T B

R

R

Editor

Jan Putnis

Law Business Research

The Banking Regulation Review

Reproduced with permission from Law Business Research Ltd.

This article was first published in The Banking Regulation Review, 1st edition (published in June 2010 – editor Jan Putnis).

For further information please email Adam.Sargent@lbresearch.com

The Banking Regulation R

Editor
Jan Putnis

Law Business Research Ltd

PUBLISHER
Gideon Roberton

BUSINESS DEVELOPMENT MANAGER
Adam Sargent

MARKETING ASSISTANT
Hannah Thwaites

EDITORIAL ASSISTANT
Nina Nowak

PRODUCTION MANAGER
Adam Myers

PRODUCTION EDITOR
Joanne Morley

SUBEDITOR
Charlotte Stretch

EDITOR-IN-CHIEF
Callum Campbell

MANAGING DIRECTOR
Richard Davey

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

ISBN 978-1-907606-02-1

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: +44 870 897 3239

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

AFRIDI & ANGELL

ANDERSON MŌRI & TOMOTSUNE

BONELLI EREDE PAPPALARDO

BREDIN PRAT

BUGGE, ARENTZ-HANSEN & RASMUSSEN

CLAYTON UTZ

DAVIS POLK & WARDWELL LLP

DLA NORDIC

ELVINGER, HOSS & PRUSSEN

F.O. AKINRELE & CO

FORMOSA TRANSNATIONAL ATTORNEYS AT LAW

GANADO & ASSOCIATES

GIDE LOYRETTE NOUEL AARPI

GORRISSEN FEDERSPIEL

HENGELER MUELLER

KADIR, ANDRI & PARTNERS

KIM & CHANG

LENZ & STAEHELIN

MARVAL, O'FARRELL & MAIRAL

MATTOS FILHO ADVOGADOS

MULLA & MULLA & CRAIGIE BLUNT & CAROE

MUÑOZ TAMAYO & ASOCIADOS ABOGADOS S.A.

NAUTADUTILH

PAKSOY

RUSSELL MCVEAGH

RUŽIČKA CSEKES S.R.O.

SCHOENHERR ŞI ASOCIAŢII SCA

SKUDRA & ŪDRIS

SLAUGHTER AND MAY

T STUDNICKI, K PŁESZKA, ZĆWIĄKALSKI, J GÓRSKI SPK

VIEIRA DE ALMEIDA & ASSOCIADOS.

WEBBER WENTZEL

WONGPARTNERSHIP LLP

CONTENTS

EDITOR'S PREFACE

Legal and regulatory areas of concern come and go in their perceived importance. It is, however, very difficult to recall any other occasion when a subject regarded by many lawyers as so obscure and arcane as international banking regulation has come to such prominence in such a short period of time.

Before the onset of the financial crisis in western economies in 2007, banking regulation was regarded by many as a discipline practised by technocrats who were, to put it politely, best left to themselves. The subject has risen up the agenda so quickly since then that few lawyers who advise financial institutions have had time to draw breath and assess the position now reached. The reality, of course, is that no final position has been reached and none is ever likely to be reached: banking regulation will continue to evolve, punctuated by bursts of activity every time there is a serious crisis to manage. What has happened is that the importance of this subject, and its rightful place amongst legal disciplines, has finally been recognised. This means that there is now great demand, from the banks themselves, but also from governments and regulators, for accessible and user-friendly explanations of the applicable rules.

The continual evolution of the rules makes any survey of banking regulation very difficult to write without risking almost immediate obsolescence. This book is an attempt to rise to that challenge and it is hoped that future editions will address the many further developments in this area that are expected to take place in the coming months and years. The book is aimed principally at lawyers and others who need access to an overview of the applicable rules in the important areas that the book covers and a commentary on recent developments. It also includes commentary on many of the areas of banking regulation that are of critical importance to the major cross-border transactions in which banks become involved.

The book illustrates the many and differing approaches that governments and banking regulators have taken to addressing what they perceive to be the problems affecting the banks that they regulate. To that extent, the lack of international coordination is a potential source of dismay amongst politicians and others who have spent so much time over the past three years trying to develop common approaches to the international challenges highlighted by the financial crisis.

It is, however, to be hoped that surveys of the kind in this book also inform the continuing debate about how to minimise the risk of a further crisis on anything like the scale that we have just seen. It will, quite literally, pay for governments to appreciate that further significant financial crises are inevitable in the future, and that the principal aim of reform should, therefore, be to minimise their likely impact, both on the lives of the millions of people who rely on banks and on local and regional economies.

It is a tribute both to the contributors and the publishers that so many leading banking and regulatory lawyers have made themselves available to write chapters for this book. I would like to thank them all for the support and encouragement that they have provided at a time when many of them have been almost overwhelmed with work on other projects emerging from the financial crisis. Many of the contributors have also been involved in initiatives designed to stabilise and reform the banking sectors in their countries. I would also like to thank Gideon Roberton and his colleagues at the publishers for their efforts in coordinating the project that this book has become, and in bringing it to fruition.

Jan Putnis
Slaughter and May
London
June 2010

Chapter 36

VIETNAM

*Samantha Campbell and Nguyen Thi Tinh Tam**

I INTRODUCTION

Vietnam's current banking system can be traced back to 1988 when four state-owned banks, the Bank for Foreign Trade ('Vietcombank'), the Vietnam Bank for Industry and Trade ('Vietinbank'), the Bank for Investment and Development of Vietnam ('BIDV') and the Bank for Agriculture ('Agribank'), were separated from the State Bank of Vietnam ('SBV') with a mandate for commercial banking activities.

There are currently five entirely state-owned banks that function exclusively on state-owned capital. State-owned commercial banks ('SOCBs'), in which the state retains an interest greater than 50 per cent, dominate the market. The aggregate total assets of the four largest SOCBs[1] account for over 60 per cent of the assets of the banking sector as a whole.[2]

Since Vietnam's accession to the World Trade Organization ('WTO') effective 1 January 2007, the government has been pursuing a policy of partial privatisation (known in Vietnam as 'equitisation') of some of the state-owned banks with a view to opening up and attracting funds to the banking sector. Of note, Vietcombank equitised in 2007 with the state retaining a 91 per cent stake, and Vietinbank equitised in 2008 with the state retaining an 89 per cent interest. The equitisation of other state-owned banks, BIDV in particular, and the prospective increase of shareholdings in already-equitised banks to be held by the public, are generally perceived to be proceeding more slowly than investors had hoped, due in part to the global financial crisis.

Another trend in Vietnam is the increasing presence of foreign banks, typically pursuing their activities in Vietnam through the establishment of branches and/or

* Samantha Campbell and Nguyen Thi Tinh Tam practise at Gide Loyrette Nouel AARPI.

1 BIDV, Agribank and two newly equitised banks: Vietcombank and Vietinbank.

2 *Moody's Global Banking – Vietnam*, August 2009 – p6.

representative offices. In 2009, following a recent change in legislation,[3] the SBV granted five licences permitting HSBC, Standard Chartered, ANZ Bank, Korea's Shinhan Bank and Malaysia's Hong Leong Bank to establish entirely foreign-owned subsidiary banks incorporated in Vietnam.

Foreign banks have also, sometimes in parallel with other forms of local presence, acquired minority 'strategic stakes' in most of the important Vietnamese banks.

The Vietnamese banking sector has weathered the global financial crisis relatively well. This is due in a large part to its relative isolation from the international financial markets. The perception in the market is that the SBV responded quickly and well to the crisis by promulgating a fiscal stimulus package and an interest rate subsidy scheme that limited the impact of reduced international demand for Vietnamese exports. These measures have now been withdrawn for the most part in the face of the SBV's main current challenges: the devaluation of the Vietnamese dong and potential inflationary growth. Memories of an inflation rate of up to 28.3 per cent witnessed in August 2008 are still vivid.

Currently Vietnamese banks are principally lenders to large corporations, although the sector remains relatively unsophisticated. Consumer banking is still in its early stages and remains undeveloped.[4] Low market penetration is viewed as providing potential for expansion into lending to smaller enterprises and consumer banking as income levels rise. GDP growth in 2010 is predicted to be in the region of 6.5 per cent, which increases the Vietnamese banking sector's attractiveness from an investment perspective, with Vietnamese and foreign banks vying for market share.

Although the Vietnamese banking and finance sector is growing rapidly, there is still a significant lack of know-how, management experience and enforceable governance controls. Important new legislation, including a new Law on Credit Institutions and the Law on the State Bank of Vietnam, is expected to be passed in 2010. However, the outcome of the current consultation process relating to key issues is still very much uncertain.

II THE REGULATORY REGIME APPLICABLE TO BANKS

Banking activity in Vietnam is governed by the Law on Credit Institutions, the Law on the State Bank of Vietnam and a number of implementing decrees, circulars and decisions issued by the government, the Ministry of Finance and the SBV.

The cross-border supply of banking services into Vietnam is heavily restricted by Vietnamese law. Offshore banks may generally not provide services to Vietnamese entities, with the notable exception of hard currency loans (which are subject to strict exchange control regulations).

3 Decree 22/2006/ND-CP dated 28 February 2006 issued by the government of Vietnam on organisation and operation of foreign bank branches, joint venture banks, banks with 100 per cent foreign-owned capital and representative offices of foreign credit institutions in Vietnam ('Decree 22').

4 In 2008 only 17 per cent of the population had a bank account: *Moody's Global Banking – Vietnam*, August 2009 – p6.

The SBV performs the traditional role of a central bank and regulates the banking system in Vietnam by working closely with the Ministry of Finance and the SBV's network of provincial branches to conduct monetary policy and supervise credit and banking activities.[5] The SBV is the authority empowered to grant establishment and operating licences to banks in Vietnam. The State Securities Commission ('SSC') regulates all securities activity in Vietnam, including securities activities carried out by commercial banks.

The scope of a credit institution's permitted activities is specified in its banking licence. Banks may only participate in the domestic and international foreign exchange and gold markets, including in respect of international payment services, upon receiving specific permission from the SBV.[6]

A commercial bank may undertake deposit taking activities, provided it opens its own deposit account at the SBV with the minimum compulsory reserve level. Although there is no statutory stipulation relating to the deposit interest rate that a bank must apply, they are *de facto* limited under a voluntary agreement between the SBV and the Vietnam Banking Association, executed in December 2009 with the aim of cooling the interest war that had been fuelled by illiquidity. This agreement has caused all banks to offer interest at around the 10.5 per cent limit (while trying to work around it with various promotions).

Banks may also of course conduct lending activities and, with effect from February 2010, the statutory ceiling on the interest rate (fixed by the Civil Code at 150 per cent of the basis rate announced by the SBV, and lifted in 2009 with respect to consumer-lending activities only) was removed with respect to commercial medium and long-term loans to borrowers operating in the areas of 'production, business, services and investment for development'.[7] Vietnamese banks may not, however, lend to off-shore entities without specific SBV approval, rarely granted on a case-by-case basis.

Banks are also not permitted to provide loans to enterprises that they control and that operate in the securities sector, nor are they permitted to provide unsecured loans for investment in any business in the securities sector.[8]

As well as the usual deposit-taking and lending activities, a commercial bank may also act as a custodian bank for securities following receipt of a registration certificate from the SSC with the function of providing depository services and supervising the management of public funds and securities investment companies.[9] The assets that the bank manages as custodian must be held separately from its other assets. The duties of a custodian bank can also include the certification of reports prepared by a fund management company or securities investment company (as applicable).

5 Article 1.2 of Law on the State Bank of Vietnam.

6 As from 30 March 2010, banks and gold traders are no longer permitted to trade gold on onshore and offshore accounts under Circular 01/2010/TT-NHNN dated 6 January 2010.

7 Circular No. 07/2010/TT-NHNN dated 26 February 2010; the wording of this Circular is ambiguous but is generally interpreted broadly.

8 Article 8.1.5 of Decision 03/2007/QD-NHNN.

9 Article 98.2 and Article 6.14, Law on Securities.

A commercial bank may act as an underwriter of bond issuances provided that it is approved by the SSC for this specific activity. Banks in Vietnam are also entitled to provide insurance services with the approval from the SBV.[10]

Banks established in Vietnam must operate under one of the following permitted forms:

a state-owned commercial bank;
b joint stock commercial bank (i.e., a company limited by shares);
c joint venture commercial bank;[11]
d entirely foreign-owned commercial bank;
e branch of foreign bank; or
f representative office of a foreign bank.[12]

Mutual structures are contemplated by law and exist most commonly under the similar forms of people's credit funds and credit cooperatives, most prevalent in rural areas.

i Restrictions on foreign ownership in Vietnamese banks and foreign banks

Despite the liberalisation of the banking sector, the acquisition by foreign entities of a shareholding in a Vietnamese commercial joint stock bank is still subject to significant restrictions. All such acquisitions must be approved in writing by the governor of the SBV.[13]

As a rule, the total aggregate shareholding of foreign investors in a Vietnamese bank may not exceed 30 per cent of its 'charter capital'.[14] The total aggregate shareholding of a foreign credit institution and its affiliated persons must not exceed 10 per cent,[15] and the shareholding of any single foreign investor and its affiliate persons (not being credit institutions), may not exceed 5 per cent[16] of the charter capital of a Vietnamese bank.[17]

10 Article 74.2 of the Law on Credit Institutions; recently, Standard Chartered Bank was licensed to provide insurance services.

11 There are currently only five joint venture banks in Vietnam: Bank Limited, Vietnam Russia JV Bank, ShinhanVina Bank, VID Public Bank and Vinasian Bank.

12 Law on Credit Institution and Section 7.B Chapter II – Schedule of Specific Commitments in Services – Vietnam's WTO accession undertakings

13 Article 5 of Decree 69/2007/ND-CP dated 20 April 2007 and issued by the government of Vietnam on foreign investors purchasing shares of Vietnamese commercial banks (Decree 69).

14 Article 4.1 of Decree 69.

15 Article 4.3 of Decree 69.

16 Article 4.2 of Decree 69.

17 Article 4 of Decree 69.

However, the law does permit a foreign 'strategic investor'[18] and its affiliated persons to acquire up to 15 per cent[19] of the charter capital of a Vietnamese bank and a number of foreign banks have, in the last five years, made such acquisitions.[20] In special cases, the prime minister, based on the proposal of the governor of the SBV, may permit a foreign strategic investor to purchase up to 20 per cent of the charter capital of a Vietnamese bank.[21] In addition to the acquisition restrictions, Vietnamese law also locks in strategic investors for five years from the acquisition of the strategic interest.[22]

Since 1 April 2007 – and in accordance with Vietnam's WTO accession undertakings – entirely foreign-invested banks, in which one of the foreign shareholders is a 'parent bank' holding a majority equity interest, may be established in Vietnam.[23] The parent bank must have total assets of more than $10 billion at the end of the year prior to application. Entirely foreign-owned banks must comply with Vietnamese prudential requirements on a stand-alone basis.

Foreign banks may also open branches as subsidiary units with no separate legal status.[24] The parent bank must have total assets of more than $20 billion at the end of the year prior to application. A foreign bank branch may not open transaction points at locations other than its registered branch office, which, in practice poses real practical problems for the expansion by foreign banks of their activities in Vietnam.

Some foreign banks operate through representative offices, which are prohibited from conducting commercial operations in Vietnam.[25] A representative office merely acts as a link between the parent bank and their clients in Vietnam. As such, its activity is generally limited to market research and the promotion and follow-up of the offshore parent entity's activities involving Vietnamese credit institutions or companies.[26]

---

18 Defined as 'a reputable foreign credit institution with financial capacity and the ability to provide assistance to a Vietnamese bank during the development of banking products and services, raising managerial and executive capability, and applying modern technology, and which has strategic advantages connected with the strategy for development of the Vietnamese bank, which satisfies the specific criteria stipulated by the Vietnamese bank'.

19 Article 4.4 of Decree 69.

20 Standard Chartered Bank: 15 per cent of ACB, United Overseas Bank: 15 per cent of Phuong Nam Bank (Southern bank), Sumitomo Mitsui Financial Group: 15 per cent of Export Import Bank (Eximbank), Malayan Banking Berhad: 15 per cent of An Binh Bank (AB Bank), Societe Generale Bank: 15 per cent of Dong Nam A Bank (Sea Bank), ANZ: 10 per cent of Sai Gon Thuong Tin Bank (Sacombank), BNP Paribas: 15 per cent of Phuong Dong Bank (Oricombank), Deutsche Bank: 10 per cent of Hanoi Building Bank (Habubank) and Oversea-Chinese Banking Corporation: 15 per cent of Bank for Private Enterprises (VP Bank).

21 On 17 August 2008 HSBC increased its interest in Techcombank to 20 per cent.

22 Article 13.1 of Decree 69.

23 Article 5.4 of Decree 59/2009/ND-CP dated 16 July 2009 on organisation and operation of commercial banks ('Decree 59').

24 Article 7.4 of Decree 22.

25 Article 7.7 of Decree 22.

26 Article 62 of Decree 22.

III PRUDENTIAL REGULATION

Relationship with the prudential regulator

The SBV controls the banking activities of all banks licensed to operate in Vietnam through the delegation of specific powers to internal departments of the SBV. The inspection body of the SBV is specifically designated to examine the operations and activities of credit institutions.[27]

All banks must send a vast number of periodic reports to the SBV, varying from those required on a daily basis to those required on an annual basis. This is regarded as contributing to an unwieldy and ultimately costly banking environment. In addition, banks must immediately report to the SBV irregular developments that are adverse to the business operations of the bank or major changes to the organisational structure of the bank.[28] Notwithstanding the volumes of reporting required, there is a clear lack of sophisticated information disclosure relating to the activities of banks, in particular from an accounting perspective.

A bank is required to obtain written approval from the SBV prior to making any changes to its corporate identity, including a change to its name, capital, location, scope of business, and management, as well as significant changes to its shareholding structure.[29]

Management of banks

The management structure of an entirely state-owned bank, a joint-venture bank or a bank with entirely foreign capital is made up from the board of management, the board(s) of controllers and the general director.[30] The board of management consists of between three and 11 members, at least half of whom are non-executive and independent members, while the board of controllers is made up of at least three members, at least half of whom must be full-time. The structure of a joint stock bank (including one that is majority-owned by the state) also requires a general meeting of shareholders, of which at least 100 must be present.

Subject to the decisions that are reserved at law or are in the bank's charter for decision by the shareholders, the board of management has the authority to make decisions in the name of the bank and to exercise the rights and obligations of the bank, in particular with respect to the credit and guarantee decisions with a value of more than 10 per cent of the equity of the bank. The general director has authority for lesser amounts.

The shareholders or owners of a bank must by law approve transactions valued at more than 20 per cent of the equity contracts between the bank and its management (members of the board of management, or of the board of controllers, or the general director) or major shareholders holding at least 5 per cent of the banks, and their respective related parties.

The board of management may appoint one of its members or employ another person as the general director. The general director manages the daily business of the

27 Article 5.1 of the Law on the State Bank.

28 Article 89 of the Law on Credit Institutions.

29 Article 31 of the Law on Credit Institutions.

30 Article 14.2 of Decree 59.

bank, supervised by the board of management and the board of controllers and is responsible to the board of management.

Each of the board of management, the board of controllers and the general director acts for a term of five years and may be reappointed for an unlimited number of terms. The election and appointment of the chairman and members of the board of management, the head and members of the board of controllers, and the general director of a bank must be ratified by the governor of the SBV, and their duties and powers must be specified in the charter of the bank.

Any shareholder who is also a member of the board of management, board of controllers or a general director must, while he is in office and for a period of one year following the end of his term, retain at least 50 per cent of the total number of shares owned when elected or appointed to the relevant managerial position.[31]

A foreign bank branch in Vietnam may be managed by only one general director who may not be a manager or executive of any other credit institution or economic institution in Vietnam.

Currently there is no specific regulation under Vietnamese law limiting the payment of bonuses to the board of management and employees of a banking institution. However, under general Vietnamese corporate law, the board of management and a general director of an enterprise (which may include a bank) may not receive a salary increase and/or bonus payment if the enterprise is not able to pay all its due debts.

Regulatory capital

Vietnamese legislation does contain prudential requirements and separate debt provisioning guidelines.[32] However, the SBV does recognise that Basel II is far from being implemented in Vietnam and it aims to complete the implementation of Basel I in 2010, followed by the gradual implementation of Basel II.

i Capital adequacy

Credit institutions (other than foreign bank branches) must maintain a minimum ratio of 8 per cent of 'equity' over 'total assets in credit at risk', calculated in the manner set out *pro forma*. It is expected that this ratio will be increased in the near term consistent with the SBV's stated intention to tighten prudential requirements.

For the purposes of this capital adequacy test, 'equity' comprises: (1) Level 1 capital, including charter capital, the reserve fund for supplementing the charter capital, the professional development investment fund, the financial reserve fund, retained profits; and (2) Level 2 capital, including 50 per cent of fixed assets, 40 per cent of revalued investment securities, long-term unsecured subordinated convertible bonds

31 Article 36.4 of Decree 59.

32 The Regulations on Prudential Ratios in Operations of Credit Institutions issued with Decision No. 457/2005/QD-NHNN of the Governor of the SBV dated 19 April 2005 (Decision 457), as amended by Decision No. 03/2007/QD-NHNN of the SBV dated 19 January 2007, Decision No. 34/2008/QD-NHNN dated 5 December 2008 and Decision 493/2005/NHNN on classification of debts (Decision 493).

and other deeply subordinated debt instruments. Level 2 equity cannot exceed Level 1 equity.

Items that must be deducted from the equity of a bank include: (1) the reduced value of fixed assets following their re-valuation by the bank; (2) the total amount of the reduced value of all types of investment securities following their revaluation; (3) the capital amount that the bank invests in other credit institutions in the form of equity aimed at controlling an enterprise operating in the insurance or securities sectors; (4) any capital contribution to an enterprise that exceeds 15 per cent of such enterprise and (5) business losses.[33]

'Total assets in credit at risk' comprises the value of assets in credit of a bank which are adjusted at risk levels ranging from 0 to 150 per cent[34] plus off-balance sheet undertakings which are adjusted at risk levels from 0 to 100 per cent.[35]

ii Large exposures and related party transactions

A commercial bank's credit exposure to a single borrower is limited to 15 per cent of its equity. In addition, the total aggregate amount lent to, and guaranteed in respect of, a single client must not exceed 25 per cent of a credit institution's equity.[36]

The aggregate amount of loans provided to a group of related clients must not exceed 50 per cent of a commercial bank's equity and the total aggregate amount of loans and contingent liabilities under guarantees provided to a group of related clients must not exceed 60 per cent of its equity.[37]

The total amount of credit and contingent liabilities arising out of guarantees provided by a credit institution to any single enterprise or all enterprises that such credit

33 Article 3.3 of Decision 457.

34 Article 6 of Decision 457. There are five categories of assets in credit depending upon the level of risk: cash and gold: 0 per cent, debt recoverable from other credit institutions: 20 per cent, debt recoverable which is secured by immoveable property: 50 per cent, paid-up charter capital in subsidiary companies that are not credit institutions: 100 per cent; loans made for investment in securities: 150 per cent.

35 Article 2.1, Article 5 and 6 of Decision 457; the risks co-efficient of the value of off-balance sheet undertakings are: 0 per cent for an undertaking guaranteed by the government or the SBV, fully secured by cash or by savings accounts or deposits of valuable paper issued by the Government or the SBV; 50 per cent for an undertaking secured by immoveable property of the borrower; in all other cases 100 per cent.

36 Article 8.1.1 of Decision 457.

37 Article 8.1.2 of Decision 457.

institution controls[38] must not exceed 10 or 20 per cent, respectively, of the credit institution's equity.[39]

iii Use of short-term funds

A commercial bank may only use 40 per cent of its short-term mobilised funds (i.e., that are repayable within one year) to finance medium and long-term loans.[40]

iv Liquidity ratio

The minimum liquidity ratio that a commercial bank must maintain in respect of each type of currency and gold is 25 per cent of defined liquid assets (including cash and cash equivalents) over liabilities due within one month. This ratio increases to 100 per cent of liquid assets being claimed within seven business days against liabilities payable within that time period and the aggregate amount of certain contingent liabilities payable within the subsequent seven business days.

v Equity investments

The maximum level of investment made by a credit institution in an enterprise or investment fund or investment project must not exceed 11 per cent of the enterprise's or fund's charter capital or 11 per cent of the value of the investment project. The total investment made by a credit institution must not exceed 40 per cent of its own charter capital and its reserve fund.

In addition, Decision 493 imposes loss provisioning requirements on commercial banks and a debt classification regime. This piece of legislation introduced for the first time the possibility for a credit institution to classify debt on a qualitative basis, based on its own, SBV approved, internal credit risk-rating systems ('ICRS'). In view of the lack of guidance regarding the establishment of ICRS, each credit institution is establishing its own system and there is a consequential lack of consistency in the classification of debts and in the establishment of prudential ratios. The SBV is apparently preparing a draft Circular to amend Decision 493 with a view to providing consistent guidelines on ICRS.

---

38 Pursuant to Article 2.21 of Regulations on Prudential Ratios in Operations of Credit Institutions issued with Decision No. 457/2005/QD-NHNN of the Governor of the SBV dated 19 April 2005, as amended by Decision No. 03/2007/QD-NHNN of the SBV dated 19 January 2007 and Decision No. 34/2008/QD-NHNN dated 5 December 2008, items of investment in the form of capital contribution or purchase of shareholding aimed at controlling an enterprise comprise: (1) items of investment amounting to 25 per cent or more of the charter capital of a shareholding company; and (2) items of investment amounting to 51 per cent or more of the charter capital of a limited liability company.

39 Article 8.1.4 of Decision 457

40 All other credit institutions may not use more than 30 per cent of their short-term funds.

IV CONDUCT OF BUSINESS

In order to protect depositors, a commercial bank must maintain compulsory deposit insurance at the Deposit Insurance of Vietnam, which is a state financial institution, in respect of Vietnamese dong deposits and transactions.[41] In the near future, deposits in foreign currencies will also need to be insured at Deposit Insurance of Vietnam.

The Law on Credit Institutions prohibits banks from disclosing any details relating to a client unless it is requested by customers, by the general director of a deposit insurance organisation or by a state body during an inspection or for the internal activities of the bank.[42] There is no other general duty of confidentiality applicable to banks.

Without the consent of depositors, a bank cannot carry out investigations into deposits or to freeze a deposit, deduct from or transfer deposits, except in the limited case of being requested to do so by a competent court or a judgment enforcement authority.[43]

A bank must not conceal or provide services in respect of money that has an illegal origin and must immediately notify the competent state body (the Anti-Money Laundering Department under the SBV) as soon as they are aware of such circumstances.[44] Under new detailed legislation effective from 1 January 2010,[45] banks must put in place internal anti-money-laundering rules on customer information, reporting suspicious transactions and coordination with law enforcement agencies. The new regulations also contain internal training and annual audit requirements. A new department under the Banking Inspectorate at the SBV has been established to take charge of all matters regarding money laundering.[46] A bank violating the money-laundering regulations may be subject to administrative sanctions ranging from a warning to a monetary fine of up to 30 million dong.[47] Individuals committing money-laundering offences may be subject to criminal sanctions, including prison terms of between one and 15 years.[48]

Depending on the nature and seriousness of other banking violations, a bank may be subject to administrative penalties which range from a warning or a fine up to 70 million dong, or suspension of operations, with or without a specified time-limit (e.g., withdrawal of the operation licence).[49] There is no publicly available information relating to the imposition of any such sanctions to date.

V FUNDING

41 Decree 109/2005/ND-CP dated 24 August 2005 on deposit insurance.

42 Article 5 of Decree 70/2000/ND-CP dated 21 November 2000.

43 Civil Proceeding Code and Law on judgment enforcement.

44 Article 19 of the Law on Credit Institutions.

45 SBV guidance for the implementation of money-laundering measures (Prevention and Combat). Circular No. 22-2009-TT-NH dated 17 November 2009.

46 Decision 1654/QD-NHNN dated 14 July 2009 on functions, duties, powers and organisational structure of the anti-money-laundering department.

47 Article 24 of Decree 74/2005/ND-CP dated 7 June 2005 on anti-money laundering.

48 Article 251 of the Criminal Code of Vietnam.

49 Decree 202/2004/ND-CP on administrative offences in the field of money and banking.

Joint stock banks in Vietnam frequently raise funds by share or convertible bond issuances.[50]

Under the Law on Credit Institutions, Vietnamese banks may also finance their operations through 'mobilised capital', which may consist of: (1) cash deposits; (2) borrowed capital from domestic and foreign credit institutions; (3) funds raised via the issuance of valuable paper, such as time deposit certificates or bonds; and (4) borrowed capital from the SBV.

As the central bank, the SBV may refinance commercial banks by relending in accordance with credit contracts, discounting or rediscounting commercial notes and other valuable paper or by granting loans guaranteed by pledges of commercial notes or other valuable paper.[51] In practice, the SBV's refinancing policy is limited; its purpose is just to supplement short-term capital and provide a payment means for commercial banks.

In extraordinary cases for the purpose of stabilising the monetary market, the SBV may grant special loans to commercial banks that may be insolvent causing a threat to the stability of the banking system.[52] During the financial crisis, the SBV has not officially granted any special loans to a bank on this 'emergency basis', although it did in January 2010 inject 15,000 billion dong in open-market transactions to improve the liquidity of commercial banks.

VI CONTROL OF BANKS AND TRANSFER OF BANKING BUSINESS

i Control regime

Other than in the case of entirely foreign held bank branches or subsidiaries, Vietnamese law prohibits any shareholder that is an organisation from holding more than 20 per cent, and any individual from holding more than 10 per cent, of a bank's charter capital.[53] The combined shareholding of shareholders and their related parties is also limited to 20 per cent.[54] In special cases in the national interest, the prime minister may, at the SBV's request, permit shareholdings in commercial banks which exceed the statutory limitations.[55]

The governor of the SBV must provide prior written approval of: (1) the purchase and sale transactions of 'significant shareholdings' (defined as 'a level of shareholding

50 By way of example, most recently Saigon Thuong Tin Bank (Sacombank) increased its charter capital from 5,115 billion to 6,700 billion dong and Export-Import Bank (Eximbank) increased its charter capital from 7,219 billion to 8,800 billion dong through share issuances.

51 Article 17 of the Law on State Bank.

52 Article 96 of the Law on Credit Institutions and Article 30 of the Law on State Bank. The SBV refinanced a private bank, Asia Commercial Bank ('ACB'), in reliance on these provisions when there was a run on the bank in 2003 resulting from rumours that the General Director had absconded.

53 Article 34.1 and 2 of Decree 59.

54 Article 34.3 of Decree 59.

55 Article 34.4 of Decree 59.

of 5 per cent or more of the voting share capital of a bank'); and (2) purchase and sale transaction of an amount of shares that results in any shareholder holding more than a significant shareholding or any shareholder no longer holding a significant shareholding.

The SBV may not approve such a transaction if it considers that it may lead to 'instability in banking operation'.[56] Since this term is not defined and is potentially broad, the SBV has, in practice, a fairly wide discretion in approving transactions. Note also the restrictions on foreign ownership in Vietnamese banks set out in Section II.

The SBV has recently passed Circular No. 04/2010/TT-NHNN ('Circular 04')[57] governing the merger, consolidation and acquisition of credit institutions, effective as of 28 March 2010, which replaces prior legislation that was narrower in scope.

Circular 04 permits the merger of commercial banks into an existing entity, and the consolidation of commercial banks into a new entity, subject to prior written approval of the Governor of the SBV.[58] The SBV will evaluate the file and the opinions of the local SBV branch and the people's committee of the province or city where the relevant banks have their head office on the current organisational and operational status of the banks and impact of the merger or consolidation (as may be the case) on 'social stability' within the locality before approving or refusing the merger or consolidation plan, when considering whether to approve or refuse the merger consolidation or acquisition.[59] Any merger or consolidation is also subject to competition approvals and the satisfaction of minimum capital and prudential requirements.

ii Transfers of banking business

Other than through the merger or consolidation activity previously described, a bank cannot transfer its clients' bank deposits to another entity without receiving specific approval from the SBV.

It may however assign its loan arrangements to a foreign or domestic purchaser (subject, in the case of an assignment to a foreign entity, to compliance with exchange control procedures). The terms of any such assignment are freely negotiable with the sole exception that certain 'group 1 standard debts', being very well-performing loans, may only be sold at the value of the debt.[60]

The debtor and any guarantors must unconditionally accept the assignment of the creditor's rights from the seller to the buyer of the debt.[61] The security for any

56 Article 36 of Circular 06/2010/TT-NHNN dated 26 February 2010 guiding organisation, management and executive operation, charter capital, assignment of shares, and amendment of and addition to licence and charter of commercial banks ('Circular 06').

57 Circular No. 04/2010/TT-NHNN dated 11 February 2010 on mergers, consolidations and acquisitions of credit institutions.

58 Article 34 of the Law on Credit Institutions.

59 Article 10.4, 14.4 and 18.4 of Circular 04.

60 Article 7.1 of Regulation on purchase and sale of debts by credit institutions issued by Decision 59/2006/QD-NHNN dated 21 December 2006 ('Decision 59').

61 Article 16.2.a of Regulation on purchase and sale of debts by credit institutions issued by Decision 59.

transferred debt will also follow the debt to the benefit of the assignee, without the need for borrower consent (unless the mortgage contains specific transfer restrictions). Note that the re-registration of the security may sometimes be problematic from a practical perspective.

VII THE YEAR IN REVIEW

During the past year, the effect of the global financial and economic crisis on the Vietnamese economy continued to dominate domestic banking policy and regulation.

Monetary policy in 2009 was nonetheless relatively stable compared to 2008, with the SBV adjusting the basic interest rate twice in comparison with an unprecedented eight times in 2008.

Credit growth in 2009 was much higher than the SBV had expected, and is currently estimated to have been over 36 per cent, compared to 21 per cent in 2008. The removal of the interest rate cap first on consumer lending, and then more generally to most medium and long-term commercial loans was viewed as a positive development, although we note that the SBV frequently makes declarations to the commercial banking sector urging restraint on the application of high interest rates. The hope is that this will allow Vietnamese banks to price risk more effectively and make credit available to smaller companies whose risk profiles would not have supported a lower prescribed rate.

The foreign exchange market remained highly volatile for a second consecutive year, with short supplies of foreign currency having a strong impact on Vietnamese enterprises. The SBV was compelled to devalue the Vietnamese dong twice against the dollar.[62]

Decree No. 59 on the organisation and operation of commercial banks (outlined in Section III, *supra*) was one of the most significant developments in banking regulations last year, evidencing the SBV's intention to modernise the management framework of commercial banks. Commercial banks have until 15 September 2011 to comply but concerns remain over enforceability.

Decree 59 also contains a special control and bankruptcy regime for commercial banks, which allows the SBV to appoint a special committee to oversee a bank experiencing financial difficulties. The appointment of such a special committee is not automatically disclosed to the public. The SBV also issued further specific guidelines on bankruptcy procedures applicable to credit institutions, which took effect on 15 March 2010.[63] This provides that a credit institution that is incapable of repaying its due debts upon the request of its creditors only be subject to insolvency procedures after the SBV has determined in writing to terminate the special control regime.

Other legislative highlights were the issuance of detailed money laundering regulations including compulsory internal reporting procedures as discussed in Section IV, and the establishment of specific guidelines on the merger, consolidation and acquisition of credit institutions as discussed in Section VI.

62 A devaluation of 3.36 per cent in February 2010, following a depreciation of 5.44 per cent in November 2009.

63 Decree No. 05/2010/ND-CP dated 18 January 2010.

VIII OUTLOOK AND CONCLUSIONS

The SBV is expected to continue tightening monetary policy gradually, particularly by increasing the basic interest rate to discourage the return of high inflation. It is also expected that the interest rate limit of 150 per cent of the SBV's basic rate currently applicable to short term commercial loans will be lifted.

The charter capital of all commercial banks (other than foreign bank branches) is required to be a minimum of 3,000 billion dong by 31 December 2010.[64] At the end of 2009, it is estimated that only 20 of the 49 commercial banks in Vietnam had reached this minimum level. As a consequence of these increased capital requirements, additional share and convertible bond issuances are expected to take place this year. There is the expectation that this requirement may lead to consolidation of the banking sector as smaller undercapitalised banks may find themselves unable to mobilise the required equity.

The equitisation of BIDV, one of the largest entirely state-owned banks, is also eagerly anticipated.

In 2010, the new Law on Credit Institutions and Law on the State Bank of Vietnam, which are more adapted to the current market are expected to be approved. The draft Law on SBV aims to strengthen the role of SBV as the central bank of Vietnam, granting it increased powers of intervention when credit institutions are violating regulations or face financial difficulties.

The draft new Law on Credit Institutions is attracting much comment from commercial banks. Of particular note, foreign banks have taken exception to the potential imposition of the 'single borrower' credit constraint that would limit the total loans made by a foreign bank branch to any single borrower to 15 per cent of the capital of the foreign bank branch (as opposed to the current constraint that is relative to the parent bank's equity).

Under the draft law, commercial banks may only be limited to carrying out underwriting activities, the sale and purchase of shares, securities brokerage, the management and distribution of investment funds and portfolio management through subsidiaries or associated companies. Commercial banks, which are the most active participants in Vietnam's nascent corporate bond market, are seeking to clarify whether they may continue to underwrite and trade in bonds.

The outlook over the next year is the sustained continual evolution of the Vietnamese banking sector in tandem with regulation. There is a clear need for further clarification of existing draft legislation and the development of new regulatory guidelines relating to more sophisticated products such as derivatives, which will require clarity over the ability of institutions to set off obligations. The focus is likely to also remain on corporate governance issues, the quality of reporting and disclosure and the enforcement measures available to the SBV.

We note that Vietnamese banking regulations change frequently, and this chapter presents a summary of regulation as at the end of March 2010.

64 Decree No. 141/2006/ND-CP issuing list of levels of legal capital of credit institutions dated 22 November 2006.

SAMANTHA CAMPBELL

Gide Loyrette Nouel

Samantha Campbell is an English-qualified solicitor. She heads Gide Loyrette Nouel's ('GLN') banking and finance group in Vietnam and South-East Asia and shares her time between GLN's offices in Hanoi and Ho Chi Minh City. Before joining GLN in Vietnam in 2009, Samantha was at a top-tier US law firm in London for nine years, prior to which she practised at a leading English law firm.

Ms Campbell's experience includes advising on numerous international finance transactions, including general bank lending work (secured and unsecured), capital markets issuances, asset-based financings, acquisition financings and debt restructurings. Her practice has an emphasis on highly structured project development and financing matters including the negotiation of project documents with host governments, state-owned companies and other counterparties. Her work to date has involved transactions around the world in both developed and emerging economies, including in Asia, the CIS, sub-Saharan Africa, Europe and South America.

In Vietnam, Ms Campbell regularly advises international banking clients on the regulatory framework applicable to their activities, including in developing sectors such as consumer financing and derivatives. She also represents international lenders in connection with financing the activities of Vietnamese institutions.

NGUYEN THI TINH TAM

Gide Loyrette Nouel

Nguyen Thi Tinh Tam joined Gide Loyrette Nouel ('GLN') in 2008 prior to which she practised at Vilaf Hong Duc and PBC Partners for six years. Ms Tam's areas of expertise include advising on all aspects of foreign investment in Vietnam, including in relation to corporate, tax and labour issues. She also regularly advises on the banking and the capital markets regulatory environment. Her clients include major international banks and financing institutions, both inside Vietnam and abroad, with Vietnamese activities or interests. Specifically, Ms Tam has recently advised a consumer-financing subsidiary of a major European bank in relation to the scope of its activities in Vietnam and a number of banks on their activities in the Vietnamese securities sector.

GIDE LOYRETTE NOUEL AARPI

Pacific Place, Suite 505-507
83B Ly Thuong Kiet
Hanoi
Vietnam
Tel: +84 4 3946 2350
Fax: +84 4 3946 2351

4th floor, 18 Hai Ba Trung
District 1, Ho Chi Minh City
Vietnam
Tel: +84 8 3823 8599
Fax: +84 8 3823 8598

samantha.campbell@gide.com
www.gide.com