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Legal News

Legislations issued during last month set forth below reveal the effort of the Government of Vietnam to tackle economic problems contemplated in the beginning of this year: enabling business entities to maintain the pace made last years after previous economic stimulus year have been reduced and providing additional means for them to develop.

1. Extension of CIT payment in 2010 for enterprises

On February 12, 2010, the Government issued Decision 12/2010/QĐ-TTg signed by the Prime Minister regarding the extension of CIT payment in 2010 for enterprises which aims at continuing relief of hardship for enterprises and contributing to promote Socio-economic development.

In the case of small and medium-sized enterprises, the amount of CIT is calculated as the amount provisionally evaluated each quarter and the amount on finalization for year 2010. If any enterprise declares CIT on real estate property transfer activities on each occasion, then the amount of CIT entitled to the extension is the amount provisionally evaluated on each occasion and the amount on finalization of such real estate property transfer activities.

In the case of enterprises manufacturing garment, textile products, leatherwear, and footwear, the amount of CIT is calculated as the amount provisionally evaluated each quarter and the amount on finalization for year 2010.

Periods of extension of CIT payment is set as follows:

- In the first quarter of 2010, the extension will be until July 30, 2010 as the latest.
- In the second quarter of 2010, the extension will be until October 30, 2010 as the latest.
- In the third quarter of 2010, the extension will be until January 31, 2011 as the latest.
- In the fourth quarter of 2010, the extension will be until April 30, 2011 as the latest.
- On the tax finalization for year 2010, the extension will be until June 30, 2011 as the latest.

This Decision shall be of full force and effect as from April 20, 2010.

2. Maximum interest rate for USD deposits of economic institutions at credit institutions

On February 10, 2010, State Bank issued Circular 03/2010/TT- NHNN regarding the maximum interest rate for USD deposits of economic institutions at credit institutions.

In details, the maximum interest rate for USD deposits of economic institutions at credit institutions is set at one per cent (1%) per annum. Also, Decision 07/2007/QD-NHNN dated on February 6, 2007 will no longer be valid. Nevertheless, interest rates on USD deposits of economic institutions at credit institutions which happened before the effective date of this Circular shall still be implemented until the end of the term agreed by the two parties.

This Circular shall be of full force and effect as from February 11, 2010.



3. Regulations on Credit Information Operations

On February 12, 2010, the Government issued Decree 10/2010/ ND- CP regarding regulations on credit information operations [“CIO”] in Vietnam.

In order to obtain a Certificate of satisfaction of conditions for a CIO, the following conditions must be followed:

- Having adequate information technology base.
- Having a minimum charter capital of thirty (30) billion dongs.
- Having managerial staff with expertise in finance, banking, and information technology.
- Having a feasible business plan.
- Having activities from a minimum of twenty (20) commercial banks or provide credit information.
- Having written agreements on procedures for collecting, processing, storing, and providing credit information between the CIO and the lending institutions.

Procedures for issuance of a Certificate of satisfaction of conditions for a CIO are described as follow:

- Request for issuance of a Certificate;
- Copy of business registration Certificate;
- Data proving satisfaction of the conditions listed above.

On the basic of collection of credit information, the information listed below will be collected:

- Personal identification of borrowers and their relatives including parents, spouse(s), and children;
- Loan history, and history of receipt of assets, goods purchased on payment or deferred payment, and history of other transactions with conditions on interest rate, term and, rent;
- Debt history including amounts of due and undue debts, repayment terms, and credit limits;
- Information on security for repayment of debts;
- Other information not including information about deposit accounts and information in the category of State secrets.

However, CIO can only provide credit information about the borrower with his/her consent. Also, CIO shall only be permitted to use credit information about borrowers for the five (5) most recent years to create credit information products.

This Decree shall be of full force and effects as from April 15, 2010.

4. Regulations on Merger, Acquisition, and Consolidation of Credit Institutions

On February 11, 2010, State Bank issued Circular 04/2010/ TT-NHNN to regulate merger, acquisition, and consolidation of credit institutions. However, this Circular does not regulate acquisition by a bank of another bank.

In details, forms of merger, acquisition, or consolidation of credit institutions are defined as follows:

1. Forms of merger:
 - A bank, finance company, and/or co-operative credit institution may merge with one bank.
 - A finance company may merge with other finance company.
 - A finance leasing company may merge with other finance leasing company.
2. Forms of consolidation:
 - A bank may consolidate with a bank, finance company, and/or co-operative finance company to become one bank.
 - Finance companies may consolidate to become one finance company.
 - Finance leasing companies may consolidate to become one finance leasing company.
3. Forms of acquisition:
 - One bank may acquire a finance company and/or finance leasing company.
 - One finance company may acquire a finance leasing company.

Credit Institutions participating in a merger, consolidation, or acquisition pursuant to this Circular must publish an announcement in at least three (3) consecutive issues of a daily newspaper which is published nationwide. During the period of the publication, the announcement must also be listed at the head offices, branches, and transaction departments of the credit institutions participating in the merger, consolidation, or acquisition. Then, it must be published on the websites of such credit institutions, on the website of the State Bank, and on the website of the Banking Association.

The credit institutions participating in the merger, consolidation, or acquisition shall coordinate in formulating a merger/consolidation/acquisition plan, a merger/consolidation/acquisition contract, and a charter on organization of the merged/consolidated/acquired credit institution. Then the merger/consolidation/acquisition plan must be jointly signed and sealed by the chairmen of the boards of management of the participated credit institutions, and such chairmen shall be liable for the contents of the merger/consolidation/acquisition plan.

This Circular shall be of full force and effect forty-five (45) days after the date of its signing.

5. Safeguard Measures Denied

On July 1, 2009, the Ministry of Industry and Trade (“MIT”) released Decision No. 3329/QD-BCT to conduct an investigation on imported glass, at the request of four local companies manufacturing glass against seven producers exporting their products to Vietnam for exercising safeguards measures under WTO.

The petitioners claimed that they have inflicted serious injury with respect to price undercutting, suppression and depression; sales and market share of domestic industry; decline in profit, in output, employment and productivity; actual and potential decline in capacity utilization; increasing inventory volume; declining investment and bad effects to glass quality and cost increase due to high inventory causing lease for more space to store the glass.

The causation of such injury is said to be the sharp increase of glass import into Vietnam. The complaint reveals throughout 2007, the total quantity of glass (converted into glass of 2mm) imported was 13 mil. square meters, while just in the first quarter of 2009, the same is approximately 7 million. From the middle of 2008, local manufacturers had to progressively lower their selling price despite a rise in production costs. Sales were not improved and inventory remained at a high level.

The petitioners proposed to MIT, for four years, imposing an absolute duty rate of 0.6 per square meter converted to glass of 2mm on all kinds of imported float glass. Pending investigation results a temporary measure of imposing the tax rate of 40% on all kinds of imported float glass for 200 days.

On 23 February, MIT gave its decision through the instrument No. 0890/QD-BCT and denied the proposal of the petitioners after a thorough investigation reported in a 51-page document.

MIT states that local manufacturers did suffer damages during the end of 2008 and the early of 2009; but the cause of which was partially made by the imported glass, but mainly by the fluctuation of F.O prices during the same time in Vietnam. At the time of the decision, the local manufacturers have been being recovered and the F.O prices in Vietnam are comparable to the same in the world. Accordingly, application of safeguard measures over the goods in question is not appropriate.

At issuance of the Decision initiating the investigation, DC LAW remarked that this is the first case in Vietnam, no precedence or practice is available for replication. Under such circumstances, it is expected that lenient measures would be applied to avoid political risks.

Legal Advice

QUESTIONS:

You have asked us to set out the key aspects of joint stock companies (“**JSC**”) in Vietnam and to compare (where appropriate) those aspects to limited liability companies (“**LLC**”).

I. GENERAL OVERVIEW

Under prevailing law, Enterprise Law of 2005 (“**2005 EL**”), the JSC form is applicable to both foreign invested and Vietnamese individuals and organizations and both enjoy equal treatment.

II. SPECIFIC LEGAL BRIEF ON JOINT STOCK COMPANIES

A. Incorporation

The 2005 EL lists all required documents for setting up a JSC of which the charter is the most important as it governs the scope of permissive company activity.

A JSC must have a minimum of three shareholders but there is no restriction on the maximum number of shareholders. Shareholders may be individuals or corporate entities.

The charter capital of a JSC is divided into shares which may consist of:

- i. Ordinary shares (voting).
- ii. Voting preference shares (voting).
- iii. Dividend preference shares (non-voting).
- iv. Redeemable preference shares (non-voting).
- v. Other types of shares as provided for in the charter of the JSC.

A JSC may issue securities to mobilize capital (including bonds) provided that the listing conditions are satisfied as required by law.

In comparison, LLCs do not have shares and cannot issue securities. *The ability to mobilize capital through the sale of shares and bonds is a key difference between the LLC and a JSC.*

In an LLC, the equity interest in the company is called “charter capital”. It is the actual capital contribution or the committed capital contribution at the time of incorporation. The charter capital can be money or other recognized assets which value can be assessed. In a JSC, “charter capital” is divided into equal portions called shares and all shares need not be subscribed to at the time of incorporation.

Thus, in a JSC, it is easier to raise capital by adding new shareholders (by subscription) because only notice need be given to the relevant Vietnamese authorities if the share assignments involve 5% or more of the total number of outstanding shares. If the sum is less than 5%, notice is not required.

Raising capital for an LLC is quite restrictive: members must fully pay his/her shares as subscribed, be liable for the unpaid amount, and reduce his/her ration if failing to pay. An LLC may have one or two or more members but not more than 50.

B. Management Structure

All JSCs must have:

- (i) A General Shareholder’s Meeting (“**SM/AGM**”);
- (ii) A Board of Directors (“**BOD**”);
- (iii) A General Director/Director and;
- (iv) A Control Board if the JSC has more than 11 shareholders, or if the JSC has a corporate shareholder which holds more than 50% of shares.

By comparison, LLC structure is simple: no BOD but a Member’s Council and a General Director.

It should be noted that a General Director of a JSC cannot concurrently be the same of another enterprise (whether that enterprise is a JSC or an LLC); but this restriction is not applicable to a General Director of an LLC.

In an LLC, a Control Board is not required unless there are at least 11 members. Additionally, the duties and powers of a Control Board in the LLC are not specified in the law. In contrast, a JSC Control Board has specifically enumerated duties and powers set in the law.

C. Quorum Mechanism

The meeting of the SM/AGM requires shareholders holding at least 65% of voting shares. If there is no quorum within 30 days of the first meeting, a second meeting requiring attendance of shareholders holding at least 51% of voting shares must be held. In the event the second meeting does not achieve quorum, a third meeting will be held within 20 days of the scheduled second meeting, regardless of the number of participating shareholders and the percentage of the voting shares held by them.

A meeting of the BOD requires attendance of at least 65% of BOD members.

By comparison, for a two or more member LLC, the quorum required for a Members’ Council meeting is at least 75% of the charter capital.

D. Corporate Governance

This principle is not popular among JSCs in Vietnam, because the latter are only “two decade old”; not a century or so old as those in developed countries. Corporate governance is a demand from international finance institutions against JSCs in Vietnam for financing purposes; under such pressure the Vietnamese government has incorporated it in the laws; firstly through a mandatory sample charter provided to listed companies in 2002 then the EL 2005.

Most JSCs in are still managed rather by expediency than scientific management. The former is similar to a family controlled business, while the latter is a manager – controlled one. Except for listed companies, which are about 200 over 60 to 80,000 ones, JSCs in Vietnam have not reached the stages of “ interests of stakeholders” or engage scandals seen in public companies in developed countries; accordingly, corporate governance exists more in law than in practice.

For “corporate governance” the law provides the following:

Approval of Certain Transactions:

Certain transactions of the JSC must be approved by the SM/AGM or the BOD in order to be effective (such as transactions with "related" persons or contracts signed with shareholders holding 35% or more of shares or contracts with BOD members or with the General Director/Director). If the legal representative, shareholders, BOD members, and General Director/Director are involved, they would also be liable for all losses and damages in relation to interested transactions.

Personal Liability:

The 2005 EL also introduces the concept of "piercing of the corporate veil".

However, under the 2005 EL, the competent authorities may impose personal liability on the shareholders if the company is seriously undercapitalized upon formation. The shareholders of a company may also be personally liable based on certain actions taken by them.

Shareholders are personally liable if they use the name of the company to (i) breach the laws; (ii) do business or carry out transactions not for benefit of the company and cause damage to others; and (iii) pay debts not yet matured when the company may be in financial difficulty.

The *BOD Chairman* is personally liable if he/she fails to carry out his/her obligations and incurs damage to the legal interests of shareholders. He may be sued by the shareholders personally or by the company.

The *General Director/Director* must compensate the company for any damage caused by failure to comply with the law, charter, his/her labour contract and decisions of the BOD.

Members of the Control Board are personally liable if they fail to perform their duties and cause damage.

BOD Members are personally liable if they vote to approve board resolutions that contradict the charter or resolutions of shareholders and/or the law. Any resulting compensation goes to the company. Shareholders holding shares for at least one year can request the suspension of any such decision of the BOD.

There are similar personal liability provisions for LLC officers.

The above details are taken from the Law on Enterprises No. 60/2005/QH11 dated 29 November 2005 of the National Assembly which came into force as of 1 July 2006 and Decree 139/2007/ND/CP dated 5 September 2007 on providing detailed guidelines for implementation of the Law on Enterprises.

We trust that the above is of assistance. Should you have any queries, please do not hesitate to contact us.

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