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Investments in Vietnam

2010

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Since July 2006, all forms of foreign or domestic investment of individuals or legal entities are regulated by the “Law on Investment” which is considered one of the most liberal investment laws in South-East-Asia.

According to the “Law on Investment” and contrary to the previous regulations, foreign and domestic investors from all economic sectors shall be treated equally. In particular, foreign investors shall be principally permitted to invest in all sectors and in all industries and trades using all legal forms of investment that are not prohibited by Vietnamese law.

Nevertheless, there are still exceptions and specifically the sector specific WTO commitments must be consulted to determine if and in which scale a foreign investor is entitled to invest in Vietnam.

Vietnam has become the 150th member of WTO on 11 January 2007. With its accession, Vietnam has entered into a number of commitments, for example regarding the opening and liberalization of im- and exports, a quite far-reaching equation of domestic and foreign enterprises as well as the limitation of state influence on the market. The implementation process is currently in progress, whereby it has to be taken into account that Vietnam has been granted a gradual implementation time line of up to seven years after accession.

It is thus in general possible to establish 100 % foreign invested enterprises in a wide range of different sectors in Vietnam. However, despite the far going commitments, practical implementation is partly still restrictive in certain sectors. Such applies for example for trading and distribution activities, which despite formal commitment to allow 100 % foreign investments, is still subject to substantial red tape in the current practical handling. This is especially relevant for distribution activities.

1. Investment Forms

Under the “Law on Investment”¹ and the complete “Law on Enterprises”², the main modes for foreign investors in Vietnam, are:

- a) Business cooperation contract (BCC)
- b) Limited Liability Company (Co., Ltd.)
- c) Joint Stock Company (JSC)
- d) Partnership
- e) Private Enterprise
- f) Representative Office
- g) Branch Office

In addition, other forms of foreign direct investments include certain PPP-contracts: Built-Operate-Transfer (BOT), Built-Transfer-Operate (BTO) and Build-Transfer (BT), mainly applicable in areas of infrastructure and energy.

The above state investment forms are available for international as well as domestic investors and thus a 100% foreign owned Co.,Ltd. can also set up ROs and Branches in order to expand its geographical scope of operations in Vietnam.

a) Business Cooperation Contract (BCC)

A contractual BCC entails a written contract between a foreign investor and a Vietnamese party to jointly conduct one or more business projects in Vietnam, based on mutual allocation of responsibilities and the sharing of production, profits or losses, without creating a separate legal entity. It is the least formal and most flexible type of investment for foreign investors. The contract should stipulate the terms and conditions for the business as well as the rights and obligations of each party.

¹ Law 59/2005/QH-11, 29. November 2005

² Law 60/2005/QH-11, 29..November 2005

Due to the fact that this investment form only consists of a contract, the participating foreign and Vietnamese parties remain independent tax and liability subjects.

One, at least theoretical, benefit of this investment form is the flexibility of the structure. The dissolution requires no more than a profit and loss distribution. In order to limit the liability of the parties, the founding of a separate entity seems advisable. The legal base for this investment form is not detailed and therefore a significant number of major issues are rather unclear. Consequentially drafting the co-operation contract should be done with adequate care.

b) Limited Liability Companies (Co., Ltd.)

A Vietnamese Co., Ltd. is currently still the standard form of investment for foreign investors in Vietnam. Other than the “BCC”, Co., Ltd.’s are legal entities. The liability of the company and the members is limited to the amount of capital registered and displayed in the business registration certificate as charter capital. A specific requirement for a minimum capitalization does only exist for certain areas (insurances, brokers, etc). However, considering the given discretion of the competent authorities in granting a license, a sufficient capitalization of new established Co., Ltd is generally recommendable and is also required in certain “sensitive areas” (distribution, trading, etc.)

A Co., Ltd. may be established by one or more members, which may be individuals or organizations. The maximum number of members is limited by law to a maximum of fifty. Members generally share profits and losses in accordance with their capital contributions. Members’ equity and the evidencing capital contribution certificate are transferrable, subject to a pre-emptive right of the remaining members. If the other members do not

exercise their pre-emptive right the capital contribution may be assigned to a non-member.

Foreign investors may establish a Co., Ltd. in the form of a joint venture or a 100 % foreign-owned enterprise. A joint venture is a legal entity based on a contract between one or more foreign investor and one or more Vietnamese investors to produce or carry out business activities. Major benefits of this investment vehicle are: facilitated access to a well-established network of contracts and easier access to land use rights.

The Members' Council is the highest decision-making authority of the company. It comprises all members of the company and decides on major issues of the company (by passing resolutions at meetings or collecting written opinions). The Members' Council shall also elect a member to be its chairman who prepares and organizes the meetings of the Members' Council and supervises the implementation of the decisions of the Member' Council. Day-to-day business activities are run by the Director or General Director of the company who is appointed by the Members' Council. The Chairman of the Members' Council may concurrently act as a director or general director. If not stipulated otherwise in the company charter, the director or general director is the legal representative of the company.

The legal representative of the company needs to be resident in Vietnam. In order to qualify for appointment as director or general director, the individual has to own at least 10% of the charter capital of the company. If a non-member shall be appointed as director or general director, the candidate shall possess sufficient professional qualifications and practical experience in corporate management.

Additionally, a Co., Ltd. with only one legal entity as a member or more than eleven members must have an Inspection Committee to check the lawfulness, honesty and care of the operations of the company and its authorities.

c) Joint Stock Companies (JSC)

Besides the Co, Ltd., the JSC is the other popular and suitable setup for investments in Vietnam. A JSC must have a minimum of three shareholders and constitutes a separate legal entity. A JSC is not required to be listed on a stock exchange. It may further issue securities to the public in accordance with the law on securities in order to finance its operations. The shares in a JSC may be freely assigned to other persons except for certain preferred shares as for example voting preference shares. During the first three years from the date of issuance of the Business Registration Certificate, the founding members must collectively hold at least 20 % of the ordinary shares of the company unless otherwise authorized by a resolution of the General Meeting of Shareholders. In addition, it needs to be noted that the structuring of preference shares is somehow limited in practice. Thus, voting preference shares may for example only be held by founding shareholders or organizations authorized by the Government and these preference shares have to be converted into ordinary shares after three years from registration of the JSC.

The management and organizational structure of a JSC consists of the General Meeting of Shareholders, the Board of Management, the Director or General Director. In case the JSC has more than eleven shareholders being individuals or organizations owning more than 50 % of the total shares of the company, the JSC must also have an Inspection Committee. The General Meeting of Shareholders is the highest decision taking body of the JSC and is responsible for the general alignment of the JSC, the raising of capital, election and release of the Board of Management, assignment of the JSC's profit and all decisions concerning more than 50 % of the JSC's total assets. The Board of Management is responsible for the actual management of the JSC, the control of the general director as well as for the implementation of the General

Meeting's resolutions. The members of the Board of Management need to own at least 5 % in the JSC's shares or have appropriate qualifications. Legal representative of a JSC is either the Chairman of the Board of Management or the Director or General Director as stipulated in the charter. The Director or General Director of a JSC may not concurrently act as Director or General Director of another company.

With the stock exchange boom in 2008 the JSC has become popular among domestic investors and is seen as a "modern" corporate setup. The participation of a foreigner as a founding member of a JSC is considered to benefit a later IPO. As the Board of Management is elected by the General Meeting of Shareholders and as the day-to-day business of the JSC is managed by the Board of Management, a foreign investor only being a shareholder has to take the factual loss of control into account. In addition, it has to be stated from practical experience that the issuance of shares in a JSC is locally seen as an appropriate instrument of building and stabilizing necessary networks. Thus, a fast growing number of shareholders in a JSC has to be taken into consideration.

d) Partnerships

Besides the Co., Ltd. and the JSC further forms of investments exist which however are currently of limited importance to foreign investors.

A partnership is defined as an enterprise with at least two partners with unlimited liability. Additionally partners with limited liability can be incorporated. As the term suggests, unlimited liability partners are liable for the obligations of the partnership with all of their personal assets, limited liability partners are only liable up to the extent of their capital contribution. Therefore, the Vietnamese Partnership is comparable to a German "*OHG*" or "*Kommanditgesellschaft*".

In contrast to the German regulations, unlimited liability partners must be individuals. Thus, the construction of a “GmbH & Co. KG” is currently not possible under Vietnamese law.

A partnership is prohibited from issuing securities of any type. From the day of issuance of the Business Registration Certificate the partnership becomes a separate legal entity.

The structure of management and organization of Partnerships consists of a Partners’ Council, Chairman of Partners’ Council and a Director or General Director. The unlimited liability partners are responsible for the legal representation as well as the organization of the management of the day-to-day business of the partnership. The unlimited partners may allocate the responsibilities freely amongst them, however any limitations towards third parties is only valid if the third parties know of such. Where a number of or all unlimited partners together carry out a number of business operations, decisions shall be passed by a majority.

e) Private Enterprises

A private enterprise is an economic organization owned by an individual above the age of 18 being liable for all activities of the enterprise to the extent of all his or her personal assets. An individual wishing to establish an enterprise must lodge an application with the local People’s Committee stating the full details of the enterprise, setting out its objectives, line of business and the level of capital invested. If satisfied, the People’s Committee will register the enterprise in the Business Register and issue a Certificate of Business Registration. However, a private enterprise is of very little practical importance to foreign investors.

f) Representative Office (RO)

A representative office is considered as a subsidiary establishment of a foreign company, which has been operating for at least 1 year. The process of

registration is comparatively easy and fast with regard to other forms of investment. Nevertheless it should be noted, that the RO is by law also one of the most restricted forms of investment. The scope of permitted activities of the RO is narrow and the RO is only allowed to conduct a limited range of operations such as stated below:

- Accelerating formulation of co-operative projects of the foreign business entity in Vietnam;
- Market research to promote opportunities for purchase and sale of goods and for provision and sale of commercial services of the business entity it represents;
- Monitoring and activating performance of contracts of the foreign business entity which have been signed with Vietnamese parties or which relate to Vietnamese markets.

A RO is not allowed to engage in direct business transactions and/or service provision. Its legal capacity is therefore restricted to signing contracts which are directly related to administrative management of an office in its literal sense, e.g. to rent office space, sign labour contracts, contracts with suppliers of office material and services as well as to open bank accounts..

Notwithstanding the above stated restrictions, this investment vehicle was and is frequently used to support and monitor business transactions of a foreign company in Vietnam.. The Vietnamese government reacted to a tendency of investors to use RO's as permanent establishments, i.e. to conduct business activities directly via the RO, and has tried to eliminate such practice by passing Decree 72 in July 2006. Under this decree, ROs are required to make a periodic written report on their business operations and will be subject to periodic or unannounced inspections. In case of breaches of the existing, rigid restrictions, authorities are entitled to suspend or stop operations of the RO or impose fines. Sanctions to be applied against violators of regulations will vary from fines of USD 2,000 - USD 50,000 to prosecution. Provided that the RO is 'misused' to directly engage in business activities, Vietnamese regulations

do further provide for a treatment of such ROs as taxable subject with regard to corporate income tax. Therefore, careless use of a RO can be risky and lead to a tax exposure of significant volume.

g) Branch

A branch is a dependant subsidiary unit of a foreign company, which has been operating for at least 5 years. This form of investment is frequently used by banks, law firms and trading companies. However, it should be noted that branches may only trade certain goods and only within of the parent's companies scope of business.

h) Build-Operate-Transfer (BOT)/Built-Transfer-Operate (BTO)/ Built-Transfer (BT)

A BOT is a form of investment mainly used in the field of development of infrastructure facilities. It is a contract entered into by an authorized State body and one or several investor(s) whereby the investor agrees to construct and commercially operate such a facility for a certain time period. Upon the expiry of such period, the investor agrees to transfer such facility to the State of Vietnam without compensation.

BTO refers to a contract entered into by an authorized State body and an investor for the construction of an infrastructure facility upon the completion of which the investor(s) shall transfer such facility to the State of Vietnam. On the other hand, the Government shall grant the investor(s) the right to commercially operate such facility for a certain period in order to recover the investment capital and earn profit.

BT means a contract entered into by an authorized State body and an investor(s) for the construction of an infrastructure facility upon the completion of which the investor(s) shall transfer such facility to the state of Vietnam. On the other hand, the Government shall facilitate implementation

of other project(s) by the investor(s) in order to recover the investment capital and earn profit or make payments to the investor(s) under the agreement in the BT contract.

BOT/BTO/BT-projects benefit from certain tax incentives and other privileges, e.g. investors will be exempted from rents on land used and duty on imports of equipment and parts.

i) Indirect Investments

Indirect investments in Vietnam have become increasingly important in the last years. According to Article 26 of the Law on Investments, indirect investments in Vietnam are *i.a.* possible by acquisitions of shares, bonds and other securities. As far as the acquisition of shares is concerned, the law distinguishes between direct and indirect investments. Direct investments are such in which the investor invests in order to participate in the management of the investment. However, in practice, a clear classification is difficult, especially in case of new establishments. Thus, a detailed assessment is recommendable, taking into account the respective practice of the relevant authorities.

Investments in as well as trading with shares of public listed companies, bonds and other valuable papers are governed by the Law on Securities and its implementing provisions. It is in general possible for foreign investors to acquire Vietnamese securities after registration and obtaining a trading code either directly or indirectly via a licensed transaction representative or local fund manager.

2. Investment Procedures

Before any foreign or domestic organization or individual can lawfully commence an investment project, a registration and licensing of the project is required. Whilst domestic organizations in most cases only obtain a business registration certificate and eventually –depending on the size and scope of investment – an investment certificate, foreign investors always need to apply for an investment certificate with the Department / Ministry of Planning and Investment.

Foreign investments requiring an investment certificate include direct and indirect investments, especially

- setting up wholly foreign owned economic organizations,
- setting up joint ventures with Vietnamese partners,
- Business Cooperation Contract (BCC), Built-Operate-Transfer (BOT), Build-Transfer-Operate (BTO), Build-Transfer (BT),
- purchasing of shares or contributing capital in order to participate in the management of a Vietnamese company (subject to a legally determined ratio for certain companies, e.g banks, insurance companies, public JSC, etc.),
- Merger and acquisitions.

Even if the current Law on Investment is applicable to foreign as well as domestic investments, the requirements for registration of investment projects are different for domestic and foreign investments. The law provides for three different categories of licensing procedures:

a) Only business registration required:

For investment projects below 15 billion VND (March 2010: ca. 800,000 USD) of domestic investors (excluding conditional projects) only a business registration certificate according to the Law on Enterprises is required.

b) Investment registration required:

An investment registration under the Law on Investments is required in the following cases:

- Domestic investment project which have an invested capital of over fifteen (15) billion VND and below three hundred (300) billion VND (March 2010: ca. 16 million USD) (excluding conditional projects)

OR

- Where the domestic investor requests issuance of an investment certificate

OR

- Foreign investment projects which have an invested capital of below three hundred (300) billion VND (excluding conditional projects)

The application dossier for the registration of the investment has to be sent to the provincial state administrative body where the enterprise proposes to establish its investment and should comprise the following:

- Registration request for issuance of investment certificate (standard form) containing the legal status of the investor (copy of the establishment decision or business registration certificate or other equivalent document/ copy of passport or identity card), objectives, scale and location for implementation of the investment project, invested capital, project implementation schedule, land use requirements and undertakings on environmental protection and proposal for investment incentives (if any)
- In case of an application by a foreign investor a report on financial ability of the investor as well as the joint venture contract or BCC contract and charter of the enterprise (if any).

Within 15 days from the date of receipt of a complete and valid file for investment registration the investment certificate should be issued by the competent authority. However, in practice, it has to be considered that the process will take much longer, as the complete and valid documents have to be prepared (e.g. foreign documents need to be legalized by the respective Vietnamese embassy or the Vietnamese Ministry of Foreign Affairs).

c) Evaluation of investment required:

Certain investment projects also require an additional evaluation of the investment. This applies to:

- Domestic or foreign investment projects which have an invested capital of three hundred (300) billion VND or more

OR

- projects on the list of sectors in which investment is conditional (conditional projects).

For such projects, the investor must submit additional documents, such as a report on financial capability of the investor, an economic-technical explanatory statement as well as an explanatory statement on the ability to satisfy the conditions for investments in conditional sectors.

Depending on the scope of investment, the authority to approve and issue the investment certificate lies with different state bodies:

Large scale projects in sectors such as air and sea transportation, radio and television broadcast, production of cigarettes or with an investment capital of more than 1.500 billion VND in sectors like railway, electricity, alcohol production require the approval of the Prime Minister. In such cases, the investment certificate will be issued by the Ministry of Planning and Investment (MPI). The MPI is also the competent

issuing authority for all investment projects for which an investment policy approved by the Prime Minister of the Government already exists.

If management committees have been set up in business zones, they are responsible for issuing investment certificates within their areas.

The procedures of issuing an investment certificate differ slightly, based on the type of authorities involved in the process. Generally, the issuing body has to collect opinions from the relevant ministries, branches and provincial People’s Committees and other relevant bodies. After receipt of these opinions an evaluation report has to be submitted to the Prime Minister for his decision or to other relevant bodies before the investment certificate might be issued.

The above mentioned investment options under the Law on Investments and Law on Enterprises can be summarized as followed:

Investment Capital \ Investment Source	< 15 billion VND	<300 billion VND	> 300 billion VND
Domestic investment	Business registration	Investment registration	Evaluation
Foreign investment	Investment registration	Investment registration	Evaluation
Conditional sector	Evaluation	Evaluation	Evaluation

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