
Legal Alert

Edition 1 | May 2014

More investments through amended Investment Law and Enterprise Law



The amended Law on Investment and Law on Enterprises will soon be submitted to Vietnam's National Assembly and will be adopted in November this year. These statutes aim to reduce administrative bureaucracy and mobilize more foreign and local capital into production. For the first time, the laws present a pro-investor approach which will hopefully create a new wave of foreign investment into Vietnam. This special review highlights the most important changes in these two laws.

Key contact:

Mr. Hong Bui
hong.bui@LNTpartners.com

Ms. Quyen Hoang
quyen.hoang@LNTpartners.com

Dr. Net Le
net.le@LNTpartners.com

1. Abolition of Investment Certificates for many foreign invested enterprises

The amended and restated Law on Investment will provide that Investment Certificates (IC) will only be required for conditional investment projects. Other projects (e.g., production projects) may proceed without an IC. That means foreign investors may establish a company in Vietnam by registering its enterprise and obtaining a Business Registration Certificate (BRC) in the same manner as Vietnamese investors. If implemented properly, many foreign investors will no longer have to prepare feasibility studies and await the opinions of numerous ministries before they can start operating in Vietnam, thereby removing one of the most critical hurdles in their investment stages.

The possibility to establish a company without having a project would boost the concept of a holding company, which has not yet been widely recognized in Vietnam. It will also make it more possible to establish special purpose vehicles (SPVs) to acquire assets or projects in Vietnam without having to enter into a joint venture or acquiring shares in a local company, thereby significantly reducing transaction costs.

These constitute the key changes that are expected to create a new wave of foreign investment into Vietnam, provided that the

Government can rein in the bureaucracy delays and obstacles in “conditional projects” (to be discussed in point 8 below).

2. Abolition of the “*ultra vires*” doctrine and HS Code requirements

The amended and restated Law on Enterprises (RLOE) will abolish the requirement of providing HS Codes when obtaining a BRC. In doing so, an enterprise may have as many business activities as they wish, provided they are not prohibited or restricted by law. Trading and distribution companies will not need to supply thousands of HS Codes for traded products (and for products they anticipate in the future). A common issue that many legal practitioners encounter is investor complaints due to the HS Code requirements and irrelevant questions asked by the licensing authorities when it comes to licensing issues.

The opening up of HS Code system and the list of business activities may lead the way to the relaxation of the *ultra vires* doctrine – that is, an enterprise may only bind or be bound if it is engaged in the businesses listed in its BRC. This, again, will provide more certainty to the business community in relieving apprehensions over the capacity of their trading partners.

3. Reduction of 65% majority vote to 51% majority vote, and 75% majority vote to 65% majority vote

Unlike any other countries, the concept of “majority voting” under Vietnam’s current LOE means 65% voting rights, not 51%. The RLOE brings Vietnam back into line with the positions of the rest of the world (where majority voting means 51% and super-majority voting means 65%).

The quorum for a board meeting for limited liability companies or joint stock companies will be reduced from 75% to 65% respectively. While this change may not affect the existing companies with their current charters, it opens up opportunities to renegotiate the charter for the benefit of the shareholders, as well as attracts more investors to buy-in shares to reach the required control majority. This also abolishes surprises from foreign investors when dealing with Vietnamese law.

4. Derivative actions - booster to private equity

Although the LOE introduced the concept of fiduciary duty, it does not provide for an implementation mechanism to protect minority shareholders if the fiduciary duty is violated. For the first time, the RLOE introduces the concept of derivative actions, which allows shareholders holding at least 1% of the total shares to launch derivative actions against board members, directors and controllers from their violation in their duty to put the company’s interests before

their own interests and the duty not to abuse powers. The cost of derivative action will be borne by the company. This can be considered good news for private equity funds or minority investors, who currently hesitate to participate in equalization programs of state owned enterprises (SOEs) because the major shareholders will be by the Government or a relative of the SOE's incumbent managers.

Nevertheless, the reform in the RLOE should go hand in hand with the reform to the Civil Procedural Code to enable derivative actions to be fully recognized, unless the charter allows this action to be started by arbitration.

5. Corporate bonds - booster of securitization

The RLOE now recognized the rights of companies to issue bonds. Unlike previous legislations which require the bond issuer to be "profitable", which might not be feasible to SPVs, the RLOE only requires the bond issuer to be solvent, i.e., able to pay its debts when due. This deregulation may create opportunities to securitization and project bonds market. Again this is good news that finally the capital market in Vietnam may be developed.

6. More than one legal representative in a company

Foreign investors sometimes express concerns over the concept of "legal representative" of a company in Vietnam, as this is the only person that can bind the acts of the company. Often than not, the dismissal of the legal representative becomes a long-term dispute among many shareholders or a third party who is surprised when the director signing the contract is actually not a legal representative. The RLOE now envisions that a company may have more than one legal representative and more than one chop, which aims to do away the classic shareholders' conflict among local enterprises and bring Vietnam's LOE more line with the rest of the world.

7. Charter capital will be paid up capital

In the past, the Vietnamese authorities often measure the capacity of a company by its "charter capital". Understanding this misconception, many companies have been established with a very high declared charter capital which never been paid up. To counter this problem, the RLOE now provides that charter capital must be the paid up capital, and must be fully contributed within 90 days from its establishment. Apart from paid up capital, there may be authorized capital but this would not be considered as charter capital.

Any issue of shares beyond the authorized capital should either comply with the process of public offerings (registration at the State Securities Commission) or private placement (notice to the business registration authority).

8. Obstacles to changes - “conditional projects” and delays in consideration

The abolition of the IC requirement does not benefit all foreign investors. There are more than 150 so-called “conditional” projects that are still subject to IC requirements. These often include services mentioned under the WTO roadmap such as retail and distribution, logistics, or pharmaceutical trading. Unfortunately, it is these foreign investors that tend to face licensing issues.

These are unlikely to be changed unless business societies and law firms lobby the drafting committees to reduce the list of “conditional projects” and to specify the requirements of documents that applicants should provide and prohibition from requiring any additional documents.

With respect to trading and distribution, all restrictions and conditions should be removed. In order to develop a production base, foreign investors should be allowed to test the market and introduce their distribution network. The restriction of foreign trading and distribution not only affects the effectiveness of the ASEAN Economy Community (to be implemented in 2015), but also harms effective local distributors in the long-run. A good local distributor always seeks to expand and would need capital, a variety of goods and also international co-operation. Any growth in modern trade may reduce the number of traditional trades, and that is the price of development and this is the trend throughout the world.

Another bureaucratic problem is that although the law provides 45 days for authorities to consider an application and issue an IC, this timing is often not respected by the authorities and is not subject to any sanction. Business societies and law firms may want to lobby to the drafting committees to impose a requirement that:

- (i) if the licensing authority requests an opinion from a central ministry, and no reply is provided within 14 days, the licensing authority may assume that there is no objection from the said ministry.
- (ii) if a “conditional project” is a service-based project and does not require any investment incentives, the licensing authority is prohibited from asking any questions or documents not listed in the law, and shall be held harmless against any liability if it issues an IC in reliance to the representations of the applications. The liability is on the applicant (i.e., the investor) alone.

As experience in the last seven years since the date Vietnam joined WTO shows, unless the business community raises their concerns, the drafting committees may face stronger challenges from various ministries for various reasons and may, in the end, forfeit their initial good intentions.

9. Support from the business community

The reform in the LOI and LOE will create a major impact to the Vietnamese legal community. The revised law will facilitate the establishment of new enterprises, especially those owned by foreign investors, and reduce the costs when investors withdraw from the Vietnamese market.

In addition, it will ensure the legitimate rights and interests of investors, shareholders, and other stakeholders.

If properly implemented, the amendments to the laws will remove many obstacles that enterprises have faced in their operations in Vietnam. However, if the laws are vague, the bureaucrats may still create multiple obstacles that frustrate the business community.

So far, the drafting committees have received only modest support from VBF through organizing seminars. It is now time for business societies and law firms to join support, either by submitting their position papers or providing examples of technical barriers and obstacles to the press and the National Assembly, to enable the drafts to be supplemented and completed. Only then will the target of the two important laws be achieved.

For more information about this article, please contact the author:



Dr. Net Le

Tel: +84 90 9759 699

Emai: Net.le@LNTpartners.com

For further information,
please contact:

Ho Chi Minh City Head Office

Unit 03, Level 21, Bitexco
Financial Tower
No.02 Hai Trieu Street, Dist. 1
Ho Chi Minh City, VIETNAM
Tel: +84 8 3821 2357
Fax: +84 8 3910 3733

Hanoi Office

Unit 8A, Level 2, International Centre
17 Ngo Quyen St., Hoan Kiem
Dist.
Hanoi, VIETNAM
Tel: +84 4 3824 8522
Fax: +84 4 3824 8580

Hong Kong Office (Affiliate)

Two International Finance Centre
Level 19, 8 Finance Street
Central, Hong Kong CHINA
Tel: +852 3125 7639
Fax: +852 3125 7629

San Francisco Office

101 California Street
Suite 2710
San Francisco, CA 94111 USA
Tel: +1 415 633 8831
Fax: +1 415 689 6821

LNT & PARTNERS is a leading full-service independently ranked local law firm in Vietnam with offices in Ho Chi Minh City, Hanoi, Hong Kong, and San Francisco. The firm is among Vietnam's most prominent, representing a wide range of multinational and domestic clients, including Fortune Global 500 companies as well as well-known Vietnamese listed companies on a variety of business and investment matters.

For more information about any of these legal briefs, please contact the individual authors or your usual LNT contact.