2. INVESTMENT LICENSING

2.1 Overview

2.1.1 Foreign and domestic investors:

The amended Law on Investment No. 61/2020/QH14 ("LOI") came into effect on 1st January 2021 and is supplemented by Decree 31/2021/ND-CP ("Decree 31/2021") effective since 26th March 2021. Art. 3 LOI generally defines as investor an "*organization or individual that carries out business investment activities*" in Vietnam. Auch investors include domestic investors, foreign investors and foreign-invested business entities as follows:

- A **domestic investor** means an individual holding Vietnamese nationality or a business entity whose members or shareholders are not foreign investors.
- A **foreign investor** means an individual holding a foreign nationality or an organization established under foreign laws and carrying our business investment activities in Vietnam.
- A **foreign-invested business entity** means a legal entity whose members or shareholders are foreign investors, with business entities only including entities established and operating in accordance with Vietnamese laws.

Under Art. 23 (1) LOI, certain foreign investors and foreign invested business entities, unlike domestic investors and business entities, must follow the investment registration procedures of the LOI when i) establishing a business entity, ii) making investments by contributing capital, purchasing shares or purchasing stakes of a business entity or iii) making investments under a business cooperation contract. In detail, the **investment registration procedures of the LOI apply** if:

- 50% or more of the investor's charter capital is held by (a) foreign investor(s) or the majority of partners are foreigners (if the business entity is a partnership).
- 50% or more of the investor's charter capital is held by one or more foreign invested business entity/entities.
- 50% or more of the investor's charter capital is held by one or more foreign investor(s) and one or more foreign invested business entity/entities.

According to Art. 37 LOI, investment projects of above defined investors ("Foreign Investors") must first be issued an Investment Registration Certificate ("IRC"). Other investors only need to follow investment procedures also applied to Vietnamese domestic investors (if any). Therefore, unlike domestic investors, Foreign Investors are subject to two subsequent licensing procedures:

- Obtaining the IRC which approves the Foreign Investor’s investment project in Vietnam, and then
- Obtaining the Enterprise Registration Certificate (“ERC”), with which the legal entity operating the foreign investment project is formally established (“Foreign Invested Enterprise” or “FIE”).

Accordingly, Foreign Investors carrying out their **first investment project** in Vietnam must not establish a FIE without a valid, approved investment project and the IRC issued prior to applying for the ERC which established the legal entity. If a Foreign Investor who has already licensed an investment project in Vietnam pursues a new investment project, procedures for executing such new, additional investment project shall be followed, however without necessarily having to establish a new, additional legal entity.

The same applies if a Foreign Investor wants to **expand their existing investment project**: In this case, they can either use their existing FIE (and its ERC) or establish a new FIE (and then a new, additional ERC needs to be issued).

2.1.2 Applying for the IRC:

The IRC application includes the Foreign Investor’s:

- Investment Project Proposal, and
- Application for Investment Project Execution.

The IRC application must be supported with a number of documents, including:

- The Foreign Investor’s certificate of incorporation (aka business registration).
- The Foreign Investor’s legal representatives’ passport copies.
- The Foreign Investor’s articles of association (aka bylaws or charter).
- The Foreign Investor’s decision / resolution to establish a FIE in Vietnam.
- The Foreign Investor’s appointment decision of Authorized Representative(s), Legal Representative(s) and the General Director of the future FIE.
- Passport copies of Authorized Representative(s), Legal Representative(s) and the General Director of the future FIE.
- The Foreign Investor’s audited financial statements for the last two fiscal years.
- Memorandum of Understanding (MOU) regarding the lease of office space in Vietnam (the MOU will commit that the future FIE will then take over the lease after the ERC is issued).
- Commitment letter or bank statement to pay up the charter capital (sometimes asked for even though not legally required).

These supporting documents (except for the commitment letter / bank statement) need to be “legalized” in the Foreign Investor’s home country so that they can be used in Vietnam. The legalization procedure varies from country to country, but generally includes at least three steps:

- **Step 1:** The document must be authenticated by a competent notary public of the country where the documents were issued (usually within the district where the Foreign Investor is headquartered or residing).
- **Step 2:** The notarized documents must then be certified by the competent diplomatic body of the country where the documents were issued. This can be the Ministry of Foreign Affairs, or in some countries the President of the Regional Court in which the notary public is located.
- **Step 3:** The certified (pre-legalized) documents must then be legalized by the Vietnamese Embassy in the Foreign investor’s home country.

The legalized foreign documents must then be translated into Vietnamese and certified before they can be submitted to the licensing authorities in Vietnam. Even though the translation can be done abroad, if is preferable to have the legalized documents translated in Vietnam, because your advisors can then better double-check the translations provided by the Vietnamese certified translation company.

2.1.3 IRC/ERC licensing timelines:

According to Art. 38 (1) LOI, the deadline is within which the investment authority must grant or reject issuance of the IRC is 15 days from the date of receipt of the complete application documents. The additional ERC must be granted within three (3) working days. In practice, however, the licensing authorities will hardly ever meet those deadlines. Rather, they will often delay approvals with various arguments why the submitted application dossiers were not accurate or complete and therefore the legally prescribed timelines could not be kept or were not started in the first place. In this context it is not uncommon that direct or indirect demand for “acceleration payments" are made by the licensing authorities. Therefore, in practice, investors should rather calculate with at least twice the statutory timelines and include in their planning the additional time required to obtain and legalize the documents required to submit the IRC and IRC applications.

2.1.4 Distribution and retail license:

In some cases, in addition to IRC and ERC, the granting of additional licenses, permits and thus the participation of other agencies, authorities or ministries may be required.

This is for example required in certain other business areas such as e.g., in education, banking and financial services, construction, hospitality, real estate and certain other limited investment areas.

Practically important for many investors is the area of retail- and distribution, in which, in addition to the IRC and ERC, a distribution license (in Vietnam rather confusingly referred to as "business license") and potentially an additional retail outlet license must be obtained by the competent Department of Industry and Trade ("DOIT"). Retail and distribution activities are governed by Decree No. 09/2018/ND-CP dated 15 January 2018 ("Decree 9"), which contains comprehensive regulations regarding *"activities directly related to sale of goods of foreign investors and foreign-invested business entities in Vietnam".* According to Art. 5 of Decree 9, a business license must generally be issued to a foreign-invested business entity to exercise the retail distribution right, importation rights and wholesale distribution rights. A foreign-invested business entity must in addition apply for a license for establishment of a retail outlet after obtaining the business license, with retail outlets being defined as places in which *"goods are sold to individuals, households, other organizations for consumption purpose."*

Art. 12 of Decree 9 requires – amongst others – that the foreign business must provide the following documentation to be issued a business license:

- Business plan: business activities and methods of doing business; presentation of business plan and market development; labour need; evaluation of the implications and socio-economic effectiveness of the business plan;
- Financial plan: An income statement made on the basis of the last audited financial statement if the enterprise has been established in Vietnam for at least 1 year; representation of capital, sources of funds and fund-raising plans; enclosed with other financial documents;
- A document justifying that the enterprise incurs no overdue tax issued by the tax authority; and
- Copies of the ERC; certificate of registration for sale of goods and other related activities (if any).

Once issued, the validity period of a business license is five (5) years.

Art. 22, 23 of Decree 9 contain the requirements for establishment of retail outlets and obtaining the retail outlet license. In particular, Art. 23 prescribes the criteria for the "Economic Needs Test" in case foreign businesses want to set up additional retail outlets. These criteria include e.g., i) The number of existing retail outlets in the relevant geographic market; ii) the impact of the retail outlet on the market stability and operating activities of other retail outlets and traditional markets in the relevant geographic market; iii) the impact of retail outlet on traffic density, environment hygiene, fire safety in the relevant geographic market and iv) the potential contribution of the retail outlet to the socio-economic development of the relevant geographic market, in particular: employment creation for domestic workers, potential contribution to the development and modernization of the retailing sector in the relevant geographic market, improvement of environment and living conditions of inhabitants in the relevant geographic market and potential and actual contribution to the state budget.

2.1.5 Investment guarantees:

Art. 10 LOI guarantees all investors that their lawful assets shall generally not be nationalized or confiscated by administrative measures. Only where an asset is bought or requisitioned by the State for reasons of national defense and security, national interests, state of emergency or natural disaster management, the investor shall be reimbursed or compensated in accordance with regulations of law on asset requisition and relevant regulations of law. In addition, Art. 12. LOI guarantees the transfer of Foreign Investors' assets overseas if all tax/financial obligations are fulfilled. Those assets specifically include the Foreign Investors' i) investment capital and proceeds from liquidation of their investment, ii) income obtained from business investment activities and iii) money and other assets under their lawful ownership.

Art. 13 LOI further provides investment guarantees for foreign investors in cases of changes in legislation: Where a new law provides more favourable investment incentives, investors are generally entitled to enjoy the new incentives for the remaining period of the incentive enjoyment of the project. Where a new law that provides less favourable investment incentives than those previously enjoyed by investor is promulgated, investors shall generally keep enjoying the current incentives for the remaining period of the incentive enjoyment of the project. Where an investor is no longer eligible for investment incentives, the following options exist: i) Deduction of the damage suffered by the investor from the investor's taxable income, ii) Adjustment of the objectives of the investment project or iii) Assisting the investor in remedying the damage.

2.2 Market Access Restrictions

2.2.1 Market access restrictions for all investment:

Under the LOI, investors, both foreign and domestic, may conduct freely all business activities in Vietnam, unless these business lines are either banned or conditional.

Banned business lines:

Art. 6 LOI lists as banned business lines:

- *Trade in the narcotic substances specified in Appendix I of the LOI.*
- *Trade in the chemicals and minerals specified in Appendix II of the LOI.*
- *Trade in specimens of wild flora and fauna specified in Appendix 1 of the Convention on International Trade in Endangered Species of Wild Fauna and Flora; specimens of rare and/or endangered species of wild fauna and flora in Group I of Appendix III of the LOI.*
- *Prostitution, human trafficking, trade in human tissues, corpses, human organs and human fetuses.*
- *Business activities pertaining to asexual human reproduction.*
- *Trade in firecrackers.*
- *Provision of debt collection services.*

Conditional Business Lines:

Like many other countries, Vietnam restricts or conditions investment into so-called "conditional sectors", which in Vietnam include certain sensitive sectors with impact on social order and state security, the education, healthcare and financial services sector, production, publication and distribution of cultural goods as well as the exploration of natural resources (mining industry). In addition, certain investments are limited to foreign investments with a particular threshold, such as investments in Vietnamese banks (30%) or investment in public enterprises (49%). The classification of a business line as a conditional investment sector also has an impact on registration and approval procedures and may therefore also determine the competent licensing authority. Art. 7 (2) in connection with Appendix IV of the LOI lists 227 such conditional business lines.

2.2.2 Foreign Investors' additional market access restrictions:

For Foreign Investors, Art. 15-18 in connection with Appendix I of Decree 31/2021 provide an additional "*list of business lines with prohibited and restricted market access*". Specifically, Art. 17 (1)-(2) of Decree 31/2021 provide that Foreign Investors are only treated like domestic Vietnamese investors when investing in business lines which do not fall under the "**Negative List for Market Access**", which is comprised of two sub-lists: A "**Prohibition List"** of business lines which Foreign Investors are not allowed to invest in, and a "**Market Entry List"** of business lines in which Foreign Investors must satisfy certain market entry conditions to invest in.

The “**Prohibition List”** lists 25 business lines prohibited for Foreign Investors because their foreign investment may harm Vietnam’s national security and -defense, social order, community health, Vietnamese historical traditions, culture and customs and/or damage or destroy natural resources and the environment as follows:

1. Trading goods and services on the list of goods and services on which monopoly is held by the State in the commercial sector.

2. Press activities and information gathering in any form.

3. Fishing.

4. Security and investigation services.

5. Judicial administration services, including judicial assessment services, poste restante services, property auction services, notary services, liquidator services.

6. Overseas contracted employment agency services.

7. Investment in the construction of infrastructure of cemeteries and graveyards to transfer land use rights associated with such infrastructure.

8. Waste collection services directly from households.

9. Public opinion polling service (public opinion polling).

10. Blasting services.

11. Manufacture and trade in weapons, explosives and supporting tools.

12. Import and dismantling of used seagoing vessels.

13. Public postal services.

14. Goods transhipment business.

15. Temporary import for re-export business.

16. Exercise of the right to export, import, and distribution of goods on the list of goods for foreign investors, foreign-invested economic organizations are not allowed to exercise the right to export, import, distribute.

17. Collection, purchase and handling of public goods in armed forces units.

18. Trading in military materials or equipment and supplies for the people's armed forces, military weapons, technical equipment, ammunition and specialized vehicles used for the army and police; components, accessories, spare parts, supplies and specialized equipment and technology used for their production.

19. IPR representation services and industrial property assessment services.

20. Services of the establishment, operation, maintenance and maintenance of aids to navigation, water zones, water areas, public navigational channels and maritime routes; service of surveying water zones, water areas, public navigational channels and maritime routes serving maritime notices; services of surveying, constructing and *publishing nautical charts for waters, seaports, navigational channels and maritime routes; building and publishing marine safety documents and publications.*

21. Navigation services to ensure maritime safety in water areas, water areas and public navigational channels; marine electronic information service.

22. Inspection and certification services for means of transport (including systems, components, equipment, components of vehicles); inspection and issuance of certificates of technical safety and environmental protection for vehicles, specialized equipment, containers, and dangerous goods packaging equipment used in transportation; inspection services and issuance of certificates of technical safety and environmental protection for oil and gas exploration, exploitation and transportation means and equipment at sea; technical inspection service of occupational safety for machines and equipment with strict requirements on occupational safety installed on means of transport and means, exploration and exploitation equipment and oil and gas transportation at sea; fishing vessel registry services.

23. Natural forest investigation, assessment and exploitation services (including gathering wood and hunting, trapping rare wild animals, management of the sources genes for plants, livestock and microorganisms used in agriculture).

24. Researching or using genetic resources of new livestock breeds before being appraised and evaluated by the Ministry of Agriculture and Rural Development.

25. Tourism services, except international tourism services for international tourists to Vietnam.

The **“Market Entry List”** lists 58 business lines in which Foreign Investors must satisfy certain market entry conditions and one “opening item” No. 59 which allows the issuance of “pilot mechanisms” on new business lines (rather than existing ones) Accordingly, if there is no pilot mechanism on a business line which falls within neither the Prohibition List nor the Market Entry List, Foreign Investors are equal to domestic investors in terms of market entry conditions. In detail:

1. Production and distribution of cultural products, including visual recordings.

2. Production, distribution and broadcast of television programs and music, stage performance and motion picture works.

3. Supply of radio and television services.

4. Insurance, banking, securities brokerage, and other services related to insurance, banking, and securities.

5. Postal services, telecom services.

6. Advertising services.

7. Printing service, publication issuance services.

8. Measurement and mapping services.
9. FlyCam services.
10. Educational services.
11. Exploration, extraction and process of natural resources, minerals, oil and gas.
12. Hydropower, offshore wind power and nuclear energy.
13. Transport of goods and passengers by railway, airway, road, waterway and conduit [pipeline].
14. Aquaculture cultivation or breeding.
15. Forestry and hunting.
16. Betting and casino business
17. Security guard services.
18. Construction, operation and management of river ports, seaports and airports.
19. Real estate business.
20. Legal services.
21. Veterinary services.
22. Goods sale and purchase activities and activities directly related to goods trading activities of foreign service providers in Vietnam.
23. Technical inspection and analysis services.
24. Travelling [tourism] services.
25. Health and social services.
26. Sports and entertainment services.
27. Paper production.
28. Manufacture of transport vehicles with more than 29 seats.
29. Development and operation of wet markets.
30. Commodity Exchange operations.
31. Domestic LCL collection services.
32. Auditing, accounting, bookkeeping and tax services.
33. Valuation services, consulting services on corporate valuation for equitization.
34. Services related to agriculture, forestry and fishery.
35. Aircraft manufacturing.
36. Manufacture of railway locomotives and wagons.
37. Trading tobacco products, tobacco raw materials, and specialized machinery and equipment for the tobacco industry.
38. Publishers' activities.
39. Ship building, and repair services.

40. Waste collection services, environmental observation services.

41. Commercial arbitration services, arbitration and mediation services.

42. Logistic services.

43. Coastal shipping.

44. Cultivation, production or processing of rare crops, breeding of rare wild animals, processing and handling of these animals or plants, including products thereof.

45. Production of construction materials.

46. Construction and related technical services.

47. Motorcycle assembly.

48. Services related to sports, art activities, performing arts, fashion shows, beauty and model contests, and other entertainment.

49. Air transport support services; airport ground technical services; catering services on the aircraft; navigation information services, aviation meteorological services.

50. Sea transport services; shipping tugboat [ship towing] services.

51. Services related to cultural heritage, copyright and related rights, photography, video recording, recording, art exhibitions, festivals, libraries, museums.

52. Services related to tourism promotion.

53. Agent, recruitment and scheduling, management for artists, athletes' services.

54. Family related services.

55. E-commerce activities.

56. cemetery business, cemetery services and funeral services.

57. Airborne seeding and chemical spraying services.

58. Maritime pilotage services.

59. Investment sector, business lines under the pilot mechanism of the National Assembly, The Standing Committee of the National Assembly, the Government, and the Prime Minister.

In summary, according to Art. 17 of Decree 31/2021, Foreign Investors are subject to the following additional market access restrictions:

- Foreign Investors must not invest in the prohibited business lines specified in the **Prohibition List** (Section A, Appendix I of Decree 31/2021).
- For restricted business lines specified in the **Market Entry List** (Section B, Appendix I of Decree 31/2021), Foreign Investors shall fulfil the conditions that are published in accordance with Article 18 of Decree 31/2021.

A Foreign Investor carrying out investment activities in different business lines specified in the Prohibition or Market Entry List must fulfil all market access conditions applied to those business lines. In business lines without above market access restrictions, Foreign Investors and domestic investors have equal market access, subjects to the applicable Vietnamese laws and regulations. If a **new Vietnamese legislative document** contains market access restrictions for Foreign Investors in the business lines without market-access commitment of Vietnam:

- Foreign Investors to whom the conditions for market access mentioned have been applied **before the new legislative document takes effect** may carry on their investment activities under the said conditions.
- Foreign Investors that carry out investment activities **after the effective date of the new legislative document** shall fulfil the market access conditions prescribed by such document.
- In case of **establishment of a new business organization**, execution of a new investment project, receipt of an investment project, purchase of stakes/shares of another business organization under a contract or change to the objectives or business lines that is subject to fulfilment of market access conditions prescribed by the new legislative document, such conditions must be fulfilled. In this case, the competent authority shall not reconsider the conditions for market access in the business lines granted to the investor previously.

Foreign Investors from countries that are not WTO members shall apply the same conditions for market access by investors from countries that are WTO members, unless otherwise prescribed by the law of Vietnam or international treaties between Vietnam and those countries. Foreign Investors that are regulated by an investment-related international treaty which prescribes more favourable conditions for market access than those prescribed by the law of Vietnam, the former may be applied. Foreign Investors that are subject to investment-related international treaties which prescribe different market access conditions may apply the conditions prescribed by any of those treaties to all of the investor’s business lines. Once the conditions prescribed by one of the international treaties have been chosen, the foreign investor shall perform their rights and obligations in accordance with the chosen treaty.

2.3 Investment Incentives

Tax incentives may apply for both new investment projects and expansion of existing investment projects, however restrictions may apply for the expansion of existing investment projects or investment projects resulting from certain acquisitions or restructuring transactions. Tax incentives only apply to the promoted investment activities and not for other, indirect or accidental income resulting from the investment activities (such as e.g., interest income, foreign currency income).

2.3.1 Types of tax incentives:

The available tax incentives may comprise:

- Reduced corporate income tax (“CIT”) rates between 10% and 17% are granted for 15 or 10 years, starting with the beginning revenue generation from the tax-funded activities. The duration of the application of the preferred tax rate may be extended in certain cases. The preferential rate of 15% applies in certain cases for the entire project period. Certain sectors (e.g., education, health) also enjoy the 10% preferential tax rate throughout the project life.
- Tax exemption means a time period in which the investment project is completely exempted from CIT, starting from the first financial year in which the company generates a profit.
- Tax reduction refers to the subsequent period of time to the period of tax exemption, in which a 50% reduction is granted to the relevant CIT rate. If the company does not generate a profit within three years, the tax exemption or tax reduction begins in each case from the fourth financial year.
- Exemption from import duties may apply for certain investment projects with special investment incentives or those in socio-economically difficult areas if the imported goods are part of the fixed assets of the investment project in Vietnam.
- Exemption from and reduction of land levy and land rents may be granted based on the nature of the investment project.
- Accelerated depreciation, increasing the deductible expenses upon calculation of taxable income.

2.3.2 Incentivised projects, entities, activities and areas:

Investment incentives exist for the following projects, entities, activities and areas:

Projects and entities eligible for investment incentives:

- Investment projects, outside the mining sector or such projects whose products are subject to special sales tax, with an investment volume of 6,000 billion VND or more (within three years from licensing), if they meet at least one of the following criteria: Revenue of at least 10,000 billion VND per year, starting with the fourth year of business, or more than 3,000 employees at the latest in the fourth year of business operations.

- Investment projects on establishment or expansion of innovation- or research and development centres with a total investment capital of 3,000 billion VND or more and which disburses at least 1,000 billion VND within a period of three years from the date of being granted the IRC or Investment Policy Approval or national innovation centres established under the decision of the Prime Minister.
- Investment projects in industries and trades eligible for special investment incentives with an investment capital of at least 30,000 billion VND and which disburses at least 10,000 billion VND within a period of three years from the date of being granted the IRC or Investment Policy Approval.
- Investment projects with an investment volume of at least 12,000 billion VND distributed within five years of licensing, except for mining projects or projects whose products are the subject to special sales tax.
- Social housing construction projects; investment projects located in rural areas and employing at least 500 employees, investment projects that employ persons with disabilities in accordance with the laws on persons with disabilities.
- High-technology enterprises, science and technology enterprises and science and technology organizations, projects involving transfer of technologies on the "list of technologies the transfer of which is encouraged" in accordance with the Law on Technology Transfer, science and technology enterprise incubators prescribed by the Law on High Technologies and Law on Science and Technology, enterprises manufacturing and providing technologies, equipment, products and services aiming at meeting environment protection requirements prescribed by the Law on Environment Protection.
- Business investment in small and medium-sized enterprises (SMEs) product distribution chains eligible for investment incentives or in a network of intermediaries that distribute products of such SMEs to consumers and meet the following conditions: At least 80% of enterprises joining the chain are SMEs, there are at least 10 places for distribution of goods to consumers and at least 50% of revenue of the chain are generated by SMEs joining the chain.
- Investment in SME incubators, technical establishments supporting SMEs, co-working spaces supporting start-up SMEs eligible for investment incentives (those established in line with the laws on provision of assistance for SMEs).
- Start-up investment projects on manufacturing of products created from inventions, utility solutions, industrial designs, semiconductor integrated circuits

layout-designs, computer software, applications on mobile phones, cloud computing, production of new livestock breed or line, new plant varieties, new aquatic breeds, new forest tree cultivars, technological advances which have been granted protection certificates in accordance with the laws on intellectual property or copyrights or international registration certificates in accordance with international treaties to which Vietnam is a signatory or recognized by competent authorities.

- Projects on manufacturing of products obtained from projects on trial production, sample products and technology completion, manufacturing of products given awards at start-up competitions, national start-up competitions, scientific and technological awards in accordance with the laws on scientific and technological awards.

Business activities eligible for investment incentives:

- High-tech activities, high-tech ancillary products, research, manufacturing and development of from science and technology products in accordance with the law on science and technology.
- Manufacturing of new, clean and renewable energies, manufacturing of products with an added value of 30% or more and energy-saving products.
- Manufacturing of key electronics, mechanical products, agricultural machinery, automobiles, automobile parts, shipbuilding.
- Manufacturing of products on the list of prioritized supporting products.
- Manufacturing of IT products, software products, digital contents
- Breeding, growing and processing of agriculture products, forestry products, aquaculture products, afforestation and forest protection, salt production, fishing and fishing logistics services, production of plant varieties, animal breeds and biotechnology products.
- Collection, treatment, recycling or re-use of waste.
- Investment in development, operation, management of infrastructural works; development of public transportation in urban areas.
- Pre-school, higher and general education, vocational education.
- Medical examination and treatment; manufacturing of medicinal products and medicinal materials, storage of medicinal products; scientific research into preparation technology and biotechnology serving creation of new medicinal products; manufacturing of medical equipment.
- Investment in sports facilities for the disabled or professional athletes.

- Investment in protection and promotion of value of cultural heritage.
- Investment in geriatric and centres for elderly, mental health centres, treatment for agent orange patient, the disabled, orphans and street children.
- Investment in people's credit funds, microfinance institutions.
- Manufacturing of goods and provision of services for the purposes of creating or participating in value chains and industrial clusters.

Areas eligible for investment incentives:

- Disadvantaged areas and extremely disadvantaged areas.
- Industrial parks, export-processing zones, hi-tech zones and economic zones.

2.4 Investment Approvals

As a general rule, investment approval is granted by **IRC issuance** by either the provincial Department of Planning and Investment (DPI) or the Management Boards of industrial parks, export-processing zones, hi-tech zones and economic zones (if the investment project is executed in such industrial park, export-processing zone, hi-tech or economic zone).

However, for below selected special investment projects, an **Investment Policy Approval (IPA)** is required in addition to the IRC. In these cases, the licensing authority in charge depends on the type and scale of the investment project as follows:

2.4.1 Large-Scale Investment Projects:

The **National Assembly** approves the following investment projects:

i) Investment projects that exert great effects or potentially serious effects on the environment, including nuclear power plants, projects that require repurposing of special-use forests, headwater protection forests or border protection forests of at least 50 hectares; of sand-fixing and windbreak coastal forests or protection forests for wave prevention of at least 500 hectares or production forests of at least 1,000 hectares.

ii) Investment projects that require repurposing of land meant for wet rice cultivation during with two or more crops of at least 500 hectares.

iii) Investment projects that require relocation of 20,000 people or more in mountainous areas or 50,000 people or more in other areas.

iv) Investment projects that require application of a special mechanism or policy that needs to be decided by the National Assembly.

2.4.2 Medium-Scale Investment Projects:

Except for the investment projects under the approval authority of the National Assembly, the **Prime Minister** approves the following investment projects:

i) Investment projects regardless of capital sources in the following cases:

- Investment projects that require relocation of 10,000 people or more in mountainous areas or 20,000 people or more in other areas.
- Investment projects on construction of airports and aerodromes, runways of airports and aerodromes, international passenger terminals, cargo terminals of airports and aerodromes with a capacity of at least one million tonnes per year.
- New investment projects on passenger air transport business.
- Investment projects on construction of ports and wharves of special seaports, ports and wharves in which investment is at least VND 2,300 billion within the category of class I seaports.
- Investment projects on petroleum processing.
- Investment projects which involve betting and casino services, excluding business in prize-winning electronic games for foreigners.
- Projects on construction of residential housing (for sale, lease or lease purchase) and urban areas that use at least 50 hectares of land or less than 50 hectares of land but with a population of at least 15,000 people in an urban area; or investment projects that use at least 100 hectares of land or less than 100 hectares of land but with a population of at least 10,000 people in a non-urban area; or investment projects regardless of the area of land used or population within the safety perimeter of relics recognized by the competent authority as the national and special national relics.
- Investment projects on construction and operation of infrastructure in industrial zones and export processing zones.

ii) Investment projects of Foreign Investors in the following fields: provision of telecommunications services with network infrastructure, afforestation, publication and press.

iii) Investment projects which at the same time fall within the power of at least two provincial People's Committees to grant approval for investment guidelines.

iv) Other investment projects subject to approval for their investment guidelines or subject to issuance of decisions on investment guidelines by the Prime Minister as prescribed by law.

2.4.3 Small-Scale Investment Projects:

The remaining special “small-scale” investment projects which are not under the approval authority of the National Assembly or the Prime Minister are approved by the provincial **People’s Committees**:

i) Investment projects that request the State to allocate or lease out land without auction or bidding for or receipt of land use rights, and investment projects that request permission to repurpose land, except for cases of land allocation, land lease or permission for land repurposing by family households or individuals not subject to the written approval by the provincial People's Committee as prescribed in the law on land.

ii) Projects on construction of residential housing (for sale, lease or lease purchase) and urban areas that use at least 50 hectares of land or less than 50 hectares of land but with a population of at least 15,000 people in an urban area; or that use at least 100 hectares of land or less than 100 hectares of land but with a population of at least 10,000 people in a non-urban area; or investment projects regardless of the area of land used or population within a restricted development area or within an historic inner area (determined in accordance with urban area planning projects) of a special urban area.

iii) Investment projects on construction and operation of golf courses.

iv) Investment projects of foreign investors and foreign-invested business entities executed on islands or in border or coastal communes, in other areas affecting national defense and security.

2.4.4 Industrial and Economic Zones:

Hundreds of industrial and economic zones have been established all over Vietnam, their main benefits being their good infrastructure, the legal certainty of land titles and the reliability of tax benefits. There are the following different types:

- **Industrial Zones (IZs):** The IZs specialize in the production of various industrial goods. The 150 IZs in operation or construction occupy a total area of about 100,000 hectares within Vietnam. The IZs in operation often have an occupancy rate of over 75%, with some very popular IZs being practically fully occupied.

- **High-Tech Zones (HTZs):** HTZs are multifunctional zones which companies can use to produce high-tech goods, conduct research and development or train personnel, which can be later be employed in the HTZs. Foreign Investor's interest in HTZs has recently been lower, mainly because of the benefits and incentives offered are very similar to those offered in IZs, and only small clusters for science and technology having arisen in and around the existing HTZs.
- **Economic Zones (EZs):** The EZs are defined as certain geographical areas where investment privileges are granted just like in the IZs. As EZs are mostly located in structurally weak regions, foreign investors are usually offered better incentives as in the IZs, mostly with regards to favourable rates for land use rights. Currently there are around 20 EZs in Vietnam.

2.5 Foreign Investors' Land Use Rights

2.5.1 Types and duration of Land Use Rights

Land Use Rights ("LURs") are governed by the Vietnamese Land Law No. 45/2013/QH13, effective since 9th December 2013 ("Land Law"). Art. 4 Land Law provides that the *"Land belongs to the entire people with the State acting as the owner's representative and uniformly managing land. The State shall grant land use rights to land users in accordance with this Law."* Accordingly, the Land Law only recognizes land "ownership" in form of LURs. While the Land Use Right Certificate ("LURC") is similar to a title deed in many countries, it is technically speaking only a certificate of "ownership" of the LUR. Art. 5 No. 7 Land Law includes as potential land users *"Foreign-invested enterprises, including 100% foreign-invested enterprises, joint-venture enterprises, Vietnamese enterprises in which foreign investors purchase shares, merge or acquire in accordance with investment law."* Art. 5 Land Law stipulates that a number of "land users" may be allocated land or leased land, have LURs recognized by the State, or acquire LURs" as follows:

- **"Allocation" of LURs:** In such case, the LUR will be granted on a long-term basis, i.e., without a specific duration of use. However, LURs will mostly be allocated to Vietnamese citizens or organizations for limited purposes. Accordingly, allocation most closely resembles "real" ownership. Allocated land must be paid for in a lump-sum payment.
- **"Recognition" of LURs:** In such case, the LUR will be first granted for the stable land use which does not originate from allocation or lease. As the state

can "recognize" LURs for national entities only, this method can play a practical role only in cases where LURs are recognized for a Vietnamese JV partner.

- **“Acquisition” of LURs:** In such case, the LUR will be granted for a specific duration of time against the payment of a usage-fee. Accordingly, even where sometimes referred to as “ownership”, the granting of the LUR by acquisition mostly resembles a long-term lease contract with the lease paid upfront.

2.5.2 LURs in foreign investment projects:

With regards to investment projects, Foreign Investors may obtain LURs by way of:

- Acquiring the LUR from the State by entering into a lease-agreement and payment of the LUR fee annually or in one upfront lump-sum payment.
- Acquiring an existing investment project from other investors, and taking-over the project’s current lease-agreement.
- Entering into a Joint Venture (“JV”) with a Vietnamese party and obtaining the LUR as the Vietnamese JV partner’s capital contribution to this JV.
- Receiving a land allocation from the state, with payment of the land use fee for specific investment projects, e.g., on the construction of houses for sale or for a combination of sale and lease.

A lot of cases in which foreign investors “acquire” land relate to JVs between Foreign Investors and a domestic investor who contributes the LUR into the JV in kind, valued at its current market price. The reason being that Foreign Investors in most cases cannot legally obtain that land without jointly investing with the Vietnamese LUR owner (and JV partner). In addition, sometimes the relevant land is located in attractive investment areas and has been in use by local entities (often state-owned enterprises) who would neither sell, lease or allocate the LUR to the Foreign Investor alone, but only to a Vietnamese party.

According to Art. 126 (2) Land Law, the term for land allocation or land lease shall be considered and decided on the basis of the investment projects or applications for land allocation or land lease but must not exceed 50 years. For certain large investment projects with slow recovery of capital, projects in areas with difficult or especially difficult socio-economic conditions which require a longer term, the term of land allocation or land lease must not exceed 70 years.

2.5.3 Payment of land lease fee:

Foreign Investors who acquire LURs from the Government by entering into a LUR lease agreement may pay rent either on an annual basis or as a lump-sum payment:

- **Annual rental payment:** Under a land lease with annual payment, the Foreign Investor may use the land for the approved investment purposes only, and is only allowed to transfer, sub-lease or mortgage the assets attached to the land, but not the LUR itself. If paid annually, the rental price is generally at market price (often between 1-3% of the land value is applied, and a lower rate of 0.5-1% may be applied for "low-yield" or agricultural land).
- **Upfront payment for entire lease term:** Foreign Investors paying upfront for the entire lease term are entitled to transfer both the LUR and the assets attached to the land, subleasing land and assets attached to the land, contributing the LUR and assets attached to the land as capital to JVs, mortgaging or guaranteeing the LUR to credit institutions in Vietnam. Where the rental is paid in one lump-sum, the amount is generally the same as it would have been if the land had been allocated rather than leased.

2.6 Investment Accounts & Profit Repatriation

Requirement to open Foreign Investor's investment accounts:

Circular No. 06/2019/TT-NHNN ("Circular 6"), effective since 6th September 2019, provides, amongst others, guidance on foreign exchange management for foreign direct investment (FDI) in Vietnam, including capital contributions, opening and use of foreign currency and Vietnamese Dong direct investment accounts as well as the transfer of capital and profits and legal revenues to foreign countries. Circular 6, Art. 4 (3) provides that Foreign Investors' "capital contributions" (i.e., the investment amount) for an investment project must be transferred to the Foreign Investor's "direct investment account" ("DIA"). DIAs are defined as "*foreign currency or Vietnamese Dong demand accounts opened by FDI enterprises and foreign investors at authorized banks to perform transactions regarding the foreign direct investment in Vietnam.*"

A DIA must generally be opened in the name of the FIE. Only exceptionally, the DIA will be opened in the name of the Foreign Investor if no FIE is established, such as in a business cooperation contract ("BCC") or in public-private partnership contracts ("PPP"). Practically, Foreign Investors shall open their foreign currency DIA at one licensed bank in Vietnam in order to receive and make payments in that foreign currency during their investment project in Vietnam. Generally, only one foreign currency DIA shall be opened, however in case of investing in Vietnamese Dong, the investor may open one Vietnamese Dong DIA at the same bank where the foreign currency DIA is opened in order to receive and make payment in VND during the term of the Foreign Investor's investment project. If a Foreign Investor participates in several BCCs or directly implements several PPP projects, such foreign investor shall open DIAs for each single BCC or PPP project.

Documents to be provided to open a DIA can be the IRC or “Establishment and Operation Certificate, the M&A approval or a BCC / PPP contract signed with an authorized state body or any other documents showing that the Foreign Investor’s project is permitted.

Transfers required to be made through the DIA:

Foreign Investors’ overseas transfers of foreign currency funds relating to their investment project must be made through the DIA. These include, amongst others, the Foreign Investor’s following (foreign currency) transactions:

- Capital contributions to the FIE or transfers relating to Foreign Investors’ BCCs or PPP projects.
- Transfers related to the increase or decrease of the FIE’s charter capital.
- Transfers relating to foreign currency loans to the FIE.
- Payment for the transfer of investment capital and investment projects.
- Overseas transfers of capital, lawful revenues and profits from the FIEs foreign currency DIA, including Foreign Investor’s implementing BBCs or PPP projects.
- Termination of investment projects and transfer of investment / charter capital overseas, including funds relating to BBCs and PPP projects.

Foreign Investors who do not open a DIA, or do not make required payments through the DIA risk being subject to a capital gains tax amounting to 20 percent.

Transfer of capital for the pre-investment stage:

Before obtaining the IRC, the “Establishment and Operation Certificate” or before signing BCCs and PPP contracts, Foreign Investors are allowed to transfer their investments from overseas or from their accounts in foreign currencies or Vietnamese Dong opened at authorized banks to pay for legal expenditures in the pre-investment stage in Vietnam.

Closing of DIAs & shifting to Indirect Investment Accounts:

FIE’s shall close their DIAs where the foreign ownership ratio in the FIE falls below the threshold to qualify as a Foreign Investor as a result of i) the Foreign Investor transferring capital contributions or shares, or ii) the FIE is issuing additional capital contributions / shares in charter capital increases or iii) The FIE is becoming a publicly listed company. FIE’s shall also close their DIAs where the FIE is dissolved the investment project is terminated or a transfer of the ownership of the investment project occurs, or where such transfer results in the change of the FIE's legal status. In these cases, Foreign Investors have the right to use their foreign currency and Vietnamese Dong accounts opened at authorized banks to purchase foreign currency and transfer their direct investments and lawful revenues overseas in foreign currency.

In some of the above cases where Foreign Investors close their DIA, they may then be required to open an "Indirect Investment Account" ("IIA") to continue their now indirect investment activities in Vietnam. Foreign indirect investment means that foreign investors make an investment into Vietnam by buying securities, capital and purchase of shares, and investment funds without direct participation in the management of investment activities. Transaction related to indirect investments must be done through an IIA at a licensed bank in Vietnamese Dong. Profits that are obtained from indirect investment activities must also be remitted by using the IIA.

Profit Repatriation:

Profits must be deposited into the above DIA or IIA. Only once all tax- and other obligations relating to profits and distributions have been met, profits and proceeds of investments may then be converted back into foreign currency and remitted abroad. Profits may only be transferred abroad once annually at the end of each fiscal year.

2.7 Practical Tips

- **Check if restrictions or conditions apply for your investment project:** It is essential for potential investors to carefully examine if and under which conditions their investment project can be licensed in Vietnam. Sometimes, foreign ownership restrictions exist or there must be at least one Vietnamese shareholder to be active in certain business lines.
- **Check local licensing differences and interpretation of regulations:** Local differences in terms of interpreting the applicable licensing requirements exist: While in some cities or provinces, an "investor-friendly" approach will be taken, other cities or provinces may be far less supportive. Therefore, prior to applying for the approval of an investment project, it is advisable to informally clarify with the licensing authority, which procedures and peculiarities should be observed, which documents should be submitted in which form and how specific procedural rules are interpreted by the licensing body in practice.
- **Invest in industrial or economic zones where possible:** Industrial and economic zones are often preferable to "greenfield" investments, as they mostly

have a good infrastructure and the legal certainty of land titles and the reliability of tax benefits is better. The management of the IZs or EZs will mostly be keen on supporting with licensing requirements. However, some IZs and EZs are better than others and there is often limited space in popular IZs or EZs.

- **Check available tax- and other investment incentives:** The granting of certain investment incentives, primarily tax incentives, will often be essential for potential investors' investment decision for Vietnam (as opposed to investing in other countries in the region). Therefore, a thorough check of tax incentives available should be conducted, also with regards to the specific licensing authority in charge.
- **Be aware of investment capitalization requirements:** Investment licensing authorities require applicants, as part of the investment approval procedure, to state in their investment proposal an investment capital for implementation of their investment project. Even though no legal thresholds exist, the licensing authority will validate if the stated amount is in their view sufficient to seriously implement the project. As a rule of thumb, they will usually consider whether the stated investment capital is sufficient to start and sustain the investment project for at least one year. Accordingly, while 25K USD may be sufficient investment capital for a consulting business, it cannot be sufficient to set up a manufacturing facility with hundreds of workers or a logistics warehouse. In those cases, amounts starting from 200K USD will be more likely.
- **Have complete, accurate and legalized documentation:** The applications for obtaining the IRC and ERC contain a large number of supporting documents that must be obtained in the Foreign Investors' home countries. Some of the documents, such as resolutions and decisions, ideally need to be prepared by lawyers familiar with the Vietnamese legal terminology to avoid rejection by the Vietnamese licensing authority. It is also important to consider the additional time to have certain documents legalized so they can be submitted to a Vietnamese licensing authority. Checklists are helpful in this regard.
- **Consistently use your DIA for all investment-related transactions:** Foreign Investors' overseas transfers of foreign currency funds relating to their investment project must be made through the DIA. If not, this can not only result in difficulties with regards to repatriation of profits and proceeds, but also in taxation or non-deductibility of the transfers made into Vietnam. The same is true with regards to private loans that are made to supplement investment financing or for other investment-related purposes.