlier edition of VLU, Decree 43 introduced a new form of enterprise registration certificate, being a combination of the business registration certificate and the tax registration certificate. This certificate will be given to the enterprise in hard copy, but will also be available electronically on the national database of enterprise registration. Circular 14 provides that these

certificates have equal legal validity, although it does make some provision for where there are inconsistencies (we understand, limited to typographical errors) providing that whichever of the hard copy or the electronic copy mirrors the content of the application for enterprise registration, shall prevail.

An enterprise established prior to Decree 43 is not required to change its business registration certificate into an enterprise registration certificate. However, if an enterprise does want a new certificate, it only needs to fill in a statutory form and send the originals of the business registration certificate and tax registration certificate to the provincial business registration department. According to Circular 14, the new enterprise registration certificate will be issued in a very speedy 2 working days.

### Provision of information about enterprises

Circular 14 provides that any organisation or individual may request certain enterprise registration information from the business registration department, on payment of a fee. This is not a new provision, it is also included in the Law on Enterprises however in practice, this service has not been available. It remains to be seen whether this will change given the reiteration of this right in Circular 14. Certainly, at the time of writing the online portal remained under construction, so we will not be holding our breath.

## Listing foreign invested companies in Vietnam – a long, hard road

Decree 38/2003/ND-CP of the Government on conversion of a number of enterprises with foreign owned capital to operate in the form of shareholding companies, dated 15 April 2003 (***Decree 38***)

Official Letter 238/UBCK-QLPH from the Ministry of Finance and State Securities Commission providing guidelines for listing/registering share transactions on the securities market, dated 29 July 2005 (***Official Letter 238***)

Decision 238/2005/QD-TTg of the Prime Minister on the percentage participation of foreigners in the securities markets of Vietnam, dated 29 September 2005 (***Decision 238***)

Decree 101/2009/ND-CP of the Government on re-registration, conversion and registration for replacement with investment certificates by enterprises with foreign owned capital pursuant to the Law on Enterprises and the Law on Investment, dated 21 September 2006 (***Decree 101***)

Decision 55/2009/QD-TTg of the Prime Minister on the percentage participation of foreigners in the securities markets of Vietnam, dated 15 April 2009 (***Decision 55***)

While many foreign-invested enterprises (***FIEs***) have been established and operated in Vietnam since the introduction of the Law on Foreign Investment in 1986, very few have ultimately been registered with or traded on the country's

securities markets. Recent newspaper reports indicate that only 9 of the 500-odd companies currently listed in Vietnam are FIEs. In some cases, this dearth of listings is not for want of trying. In this article, we take a brief look at the legal history for FIEs wanting to list in Vietnam, as well as the current state of play.

## Listing in the days before the Law on Enterprises

From 1986, when the Vietnamese law first allowed the establishment of FIEs, the Law on Foreign Investment required that such companies exist only in the form of a limited liability company. For the very reason that such companies were not entitled to issue shares, these companies could not be listed on a share-trading market.

Despite a pilot program allowing for the conversion of FIEs and rules applying to the listing of such converted FIEs, in practice very few companies converted and listed

This situation was first addressed in 2003 with a pilot scheme allowing the conversion of certain FIEs into shareholding companies pursuant to Decree 38. Certain FIEs recommended by MPI and approved by the Prime Minister were allowed to convert, so long as they continued to have at least one foreign founding shareholder and so long as at least 30% foreign ownership was maintained throughout their term of operation.

Given that these converted companies now had 'shares' to list, in 2005 the State Securities Commission (***SSC***) provided guidelines, in the form of Official Letter 238, for FIEs wishing to list. Arguably, these guidelines introduced further restrictions on the listing of these types of companies, including providing that only those shares of an FIE which had been offered to the public (for example, under the conversion plan approved by the competent authorities) could be listed. This meant that those shares still held by the founding foreign shareholders could not be listed.

Following Official Letter 238, the Prime Minister issued Decision 238 which added another layer of regulation. This provided that foreign investors may purchase up to 49% of total number of converted-FIEs listed shares. Importantly, this 49% limit applied only to the number of shares listed, rather than the total number of shares in the company.

Despite this regulatory framework, only a few FIEs were converted and listed, including Chang Yih, Full Power, Taicera, Taya and Tung Kuang. The disincentives to listing are not hard to identify – firstly the company had to meet the strict criteria for the pilot conversion program, and then, assuming that did happen, there was little incentive for founding foreign shareholders whose shares were not able to be listed in any event.

## Changes under the Law on Enterprises – but even less movement on the markets

The Law on Enterprises, which came into effect midway through 2006 broadly provides for the same processes for establishing and operating FIEs and Vietnamese companies. In particular, under the Law on Enterprises, an FIE can be established in the form of a shareholding company. Moreover, the

Government also issued Decree 101 under which all FIEs established under the Law on Foreign Investment could apply for conversion into shareholding companies. Neither the Law on Enterprises nor Decree 101 made any reference to requiring an ongoing minimum 30% foreign ownership.

The Law on Enterprises made no specific reference to the listing of FIEs, and given that the overarching principle of the Law on Enterprises was that FIEs and Vietnamese companies be treated the same, on its face, shareholding FIEs should be able to list all of their shares in the stock market in the same way as Vietnamese companies do.

This has not, however, been the reality. In practice, FIEs have been largely unsuccessful in attempting to list their shares relaying on the regulations applicable to local companies. In particular, the SSC has continued to apply the concepts set out in Official Letter 238 and Decision 238, including permitting FIEs only to list those shares which have been offered to the public. This is in spite of the fact that these 2 instruments were issued under Decree 38, which has been effectively superseded by the Law on Enterprises and Decree 101. We are aware of 2 FIEs, Sucrerie De Bourbon Tay Ninh and Mirae Joint Stock Company, which have converted into shareholder companies under Decree 101 and subsequently listed their publicly offered shares, applying these guidelines.


**The dearth of FIEs listed on Vietnam's markets is unlikely to change in the near future**

## Decision 55

If the continued reliance on Official Letter 238 and Decision 238 were not complicated enough, further uncertainty followed the 2009 issuance of Decision 55. While Decision 55 clearly replaced Decision 238, it did not, on its face, affect the SSC's views about the ongoing application of the views expressed in Official Letter 238. Moreover, it amended the 49% cap on foreign ownership of listed securities by applying the 49% limit to the total number of shares in the company, not just those shares that were listed.

Given that a 'private' shareholding FIE, upon establishment or conversion, can have foreign ownership of more than 49% (depending on the industry in which it operates), the application of a 49% limit by reference to the total number of shares at the time of listing may prove problematic. The Decree does address

this issue in part through transition provisions which do not require foreign investors to immediately reduce their ownership in a listed company to less than 49%, instead entitling them to keep their shares but prohibiting them from acquiring any more shares in any circumstances, including to maintain their current level of ownership in the event of a further share issue.

## Invisible hurdles

The inability for foreign shareholders to maintain or increase their shareholding in a company once it lists (assuming they have over 49%) is likely to be a major disincentive for FIEs to list on Vietnam's markets. Moreover, at an administrative level, FIEs seeking to list are likely to face insurmountable objections from the SSC.

According to an interview with Mr. Nguyen Son, head of the Securities Market Development Department of the SSC published in the VnEconomy on 3 May 2010 (http://vneconomy.vn/20100503084033643P0C7/bao-gio-co-huong-dan-cho-doanh-nghiep-fdi-len-san.htm), the SSC's view is that the current legal framework for the listing of FIEs is 'insufficient' and requires reform. Despite counter arguments that the regime is not insufficient (if you simply say that, post the Law on Enterprises, the same listing requirements should apply to FIEs as local companies), given the SSC's view, in the absence of reform, one may assume that FIES will face significant opposition or simply inaction from the SSC should they try to pursue a listing.

## A way forward?

Believing that a separate legal framework for the listing of FIEs is essential, Mr Son explained in the VnEconomy interview that the SSC and Ministry of Finance are working on proposals to be put to the Prime Minister for approval. These proposals may include:

- that foreign ownership in listed FIEs be unlimited (except where certain industry limits apply);
- that FIEs be allowed to list all of their shares, not only those publicly offered; and
- that all shareholders (including foreign shareholders) be allowed to buy newly issued shares.

These proposals represent a quite radical shift away from past (and present) policy, including that the first of these proposals strictly contradicts Decision 55, issued only last year. Even assuming the SSC, MOF and indeed the Prime Minister agree with these radical changes, we anticipate it would be a considerable time before any final guidelines are issued. In the meantime, the listing of any FIEs is likely to remain in limbo.

 

# A taxing time for miners

Law 45-2009-QH12 on Royalties, dated 25 November 2009 (***Law 45***)

Decree 50/2010/ND-CP of the Government on Royalties, dated 14 May 2010 (***Decree 50***)

In November 2009, the National Assembly enacted Law 45 which set out new rules (and new rates) for royalties payable on mining in Vietnam. This was recently followed by Decree 50, which comes into effect on 1 July 2010 and sets out detailed regulations and guidelines for the implementation of the Law on Royalties. These regulations largely reiterate the provisions of Law 45, adding very little in the way of change.

## Current royalty rates

Current applicable royalty rates are set out in Law 45. Some of the rates applicable include:

| Resource | Tax rate (%) |
|---|---|
| gold | 9-25 |
| iron & manganese | 7-20 |
| lead, bauxite, aluminium, copper & nickel | 7-25 |
| platinum, silver and tin | 7-25 |
| diamond, ruby and sapphire | 16-30 |
| crude oil* | 6-40 |
| natural gas and coal gas* | 1-30 |

* The specific royalty rate in the case of crude oil, natural gas and coal gas is calculated progressively on each part of the average daily output

Further change may come after Decree 50 comes into effect. Decree 50 refers to a 'Royalties Tariff' to be issued by the Standing Committee of the National Assembly setting out royalty rates. It remains to be seen, if indeed the Standing Committee does issue such a tariff after 1 July, how it will compare with the rates set out above.

## What price is taxed?

Beyond the applicable rates, the precise method of applying that rate has, in certain cases, been changed by the introduction of Decree 50.

Under Law 45, as reiterated in Decree 50, the 'taxable' price of resources is determined in accordance with the selling price of a product unit of the natural resource by the entity exploiting it, excluding value added tax. Where the selling price is not ascertainable, Decree 50 makes clear that the taxable price is determined by reference to the actual selling price in the regional market of the

relevant geographical area. In any event, the taxable price will not be less than that determined by the relevant provincial people's committee.

A key change introduced by Decree 50 relates to determining the royalties paid on natural resources which are exported. Specifically, under Decree 50, the taxable price for exported natural resources is the export price, that is the free-on-board or FOB price. By contrast, under the previous Ordinance on Royalties 5-2009-ND-CP dated 19 January 2009, taxes were paid by reference to the price paid at the place of exploitation (ie the mine) rather than at the export point. Decree 50 further provides that where a natural resource is sold in Vietnam and also exported, then that part sold in Vietnam will be taxed on the selling price of a unit of that resource (excluding VAT) while that part exported will be taxed on the FOB export price.

**A key change is that royalties are levied on the free-on-board price of exported natural resources, rather than their cost at the mine-site**

The taxable price of crude oil, natural gas and coal gas is the selling price at the 'delivery point', being the location where ownership of the oil, natural gas or coal gas is transferred to the counterparty, as agreed in the contract. The Decree makes specific provision for further regulation to be issued by the Ministry of Finance regarding the taxable price of crude oil, natural gas and coal gas.

### Exemptions and Reductions of Tax

Tax exemptions remain as outlined in the Law of Royalties. These broadly include natural resources used by family households and individuals for their daily lives, natural marine products and exploited resources lost through accident or natural disaster.

## The case against Megastar – one to 'watch'

Recent domestic and international press has been buzzing on news that six cinema owners in Vietnam have complained to Vietnam's competition regulator about the allegedly anti-competitive actions of Megastar, a major Hollywood film

distributor. According to newspaper reports, the other cinema operators allege that Megastar is abusing its dominant position in the market, in a manner prohibited by Vietnam's Competition Law.

In this piece we take an overview look at the alleged prohibited conduct by Megastar, and the legal framework within which such conduct will be considered.

## VCAD and the Competition Council's history

The matter, should it go ahead, will be a test of the powers of the Vietnam Competition Administration Department (***VCAD***) and the Competition Council, the tribunal that adjudicates competition cases and imposes penalties for breach of the competition law.

The case against Megastar, should it be pursued by VCAD, will be only the second test of the powers of VCAD and the Competition Council

Since the Competition Law came into effect in 2004, only one case has been brought to the Competition Council. That case, by way of reminder, was reported in our case commentary in May 2009 and concerned the provision of airline fuel by VINAPCO to Jetstar Pacific Airlines. In that case VINAPCO was found to be in breach of the Law and fined approximately VND3.4 billion, equivalent to 0.05% of its 2007 revenue.

## The case against Megastar

According to newspaper reports, VCAD has commenced preliminary investigations to determine whether a case ought to be brought against Megastar following complaints made to VCAD by rival cinema exhibitors. Specifically, six cinema exhibitors across the country have argued that Megastar has abused its dominant position by increasing the per-ticket fee which it charges on films that it distributes to the cinema exhibitors. According to reports, Megastar has set a per-ticket distribution fee of VND25,000, a reasonably significant sum given the movie ticket prices charged by many Vietnamese cinemas to customers often range between VND25,000 and VND40,000. The high per-ticket distribution fee obviously cuts into the profits of the smaller cinema operators and may drive consumers to watch movies at Megastar-run cinemas.

## The legal framework

To make a case against Megastar, VCAD would need to establish a 2-limbed test: that Megastar:

- is in a 'dominant position' in the relevant market; and
- has engaged in prohibited conduct.

Under the Competition Law, an entity is in a 'dominant position' in a relevant market if it has market share of 30% or more or if the entity is capable of substantially restraining competition in the relevant market.

If it can be established that Megastar does indeed hold a dominant position in a particular market, next it must be shown that Megastar has engaged in

prohibited conduct. The most likely types of prohibited conduct that would be claimed by the other cinema exhibitors include that Megastar has:

- engaged in price-fixing, fixing an unreasonable selling or purchasing price or fixing a minimum re-selling price of goods or services, thereby causing loss to consumers; or
- restrained the distribution of goods or services or limited the market, thereby causing loss to consumers.

Before either limb can be established, the relevant market for Megastar must first be identified. It is within this market that Megastar's dominance will be assessed and within which the anti-competitive effects of any prohibited conduct will be considered.


**A per-ticket distribution price of VND 25,000 appears significant considering that many cinemas charge only VND 25,000-40,000 to customers for tickets**

## The relevant market

News reports have already suggested that defining the relevant market in this case will be a difficult exercise for VCAD. Relevantly, the Competition Law looks at both the product and geographical market when identifying and defining a relevant market. Both analyses turn on the substitutability of the goods or services and an assessment of substitutability requires considerable in-depth analysis of a wide variety of factors. These may include:

- whether, if a cinema ticket price increased by, say, 10%, the cinema goer would switch to other forms of entertainment? Would going to the cinemas be substitutable for watching a DVD, television or singing karaoke? Traditionally the cinema exhibition market is narrow and excludes television and video as the experience of watching a film at the cinema is different to watching at home. It is also arguable that the cinema market is limited to the exhibition of 'first-run' newly released films. However, the relative ease with which 'first-run' films can be widely and cheaply accessed through pirated DVDs may impact on the analysis for the Vietnamese market;
- the particular geographic market - cinema goers are unlikely to scooter

100 kilometres to the next cinema if the price at the local cinema increased by only 10%, but a 100% jump in prices could be a different story; and

- the relatively high initial set-up costs (in terms of obtaining proper licenses etc) which may acts as barriers to new entrants in the Vietnamese cinema market. The fact that the film distribution and exhibition markets are vertically integrated in Vietnam, that is, that Megastar, Galaxy and others act as both film distributor and exhibitor, is another factor to be considered.

### Establishing prohibited conduct

Even assuming the relevant market has been readily identified and defined, VCAD would still need to show that Megastar had engaged in prohibited price-fixing or other prohibited conduct. Again, this will not involve a simple assessment. While Megastar-run cinemas charge a significantly higher movie ticket price, they also provide better infrastructure and their cinemas are located in prime locations. Arguably, VCAD will need to consider a myriad of issues including whether Megastar applies the same per-ticket distribution fee to its own cinemas and perhaps whether such per-ticket distribution fees are in or out-of-step with similar charges in other jurisdictions.

### A test for VCAD

Given the myriad of issues and considerations which we have only briefly touched on in this article, any potential action taken by VCAD against Megastar will provide a good test of VCAD's powers and those of the Competition Council. News reports have indicated that a preliminary assessment of the complaints to VCAD will be issued shortly and we will keep readers informed on updates as we hear them.

## New tougher rules for bank listings

Draft Circular guiding shareholding credit institutions on registration to list shares on the stock exchange, dated 10 June 2010 (***Draft Circular***)

The State Bank of Vietnam (***SBV***) is busy drafting and seeking public opinion on a new circular guiding shareholding credit institutions (such as a shareholding banks) who wish to list their shares on a stock exchange. The Draft Circular, which sets out the conditions required to obtain SBV approval to list on a local or foreign exchange, has ignited considerable debate. It proposes 3 broad types of conditions which must be met in order for the SBV to consent to registration for listing on the domestic stock exchange:

- conditions relating to financial capacity;
- conditions relating to the operational safety of the credit institution; and
- conditions relating to the management and executive operation of the

institution.

In addition to meeting these conditions, the Draft Circular proposes that a Credit Institution seeking approval to list on a foreign stock exchange must also have been listed on the domestic exchange for at least a year and must not have been penalised by the authorities for any breach of the securities market regulations in the year prior to application.

## Financial capacity conditions

Under the Draft Circular, the SBV will only approve a credit institution for domestic listing if:

- the actual paid up charter capital of the credit institution at the time of the request is equal to or higher than the requisite 'legal capital' amount. This will be the amount of 3000 billion VND which, under current regulations, commercial banks must have in charter capital by the end of 2010; and
- the credit institution's business operations have been profitable for the last 2 consecutive years and it must not have accumulated losses at the date of the request for approval.

## 'Operational safety' conditions

Conditions designed to safeguard the operations of listed credit institutions are five-fold:

- at the close of the previous year, the institution must have met relevant minimum prudential limits;
- for the last 3 consecutive months prior to the date of application, the institution must have satisfied all banking operation prudential limits;
- for the previous year and for quarters calculated from the end of previous year up until the date of the application, the ratio of bad debts over total loan balance must be no more than 3%;
- as at the end of the previous year and for quarters calculated from the end of the previous year up until the date of the application, the credit institution must have fully conducted debt classification and establishment of risks reserves in the manner set out in relevant regulations; and
- during the previous year and up to the date of application, the institution must not have received total fines of more than 5 million VND from the Banking Regulator for breaches of regulations on prudential limits during that period.

## Management and executive operation conditions

The third range of conditions concern compliance with the legal requirements for the structure and composition of the board of management and board of

 

controllers. Credit institution must also have established and implemented an internal audit section and an internal control and inspection system in accordance with relevant requirements.

## Documents and procedures required to apply for SBV consent

The Draft Circular also sets out the proposed application documents and procedures, as well as some fairly aggressive time-frames, involved in applying for SBV approval to list either domestically or on a foreign exchange.

| Item | Domestic stock Exchange | Foreign Stock Exchange |
|---|---|---|
| Number of dossiers | 1 | 2 |
| Documents in the dossier | Letter from the institution requesting that the Governor provide consent to registration for listing on the Stock Exchange<br>Resolution of the GMS approving listing of shares on the domestic stock exchange | Letter from the institution requesting that the Governor provide consent to registration for listing on the Stock Exchange<br>Resolution of the GMS approving listing of shares on the foreign Stock Exchange<br>Report on compliance with the Law on Securities and securities market by the credit institution listed on the domestic stock exchange |
| Receiving body | Inspection and Supervising Division of the SBV | Inspection and Supervising Division of the SBV |
| Timeline for the receiving body to submit its opinion to the SBV's Governor | 20 days from the date of receipt of the application file | 30 days from the date of receipt of the application file |
| Timeline for the Department of Justice and Department of Foreign Currency Management to comment | N/A | 7 days from the date of receipt of a letter from the Inspection and Supervision Division of the SBV |
| Timeline for obtaining final opinion from the SBV | 30 days from the receipt of the application file | 40 days from the receipt of the application file |

## Catch 22 for small banks

Still in the consultation phase, the Draft Circular has met some stiff criticism, particularly from those smaller credit institutions which have yet to meet the minimum charter capital amount stipulated by law. While the SBV is pushing these institutions to raise capital to meet these requirements, these new

conditions would effectively cut-off a key avenue to obtain such capital.

In particular, it is reported that several of these smaller-sized shareholding banks had been preparing plans to increase their charter capital by listing their shares on the stock market. While some of these banks may look to try and 'hurry along' their listing application before the Draft Circular is enacted into law, it is not clear whether this would be successful as even under the current rules, credit institutions need SBV approval to list and although the Draft Circular has not yet been enacted, its general principles may inform the SBV's decisions on any applications. To that end, we note that both Navibank and Western Bank (both having charter capital of 1000 billion VND) submitted dossiers to the SBV last year for approval to list their shares on the stock exchange but they are still awaiting approval.

## More rumblings in the great 'pre-payment' debate

As we reported in the April 2010 VLU, Vietnam's newspapers have been closely following a debate between the Ministry of Justice and the Ministry of Construction concerning the requisite conditions before residential developers can secure pre-payments for prospective buyers. To recap briefly, there are provisions governing pre-payments (and particularly the conditions which must be met before such payments can be collected) in:

- Law No.56/2005/QH11 of the National Assembly on residential housing, dated 29 November 2005 (***Law on Residential Housing***)
- Decree 02/2006/ND-CP of the Government on urban zones, dated 5 January 2006 (***Decree 02***)
- Circular 04/2006/TT-BXD of the Ministry of Construction providing guidelines on the implementation of Decree 02, dated 18 August 2006 (***Circular 04***)

The Ministry of Justice believes that the provisions of Decree 02 and Circular 04 are inconsistent with the Law on Residential Housing and should be amended for consistency. In particular, it is their view that the restrictions in the Law on Residential Housing apply even to primary developers in new urban zones.

**With the Ministry of Justice and the Ministry of Construction still arguing about the relevant laws applying to pre-payments, developers remain in a difficult position**

According to more recent reports, the Ministry of Construction has pushed back on the Ministry of Justice's view arguing that:

- primary developers of new urban zones ought to be treated differently (and more favourably, ie with fewer restrictions on pre-payments) from other residential developers given their work involves significant land areas, infrastructure and costs; and
- in any event, there is no direct conflict between Decree 02 and Circular 04 on the one hand, and the Law on Residential Housing on the other. In their view these laws, together with the Law On Real Estate Business, all cover different aspects of development and construction and should apply as such.

Given this initial response from the Ministry of Construction to the Ministry of Justice's request, it appears that it may be some time before there is clarity for developers in this contentious area.

## 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. The list below provides a snapshot of the new legislation uploaded on to the database in the last month.

- Decision 580 establishing State Steering Committee for Ninh Thuan nuclear power project, 4 May 2010
- Decree 48 on contracts in construction activities, 7 May 2010
- Letter 3401 of the State Bank with standard form reports by banks on raising capital and providing loans in foreign currency, 10 May 2010
- Directive 15 on review of local hydropower projects, 13 May 2010
- Decree 51 regulating invoices for sale of goods and services, 14 May 2010
- Circular 13 regulating prudential ratios of banks and finance companies, 20 May 2010
- Letter 3492 on "Delivering as One", the pilot reform initiative of the UN in Vietnam, 25 May 2010
- Circular 11 with standard form tender invitation documents for competitive quotations in procurement of goods, 27 May 2010
- Letter 6824 on non-taxable activities of foreign shipbrokers, 28 May
- Notice 189 with current State Bank interest rates, 31 May 2010
- Draft Resolution on legislative program for Year 2011, 1 June 2010

- Draft 3 Circular on BOT contracts, 1 June 2010
- Draft Regulations on trial public - private partnership (PPP) investment form, current as at 1 June 2010
- Decree 61 on investment incentives in the agriculture and rural sector (with retroactive application to current projects), 4 June 2010
- Letter 7209 deferring the deadline for lodging Year 2009 PIT finalizations until 31 July 2010, 4 June 2010
- Circular 14 with list of standard forms for enterprise registration, 4 June 2010
- Draft 1 Circular on listing by shareholding credit institutions, 10 June 2010



**Hanoi**
Suite 401, Hanoi Tower
49 Hai Ba Trung Street, Hoan Kiem District
Hanoi, Vietnam
T +84 4 3936 0990
F +84 4 3936 0984
Bill.Magennis@aar.com.au

**Ho Chi Minh City**
Suite 605, Saigon Tower
29 Le Duan Boulevard, District 1
Hi Chi Minh City, Vietnam
T +84 8 3822 1717
F +84 8 3822 1818
Nigel.Russell@aar.com.au
Thomas.Miller@aar.com.au