



Doing Business in Vietnam – Starting Up and Beyond

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Outline

- Overview of Vietnam's legal system
- Key issues to consider:
 - What investment structures are available?
 - What corporate structures are available?
 - What is the duration of a project?
 - What are the mandatory capital requirements?
 - How to secure land for the project?
 - What are some key provisions of the laws on housing and real estate business?
 - What are the issues an investor should be aware of in distribution and retail?
 - What employment issues should an investor be aware of?
 - What are the foreign exchange issues?
 - Can foreign law be selected as the governing law?

Outline (cont'd)

- How are disputes resolved?
- Can a foreign court judgment or arbitration award be enforced in Vietnam?
- Is there protection against any adverse change in law or confiscation of assets?
- What is the tax regime in Vietnam?
- What are the financing issues?
- Pitfalls to avoid



Overview of Vietnam's legal system

- Civil jurisdiction
 - Laws/ordinances
 - Decrees
 - Decisions
 - Circulars
- Cannot incorporate a shell company
- To develop a greenfield project must identify the project at a specific location and obtain an **Investment Registration Certificate (IRC)** and an **Enterprise Registration Certificate (ERC)**

Overview of relevant Vietnamese legislation

- Enterprises Law
- Investment Law
- Civil Code
- Commercial Code
- Foreign Exchange Ordinance
- Code of Civil Procedures
- Land Law
- Competition Law
- Anti-Corruption Law
- Labour Law
- Tax
- WTO Commitments
- Treaties and Investment Agreements

What investment structures are available?

Representative Office or Branch

- Set up a representative office to study the market
- Set up a branch of a foreign investor to conduct business in Vietnam

Direct Investment

- Establish a Vietnamese subsidiary or a joint venture (by obtaining an IRC to carry out a project under the Investment Law, and then obtaining an ERC to establish a company under the Law on Enterprises)
- Purchase shares or contribute capital to a Vietnamese company to own more than 50% shares in such company (by obtaining an M&A approval for share acquisition or capital contribution)
- Enter into a Business Cooperation Contract (BCC) with a Vietnamese party in accordance with the Investment Law

Other common structures

- Indirect investment in a local company to own less than 50% shares in such company
- Franchise, licensing, distribution arrangements with Vietnamese companies

Investment structures: Forms of direct investment

Three common forms

100% foreign owned
(WFOE)

Joint venture (JV)

Business Cooperation
Contract (BCC)

- WFOEs and JVs are Vietnamese legal entities
- Under a BCC, the foreign party may establish its operating office and may together with the Vietnamese party set up a coordinating board in Vietnam to implement the BCC
- All three forms (if having more than 50% foreign shareholding) require an IRC or an M&A approval to be issued
- IRCs and M&A approvals are not required for projects having less than 50% foreign shareholding and not within the conditional business sectors
- Applicable law is Investment Law

Investment structures: Is a JV required in respect of a project?

- **Investment Law:** Investments in the following sectors are subject to conditions:
 - national defence and security, social order and safety
 - banking and finance
 - public health
 - culture, information, press and publishing
 - entertainment services
 - real estate business
 - survey, prospecting, exploration and mining of natural resources, environmental and ecological projects
- development of education and training
- other sectors as set out by law
- **Vietnam's WTO Commitments**
 - Government can place conditions upon types of structures, forms of investments (e.g. JV is required in respect of projects for advertising services, film production, publication and projection services, electronic games business, etc.)

Investment structures: Licensing procedures relating to direct investment

- M&A approval applications and IRC applications for services projects will be simpler and fast tracked.

Time limit: 15 days

- IRC applications for other projects seem more complicated, however, requiring obtaining in-principle approvals first and then IRC applications. Mega projects may require the approval of the Prime Minister or the National Assembly. Projects with “conditional businesses” will still be subject to strict scrutiny.

Time limit: 35 days

- After obtaining an IRC for the project, foreign investors may apply for an ERC to set up the project company.

Time limit: 3 business days

What is new in the 2020 Investment Law?

Valid as of 1 January 2021



Key changes

- New 2020 Investment law regulates the new “market entry conditions for foreign investors”
- New 2020 Investment Law adds new categories of projects to the list of project entitled to investment incentives
- The Prime Minister is authorized to grant special incentives to create a favorable mechanism and policies
- New 2020 Investment law creates more favorable legal mechanism for foreign investors to set up innovative start-up businesses in fintech, shared technology businesses, and other creative start-up projects
- Under new 2020 Investment Law, nominee arrangements are now under strict scrutiny

What is new in the 2020 Investment Law? (cont'd)

Key changes (cont'd)

- New 2020 Investment Law has clearer guidance on when an M&A approval is required.
Specifically, an M&A approval will be required when the acquisition by foreign investors leads to: (i) an increase in the ownership of foreign investors in the target company engaging in business sectors with market entry restrictions for foreign investors; (ii) an increase in foreign ownership in the target company from less than 50% to more than 50% of the charter capital; or (iii) an increase of foreign ownership in the target company where ownership is already exceeding 50% of the charter capital.
- The threshold for a company to be treated as a foreign investor has been reduced from 51% under the 2014 Investment Law to 50%.
- New 2020 Investment law adds the investment projects of which the duration is not allowed to be extended.

What corporate structures are available?

Enterprise Law allows for a number of corporate structures:

- Limited Liability Companies (LLC)
- Shareholding or Joint Stock Companies (JSC)
- One-member LLC
- Partnerships
- Private Enterprises

Corporate structures

Which corporate vehicle?

LLC

- Can be set up with at least 2 but not more than 50 members (two-or-more members LLC), or with only 1 member (one-member LLC)
- Is the preferred structure for foreign investors
- Can reduce capital
- Can increase capital without going through private placement

JSC

- At least 3 shareholders but no maximum
- Is preferred by Vietnamese shareholders
- Can list on the stock exchange
- More stringent corporate governance structure
- If issue new shares to private investors, must comply with private placement rules (public and non-public JSCs)
- Flexibility in respect of types of shares that can be issued
- Harder to reduce/redeem capital (subject to a cap of 30%)

- Offshore tax implications of both structures should be evaluated as well

Corporate structures (cont'd)

Enterprise Law

Management & Control

Corporate Governance

New Rules

Certain decisions require **65%** approval

- types and number of shares
- change of business lines or business sectors
- change of management structure
- sale of assets which are equal to or exceed 35% of total value of assets of company as set out in company's latest financial statement
- reorganisation, liquidation of the company

Other types of decisions require **51%** approval

Written resolutions – 51%

Corporate structures (cont'd)

Enterprise Law

Management & Control

Corporate Governance

New Rules

- Control Board: oversees and audits activities of the Board and the management of a JSC and an LLC (in which the State owns more than 50% of charter capital)
- General directors (CEOs), board members and officers may be personally liable for using the company's name for their own benefit
- Disclosure and approval are required for certain transactions, such as related-party transactions, and in such case the interested shareholder/member/director cannot vote

Corporate structures (cont'd)

New 2020 Enterprise Law

Valid as of 1 January 2021

Management & Control

Corporate Governance

New Rules

- Father-in-law, mother-in-law, son-in-law and daughter-in-law of any manager of the company, or of any member or shareholder holding a share of capital contribution or controlling shares, legal representative, inspector is also considered as the related person
- An enterprise is no longer required to report on change of information about its managers
- More time to contribute capital by assets: The time for conducting administrative procedures for transferring ownership of assets is not counted for the 90-day capital contribution timeline
- New definition on State-owned enterprises (SOE). An SOE is an enterprise of which 50% shares are owned by the State

Corporate structures (cont'd)

New 2020 Enterprise Law

Valid as of 1 January 2021

Management & Control

Corporate Governance

New Rules

- No inspector or Inspection Committee is required for a non-SOE LLC
- Under the new 2020 Enterprise Law, a 5% shareholder (as opposed to 10% under the previous Enterprise Law) may call a shareholders' meeting and review the company's records
- A 10% shareholder may nominate candidates to the Board and the Inspection Committee as soon as it achieves such required shareholding instead of having to wait for six months.
- Shareholders holding at least 1% of the total shares may initiate actions against board members, CEO, controllers for breach of fiduciary duty as soon as it owns the required shareholding instead of having to wait for six months.

What is the duration of a project?

- 50 years maximum
- 70 years in special cases as approved by the Prime Minister
- In an application for extension of the term of the project priority is given to the investor

What are the mandatory capital requirements?

- None except in special cases (e.g. real estate business, BOT projects)
- In practice the licensing authority may require a 80/20 debt to equity split
- Capital must be contributed within 90 days from the date of establishment

How to secure land for the project?

- Land system in Vietnam is similar to that of China. No land ownership, instead ownership is secured by way of getting land use rights
- Land can be secured via land allocation or land lease from the Government. The local authority will allocate land to an investor for a residential project, and lease land pursuant to a land lease agreement for a non-residential project
- Land can also be secured via a capital contribution of land by a local partner in a JV
- Land compensation, site clearance and resettlement costs can be issues for large projects

What are available in the laws on housing real estate business?

In respect of rights of foreigners to purchase housing in Vietnam

- Any foreigner having a Vietnamese visa is allowed to purchase residential properties (condos and landed housing) in Vietnam, but the total number of units owned by foreigners may not exceed 30% of the total units in one condo complex, or not exceed 10% landed property units in one landed housing project
- Foreign investment funds may own houses in Vietnam but can only use for their staff members' residence

What are available in the laws on housing real estate business?

In respect of foreign investment in real estate in Vietnam

- Real estate business companies must have at least VND20 billion (approximately US\$862,400 million) of charter capital
- Real estate business FIEs can conduct more activities (including leasing and subleasing)
- Houses to be built in the future are allowed to be traded, but will be subject to banks' guarantees and more buyer-friendly conditions

What are the issues an investor should be aware of in distribution and retail?

Further to Vietnam's WTO Commitments:

- Before 1 January 2008
 - Foreign Investors had to establish a JV with a local company
 - Foreign capital contribution was capped at 49%
- From 1 January 2008 to 1 January 2009
 - 49% cap abolished
 - Wholly foreign owned company was still prohibited and JV was the only option
- Since 1 January 2009
 - No equity cap on foreign investment

What are the issues an investor should be aware of in distribution and retail?

Distribution activities include:

- Wholesale trade services
 - The activity of selling goods to other business entities and organisations. It does not include the activity of selling goods directly to the final consumer
- Retailing services
 - The activity of selling goods to the final consumer
- Franchising
 - A commercial activity whereby a franchisor authorises and requires a franchisee to conduct on its own behalf the purchase and sale of goods or the provision of services

Distribution and retail (cont'd)

Foreign investors are prohibited from distributing:

- Husked rice
- Sugarcane and sugar beet
- Tobacco and cigars
- Printed materials
- Crude oil and processed oil
- Certain types of pharmaceutical drugs
- Certain types of precious stones
- Explosives

Distribution and retail (cont'd)

Vietnamese owned company

- Generally no restrictions or additional requirements
- Approvals may be required depending on what exactly will be sold in the retail outlets (e.g. operating a pharmacy and/or selling cosmetics requires approvals from the Ministry of Health)

Distribution and retail (cont'd)

Foreign invested company

- Can establish **the first** retail outlet, and any additional retail outlet with less than 500 sqm in a commercial mall, without any restrictions
- The establishment of additional outlets for retail (beyond the first one) shall be allowed on the basis of an **economic needs test (ENT)**
- In practice, identifying suitable sites where the establishment of a retail outlet is permitted by the zoning master plan may be an issue

Distribution and retail (cont'd)

Economics needs test

- Applications to establish additional outlets (beyond the first one) shall be determined on a case-by-case basis and approval shall be based on the following criteria:
 - Market stability
 - Number of retail outlets
 - Population density
 - Consistency with the zoning master plan
- Applicable to all foreign invested companies regardless of the percentage of foreign ownership
- Approval granted solely at the discretion of the Vietnamese authorities

Distribution and retail (cont'd)

Licensing

- In order for a foreign invested company to engage in distribution activities it must be specifically permitted to do so under its IRC
- If its existing IRC does not provide for this, the foreign invested company must apply for a distribution licence
- Note: this does not apply if a company is licensed to manufacture a product. In such a case, it is allowed to distribute such product

What employment issues should an investor be aware of?

- Three types employment contracts



- No “at-will” employment relationship
- **Very difficult to terminate a contract** (must follow specific disciplinary measures allowed by law and for specific reasons)

What employment issues should an investor be aware of? (cont'd)

- Definite term contracts can only be signed and extended **once**. Thereafter, must sign indefinite contracts. If at end of term, no new contract is executed and employment is continued – definite term contract automatically converted to indefinite term contract
- Employment rules and regulations must be registered if more than 10 employees

What are the foreign exchange issues?

- Fairly straightforward
- Must open a capital account at one bank
- Right to convert VND to foreign exchange is guaranteed by law. Law sets out long list of permitted forex transactions
- Right to remit profits can be done annually (after tax is finalised)
- As long as proper documents are provided to banks to evidence proper purpose, a forex transaction can be carried out
 - e.g. to remit profits must submit to bank evidence that corporate income tax has been paid and there is a decision to distribute dividends by the Board

What are the foreign exchange issues? (cont'd)

- Guarantee of the availability of foreign exchange is only available for “a number of important” projects, as decided by the Prime Minister. Mechanism to give effect to this has to be specifically negotiated
- Offshore loans over a year must be registered with the State Bank of Vietnam
- Offshore accounts require the approval of the State Bank of Vietnam

Can foreign law be selected as the governing law?

Investment Law

- Foreign law may be applied if Vietnamese law does not provide for an issue
- The application of foreign law must not be inconsistent with the “basic principles” of Vietnamese law

How are disputes resolved?

Investment Law

A dispute where one party is a foreign investor or a foreign invested company may be resolved by:

- A Vietnamese arbitration body
- A foreign arbitration body
- A Vietnamese court
- An international arbitration body
- An ad hoc arbitration body established by the disputing parties

Can a foreign court judgment or arbitration award be enforced in Vietnam?

- Foreign court judgment: not enforceable
- Foreign arbitration awards: enforcement is possible because Vietnam is a signatory to the NY Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Can a foreign court judgment or arbitration award be enforced in Vietnam? (cont'd)

- The Code of Civil Procedures sets out the formalities to be carried out:
 - A petition must be sent to the competent court
 - All foreign language documents must be translated into Vietnamese and duly notarised and authenticated
 - Courts are allowed to request further information
 - A court can reject the award if it is made against the “basic principles of Vietnamese law”

Is there protection against any adverse change in law or confiscation of assets?

Change in law:

- Automatically benefit if change in law is beneficial
- If change is not beneficial, allows the investor to
 - retain same incentives; or
 - deduct losses from taxable income; or
 - adjust scope of business; or
 - will be considered to be paid compensation in certain cases

Confiscation:

- Will be compensated at **value of actual damage** and paid in a convertible currency and money may be remitted out of Vietnam

What is the tax regime in Vietnam?

Corporate Income Tax (CIT)

- The regular rate is 20%
- Incentive rates: 10%, 20%, available for a period between 10-15 years from date the company begins to operate. From 1 January 2016, enterprises having projects entitled to preferential CIT rate of 20% will enjoy a rate of 17% instead
- Tax holidays: from 2-4 years depending on where project is located, types of activities. Tax holidays can take form of complete tax exemption for a certain period from the date the company makes profits followed by a period when tax is charged at half rate

What is the tax regime in Vietnam? (cont'd)

Withholding tax

- No withholding tax on remittance of profits
- Interest: 5% withholding tax on interest payments on offshore loans
- Royalties, licence fees: 10% withholding tax



What is the tax regime in Vietnam? (cont'd)

Foreign contractors tax (FCT)

- Income from foreign contractors/subcontractors is taxed at source
- FCT is levied on goods/services provided by foreign contractors to generate income in Vietnam
- Covers foreign suppliers selling goods in Vietnam by in-country import/export arrangements or under Incoterms of DDP, DAT and DAP
- Online advertising, marketing and training services subject to FCT
- Tax applicable to foreign contractors comprises:
 - VAT and
 - CIT

What is the tax regime in Vietnam? (cont'd)

Foreign contractors tax

- Deduction method
 - Foreign contractor (FC) will file VAT under deduction method under VAT Law and declare CIT on actual net profits at the standard tax rate in accordance with CIT Law
 - FC must satisfy following conditions:
 - FC has a permanent establishment in Vietnam or is a tax resident of Vietnam
 - Period of conducting business in Vietnam is at least 183 days
 - FC has adopted the Vietnamese accounting system

What is the tax regime in Vietnam? (cont'd)

Foreign contractors tax

- Deemed method
 - VAT and CIT will be withheld by the Vietnamese contracting party at the time of payment to the FC



What is the tax regime in Vietnam? (cont'd)

- Under the deemed method the VAT and CIT rates for FCT are based on a deemed percentage of taxable turnover:

Industry	Effective VAT rate	Deemed CIT rate
Trading: distribution, supply of goods, materials, machinery and equipment in Vietnam	Exempt or 1.5% or 3%	1%
Services, lease of equipment, means of transport (including oilrigs) and insurance	Exempt or 5%	5%
Construction, installation (not including the value of construction materials or equipment)	5%	2%
Construction, installation (including the value of construction materials or equipment)	3%	2%
Transportation, other manufacturing and business activities	1.5% or 3%	2%
Interest (financial institutions)	Exempt	5%
Financial derivatives	Exempt	2%
Royalties	Exempt	10%
Management services fee for restaurants, hotels or casinos	5%	10%
Transfer of securities and offshore re-insurance	Exempt	0.1%

What is the tax regime in Vietnam? (cont'd)

VAT

- Three rates
 - 0%, 5%, 10%

Export – Import Duties

- Export – import tax is levied on export or import of goods across Vietnamese border
- Tax rate for each item is determined based on the tax rate schedule

What is the tax regime in Vietnam? (cont'd)

Personal Income Tax (PIT)

- All residents and non-residents are subject to PIT
- A resident is liable to pay tax on income sourced in Vietnam and portion of income from foreign sources
- A non-resident is subject to tax only on income sourced in Vietnam

What is the tax regime in Vietnam? (cont'd)

Resident

I Income from salaries and wages, business and production (million VND)			
Level	Taxable income/year	Taxable income/month	Tax rate
1	Up to 60 (approximately US\$2,600)	Up to 5	5%
2	From 60 to 120 (approximately US\$2,600 to US\$5,200)	From 5 to 10	10%
3	From 120 to 216 (approximately US\$5,200 to US\$9,310)	From 10 to 18	15%
4	From 216 to 384 (approximately US\$9,310 to US\$16,550)	From 18 to 32	20%
5	From 384 to 624 (approximately US\$16,550 to US\$26,890)	From 32 to 52	25%
6	From 624 to 960 (approximately US\$26,890 to US\$41,370)	From 52 to 80	30%
7	Over 960 (approximately US\$41,370)	Over 80	35%

What is the tax regime in Vietnam? (cont'd)

Social security and health insurance

- Social insurance
 - Employee: 8%
 - Employer: 17.5%
- Health insurance
 - Employee: 1.5%
 - Employer: 3%
- Unemployment insurance
 - Employee: 1%
 - Employer: 1%

What are the financing issues?

- Banking legislation is fairly clear
- US\$ loans available in Vietnam only for limited purposes
- Offshore US\$ loans over one year require the approval of the State Bank of Vietnam



What are the financing issues? (cont'd)

Mortgages

- May only mortgage land if rental is paid in full in advance
- May only mortgage land to “credit institutions licensed to operate in Vietnam” and not to “offshore” lenders, including shareholders
- Registration is effected at Land Use Right Registration Offices
 - Procedures fairly clear and the registration offices have limited time periods to carry out formalities
 - Enforcement based contracts
 - If enforcement cannot be carried out pursuant to the contract, the mortgagee may sell the land use right or request a State body to sell the land by auction or commence proceedings

Negotiate enforcement provisions very carefully

Pitfalls to avoid

Documentation

- review documentation very carefully
- pay attention to Vietnamese versions

Consents and approvals

- for any proposed business transaction ensure that the law is followed

Allow sufficient time to set up business in Vietnam

- delays in securing approvals, and negotiating, etc. are still common but improving depending on where you invest

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