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ENTERPRISE AND INVESTMENT LAWS IN PLACE, but implementation still being hindered

The Enterprise Law and Investment Law have been in effect for ten months, and the government has recently issued a number of decrees, circulars, and resolutions to guide their implementation. Though it is still too early to assess the impacts of the two new laws, there have been positive indicators of an increasingly investor-friendly business environment, especially in the context of Vietnam's recent accession to the World Trade Organization (WTO). However, over the past few months, obstacles have surfaced during implementation, particularly at the provincial level, due to a) lack of clarity and detail in some of the decrees and circulars, and b) the lack of technical capacity of local authorities to understand and/or apply the laws effectively.

This bulletin highlights a number of issues which need clarification or further guidance in order to effectively implement the two laws.

Narrow interpretation and inflexible administration of business registration requirements

One of the key objectives of the two laws is to simplify the business startup process for both foreign and domestic investors. The recently issued inter-ministerial Circular (Ministry of Planning and Investment, Ministry of Finance and Ministry of Public Security) enables more effective coordination and a clearer delineation of responsibility between these three Ministries, which will help to reduce the time and costs related to business registration procedures, tax code registration, and company seal preparation.

However, some provincial business registrars are very rigid in how they apply regulations related to business entry, especially for foreign invested enterprises. For example, the Enterprise Law sets out clear guidelines for naming a company, and specifies cases where names would be considered identical or nearly identical to those already in existence, and are therefore not permitted. The law states, "The name of an enterprise must be written in Vietnamese, may be comprised of numerals and symbols, must be pronounceable and have at least two components: a) Type of business organization, and b) Distinct name." For foreign companies, this should mean that under the Enterprise Law, a foreign name or

word would be allowed to be used in a company name e.g. 'Smith, Limited' should be allowed to be called Cong ty TNHH Smith, or 'Venus joint-stock Corporation' could be called Cong ty co phan Venus. However, in many cases provincial civil servants require that foreign enterprises either translate the foreign name completely into Vietnamese¹ or use the registered name of the parent company.² These rigid requirements are not stated in the law and are causing delays.

Another issue is the inappropriate application of the category of "conditional businesses" to sectors that are considered controversial by provincial authorities. So for example, some registrars delay the processing applications for businesses such as massage parlors, karaoke bars, online gaming, internet services, security services, private investigation, debt collection, etc. using the criteria of conditional businesses because they consider these types of business to be sensitive, even though there is no legal basis.

Growing confusion among foreign investors regarding the business registration and investment licensing procedures

According to both the Investment Law and Enterprise Law, a foreign investor wishing to set up an enterprise for the first time in Vietnam needs to present the investment licensing authorities with an investment project. If approved, the

enterprise is granted an Investment Certificate and is not then required to obtain a business registration certificate. Thus in theory, the investment certificate certifies not just the investment project but the new enterprise as well. However, the current template for the investment certificate does not ask the entrepreneur for the same information that is required for a business registration certificate. So in practice, when foreign enterprises with investment certificate want to modify business registration information, they are facing delays. In addition, some investors are having problems registering branches in additional provinces, and they are being denied by local business registrars which claim that these businesses have not been properly registered in accordance with the Enterprise Law. Clearer delineation of responsibility for relevant authorities, together with a thorough review of applicable registration templates is needed.

Provincial level authorities do not have skills to appraise complicated projects for investment and licensing

The Investment Law has decentralized the decision-making process and given provincial authorities a high degree of autonomy for licensing and monitoring investment projects in their localities. This decentralization facilitates positive

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(1) For example, one foreign enterprise called ACE EMB (Ltd.) was told it had to translate its name into Vietnamese, but this name was already registered by a domestic enterprise. So, the enterprise faced a delay in registering itself in Vietnam.

(2) The fact is that many companies are owned by a parent company abroad under a different name, e.g. Coca Cola Vietnam is owned by Fraser & Neaves.

Narrow interpretation and inflexible administration of business registration requirements



● Even though nowhere stated in the law, many business activities are considered to be sensitive by public officials, such as massage, karaoke, online gaming, internet service provision, bodyguard services, private investigation, debt collection and others. When a business activity is difficult for public authorities to manage, it is quite likely that more limits and conditions will be set for entry into this business activity.

Lawyer Tran Vu Hai, Head of Tran Vu Hai Law Office



● There are some very arbitrary rules and processes currently being applied to business registration. Take the example of a company name. Currently the name of a company is required to be written in Vietnamese. In addition, there are departments in MPI which do not allow the use of the words "Việt Nam" in the name, though no one knows where that rule came from. Furthermore, foreign invested businesses that want to use foreign names

can only use the names of their parent companies. It is because of these regulations that the translation of some foreign names are nonsense, e.g. Công ty Hậu cần Quyền lực (Power Logistics Corporation), Công ty chuyên nhân tạo (Artificial Pro Inc.), Công ty sản xuất phim bạc (Silver Production), to give a couple of examples. Is it really necessary to preserve and promote the use of Vietnamese and the cultural identity of Vietnam though such rigid regulations? Is it necessary to protect the Vietnamese language regardless of how obscure the regulations can be?

Most countries in the region allow businesses to register using foreign company names so that they can better integrate. In China, Lenovo, Haier, Chery, Alibaba.com, and others are well known examples. In South Korea, there is Lucky Goldstar (later LG), while in Japan, Sony is not a Japanese word. Therefore, does it make sense that well-known Vietnamese brands, such as X-MEN, KIDO, NINO, KAILA, MAXX, VNEXPRESS, VIETNAMNET, etc are not allowed to use their commercial names as their company names because of these regulations?

Making a company name easy to remember and lodging in the hearts and minds of consumers is the ultimate goal of investors. So the regulation of Vietnamese names is creating disadvantages for Vietnamese businesses when compared to foreign companies operating in the same area. The regulation that stipulates the mandatory use of the parent company's name for foreign-invested businesses is also an obstacle. Many businesses set up in Vietnam through parent companies have different names. For example, Coca Cola in Vietnam is owned by a parent company named Fraser & Neaves. Perhaps the regulation intends to avoid confusion of identity,

but such a regulation is an unnecessary formality and actually constrains businesses. In choosing a name, a company should only be required to not violate the intellectual property rights of other businesses. "Causing confusion" is a concept of the Law on Intellectual Property Rights. For business registration, it should be sufficient to apply the rule of 'first come, first served.'

Mr. Le Net, Partner, LCT Lawyers Office



● According to current regulations, the name of a household business is protected within a district, and the name of an registered company is protected within a province. So there are different enterprises with the same business name located in different provinces (e.g., HASICO Haiphong and HASICO Hanoi). There needs to be a unified system to register and protect business names throughout the country. To do this, there should be a connection

between the Business Registrar and the Industrial Property Registrar (NOIP), as well as a unified business identification system (i.e., the first 2 digits representing the province where business is located, the next 2 digits representing the district, and the next 2 digits representing the enterprise, etc).

Mr. Pham Duy Nghia, Head of Business Law Division Law Faculty, Vietnam National University



● I believe that until the conditional businesses and areas of conditional investment are clarified and formalized by competent authorities, the functional authority will continue to act in the manner of "if we can not manage it, we will not allow it". These areas are still unclear and at the discretion of the relevant ministries, even though the law grants the right to issue this list to the Prime Minister. However, the Prime Minister and Deputy Prime Minister

have assigned this responsibility to the ministers, and thus this problem will continue.

There are two new terms introduced in the current legislation: "areas of conditional investment" and "conditions for investment projects in areas of conditional investment". What do they mean? These two concepts are confusing and hampering investors and local authorities in identifying the specific conditions applied for an investment project. Clear instructions on these issues, as well as specified investment procedures, forms, and contents of documents, as we had with the "financial capacity report" and "project justification report", are needed in upcoming implementation decrees.

Mr. Vu Duy Thai, Chairman Association of Commerce and Industry in Hanoi

Growing confusion among foreign investors regarding the business registration and investment licensing procedures

● Recently, the MPI issued Decision No 1088/2006/QĐ-BKH, dated October 19, 2006, which introduces three Standard Forms for Conducting Investment Procedures in Vietnam: (i) investment

registration without the establishment of a new enterprise (form in Appendix II-1), (ii) with the establishment of a business branch (form in Appendix II-2), and (iii) with the establishment a new

enterprise (form in Appendix II-3). In the latter two forms, there is no provision of "the IL is used as the BRC", and the heading of the forms have the statement: "Business to be registered and the investment project to be implemented with the following details...". With this guidance, whenever a foreign investor wants to expand his project, or a domestic enterprise wants to apply for a new investment project, they will use the form II-1. Whenever an existing foreign enterprise applies for an investment project in other provinces, form II-2 will be used. And whenever a foreign enterprise is established for the first time in Vietnam, form II-3 will be used. This decision has significantly improved the investment registration procedure - it is about time this improvement was made as it's been 20 years! (1987-2006)

At present, the Business Registrar and Investment Registrar are two different offices located in the same Provincial Department of Planning and Investment (DPI). So it is important to have strong coordination between the two offices in order to provide a full picture to both foreign and domestic investors. In my opinion, whenever a foreign enterprise (with an IC used as BRC), wants to establish a branch in other provinces, they should register with the host Provincial Investment Registrar Office rather than with Business Registrar Office. This would be more suitable for state management, as foreign investment should be considered a different source of capital. This management practice is not considered as a case of unequal treatment between foreign and domestic investors.

To implement these two laws consistently throughout all provinces, the MPI should ask the provincial DPIs to accept the establishment of a new branch of a foreign-invested enterprise in another province. For such a situation, the enterprise uses the form II-2. Domestic investors can also register with this form if they start a new investment project in the original province. This original IC can then be used as a certificate of a business branch in another province. The enterprise should not need to apply for any further registrations with the Business Registry. Clear guidance from the MPI on this issue would go a long way towards solving the current overlap and confusion existing at the provincial level.

Mr. Nguyen Ngoc Bich, General Director, DC Law



● There is overlap between the new Enterprise Law (EL) and Investment Law (IL), which is causing problems with their implementation. In principle, there should be no overlap between them, as the EL sets provisions on establishment, organizational structure, and operation of a business, while the IL stipulates the investment activities. For the operation of enterprises, the IL should stipulate only the conditions for investment incentives that enterprises would have on their specific investment activities or projects. However, there is an overlap caused by a provision of the IL which permits the Investment Certificate (IC) to substitute for the Business Registration Certificate (BRC) in certain circumstances. The lack of guidance on this issue has created delay and confusion in implementing these two procedures at the provincial level. For example, a foreign investor who is using their IC to substitute the BRC, may later on want to expand their business activities and will need to have its investment license revised. However, it is not clear where and how to register these changes to the business activities. Are we to assume that the Business Registrar will have the responsibility for revising the investment license?

There are also examples of unequal treatment between foreign investment and domestic enterprises in this provision. Domestic investors must carry out both business registration and investment registration procedures, while foreign investors are able to use the IC as a substitute for the BRC, and need not apply for the BRC separately. Furthermore, after acquiring the IC, domestic investors still need to apply for licenses related to land, construction, and environment, as well as other licenses depending on the specific investment project. This raises the question of what the purpose of the IC really is. In principle, the IC is issued to verify an investment project and to certify that the project meets all requirements stipulated by law. This should mean that other sub-licenses are unnecessary as the IL has already verified all aspects of the investment project.

*Mr. Cao Ba Khoat, Lawyer, Director
K & Associates Consulting Firm, LTD*

Provincial level authorities do not have skills to appraise complicated projects for investment and licensing



● The decentralization of decision-making on investment has given the provincial authority more accountability and responsibility in the investment appraisal and approval process. However, many officials are conservative in dealing with business applications. To protect themselves, they tend to ask and wait for the "opinion from higher authorities" on all unclear or sensitive regulations. Clear and detailed guidelines for these two laws are

necessary for avoiding misunderstanding and arbitrary implementation of the laws throughout the provinces. Also, the implementation of EL and IL should be accompanied by other improvements in the business environment. Some provinces try to offer different investment incentives to attract large-scale investment projects, and ignore the small and medium enterprises (SMEs). More support and investment promotion activities should be provided for private sector SMEs. The procedures related to investment appraisal and approval are still very cumbersome. After acquiring an

investment certificate, a local investor still faces many further procedures and requirements. So it is very important to establish a legal framework for a "One Stop Shop" model for the IC application process.

*Mr. Nguyen Phuong Bac, Vice-Director
Bac Ninh Department of Planning and Investment*

● Recently, there have been plenty of complaints from foreign investors about the delays and red-tape that occur during the investment appraisal and licensing procedures at local levels. Despite the fact that the new IL has assigned greater decision-making responsibility for the investment approval process to the provincial level, many provincial officials prefer to seek advice from higher level (or central) authorities, especially when dealing with large-scale or complex projects. This shows a lack of experience and the low capacity of local officials, and an inflexible application of laws and regulations in business proceedings. Furthermore, although these provincial authorities are reported to have a generally poor attitude towards businesses, nothing has been done to help change their behavior.

Mr. Nguyen Ngoc Bich, General Director, DC Law

Rights of foreign investors under WTO commitments need clarification



● Ministry of Trade and MPI need to cooperate on issuing a guide for the implementation of WTO agreements. Recently, the biggest obstacle on the implementation of WTO agreements has been the business registration of foreign investors in service sectors. For some services, the present business laws and regulations exceed the WTO commitments on foreign investment. In principle, these laws and regulations should be the ones that are administered. However, certain conservative provincial authorities only offer new investors the "lowest level of favor" that are stated in the WTO commitments.

Mr. Nguyen Ngoc Bich, General Director, DC Law

● Subject to WTO commitments, Vietnam must permit foreign-invested enterprises to carry out import-export business, effective as of Vietnam's accession to the WTO. To implement this, the Government issued Decree 23/2007/ND-CP, which allows foreign-invested enterprises to conduct export-import business. However, the issuing of licenses for export-import businesses has been frozen until MPI issues its Circular, which will provide guidelines for export-import business (Official Letter 1709/TM-KHDT dated 27 March 2007). As a result, foreign invested enterprises hope that the circular will be issued soon so that they may resume their import-export business.

*Mr. Tran Anh Duc, Vilaf Law Firm,
Member of Manufacturing & Distribution Working Group*

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competition among Vietnam's provinces for attracting more investment and has helped improve administrative procedures and the quality of service from civil servants. However, in many cases local authorities lack the capacity to appraise complicated investment projects, resulting in the opposite result, i.e. taking much longer because they ask for and then to wait for detailed guidance from Ministries. Combined with the overlap and lack of clarity in some of the implementing guidelines, businesses are often facing even longer delays.

Recently, the MPI endorsed a plan to create small teams of experts which will play the role of responding to provincial requests to help with complex investment projects on a case by case basis. While this may be a solution in the short-term, the long term goals should be to promulgate further guidelines for implementing investment-related regulations in construction laws, land laws, environment law, real estate trading laws, and others. It will also be necessary to strengthen local staff capacity to independently and effectively administer those regulations.

Rights of foreign investors under WTO commitments need clarification

Vietnam, officially a member of the WTO since January 2007, now needs to strictly implement its WTO commitments. Implementation will result in many service sectors being opened to foreign investors. However, according to some foreign business associations, it is more difficult now for foreign investors to open a business in WTO-committed service sectors than it was prior to WTO accession. Many foreign applications in the service industry are being backlogged or even rejected due to confusion and inconsistency in interpretation of the WTO commitments and other related regulations. This is happening at both ministerial and provincial levels. Provincial authorities, with their conservative interpretation and frequent misunderstanding of WTO principles, are applying the lowest level of the offer in the WTO commitments³ to foreign investors, regardless of current regulations. Further difficulties have arisen from a lack of guidance for domestic enterprises in these sectors on the procedures and permitted volumes for selling shares to foreign investors.

WTO implementing decrees need to be promulgated quickly, to

guide provincial authorities on the following three issues: i) in cases where current regulations offer more favorable conditions than WTO commitments, which commitments to follow; ii) whether foreign investors are permitted to do business in a number of services where they are not specifically mentioned in the Service Schedule; and iii) how to deal with conflicts between WTO commitments and other international treaties and obligations.

Comments from the Vietnam Business Forum

At the last Vietnam Business Forum in May 2007, the Manufacturing and Distribution Working Group had a number of specific recommendations on provisions that need detailed implementing guidelines. These include:

- Although Decree No. 108 provides a list of conditional business sectors for investment, the government needs to issue detailed guidelines on the specific requirements for each conditional business sector;

- There is no detailed procedure for capital and project transfer. While the procedure for project transfers is subject to Article 66 of Decree 108, this section deals mainly with capital transfer. This section does not provide details on documents enterprises should submit to the competent agency for either capital or project transfers;

- The Enterprise Law requires certain business sectors to have a minimum amount of charter capital. There has not been any guidance on the certification process regarding minimum capital, nor any guidance on identifying the competent authority responsible for certifying the charter capital;

- Guidelines are still lacking on how to change business cooperation contracts into joint ventures;

- Cumulative voting: There are two different interpretations of Article 104: a) voting to elect members of the board of management (BOM) or the board of supervision only need comply with item 3 paragraph C, i.e., cumulative voting; or b) the phrase "when all the following conditions are satisfied" in item 3 could mean that such elections require compliance with both paragraphs a and c. This would mean cumulative voting is allowed but successful candidates need at least 65% of the votes. According to international practice, the first interpretation is designed to protect the minority shareholders in the company.

(3) The Schedule of Specific Commitments in Services