

Legal news

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Foreign Investment

Equitization of FDI enterprises

The Ministry of Planning and Investment and the Ministry of Finance issued Inter-ministerial Circular 08/2003/TTLT-BKH-BTC dated 29/12/2003 on implementation of the government Decree 38/2003/ND-CP on transformation of FDI enterprises into joint stock companies. According to other source of information, FID enterprises may send application to the Ministry of Planning and Investment asking permission to transform into joint stock company before March 25, 2004. *We will provide you with further information in the next issue.*

How to set up a common legal grounds for all types of business entities in Vietnam

Rationale

A common legal ground for all businessmen has been debated in the recent conference for summing up the achievement of the 4 year implementation of the Law on Enterprises 1999. In response to that, the Prime Minister recently makes his instruction to line ministries, people's committees, business associations and business community to think about how rationalizing the existing legal system with a view to setting up a common legal ground for all businessmen in Vietnam, eliminating step by step the discriminations between foreign direct investment and local investment and amongst local investment between the public and private sectors.

Since many agrees that this is the right time for looking at that issue on an overall basis, reviews should be made on all laws and regulations not only governing but also relating to business activities in Vietnam. The question however remains till now be **from where and how we should go**. From the legal and business perspectives, this aims to sharing some views on that point.

From where ...

At present, Vietnam has different laws governing different types of business entities in the country. Excluding the regulations on business individuals, the laws can be divided into two major systems, one for foreign direct investment and the other for local investment. In the former, the FIL plays the backbone which is being extended by a number of guiding regulations. In the latter, there are several laws including the LE for private entities, the Law on State-Owned Enterprises 1996 ("LSOE") for public entities, the Law on Cooperatives 1996 ("LC") for collective entities, amongst those the LE is widely referred to as the second but most important law of the market-oriented economy after the FIL, that liberates all society resources for doing business and elevating the role of the private sector in the country. Nevertheless, it would be unforgivable should the Law on Domestic Investment Promotions 1998 ("LDIP") not be named here, which provides investment incentives for all local investment in Vietnam.

In addition to those, there are a series of functional or specialized laws and regulations, lying in the middle between those two systems, supporting the implementation of those

laws and having coverage over all businessmen regardless of nationality and ownership. Some has certain influences to the business establishment, organization and part of operations in some special sectors or areas, for instance finance, banking, insurance, lawyers, etc., while the remaining governs over greater business operations providing rules for the business behaviors in finance, banking, taxation, trading, contracting, arbitration and principles for business dissolution and bankruptcy.

It is seen that while the FIL plays a dual mandate, not only covering all business aspects from establishment, organization, operation to termination of, but also offering incentives to foreign investment, its three counterpart laws just provide legal base for establishment, organization and management, leaving a larger room for the LDIP to offer incentives to all local investment and other functional and specialized laws and regulations to deal with business operations and termination.

Since the functional and specialized laws and regulations cover all foreign and local business, hence little points therefrom for further discussion here. And as a result, the FIL and its three counterpart laws and the LDIP become the focal point of discussion herein.

While discriminations amongst the local investment between the public and private sectors are being step by step eliminated thanks to the advancement of the LE and subsequent amendments of the LSOE and LC to make them closer to and integrated into one law when possible, concerns now mainly lie in the relationships between the FIL, LE and LDIP. In addition to the purpose of supporting business in Vietnam, the amendment of those laws reflects also Vietnam's commitments to the recently signed or acceded bilateral and multilateral agreements, and paving the way for Vietnam to accede to other agreements in the future.

... and how we should go

Though still need some amendments, it gets wide consensus that at this moment the LE is in advanced position than the others in terms of creating a more friendly business environment to business and closer to the international practices. The LE should therefore serve as the platform for any business legal rationalization and incorporation.

Pursuing that way, the LE should be incorporated to be the basic law, setting forth overall business policy, providing business vehicles and ruling the business behaviors. Incentives in land, taxation, and so on for all investment should be incorporated together in a new law enriching from the existing LDIP, without any discriminations between foreign and local, both direct and in-direct investments. The FIL in that scenario would focus just on special features of foreign direct investment lying in licensing procedures and maybe in legal forms and organizations of foreign invested companies.

The right to do business

The basic principle that is clearly affirmed in the Constitution 1992 that all businessmen can do all what the laws do not prohibit should be fully respected in all aspects. This is well reflected in the existing LE while varying in the FIL. It is therefore that this may be the **first reason** for adapting the FIL to that principle. However, it could be understandable should in the future wider restrictions on licensable business areas be still remained for foreign direct investment, that relate to national defenses and security.

Since the FIL does not allow business individuals to have any formal partnership relationships with foreign partners, a due consideration should again be made so that the FIL can come closer and comparable in this regard to the LE where any business individual and institution can select one investment vehicle suitable to them for conducting business in Vietnam.

In addition to that an investment according to the FIL will only be licensed if that investment adheres to and serves for a specific project upon the licensing. This actually leads to the fact that an investor if desiring to have different factories in different cities and provinces, has to apply for individual licenses from different agencies following the same procedures. In the meantime, simple commitment from registers is fully enough for business registration by local businessmen at that time.

Investment and business incentives

The existence of the dual lists of encouraged business sectors and locations attaching to the FIL for foreign direct investment and the LDIP (not the LE) for local investment, actually causes investors confused when deciding to invest in Vietnam, and further resulting in complicated systems of investment incentives. This may be the **second reason** for simplifying the FIL while codifying the existing LDIP in this regard.

Since a new law on investment promotions was earlier recommended to be created, synchronized lists of encouraged business sectors and locations for all foreign and local investment should be therein specified providing base for synchronizing the investment incentives system for all investments.

Business licensing and registering procedures

Licensing procedures under the FIL may be an area that does not need to be incorporated since that would be demanded for foreign direct investment in some sectors. However, consideration should be made to expand the scope of registration to foreign direct invested projects that satisfy requested criteria. This may be the **third reason** for re-adjustment of the FIL and LE. It is time to think about having the same agencies being in charge of both foreign and local investment. Since the Ministry of Planning and Investment at the central level is being in charge of foreign investment nationwide, the formulation of an agency under such an organization to be in charge of the local business registration is now under the shape making process. At the local level, though the right is empowered to the provincial level people's committees, in practice, departments for planning and investment play the two roles in business registration for local investment and also in assisting the people's committees to licensing for foreign direct invested projects.

Business term limits

While the LE fully respects the businessmen' decisions and having no limitation on their business duration, limitation in the business duration is still being under the FIL. Though the term for a foreign invested project can last maximally 50 years in a normal case and may reach 70 years for a special case, few one can reach that maximum. This actually puts foreign IZ developers in a funny situation since their limited duration could not let

them to execute longer term rental with local IZ entities who business term is un-limited. This may be the **fourth reason** for amendment of the FIL.

Legal forms of business entities

The varying provisions on the legal forms is another topic getting recent complaints from business community. While the LE provides businessmen with greater choice of legal forms, either limited liability, joint stock, partnership or private company, the FIL offers only one form of limited liability company. This not only narrows the choice for foreign investors at the beginning but also restricting their business conversions thereafter. Though the pilot conversion of some selected foreign invested companies into joint stock ones has just been permissible, but that is not an ultimate solution addressing to this issues. This may be the **fifth reason** for amendment of the FIL.

Business organization and management

Yes, each legal form results in different way of organization and management. Since only one form of limited liability company is in existence in both the FIL and LE, discussion here focuses only upon that form. According to the LE, the highest power organ in a limited liability company is the member council (hoi dong thanh vien), while under the FIL, that is the board of management (hoi dong quan tri) with representatives thereto nominated by investor(s). Again, the FIL allows a foreign individual to select and set up his/ her entirely owned limited liability company in Vietnam, while a local individual can no way select that form for his/ her business other than selecting the private enterprise form with un-limited liability. Those could be the **sixth reason** for amendment of the FIL.

According also to the FIL, unanimous consensus (100% agreement) by the board of management is still remained for several principal issues of a joint venture, while under the LE businessmen have full power of making decision on all business aspects in a company. Three fourths or just simple major voting are normally required for almost all principal business issues. This adds more point for consideration of legalizing the best corporate governance practices in Vietnam for all business entities.

Other issues

In addition to the investment incentives that are recommended to be incorporated into the new law on investment promotions in Vietnam as above said, the following issues should be no longer in existence in and be considered to be precluded from the FIL since at the moment they are well being incorporated in the functional and specialized laws and regulations and bringing about benefits for local investments.

They may include the land compensation and rental (the Land Law), technology transfer and contributions (the Civil Code), environment protections (the Environment Protection Law), labour relationships (the Labour Code), taxation tariff, incentives and payment (the Taxation Laws), financial transactions (the Laws on Statistics and Accounting), banking transactions (the Laws on Credit Institutions), import-export activities (the Laws on Trade and Customs), etc.

Conclusion

Knowing that the Ministry of Planning and Investment takes now the jobs of preparing a proposal on how to set up a common legal ground for all business activities in Vietnam, for submission to the National Assembly for approval sooner by the end of the next 2004 or latter by the beginning of 2005. Great efforts would likely be made to that.

Vietnam – Japan Agreement, further step towards full integration

... continued from previous issue

On 14 November 2003, the Bilateral Agreement between Vietnam and Japan for the liberalization, promotion and protection of investment was concluded in Tokyo. In comparison with some other agreements, this is a compact one with only 23 Articles, 2 Annexes and a Memorandum of Understanding. However, this is an important Agreement to urge more investment from Japan and promote Vietnam in its anticipated accession to the WTO.

This article shortly briefs the salient issues of the Agreement and takes a bird eye view on its influences.

As stated in preamble, one of the objectives of the Agreement is to create enabling conditions for investment and strengthen the economic relations between Vietnam and Japan. Vietnam and Japan committed in Article 2 and 3 of the Agreement to apply the National Treatment (NT) and Most Favored Nation (MFN) Treatment to investors and their investment shall be guaranteed at the initial step of investment. This means that subject to the circumstances, the investors of a constituent Party will be treated no less favorably than the nationals of the other Party or the third Party.

In compliance with the Agreement, the Japanese companies will get wider access to Vietnam's market. They will be entitled to invest in some of the conditional investment projects.

Furthermore, to ensure general trade principles consistent with the WTO's practices, the Agreement sets out in Article 4 all requirements which are not allowed to be applied by one Party on investors of the other Party. Some of such requirements include:: to export a certain amount or ratio of goods and services; to meet the localization rate; to purchase or use locally manufactured products or services; to limit market; to nominate director, members or manager of the management board; or to require technology transfers etc. In so providing, Japanese investors will enjoy more autonomy in investing and doing business in Vietnam.

However, the Agreement also states clearly in it's annexes the cases and sectors in which the NT, MFN or prohibition of requirements may be derogated. As such, the localization requirement is still applied to the car production and assembling at the rate of 5%.

Article 5 of the Agreement allow a Party to apply requirements and conditions for other Party's investors to enjoy incentives. Another Article also entitle a Party to offer exception on the current provisions of the Agreement. This means that Vietnam and Japan still have chances to remove such requirements as mandatory ratio of localization on automobile manufacturing and assembly.

The investors' lawful rights and interests are protected at maximum under the Agreement. They will get enforceable protection against expropriation from the state authority (Article 9) and freely transfer any payment or profit in relations to their investment to anywhere (Article 12).

Besides, the Agreement has a lot of other provisions for supporting and facilitating the investment activities of Vietnam and Japan's investors such as information exchange, residential regime, dispute settlement etc.

Like other agreements, the intellectual property rights are paid much attention in the Agreement. Any obligations and rights occurred in accordance with any multilateral Treatment of protection of intellectual property rights shall be taken into consideration to get full protection by the two parties of the Agreement. And in addition to the provisions on the NT, MFN and prohibition of requirements, the transparency in law and regulatory policy is considered as one of measures to streamline the investment activities.

The Agreement will come into full effect 30 days after Vietnam and Japan exchanged protocols notifying the completion of necessary legal procedures for application of the Agreement.

Japan ranks 3 in the amount of registered direct capital invested so far in Vietnam. The approval of the Agreement by two Government may be considered as a move towards the WTO's principles and practices on investment. But on the other hand, the bilateral Agreement may be also considered as circuit-breaker towards faster liberalization until the bidding of Vietnam into WTO is expected to be successful in 2005.

Intellectual Property

Codifying internal regulations on examination

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A long awaited Circular guiding the implementation of procedures for registration of industrial property rights (IPRs) with respect to industrial designs (IDs) has recently been issued by the Ministry of Science and Technology, (Circular No. 29/2003/TT-BKHHCN dated November 5, 2003).

The Circular, which is expected to create a revolution in the registration process of IPRs with respect to IDs, has been greatly appreciated by those in Vietnam concerned with intellectual property issues.

The issuance of Circular 29, together with the Circular No. 30/2003/TT-BKHHCN dated November 5, 2003, guiding the implementation of procedures for registration of IPRs with respect to patents and utility solutions, marked a new level of development of IPR protection in Vietnam.

Previously, the implementation of procedures for the registration of all subjects of intellectual property was stipulated in a sole Circular, No. 3055/TT-SHCN dated December 31, 1996, of the Ministry of Science, Technology and Environment (now the

Ministry of Science and Technology) providing guidelines on the procedures to register of industrial property rights as stipulated in Decree No. 63/CP dated October 24, 1996 of the Government.

Before the issuance of Circular 29 and Circular 30, the National Office of Intellectual Property (NOIP) examined the applications for protection of IPRs in accordance with the NOIP's internal regulations. This gave rise to debate in the business and IP community, given that the examiners depended on personal opinions to get their results. Circular 29 and Circular 30 will serve as milestones in the process of codifying NOIP's internal regulations, including those for examination of such other IPR items as trademark registration.

The following will introduce salient new points of procedure for registration of IDs under Circular 29.

IDs have been developed into a distinct item of IPRs because of their peculiar nature, aimed at satisfying both aesthetic and functional purposes when incorporated in a utilitarian product.

IDs are at the crossroads of art and technology, since the designers of industrial products strive to create products whose shape or appearance will satisfy the aesthetic preferences of consumers as well as their expectations with regard to the functional performance of those products.

As IDs are a special item of IPR, Vietnam, among many countries in the world, grants to IDs a cumulative protection, that is, they are under the copyright regime and the *sui generis* ID regime. Circular 29 provides guidelines on the implementation of procedures applied in the latter regime.

Generally, Circular 29 simplifies almost all the procedures and requirements which used to be regarded as cumbersome and time-consuming for registration of IDs in Vietnam.

Henceforth, among other changes, the signatures of applicants in original documents enclosed in application dossier will no longer need notarizing.

The requirements on number of application copies, the descriptions of claimed IDs as well as of the set of pictures/photographs of claimed IDs in the application dossier have been reduced.

Furthermore, an expedited examination can be requested. Applicants can request the NOIP or relevant authorities to shorten the time limit for implementing the procedures in relation to registration of IDs, providing that a fee is paid and the NOIP or relevant authorities accept that request.

The duration of both the formal examination as well as substantive examination of claimed IDs have been considerably shortened.

From now on, the formal examination, which used to last three months, now lasts for only one month and the time for substantive examination has been shortened by three months.

Therefore, it may normally take a total of nine months to have a claimed ID registered instead of 12 or 13 months as previously. The change will give applicants the legal tools to enforce their ID rights and should encourage applications for IDs in Vietnam.

Of note is that the regulations on the substantive examination of claimed IDs have been codified. To be registered as an ID, a claimed ID must meet the following requirements: (i) a claimed ID must be the outer appearance of an item which may essentially and sufficiently be the combination of aesthetic features of shapes, lines and colors; (ii) a claimed ID may be industrially applicable, that is to say it can be a model for industrial products and handicrafts manufacturing; and (iii) a claimed ID must be new to the world.

Those requirements are also defined as criteria for protection of IDs, based on which the examiners can conduct substantive examination for claimed IDs.

Other documents

- On November 25, 2003, the Prime Minister issued Decision 253/2003/QD-TTg on the approval of building and promotion programme of national trademark in the period to 2010.

Other Sectors

Taxation

- The Ministry of Finance issued Circular 113/2003/TT-BTC on November 27, 2003, supplementing Circular 98/2002/TT-BTC dated October 24, 2002, guiding the implementation of tax exemption and tax holiday for the investors being subject to investment preferences.
- The Ministry of Finance issued Decision 192/2003/QD-BTC on November 25, 2003 on promulgation of the List of commodities and import duty tariff for implementation of the import duty reduction roadmap in accordance with the Agreement on garment and textile trading executed between Vietnam and EU for the period from 2003 to 2005.
- The Government issued Decree 149/2003/ND-CP on December 4, 2003 detailing the Law on Special Consumption Tax and its amended and supplemented Law.
- On December 10, 2003, the Government issued Decree 158/2003/ND-CP detailing the Law on Value Added Tax and its amended Law.
- The Ministry of Finance issued Circular 118/2003/TT-BTC on December 8, 2003 guiding the Government's Decree 60/2003/ND-CP dated June 6, 2003, defining prices for tax calculation on imports in accordance with Article 7 of the General Agreement on Tariff and Trade.
- The Government issued Decree 164/2003/ND-CP dated December 22, 2003 guiding the implementation of the Law on Corporate income tax.
- The Ministry of Finance issued Circular 128/2003/TT-BTC dated December 28, 2003 detailing the Government's Decree 164/2003/ND-CP.

Import - Export

- On December 8, 2003, the Government issued Decree 150/2003/ND-CP detailing the Ordinance on self-protection in import of commodities into Vietnam.

Securities

- On November 28, 2003, the Government issued Decree 144/2003/ND-CP, on securities and securities market.
- Circular 121/2003/TT-BTC dated December 12, 2003, of the Ministry of Finance guiding Decision 146/2003/QD-TTg dated July 17, 2003, of the Prime Minister on the participating proportion of foreigners in Vietnam securities market.

Land

- Decision 14/2003/QD-BTNMT dated November 20, 2003, of the Ministry of National Resource and Environment, issuing technical - economical norm to register land uses, prepare cadastral documents, grant land use right certificates.

Contact Details**Hanoi Head Office**

Mr. Pham Nghiem Xuan Bac

Managing Partner

Mr. Pham Minh Hai

Partner, Consulting

Ms. Le Quynh Anh

Partner, Legal

Ms. Le Thi Kim Dung

Partner, Intellectual Property

Unit 2, 1st Floor, International Center

17 Ngo Quyen, Hanoi, Vietnam

Tel: 84-4 934-0629 / 824-1623 Fax: 84-4 934-0631

E-mail: vision@hn.vnn.vn

Ho Chi Minh City Office

Mr. Dang The Duc

Partner, Manager

Unit 8A1, 8th Floor, Han Nam Office Building

65 Nguyen Du, District 1, Ho Chi Minh City, Vietnam.

Tel: 84-8 823-6495 / 823-6501 Fax: 84-8 823-6496

E-mail: hcmvision@hcm.vnn.vn

www.vision-associates.com