



LEGAL STRUCTURES FOR SETTING UP A PRESENCE IN VIETNAM

<p>Which legal entities may a foreign investor establish in Vietnam?</p>	<p>The legal entities most commonly used by foreign investors wishing to set up in Vietnam are:</p> <ul style="list-style-type: none">- A company incorporated as a “Limited Liability Company” (“LLC”); and- A company incorporated as a “Joint Stock Company” (“JSC”). <p>The characteristics of the LLC and the JSC are described below.</p> <p>In addition, foreign investors may also set up:</p> <ul style="list-style-type: none">- A branch; or- A representative office.
<p>What characterises the establishment of a legal entity in Vietnam?</p>	<p>Since Vietnam first opened its door to foreign investment in 1986, the country has increasingly liberalised its laws to encourage foreign investments. It also became a member of the WTO in 2007.</p> <p>In general, foreign investors may own up to 100% of a Vietnamese company, unless such company engages in business sectors where there is a cap on foreign ownership as committed by Vietnam’s WTO Commitments or other treaties of which Vietnam is a signatory. Vietnam has also recently removed the 49% foreign ownership cap on listed and unlisted public companies.</p> <p>The establishment of a legal entity to engage in general services is a relatively simple and fast process (approximately 1 month to obtain a licence).</p> <p>The establishment of a legal entity to engage in “conditional” business activities (such as real estate, retail, distribution, import and export, medical, education, etc.) or business activities that are not committed by Vietnam’s WTO Commitments will be subject to strict scrutiny. Thus, getting approvals in such cases will take more time.</p>

Setting up an LLC/JSC

<p>What is an LLC?</p>	<p>An LLC is a limited liability company established under the laws of Vietnam. There are two types of LLCs: (1) an LLC with only 1 member (Vietnamese law refers to shareholders of an LLC as “members”) (one member limited liability company); and (2) an LLC with 2 to 50 members (limited liability company with two or more members).</p> <p>An LLC does not issue shares. Its ownership structure is set out in its business registration certificate (“BRC”).</p> <p>The liability of members of an LLC is limited to the amount of their contribution to the charter capital of the LLC.</p> <p>Foreign investors prefer the LLC form when they want a closed and simple management structure for their company in Vietnam.</p>
<p>What is a JSC?</p>	<p>A JSC is a joint stock company (or shareholding company) established under the laws of Vietnam. A JSC must have a minimum of 3 shareholders but there is no maximum number.</p> <p>A JSC’s charter capital is divided into equal portions called “shares”. A JSC’s shareholder may transfer its shares freely except there is a lockup period of 3 years following the JSC’s establishment in respect of the transfer of founding share(s) held by a founding shareholder to another party not being a founding shareholder, unless such transfer is approved by the general meeting of shareholders where the transferring shareholder may not vote.</p> <p>A JSC may call for capital by public offering or by private placement of shares.</p> <p>The liability of shareholders of a JSC is limited to the amount of their contribution to the charter capital of the JSC.</p> <p>Foreign investors prefer the JSC form when they want their company in Vietnam to be a public company and need a more vigorous management structure where decisions are made at two levels by a board of directors at the lower level and by the shareholders at the highest level and where there are strict audit and control of the board and management by another supervising/inspection board, or if they wish to list on Vietnam’s stock exchange.</p>
<p>How can a foreign investor acquire an existing LLC/JSC?</p>	<p>A foreign investor may acquire shares in an existing LLC/JSC by subscribing to new shares/capital or buying existing shares/capital, and the cap on foreign ownership will be</p>

	<p>determined as follows:</p> <ul style="list-style-type: none"> - If any business activity being conducted by such target LLC/JSC is subject to a cap on foreign ownership as committed by Vietnam’s WTO Commitments or by other treaties of which Vietnam is a signatory or in any local laws of Vietnam, the maximum percentage that the foreign investor may acquire in the target LLC/JSC will be subject to the business activity that provides for the lowest cap on foreign ownership. - If it is unclear whether the business activity being conducted by such target LLC/JSC is subject to a cap on foreign ownership, the maximum percentage that the foreign investor may acquire will be considered and approved by the licensing authority on a case-by-case basis taking into account precedents in relation to such business activity. <p>If a foreign investor wishes to acquire from 51% to 100% shares in the target LLC/JSC, or the acquisition of a foreign investor triggers more than 51% foreign ownership in the target LLC/JSC, or the target LLC/JSC is conducting any “conditional” business activities (regardless of foreign ownership in such target LLC/JSC), the acquiring foreign investor must obtain an acquisition approval before it can acquire shares in the target LLC/JSC.</p> <p>Once the acquisition approval is issued, the BRC of the target LLC and the shareholders’ registration book of the target JSC will be amended to reflect the acquiring foreign investor’s shareholding in the target LLC/JSC.</p> <p>Other acquisitions by a foreign investor not being subject to the acquisition approval will be more straightforward, where the target LLC/JSC only needs to amend its BRC/shareholders’ registration book as discussed above.</p>
<p>What is the procedure for the incorporation of a new LLC/JSC?</p>	<p>A foreign investor wishing to establish an LLC/JSC must also have an investment project to be carried out by such LLC/JSC. Thus, the foreign investor must (1) complete the procedure for obtaining an investment registration certificate (“IRC”) in respect of such project, and then (2) complete the procedure for obtaining a BRC to establish an LLC/JSC on the basis of the registered project under the IRC.</p> <p>Both the IRC and the BRC will be issued by the Department of Planning and Investment (“DPI”) of the province/city where the head office of the LLC/JSC is located.</p> <p>The timing for obtaining the BRC is fixed at 3 working days, while the timing for obtaining the IRC varies depending on the business activities of the LLC/JSC and other factors of the</p>

	project which in practice may range from 1 to 6 months.
<p>What are the rules for choosing the corporate name of an LLC/JSC?</p>	<p>The corporate name of an LLC/JSC must include a Vietnamese name and may include a foreign language name. The foreign language name must have the same meaning with the Vietnamese name.</p> <p>As to the Vietnamese name, the words “Cong ty TNHH” must appear at the beginning of an LLC’s name, and the words “Cong ty Co phan” must appear at the beginning of a JSC’s name.</p> <p>The DPI has discretion to refuse any name chosen by an investor for an LLC/JSC if that name is identical or similar to a name used by a company already registered in Vietnam or contrary to historical traditions, culture, ethics and fine customs of the people.</p>
<p>What are the documents to be submitted to the DPI for the registration of a new LLC/JSC?</p>	<p>In the IRC stage, documents to be submitted to the Investment Registration Office of the DPI include:</p> <ul style="list-style-type: none"> - Application for implementation of a project; - Certificate of incorporation and/or business registration certificate or equivalent of the corporate foreign investor (required to be legalised by the Vietnamese Embassy); - Passport of the individual foreign investor (if any) (required to be legalised by the Vietnamese Embassy); - Proposal for the investment project including all details in respect of the project; - Documents proving that the foreign investor has sufficient financial capacity for implementing the project; - Documents in relation to the location of the project and the head office address of the LLC/JSC to be established; and - Other documents or explanations, depending on the nature of the project and the business activities to be conducted by the LLC/JSC. <p>In the BRC stage, documents to be submitted to the Business Registration Office of the DPI include:</p> <ul style="list-style-type: none"> - Copy of the IRC obtained in the IRC stage; - Application for incorporation of an LLC/JSC; - Charter (i.e. Memorandum and Articles of Association); - List of shareholders listing out all details in relation to the

	<p>shareholders;</p> <ul style="list-style-type: none"> - Certificate of incorporation and/or business registration certificate or equivalent document of the corporate foreign investor and the power of attorney or equivalent decision/resolution in respect of the authorised representative of the corporate foreign investor (required to be legalised by the Vietnamese Embassy); - Passport of the individual foreign investor (if any) (required to be legalised by the Vietnamese Embassy); and - Passport of the legal representative (required to be legalised by the Vietnamese Embassy or notarised in Vietnam).
<p>What are the applicable rules for the charter capital and total investment capital?</p>	<p>Vietnamese laws generally do not stipulate any minimum amount for the charter capital or equity of an LLC/JSC.</p> <p>The total investment capital of an LLC/JSC is the total amount that the foreign investor will be investing in its company in Vietnam and consists of charter capital/equity and loan capital. The LLC/JSC may mobilise loan capital by way of borrowing from its parent company or from financial institutions.</p> <p>Some “conditional” business activities require the investor to maintain a certain amount of minimum charter capital or maintain an escrow deposit in a bank in Vietnam during its operation.</p>
<p>What is the legal representative of an LLC/JSC?</p>	<p>A legal representative of a company is an individual representing the company to exercise the rights and perform the obligations arising out of transactions of the company, and representing the company to act as plaintiff, defendant or person with related interests and obligations in arbitration proceedings or courts and to exercise other rights and perform other obligations in accordance with the laws.</p> <p>An LLC/JSC can appoint as many legal representatives as it wishes, but at least one of them must reside in Vietnam.</p>
<p>Who can be appointed director of an LLC/JSC?</p>	<p>In general, any person having professional qualifications and experience in business administration can be appointed director of an LLC/JSC.</p> <p>A legal representative may also be a director of an LLC/JSC.</p>
<p>Is there Company Secretary under Vietnamese laws?</p>	<p>Vietnamese law does not require a legal entity to have a Company Secretary and does not provide for the role of a Company Secretary. Any registration for change in corporate details will be conducted under the name of the LLC/JSC.</p>

<p>What are the material annual report obligations that a foreign invested LLC/JSC needs to comply with?</p>	<ul style="list-style-type: none"> - <u>Report on project implementation</u>: A foreign invested LLC/JSC must report to the DPI on the implementation of its investment project in Vietnam on a yearly basis. - <u>Audited financial statements</u>: A foreign invested LLC/JSC must have its financial statement audited and submit the same to the provincial tax authority.
<p><i>The establishment of a branch</i></p>	
<p>What is a branch?</p>	<p>A branch to be discussed in this section is the branch in Vietnam of a foreign investor, and not a branch of an LLC/JSC established by a foreign investor in Vietnam. This section describes the characteristics of the branch to the extent that the foreign investor is conducting general trading and services activities. The establishment of a branch in Vietnam of a foreign investor engages in special business activities such as banking, insurance, securities, construction, culture, tourism, etc. being subject to the applicable specialised laws of Vietnam will not be discussed in this section.</p> <p>Unlike an LLC/JSC, a branch does not have any legal personality. It is a simple extension of its parent company and does not have its own rights, obligations and assets.</p> <p>With regard to business activities, a branch may engage in the same activities as its parent company, in part or in whole subject to the scope of activities recorded in the branch licence.</p>
<p>Why do foreign investors prefer to establish an LLC/JSC instead of a branch?</p>	<p>Foreign investors prefer an LLC/JSC to a branch in Vietnam are:</p> <ul style="list-style-type: none"> - A branch cannot own shares in a company; - The parent company of a branch has unlimited liability for the debts of a branch. This is not the case for an LLC/JSC; - The parent company remains liable for all activities of the branch and proceedings may be initiated against the parent company on that basis; - A branch must still satisfy business conditions as if it is an LLC/JSC if it registers to carry out conditional business activities; and - In some cases, the length of procedure for obtaining the branch licence in practice is almost the same as that for obtaining the IRC and BRC for incorporating an LLC/JSC.

<p>What are the conditions for establishing a branch in Vietnam?</p>	<p>Up to the date of applying for establishing its branch in Vietnam, the foreign investor must have been operating for more than 5 years and must have the audited financial statements of the latest fiscal year to prove its actual existence and operation.</p>
<p>What is the procedure for the establishment of a branch?</p>	<p>A foreign investor wishing to establish a branch in Vietnam will apply for the branch licence at the Ministry of Industry and Trade (“MOIT”).</p> <p>The procedure for the establishment of a branch is quite straightforward. However, although the law requires the MOIT to issue the branch licence within 15 working days, in practice, the MOIT may take around 2 months to do so.</p> <p>The preparation step before such licensing procedure will be time-consuming because it involves the legalisation of incorporation documents and audited financial statements of the foreign investor and the notarisation of Vietnamese translations of such legalised documents.</p>
<p>What post-licensing procedures are required after the branch licence is obtained?</p>	<p>Within a period of 45 days upon receipt of the licence, the branch must obtain its tax code and official seal, open its bank account in Vietnam, publish its establishments in local newspapers for three instalments and notify the MOIT of an official operation date in writing. The official operation date must be a day within such 45-day period.</p> <p>The establishment of a branch is only considered to be done when all of the above post-licensing procedures are completed and the written notice of operation is acknowledged by the MOIT.</p>
<p><i>The establishment of a representative office</i></p>	
<p>What is a representative office?</p>	<p>A representative office to be discussed in this section is the representative office in Vietnam of a foreign investor, and not a representative office of an LLC/JSC established by a foreign investor in Vietnam. This section describes the characteristics of the representative office to the extent that the foreign investor is conducting general trading and services activities. The establishment of a representative office in Vietnam of a foreign investor engages in special business activities such as banking, insurance, securities, construction, culture, tourism, etc. being subject to the applicable specialised laws of Vietnam will not be discussed in this section.</p> <p>The representative office is a legal entity often used by foreign investors to explore the local market in anticipation of greater</p>

	<p>investment in the future.</p> <p>The functions of a representative office are limited to promotional and liaison activities to the exclusion of any commercial or industrial activity. Accordingly, it is prohibited to produce, sell or buy products in order to generate income.</p>
<p>What are the conditions for establishing a representative office in Vietnam?</p>	<p>Up to the date of applying for establishing its representative office in Vietnam, the foreign investor must have been operating for more than 1 year and must have the audited financial statements of the latest fiscal year to prove its actual existence and operation.</p>
<p>What is the procedure for the establishment of a representative office?</p>	<p>A foreign investor wishing to establish a representative office in Vietnam will apply for the representative office licence at the provincial Department of Industry and Trade (“DOIT”) where the representative office will be located.</p> <p>The procedure for the establishment of a representative office is quite straightforward. The DOIT may issue the representative office licence within 15 working days in accordance with the law.</p> <p>However, the preparation step before such licensing procedure will be time-consuming because it involves the legalisation of incorporation documents and audited financial statements of the foreign investor and the notarisation of Vietnamese translations of such legalised documents.</p>
<p>What post-licensing procedures are required after the representative office licence is obtained?</p>	<p>Within a period of 45 days upon receipt of the licence, the representative office must obtain its tax code and official seal, open its bank account in Vietnam, publish its establishments in local newspapers for three instalments and notify the DOIT of an official operation date in writing. The official operation date must be a day within such 45-day period.</p> <p>The establishment of a representative office is only considered to be done when all of the above post-licensing procedures are completed and the written notice of operation is acknowledged by the DOIT.</p>

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