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Vietnam

PROPOSED AMENDMENTS TO INVESTMENT REGULATIONS

ベトナムにおける投資関連手続を検討する上で最も基本となる法律が投資法と企業法である。現行の投資法と企業法は 2014 年 11 月に成立し、現在約 5 年が経過しようとしているが、その間、数々の制度上の不備等も指摘されてきた。こうした指摘を踏まえ、両法律の改正案が現在検討されている。本稿では、かかる改正案のうち実務上も重要と思われる点について概観する。

Introduction

The current legal framework for business investment in Vietnam is generally governed by two laws.　The Law on Investment (“**LOI**”) governs the investment aspect while the Law on Enterprises (“**LOE**”) governs the organizational structures of the enterprise implementing the investment projects.

The current versions of these two laws were issued on 26 November 2014 by the National Assembly of Vietnam and came into effect from 1 July 2015.

After few years of implementation, it has been observed that certain provisions of these laws have not been conducive to business investment and therefore should be amended.　In addition, new issues regarding business investment have arisen which should be governed by these laws. For these reasons, there has been a proposal to amend these laws.　The proposed amendments are expected to be submitted to the National Assembly in its meeting to be held at the end of 2019 and if such amendments are approved, they will come into effect from 1 July 2020.

Certain amendments which may have some effect on foreign investment as included in the latest draft amendments to the LOI and LOE (hereinafter referred to as “LOI Draft” and “LOE Draft” respectively) publicly disclosed on 4 April 2019 are discussed below.

Proposed Amendments to the LOI

In addition, in an effort to liberalize foreign investment, the LOI Draft has cut 17 conditional businesses (including logistic services, debt trading services and lodging services) which mean investors can carry out these businesses without any conditions.

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M&A Procedures: Under the current LOI, a foreign investor investing in an enterprise in Vietnam is generally required to obtain approval of the licensing authority ("**M&A Approval**") before making an investment. The rationale for this process is that the Government wishes to ensure that foreign investors will not invest in the sectors that they are not permitted to invest or exceed the ownership ratio that foreign investors can own. However, the wording in the current LOI is very broad so that this M&A Approval is also required in unnecessary cases. For example, the current LOI requires that any investment by foreign investors resulting in the foreign ownership ratio in the target Vietnamese company being 51% or more must be subject to M&A Approval. As a result, in practice, this requirement applies to cases where (i) the sole foreign owner of an enterprise contributes more capital in such wholly-owned enterprise, or (ii) a foreign investor acquires interest in a Vietnamese enterprise from another foreign investor resulting in a change to the foreign investor but no change to the foreign ownership ratio. The LOI Draft is drafted to solve this broad interpretation.

Accordingly, M&A Approval would only be required in the following cases:

(a) The investment by the foreign investor resulting in an increase in foreign ownership ratio in a Vietnamese enterprise which is conducting a business subject to conditions applicable to foreign investors; or

(b) The investment resulting in a "foreign investor" and/or "enterprise being treated similar to foreign investor (eg enterprise having foreign ownership of 51% or more)" holding 51% or more charter capital of the enterprise in the following cases: (i) increasing the foreign ownership ratio from below 51% to 51% or more, or (ii) increasing the ownership ratio of foreign investors who already owned 51% or more of the charter capital of the enterprise; or

(c) The investment by a foreign investor in an enterprise using land on an island or in a border or coastal commune, ward or township or in some other area which affects national defence and security.

Accordingly, except for item (c), it appears that the authorities will only supervise the investment resulting in the increase of foreign ownership "ratio" in the target company.

Investment Procedures Applicable to Projects Using Land: The LOI Draft introduces a new provision regarding investment procedures for projects using land. Accordingly, when an investor requests the State to allocate or lease land for implementation of an investment project, the authority shall conduct one of the following procedures in the following priority order:

(a) Auctioning the land use right if the land must be, under the law, allocated or leased through an auction process. Accordingly, the investor who offers the highest price for the land use right will be allocated or leased the land;

(b) Tendering for selection of investor for the project, the investor which offers the lowest price for implementation of the project will be selected through a tendering process;

(c) Investment policy approval procedures in accordance with the LOI.

If the investor already has the land use right, depending on the nature of the project, it may need to apply for the IRC or investment policy approval in accordance with provisions of the LOI.

The Government is required to provide detailed guidelines on these issues.

Proposed Amendments to the LOE

Application: Under the current regime, many types of enterprises are not registered with the provincial Department of Planning and Investment ("**DPI**") in accordance with provisions of the LOE. For example, law firms are established by decisions of either provincial Department of Justice or Ministry of Justice in accordance with the Law on Lawyers and securities companies are established under decisions of the State Securities Commission under the Law on Securities. These companies, under the current regime, are not required to register with DPI under the LOE. The LOE

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Draft intends to centralize the company registration to one law only which is the LOE. Accordingly, although the LOE allows special regulations to set out regulations regarding the establishment, organization of management, re-organization, dissolution and related activities of enterprises, it requires the registration of enterprises to follow the LOE. If this draft is approved, for law firms and securities companies, after the establishment decisions are issued by the Ministry of Justice and State Securities Commission, respectively, the investors would need to carry out the registration process at the DPI. In addition, during their operations, they may need to register for changing of certain information.

This requirement will require enterprises to implement additional procedures for their establishment and operation.

Legal Representatives: Under the current LOE, a company is entitled to appoint multiple legal representatives to represent it, however there is no express provision setting forth the default rule of the rights and obligations of each legal representative. The rights and obligations of each legal representative are supposed to be specified in the company charter. However, charters of some companies may not deal with this issue, so the LOE Draft deals with this point by stating that if a company has more than one legal representative, and the charter of the company is silent regarding the authorities of these legal representatives, any legal representative would have full authority to act on behalf of the enterprise.

Other relevant issues: Under the current LOE, shareholders may only have some rights (eg. the rights to request for convening the general meeting of shareholders and the right to claim against the management) if they hold a number of shares for 6 consecutive months. This requirement seems to create difficulty to shareholders and therefore is proposed to be eliminated under the LOE Draft. Accordingly, shareholders will have these rights if they hold certain number of shares regardless of the time of holding.

Under the current LOE, the head of the inspection committee of a joint stock company must be a *professional* accountant or auditor and must work full-time in the company. The terms “professional accountant” and “professional auditor” are not defined in the LOE or other regulations, therefore, it is unclear how an enterprise can appoint a professional accountant or auditor to be the head of inspection committee. The LOE Draft now proposes to amend this provision to state that the head of the inspection committee must be an accountant or auditor, unless the company charter requires higher standards and must not accept any other position in the company. This amendment will partially improve the aforementioned issue regarding the lack of clarity regarding these terms. Specifically, the term “auditor” is quite clear as it is defined under the Law on Independent Auditing to mean a person issued with an auditor's certificate in accordance with law, or a person with a foreign certificate recognized by the Ministry of Finance and who passes an examination on the law of Vietnam. Meanwhile, the term “accountant” (“kế toán viên” in Vietnamese) is less clear. The Law on Accounting does not have any definition for this term.

The LOE Draft also proposes elimination of some notification requirements such as (i) report on change of information about managers of the enterprise and (ii) notification of the sample seal.

Conclusion

The LOI Draft and LOE Draft clarify certain ambiguities which had arisen during the implementation of the LOI and LOE and further liberalize the law relating to foreign investment. The final set of amendments proposed and approved by the National Assembly will have to be closely monitored to determine the impact of such amendments on foreign investors.

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Philippines

REVISED CORPORATION CODE OF THE PHILIPPINES

2019年2月20日、フィリピンの会社法が約40年ぶりに改正され、同23日に施行された。改正会社法では限定的ながら一人会社が認められるなど実務に影響のある改正も少なくない。2年以内に改正会社法の規定を遵守する必要があることから各社順次対応を始める必要がある。そこで本稿では、改正会社法の主要な改正点について解説する。

On 20 February 2019, Republic Act No. 11232, otherwise known as the Revised Corporation Code of the Philippines ("**Revised Code**") was signed into law and became effective on 23 February 2019.

The Revised Code repeals the nearly four-decade old B.P. Blg. 68 or the Corporation Code of the Philippines ("**Old Code**") and adopts international best practices and standards to improve the ease of doing business in the Philippines. While all the salient amendments introduced by this "landmark legislation" cannot be covered by this article alone, among the significant changes introduced by the Revised Code are the following:

Amendments affecting domestic corporations

I. Liberalisation of incorporation requirements

The stringent incorporation requirements of the Old Code were barriers to the entry of both small and large enterprises into the market. For example, under the Old Code, a corporation (e.g., a domestic subsidiary of a foreign company) could only be established by a group of at least 5 to 15 natural persons, of legal age and majority of whom must be Philippine residents. Further, at least 25% of authorized share capital had to be subscribed, and at least 25% of the subscribed share capital had to be paid-up at the time of incorporation. The minimum paid-up capital requirement was at least Php 5, 000, subject to special laws.

However, with the enactment of the Revised Code, the minimum number and residency requirements of incorporators have been removed. A corporation may now be established by any person, partnership, association or corporation, singly or jointly with others, but not more than 15 in number. The Revised Code also eliminated the 25% subscribed and paid-up capital requirements. Corporations are no longer required to have a minimum paid-up capital, except as may be otherwise specifically provided by special law.

II. Perpetual existence and revival of expired terms

Corporations organized under the Old Code could only exist for a term not exceeding 50 years, unless such term was extended through an amendment of the Articles of Incorporation ("**AOI**"). Failure to extend a corporate term before its expiration was fatal to a corporation's existence as the mere lapse of the term would automatically result in a corporation's dissolution.

To resolve problems posed by corporate term limits and be at par with the practice in other jurisdictions, the Revised Code now provides that a corporation shall have perpetual existence, unless otherwise specifically provided by its AOI. Existing corporations organized under the Old Code automatically benefit from this perpetual existence clause, unless a corporation notifies the Securities and Exchange Commission ("**SEC**") that upon vote of a majority of its shareholders, it elects to retain the specific term stated in its AOI.

Corporations with expired terms are now also allowed to revive their corporate existence. A revived corporation will be granted all its prior rights and privileges, and be subject to all its prior duties, debts and liabilities. It will also be granted perpetual existence, unless its application for revival states otherwise.

III. Corporate governance matters

The Revised Code adopts several substantial amendments which reinforce good corporate governance practices and safeguard the interest of corporations and their shareholders. These amendments include, but are not limited to:

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(a) Attendance and voting at shareholders' meetings
Unlike the Old Code, which limited the options of shareholders to attend and vote at meetings either in person or by proxy only, the Revised Code embraces modernization and allows shareholders to attend and vote through remote communication or in absentia, as long as authorized in the by-laws or by vote of the majority of the board of directors. The manner of participating and voting through remote communication or in absentia, however, will be subject to the rules and regulations which will be issued by the SEC.

(b) Allowing the creation of an emergency board
Where a vacancy prevents the board of directors from constituting a quorum and an emergency action is required to avoid substantial and irreparable damage to the corporation, the Revised Code allows the remaining directors to create an emergency board by electing, through unanimous vote, an emergency director from among the officers of the corporation. The term of the emergency director shall cease when the emergency ends or when the replacement director is elected and the SEC must be notified within 3 days from the creation of an emergency board, stating the reasons for its creation.

(c) Requirement of Independent Directors and Compliance Officer
Corporations vested with public interest, such as corporations whose securities are registered with the SEC, public[1] and publicly listed companies, banks, quasi-banks, loan associations, pawnshops, pre-need, trust, insurance companies and other financial intermediaries are required under the Revised Code to (i) have independent directors constituting at least 20% of the board, and (ii) elect a compliance officer.

Amendments affecting foreign corporations

Foreign corporations licensed to do business in the Philippines ("**Licensee**") must note that the minimum amount of security deposit required has been increased from Php100, 000 to Php500, 000 by the Revised Code. Further, within 6 months after each fiscal year, a Licensee shall be required to deposit additional securities or financial instruments equivalent to 2% of the amount by which its gross income for the fiscal year exceeds Php10 million. Additional securities deposit may also be required if the market value of the securities deposited has decreased by at least 10% since the time it was deposited.

One Person Corporation

Another modification introduced by the Revised Code is the One Person Corporation ("**OPC**"), a special corporation which may be formed by a single shareholder, who must be either (i) a natural person, (ii) a trust managed by a trustee, or (iii) an estate.

The single shareholder shall be the sole director and president of the OPC and corporate actions will be approved through written resolution in lieu of meetings. The OPC is required to appoint at least a treasurer and corporate secretary. A single shareholder claiming limited liability must prove that the OPC is adequately financed, and the property of the OPC is independent from his personal property. Otherwise, the single shareholder will be jointly and severally liable for the debts and liabilities of the OPC.

It should be noted, however, that the formation of an OPC is subject to limitations. Banks, non-bank financial institutions, pre-need, insurance, trust, public and publicly listed companies, among others, can only be organized as regular corporations and cannot be incorporated as OPC. Further, based on how the Revised Code characterizes an OPC, juridical persons (i.e., partnerships, associations and corporations) are not qualified to act as a single stockholder and therefore, cannot establish an OPC.

[1] Public companies are defined as corporations with assets in excess of Php50 million and having 200 or more shareholders, each holding at least 100 shares.

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Corporate liability for fraudulent business and corrupt practices

The penalty clause of the Old Code was somewhat inadequate. It only stated that violations not specially penalized, were subject to a fine of Php1, 000 to Php10, 000 or imprisonment of 30 days to 5 years or both, at the discretion of the court, and may result in the dissolution of the corporation after notice and hearing. Lawmakers have given the Revised Code more teeth by creating a separate chapter on "Investigation, Offences and Penalties" which reinforces the administrative investigation powers of the SEC and enumerates specific sanctions for (i) unauthorized use of corporate name, (ii) violations of disqualification provisions of a director, and (iii) violations of duty to maintain corporate records and allow their inspection, among others.

Notably, the Revised Code institutes the concept of corporate liability for fraudulent business and corrupt practices. Depending on the violations committed, corporations may now be penalized with a fine from Php100, 000 to Php5, 000,000 for (i) conducting its business through fraud, (ii) committing or concealing graft and corrupt practices, and (iii) engaging intermediaries to engage in graft and corrupt practices for the corporation's benefit or interest. Responsible directors, officers and employees who knowingly fail to sanction, report, or file the appropriate action with proper government agencies, or allow or tolerate the graft and corrupt practices or fraudulent acts committed, may also be similarly penalized under the Revised Code. Acts of retaliation against whistleblowers who provide truthful information on the violations of the Revised Code will be penalized with a fine of Php100, 000 to Php1, 000,000.

Conclusion

Since existing corporations are given a grace period of 2 years from the date the Revised Code came into effect within which to comply, existing corporations have ample time to thoroughly acquaint themselves with the changes introduced by the Revised Code.

In the meantime, existing corporations will need to keep themselves informed of the guidelines which the SEC will be issuing to implement the Revised Code. As of April 2019, the SEC has already prepared for public comment, proposed guidelines on (i) the establishment of the OPC, (ii) use of corporate names, (ii) retention of specific corporate term, and (iv) revival of expired corporations. More importantly, existing corporations should consider revisiting and re-examining their AOI, by-laws and shareholders' agreements to determine whether amendments or revisions will need to be adopted during the grace period to achieve compliance.

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Australia

UPDATE ON LOOT BOX REGULATION IN AUSTRALIA

オーストラリアでは、2018 年ビデオゲームにおいて「戦利品箱（Loot Box）」と呼ばれる、ゲーム上の通貨又は実際の通貨を使ってランダムに割り当てられるゲーム上のアイテムや能力を購入するという課金システムが賭博法に抵触するのではないかという問題提起がなされ、議会から委託を受けた委員会によって調査・検討が行われた。日本でも数年前にいわゆる「コンプガチャ」が景表法に抵触するという問題提起がなされたように、ゲーム上の課金システムは世界的に規制が強化される方向に動いていることから、その動向について紹介する。

Background

On 28 June 2018, the Australian Senate ordered that there be an inquiry into the use of “micro-transactions” in video games. “Micro-transactions”, sometimes referred to as “loot boxes”, involve the user paying money (sometimes represented by in-game currency, sometimes by actual currency) whilst playing the video game in question, separate to the purchase price of the game, so as to obtain an object or ability not identified at time of the transaction, or credits that can be used towards such a purchase.

These items and abilities often have no impact upon the actual gameplay – rather, they may be merely cosmetic or for the purposes of entertainment (i.e. the ability to “taunt” foes, or the acquisition of a new costume or paint scheme). However, there are occasions where the purchase can impact upon the player’s ability to play the game, and such matters may also have an impact upon the perception of the player within the game.

On 27 November 2018, the committee handed in its report. This note provides a brief overview of the conclusions, and what that may mean for the use of “loot boxes” in video games in Australia.

What prompted the investigation?

Loot boxes are not a particularly new concept in video games. In 2017 however, Electronic Arts released *Star Wars: Battlefront II*, which contained a new kind of loot box which contained items that gave the player holding that box advantages that significantly improved their prospects in the game (more health, greater damage to other players, etc.). This was described as a “pay to win” concept which was heavily criticized, and eventually removed by Electronic Arts.

Whilst a large number of game developers followed Electronic Arts in removing loot boxes from their major titles, concerns remained regarding the impact that in-game micro transactions may have on people under the age of 18, the legal gambling age in Australia. This concern was heightened by the increasing popularity of what has been termed as the “skin gambling” market – that is, where participants are able to use in-game items (whether won or purchased) in real-life bets.

Gambling in games in Australia

In Australia, the Interactive Gambling Act 2001 (Cth) (**Act**) defines a gambling service to be a service for the conduct of a game where the game is:

- a game of chance, or of mixed chance and skill;
- played for money or anything else of value; and
- entered through the customer giving some consideration (through currency or otherwise).

Under the Act, certain services are prohibited from being provided to, or advertised to, customers. These include things like online slot machines and online casino-style games. There are some gambling services that are permitted under the Act, however they require an appropriate license.

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To date, online games (including those containing loot boxes) have not been regarded as gambling services under the Act. The Australian Communications and Media Authority has stated that this was because such games "are not played for money or anything else of value". This position is clouded when one considers the "skin gambling" market, where there is clearly a secondary market for items obtained in games.

What was the committee asked to investigate?

The terms of reference for the committee appointed by the Senate requested that the committee investigate the extent to which gaming micro-transactions for chance-based items may be harmful, with particular reference to:

- whether the purchase of chance-based items, combined with the ability to monetize these items on third-party platforms, constitutes a form of gambling; and
- the adequacy of the current consumer protection and regulatory framework for in-game micro transactions for chance-based items, including international comparisons, age requirements and disclosure of odds.

The committee was asked to carry out the inquiry and provide a report by 17 September 2018. This time was extended on a number of occasions, with the final report being given on 28 November 2018.

Observations by the committee

The committee observed the potential benefits that may flow to video game producers from the allowance of loot boxes. A focus was the fact that it provided an additional revenue stream for those producers, which was notable in light of the fact that:

- the cost of video games to the consumer has not really increased, whereas the costs of production and development have risen significantly; and
- piracy was, and remains, a threat to the industry.

The committee gave significant consideration to the psychological effect that loot boxes may have on younger audiences. There were concerns raised that loot boxes, which are often entirely chance based as to what items are obtained, may familiarize children and young people with gambling and related activities at an inappropriate age. It was noted however, that research into the psychological impact of loot boxes on players was still at a very early stage, and further research was required on the issue.

The committee also noted that, internationally, several other jurisdictions have given consideration to the issue of loot boxes, as to whether they constitute gambling although no global consensus has yet been reached. The fact that loot boxes can take a variety of forms, some that are potentially more harmful than others, makes a definitive approach very difficult.

Having regard to the above, the committee recommended that the issue of loot boxes be subject to a formal review by the Department of Communications and the Arts, which addresses, amongst other things, the relevant regulators' roles and responsibilities, and the appropriate manner in which to protect consumers including whether the existing framework is sufficient. It also recommended that the Department further research into the potential for gambling-related harms resulting from interaction with loot boxes.

What does this mean?

As the committee identified in its report, Australia is not alone in expressing concerns about the impact of in-game loot boxes. In Denmark, the Danish Gambling Authority has issued a public statement as to when loot boxes would fall under their gambling laws, whilst Belgium's Gaming Commission has determined that loot boxes were "games of chance" and thus were subject to their gambling regulations. The Netherlands has distinguished between loot boxes where the content is transferable; in the event that the content *is* transferable, it will be considered gambling and is thus illegal. Where it is not transferable, it is considered gaming and is permitted.

France, Germany, the United Kingdom and the United States have all at least initiated a review into the matter, whilst China requires video game producers to provide information as to the odds of receiving particular items.

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Whilst it is encouraging that Australia is seeking to take an evidence-based approach to any potential regulation by carrying out further research, it places video game manufacturers in limbo with respect to the Australian market regarding whether content containing loot boxes will be permitted. One possible outcome is that the content will be regulated by the classification system. This was the strongest thread in public submissions received by the committee, so as to prevent young people from being exposed to gambling at an inappropriate age.

There is no timeframe for any Department review as yet.

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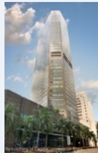

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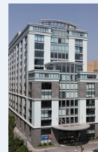

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