ANALYSIS OF PROPOSED REVISIONS TO THE 1994 BANKRUPTCY LAW OF THE REPUBLIC OF VIETNAM

Compiled by the ABA-UNDP International Legal Resource Center (ILRC)
June 2002

w w w . a b a n e t . o r g / i n t l a w / i l r c

TABLE OF CONTENTS

ANALYSIS OF PROPOSED REVISIONS TO THE 1994 BANKRUPTCY LAW OF THE REPUBLIC OF VIETNAM

Ralph E. Avery
Deputy Chief, Bankruptcy Judges Division, Administrative Office of US Courts

Introduction and General Principles

An effective business bankruptcy law should foster an entrepreneurial atmosphere among both creditors and debtors. It does this by providing clear and efficient rules for the reorganization or liquidation of businesses which minimize the impact of failure on creditors, thus easing access to capital, and, especially to credit. At the same time, it allows for the prospect of rehabilitation after failure, thus giving society the benefit of renewed human resources and revised business strategies. An effective bankruptcy law will also enlarge the availability of capital and credit by helping to attract foreign investment.

A general conceptual framework for a bankruptcy law that might achieve the above goal would include the following elements: (1) a definition of the conditions under which parties may have recourse to the law; (2) a stay of debt collection activities against the debtor; (3) provisions for resolution of claims against the debtor; (4) grants of power to the debtor or trustees to rescind certain pre-bankruptcy transactions; (5) mechanisms for the reorganization or liquidation of the business; (6) designation of priorities in distribution of assets among different types of creditors, including priority treatment for post-proceeding creditors; and (7) efficient structural mechanisms, such as courts, creditors' committees, trustees, and the like, to implement these criteria.[1]

This paper will analyze the proposed revision of the current bankruptcy law of Vietnam with respect to these conceptual elements.

[1]These elements are based on Pamela Bickford Sak and Henry N. Schiffman, Bankruptcy Law Reform in Eastern Europe, 28 The International Lawyer 927, 931 (1994). See also, Resolution of Financial Distress, An International Perspective on the Design of Bankruptcy Laws, (Stijn Claessens, Simeon Djankov, Ashoka Mody, editors, World Bank, 2001); Henry N. Schiffman, Model Provisions for Commercial Bankruptcy Law for Economies in Transition, Butterworths Journal of International Banking and Financial Law, Special Supplement, March 1999; Manfred Balz and Henry N. Schiffman, Insolvency Law Reform for Economies in Transition - A Comparative Law Perspective, Butterworths Journal of International Banking and Financial Law, January and February 1996.

Conditions Under Which Bankruptcy May Be Invoked

The hallmark of bankruptcy is its collective nature.[2] The law appears, however, to allow a single creditor or unpaid employee to file a petition.[3] Use of bankruptcy proceedings to resolve two-party disputes is inefficient, as experience in the United States with cases of this nature has shown. Many of the mechanisms used to resolve multi-party disputes, such as the automatic stay of proceedings against the debtor, introduce complexity and delay into two-party disputes that are not necessary to resolution of the case and which, therefore, serve only to provide one of the parties with unjustified leverage over the other.

The law imposes a positive duty upon a merchant who has fallen behind in his or her debt service to file for bankruptcy within 30 days. This duty, especially when taken together with the severe consequences attaching to bankruptcy through other provisions of the law, will have a significant negative effect on entrepreneurial activity. It also will limit the opportunity for out of court resolutions to business crises, which should be encouraged, because it will place an artificial time limit on the negotiations of the parties. Given that creditors have a right to file a petition in bankruptcy, filing by the debtor should be voluntary.[4] In the United States, insolvency is not required for a debtor to file a petition. This option allows for filings when reorganization on a collective basis is seen as desirable, thus encouraging innovation in the management of businesses. The potential abuse of this freedom is curbed to some extent by the possibility that a proceeding for reorganization might be converted, on motion of the creditors, to a liquidation, or that present management might otherwise lose control of the business. Potential damage to a business' credit rating and the expense of reorganization proceedings also help to limit abuse of the system.

The use of a liquidity test for insolvency, as set out in section 6(9), in which cessation of

---

[2]Manfred Balz and Henry N. Schiffman, Insolvency Law Reform for Economies in Transition - A Comparative Law Perspective, Butterworths Journal of International Banking and Financial Law, January and February 1996.

[3]Sections 7(1), 8, 52(2).

[4]Manfred Balz and Henry N. Schiffman, Insolvency Law Reform for Economies in Transition - A Comparative Law Perspective, Butterworths Journal of International Banking and Financial Law, reprint p. 7, January and February 1996 expresses a contrary opinion. Those authorities believe this mechanism deserves consideration as a way to protect creditors and impose financial discipline on managers in economies in transition.

payments is the criterion, as opposed to a "balance sheet test" based on the net of assets and liabilities, is consistent with the majority of legal systems.[5] This test is especially appropriate in developing market economies, since accounting practices and access to business information may not be sufficiently developed to make the balance sheet test manageable.[6]

Stay of Actions Against the Debtor

Sections 4 and 64 contain appropriate suspensions of lawsuits against the debtor and section 61(2) prevents a bank from exercising a right of setoff against the debtor's accounts. Some consideration may be given to broadening the protections of section 4 to other forms of debt collection, such as self-help repossession of collateral. Consistent with the recommendation made below that collateral be included in the assets subject to a bankruptcy proceeding, realization upon security interests should be expressly stayed. Deferral of the claims of secured creditors is essential to make rehabilitation a realistic alternative to liquidation.[7]

Section 44 enables parties who have leased or lent property to the debtor to recover that property solely upon the proof of ownership. Business dealings in emerging economies are often informal, giving rise to difficulties in proof of the terms of a lease or loan. This may, in turn, argue for a power such as is granted in section 44. The breadth of this power would, however, enable lessors or lenders to render a reorganization of the debtor infeasible by depriving the debtor of property which may be essential to the operation of the business. Provisions should be made to allow the debtor to retain the property subject to performance of the terms of the lease or loan or to the provision by the debtor of adequate protection of the interests of the non-debtor party.

Resolution of Claims

[5]Manfred Balz and Henry N. Schiffman, Insolvency Law Reform for Economies in Transition - A Comparative Law Perspective, Butterworths Journal of International Banking and Financial Law, reprint p. 6, January and February 1996.

[6]Manfred Balz and Henry N. Schiffman, Insolvency Law Reform for Economies in Transition - A Comparative Law Perspective, Butterworths Journal of International Banking and Financial Law, reprint p. 6-7, January and February 1996.

[7]The laws of the Czech Republic and of Germany before reform in 1999 have been criticized for this reason. Pamela Bickford Sak and Henry N. Schiffman, Bankruptcy Law Reform in Eastern Europe, 28 The International Lawyer 927, 944 (1994).

Section 86 of the proposed law appears to provide a definitive resolution of claims against the debtor in a rehabilitation case by binding the parties[8] to the terms of a confirmed plan of rehabilitation. Section 96(2) of the proposed law, however, does not discharge individuals or owners of private enterprises from personal liability for the debts remaining after liquidation of a business. By definition, persons who participate in businesses which are not organized on a limited liability basis remain personally liable for the debts of the business. It is also understood that this law addresses business bankruptcies and not personal indebtedness, making the latter beyond the scope of this analysis. The provision of a "fresh start" for the individual is, however, essential in a modern commercial economy. Some provision should be made, either in this law, or in a corresponding statute governing personal debt relief, for discharge of the debts of an individual. In the final analysis, the strength of a market economy rests in the ability of individuals to take risk and, inherently, to fail without the consequences of that failure being so severe as to stifle subsequent business ventures.[9]

[8]Section 86 states that all "creditors" will be bound by the rehabilitation plan, but all "parties" to the plan should be bound by it, including the debtor and anyone else who participates in the plan, not just the creditors.

[9]Pamela Bickford Sak and Henry N. Schiffman, Bankruptcy Law Reform in Eastern Europe, 28 The International Lawyer 927, 938-39 (1994).

Rescission Of Transactions

This section will address three major elements: (1) recovery of fraudulent or preferential transfers; (2) rejection of pre-petition contracts; and (3) post-petition operation of a business.[10]

Fraudulent or Preferential Transactions

[10]The third category is included in this section because section 42 of the draft law addresses the post-petition operation of the business in connection with the power of rescission.

The theory underlying the recovery of fraudulent or preferential transfers is that certain creditors ought not to benefit at the expense of others when a business failure is imminent. This theory pre-supposes that the transfers are made either with actual fraudulent intent to injure a particular creditor,[11] or group of creditors, or that the debtor is insolvent at the time of the transfer. With the exception of actual fraud, insolvency must be a requirement for recision of a preferential transfer, because otherwise there is no harm to the ability of creditors to recover from the assets of the debtor. The law of the United States also requires that the transfer provide a greater benefit to the creditor than that creditor would receive in a liquidation of the debtor's assets, on the same theory that, otherwise, there is no detriment to the other creditors.

Section 33 of the proposed law permits recision[12] of transactions that take place within six months prior to the insolvency of the business, but does not require detriment to creditors in the form of either a requirement of insolvency at the time of the transfer or that the transfer would provide the creditor with a greater return than it would receive upon liquidation of the business. The absence of these conditions to recision of a transaction may tend to induce some uncertainty in the market, with a corresponding constriction of the availability of credit. Since the actual date of a bankruptcy is usually not known in advance, the lack of a requirement of detriment to other creditors means that a transaction may be liable to recision merely because it took place at some arbitrary time in relation to a bankruptcy petition. There also does not appear to be any allowance made for benefits received by the debtor in the subject transactions; the law should provide for the recovery only of the net gain received by the non-debtor party and not for recovery of everything. The pre-condition of a net detriment to other creditors is necessary for a conceptually valid preference law and should be clearly written into the proposed new statute.

Recision of Contracts

Chapter VII of the proposed law recognizes that the debtor ought not to be required to perform contracts that will result in a net loss, since this is a type of preferment of the non-debtor contracting party over existing creditors. Hence, the debtor should have the power to reject unprofitable contracts. There are, however, a few points about which some clarification may be useful.

Non-debtor parties to an executory contract should have the right to know whether the

[11]For example, a debtor might conceal an asset that is subject to an enforceable security interest, thus impairing the value of the creditor□s security interest.

[12]Section 33 of the proposed law states that the transactions are "void," but other parts of Chapter VI, such as section 36, imply that the subject transactions can be avoided at the instance of the Head of the Asset Management Team or the Head of the Asset Liquidation Team and are not nullified by operation of law.

contract will be performed or rejected, so that they will know whether they have a claim in the bankruptcy case and whether they need to obtain substitute performance of the contract. This seems to be the intent of section 39(2), but it appears that the non-debtor party is given the power to establish the time period in which the decision to accept or reject a contract must be made. This could frustrate an effort to reorganize, or, in the event of a liquidation, deprive the Asset Liquidation Team of sufficient time to ascertain whether the contract will result in a benefit to the debtor on not. Establishing a certain time in the statute in the case of liquidation or permitting the court to establish a time for the assumption or rejection of a contract in the case of reorganization, as is the case in the law of the United States, would be a more effective mechanism.

Section 40 recognizes that the non-debtor party to a rescinded contract has a claim in the bankruptcy proceeding for appropriate damages. Section 40(2), however, gives the non-debtor party a right to reclaim any tangible property in the possession of the debtor which was the subject of the contract. This section would effectively create a security interest in property that is involved in a rejected contract, without regard to whether the contract or a separate security agreement creates such a security interest. It would be preferable to allow the security status of the non-debtor party to be determined by the terms of the contract or other security instrument. This would clarify the rights between the parties, and, if security interests are subject to recordation, would provide clear notice to other creditors in advance of financial difficulties by the debtor. It cannot be known in advance whether the debtor will reject a contract in the event of financial distress, since the profitability of any given contract may or may not be affected by the same factors that generate the financial problems of the debtor. If rejection of the contract can be grounds for creation of a security interest in favor of the non-debtor party to the contract, other creditors will be unsure whether the property which is the subject of the contract will be available as collateral, thus reducing the credit-worthiness of the business even before financial distress is experienced. Requiring the security status of the non-debtor party to follow the applicable non-bankruptcy law of secured transactions improves the certainty of commercial transactions, with a corresponding decrease in transaction costs.

Post-petition Payments in the Ordinary Course of Business

Post-petition obligations of the debtor which occur in the ordinary course of business should be honored. This is recognized in section 35. The placement of this section in Chapter VI, dealing with the avoidance of transactions, and the literal phrasing of the section, which makes the power of avoidance inapplicable to obligations incurred in the ordinary course of business, seems simply to remove the authority of the Head of the Asset Management Team or the Head of the Asset Liquidation Team to avoid these transactions. Entry into the bankruptcy regime places the debtor and those acting on its behalf into a special relationship[13] with the creditors and the assets against which they might seek recourse. Authorization, either under conditions described by statute or court order, should be required for the debtor to incur post-petition obligations, even in the ordinary course of business, although this authorization might be in general terms, as in section 1108 of the Bankruptcy Code of the United States.[14] Transactions which are undertaken without the required authorization should be subject to avoidance,[15] just as preferential or fraudulent pre-petition transactions are. The limitation currently expressed in section 35 would restrict the ability of the managers of the assets of the distressed business to undo unauthorized transactions.

Mechanisms for Reorganization or Liquidation of the Business

The proposed law provides for either reorganization or liquidation of a business, thus allowing for the possible preservation of an entity which has greater value in the long run as a going concern than it would have if liquidated.

One of the central issues in any insolvency regime is the balance of power to be established between the debtor and the creditors. The proposed law employs an Asset Management Team to supervise the operation of the distressed business pending agreement upon a rehabilitation plan. The membership of this team specified in the proposed law is rather extensive and may make it cumbersome in actual operation. Some consideration should be given to streamlining the function of the team by restricting its membership. On the other hand, use of a trustee type of mechanism such as the Asset Management Team is probably a sound concept in a transition economy, where accounting standards are not highly developed and commercial knowledge is not widely available. The proper function of trustee types of mechanisms is likely to be debated in every insolvency regime in the world for the foreseeable future. The

[13]In the United States, this is often termed a "fiduciary relationship." The provision for Asset Management and Asset Liquidation Teams in the draft law recognizes the need for special care of the assets of the debtor in the bankruptcy regime.

[14]Sections 59 and 60 permit operation of the business in the ordinary course, subject to the supervision of the Asset Management Team and the judge.

[15]Section 549(a) of the United States Bankruptcy Code so provides.

functioning of the Asset Management Teams in actual practice should be closely observed and the use of the mechanism adjusted according to how it works in practice and how the market economy and the overall practice of insolvency law develops.

With respect to liquidation, the relationship between section 27, dealing with priorities in payment of classes of claims, and section 94,[16] dealing with the distribution of assets, is not clear. Section 27 specifies a hierarchy of classes of claims for purposes of payment, while section 94 seems to permit the creditors to design a system of asset distribution by consent.

[16]The proposed law has two sections numbered A94", both dealing with the distribution of assets, and no section 93.

Priority of Distribution of Assets

Chapter V of the proposed law contains a number of provisions dealing with the priority of distribution of assets. Section 24 excludes secured claims from treatment under the law, which is traditional, also, in the laws of Europe.[17] Inclusion of secured creditors in the bankruptcy proceeding, is, however, more consistent with a modern credit economy.[18] Assets subject to security interests may, nevertheless, be essential to an effective reorganization of a business. The debtor may also have equity in the collateral, which must be preserved for the benefit of creditors. Appropriate provisions for protection of the interests of secured creditors, such as "adequate protection" payments, can be structured so that the effect of including their interests in the bankruptcy proceeding is not to reorder the economic priorities of secured creditors, but to assure the most effective procedure for all creditors.[19]

The intent of section 29, which excepts claims established after the commencement of the bankruptcy case from the priority of distribution established for pre-petition claims, seems to be to afford the post-petition claims superiority over pre-petition claims. This is entirely appropriate and is necessary to assure the continuation of a business pending reorganization. The intent of section 29 should be made explicit in the law.

Efficient Structures to Implement the Law

An efficient insolvency law allows for an expeditious, yet equitable, settlement of the rights of the various parties through balancing the amount of involvement of private and state participants in the process. Bankruptcy proceedings serve not only as a collective debt resolution device, but also impose some measure of fiscal discipline on entrepreneurs, thus advancing both the interests of the parties to the transactions in question and the broader interests

[17]Manfred Balz and Henry N. Schiffman, Insolvency Law Reform for Economies in Transition - A Comparative Law Perspective, Butterworths Journal of International Banking and Financial Law, reprint p.12, January and February 1996.

[18]Jay Lawrence Westbrook, Systemic Corporate Distress: A Legal Perspective, in Resolution of Financial Distress, at p.51 (Stijn Claessens, Simeon Djankov, Ashoka Mody, editors, World Bank, 2001); Manfred Balz and Henry N. Schiffman, Insolvency Law Reform for Economies in Transition - A Comparative Law Perspective, Butterworths Journal of International Banking and Financial Law, reprint p.12, January and February 1996.

[19]Manfred Balz and Henry N. Schiffman, Insolvency Law Reform for Economies in Transition - A Comparative Law Perspective, Butterworths Journal of International Banking and Financial Law, reprint p.12-13, January and February 1996.

of the state in a smoothly functioning and efficient economy. Hence, some level of state involvement in the process is essential, if for no other reason than to prevent fraud. As a general rule, however, in keeping with the goal of moving toward a market economy, the role of agents of the state, such as the judge, should be kept to a minimum, with the major role in reorganization, or even in liquidation, being played by private entities. Ready access to the court or other state agents as arbiters of disputes and supervisors of the process should serve as a corrective to overreaching by any particular creditor or group of creditors.

Investing the People's Procuracies and, through the Procuracies, the State Investigation Bureaus with the right to file a bankruptcy petition, as in sections 11 and 12 of the proposed law, probably interjects a larger amount of state involvement in the process than is desirable. Given the right of the creditors, and the duty of the merchant, to file for bankruptcy, it would appear that a further right in these state bodies is not necessary to enforce fiscal discipline in the market.

Section 13 of the proposed law empowers the court to place a business into bankruptcy if, in the course of an unrelated legal proceeding, it appears that the business is bankrupt. This power could divert the court's attention from the principle disputes in the unrelated proceeding. Moreover, the possibility of any lawsuit leading to bankruptcy gives the non-debtor party to a suit leverage in dealing with its adversary that is unrelated to the merits of the dispute between the parties. This makes the dynamics of lawsuits unduly complex and the stakes of litigation artificially high, so that resort to the courts as arbiters of disputes, which should be encouraged, especially in a transition economy, is correspondingly impaired.

The consolidation of legal actions involving the debtor in the court which is handling the bankruptcy proceeding, as provided in section 65 of the proposed law, is highly advisable. Centralization of legal proceedings is virtually essential to maintaining control over the assets of the debtor and to completing the collective process, be it rehabilitation or liquidation, that is the reason for establishing a bankruptcy system.

Judicial resources are typically very valuable in any society, whether the economy is in transition or is a fully matured market system. This argues against involving judges in routine transactions. It is also important to avoid placing judges in potential conflict of interest situations, since this undermines respect for the judicial process and intensifies the demand on scarce judicial resources in the event recusal is necessary. Sections 59 and 60 of the proposed law empower, or perhaps require, the judge to supervise transactions in the ordinary course of a business' affairs. This unnecessarily consumes the judge's time and could require recusal of the judge in the event any of these transactions later becomes disputed. The requirements for the court to convene the creditors, meeting[20] and for the judge to preside[21] are probably not an efficient use of judicial time and could lead to a clear conflict of interest under section 77, which gives both the court and the Head of the Asset Management Team[22] the power to challenge resolutions of the creditors, meeting. Section 78 also raises the likelihood of a conflict of interest by requiring the judge who is responsible for the reorganization to preside at the trial to determine whether a reorganization should be undertaken.

Section 85(3) provides a voting procedure for acceptance of the plan of reorganization which establishes a class of secured creditors and a class of unsecured creditors. The proposed law does not, however, require that the parties entitled to vote hold claims that would be "impaired," in the sense that they would not be fully paid under the rehabilitation plan being voted upon. Only those creditors who will suffer some economic harm under the terms of the plan, however, should be entitled to vote; parties who will be made whole under the plan should be presumed to accept it and not be permitted a role in voting on the plan. Modifying the proposed voting structure along these lines should streamline the process of plan formulation and acceptance.

By requiring that secured creditors accept the plan by two thirds of the value of their claims, the law gives greater leverage to holders of secured claims than it does to holders of unsecured claims, who must only accept the plan by a majority of the value of their claims; but, presumably, secured creditors will already be protected by their security or by some requirement that the debtor provide the secured party with adequate protection of the security interest in return for use of the collateral, so providing secured creditors with greater voting leverage would not seem to be equitable. Voting power should reflect the extent of claim impairment.

---

[20]Section 71.

[21]Section 72.

[22]Section 16(1) specifies that the Head of the Asset Management team will be a member of the court staff. This could place the judge in the position of having to rule on a position taken by a member of the court□s own staff.

Section 98 prevents directors, members of the board of management, and the president of a bankrupt organization from holding similar positions in any other enterprise for a period of from one to three years.[23] Section 98(2) allows for three narrow exceptions to this: (1) bankruptcy due to force majeure; (2) lack of "direct responsibility" for the bankruptcy; and (3) where a voluntary bankruptcy has been declared and creditors have been paid in full.

Business failure is a common occurrence in a market economy and frequently involves circumstances which do not fall within the exceptions, but which, at the same time, do not involve fraud or willful mismanagement. Market economies are notoriously volatile and changeable. Part of the strength of market economies is their flexibility to adjust to changing social conditions. To achieve this flexibility, however, a significant degree of "fault tolerance" must be built into the economy. Without this, innovation and risk-taking are not sufficiently stimulated to permit the market to flourish and contribute flexibility to the society. Debarment of business people from the market as the result of failure, even when that failure is a result of their own misjudgments, dampens the type of atmosphere necessary for a sound market economy, and should be avoided. This is especially so when the debarment from the market is extended to foreign participants, as it would appear to be through the application of section 99. This provision can be expected to have a detrimental effect on the level of foreign private investment.

Conclusion

The Republic of Vietnam has correctly recognized that revision of its bankruptcy law is a key element in moving its economy towards a market-based system. The process of developing an effective bankruptcy system is difficult, as the history of the law of the United States shows.[24] For the first century after the passage of our Constitution, insolvency was handled for the most part by a patch-work of state laws, without a national system. Development of an effective bankruptcy law for an economy in transition is especially difficult due to the changing character of the economy which the bankruptcy law is designed to serve. Successive revisions of the law are to be expected, based on the experience gained under prior versions and according to the manner in which a market economy develops.

With these caveats in mind, further study and development of the proposed law is suggested.

The ability of a single creditor to place a firm into bankruptcy may lead to abuse of the law to settle two-party disputes rather than to resolve the financial distress of a company on a

[23]The law does not indicate what circumstances determine the actual term of debarment.

[24]Charles Jordan Tabb, The History of the Bankruptcy Laws in the United States, 3 American Bankruptcy Law Institute Law Review, No. 5, page 5 (1995).

collective basis, which is the true goal of a bankruptcy process.

Inclusion of collateral in the assets of the estate is essential to an effective rehabilitation system, as experience in Germany and elsewhere has shown. Lessors and lenders of property should not be permitted to reclaim their property unconditionally, since this power, too, may nullify the rehabilitation system. A workable rehabilitation system is especially important in a transition economy, since the market may not be sufficiently developed to absorb assets through a large number of liquidations. Further, reorganization processes may be a means for moving state owned enterprises into the private sector that is preferable to liquidation.

Rehabilitation of individuals is a key element of a bankruptcy system, especially in an economy in which sophisticated forms of business enterprises which limit the liability of individuals are not widely used. The proposed law expressly provides that business debts of an individual are not discharged and that the individual is prohibited from holding a management position in a business from one to three years following a bankruptcy. These provisions will exert a substantial deterrent to the risk-taking that is needed for the development of a vital market economy. Extension of these provisions to foreign parties will discourage private participation in Vietnamese business ventures.

The proposed law appears to involve the court in management of the bankruptcy process to a greater degree than is consistent with high efficiency. Valuable resources such as the time of judges should be reserved for key functions such as the resolution of disputes. This is recommended even in a system which draws from the inquisitorial tradition of jurisprudence. Many of the functions to be performed in administration of a distressed company can be performed more accurately and efficiently by other parties, as experience in the United States has shown.

It is hoped that considerations such as offered in this analysis will enable the final version of the proposed revision of the bankruptcy law to make a substantial contribution to the transition of the economy of Vietnam.

ANALYSIS OF PROPOSED REVISIONS TO THE 1994 BANKRUPTCY LAW OF THE REPUBLIC OF VIETNAM

Molly J. Baier
Senior In-house Counsel, Wells Fargo Bank

Most importantly, the issue of **separation of powers** deserves careful consideration in this draft law and its implementation. Here are several examples:

1. Section 16 describes an Asset Management Team consisting of members of the judicial branch (court staff), the executive branch (judgement enforcement office or judgment enforcement group) and representatives of various parties in interest (merchant, employees, creditors). Section 16 makes the court staff the head of the team. The law does not state how decisions are to be taken by this team. For example, does the majority decide? Does the Head of the Team hold all the power? Unless it is set forth in the law, there is a risk that one or more members of the Team will control too much power.

It might be better for each member of the Team to have a different role. For example:

A. Generally, the court staff's role should be limited to assisting the judge in carrying out court hearings.
B. Section 67 provides for the Asset Management Team to finalize the creditors' list. The merchant, not the court staff or the enforcement office, should generally make the list of assets and liabilities of the merchant. If the creditors disagree, they should submit an alternate list to the judge. The judge should decide the final version of the list.
C. The judge's decisions should be obeyed by all parties, but if forcible enforcement is required, it should be the task of the judgement enforcement office, not the other members of the Asset Management Team.
D. Various other tasks administrative tasks that are assigned to the Asset Management Team might be better carried out by the authorized representative of the Judgement Enforcement Office. For example, the deposit of monies into a newly opened bank account (Section 19.5), or the registration of a secured loan (Section 69).

2. If Separation of Powers is properly exercised, only the judge will have discretion in making decisions. In Section 17.2 there is a reference to the head of the Judgment Enforcement Office "issuing" a decision. Section 18.1 gives the head of the Asset Liquidation Team the power to "issue decisions" on various subjects. Section 19.3 states that the Head of the Asset Liquidation Team makes the decision regarding recovery of an asset. Perhaps the meaning is not clear because of translation. It should be confirmed in the original that only the judge has the discretion to issue decisions. The Judgment Enforcement Office should then carry out the

decisions.

3. Section 15 gives the judge the power to "gather evidence." How is the judge to do this? Neither the judge nor the judge's staff should speak with parties outside of court. Rather, the employees, merchant, creditors and so forth should submit the evidence to the court where all parties can review it.

4. Section 16.2(d) states that the Asset Management Team shall "enforce" the judge's decisions. This should be the task of the Judgment Enforcement Office - not the representatives of the financial and banking offices, the creditor's representatives, the labor union representatives or the merchant's representatives.

Comments on individual sections - first installment.

Section 1.2. There is a phrase "in accordance with the Government's provisions" which appears in a number of sections of the draft law. (see also, for example, Section 9.3(e) and 9.4). If these provisions are currently in existence, it would be helpful to specify where they are published and how they are codified. If this legislation is intended to empower a certain government commission or agency to promulgate new rules and/or regulations, or to amend those in existence, then the agency charged with this responsibility should be clearly specified. (If the agency or commission does not yet exist, the legislation should specify how the commission is to be appointed or elected). Please consider whether any guidelines should be given or restrictions placed on the scope of rules or regulations the commission may enact, how often the rules may be changed, and where the rules are to be published so that they are available to everyone to review.

Section 4. It is difficult due to the translation to understand what is meant by "handled," but I recommend checking the original to see if it refers to a precise point in time (such as the time the court enters an order deciding to handle the case), or, as the English translation suggests, a process that could occur over a lengthy period of time. Parties need clarity as to the point in time when suspension shall occur. Consider cross referencing Section 4 to entry of the court's decision in Section 50.

Also in Section 4, when speaking of "temporary suspension," describe the conditions under which the suspension would end.

Section 6. Consider adding a definition of Small, Medium and Large Enterprises for purposes of section 15.

Section 6.4. Be sure that the definition of "Merchant" includes "owner of a state-owned enterprise", since that is described in section 10.1.

Section 6.9. For clarity, move the provision currently found in Section 52.2 to section 6.9.

Section 8.1. Consider specifying a time period during which the salary must go unpaid before an employee may file a petition. For example, it could be specified that if one week's salary were not paid within 3 days of the date it was originally due, then the employee could file a petition.

Section 8.5. Please consider whether there will be a fund from which the costs of the bankruptcy proceeding commenced by employees can be paid. (For example, who will pay the costs of publication required under Section 55?

Section 9.1. Consider cross referencing section 6.9 for the definition of "bankrupt situation."

Section 9.3(b). Will it be clear from other laws or regulations what the "financial report" should contain?

Section 9.3(d). The list of debts should include mention of any assets pledged as security for the debt. (Perhaps there is a translation issue whereby "securities" was intended to mean "security.")

Section 9.3(e). There appears to be a logistical problem in this section. How can the merchant attach to the petition documents that the court has ordered attached? Presumably, the court will hold its first hearing after the petition is filed. Please consider providing, in a separate sentence, that the court may order additional documents to be filed to supplement the original petition.

Section 10. The phrase "state-owned enterprise" does not appear in section 6.4. Please check the original version to see whether this is the same as "enterprises belonging to political or social organizations." If a "state-owned enterprise" is in fact something different from a "merchant," then "state-owned enterprises" should be mentioned in section 1.1.

Also check the original of Section 10 to see that "bankrupt procedure" is the same as "liquidation procedure" under section 5.1(b). The same term should be used throughout the law to avoid ambiguity. (See also title to Chapter III.)

Section 11. Section 6.4 speaks of "holding companies" but not "share holding companies." Please check the original to see that they are the same.

Section 17. If the merchant has assets in more than one district, please consider whether the Judgment Enforcement Office has the power to take control of, and liquidate, assets in districts other than where the merchant's principal place of business is located. If not, please consider expanding this legislation to permit ancillary administration by enforcement offices in other districts.

As currently drafted, the time line for events to occur in a hypothetical bankruptcy case appears to be as follows:

Petition by Merchant
June 1 - Merchant falls into bankrupt situation - §6.9
July 1 - Petition filed - §9
July 7 - Decision to handle petition or require additional documents - §§50.1, 50.3
July 14 - Additional documents due - §50.3
July 21 - Decision to handle petition based on additional documents - §50.3
July 17/July 31 - Court notifies merchant of decision and publishes notice - §55.1
July 17/July 31 - Merchant is prohibited from making payments of debts except with the judge's approval - §61.1
September 5/September 19 - Inventory is to be completed - §68
September 15/September 29 - Creditors' claims due in court - §55.3
September 20/October 4 - First Creditors' Meeting convened - §71
October 10/October 19 - Trial on commencement of bankrupt settlement procedure -§78.1

Petition by Credit or other third party
June 1 - Request for payment of due debt sent - §7
July 1 -Petition filed - §7
July 5 - Court gives notice to merchant - §48.2
July 20 - Financial reports and list of debts must be filed - §§48.2, 9.3
July 27 - Decision to handle petition or require additional documents - §§50.2, 50.3
August 3 - Additional documents due - §50.3
August 10 - Decision to handle petition based on additional documents - §50.3
August 6/August 20 - Court notifies merchant of decision and publishes notice - §55.1
August 6/August 20 - Merchant is prohibited from making payments of debts except with the judge's approval - §61.1
September 25/October 9 - Inventory is to be completed - §68
October 5/October 19 - Creditors' claims due in court - §55.3
October 10/October 24 - First Creditors' Meeting convened - §71
October 25/November 8 - Trial on commencement of bankrupt settlement procedure -§78.1

This time line presents a dangerous opportunity for a merchant to favor payment of certain creditors or for assets otherwise to be dissipated instead of divided fairly among employees, tax authorities and creditors. The reason for this is that there is a substantial gap between the time the petition is filed and the time the prohibition becomes effective.

In the case of a petition by a merchant, the prohibition could be made effective upon the filing of the petition under section 9.

In the case of a petition by a creditor or other third party, there is an even more substantial opportunity for abuse of creditors by the merchant: first the gap is for a longer time period; and second, the merchant who fails to initiate a petition may be more likely to engage in

such asset transfers.

First, the creditor must send a request for payment and wait 30 days. This alone could allow the merchant to dissipate all assets. Second, even after the petition is filed, the creditors may have to wait as long as 7 weeks before the merchant becomes subject to the prohibition on making payments. Ways should be found to shorten this period. For example, the court could notify the merchant of its decision to handle the petition more quickly, making the prohibition effective more quickly. In addition, a provision could be added to the Bankruptcy Law permitting the creditors to file a petition without waiting 30 days, and to submit evidence to the judge showing reasons why the prohibition should be imposed immediately, or within a few days. The statute could provide the merchant with an opportunity to respond, after which the judge could issue a decision on a provisional measure under Section 15.3(c). The evidence should be considered very carefully, because it could be detrimental to the merchant's business for the judge to impose the prohibition. The judge could minimize this risk by being more liberal in verifying payments permitted under section 60.

If the judge found the evidence insufficient to grant the prohibition immediately, the petition could be re-filed after the normal 30 days' demand had been given.

Modifications to the existing time line should also be considered to require the inventory to be completed much more quickly. Otherwise, there is a danger that assets could be transferred away before creditors are aware that they exist.

Another modification might be considered to have the creditors' meeting held more quickly, and to leave a longer period of time between the creditors' meeting and the trial on the plan. If a plan will be complex, it may take more than 15 days to discuss it among all the creditors, once their claims are filed and the representatives are elected.

Comments to individual sections – second installment.

Section 13. Please consider including standards or criteria by which the judge would decide whether to commence a bankrupt procedure.

Section 15.3(a). The judge should not "gather evidence" himself or herself. Rather, he or she should listen to evidence brought by other parties. Otherwise, there is a risk of the judge hearing and reading things that the parties are not aware of. If this evidence is not true, there will be no easy way to set the record straight even if one of the parties has evidence which would show it to be untrue.

Section 15.3®. What standards or criteria should a judge use in determining whether rehabilitation or liquidation should apply?

Section 16.2(b) Please consider whether the Asset Management Team should have the power to "supervise" the management of the merchant's assets when doing so might interfere with the

running of the business.

Section 16.2(c). Does the claim which a creditor files under section 55.3 supersede the amount which is established by the creditor's list?

Section 22.1. Please clarify when the merchant is "recognized" as having fallen into a bankrupt situation. Is this as specified in section 50? If so, please consider establishing an earlier point in time, such as the petition date in a case initiated by a merchant.

Section 22.4. Under American bankruptcy law, secured property is considered part of the bankrupt assets

Section 23. Perhaps the judgment enforcement office should have the power to manage assets, rather than an asset management team which includes parties who might have other interests.

Section 26. Will the secured creditor have the right to object to the sale of a pledged asset if the price at which it is proposed to be sold is too low to repay the secured debt in full? Alternatively, will there be a requirement of an auction or other public sale, in order to maximize the price charged? May the secured creditor receive the proceeds of a sale as soon as it is completed, or will he or she have to await the distribution plan under section 94?

Section 27.2. Are there any limits on the amount of salary that is entitled to priority? Are there any restrictions or opportunities for creditors to object if the salary is to be paid to an insider or high company official?

Section 29. Please consider whether such claims will require judicial approval pursuant to section 60 in all cases, or whether certain categories of such claims can simply be paid in the ordinary course of business.

Section 33. The period during which certain activities are void needs to be expanded to include activities conducted after the merchant ceased payment of debts. Otherwise, there will be a gap during which all such activities will be permitted to stand, until notice of the court's decision is published and section 60.2 takes effect. It should also be clarified what is meant by "ceased payment of debts." What if some debts are being paid and others are not? Does it apply only if a demand has been sent and not responded to?

Section 34. An exception could be made to the power of denial if the creditor received less through this transaction than he or she would have otherwise received in a liquidation case.

Section 40. Please consider specifying the measure of damages. Is the creditor obligated to mitigate damages? Is the measure of damages the lost profit or simply the difference between the contract price and the market price?

Section 41. If the merchant's wage belongs to the bankrupt assets, please consider whether there should be a portion which is exempt, to be used for living expenses.

Section 46. Is the cross reference to Section 37 correct?

Section 47. Who is liable to pay the compensation to the transferee? Does it make a difference if the transferee is innocent or a part of a scheme to defraud other creditors?

Section 50.2. Please consider adding: "…within 7 days of the deadline for receipt of the documents….."

Section 55.3. How will we know when creditors have "received" the notice? Will it be hand delivered? Will the person making delivery keep a written record of delivery? Does the deadline run from the later of 30 days from receipt or 60 days from publication? Will a creditor need to file a claim even if is shown on the list prepared by the Asset Management Team?

ANALYSIS OF PROPOSED REVISIONS TO THE 1994 BANKRUPTCY LAW OF THE REPUBLIC OF VIETNAM

Honorable Samuel L. Bufford
US Bankruptcy Judge, Central District of California

The following are my comments on the proposed amendments to the Vietnam bankruptcy law. These comments are based principally upon the best practices relating to reorganization and liquidation that have been developed by UNCITRAL.

Most of my comments suggest additional provisions that are not in the present statute or the proposed revisions. I can provide model statutory language (which has been drafted for the revision of the bankruptcy law in Ecuador) for these subjects.

Debtor's Discharge

Probably the most important element missing in the Vietnamese bankruptcy law is the discharge of debtors who are individuals. Section 96(2) explicitly denies a discharge to an individual or the owner of a private enterprise. Such a provision is a substantial inhibition to the development of economic activity, and is contrary to best practices recognized throughout the industrial world. It is very important that individuals have the ability to discharge past debts and to be able to obtain a fresh start in the economy. Such individuals frequently make valuable subsequent contributions to the economic life of a community.

A discharge is also needed in a second context. A reorganization plan typically provides for only partial payment of unsecured debts (and it may change secured debts as well). The law should authorize a plan to discharge all unsecured debts that are not to be paid in full over the life of the plan.

In a related matter, under international best practices, the law should prohibit discriminatory treatment of a merchant who has filed bankruptcy, with respect to employment, access to government benefits, and participation in economic life of the community.

In addition, section 98 should be deleted in its entirety. This section prohibits the directors, the president and the members of management from holding similar positions within one to three years after the declaration of bankruptcy, with certain exceptions. This provision discourages utilization of the bankruptcy law, and also interferes with the ability of a merchant to rehabilitate and to become a successful, productive participant in the economy. We tried this approach in the United States in the early days of the republic, and found that it inhibited economic development. Merchants should be permitted to undertake new enterprises after bankruptcy. Bankruptcy should be treated entirely as a civil matter, with no criminal or administrative penalties to a debtor who is the subject of a bankruptcy case. The law may permit other businesses, however, to take the bankruptcy into account in deciding whether to extend credit or on what terms it should be granted.

Under international standards, certain debts may be excepted from a discharge. Appropriate

exceptions include debts resulting from intentional extracontractual responsibility (intentional torts), alimony and child support, and perhaps taxes. However, obligations owing to a government agency apart from taxes and penalties should be dischargeable.

Government Involvement in Case Administration

The second most important reform needed for Vietnam's bankruptcy law is to remove the government from the administration of bankruptcy cases, both reorganizations and liquidations. This would require a modification of both article 16 (asset management team) and article 17 (asset liquidation team) to remove the government officials from these teams. International standards require that both reorganizations and a liquidations be administered in a transparent fashion to obtain the highest recovery for creditors. Management of bankruptcy cases by the private sector of the economy can provide these incentives. Government agencies lack these incentives, and their decision-making is not transparent. In addition, losses are multiplied whenever government agencies have an important role in insolvency systems.

The removal of government agencies from the bankruptcy process also helps to achieve another international goal, that bankruptcy losses be confined to the private sector and not be paid by the government.

Automatic Opening of Voluntary Case

International best practices require the automatic opening of a bankruptcy case that is filed voluntarily by a merchant. No administrative or judicial decision is needed to open a voluntary bankruptcy case. Section 13 or section 50 should be modified accordingly.

In addition, it is extremely important under international standards that the moratorium under section 64 apply automatically to all creditor collection activities from the moment of the filing of a voluntary case (both reorganizations and liquidations). Again, no judicial decision is needed for this purpose.

Automatic opening is especially important in a voluntary rehabilitation case, so that the business can continue to operate without interruption. If business activities are interrupted, even for a few days, they rarely resume. In consequence, the value of the business disappears and all creditors suffer the resulting losses.

Financing and Credit

In the reorganization context, it is absolutely essential under international standards that the law authorize a debtor, after filing bankruptcy, to obtain credit for continuing to operate the business. The debtor should be authorized to borrow money on security, and in appropriate circumstances to prime existing secured creditors. In certain liquidation cases, it is also necessary

for the liquidator to obtain such financing to preserve the value of a business and to permit its sale as a package.

Scope of Moratorium

The law should clearly state that secured creditors are subject to the moratorium provided in section 64. Many businesses are worth more if they are sold as a package rather than in pieces. It is very important that the moratorium apply to secured creditors to permit such a sale. If it is not feasible to sell a business as a package or several large packages, the court can grant relief from the moratorium for a secured creditor to take or sell its collateral.

Conflicts of interest

There is no provision in the law to protect bankruptcy officials from conflicts of interest. The law should provide that the judge and the judge's close relatives have no conflicting interest in the debtor or a creditor whose interest the judge must decide. The same rule should apply to the members of the asset liquidation and asset management teams.

Professionals

The successful administration of bankruptcy cases, both rehabilitation and liquidation, frequently require the use of experts, including lawyers, accountants and business experts. The law should provide for their employment by the liquidator or the debtor in rehabilitation with the approval of the court. The law should also provide for the payment of these professionals from the bankruptcy assets with court approval.

Administrative Expenses

International best practices dictate that the expenses of administering a reorganization or a liquidation should have first priority in the distribution of assets, and that these expenses should be paid before other creditors (except secured creditors).

Evaluating Claims

Section 75 assigns to the meeting of creditors the duty of evaluating claims. No legitimate evaluation of claims can take place in such a context. Claims need to be evaluated by experts,

including lawyers and business advisors. Frequently it is necessary to litigate the value of a claim in court.

Consolidation of Related Cases

Frequently a business enterprise that becomes insolvent involves a number of separate legal entities. The law should provide for the procedural consolidation of such cases, and for their substantive consolidation (unification) in appropriate cases.

Abandonment of Burdensome Assets

It frequently occurs in a bankruptcy case that some assets have little or no value for the reorganization of a debtor, and cannot be sold for any consequential value. The law should provide for these assets to be abandoned to the debtor or to a secured creditor (where the assets are subject to a security interest), so that the liquidator does not continue to incur expenses in safeguarding these assets.

Rights of the Debtor

Under international best practices, the law should provide specifically for rights of the debtor or the debtor's management to participate in the bankruptcy process. This should include the right to participate and to be heard in court proceedings, and the right to obtain information from the reorganization committee or the liquidation committee about the progress of the case. Section 9 should clarify the corresponding duties of a debtor to cooperate with creditors in providing them information, and to assist the reorganization committee or the liquidation committee in carrying out its duties.

Liquidator

The law should specify the measure of compensation for the liquidator, who should be appointed from the private sector. The law should also provide for the removal or replacement of the liquidator in appropriate circumstances.

Reorganization Procedures

The provision in section 85 allowing only 15 days for forming a merchant rehabilitation plan

is much too short. In the United States, on the average, it takes more than a year to formulate such a plan. Fifteen days is especially short where the operations of a business must be changed or a portion of the business must be closed or sold to make it profitable. This period is also too short where the causes of business failure are entirely beyond the debtor's control, and based on economic circumstances that may only change over a period of time.

Furthermore, longer plans should be permitted. Section 88 limits the maximum term before a plan of reorganization to two years. In the experience of the industrial world, it frequently takes longer than two years for a business to return to profitability under reorganization plan, and to repay its creditors. A limit of five to eight years would be more appropriate.

UNCITRAL Model Law on Cross Border Insolvencies

UNCITRAL has promulgated a model law for internal adoption in each country for the coordination of international insolvencies. This law has been adopted in Canada, Mexico, Japan, South Africa and Eritrea. Many other countries, including the United States, are in the process of adopting it. Vietnam should also.

Closing and Reopening

Finally, the law should provide specifically for the closing of a case when it is completed. In addition, the law should provide for reopening the case if assets are subsequently discovered, or other problems arise that need further administration or legal rulings.

ANALYSIS OF PROPOSED REVISIONS TO THE 1994 BANKRUPTCY LAW OF THE REPUBLIC OF VIETNAM

Dao Nguyen (Ho Chi Minh) & Jonathan Hickin (Hanoi)
Johnson Stokes & Mater, Vietnam

(A) GENERAL

It is our understanding that since the opening up of the Vietnamese economy in the late 1980's there have been very few cases of enterprise's being placed into liquidation through the court process and that since the enactment of the Bankruptcy Law in 1994 a few hundred enterprises (at most) have been successfully liquidated.

This reflects a number of practical and legal difficulties under the current system.

(i) The difficulty of establishing insolvency under the existing legislative regime;

(ii) The mandatory requirements for attempted rehabilitation of distressed companies;

(iii) Inconsistent application of the law by the courts and an underdeveloped system of court procedure.

It appears, therefore, that there has been a reluctance on the part of the policy makers (which has been reflected on the application of the law by the courts) to allow companies to be placed into liquidation. Accordingly, and given the discretion which ultimately resides with the court the detailed provision of the amended legislation will have little impact unless there is an acceptance in principle that technically insolvent companies should be wound up.

(B) STRUCTURE OF THE DRAFT

The draft law is structured in two parts; the first containing general provisions (Chapters I – IX, ranging from Basic principles to treatment of antecedent transactions to recovery of assets); the second part deals with procedural matters (again Chapters I – IX, covering issues ranging from lodging of the petition to creditors meetings, to the rehabilitation procedure).

However, this structure is not particularly well or logically ordered and is not easy to understand or to follow. There are also some examples of provisions contained in the procedural Part II which should properly be found in the General Principles Part I. By way of example in the Second Part, Chapter II, Section 59, provisions relating to the right of the Asset Management Team ("AMT") to deal with property of the Insolvent Enterprise. We would suggest that the treatment of procedural matters should be handled separately and in a

way consistent with other court rules of procedure and practice (since the economic courts would have to handle liquidation petitions in practice). There is also some justification for the argument that the rules of procedure should be provided for in a separate document, independent of the Law. This is usually the case in other jurisdiction where the rules governing company liquidations would usually be found in a companies Ordinance/Act and the rules of procedure separately provided for by way of companies winding up rules or incorporated as a specific section of the Court Rules of procedure.

Within such a structure we believe that the General Provision Sections, or Law, dealing with Corporate Liquidation Principles should be structured along the following lines:

1. The purpose of the legislation. If this is primarily to facilitate creditors in pursuing their claims, leading to the liquidation and dissolution of insolvent companies then this should be stated. If it is intended to focus on rehabilitation of insolvent companies then equally this should be stated.

2. What types of Liquidation. There is a need to distinguish clearly between insolvent liquidations (and the clear test for insolvency), just and equitable liquidations (for example in the case of irreconcilable shareholders disputes), and public interest liquidations.

3. Commencing the Process. By creditors or by the court (involuntary liquidations), or by the company (voluntary liquidations) and the distinction in terms of procedure etc. should be made explicitly clear in the Procedural Section to follow).

4. Administration/Supervision of the Liquidation. Following the date of the winding up order the role of the creditors, court and other bodies should be clearly provided for (see comments below on this). The right of the 'administrators' in dealing with the wound up companies property etc. should be specified in this section.

5. Rights of Creditors. The rights of creditors with regard to distribution of assets of the insolvent company need to be included here, and a very clear expression of the Pari Passu principle enunciated (if it is intended to apply, see comments below) etc.

6. Antecedent Transactions. Separate provision should be made for the setting aside of antecedent transactions such as unfair or fraudulent preferences (with clear time frames provided for), void transactions, and powers of recovery of illegally disposed of property of the insolvent company.

7. Liability of Offices of the Company/Offences. The liability of offices of the company for actions leading to the insolvency of the company need to be specifically provided for and the penalties very clearly set out.

8. Rehabilitation of Insolvent Companies. This is deserving of a separate section in the legislation to make clear what circumstances would justify the court invoking its powers to give effect to a "Corporate Rescue" of the company. The form of such corporate rescue and clear principles as to how it needs to be approved, administered and for what period it may be used also need to be provided for. The current draft in the Second Part, Chapter VI, Sections 85 – 90 needs some clarification/redrafting in this regard.

9. Rights and Responsibilities of the Administrators. This would be more conveniently handled in one discrete section which provided for the role and duties of the AMT/ALT. For example, the provisions relating to Application of Provisional Measures found in the Second Part, Chapter III, Section 70 of the draft Law would be better placed together with those provisions in the First Part, Chapter III, Sections 14 – 20.

With regard to the Section of the law dealing with court procedure, or separate court rules addressing this, the following things come to mind which need to be addressed:

1. Definition of Bankruptcy. The draft Law does not contain a clear and simple test which needs to be satisfied in order to persuade the court that "a merchant has fallen into bankrupt situation" (Part II, Section 52(2) of the draft Law). There should perhaps be a rebuttable assumption of bankruptcy following the occurrence of certain events such as non-satisfaction of a formal demand (prepared in a prescribed form and served in a required manner) after a certain period of, say 30 days. In the event that this test is satisfied the burden should rest on the company to prove its solvency and ability to continue its business.

2. Provision for Effective Date of Liquidation. A clear procedural rule needs to be established for determining the effective date of the liquidation. In some jurisdictions this is not the date of the eventual court order but the date of presentation of the petition. In any event this needs to be clearly provided for since the rights of the company, creditors, and administrators will be fixed by reference to such date.

3. Pre/Post Winding Up Order. The rules of procedure suggest a role for the court in the period prior to and post making of a winding up order. Whilst there is no reason in principle why this should not be the case, there should be a clear distinction between pre and post winding up order issues. In this regard, the Second Part, Chapter VII, Sections 91 – 96 appear somewhat confused. It would be easier to understand, and would assist in the administration of the process if a clear distinction were made between the pre winding up order period (during which the court's only consideration should be whether a winding up order should be made or not), and the

post winding up order period (when the court can properly consider questions of administration of the companies affairs, collection of assets, distribution to creditors etc.).

4. Immediate/Emergency Relief. The draft law contains no provision for an appointment akin to that of a provisional liquidator (in other common law jurisdictions for example) to deal with matters on an urgent basis. This type of appointment may be useful in some circumstances, and it may be worth addressing the possibility of including this type of provision and the circumstances in which such an appointment would be justified. Perhaps the Second Part, Chapter III, Section 70 could be expanded in this regard.

(C) SCOPE OF APPLICATION OF THE LAW

The draft law is stated as having application specifically to merchants (as defined) but a number of organisation may fall outside of such definition – for example, credit institutions. Ideally this definition should be more expansive. This is not just limited to the organisations which may be the subject of bankruptcy proceedings but also those creditors entitled to lodge a petition (per Part One, Chapter II, Section 7). The Law should be very clearly drafted in this regard to include all creditors of whatever type.

(D) ADMINISTRATION OF LIQUIDATIONS

In order to effectively manage the liquidation procedure there is arguably a need for the involvement of a more administrative type body once the court has done its initial adjudication and decided whether to make a winding up order. In jurisdictions like Hong Kong or England, this role is taken on by the Official Receiver's Office ("OR"); which overseas liquidations post making of a liquidation order. The OR is usually a government funded organization which administers insolvent companies, deals with recovery of assets and distribution to creditors. Often this process is handled with the assistance of 'Special Managers' or court appointed liquidators – in each case insolvency practitioners charged with the specific task of winding up the companies affairs in an orderly and legal manner. The liquidators/special managers owe a dual duty to the court and to the creditors.

In the draft legislation this function falls on the Asset Management Team, supervised by the Asset Liquidation Team under the Judgement Enforcement Group. However, the provisions found at Articles 14 – 21 in this regard are not completely clear, there is some blurring of responsibility between these various Teams/Groups and the process envisaged is not absolutely clear about who these bodies are answerable to; the court, the creditor or another body?

(E) BASIC PRINCIPLES OF DISTRIBUTION OF ASSETS

Whilst the draft law contains some provisions with regard to the rights of secured versus unsecured creditors there is no unequivocal statement of the Pari Passu principle upon which the liquidation of companies in many other jurisdictions in founded. In the First Part, Chapter V, Section 27(4)(b) this principle should be made absolutely clear as it is a fundamental principle of fairness on which orderly liquidations should be based.

(F) INDIVIDUAL BANKRUPTCY

Under the existing legislation there is no concept of or provision made for the bankruptcy of individuals in Vietnam. However, the definition of "merchants" in the draft law does include reference to individuals and partnerships. Notwithstanding this proposed departure from the existing law there is no separate or special provision made in the draft law to deal with personal bankruptcy rather than corporate liquidation. Clearly different principles and rules need to be provided for both corporate and personal insolvencies.

(G) OTHER ISSUES

A number of other general issues present themselves which need to be addressed in the draft law including:

1. Cross Border Insolvencies. Clear principles should be provided for cases of cross border insolvencies and cases where companies in different jurisdictions are declared insolvent. In such a case, what would happen to assets or interests owned by such a wound up company in Vietnam? Also, what would be the right of a foreign liquidator to intervene in a business in Vietnam, and what approval from the court or other bodies (for example the MPI or other licensing authorities) in Vietnam would be required. The UNCITRAL Model Law on Cross border insolvency issues may give some guidance to the drafters of the legislation in this regard.

2. Group Insolvencies. The effect of the liquidation of one company within a group of companies should be considered. For example, would the liquidation of a parent company automatically result in the liquidation of its subsidiaries. What if such subsidiaries were profitable and viable businesses in their own right? Also what rights would one group company have as a creditor against another insolvent company in the same group with regard to shareholder loan arrangements or other inter-company financing arrangements.

3. Employee Petitions. The First Part, Chapter II, Section 8 of the draft law provides for the right of individual employee's to petition for a corporate insolvency in the event of non payment of salary. This is a dangerous provision since it may open the door to petitions in cases where the dispute is simply a employer/employee issue in no way connected to insolvency or giving rise to the need for insolvency proceedings.

The issues raised in this paper are selective only and a comprehensive review has not been possible given the time constraints in reviewing the draft law and quickly responding to the request for comments. This review is also based on an English translation provided to us and no review of a Vietnamese version of the document has been possible.

ANALYSIS OF PROPOSED REVISIONS TO THE 1994 BANKRUPTCY LAW OF THE REPUBLIC OF VIETNAM

Nicolas Audier
Associate, Gide Loyrette Nouel

I am happy to provide my comments and remarks on the second draft of the new law, (the "Draft"), mainly based on my legal practice in Vietnam over the last eight years and the experience I have acquired in the liquidation and early dissolution of foreign investment projects.

I understand from discussions with the drafters, and especially from Mr. Ngo Cuong of the Supreme Court of Vietnam, that the new law on bankruptcy should be approved by the National Assembly in November 2002. This new law shall replace and supersede all previous regulations and indeed the 1993 law.

Due to time constraints, I will just highlight the main issues in point form in this memorandum but as a preamble, allow me to provide some general comments:

1. General Comments

There is indeed a need for the public sector (including state-owned companies) the private sector (including foreign invested companies), individuals, and any other entity (such as not for profit organizations), to benefit from a comprehensive regulation on liquidation.

The current regulation, the 1993 law, not the 1939 law as mentioned in the English translation, is rarely applied in practice, and I have been faced over the years with practical difficulties in commence proceedings before the People's Courts for many reasons such as, mainly, the lack of training and expertise of experts of various Vietnamese authorities. Therefore, to implement the new law effectively, efforts should be devoted to train judges and experts in the main industrial cities in Vietnam, (Hanoi, Ho Chi Minh City, Haiphong, Danang, etc…).

In Vietnam, according to the statistics, there are approximately 40,000 domestic enterprises, and 3,000 foreign invested companies. Since 1993, the Supreme Court has seen an average of 20 bankruptcy cases per year which indeed does not reflect the real picture of Vietnamese private and state owned enterprises, and many companies are continuing to run on a loss basis. That significantly impacts the banking sector, and the so-called "bad loans" are, and remain, an issue for any reorganization of the banking industry, and the various creditors which are reluctant to provide any rescheduling of repayments. Vietnam is still a cash economy.

Another main point of concern is the lack of transparency. Although enterprises are required to file

their annual accounts to competent authorities, in practice it is difficult to obtain a copy of such documents from the provincial and municipal Departments of Planning of Investment or the central Ministry of Planning and Investment. Bankers, lawyers and creditors have to rely on information provided by the enterprises and not from a neutral third party. Therefore, when lawyers have to provide, for example, a legal opinion on a loan agreement, their task is not easy since they have to include a lot of restrictions and limits. Therefore, efforts should be made to provide for full transparency and easy access of information.

As to the drafting of the new law, many legal approaches could be adopted. For example, the creditor approach which gives more powers to secured and unsecured creditors, and the procedure is mainly on their side. The other approach is to favor the continuity of the enterprises. In this approach, all solutions must be envisaged to reorganize the enterprises, and sometimes to the detriment of the creditors but to the benefit of the employees, and in such cases, judges of the Court are granted strong powers. If the solution is indeed in the hands of the Vietnamese experts, foreign consultants should present the *pros* and *cons* of these options and leave full freedom to the Vietnamese experts to decide which option is the best for Vietnam.

It is true as matter of practice, that Vietnamese authorities have over the years preferred the second option and are reluctant to liquidate failed enterprises. In one case in which I had been involved in Haiphong some years ago, the Court requested the foreign enterprise (the creditor) to take a stake in the enterprise under bankruptcy proceedings as a payment for its unpaid debt. That was in 1997, when the Asian crisis was at its most intense and sensitive level.

The Vietnamese rule is much more based on a consensus rule, and judges are reluctant to impose solutions on any parties. As a matter of practice, judges are requesting that all parties find a consensus solution on an arms-length basis. However, since Vietnam is willing to enter into a global economy, since Vietnam has signed and ratified a bilateral trade agreement with the US, which is applicable to other countries or group of countries such as the EU, and since Vietnam is applying to join the WTO, best practices must be envisaged in Vietnam to attract foreign investors and develop the domestic sector which is the only solution to achieve the necessary 6% to 7% growth rate per year to absorb the million young Vietnamese coming into the work force every year.

2. Detailed remarks

I have worked on the English and French translations of the Draft but terms should be properly defined and used in a comprehensive manner in the whole document and must be consistent with other definitions used in other relevant legal documents issued by other Ministries, the Government and the National Assembly. I refer in particular to the regulations on Land Law, Domestic Enterprises and the Foreign Investment Law. If this is not the case, implementation of the law shall be difficult and shall give rise to different interpretations and solutions from various Vietnamese authorities at the central level but also at the local level. I have also noted some discrepancies

between the English and Vietnamese versions.

In particular, I have the following comments:

- The definition of Merchant is not clear since it refers to a registration with an unidentified entity, presumably the Department of Planning and Investment of each of the People's Committee. That definition excludes individuals who are not considered or treated as Merchant. As to the definition of Enterprise, it would be wise to use the same definition as appears in the Enterprise Law and the Foreign Investment Law. For your information, Vietnam has a civil code, a commercial code and has an ordinance on economic contracts. As a matter of practice, it is difficult to assess if the civil code or commercial code is applicable in particular cases of dispute, and that has an impact on the competent court to try the case. Therefore, the definition should refer clearly to the definition of the commercial code to avoid any difficulty in the implementation of the new law. Furthermore, the new law should apply to any industries such as telecommunication, financial and banking, railways and airline industries.

- The new drafting of Article 2 has raised questions from some Vietnamese experts as to the application of the bankruptcy law to foreign contractors (not incorporated in Vietnam) who are doing business in Vietnam, and vice versa, Vietnamese enterprises having any interest in a foreign enterprise abroad.

- The definition of "bankruptcy" as mentioned in Article 6.9 must be consistent to avoid any conflict of interpretation with the definition in paragraph 2 of Article 52. The definition in Article 6.9 is clear and should be preferred to the definition in Article 52.

- The Draft does not provide any penalty in the event that the debtor does not file the Petition in time. (Article 9).

- The "Scope of Assets" as mentioned in Article 22 must take into account *inter alia* the notion of co-ownership of assets in the case of married couples, and must be consistent with the definition of Land Use Rights as mentioned in the Land Law and the Foreign Investment Law. Indeed, the main legal issue I have been faced with in Vietnam is the value of land use rights.

  In Vietnam the land belongs to the people and is managed on their behalf by the Government represented by the Cadastral Department of the competent People's Committee where the land is located. The beneficiary is granted with a simple land use right duly evidenced by a certificate (although such document is difficult to obtain in practice) not negotiable, which is in theory terminated when the rental fees are not paid. Issues arise when hotels, office buildings, or factories have been built on such land, since it is in practice difficult to assess the value of a building when the land use right certificate has been terminated. The real

estate sector is highly protected and is not open to foreign investors. Efforts should be made on this issue by the foreign consultant in conjunction with the land department to find a comprehensive approach.

The issue of Scope of Assets is indeed also important when the debtor is an individual. For example, can any personal belongings or any other assets be seized by the creditors?

- It is not clear why Article 25 includes in the liabilities the unpaid debt especially if the enterprise is subject to a rehabilitation plan? It makes sense if the enterprise is liquidated but not if the enterprise is subject to a rehabilitation plan.

- Article 27 does not mention the order of payment for secured creditors.

- Article 29 should indicate that the commencement date should be the date of lodging the application.

- The drafting of Article 33 should be reviewed since all activities are considered void if they were conducted within 6 months before the date on which the merchant ceased payment of the debts. It should be limited to irregular or abnormal activities. The right of returning assets (Article 44) should be limited otherwise a rehabilitation plan will not be possible in any event.

- As to the creditors, foreign experts should carefully review the right and duties of the creditors since the Draft is much more in their favor than the existing law. The creditors meeting should therefore represent all creditors whether they are secured or unsecured and make sure that there is at least one representative from the secured creditors and one from the unsecured creditors in the creditor meetings. As mentioned previously the deadline to convene the creditors meeting is too short and it is not certain that all creditors can be informed of such meeting. Be aware, that there is no presence in Vietnam of an Official Gazette as we can have in European countries.

- The Draft is confusing as to the starting date for the calculation of any delay since the Draft refers to (i) the date of lodging the petition, (ii) the date on which the court has issued the decision on handling the petition, and (iii) the commencement date of the bankruptcy settlement procedure. It would be wise to retain as a starting date for the calculation of all delays, the date of lodging the petition since it is indeed the real starting date of the proceedings. Therefore, the foreign experts should carefully review the practicality of all deadlines mentioned in the Draft, such as convening the creditors to the first meeting, or the commencement date of the calculation of the six-month period, (Article 33).

- Foreign experts should review the rehabilitation plan (Article 85 to 90) and consider including some guidelines. For example, the duration of the rehabilitation plan should

not be too long. Conversely, the 15-day period to approve the rehabilitation plan by the creditors is too short.

- The Draft should envisage the possibility of liquidating a bankrupted enterprise at the date of lodging the petition where the bankruptcy status of the debtor is not questionable, with indeed the immediate appointment of the Group of Creditors, and the Liquidation Team Managers. This is not the case in the Draft and the practical consequence is that many bankrupted enterprises may survive until a final decision is taken by the Court. A right of appeal should also be granted in the event of immediate liquidation.

The above list of comments and remarks is not exhaustive but it gives a brief overview of the legal issues that the foreign consultants shall be faced with during the implementation of his mission. I shall remain at your disposal to answer any questions you may have and to meet the foreign consultants to discuss all the above issues.

ANALYSIS OF PROPOSED REVISIONS TO THE 1994 BANKRUPTCY LAW OF THE REPUBLIC OF VIETNAM

Gerald D. Vinnard
Attorney, Thomas & Snell

Costs of the proceeding. All petitioners are required to advance costs of the proceeding, in accordance with the government's provisions. If these costs are substantial, this could discourage timely filings. It appears that the party advancing costs would be entitled to priority rights upon distribution (§27), but this should be made explicit. An alternative approach would be to require a relatively small filing fee for the petition, to be followed by dismissal if no party is willing to advance costs of the proceeding.

Administration. Sections 16 and 17 appear to provide that administration of bankruptcy cases will be handled by rather large committees composed of members with competing interests. Perhaps this system has worked in practice, but seems rather cumbersome and inefficient. Appointment of a trustee or other fiduciary with direct, day-to-day responsibility, subject to committee supervision, might be more effective.

Are any of the members of the Management Teams to be compensated, or reimbursed for expenses? This should be addressed.

Access to Information. Section 9 requires a petitioning debtor to provide detailed information on its assets, liabilities and financial history, but I couldn't find a provision authorizing a Court or Management Team to require a debtor to provide that information after an involuntary petition has been granted. The Court and/or the Management Team should have that power.

It would be highly desirable to adopt forms for the listing of assets and liabilities, and a questionnaire about the debtor's financial affairs, to be completed by all debtors. Leaving the format for providing information up to the debtor creates opportunities for concealing assets and withholding information.

Section 74 should be changed to require the debtor's attendance at the first meeting of creditors, and there should be a provision for subsequent examinations of the debtor at the discretion of the court and the case administrator.

Post-petition financing. Do the Management Teams have authority to borrow money, and pledge property under their supervision as collateral for loans? They should, if continued operation of the business is contemplated.

Sales. The only provision dealing with sales appears to be §19, which authorizes the Liquidation Team to organize an auction. The Team should, subject to court approval, be authorized to use other approaches, such as employment of a broker. Also, the sale of encumbered property needs to be addressed. Under what circumstances, if any, will the Liquidation Committee be permitted to sell property free and clear of liens?

Distribution. Unlimited priority for employment and tax – related claims seems unfair to trade and other general creditors, but this could depend on the anticipated nature and amount of such claims.

How are post – petition business expenses paid? According to §29 they will not be paid "through the preferential order", but I didn't see any provision specifying how they will be paid.

Plan Confirmation Process. Section 85 appears to require affirmative votes by both the unsecured and secured creditor classes. This effectively gives the secured creditors, who typically favor liquidation, a veto power over any rehabilitation plan (§90).

Section 85 appears to include priority creditors in the unsecured group for voting purposes. It would be better to create separate classes for such creditors, as they also have different interests.

The reference to "values" in §85(3)(a) appears to mean that the unsecured portions of secured claims cannot be voted in that class – will partially secured creditors permitted to vote the unsecured portions of their claims in the unsecured class?

The two-year limitation in §88 seems unreasonably short and inflexible. In most cases this limitation will mean that only a small percentage of unsecured claims are paid. Many creditors are likely to prefer liquidation because they would then retain their claims against the debtor (§96).

Debtor Benefits. There does not appear to be any provision for exempt assets – perhaps this is covered in some other statute.

The discharge and stay of litigation proceedings are unclear. Section 96 denies a discharge to a debtor whose assets have been liquidated, but the stay of litigation (§§ 4 and 64) isn't necessarily terminated. Sections 96 and 85 seem to mean that a rehabilitated debtor is discharged, but this should be made explicit.

Time. There are a number of provisions in the Bankruptcy Law requiring various acts and processes to be completed within specified time. Some are rather short – e.g., §§50 and 52 give the Court only seven days to decide involuntary petitions. The Court should have at least some discretion to extend times for cause – perhaps this is covered in some other statute.

Some of the time periods are not entirely consistent. For example, Section 48 requires notice to a debtor within five days after an involuntary petition is filed, but §52 appears to require the Court to rule on the petition within seven days – apparently giving the debtor only two days to respond to the petition.

ANALYSIS OF PROPOSED REVISIONS TO THE 1994 BANKRUPTCY LAW OF THE REPUBLIC OF VIETNAM

Douglass Bellis
Deputy Legislative Counsel, US House of Representatives

Vietnam has no doubt tried to add more detail to their original law, and this is a good goal. A key need for a bankruptcy law is predictability and certainty. When it is clear what happens in the case of an insolvency, both creditors and debtors can decide what they will risk in entering into a debt relationship in the first place. The new law includes more expected detail than the old, with the options of liquidation and reorganization set forth, the usual protections for secured debt, and some details like the creditors' meeting. But unlike many other bankruptcy laws, it does not appear to provide for insolvencies by non merchants. (Oddly, "merchant" is defined so broadly that it includes individuals, but apparently it is intended only to include individuals who are somehow in business. The key ingredient of the definition seems missing. There is an exclusion for, among others, "nosh vendors" which might tempt restaurants and others to either seek to fit in or avoid the definition.) The net effect of this is to create uncertainty as to whom the law applies.

Another issue that may add to uncertainty is that it appears courts on their own motions in unrelated cases may precipitate debtors into bankruptcy, or perhaps the procurator's office may do so. Sometimes both debtors and creditors would prefer not to do this. That courts and the government have so much discretion is not very helpful. Even the creditors' meeting sounds like something the court will fully control. The close tie ins with the procurator's office for referrals of criminal matters may also be a disincentive to those seeking bankruptcy protection.

Oddly, various details are required by this draft for a petition for bankruptcy. One wonders if an error in supplying that information, or the reasonable lack of information on the part of the petitioner, voids the petition. These sorts of requirements are usually left to court rules rather than included in a law. To sue anybody you have to know who they are. Why should it differ for bankruptcy proceedings?

An intriguing clause says that if a more specialized law addresses a topic covered by the bankruptcy law, the more specialized law applies. Who decides what is more specialized? It would be better to hunt down conflicts and decide them individually, rather than putting this shotgun into the law, with unpredictable results.

An overall theme is that the courts have considerable power over this process, without the consent of the parties. Going into bankruptcy may turn out to be unpredictable because of this and so avoided.

An advance of money is required for a petition by the bankrupt. Will they have the cash? What if they don't?

The overall idea should be that when a debtor, probably any debtor, gets into trouble, they or a creditor can initiate a process in which the assets of the debtor are verified and an agreed upon system found for either letting the debtor continue in possession of some or all assets while paying off agreed portions of the unsecured debt, or liquidating the assets and paying off the creditors more or less pro rata. If they can't agree, the court should step in, and the court should make sure any agreement is not unfair to any party. The debtor should be able to make a fresh start without being overwhelmed by the old debts that cannot be paid, and the creditors should get as much as is feasible of what they are owed as soon as possible. In essence, any bankruptcy law should be looked at through this lens. There is much debate about whether the fresh start is more important than paying the creditors the maximum amount possible, or vice versa, in the US. But either way, both debtor and creditor know what their rights are, so they can decide for themselves whether or not to enter into a relationship with each other. If the law favors creditors too much, debtors will not borrow to improve their businesses or add to their personal consumption and the economy is hurt. Likewise, if the law favors debtors too much, creditors will not risk their money, with the same results. The balance is hard to find, but predictability allows it to show itself over time and the law can be changed.

It is the lack of predictability, much of it coming from too much governmental and court discretionary power, that may be a defect in this draft bankruptcy law.

ANALYSIS OF PROPOSED REVISIONS TO THE 1994 BANKRUPTCY LAW OF THE REPUBLIC OF VIETNAM

Marc Albert
Partner, Morrison & Hecker LLP

1. Time limits set forth in the draft seem to be very short. Experience tells me that the Court and the parties can not comply in the time periods set forth in the draft.

For instance, the debtor must submit documentation to the Court within 15 days relating to his bankruptcy. The Court must decide within 7 or 15 days on handling the petition for bankrupt settlement. For another example, a creditor must submit a claim within 60 days and a lessor must submit documentation to have his assets returned with 30 days. The asset management must finalize the creditor list within a very short period of time. The Court must settle disputes relating to value of debt within 7 days. The commencement of the settlement procedure must be held within 15 days since the first creditors meeting.

2. Too many parties are involved in making decisions. You have the judges, you have the teams, and you have the creditor committees. I suggest this might prevent cases from being resolved efficiently.

3. Parts of the law leave some questions open. What is the test for rehabilitation plan. Is it just based on votes. The US system also requires best interest of creditors. In other words are creditors being paid as much as the bankrupt can afford to pay. Also, limiting payments to two years seems to short of period.

4. I have some confusion as to what rights secured parties have. Do they have right to take their property or are they going to be paid first.

Should they not have the option to decide?

5. Test regarding post petition claims seems harsh for creditor who had no knowledge of bankruptcy if creditor tendered goods or services or loaned money after the bankruptcy.

6. Preference - should we consider expanding exceptions to preferences such as new value.

7. Executory contracts- should not court have rights to decide whether contract should be assumed and the non bankrupt party should have the right to be heard.

8. Claims priority- should we not limit type of taxes having priority (ie old) , should we not limit amount of wage claims entitled to priority, what about interest and penalties before money going back to debtor.

9. Definition who can be in bankruptcy-is this too narrow. what do we do with those who do not fit into that category.

10. If merchant files for bankruptcy what happens if merchant does not have moneys to pay litigation cost.

11. Does the asset liquidation team deposit moneys in insured accounts and are the accounts earning interest.

12. Preference deadline of 6 months might be too short. Merchant could make plans and hopefully wait 6 months before bankruptcy.

13. I am not sure I understand issue relating to the suspension of merchant's power to dispose of the secured asset temporarily.

These are initial comments that come to mind after reading the draft a few times. Please let me hear from you. I am very interested in your project.

ANALYSIS OF PROPOSED REVISIONS TO THE 1994 BANKRUPTCY LAW OF THE REPUBLIC OF VIETNAM

Kenneth E. Barden
Tax Counsel, Ministry of Administration of the Republic of Palau

Overall, the draft law is a vast improvement over the existing bankruptcy law. The existing law fails to provide some details as to procedure which have now been addressed in the new proposal. I find that the proposed law is much easier to understand and enforce.

Specific Comments

Assessment Management Team

Several references are made to the Assessment Management Team and its powers. While Sections 16 and 17 generally address the composition and duties of the Asset Management Team, and Section 15 provides that the judge shall supervise and examine the activities of the Asset Management Team's members, it was not quite clear who actually appoints the Asset Management Team. I would presume it would be the judge, but I did not think this was clearly stated.

Professional Trustees

Some jurisdictions, particularly in many U.S. District Courts, there are pools of professionals who serve as trustees of the bankrupt estate. This may be a useful tool for Vietnam to adopt as well. I did not see any explicit reference in the new law to allow the creation of such a pool, but it may be worth considering.

Time Period for Lodging Petition

Section 7 provides that a creditor may lodge a petition to commence a proceeding against a merchant if 30 days have lapsed since sending a request for payment which has not yet been paid. Perhaps allowance should be made that the 30 day period is presumptive unless the debtor and creditor have agreed to a longer period in writing.

Section 12

I believe the more appropriate translation of Section would refer to the right to sue ***of*** the People's Procuracies.

Section 71

I believe the proper word should be “convening” rather than “convincing”.

ANALYSIS OF PROPOSED REVISIONS TO THE 1994 BANKRUPTCY LAW OF THE REPUBLIC OF VIETNAM

List of Legislative Assessors

Marc Albert, USA
Partner, Morrison & Hecker LLP, Washington, DC
(202) 728-3020; mealbert@moheck.com
Currently a partner at Morrison & Hecker, Mr. Albert has been practicing law, mainly in the bankruptcy field, since 1973. He has worked in the Tax Division of the US Department of Justice. He has also been a Trustee in Bankruptcy for the District of Columbia for the past 15 years. Mr. Albert received his JD from George Washington University and his Masters in Law of Taxation from Georgetown University Law Center in 1984.

Nicolas Audier, France
Associate, Gide Loyrette Nouel, Hanoi, Viet Nam
+844 825 1958; n.audier_glnhn@hn.vnn.vn
Mr. Audier is currently an associate/resident representative in the Hanoi, Vietnam office of Gide Loyrette Nouel. His practice focuses on corporate, commercial, and banking law, as well as bankruptcy and foreign investment in Vietnam. From 1994 to 1999, Mr. Audier was an associate in the Ho Chi Minh and Hanoi offices of Ngo, Migueres & Associates. He received LLMs in commercial law and business law from the University of Paris X and an LLM from New York University Law School.

Ralph E. Avery, USA
Deputy Chief, Administrative Office of US Courts-Bankruptcy Judges Division, Washington, DC
(202) 502-1914; ralph_avery@ao.uscourts.gov
Mr. Avery is the Deputy Chief of the Bankruptcy Judges Division at the Administrative Office of U.S. Courts since 1999. He has extensive international insolvency experience and has studied the substantive and procedural insolvency laws of other countries. Mr. Avery also has extensive knowledge of domestic bankruptcy law, as well as litigation and dispute resolution experience. He was previously Litigator with the Litigation Division of the Office of the Judge Advocate General of the Army. Mr. Avery received his JD in 1975 from the Dickinson School of Law, Pennsylvania State University.

Molly J. Baier, USA
Senior In-house Counsel, Wells Fargo Bank, Berkeley, CA
(415) 290-5435; mollybaier@aol.com
Ms. Baier has spent the last two years as Senior in-house counsel with Wells Fargo Bank. Prior

to that, she was in private practice with Lempres & Wulfsberg PC (1991 to 1997) and Severson & Werson (1986 to 1991). From 1997 to 1999, Ms. Baier participated in international rule of law projects in the Ukraine. She specializes in debt restructuring, banking, bankruptcy and lending issues. She received her JD in 1983 from the University of California School of Law, Davis.

Kenneth E. Barden, USA
Tax Counsel, Ministry of Administration of the Republic of Palau, Koror, Palau
(680) 488-5628; kbarden@palaunet.com

Mr. Barden has over 20 years of legal experience in the public sector, at the local, state, and national levels. Most recently, Mr. Barden has served as Tax Legal Counsel to the President, Vice-President, and Legislature of the Republic of Palau. Prior to that position, Mr. Barden served 16 years as a City Attorney for the City of Dayton, Ohio, and the City of Richmond, Indiana. Mr. Barden has also served as a Municipal Court Judge in Marion County Municipal Court in Indianapolis, Indiana, and as an adjunct professor for business law at the University of Indianapolis and the Union Institute at Cincinnati, Ohio. He earned his JD from the Indiana University School of Law.

Douglass Bellis, USA
Deputy Legislative Counsel, US House of Representatives, Washington, DC
(202) 225-6060; douglass.bellis@mail.house.gov
President, International Association of Legislative Drafters
Member of the North Carolina Bar

Mr. Bellis did his undergraduate degree in Greek and Latin Classics and Government at Cornell University. His law degree is from Duke University (1971). Since 1971, he has been a lawyer in the Office of Legislative Counsel for the House. Areas in which he has drafted Federal law include civil rights, rules of evidence for Federal courts, criminal law and procedure, civil procedure, bankruptcy law, agricultural credit, international trade, and railroad retirement and unemployment benefit legislation. He has worked on a number of the impeachments conducted by the House. A founder of the International Association of Legislative Drafters, he is very interested in encouraging professional legislative drafting and improving the effectiveness of popularly elected legislatures throughout the world. In the US, he has been active in trying to promote more understanding and communication between the Federal courts and the United States Congress.

The Honorable Samuel L. Bufford, USA
US Bankruptcy Judge, Central District of California, Los Angeles, CA
(213) 894-0992; samuel_bufford@cacb.uscourts.gov
Judge Bufford has been U.S. Bankruptcy Judge for the Central District of California for over 15 years. He practiced and taught law intermittently from 1974 to 1985. Judge Bufford has participated in multiple

rule of law projects mainly in Central and Eastern Europe. He holds a JD from the University of Michigan, and a PhD in philosophy from the University of Texas.

John Hickin, UK
Attorney, Johnson Stokes & Master, Hanoi, Viet Nam
+844 824 4316; jsmhn@hn.vnn.vn
Mr. Hickin is a British Solicitor practicing since 2001 in Hanoi, Vietnam with the law firm Johnson Stokes & Master (JSM). His areas of specialization include insolvency, corporate restructuring, banking, dispute resolution and general commercial law. Prior to joining the Hanoi office, Mr. Hickin worked in JSM's Hong Kong office (1997-2001) and in London with Clifford Chance (1993-1997). He is a graduate of Newcastle University Law School, England.

Dao Nguyen, Viet Nam
Attorney, Johnson Stokes & Master, Ho Chi Minh, Viet Nam
+848 822 8860; sdn@jsm.com.hk
Ms. Nguyen is Deputy Head of Johnson Stokes & Master's Ho Chi Minh City Branch since 1995. Prior posts have included a position as Banking Associate with Milbank, Tweed, Hadley & McCloy in Tokyo, Japan (1993-1994) and as Business Litigation Associate with Folger & Levin (1991-1993) in Los Angeles, California, USA. She specializes in banking, finance, and general commercial law work. She received her JD from the University of California School of Law, Los Angeles in 1991.

Gerald D. Vinnard, USA
Attorney, Thomas & Snell, Fresno, CA
(209) 442-0600; gvinnard@gwvcm-law.com

Mr. Vinnard has been an attorney with Thomas & Snell since 1974. He specializes in bankruptcy, creditor's rights, real estate and business litigation. He has assisted the American Bar Association's Central and Eastern European Law Initiative (CEELI) as a Bankruptcy Law and Commercial Law Specialist in Macedonia. Mr. Vinnard also served as Assistant Professor at Loyola University Law School. He earned his JD in 1969 from Harvard University Law School.