Newsletter
12 - 2015

VILAF

VIETNAM INTERNATIONAL LAW FIRM

Newsletter Winter 2015:

Regulations on Investment

In This Issue:

Investment Registration

Government Decree 118/2015/ND-CP (Decree 118) regulates investment activities

Decree 118, which takes effect on December 27, 2015, provides a more detailed guidance on the implementation of the new Law on Investment with respect to (i) application, control and announcement of conditions for business investments, (ii) measures of investment guarantee, (iii) investment incentives, (iv) project implementation, and (v) State-management of investment. Below are some of the most important changes affecting foreign investors:

Treatment of non-WTO-member investor

A foreign investor from a non-WTO-member country is sub-

subject to investment conditions as provided for foreign investors from WTO-member countries, unless otherwise provided in an existing bilateral agreement between Vietnam and such other non-WTO-member country or relevant laws.

Optional one-door procedure

Instead of separately undergoing corporate registration procedure with the Enterprise Registration Authority (ERA) and investment registration procedure with the Investment Registration Authority (IRA), a foreign investor now has the right to file both registrations with the IRA. In such case, the IRA will be the one to coordinate with the ERA internally. The foreign investor can then collect both Investment Registration Certificate (IRC) and Enterprise Registration Certificate (ERC) from the IRA.

Exemption of investment deposit escrow

The requirement to make an investment deposit escrow for a proposed investment project involving the use of land is now exempted for any of the following entities:

a) A winning bidder in an auction of land use rights for a project for which the land is allocated or leased by the State with the payment of land use fees or lump sum land rental;
b) A winning bidder for a project for which the land is used in accordance with the tendering regulations;
c) An investor to whom the land is allocated or leased by the State upon acceptance of a transfer of a project for which a deposit escrow has been paid or in which the capital contribution has been completed as scheduled under its IRC or in-principle approval;
d) An investor to whom the land is allocated or leased by the State for the implementation of a project upon acceptance of a transfer of land use rights and/or assets attached to land from another land user;
e) An investor who is a revenue-generating governmental administration agencies or developer of high-tech zones established under a decision by a competent state authority for the implementation of a project where land is allocated or leased by the State for the purpose of developing infrastructure in industrial zones, export processing zones, high-tech zones or functional areas in economic zones.

Reduction or postponement of investment deposit escrow

A 25% or 50% reduction of the deposit escrow may apply to projects in business lines entitled to investment incentives, special investment incentive, in disadvantageous or extremely disadvantageous areas, high-tech zones, industrial zones or export processing zones, including projects for building and commercially operating infrastructures in such zones.

Procedures for new investment project

When an existing foreign-owned enterprise (FOE) engages in a new investment project, either of the following procedures will apply:

a) If the FOE is a foreign-investor equivalent, it must apply for a separate IRC for the new investment project;
b) If the FOE is not a foreign-investor equivalent, it does not need to apply for a separate IRC, but must file a report of the new project with the IRA before the implementation of such new project.

Under the new Law on Investment, a "foreign-investor equivalent" is an enterprise in which at least 51% of the charter capital is owned by the following:

- Foreign investors; and/or
- FOEs in which foreign investors own at least 51% of the charter capital.

Formation of New Branches

An FOE may form new branches, representative offices and/or business locations without having a new investment project.

Financial investment

An FOE that is a public company whose shares are listed or registered for trading on a stock exchange may trade shares on the stock exchange pursuant to the securities laws on (i) investment procedure and (ii) foreign ownership thresholds, except where the investment laws or international treaties provide for a different foreign ownership threshold.

Acquisition of shares/equity

An acquisition of shares/equity or making capital contribution to an existing enterprise is not subject to prior approval of the IRA, unless it falls under either of the following cases:

a) The target enterprise engaged in a conditional sector for foreign investors; or
b) The acquisition or capital contribution causes foreign investors and/or foreign-investor-equivalents to own at least 51% of the charter capital of the target enterprise through either of the following cases: (i) increase in foreign ownership from below 51% to 51% or higher, or (ii) increase in foreign ownership where such foreign ownership is at least 51% before such change.

The target enterprise is not required to amend or apply for an IRC or amend the previous in-principle-approval for the target enterprise's existing investment project.

Existing FOEs

An FOE which is operating under a previously issued investment license or investment certificate is entitled to continue its operations pursuant to such investment license or investment certificate and charter. The FOE, however, must comply with new laws with respect to legal matters not stipulated in its investment license, investment certificate and charter.

www.vilaf.com.vn

HO CHI MINH CITY OFFICE
Kumho Asiana Plaza Saigon,
Suite 4.4 – 4.6, 39 Le Duan Street,
District 1, Ho Chi Minh City, Vietnam
Phone: (84-8) 3827 7300

HANOI OFFICE
HCO Building (Melia), Suite 603
44B Ly Thuong Kiet Street
Hoan Kiem District, Hanoi, Vietnam
Phone: (84-4) 3934 8530

Sale of State equity interests

Government Decree 91/2015/ND-CP (Decree 91) on the management of State capital regulates, inter alia, the sale of State-equity interests in enterprises

The sale process below applies to the sale of State-equity interest in a joint stock company (JSC) or multiple-member limited liability company (LLC) previously converted from a State enterprise. It also applies to the sale of equity interests held by a State enterprise in a JSC or LLC.

Floor price

The floor price for the purpose of an auction or private sale of a State-equity interest must be determined by a qualified price evaluation organization and include the applicable value of land use rights and intellectual property rights.

Relevant authority

The authority to decide on the sale of a State-equity interest in a JSC or LLC converted from a State-enterprise is with the Prime Minister or the "owner representing authority" under whose decision such State enterprise was initially established or supervised.

Sale of State equity interest in an LLC

A sale to other members of the LLC may be conducted through a private negotiation with the other members, and the floor price is to be determined as mentioned above. A sale to third parties must be conducted as with the case of State-equity interest in a non-listed JSC.

Sale of State-equity interest in a listed JSC (or a JSC whose shares are registered for trading on a stock exchange)

The sale must be conducted on the stock exchange within the trading band.

Sale of State-equity interest in a non-listed JSC (or a JSC whose shares are not registered for trading on a stock exchange)

The sale must be conducted through a public auction. If the auction was not successful, the sale must be conducted through a competitive offering. If the value of the offering of the State-equity interest is at least VND10 billion, the auction must be organized in the stock exchange (this is usually understood to mean that the auction should be organized by a securities company). If there is only one interested buyer or if permitted by the Prime Minister, a private negotiation may be conducted for the sale.

Construction Management

Government Decree 59/2015/ND-CP (Decree 59) stipulates the management of construction investment projects

Decree 59 took effect from 5 August 2015

Classification of construction investment projects (project)

Projects are categorized into (i) National important projects, (ii) Group A projects, (iii) Group B projects, and (iv) Group C projects. The criteria for each kind of project are specified in Annex 1 of Decree 59, which appear similar to those under the Law on Public Investment.

Depth of management of projects subject to sources of capital

The depth of the State management of a project is subject to the sources of capital:

• A project which utilizes the State budget capital must be managed tightly and comprehensively to ensure the control of the investment principles, quality, schedule progress, budget control and efficiency;

• A PPP project involving construction must be managed as a project which utilizes the State capital other than the State budget capital and pursuant to other relevant regulations;

• A project which utilizes the State capital other than the State budget capital must be managed to monitor the investment principles, scale, expenditure, impact on the landscape, environment, community safety, national security, and efficiency. The investor is responsible for the management of the project pursuant to this Decree and other relevant regulations;

A project which utilizes capital from other sources must be managed to monitor the investment objective, scale, impact on the landscape, environment, community safety, and national security.

Authority to evaluate a project and basic design

National important project: Prime Minister establishes a State evaluation commission to evaluate the feasibility studies in accordance with relevant laws

Project utilizing the State budget capital: (i) Group A projects: Ministry of Construction or the sector supervising ministry; (ii) Group B projects: Ministries or equivalent agencies which made the investment decision; (iii) Other projects: Construction Department or sector construction supervising department in a province or district as applicable.

Project utilizing the State capital other than State budget capital: (i) Group A projects: Ministry of Construction or the sector supervising ministry; (ii) Group B projects: Ministries or equivalent agencies, or State corporate groups which made the investment decision; (iii) Other projects: Construction Department or sector construction supervising department in a province or district as applicable except for project with investment capital below VND5 billion.

Project utilizing other sources of capital: (i) Grade 1 project: Ministry of Construction or the sector supervising ministry; and (ii) Grade 2 project having a material impact on the landscape, environment or public safety: Department of Construction, or sector construction supervising department in a province.

Organization of project management

The investor of a PPP project may choose either to establish a "single project management board" or to hire a third party project management consultant for the management of the construction of the PPP project.

The investor of a project not utilizing State capital may choose to organize its project management efforts based on the requirements and conditions of its specific project. However, the investor may only choose to conduct the project management entirely on its own if the project is an upgrade project of a value below VND 5 billion or a new project of a value below VND2 billion where the investor is the people's committee of a ward.

Real Estate Business

Government Decree 76/2015/ND-CP (Decree 76) regulates the real estate business

Decree 76 took effect on 01 November 2015

Exemption from incorporation of real estate enterprise requirement

Specifically, an enterprise, an individual or a household which sells, transfers, leases out or hire-purchases real property will not be required to establish a real estate enterprise in any of the following cases:

• it is not an investment in a real estate project;
• it is an investment in a real estate project with total investment capital of less than VND20 billion (excluding land use fees);
• it is a transfer of land use right or sale of houses or construction works as a result of bankruptcy, dissolution or demerger process;
• it is a transfer of land use right or a real estate project or sale of houses or construction works as part of the foreclosure of security assets;
• it is a transfer of land use right or a real estate project or sale of houses based on court judgment or decision by competent State authorities;
• it is an investment in the development of houses for sale, lease, or hire purchase where the Law on Housing does not require the incorporation of a real estate enterprise;
• it is a sale, transfer of land use right, houses, or construction works owned by the State according to regulations on public asset management; or
• it is a sale, lease or hire-purchase of real estate by the owner of such real estate.

Minimum capital

The minimum legal capital requirement of VND20 billion does not apply to:

• a case where the incorporation of a real estate enterprise is not required; and
• an enterprise which carries out businesses of real estate brokerage, real estate trading floor, real estate consultancy, or real estate management services.

In cases where the minimum legal capital requirement of VND20 billion applies, it is sufficient to prove the satisfaction of this requirement by registering the required charter capital under the respective ERC.

Enterprises are no longer required to present evidence of capital contribution to prove that the minimum capital has been duly paid at the time of registration of the business.

Standard forms of real estate contracts

Decree 76 provides for certain standard forms of real estate contracts. The forms however are not mandatory, but are for reference only. The parties to the relevant real estate contracts, however, are required to ensure that their contracts include all mandatory content required under Articles 18, 47 and 53 of the Law on the Real Estate Business.

Transfer of a real estate project in whole or in part

Decree 76 sets forth in detail the procedure to obtain the People's Committee's approval of a transfer of a real estate project in whole or in part. The application dossier is filed with the relevant People's Committee or its authorized agency. The authorized agency must consult with various departments including the Department of Planning and Investment, the Department of Finance, the Department of Natural Resources and Environment, the Department of Construction, the Tax Department, etc, and submit a proposal to the People's Committee for approval.

If the project to be transferred was previously approved in principle by the Prime Minister, the People's Committee must consult with the Ministry of Planning and Investment, the Ministry of Finance, the Ministry of Natural Resources and Environment, the Ministry of Construction, etc, and submit a proposal to the Prime Minister for approval of the proposed transfer.

www.vilaf.com.vn

HO CHI MINH CITY OFFICE
Kumho Asiana Plaza Saigon,
Suite 4.4 – 4.6, 39 Le Duan Street,
District 1, Ho Chi Minh City, Vietnam
Phone: (84-8) 3827 7300

HANOI OFFICE
HCO Building (Melia), Suite 603
44B Ly Thuong Kiet Street
Hoan Kiem District, Hanoi, Vietnam
Phone: (84-4) 3934 8530

VILAF NEWS: Autumn-Winter Ranking and Awards

This Autumn, VILAF was awarded the "2015 Asian-Mena Counsel In House Community Firm of the Year" and additionally was recognized as "Most Responsive Domestic Firm of the Year."

In the 2015 international survey, Asian-Mena Counsel asked in-house counsels, "Which law firms do you prefer to use?" and "Why?" Based entirely on the nominations and testimonials of the in-house counsels surveyed, VILAF was ranked 1st in Vietnam in the following practice areas:

- Banking and Finance
- Corporate and M&A
- Energy & Natural Resources
- Compliance/ Regulatory
- Maritime & Shipping

Additionally, at the Annual Vietnam M&A Forum 2015 on 6 August 2015, VILAF won the "Best M&A Vietnam Law Firm of the Year Award."

Vietnam M&A Forum is the largest M&A and strategic investment annual public event in Vietnam for the business community, domestic and foreign investors in Vietnam, organized by Vietnam Investment Review, AVM Vietnam, and the Ministry of Planning and Investment.

In 2015, VILAF continues to be ranked a 1st tier law firm in Vietnam by IFLR1000, ALB, Chambers, and Legal 500. VILAF was also recently awarded the "Vietnam Leading Law Firm of the Year" by Chambers.

As one of the largest law firms in Vietnam, primarily serving foreign investors and foreign financial institutions, VILAF has continued to be involved in many of the largest and most complex cross-border deals in different sectors involving Vietnam.

VILAF recently advised the sponsors in the USD1.4 billion Vinh Tan 1 BOT power project, advised Mondelez International in the USD370 million acquisition of Kinh Do Corporation's assets, advised SCG in the USD240 million acquisition of the Prime Group, advised Kris Energy in its USD 271 million IPO on the Singapore Exchange, and advised Vingroup in the issuance of bonds worth USD 200 million in the international debt capital market.

Our lawyers contributing to this issue:

Vo Ha Duyen
Chairperson
duyen@vilaf.com.vn

Nguyen Truc Hien
HCMC Managing Partner
hien@vilaf.com.vn

Dang Duong Anh
Hanoi Managing Partner
anh@vilaf.com.vn

Pham Si Hai Quynh
Partner
quynh@vilaf.com.vn

Nguyen Thi Phuong Nga
Senior Associate
nga.nguyen@vilaf.com.vn

Nguyen Thuy Trang
Associate
trang.nguyen@vilaf.com.vn