

Informed Counsel

Analysis of Recent Legal Developments in Southeast Asia



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Our firm has been named "Firm of the Year 2015" in Asia and Vietnam by Managing Intellectual Property, while Asian Legal Business has recognized the firm as "Employer of Choice" and a member of its "Power List."

Vietnam's New Investment and Corporate Law: A Step Forward or More of the Same?

Michael K. Lee | Partner
michael.l@tilleke.com



On November 26, 2014, the National Assembly of Vietnam passed amended versions of the Law on Investment (LOI) and the Law on Enterprises (LOE), replacing the 2005 versions of each law. The new laws will take effect on July 1, 2015. As these two laws form the principal legal framework for foreign companies doing business in Vietnam, the foreign investment community has been keen to discover whether the new LOI and LOE will improve on the existing law or merely reshuffle the pieces with the net result being essentially the same.

The problems faced by foreign investors under the current laws are the complexity and length of time it takes for investment registration and corporate formation. Foreign investors are not allowed to incorporate a company without proposing and obtaining approval for a detailed investment "project." Accordingly, they are required to submit a business plan or feasibility study in conjunction with the submission of information and documentation necessary to incorporate.

In addition, the licensing authorities will review and comment on the legal scope of business activities of a company, the adequacy of capital contributions, and the proposed business plan or feasibility study of a company, and require the investor to provide considerable detail and justification. The licensing authorities often require multiple meetings with counsel and revisions to the application dossier, which further prolongs the process.

Although the new laws fall short of making sweeping changes, there are some indications that they may ease the burden on foreign investors. The changes are discussed in greater detail below.

Investment Registration Structure

Under the 2005 LOI, all direct foreign investment activity must be licensed via an Investment Certificate (IC) which acts as both a foreign investment registration certificate and an incorporation certificate. Under the new law, where required, foreign investors must first apply for an Investment Registration Certificate (IRC) and then an Enterprise Registration Certificate (ERC).

While it may seem that requiring two steps instead of one could lead to a more complex and lengthier approval process, this is not necessarily the case. The combined statutory time frames for the authorities to approve the IRC and ERC are approximately the same as the time frame allotted to issue an IC. Moreover, under the current law, the authorities routinely go beyond the legally prescribed time frames, with ICs normally taking two to six months from the date of filing to approval. We can expect more of the same under the new law unless the approval process is streamlined, and there appears to be a serious attempt to do so.

Investment Registration Approval Process

Under the 2005 LOI, any foreign direct investment project with invested capital of over VND 300 billion (approximately USD 1.4 million) or in a conditional sector is required to go through the investment "evaluation" process, while all others must go through the investment "registration" process. Certain projects also need the Prime Minister's approval. In practice, little distinction has been made between the two processes.

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Most applications for ICs are processed by the Department of Planning and Investment (DPI) under the provincial-level People's Committee. When investment activity falls within the jurisdiction of certain ministries, such as trade, communication, or health, the DPI normally contacts those ministries for their input and opinions. Sometimes multiple ministries may have to be consulted. These consultations are time-consuming processes involving the submission of formal requests from the DPI, along with the delivery of any necessary supporting documents.

Consultations are mandatory for foreign investment in certain conditional sectors, unless local legislation or an international treaty to which Vietnam is a party (e.g., its WTO Commitments) makes consultation unnecessary. Under these rules, more often than not, consultation is required and, in practice, the DPI has normally erred on the side of caution and sought consultation from any ministry that may have jurisdiction over the proposed investment activity. For example, the Ho Chi Minh City DPI has sent all product distribution-related applications to the trade ministry in Hanoi regardless of whether they had prior experience with the trade ministry's policy on a particular product. Furthermore, unless the investment is in an industrial zone, an officer from the provincial-level People's Committee signs off on the ICs, adding yet another layer of bureaucracy to the approval process.

Under the new LOI, the first step is to determine whether a decision on investment policy is needed and who has the authority to issue a decision on investment policy, which is ascertained as follows:

1. *National Assembly* – Projects which have a significant impact on the environment, e.g., nuclear power plants and projects involving the relocation of 20,000 or more people in mountainous areas or 50,000 or more in other areas.
2. *Prime Minister* – Projects which involve the relocation of 10,000 or more people in mountainous areas or 20,000 or more in other areas, airports, seaports, petroleum, casinos, golf courses, and telecommunications involving the building of network infrastructure.
3. *People's Committee* – Projects in which the state allocates or leases land without auction, tender, or transfer; projects involving conversion of land-use purposes; and projects utilizing technology on the technology transfer restricted list.

Once a favorable decision on investment policy is issued, the IRC is to be issued within 5 working days. If the project is not subject to a decision on investment policy, then the IRC is to be issued within 15 calendar days. At this point, until follow-on legislation is issued, it appears that consultation with the ministries would not be mandatory under the new LOI, nor would sign-off from the People's Committee be necessary. If the automatic involvement of the ministries at the IRC stage can be avoided, the processing time for investment registration would be significantly reduced.

Clarity on What Constitutes a Local Company

The 2005 LOI did not clearly set out what constitutes a "domestic investor," leading to a situation where even a minor foreign holding in a domestic company could trigger the requirement for an application for an IC. Under the new LOI, any Vietnamese enterprise in which foreign entities or individuals or foreign-controlled entities hold or will hold 51 percent or more of the equity in an enterprise

must comply with procedures applicable to foreign investors; otherwise, the enterprise will only be subject to domestic investment registration requirements. If this distinction is applied consistently throughout Vietnamese corporate and commercial law, many foreign investors are likely to choose the joint venture model as a path of entry into areas restricted to foreign participation, such as the distribution of pharmaceutical products, books, and video media.

Under the 2005 LOI, only projects with an amount invested of less than VND 15 billion (approximately USD 700,000), which are not in conditional sectors, are exempt from registration. Under the new LOI, domestic companies do not need an IRC, but they can apply for one if it is desired. They do need a decision on investment policy where the nature of the project requires it.

Legal Representatives

Under the new LOE, an enterprise will be allowed to have multiple legal representatives, instead of just one as limited under the current law. This is a significant change because replacing legal representatives was a slow and cumbersome process that not only created unnecessary administrative burdens on investors, but had the potential of temporarily debilitating business activity should the former legal representative become uncooperative or unavailable during the transfer. Having multiple legal representatives will likely mitigate this problem.

Capital Contribution

Under Decree 102 guiding the 2005 LOE, the time limit for capital contribution of an LLC may not exceed 36 months from the date of issuance of an IC. Under the new LOE, the time limit is 90 days from the date of issuance of an ERC. The requirement to complete an injection of capital contribution within 90 days from the date of issuance of an ERC is likely to have a significant impact on foreign investors. Prior to this change, in most instances, investors were allowed to contribute their charter capital within two years, according to their business needs. Now, they have only 90 days from the date of incorporation regardless of whether there is a commercial need to do so.

Equity Purchase in a Vietnamese Company

Under the 2005 LOI, for limited liability companies, approval is required for any amount of equity purchase. For joint-stock companies, notice must be made to the investment authorities for a purchase of over 5 percent of equity, and registration is required if any founding shareholder is replaced. Under the new LOI, investment registration is only required if the combined foreign ownership after acquisition will be 51 percent or more or the target entity operates in a conditional field in respect of foreign investors. The new LOE would, however, require corporate registration of a new member to an LLC and, for a JSC, notice of a new foreign shareholder must be made to the investment registration body within ten days of the completion of the share purchase.

The 2005 LOE only allows enterprises of the same type (e.g., LLCs or JSCs) to be merged or consolidated. This provision has been abolished in the new law.

Conclusion

While the new laws have kept many of the same requirements of the old laws, they include some changes that could be beneficial to foreign investors. In particular, depending on how the laws are applied, there may be a significant improvement in investment registration times. It is yet to be seen whether the shortened time frame for capital contribution is a cause for concern. 🏠