

1997

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Recommended Citation

Claude Rohwer, *Progress and Problems in Vietnam's Development of Commercial Law*, 15 BERKELEY J. INT'L LAW. 275 (1997).
Available at: <http://scholarship.law.berkeley.edu/bjil/vol15/iss2/3>

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Progress and Problems in Vietnam's Development of Commercial Law

Claude Rohwer†

I.

INTRODUCTION

The author traveled to Vietnam in 1996 under the auspices of the United Nations Development Program and the United States Department of Commerce to work with Vietnam's Ministry of Justice and Ministry of Commerce. Drafting committees of these two ministries were at that time implementing regulations for the Civil Code, which went into effect on July 1, 1996,¹ and writing a new Commercial Law, which went into effect on January 1, 1997.²

This article first provides an overview of the recent history of Vietnam, which has had a profound impact upon the political direction of the country and thus upon current commercial legislation and regulation. The article then summarizes personal impressions regarding aspects of Vietnamese society that have influenced and probably will continue to influence the development of commercial law in Vietnam. Finally, it provides an analysis of some features of the Civil Code and the new Commercial Law.

II.

STEPS TOWARD THE CREATION OF A MODERN COMMERCIAL LAW IN VIETNAM

A. *The Impact of a Half-Century of War Followed By Economic Collapse*

In 1986, in the face of a severe economic crisis, Vietnam began its move toward a market economy and the legalization of some forms of private owner-

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1. THE CIVIL CODE OF THE SOCIALIST REPUBLIC OF VIETNAM, adopted by the National Assembly (Legislature IX, 8th Session) October 28, 1995, effective July 1, 1996 (on file with author).

2. THE COMMERCIAL LAW OF THE SOCIALIST REPUBLIC OF VIETNAM, adopted by the National Assembly (Legislature IX, 11th Session (April 2 to May 10, 1997)), effective January 1, 1998 (on file with author).

ship.³ This crisis took a long time to develop, however.⁴ The Vietnamese people in 1986 were dealing with the effects of a fifty year period of nearly continuous warfare. This history had a profound impact on Vietnam and set the stage for the recent efforts at reform. What follows is a summary of the principle stages of the conflict.

The resistance against the French colonial presence began in the early 1930's.⁵ During World War II, Vietnamese communists and nationalists continued their guerrilla warfare against the Japanese and the French who jointly occupied the country. In 1945, following the withdrawal of Japanese military forces, the revolutionaries declared independence,⁶ but the French military returned and the war for independence continued for nearly another decade.

After French forces were decisively defeated by Vietnamese forces at Dien Bien Phu on May 7, 1954, the Geneva Agreement of 1954 formally ended French control of Vietnam and provided for separate administration of the northern and southern halves of the country pending an election leading to unification that was to occur in 1956.⁷ Civil war broke out the following year when the government administering the southern part of Vietnam repudiated the treaty under which the country was to be unified. After a lengthy war in which the United States and other nations came to the aid of the South, the Southern regime and its allies were defeated in 1975.⁸

But the war did not end there for the Vietnamese people. In December, 1978, Vietnam sent troops into Cambodia, capturing Phnom Penh, installing the Hun Sen government, and driving the Chinese-backed forces of Pol Pot into Thailand and the border areas. Thereafter, China invaded Vietnam from the north in February, 1979, and then withdrew after the Chinese Army suffered military reversals during rather inconclusive fighting.⁹ The Vietnamese efforts

3. Ebashi Masahiko, *The Economic Take-Off*, in *VIETNAM JOINS THE WORLD* 40 (James M. Morley & Masahi Nishibara eds., 1989). The 6th Congress of the Vietnamese Communist Party convened on December 15, 1986. The death of Communist Party General Secretary Le Duan earlier in the year removed a major obstacle to the market-oriented policies promoted by reformers. These policies thus found their way into the political report issued by the 6th Party Congress.

4. For a discussion of the economic crisis facing Vietnam in respect to agriculture see Tuyet L. Cosslett and William R. Shaw, *The Economy: Agriculture*, in *VIETNAM: A COUNTRY STUDY* 144-186 (Ronald J. Cima ed., 1989).

5. The Communist Party of Indochina, which later became the Vietnamese Communist Party, was founded on February 9, 1930, under the leadership of Ho Chi Minh. Ho brought together three fledgling Marxist-oriented parties established by Vietnamese nationalists in Tonkin and Annam, two regions of French-held Indochina. Soon thereafter, the Communist Party of Indochina began organizing strikes and armed resistance to the French colonial presence in Vietnam. See generally NGUYEN KHAC VIEN, *VIETNAM, A LONG HISTORY* 198-211 (1993) and JOSEPH BUTTINGER, *A DRAGON DEFIANT* 73 (1972).

6. On September 2, 1945, in Ba Dinh Square in Hanoi, Ho Chi Minh declared the independence of the Democratic Republic of Vietnam. ALLAN W. CAMERON, *VIET-NAM CRISES: A DOCUMENTARY HISTORY*, VOL. I: 1940-1956, 52 (1971).

7. Agreements Relating to the Situation in Viet-Nam, July 20, 1954, Fr.-Viet.

8. See generally JOHN PINCKNEY HARRISON, *THE ENDLESS WAR: FIFTY YEARS OF STRUGGLE IN VIETNAM* (1986). Countries other than the United States that sent forces to fight with South Vietnam included Australia, New Zealand, the Philippines, the Republic of Korea, and Thailand.

9. See generally KING C. CHEN, *CHINA'S WAR WITH VIETNAM, 1979: ISSUES, DECISIONS, AND IMPLICATIONS* (1987).

in Cambodia have not succeeded in ending the civil war and strife in that country. This might be considered the only set-back for Vietnamese forces during the fifty years of fighting in the Indochina wars.¹⁰

After the Vietnamese civil war, sometimes referred to as the "American" War, ended in 1975, much of the world closed to Vietnamese trade.¹¹ Isolation from international trade, combined with the effects of the protracted fighting, contributed to the collapse of the Vietnamese economy during the early 1980s.

By the time of the Communist Party Congress in 1986, Vietnam was ready for Doi Moi: a Vietnamese phrase meaning "the new way." Implementation of Doi Moi has involved the gradual introduction of selected market reforms and some forms of private ownership.¹²

B. Other Factors Controlling the Direction of Change

The significance of recent Vietnamese history extends beyond the collapse of the economy. Its legacy is seen in the background of Vietnamese lawyers and in the habits acquired generally from the command economy, such as bureaucratic thinking, restricted property rights and suspicion of any economic activity not controlled by the Government. The author had ample opportunity to observe this legacy at work in his experience with the drafting committees. This section contains a summary of personal impressions regarding the factors influencing the work on these committees and hence the development of commercial law in Vietnam.

The author's trip was jointly financed by the United Nations Development Program and the United States Department of Commerce and the United States Information Service. The first phase of the assigned tasks involved working with the teams that had been assembled at the Ministry of Justice under the supervision of Dr. Dinh Trung Tung, to write regulations under the Civil Code which was to go into effect on July 1, 1996. Each team was responsible for a specific area and consisted primarily of Vietnamese lawyers, some of whom had good English language capabilities.¹³

10. Ronald J. Cima, *Government and Politics: Foreign Relations, Laos and Cambodia*, in VIETNAM: A COUNTRY STUDY, *supra* note 4, at 216. The incursion into Cambodia is always described by the Vietnamese as a defensive action alleging that the Beijing backed Pol Pot forces were attacking Vietnamese villages in and around the Tay Ninh Province. One might conclude that there is a lesson to be learned here. Three permanent members of the United Nations Security Council went to fight in Vietnam and each was humiliated militarily. Then Vietnam invaded its disorganized little neighbor Cambodia and was unable to completely subdue or pacify that small country.

11. Ronald J. Cima, *Government and Politics: Foreign Relations, the United States*, in VIETNAM: A COUNTRY STUDY, *supra* note 4, at 227.

12. See *infra* notes 24 and 29 and accompanying text. The Ordinance on Economic Contracts became effective September 25, 1989, and Decree No. 17-HDBT on Economic Contracts followed on January 16, 1990. The Law on Private Enterprises and the Law on Companies were both adopted on December 21, 1990. In 1992, amendments to the Law on Foreign Investment in Vietnam provided a legal basis for the Vietnamese private sector to establish joint ventures with foreigners.

13. English is not the "second language" of Vietnam. Many of the educated people are multilingual, but foreign languages commonly encountered by the author included Russian, German, Chinese, Japanese and French.

The second phase of the trip was spent with the committee organized by the Ministry of Trade under the chairmanship of Professor Luu Van Dat, which by then had been through multiple drafts of the Commercial Law that was to be submitted to the National Assembly for consideration later that year. Committee members were drawn from a rather wide constituency of government agencies and included representatives from the principal ministries and lead attorneys from other government agencies such as the State Bank.

1. The Background of Vietnamese Lawyers

Due to the training and inclination of the Vietnamese lawyers on these committees, many features of the Civil Code and Commercial Law were influenced by civil law concepts imported from both France and Germany.

There was substantial French influence in the law schools that were operated in Vietnam through 1954. Professor Luu Van Dat, the prominent senior attorney and legal scholar in Hanoi who headed the Commercial Law drafting committee, describes himself as "French-trained." Professor Dat demonstrated a knowledge of French law and enjoys a relationship with law professors in France and other countries.

Other attorneys principally involved with the drafting of new laws were trained in the Soviet Union or the German Democratic Republic (East Germany). In these legal systems, basic principles of contract and commercial law were derived from the German Civil and Commercial Codes and their Roman Law antecedents. The educational curricula in law schools in the Soviet Union and German Democratic Republic were not designed to acquaint students with issues such as the formation of business organizations or appropriate governmental regulation of private enterprise. Thus, as the country embarks upon preparing itself for a market economy, extra effort is required of law drafters to acquaint themselves with the issues involved as well as potential solutions.

The author worked with a number of younger lawyers with educational experience in other countries as well, including Australia, Canada and the United States. Some of them had obtained advanced degrees from foreign institutions. Several lawyers demonstrated knowledge of the 1980 Vienna Convention on the International Sale of Goods (hereinafter CISG).¹⁴

The drafters expressed a desire to develop legislation containing legal principles that would be respected by foreigners. The CISG and other international and national sources appeal to the Vietnamese as examples of internationally respected law. Concern with international acceptance made the drafters willing and even eager to consider laws that are effective in solving legal and commercial problems in other countries. Far from limiting themselves to traditional nationalistic approaches, they demonstrated a willingness to borrow what works from others.¹⁵

14. U.N. Conf. on the Int'l Sale of Goods, U.N. Doc. A/CONF.97/18, Annex I (1980); 52 Fed. Reg. 6264 (1987); 19 I.L.M. 668 (1980).

15. See *supra*, notes 48-50 and 58-59, for examples of a "willingness to borrow what works" among the members of the drafting committees. In addition to their interest in the CISG, the drafters

2. *The Impact of Habits Acquired from a Command Economy*

As with the Soviet Union, the Peoples Republic of China and other communist regimes, Vietnam has operated for decades under an economic regime in which both general policies and specific details of economic activity have been decided at the centers of government in Hanoi and then extended to the provinces and municipalities. The exigencies of wartime conditions undoubtedly magnified this tendency, as has been the common experience of almost every country that has endured periods of all-out warfare.

Operating a command economy involves central planning in which both broad policies and specific details regarding the implementation and conduct of economic activity are spelled out, sometimes in excruciating detail. The methods associated with central planning become ingrained in those who devise and implement them. One result is the tendency to spell out how everything is to be done and leave little or no discretion to those who will implement the plans and solve the problems that will arise.

This distrust of granting too much discretion to individuals was evident in the drafting of laws. One clear example of this in the new Vietnamese Commercial Law is the numerous articles that require different types of contracts to include a prescribed list of specific provisions as a prerequisite to having a valid contract.¹⁶ When discussing the issue of mandatory contract terms, the members of the drafting committee were quite firm in their belief that Vietnamese business people and other common people could not decide for themselves what should be included in their contracts. It was stated, with no hint of sarcasm, that while American business people are sophisticated with market economics and matters such as contract drafting, Vietnamese people lack such experience and thus need guidance and direction. Efforts to make listed terms merely recommended and not mandatory were unsuccessful.

had studied and evidenced interest in laws such as the Australian Torrens land recordation system and the laws of Quebec, Canada, and the U.C.C. Art. 9 relating to security interests in personal property.

16. For example, Article 50 of the Commercial Law provides:

"A commodity trading contract must specify the following main terms: (1) Name of the goods; (2) Quantity; (3) Specifications, Quality; (4) Prices; (5) Mode of payment; (6) Location and time for delivery of the goods. Apart from main contents regulated in this Article, the parties involved may agree upon other contents in the contract."

Article 51 provides in part:

"1) Commodity offer . . . must bear main contents of the commodity trading contract. . . ."

The required contents for different types of contracts is mandated in other articles including 81, 85, 94, 104, or 119. Similar drafting tendencies are manifested in articles such as 86, 87, 95, 107-109, and 120-123.

The Economic Court of Ho Chi Minh City is regarded by most lawyers in Vietnam as the most experienced, "equivalent to the Southern District of New York" as one expatriate attorney stated. In conversation with a judge on that court, the author asked whether the court would enforce a contract that omitted some required term such as place of delivery where the parties had repeated dealings with each other and always delivered goods at the same place. His response was: "The contract would be void." Suggestions that some concept such as course of dealing might be employed to save the contract did not shake this jurist from his conclusion. There was simply nothing to discuss.

3. A Newly Created Court Structure with Inexperienced Judges

Prior to 1986, Vietnam had no discernable commercial law and only a limited court structure to implement whatever law did exist.¹⁷ Creation of the Economic Courts commenced in 1994.¹⁸

Working from a clean slate provides certain advantages, but the tasks associated with "starting from scratch" can be daunting. It is evident that some newly appointed judges have minimal commercial or judicial experience. Perhaps more troubling, those who are drafting commercial laws assume these Vietnamese judges have insufficient experience. The result is a reluctance on the part of the Vietnamese lawmakers to draft laws that leave any discretion to the courts.

Those who work with the law in countries with established commercial systems recognize the benefits of having general or open-ended rules which judges have the discretion to interpret in a manner appropriate to a given set of circumstances. If one proceeds from the assumption that judges who are apprised of all of the relevant facts will be unable to reach the right conclusion or at least an acceptable conclusion, the drafting of legal rules becomes much more difficult.

For example, the author and members of the Commercial Law drafting committee spent considerable time together discussing how long an offer should remain open where the offeror failed to specify the duration of the offer. The draft then in existence provided for a thirty day duration. It was noted that thirty days could prove to be too long, particularly in respect to offers to sell commodities such as oil which is now being recovered off the Vietnamese coast. While there was general agreement that a fixed time for all offers was problematic, there was simply no acceptable alternative. A "reasonable time" would not be workable, it was argued, because "Who would fix what time is reasonable?" The generally accepted wisdom was that such an issue could not be left to "our inexperienced judges" because there was simply no way to instruct them on how to resolve the question.¹⁹

17. The establishment of People's Courts was initially undertaken in 1957 after the Viet Minh took over in the North. John Gillespie, *Private Commercial Rights in Vietnam: A Comparative Analysis*, 30 STAN. J. INT'L L. 325, 332 n. 38 (1994). The 1980 Constitution provided for the establishment of a system of People's Courts, but full implementation began with the adoption of the Law on the Organization of the People's Court by the National Assembly on October 6, 1992.

18. The Economic Courts were established within the People's Court system by the Law on Amendments and Additions to a Number of Articles of the Law on the Organization of the People's Courts, adopted by the National Assembly on December 28, 1993 (effective on July 1, 1994). The Economic Courts are empowered to hear "economic cases" and bankruptcy cases and to function in accordance with the Ordinance of the Procedures for Handling Economic Cases adopted by the Standing Committee of the National Assembly on March 16, 1994 (effective July 1, 1994). See generally Pham Van Thuyet, *Legal Framework and Private Sector Development in Transitional Economies: The Case of Viet-Nam*, 27 LAW & POL'Y INT'L BUS. 541, 581 (1996).

19. Quotation marks reflect discussions the author recalls with various drafting committee members. The subject at hand produced an extensive debate about how judges were selected in the United States compared to the traditions of Continental European countries. The notion that Vietnam presently could not afford to appoint the few experienced lawyers it has to the bench is unfortunately used to justify the assumption that discretion cannot be left to the judges. This in turn has

4. *Entrenched Bureaucrats, Notaries and the Like*

All political and legal systems have established practices and people whose positions and power depend on the preservation of those practices. Absent a revolution (which definitely did not occur in Vietnam in the 1980s), those who would effect change must work around or challenge people who possess the power of established positions.

In Vietnam, there is no concept of a clerk or other public official simply filing, registering or authenticating a document. If an official places a stamp or signature on a document or accepts that document for placement in any public record, that official is certifying that the document is proper in form, that it has the intended legal effect, and that the person executing the document has full authority to do so.

Consistent with the Continental European tradition, Vietnamese notaries advise people as to the form, content and meaning of legal documents. However, Vietnamese notaries assume an additional role in that they also approve the substance and terms of the transaction.²⁰ Their duties differ significantly from those of the American notary who simply authenticates signatures without specific regard to why or what the parties are signing. This approach to official action can be obstructive and result in unnecessary delays.²¹

In 1996, existing Vietnamese commercial laws and the draft Commercial Law required documents to be notarized in a number of instances including circumstances in which there was no logical purpose for authentication. Convincing the drafting committee to remove such a requirement was not so difficult, but getting the National Assembly to approve legislation that would reduce the role and power of notaries appeared to exceed what was politically feasible. That this was, in the end, accomplished inspires hope that the commitment to reform in Vietnam may be stronger than the force for maintaining the status quo on other issues.²²

justified retention of draft language that prescribes specific results for specific situations to avoid leaving any discretion to the judge. This approach has been favored because it is consistent with the notion that judges do not interpret the law, they just apply the law.

20. The experience of a foreign law firm practicing in Vietnam is instructive. After operating for more than a year in Hanoi, the firm completed the process to obtain a business license only to have it denied because the lease under which the firm occupied its office space was not notarized. The notary then refused to notarize the lease because in his opinion, the rent was too low. The problem was eventually solved after the rent was renegotiated.

21. In addition to the official and sometimes unofficial payments that must be made to notaries and the delays and inconvenience inherent in this process, the requirement of approval by a notary can distort or preclude certain transactions. Examples of this can be observed in note 20, *supra*, and the text accompanying note 28, *infra*.

22. Article 29 of the June, 1996, working draft of the Commercial Law provided that after completing the process for obtaining a business license and receiving a "registration certificate" from relevant authority, the enterprise was required to file a "duly notarized" copy of the registration certificate with the government tax authorities. It was suggested to the drafting committee that there was no apparent reason to require authentication because the likelihood that people would falsely alert the tax authorities to the fact that they are in business must be very low. As finally adopted, Article 26 of the Commercial Law deletes the notarization requirement. The notaries thus lost this opportunity to collect another fee and perhaps even require changes in the registration certificate.

5. *The Retention of Principles of Ownership and Economic Rules Not Fully Compatible with a Market Economy*

All land in Vietnam is owned by the People and is administered by the State.²³ Socialist principles have not been abandoned in this regard. Certain State-owned enterprises are being "equitized,"²⁴ but the concept of privatization is rejected. Various agencies of the State retain authority to approve different types of economic transactions. Within that framework, however, many steps have been taken to loosen controls over the domestic economy.

It is reasonable to assume that there are those, as in any political structure, who do not welcome the changes that have been made and who will therefore resist further liberalization of economic policies. This would explain the apparently unnecessary delays and inconsistencies as well as calculated ambiguities in many areas. While everyone calls for transparency, political exigencies no doubt dictate that opaque rules may at times be the only alternative to no movement at all.

C. *Initial Steps Toward Economic Change*

Since 1986, the Vietnamese have moved to create the legal structure that will attract and permit private investment and facilitate the creation of at least a limited market economy. This requires both substantive laws and procedures for their administration and enforcement. Creation of such laws and institutions is a daunting task in the best of circumstances and is made more complex when undertaken in an environment in which the basic goals of Marxist socialism have not been abandoned.

1. *Ownership of Real Property*

Prior to 1986, agricultural land was held by collective farms. Under Doi Moi, the local Peoples' Committees began subdividing this land into family-size farming units and allocating parcels to farming families.²⁵ Farmers are given possessory rights to parcels of farm land which are owned by the family as a unit. These can be sold to buyers who are qualified farmers and can be inherited by family members who are willing to continue to operate the farm. Allocation

23. See Articles 17 and 18 of THE CONSTITUTION OF THE SOCIALIST REPUBLIC OF VIETNAM adopted by the National Assembly (Legislature VIII, 11th Session) on April 14, 1992; Land Law adopted by the National Assembly (Legislature IX, 3rd Session) on July 14, 1993; Civil Code, Article 690.

24. The process of "equitization" contemplates the conversion of State-owned enterprises into joint stock companies subject to the Company Law. See *supra* note 12. Sale of a minority stock interest to private parties introduces a profit incentive into the company while retaining State control.

25. See Civil Code, Part 5, Chapter 1. Some family-controlled parcels were authorized before 1986. The size of the individual units varies with the productivity of the land and the density of population in the specific area. With the majority of Vietnam's 75 million people employed in agriculture, family units are very small. The size of the units precludes mechanization or other efficiencies, but with surplus labor and substantial underemployment in the rural areas, this is not viewed as a pressing problem.

of agricultural land is generally limited to three hectares for annual vegetation and ten hectares for perennial vegetation.²⁶

The right to occupy rural lands may not be transferred by a farming family to non-farmers. Thus any commercial or industrial activity that seeks to locate in rural areas must deal with the local Peoples' Committee which has the authority to remove farm families from the land and grant the right of possession for a period of years for a specific commercial use.²⁷ There are instances where possession of tracts of rural lands has been given to commercial farming ventures, particularly where they are producing crops for export. Possession of commercial and industrial land in developed areas is also granted for a period of years.

Residential buildings may be privately owned, but the lots underlying them belong to all of the people collectively. However, ownership of a residential building apparently embodies the long-term right to occupy and use the underlying land.²⁸ A system for recording title to houses and the corresponding land use right is evolving based on Decree No. 60/CP on Ownership of Residential Houses and Residential Land Use Rights in Urban Areas issued on July 5, 1994. This welcome step will replace a system in which proof of ownership of property such as a house depended on the production of a chain of documents all in proper form. After fifty years of warfare, it is not surprising that many home "owners" lack some or all of the necessary documents. When such a person transfers his or her interest in the house, this can only be accomplished on the gray market. If there is a defect in title, no official will notarize or otherwise authenticate documents or record the transaction because to do so would be to declare officially that the seller owns the property and has the power to convey it.

2. *Tolerance of Private Enterprise and Foreign Investment*

Vietnamese can own and operate private businesses, and existing State-owned economic enterprises of various types are slowly being equitized.²⁹

26. Regulations on Allocation of Agricultural Land to Family Households and Individuals for Use on a Stable and Long-Term Basis, promulgated with Decree No. 64/CP of the Government on October 15, 1993; *see also* Civil Code, Article 695.3. The effect of these provisions is to avoid absentee ownership and limit each family to possession of one farming unit. If the children all abandon farming and move to the city, they cannot inherit. While the possessory interest can be sold to another farm family, it cannot be sold for non-farm uses. One hectare is the equivalent of 2.471 acres.

27. Civil Code Articles 690, 695 and 697. Those familiar with this practice indicated that the local Peoples' Committees in rural areas were keen to attract industry and jobs to their areas and that dealings with them were not difficult. "Easier there than in the cities" was a common statement. The Vietnamese Government has established national standards concerning compensation rates in cases where the State relocates occupants and users of the land in question. In some locations, local implementing regulations have been issued in respect of the specific amount of compensation.

28. Decree No. 60/CP on Ownership of Residential Houses and Residential Land Use Rights in Urban Areas, issued on July 5, 1994.

29. Vietnam's "equitization" program was initiated by Decision No. 202/CT Concerning the Continuance of the Implementation of the Pilot Scheme for Converting State Enterprises into Joint Stock Limited Companies which was issued by the Council of Ministers on June 8, 1992. Under Decision No. 202, shares would be sold directly to employees, economic organizations and

The original Law on Foreign Investment in Vietnam was adopted in 1987 and amended in 1990 and 1992. The current Law on Foreign Investment in Vietnam, adopted on November 12, 1996, permits and encourages investment in specified areas of economic activity.³⁰ Foreign products can be imported and sold on the market and certain services can be provided by foreign entities such as banks, accounting firms and law firms.³¹ Foreign firms can do business in Vietnam in the form of joint ventures with State-owned or private economic entities, or they can establish wholly foreign-owned enterprises.³²

3. *Promulgation of Subordinate Legislation or Underlaws*

Since 1986, Vietnam has produced a large number of new laws and subordinate legislation, sometimes referred to as underlaws.³³ Some of the subordinate legislative enactments in existence in 1996 are very good insofar as they i) facilitate economic activity and development, ii) make the law and legal processes more transparent or iii) remove layers of bureaucracy (such as require-

Vietnamese citizens of at least 18 years of age for a limited period of time. Decision No 203/Ct on the Name List of State Enterprises Selected for Experimenting with the Transforming Into Joint Stock Companies, which was also issued on June 8, 1992, provided a detailed list of State-owned enterprises that were to be converted to joint stock companies. To date, only a handful of State enterprises have been equitized. Despite strong support from Hanoi and from the People's Committee in Ho Chi Minh City, progress in this area has been slowed by managers of State-owned enterprises. They apparently fear that equitization will lead to loss of their position. Foreigners are still precluded from purchasing shares in equitized Vietnamese companies except in very limited circumstances. Noteworthy, however, was the authorization and implementation in 1996 of the first convertible bond issue to foreign investors by Refrigeration Electrical Engineering Joint Stock Company (REE), a successfully equitized State-owned enterprise in Ho Chi Minh City. Conversion shares are slated to be issued beginning on July 1, 1998, though, amongst other restrictions, foreign shareholders will be barred from participating in REE's management.

By selling to private shareholders a minority of the stock of a business venture, the economic incentive to return a profit for shareholders is introduced into management philosophy, but the majority control of the business is retained by the government which can thus control the focus and direction that the business takes.

30. Law on Foreign Investment in Vietnam, adopted by the National Assembly (Legislature IX, 10th Session) November 12, 1996. Professor Luu Van Dat is a principal author of the Law on Foreign Investment which was written with the advice of foreign consultants. Prof. Dat told the author with obvious relish that in 1996 he found himself serving as the foreign expert in Laos, advising drafters in that country as to the content of their proposed foreign investment act. Progress marches across Indo-China.

31. *See generally* Regulations of Foreign Bank Branches and Joint Venture Banks Operating in Vietnam, promulgated by Decree No. 189/HDBT of the Council of Ministers on June 15, 1991; Decree No. 42/CP Promulgating the Regulations of the Practice of Legal Consultation in Vietnam by Foreign Law Firms dated July 3, 1995.

32. Law on Foreign Investment in Vietnam, Article 4, *supra* note 30.

33. Vietnamese legislation is issued in the following forms: Codes and Laws, adopted by the National Assembly, are the highest form of legislative authority; Ordinances, which are passed by the Standing Committee of the National Assembly when the National Assembly is not in session; Decrees issued by the Government which are typically accompanied by more detailed Regulations; Circulars and Decisions, which are issued by individual Ministries or Ministry-level bodies such as the Ministry of Finance, Ministry of Commerce and the State Bank of Vietnam; and Guidelines, which are policy pronouncements or directives issued by the Prime Minister. *See generally* LEGAL DOCUMENTS ON FOREIGN INVESTMENT AND PROTECTION OF INVESTMENT IN VIETNAM, Vol 1 and 2 (National Politics Publishers, Hanoi, 1995).

ments of approval) that had previously been required before people could undertake basic economic activities.

Some of the subordinate legislation is potentially harmful to the economy. An example is the Ordinance on Economic Contracts³⁴ which perpetuates extensive and detailed regulation of economic activities by governmental agencies including assorted bureaucrats and notaries.³⁵ In their most benign application, these requirements place a burden on commercial activity. When the public officials choose to assert their discretionary authority, these requirements can create obstacles to economic activity.

The adoption of the new Commercial Law has left in place at least portions of the Ordinance on Economic Contracts and accompanying Decree.³⁶ The Commercial Law repeals only "all previous provisions which are contrary."³⁷

III.

THE CIVIL CODE, THE COMMERCIAL LAW, AND OTHER RECENT ENACTMENTS

A. *The Civil Code*

After several years of drafting, in 1995 Vietnam adopted a civil code which is now the basic law of the country.³⁸ Like the Civil Codes of other civil law countries such as France or Germany, Vietnam's Civil Code covers a wide range of subjects including some aspects of what Americans would understand to be commercial law including the basic rules of contract law.³⁹ It has unfortunately frozen into law some basic concepts that may hamper the economic development of the country. For example, traditional legal practices in Vietnam did not permit a creditor to take a security interest in property unless possession of the

34. The Ordinance on Economic Contracts dated September 25, 1989; *See also* Decree No. 17-HDBT, Making Detailed Provisions for the Implementation of the Ordinance on Economic Contracts dated January 16, 1990.

35. The Ordinance on Economic Contracts (the "Ordinance") stipulates that the signing of an economic contract shall be based on "State plans, policies, regimes and all current economic and technical guidelines." *See* the Ordinance, Article 10. The Ordinance also provides that "certain types of economic contracts" must be registered in accordance with the law. *See* the Ordinance, Article 6.

36. It was the stated desire of some leaders of the Commercial Law drafting committee that the Commercial Law should expressly repeal laws such as the Ordinance on Economic Contracts and Decree on Economic Contracts. This did not occur. Commercial Law article 263 provides in part: "Previous provisions that are inconsistent with this Law shall be repealed." The author was in Vietnam in January 1998 and learned that the task of recommending revisions or repeal of the Ordinance on Economic Contracts has been assigned to the Supreme People's Court, and work on this project is presently going forward.

37. Anthony Foster, *The New Vietnam Commercial Law: Importance, Changes and Issues*, The California International Practitioner, Vol.8, No.1, p. 28.

38. *See supra* note 1.

39. Part 1 deals with basic principles including personal and family rights; Part 2 with property and property rights; Part 3 with civil obligations and contracts including pledges and mortgages; Part 4 with inheritance; Part 5 with the transfer of the right to use land including the pledging of that right; Part 6 with intellectual property; and Part 7 with civil relationships involving foreign "aspects," which includes foreign persons or entities, foreign property and relationships whose creation, alteration or termination are grounded in a foreign country.

property or of a certificate of title to the property was delivered to the creditor. Transfer of physical possession of the property or the certificate of title by way of a pledge was the only way to secure a loan. The Civil Code does not expressly expand upon this limited approach to the creation of security interests but a breakthrough may occur through the evaluation of a concept of non-possessory pledges.⁴⁰

In the summer of 1996, both the committee that was drafting implementing regulations for the Civil Code and the Commercial Law drafting committee were working within the constraints of a Civil Code that was already in place as well as the entrenched mindset of many participants that can best be described as a product of years of experience with a command economy.⁴¹

B. The Commercial Law

The Commercial Law was adopted in 1997⁴² and reflects the varied sources and concerns involved in its drafting.

1. Contract Formation

To constitute an offer, a communication must contain express language covering each and every one of the terms that the law requires.⁴³ This list of terms is not a suggested list to provide guidance, and there is no indication that trade usage or prior course of dealing between the parties can supply a missing term. This is command economy thinking at work.

As in many legal systems, offers are irrevocable unless otherwise stated. This concept might be traced to basic Germanic law.⁴⁴ It is a quite workable rule of contract formation but does require that one determine the period of irrevocability if no time is expressly stated in the offer.

The Commercial Law provides that if no time is stated, offers are irrevocable for 30 days.⁴⁵ The drafting committee rejected all efforts to convince them that a flexible period of time was a preferable alternative. There was agreement that a fixed period such as 30 days would prove to be highly inappropriate in many situations such as offers to buy or sell goods with volatile prices. However, having a flexible standard was deemed a worse alternative because it would leave discretion to the court to define the period. This decision reflects command economy thinking combined with a basic lack of confidence in the ability of judges to resolve uncertainties or intentional ambiguities in the law.

40. See the Civil Code, Article 329 and Decision No. 217/QD-NH1 of the State Bank of Vietnam Promulgating Regulations on Mortgages and Pledges of Property and Guarantees for Bank Loans dated August 17, 1996. See *infra*, text following n.69.

41. See *supra* text accompanying note 16.

42. See *supra* text accompanying note 2.

43. Commercial Law Article 51.1. The required terms for a valid contract are listed in Article 50.

44. Commercial Law Art. 53.1 and German Civil Code (Bürgerliches Gesetzbuch, or BGB) section 145.

45. Commercial Law Art. 53.1

Surprisingly, the Commercial Law makes an acceptance effective when sent for the purpose of binding the offeree although the contract is not formed until the acceptance is received by the offeror.⁴⁶ It is unclear why any legal significance is assigned to the dispatching of the acceptance. This rule is familiar to those trained in the common law, but the common law system gives effect to a dispatched acceptance because most offers are revocable under the common law. Providing for contract formation at the time an acceptance is dispatched protects the offeree who would otherwise be vulnerable to a revocation while the acceptance was being transmitted. As noted, Vietnamese law makes offers irrevocable. In most other legal systems where offers are generally irrevocable, acceptances are not effective until they are received because there is no need to protect the offeree from revocation.⁴⁷

It is possible the Vietnamese provisions were influenced by provisions of the CISG which also make acceptances effective at different times for different purposes. The CISG makes the offer irrevocable from the time the acceptance is sent, but as with the common law, this protection is necessary because under the CISG offers are generally revocable.⁴⁸

Another unusual aspect of acceptances under Vietnamese law relates to acceptances which change the terms of the offer. Vietnamese law provides that if the offeree amends or supplements a main term of the offer, this is a counteroffer. However, a purported acceptance which varies terms other than the main terms of the offer constitutes an acceptance and results in a contract unless the offeror promptly objects.⁴⁹

This may appear on the surface to be taken from Section 2-207 of the American Uniform Commercial Code, but it works quite differently from the UCC rule. It is in fact similar to Article 19 of the CISG, and will probably be interpreted to operate in a manner similar to the CISG rule.⁵⁰

2. *Contract Interpretation*

The provisions of the Vietnamese Commercial Law are designed to require that contract terms be gleaned from the written contract only. Interpretation

46. Commercial Law Art. 51.2 defines acceptance; Art. 53.2 binds the offeree upon its dispatch; and Art. 55 indicates the contract is created when the acceptance is received.

47. German Civil Code (BGB) sections 147 and 149.

48. CISG Art. 16.1 makes the offer irrevocable from the time the acceptance is sent but under Art. 18.2, the contract is not formed until the acceptance is received. Thus, the risk of loss or delay in transmission is on the offeree.

49. Commercial Law, Art. 52.

50. UCC section 2-207(1), CISG Art. 19 and Commercial Law Art. 52.2 all permit formation of a contract based upon an acceptance which purports to add to or change a term of the offer. However, the similarity ends there. Section 2-207 provides for formation of a contract on the terms contained in the original offer (or in jurisdictions applying the so-called knock-out rule, the terms upon which both writings agree). Whether the offeree's proposed terms ever become part of the contract depends upon further analysis based upon 2-207(2). Both CISG Art. 19 and Commercial Law Art. 52.2 provide for formation of a contract only if changes suggested by the offeree are not material *and* the offeror fails to object to these additional or different terms. Thus, if the offeror objects, there is no contract. If a contract is concluded, its terms include those proposed by the offeree in the acceptance.

does not involve any use of extrinsic evidence related to the negotiation process. Article 56 provides that when the contract is made, "all previous transaction correspondence and negotiations concerning the contract shall cease to have any effect."

This is an unfortunate choice of direction that was not dictated by existing laws. It appears to be at odds with Article 408 of the Vietnamese Civil Code, which provides for the consideration of multiple factors in interpreting a contract.⁵¹ The drafting of the Commercial Law presented an opportunity to expand on this list and perhaps move toward interpretation provisions such as those contained in Articles 8 and 9 of the CISG.⁵² The CISG focuses on the intent of the parties and trade usage and might be an appropriate model for all national law.

It is possible that the rejection of the more liberal approach is again a reflection of the lack of confidence in the ability of judges to deal effectively with complex factual settings. It is also consistent with an overriding desire to require people to negotiate specific written contracts that include express terms

51. Civil Code Art. 408 provides:

1. If a contract contains unclear provisions, the interpretation of such provisions shall not only rely upon the wording of the contract but also shall be based upon the mutual intentions of the parties.
2. If a paragraph of the contract shall be susceptible of many meanings, the meaning shall be chosen which would allow implementation of the Paragraph to benefit the parties the most.
3. If a contract contains certain wording which may have multiple different meanings, the contract shall be interpreted according to the meaning which best conforms to the nature and purpose of the contract.
4. If a contract contains paragraphs or words which are difficult to understand, those shall be explained according to the custom and usage of the appointed place for the execution of the contract.
5. When a contract lacks some provisions not belonging to the essential elements, the contract shall be supplemented according to the custom and usage in regard to contracts of a similar type at the appointed place for the execution of the contract.

The paragraphs of (a) contract shall be interpreted in relation to each other so that each is given the meaning derived from the contract as a whole.

52. CISG Article 8 provides:

- (1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.
- (2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.
- (3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

CISG Article 9 provides:

- (1) The parties are bound by any usages to which they have agreed and by any practices which they have established between themselves.
- (2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation any usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

covering all matters. For whatever reason, the Commercial Law opts to require parties to include in the written contract everything that is significant to them in the transaction.

3. *Quality of Goods and Seller's Delivery Duties*

A valid contract for the sale of goods must contain terms relating to "specifications and quality."⁵³ Parties who discussed or documented details relating to quality in precontract negotiations may be unable to prove these matters unless they are expressly included in the written contract.⁵⁴ To the extent that quality and packaging are not specified in the contract, the seller must comply with "average quality of that type of commodity in circulation on the market at the time of delivery" and "packaging commonly used for this type of commodity" which "must be sufficient to insure safety."⁵⁵ Seller gives a warranty of "ownership" which also warrants against third party claims.⁵⁶ Article 66 of the Commercial Law simply recognizes the possible existence of express warranties and notes that the seller can be liable thereon.

4. *Receipt of Goods, Inspection and Notice of Defects*

Seller is obligated to deliver goods conforming to the contract quantity, quality, specifications and packaging and within the specified time limits. Depending upon which translation one reads, this obligation is qualified by the term "right quantity. . .", "exact quantity. . ." or "correct quantity. . .".⁵⁷

The Germanic influence was quite apparent in the draft versions of the Commercial Law relating to inspection and rejection of goods by the buyer. The buyer was required to inspect the goods "within the shortest time as is practically possible." The draft also required that notice of defects be given within the time fixed in the contract. No provision stipulated the default time within which the buyer has to give notice where there is no contract term that addresses this issue.⁵⁸

53. Commercial Law Art. 50.3. Failure to provide some express terms covering specifications or quality would presumably make the contract void. *See supra* note 16.

54. *See supra* text accompanying notes 51-52.

55. Commercial Law Art. 60. Seller's duty to deliver documents is covered in Commercial Law Art. 60.6. This article also prohibits unauthorized early delivery or partial deliveries without buyer approval. Specific provisions regarding excess quantity of quantity shortages are covered in Commercial Law Art. 65.

56. Commercial Law Art. 69. The first sentence of the official translation reads: "The seller is obliged to ensure the right to ownership of the commodity that has been sold for the buyer so that the buyer is not conflicted by a third person." One unofficial translation of the same sentence provides: "The seller shall have the obligation to ensure that the buyer's ownership rights over the goods sold (to it) are not disputed by a third party."

57. Commercial Law Art. 60. There is apparently no specific provision regarding the standards by which the law will determine the general right of the buyer to reject goods. It is not clear whether a concept such as perfect tender or material or fundamental breach would be controlling. *Cf.* CISG Arts. 25, 46 and 49 or Uniform Commercial Code sections 2-601 and 2-612.

58. Draft Art. 86 provided: "The buyer has the right to check the goods at the place of arrival within the shortest time which is practically possible on each concrete case, except in cases where the goods were accepted by the buyer at the (point) of departure."

After discussions regarding the German rules, the American rules and the apparent compromise between the two which one finds in the CISG, the members of the drafting committee saw this issue as a choice between rules that favored sellers and rules that favored buyers. Given current conditions in the Vietnamese economy, it was deemed appropriate to give buyers more latitude. Under Article 74, buyers now are permitted to inspect the goods "within a reasonable time period that is appropriate to the characteristics of each kind of goods under the contract." Note the inclusion of language that spells out the method by which a reasonable time was to be determined. The concern about the perceived inexperience of the judges had not vanished.

There is still no provision in the Vietnamese law regarding time for giving notice of defects if the contract is silent on the issue. Perhaps the judges will take the bull by the horns and impose a similar reasonable time provision for this action. As adopted, the Commercial Law still requires a notice of defect to be given within the time fixed by the contract.⁵⁹ This is a provision that sellers can abuse, and given the apparent tendencies of the judges to give literal meaning to all law, one can anticipate that sellers will be permitted to impose unreasonably short periods for giving notice.

The Commercial Law also contains provisions relating to pre-shipment inspection by seller and provision of certificates of quality. Buyers may participate in such pre-shipment inspections but ultimate responsibility for compliance with quality terms in the contract remains with the seller.⁶⁰

5. *Seller Liability; Fault and Force Majeure*

The seller's liability for damages for breach of contract is limited by a concept of fault. The burden of proof is on the seller to establish lack of fault.⁶¹

Exceptions from liability or excuses from performance are covered in Articles 77-79. These articles provide for party autonomy by allowing the contract terms to control. Beyond that, Article 77 is noteworthy for having survived

Draft Art. 87 provided: "A buyer shall forfeit his/her right to complain of goods which do not correspond with those agreed in the contract if he/she does not notify the seller of the discrepancy within an agreed time limit from the time the buyer detected or shall (should) have detected this discrepancy."

There was (and still is) no provision regarding time of notice if the contract was silent on the issue.

The German Commercial Code (*Handelsgesetzbuch*, or HGB) section 377(1) provides: "If the sale is a commercial transaction as regards both parties, the buyer should examine the goods immediately after delivery by the seller to the extent that this is practical in the ordinary course of business, and if a defect is found, he should without delay notify the seller."

Cf. CISG Articles 38 and 39.

59. Article 75 provides: "In cases where the parties have an agreement on a time limit for giving notice regarding the goods that fail to conform with the contract, the buyer must notify the seller of the non-conformity of the goods within the time limit agreed upon; if the buyer fails to notify the seller upon the expiry of the time limit, (it) shall lose its right to make a complaint."

60. Commercial Law Arts. 61 and 62.

61. Commercial Law Art. 68. A U.S. Government translation provides: "...except for the case the seller can prove that he is not faulty." An unofficial translation states: "...except in circumstances where the seller is able to prove that it is not at fault."

efforts to define specifically those events which would constitute a force majeure defense.

6. *Contracts Involving Foreign Merchants*

The Commercial Law makes special provision for contracts between a Vietnamese merchant and a foreign merchant.⁶² Following the usual pattern, the contract is not effective unless detailed provisions are included. These include the juridical status of both buyer and seller, and the official authorization of the Vietnamese party to "conduct direct commercial activities with foreign countries."⁶³ If the foreign merchant is to be certain of having a valid contract, inquiry must be made as to the status and scope of authority of a Vietnamese merchant. These are matters that may not be readily discernable by the foreign party.

7. *Secured Financing*

The ability to make secured loans to a debtor in any legal system depends on the debtor having legally recognized title to some property, the debtor being able to transfer to the creditor a security interest in that property, and the creditor being able to foreclose and either obtain legal title to that property or transfer legal title to another to satisfy the secured obligation. There is also a need for creditors to know what other security interests or liens encumber the property and what priority the different security interests have. Until recently, one or more of these factors has been absent from Vietnamese laws and procedures in almost all circumstances. Even where the debtor has legally recognized title to property,⁶⁴ the other factors created problems.

Vietnamese law recognizes the right to mortgage interests in immovable property; the right to pledge movable property including commercial paper and other documents with monetary value, and the right to give personal guarantees with or without collateral from the guarantor. The Civil Code established some basic detail with respect to different types of transactions.⁶⁵ These rules have been supplemented by Regulations issued on August 17, 1996, by the Governor of the State Bank.⁶⁶

62. Commercial Law Art. 80. No definition of a "foreign merchant" is provided.

63. Commercial Law Art. 81.

64. See *supra* text accompanying note 28.

65. The Civil Code, Section 5, Articles 324, et seq. Mortgages can be utilized with respect to immovables (Article 346) and pledges can be utilized with respect to moveable property in which case the pledged asset must be delivered to the pledgee and with respect to assets which have registered ownership in which case the registration certificates can be delivered with the pledgor retaining possession of the asset (Article 329). Registered ownership exists for motorized vehicles, planes and certain vessels.

66. Decision of the Governor of the State Bank No. 217/QD-NH1 promulgating Regulations on Mortgages and Pledges of Property and Guarantees For Bank Loans (hereinafter "State Bank Regulations"). These State Bank Regulations apply to loans made by all credit organizations operating in accordance with the Ordinance on Banks, Credit Cooperatives and Finance Companies and by the system of People's Credit Funds. That apparently includes all domestic and foreign financial institutions.

These State Bank Regulations (hereinafter Regulations) establish procedures relating to mortgages of possessory interests in immovables including creation of the mortgage, rights and duties of the parties and foreclosure procedures.⁶⁷ Mortgage lending can be conducted only by Vietnamese Banks.⁶⁸ The regulations also provide procedures relating to pledges of movables and commercial paper.⁶⁹

One shortcoming of the security interest scheme established in the Civil Code was the apparent failure to provide for non-possessory security interests in any personal property other than that which had registered ownership, such as vehicles, planes and ships. The requirement that possession be surrendered places serious restrictions upon the potential for giving security interests in inventory, production machinery or the like. The Regulations may have opened the door to permit additional non-possessory security interests.

Article 2.2 of these Regulations provides for accomplishing a pledge by delivery of the property or by delivery of the original ownership documents of property. (The law requires registration of the ownership rights or "document(s) evidencing the ownership rights (thereto).") Article 34 refers to ". . . circumstances where the Pledgee only keeps the Pledgor's ownership documents of the property but not the (pledged) property. . . ."

Under these Regulations it would appear that documents representing ownership rights could be issued with respect to various types of personal property. Pledges could then be perfected by delivery of these documents of ownership in similar fashion to the procedure now used for certificates of registration.

Central registration or filing is not yet available in Vietnam but it is a subject in which the drafting committees expressed a good deal of interest. There is no apparent vehicle for giving security interests in inventory or accounts receivable. However, progress has been made to facilitate credit availability in Vietnam.

Foreign businesses in Vietnam have access to financing through foreign banks. In the past, transactions have been concluded offshore, thus avoiding the gaps and uncertainties of Vietnamese domestic law. This has left domestic Vietnamese entrepreneurs and banks at a distinct competitive disadvantage. Perhaps the implementation of the State Bank Regulations and further developments that have been under consideration will change this scenario.

8. *State Management of Commerce*

Chapter V of the Commercial Law is entitled "State Management of Commerce." The five articles in Section 1 of this chapter, Articles 244-248, contain open-ended provisions giving the State the right to control all economic activity.

67. State Bank Regulations, Chapter II, Articles 23 through 33. These regulations list twelve specific terms that must be included in mortgages (Article 15.1) and provide for registration of mortgages with a Notary Public or a district People's Committee (Article 15.3). There is apparently still no provision for central registration or filing of these or other interests in immovables.

68. State Bank Regulations Article 23.

69. State Bank Regulations, Chapter 3, Articles 34-42.

Specifically mentioned are such items as control of prices,⁷⁰ provision of "guidelines for logical and economical consumption" and regulation of "the circulation of goods in line with the State's socio-economic development plans and regulations."⁷¹ There are specific directives such as: "People's Committees at all levels shall perform State management of commerce within their localities in accordance with the Government's division of authority." An outsider cannot predict how such provisions will be implemented.

These articles also provide "The State shall uniformly administer commerce by laws [and] policies, . . ." and "The Government shall uniformly exercise State management of commerce." This promise of uniform administration of the laws is a desired goal, and some liberals view these articles as very important because they appear to require the government to treat state entities and private businesses equally without discrimination against any sector.

IV.

THE PACE OF CHANGE

One encounters many Vietnamese and expatriate business people and professionals who are dissatisfied with the pace of change and highly critical of the continuing extent of government control over development and specific transactions. From the point of view of one who has not had to deal with daily frustrations of doing business in Vietnam, it would appear that the changes made in the relatively short span of eleven years are quite extensive. It further appears that the hands at the controls of the inflow of capital and pace of economic development are guided by a good deal of logic and common sense.

Anecdotal information describes two proposals for the sale of earth moving equipment that were submitted to government agencies: one for equipment to be used in coal mines and one for use in road repair. The first was promptly approved but the second was still in limbo after considerable time. One can not help but notice that coal is an export commodity and is also necessary to keep the domestic economy functioning. On the other hand, poor roads are endemic to Vietnam, and a bit more delay in getting them fixed is not going to bring the economy to its knees. Foreign investment and transactions are prioritized based upon the production of goods for export, the production of agricultural, forestry and aquatic products, production of "high tech" and "state-of-the-art" technology, facilities for the processing of raw materials, and construction of infrastructure projects.⁷²

After initial periods of high inflation following the introduction of reforms in 1986, Vietnam has had several consecutive years of growth in the vicinity of 9% per year with inflation at or below 3% per year.⁷³ This might not have been accomplished had Vietnam simply opened its economy to market forces. This

70. Commercial Law Art. 244

71. Commercial Law Arts. 245.4 and 245.5.

72. Law of Foreign Investment in Vietnam, Art. 3. See *supra* note 30.

73. Appendix A, Table 4, Economic Growth Rate 1976-1990, in VIETNAM: A COUNTRY STUDY 319, *supra* note 4.

brings to mind the economic controls imposed in the Federal Republic of Germany (West Germany) after World War II which were considered by many to be responsible, in part, for the German economic miracle.

Since 1986, the development of laws and legal institutions has proceeded at what the author perceives to be a very fast rate. Today, it is easy to criticize the rudimentary development of Vietnamese laws, courts and other legal institutions as a few Americans have done recently, but the Vietnamese have drafted and adopted numerous new laws and created several new institutions in eleven years since 1986. This could be contrasted with the speed of change in the United States, where the better part of eleven years can be spent trying to rewrite one article of the UCC. Sometimes foreigners tend to overlook the fact that there are competing economic, political and philosophical interests that may oppose those who support changes in law or legal institutions. It is not simply a question of how quickly one can write a new law covering a certain topic. It is also a question of which different groups have to be involved in the process and what steps must be taken to obtain the consensus that is often necessary to get the whole adopted.

As this is written, currency instability, stock market panic, and other financial uncertainties have descended upon Southeast Asia. It is perhaps noteworthy that the nations most severely impacted to date have been those that moved most rapidly to permit free flow of capital, exchange of currencies and the like. Perhaps Vietnam is fortunate that it had not yet opened its economy and financial markets to unfettered investment and money transfers. The relatively deliberate pace at which the country has moved may have been vindicated. It might be anticipated that current events in neighboring countries are not likely to encourage the Vietnamese to speed the pace of market opening in the immediate future.