

# Foreign Direct Investment

## Legislation

From 1 July 2015, the Law on Enterprises 2014 (“LE”) and Law on Investment 2014 (“LI”) replace the previous Laws of 2005 and generally govern investment activities, establishment and operation of enterprises in Vietnam. At present, the Government continues to issue Decrees and other lower level legal documents providing guidelines for the entire process from the investment registration, business registration to the business operations.

The LE and LI continuously confirm to guarantee the legal capital and assets of foreign investors in Vietnam, and allow foreigners to invest in most sectors of the economy, particularly in sectors of export-oriented, agricultural activities, new materials, high technology, development research, environment protection, and others of similar nature.

## **Vehicles of Foreign Direct Investment**

Under the ULE and CLI, foreign investors are entitled to select one of the following vehicles or forms for their investment in Vietnam:

- (i) Establishment of a foreign-invested company: Limited Liability Company, with One or More Members (“LLC”); Joint Stock Company (“JSC”); Partnership; or other economic organization
- (ii) Capital contribution to; purchase of shares/ capital contribution portions in Vietnamese company
- (iii) Public – Private Partnership (“PPP”) contract; and
- (iv) Business Co-operation Contract (“BCC”).

It is worthy of note that for establishment of any new economic organization, it is required to attach the establishment to an investment project in Vietnam. The LI and LE separate application for the issuance of IRCs of investment projects and application for the issuance of Enterprise Registration Certificates (“ERC”) of the newly-established economic organization instead of the old regulations allowing the IRC to serve at the same time as the ERC.

Details concerning each vehicle are described hereunder. *(i)*

## **LLC**

LLC may be established by a single investor or pursuant to a joint venture contract signed by one or more investors, either Vietnamese investors and one or more foreign investors; or between foreign investors, individually or institutionally, for the purpose of carrying out business activities in Vietnam. The difference of the LLC compared with the JSC is that the LLC is not permitted to issue shares (and list its shares on stock exchange), and the number of investors, regardless individual or institutional, is not allowed to be excessive of 50.

Unlike the Law on Foreign Investments in Vietnam ("FIL"), which was no longer valid, the old LE and LI since 2005 introduced the term of "charter capital" for replacement of the confused "legal capital", and do not require the ratio between the charter capital of the LLC per the invested capital of their investment project being at least 30%. It seems that under the LE and LI, foreign investors will have more choice in making their contributions to the charter capital in cash or in kinds compared with the FIL in the past, and that there are no floor limits of the foreign investors in the charter capital of the LLC (pursuant to the FIL in the past, the contribution by the foreign investors is required to be at least 30% of the company's charter capital).

Unlike the FIL in the past where the JVC or FOC is managed by the Board of Management ("BOM"), and members are nominated by the parties in proportion to their contributions, under the LE and LI, the LLC shall be ultimately managed by the Member Council or Company Chairperson. The general director/ director shall be responsible before the Member Council or Company Chairperson, for the day-to-day management and business of the LLC. No specific regulations on the nationality of the general director/director in the LLC are provided, and the unanimous agreement/ voting on some matters of the LLC (i.e. revising the charter, appointing the general director, etc.) have been no longer valid. Instead of those, the voting principles by majority of votes representing at least 65% and/ or 75% (as the case may be) of the total capital contributed by attending members for LLC with Two or More Members, or more than 1/2 and

3/4 (as the case may be) of attending members for LLC with One Member, in a duly-organized Member Council meeting.

### ***(ii) JSC***

JSC is a company established by at least 3 investors, regardless individual or institutional, local or foreign. Differing from the LLC, JSC can issue shares to the public and list its shares on stock exchange. JSC is a kind of limited liability company, and has the legal person status in accordance with the laws of Vietnam.

Like LLC, under the LE, the specific requirements of the ratio of the charter capital of the JSC per the invested capital for the investment projects by the JSC (i.e. 30%) and the same of the contributions by the foreign investors in charter capital (i.e. 30%), are no longer valid.

Similarly, the LLC, the highest management authority of a JSC is the general shareholder meeting, which decides all the most principal matters of the company. However, the LE is opener than the old Law with provisions permitting JSCs to choose either of two organizational and managerial models, or to have one or more legal representative(s). The general director/director is responsible to the general shareholder meeting and BOM for the day-to-day management and business of the JSC. Assisting the general shareholder meeting in supervising the performance of the BOM, general director/director and other the management positions is the Board of Supervision.

Finally, voting principles by majority of 51% or 65% (as the case may be) of the total number of votes of all shareholders attending a duly-organized general shareholder meeting, or a number of shareholders representing at least 51% of the total number of votes in the case of collecting opinions in writing.

### ***(iii) Partnership***

Partnership is a company by at least 2 members, who are individual or organization, domestic or foreign, together under one common name ("general partners"). In addition to the members of the partnership, partnership can have capital contributing partners. Unlike JSC, partnership may not issue any type of securities, and general partners shall be liable with all its assets for the obligations of the company. Partnership has legal personality under the law of Vietnam.

Members' council of the partnership is consisted of all members of the company, and has the right to decide on all the business activities of the company. The general partners have the right of legal representatives of the company, and organize and direct daily business operations of the company. Chairperson of the Members' Council is concurrently general director or director if the company's charter does not provide otherwise. The decision of the Council of Members shall be adopted with the approval of at least 3/4 or 2/3 of the total number of partners (as applicable).

***(iv) Capital contribution to, purchase shares/ capital contribution portion in Vietnam-based company***

Foreign investors are entitled to:

(a) Capital contribution to companies in Vietnam in the following forms: Purchase of initially-issued shares or additionally-issued shares of a JSC; Capital contribution to a LLC or Partnership; Capital contribution to other economic organizations; and

(b) Purchase of shares/ capital contribution portion in the companies in Vietnam in the following forms: Purchase of shares of a JSC from the company or its shareholders; purchase of capital contribution portion of existing members of a LLC to become a member of such LLC; purchase of capital contribution portion of capital contributing partner(s) in a partnership to become capital contributing member of such partnership; Purchase of capital contribution portion of a member of other economic organization.

***(v) PPP Contract***

A PPP is a new form of investment stipulated in the LI, based on the provisions of previous laws on the BOT, BTO and BT contracts; made on the basis of contracts between competent State agencies and investors, project companies for implementation, management and operation of infrastructure projects, provision of public services.

PPP contracts may take any of 5 forms specified by the Government, including: Build – Operate – Transfer (“BOT”) contracts; Build – Transfer – Operate contracts (“BTO”); Build – Transfer (“BT”) contracts; Build – Own – Operate (“BOO”) contracts; Build – Transfer – Lease (“BTL”) contracts; Build –

Lease – Transfer (“BLT”) contracts; Operation – Management (“O&M”) contracts; and other similar contracts. There are two groups of contracts: First, investors directly charge users or generate revenue through product consumption contract; Second, the investor’s income comes from repeated payment of State agencies depending on the quality and progress of the investment made.

And also, there are two ways for investors to participate in the projects: First, the State determines ideas, proposals and feasibility study reports. Investors will be consulted during project preparation and tendering to gain the right to implement the project. This is a key way for the projects on socio-economic development planning and sectorial planning. Second, investors propose the idea, and prepare the project proposal and feasibility study report. When the report is approved, the State agency shall organize tendering for selection of investors. Investors preparing the proposals are entitled to certain incentives in tendering; if they do not win the tendering, the cost of project study will be reimbursed.

Almost all projects must apply for the issuance of IRC (except for Group C projects under the Law on Public Investments), and apply for the establishment of a project company (excluding Group C projects and projects under BT contracts).

#### ***(vi) BCC Contract***

BCC is a cooperation contract signed by investors with the objective of conducting jointly one or more business operations in Vietnam, on the basis of mutual allocation or responsibilities and sharing of profits and products or losses, without creating or forming a legal entity in Vietnam. As BCC is not a separate legal entity, the contractual rights and obligations of the parties must be shared. To implement the contract and co-ordinate the daily operation of a BCC, if necessary, a co-ordination board having the functions, duties and powers as agreed by the parties, can be set up when necessary, with presence of the equal nominees from the parties.

To do joint business under the BCC, the parties to a BCC signed between a local investor and a foreign investor or between foreign investors must apply for the issuance of IRC.

#### **Project Classification and Licensing Agencies**

Unlike the FIL in the past, the projects under the LI are classified into two groups: projects requested to apply for the issuance of IRC and those not requested to do so. In which, investment projects of foreign investors normally fall on the first group. More decentralized, all projects (except PPP projects to which MPI or provincial-level PC will issue the IRCs) are approved and licensed by the provincial-level Department of Investment and Planning (DPI) with respect to projects outside IZs, EPZs, HZs and EZs, and provincial-level Management Boards of IZs, EPZs, HZs and EZs with respect to projects inside an IZ, EPZ, HZ or EZ. **Application Document Requirement**

An application/ registration file for submission to investment registration agencies, under the LI, normally includes:

- (a) Written application for implementation of the investment project;
- (b) Personal papers for individual investors, the documents certifying the legal status of institutional investors;
- (c) Proposal for investment project;
- (d) Written confirmation of investor's financial capacity;
- (e) Proposal for a need for land use; where the project does not require the State to allocate or lease out land or to permit conversion of the land use purpose, a copy of the site lease agreement or other document certifying that the investor has the right to use the site for implementation of the investment project shall be submitted;
- (f) Explanatory statement on technology to be used in respect of the projects using technology falling within the List of technologies limited to be transferred under the laws on transfer of technology;
- (g) BCC contract in the case of investment projects in the form of a BCC contract; and
- (h) Explanation on satisfaction of WTO's requirements, as the case may be.

Vietnamese language is lawfully required, but a widely-used foreign language may also be accompanied, for instance, English. In principle, the two languages have equal legal weight in determining the parties' intentions, but in case of discrepancies, the Vietnamese shall prevail.

## **Licensing Procedures and Timing**

All the new establishment of LLCs, JSCs, Partnerships, BCCs, other economic organizations; implementation of PPP contracts (except for Group C projects) are required to get IRCs. The licensing procedures and timing for obtaining the certificates are in the same and described hereunder:

(a) For investment projects subject to investment policy decisions, the investment registration agency shall issue IRCs to investors within 5 working days from the date of receipt of the written investment policy decision.

(b) For the remaining projects, the investment registration agency shall issue the IRC within 15 days from the date of receiving the complete dossier.