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# Legal news

June 2006

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## Contents

<b>Law on Enterprises</b> .....	<b>2</b>
<b>Other Sectors</b> .....	<b>6</b>
Finance.....	6
Banking .....	6
Trading.....	6
Land.....	7
Culture – Information.....	7
Miscellaneous .....	7
<b>Contact Details</b> .....	<b>8</b>

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## **Law on Enterprises**

### **The Unified Law on Enterprises 2005 Fundamental changes and developments**

**By Luu Tien Ngoc**

*On the occasion of Law on Enterprises 2005 and Law on Investment 2005 (Hereinafter referred to as the Unified Law on Enterprises 2005 and the Common Law on Investment 2005) to be fully effective on and from 1 July 2006, V&A would like to have some briefs on the new changes and developments of the twin laws, as well as analyses on the major influences of the twin laws to the business environment and management rules applicable to all types of companies, particularly foreign invested companies, in Vietnam.*

*This is the first article by V&A in VIR, briefing the new changes and developments of the Unified Law on Enterprises 2005 mainly in comparison with the old Law on Enterprises 1999 and the Law on Foreign Investment in Vietnam 1996.*

In spite of having the Law on Companies 1990 ("LC 1990"), the Law on Enterprises 1999 ("LE 1999") is regarded as the "real" legal ground for the companies in Vietnam, that actually provides the people with the free right to do business. The implementation of the LE 1999 during over the last 5 years (i.e. 1 January 2000 to 1 July 2006), experiences the great development in terms of quantity of private enterprises of all types in Vietnam.

The growth in quantity of the private companies in the context of having different legal grounds for different types of companies, requests to have a common playing field for all types of companies in Vietnam. In that context, a new law on enterprises needs to be issued, which does not cover only private companies, but also companies of other ownership, including State owned companies and foreign invested companies being governed by the Law on State owned enterprises ("LSOE 2003") and the Law on Foreign Investment in Vietnam ("FIL 1996"), respectively. The international and regional integration, particularly the implementation of AFTA, BTA, and the near future WTO accession, again generates a number of competition pressures on and the request for Vietnamese companies in general to improve themselves. In addition to the quantitative development, Vietnamese companies need to be improved in terms of business objective and management quality. This further requires the new law on enterprises not only focuses on the promotion of new business registration and start up, but also provides a common framework for corporate governance that are insufficient under both the LE 1999 and FIL 1996.

The Unified Law on Enterprises was passed by the National Assembly on 29 November 2005, taking full effect on and from 1 July 2006 ("ULE 2005"), in responses to the said requests. By the issuance of the ULE 2005, for the first time in Vietnam, there is a common legal ground for establishment, organization and operation of all types of companies, regardless the types of companies and ownership structures. More particularly, the ULE 2005 together with the twin, i.e. the Common Law on Investment ("CLI 2005"), unifies the legal ground for local and foreign invested companies in Vietnam for the first time. Once fully effective, the ULE 2005 will replace the LE 1999, the LSOE 2003 and the FIL 1996.

Beginning a series of articles by V&A on the ULE and CLI 2005, the new changes and developments of the ULE 2005 in comparison with the LE 1999 and FIL 1996, can be briefed as follows:

First, the subject. The ULE 2005 (Article 1 and 2) regulates the establishment, organization and operations of all types of companies in Vietnam, including limited liability company (“LLC”) with one and more members, joint stock company (“JSC”), partnership, and private enterprise. From the effective date of the ULE 2005, all the establishment, organization and operation of foreign invested companies, which is now subject to the FIL 1996, shall be uniformly regulated by the ULE 2005.

As one of the consequences, foreign invested companies (including joint venture companies and wholly foreign owned companies) which are licensed prior to the effective date of the ULE 2005, can be either re-registered under the ULE 2005 (Article 170), to be new LLCs or JSCs, during the first two years from the effective date of the law, or keep their legal status unchanged, in accordance with the FIL 1996.

Second, the right to establish and manage company. The ULE 2005 (Article 13) permits all businessman, regardless local or foreign, resident or non-resident, to have the same right to establish and participate in management of the company. It means that from the effective date of the ULE 2005, the restriction that is now applicable to non-resident individual and institutional person, under the LE 1999, shall be removed, and that foreign investors, including foreign invested companies will have more choices and be more flexible in having further investment in Vietnam, compared with some restrictions (e.g. investment forms, etc.) under the FIL 1996.

Third, the business registration. The “request for business registration” (Article 18, ULE 2005) shall be in used instead of the “business registration letter” as it is under the LE 1999. This seems to highlight the free right to register business and establish company by the people under the ULE 2005. With respect to the foreign invested company, though the similar business start-up procedures will remain unchanged (i.e. an investment project shall be needed upon the request for business registration for setting up of a new company), but the concept of one-project-one-company shall be no longer valid. Under the twin laws (i.e. ULE and CLI 2005), it is likely that an existing company can have more than one investment projects, without the request for setting up a new company for every individual project as it is under the FIL 1996.

Forth, the name of the company. For the first time, the name of the company shall be regulated by the law [i.e. the ULE 2005 (Article 31)], and hence, the name of all types of companies shall be centrally and nationwide managed. Depending upon the centrally and nationwide-managed database to be formulated under the ULE 2005, it is expected that the name of every new company shall be checked nationwide, by the business registration agencies prior to being recorded into the business registration certificate. This hopes to cease the fact that the name is now checked and valid within the territory of province or city, and that more than one company have the same name.

Fifth, the charter capital and the form of charter capital contribution. More flexible in the form of charter capital contribution (Article 30, ULE 2005) will be applicable to all investors, particularly to foreign investors if compared with the FIL 1996, where the form of charter capital contribution by foreign investors are limited. Under the ULE

2005, the concept “charter capital” is used for all types of companies, instead of the confused concept of “legal capital” under the FIL 1996. Again, no minimum requirements for contribution by foreign investors to the charter capital of the company (i.e. 30% of the “legal capital” as it is under the FIL 1996), where there is a combination between local and foreign investors under the ULE 2005, as well as the same between the “legal capital” and the “total investment capital” (i.e. the “legal capital” must be at least 30% of the total investment capital as it is under the FIL 1996).

It is noted that under the ULE 2005 (e.g. Article 47), the charter capital of the company including the one where there is foreign invested capital, can be reduced, which has never been permissible under the FIL 1996 as well as previous laws.

Sixth, the shareholders and shareholder registration book. Like the LE 1999, the ULE 2005 (Article 84) requires that the founding shareholders must hold at least 20% of the charter capital of the JSC, and the capital must be fully paid within 90 days from the business registration date. Also during that period of time (i.e. within 90 days from the business registration date), notification of the charter capital contribution must be made to the business registration agency. Within the first 3 years from the business registration date, founding shareholders shall be free to transfer the share to other founding shareholders, and be conditional to transfer the share to the others (non-founding shareholders), who will be then become the new founding shareholders of the company. Stricter than the LE 1999, the ULE 2005 (Article 86) requires the registration of any new shareholder who holds over 5% of the share capital of the company, with the competent business registration agency, within 7 working days.

Seventh, the right to summon the general shareholder meeting. The shareholder or group of shareholders have the right to request for the general shareholder meetings, and finally to hold the general shareholder meeting if the board of management and supervision in turn fails to hold the meeting. New development compared with the LE 1999, the ULE 2005 (Article 97) clearly mentions the legal obligations of the board of management and supervision as well as the compensations if any towards the company, in case they fail to hold said meeting.

Eighth, the internal management structure. Under the ULE 2005, the internal management structure of the company shall be a continuance of what has been regulated in the LE 1999, but much differ from what has been regulated by the FIL 1996. Subject to the type of the company and the size of it, the internal management structure of the company under the ULE 2005 (e.g. Article 46) shall comprise, top down, the general shareholder meeting/ member council, board of supervision, board of management, and general director, while it simply consists board of management and general director under the FIL 1996. Though called “board of management”, but the nature of the board of management of under the different laws, is different, where under the FIL 1996 it is closer to general shareholder meeting/ member council, making decision based on equity representative proportion. This as a whole will give a great change in the decision making process toward the internal issues of the company under the new law in comparison with the old law.

Ninth, the decision making rules. Under the ULE 2005 (e.g. Article 52), a 65% majority of the general shareholder meeting/ member council, shall be required for almost all matters, except some special ones which require a 75% majority. This is a critical changes if compared with what is regulated under the FIL 1996, where a 51% majority

is required for almost all matters, except some special ones in joint venture company with local partners (e.g. appointment/ dismissal of the general director and the first deputy general director, and revision of the charter of the company) that legally require unanimous agreement of the board of management of the company.

Though the ULE 2005 stipulates that the charter of the company can provide more in details the corporate management rules, the ULE 2005, unlike the FIL 1996, lists down all matters that will be decided by the general shareholder meeting/ member council, board of management, and the mandates of the general director of the company.

Tenth, the general obligations of the management persons. Unlike the FIL 1996, the ULE 2005 (Article 119) provides general obligations of the key management persons of the company, including members of the board of management/ member council, general director, and other key management positions. It is required that those positions must exercise the mandates carefully, truthfully, and all for the benefits of the company and shareholders, and that those positions are not allowed to use the inside information, abuse the power for the benefits of them and their related persons.

In addition, the ULE 2005 (Article 118, 120) requires the declaration of the interests of the key management positions in relation to the interest of the company, and the prior approval/ acceptance of some kind of contract between the company and the key management positions of the company and/ or their related persons.

Eleventh, the legal representative of the company. Unlike the FIL 1996, the ULE 2005 (Article 95) requires that the legal representative of the company must be resident in Vietnam (at the moment, how a person be regarded as a resident in Vietnam is still vague, and different from legal documents). If absent in Vietnam for more than 30 days, an authorization must be made to another to exercise the mandates of the legal representative.

In addition, the ULE 2005 (Article 116) requires that the general director of a company is not allowed to hold the same position in other companies.

Twelfth, the multi-layer company structure. More specific than the LE 1999 and FIL 1996, the ULE 2005 (Chapter VII) regulates the multi-layer company structure, whereby a group of companies of different levels has long-term relationship one another, based on economic, technology, market and other business interests. More open than the FIL 1996, this enables not only joint venture company, but also wholly foreign owned company (which is not permissible under the FIL 1996) to set up by itself lower-level subsidiaries, where it can hold in full or part of the charter capital.

Finally, the re-organization of the company. Compared with the FIL 1996, the ULE 2005 provides more in detail the re-organization of the company, covering split, consolidation, merger, separation, and conversion of the legal status of the company, with references made in some cases to the laws on competition.

## **Other Sectors**

### **Finance**

- On May 19, 2006, the Ministry of Finance and the Ministry of Justice issued Interministerial Circular 43/2006/TTLT-BTC-BTP, guiding the collection, payment, management and using of enforcement fees.
- Circular 45/2006/TT-BTC, dated May 25, 2006, of the Ministry of Finance, on amendment of and supplementation to Circular 63/2002/TT-BTC, dated July 24, 2002, guiding the implementation of the regulations on fees and charges.
- The Ministry of Finance issued Decision 32/2006/QD-BTC, on June 06, 2006, promulgating the regulation on financial inspection and examination.
- The Ministry of Finance issued Circular 49/2006/TT-BTC, on June 06, 2006, on amendment of and supplementation to Circular 58/2002/TT-BTC, dated June 28, 2002, guiding financial regulations of one-member limited liability company belonging to the State, political organization and socio – political organization.
- On June 12, 2006, the Ministry of Finance issued Circular 52/2006/TT-BTC, guiding the implementation of special preferential import duty tariff of Vietnam for the purpose of implementation of ASEAN – China Trade Agreement.
- On the same day of June 12, 2006, the Ministry of Finance issued Circular 53/2006/TT-BTC, guiding the application of management accounting in enterprises.

### **Banking**

- On May 19, 2006, the Prime Minister issued Decision 108/2006/QD-TTg, on the establishment of Vietnam Development Bank.
- The Prime Minister issued Decision 112/2006/QD-TTg, on May 24, 2006, on the approval of the Project for the development of Vietnam Banking to 2010 and orientation to 2020.

### **Trading**

- Circular 09/2006/TT-BTM, dated May 25, 2006, of the Ministry of Trade, guiding the registration of franchising activities.
- Decision 21/2006/QD-BTM, dated May 31, 2006, of the Ministry of Trade, on the approval of National trading promotion program of 2006.
- Circular 10/2006/TT-BTM, dated June 01, 2006, of the Ministry of Trade, on amendment of and supplementation to Circular 08/2006/TT-BTM, guiding the determination of the origin of import, export goods, which have non-purely origin, according to Government's Decree 19/2006/ND-CP, dated February 20, 2006, with detailed regulation of the Commercial Law on the origin of goods.

- The Ministry of Agriculture and Rural Development issued Circular 32/2006/TT-BNN, on June 08, 2006, guiding the implementation of Government's Decree 12/2006/ND-CP, dated January 23, 2006, with detailed regulation on the implementation of the Commercial Law in respect of international trading and procurement agency, processing and transit of goods to foreigners.
- On June 09, 2006, the Government issued Decree 57/2006/ND-CP, on e-commerce.
- The Government issued Decree 59/2006/ND-CP, with detailed regulation of the Commercial Law on goods and services which are prohibited, restricted or conditional for trade.

### Land

- On May 24, 2006, the Ministry of National Resources and Environment issued Circular 05/2006/TT-BTNMT, guiding the implementation of a number of articles of Decree 182/2004/ND-CP, dated October 29, 2004, dealing with administrative violation in field of land.
- Interministerial Circular 03/2006/TTLT-BTP-BTNMT, dated June 13, 2006, of the Ministry of Justice, the Ministry of National Resources and Environment, on amendment of and supplementation to a number of articles of Interministerial Circular 05/2006/TTLT/BTP-BTNMT, dated June 16, 2005, on the registration of mortgage, guarantee by land-use right, property attached with land.

### Culture – Information

- On June 06, 2006, the Government issued Decree 56/2006/ND-CP, dealing with administrative violation in culture and information activities.

### Miscellaneous

- The Government issued Decree 49/2006/ND-CP, dated May 18, 2006, on the registration of buying and selling ship.
- The Government issued Decree 52/2006/ND-CP, dated May 19, 2006, on the issuance of enterprises' bond.
- Interministerial Circular 60/2006/TTLT-BVHTT-BBCVT-BCA, dated June 01, 2006, of the Ministry of Culture and Information, the Ministry of Post and Telematics, the Ministry of Public Security, on the management of on-line games.



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