3. COMPANY FORMATION

3.1 Overview

The “Limited Liability Company” (“LLC”) is by far the most popular company form for a Foreign Invested Enterprises (“FIEs”) and therefore chosen by the majority of Foreign Investors when investing in Vietnam. While the “Joint Stock Company” or “Shareholding Company” (“JSC”) is another option, it is chosen more rarely because of its more complicated corporate governance requirements. It may, however, be suitable in case of larger capital needs, if Foreign Investors want to access the domestic capital markets for further funding in the future and/or if funding and voting shall be separated for example by issuing preferential shares next to ordinary shares. In practice, however, Foreign Investors mostly take a two-step approach and open a LLC first before they would then convert it into a JSC if the need arises.

3.1.1 Legal Representatives:

Both LLC and JSC must have at least one so-called Legal Representative (“LR”) and at least one LR must reside in Vietnam. The LOE defines the LR of the FIE as the *“individual who represents the enterprise to exercise the rights and perform the obligations arising from transactions of the enterprise, and represents the enterprise in the capacity as plaintiff, respondent or person with related interests and obligations before the arbitration or court, and other rights and obligations as prescribed by law.”* If there is more than one LR, the FIE’s Company Charter needs to precisely specify the number, managerial titles and rights and obligations of the FIE’s LR(s). Under the LOE, LRs have the obligation to:

- Exercise vested rights and perform assigned obligations in an honest, prudent and best manner in order to protect the lawful interests of the enterprise.
- Be faithful to the interests of the enterprise; not to use the business information, know-how and opportunities of the enterprise; not to abuse his/her title, position and assets of the enterprise for personal purposes or for the interests of other organizations or individuals.
- Notify the enterprise in a timely, sufficient and accurate manner about him/her and his/her affiliated persons owning or having controlling shares or contributed capital amounts in, other enterprises.

Note that the LOE strictly distinguishes between the company’s LR(s) and the company’s General Director (“GD”) who will regularly be employed by the company. Even though the GD will, for practical reasons, usually also be appointed as a LR, it is not legally required that the company’s GD also be its LR. On the contrary, the company may appoint a LR without the LR being the GD or having any other corporate function in the company (even though this is rather uncommon). This is important, as the company's LR - other than the GD - is personally liable under the LOE for any damage caused to the enterprise by breaches of his/her obligations, even if the LR (not being the GD at the same time) was unaware of any breaches by the acting GD.

Foreign expatriate employees requested or instructed by their overseas employers to act as the GD and LR of the employer's FIE abroad should therefore request their (overseas) employers to indemnify and hold them harmless against any personal liability resulting from their appointment as the FIE's GD & LR. This is even more urgent if they are requested to act as the GD or LR of several subsidiaries abroad. Ideally, a comprehensive indemnification Agreement should be entered into, covering scope of indemnification, exceptions and procedure. A very basic indemnification clause could be the following: *The Employer shall indemnify and hold Indemnitee harmless in respect of all Claims and Losses arising out of, or in connection with, the actual or purported exercise of, or failure to exercise, any of the Indemnitee's powers, duties or responsibilities as the General Director & Legal Representative*.

3.1.2 The FIE's Company Charter:

The FIE's Company's Charter is the most important corporate governance document of the FIE and should be carefully drafted. It must contain at least the:

- FIE's name, headquarters address, branches and representative offices, its business lines and its Charter Capital (or total quantity of shares, types of shares and face value of each type for joint stock companies).
- FIE's organizational structure (management model).
- Full names, mailing address, nationality of each Member (for limited liability companies) or the founding shareholders (for joint stock companies) as well as the Charter Capital held by each Member (for limited liability companies) or quantity of shares, types of shares and value of each type held by founding shareholders (for joint stock companies).
- Rights and obligations of the Members (for limited liability companies) or shareholders (for joint stock companies).
- Number, titles, rights and obligations of the FIE's Legal Representatives.
- Procedure for ratifying the FIE's decisions.
- Rules for settlement of internal disputes.
- Basis and method for determination of salaries and bonuses of the executives.
- Cases in which members/shareholders may request the company to repurchase their capital contributions/shares.

- Rules for distribution of profits and settlement of business losses.
- Cases and procedures for dissolution and liquidation of the company's assets.
- Procedures for amending the Company Charter.

3.1.3 Applying for the Enterprise Registration Certificate:

The establishment of legal entities in Vietnam is governed by the Law on Enterprises No. 59/2020/QH14 effective since 1st January 2021 ("LOE"). After issuance of the IRC, Foreign Investors must in addition apply for the Enterprise Registration Certificate ("ERC"), with which their FIE will be established as a legal entity. The following information shall be provided in the enterprise registration application form:

1. The enterprise's name;
2. The enterprise's headquarters, phone number, fax number, email address;
3. The enterprise's business lines;
4. The charter capital;
5. Types of shares, face value of each type and total authorized shares of each type if the enterprise is a joint stock company;
6. Tax registration information;
7. Expected quantity of employees;
9. Full name, signature, mailing address, nationality and legal documents of the legal representative (for limited liability companies and joint stock companies).

In addition, the following documentation has to be submitted in legalized (foreign documents) or notarized form (domestic documents):

- The enterprise registration application form.
- The Foreign Investor's IRC.
- The FIE's draft Company Charter.
- The FIE's list of members (LLC) or founding shareholders (JSC) and list of shareholders that are Foreign Investors.
- Articles of association of members or shareholders (for legal entities) or passport copy for members or shareholders who are individuals.
- Other legal documents of members or shareholders as the case may be.

While the LOE requires no minimum capitalization, the investment licensing approval authorities require a minimum investment with regards to the prior investment approval (i.e. issuance of the IRC, see above). In addition, certain minimum capital requirements are required e.g., in the areas of real estate development and trade, construction and design, banking and finance (including finance leases and collection activities), film production and aviation.

In principle, Foreign Investors may contribute their capital in cash or in kind (e.g. through land use rights, technology, know-how etc). However, Foreign Investors' contributions in kind are unusual, mostly because of time delays caused by validating and evidencing that the value of the contribution in kind matches the stated amount.

The charter capital ("Charter Capital") of the LLC must be transferred to the FIE's company bank account within 90 days from the issuance of the ERC. The amount to be transferred must correspond exactly to the Charter Capital as stated in the ERC. In practice, it will be transferred in foreign currency to the FIE's DIA and then converted by the Vietnamese bank into Vietnamese Dong ("VND"). The non-fulfilment of this obligation can have serious consequences up to the revocation of the ERC.

3.1.4 Post-licensing procedures:

After the Foreign Investor has established the FIE, the following so-called "post-licensing procedures" are required to make the FIE operational:

- Opening of the Company's bank account (to which the investment capital of the company is to be revoked within 90 days of the exhibition of the ERC),
- Registration of the company seal and VAT invoices,
- Registration for CIT, VAT and, etc., certain customs declarations,
- Payment of the business license fee,
- Tax and social security registration for employees,
- Appointment of a "Chief Accountant" unless exempted.

3.2 The Limited Liability Company:

The LLC can be established either as a 100% foreign-owned subsidiary or with both domestic and foreign participation. While the latter case is often referred to as "Joint Venture" (JV), the JV does not exist as a separate company form. In practice, most Foreign Investors prefer the establishment of a 100% foreign-owned subsidiary whenever possible. Both legal entities and individuals may become "shareholders" of an LLC, which are referred to in Vietnam as "Members".

The LLC can have a up to a maximum of 50 Members. Depending on the number of Members, the LOE distinguishes between a "Single Member Limited Liability Company" ("SLLC") and a "Multiple Member Limited Liability Company" ("MLLC"). For both, liability is limited to the amount of the Members' equity contribution ("Capital Contribution").

3.2.1 The LLC's organizational structures available:

- **SLLC with individual ownership:** Must only have a Company President and a GD. The Company President may work as the GD concurrently or hire another person to work as the GD. The rights and obligations of the GD shall be provided in the Company Charter and the GD's employment contract.
- **SLLC with institutional ownership:** Can choose between two organizational models with the following bodies: i) Members' Council, GD and Supervisor, or ii) Chairman/President, GD and Supervisor. While the first model is needed to implement a "four-eye"-principle in the company, the second model simplifies the decision-making and efficiency as only the Chairman decides.
- **MLLC:** Must have a Members' Council, the Chairperson of the Members' Council and a GD. In addition, MLLCs with 11 or more Members must set up a Supervisory Board. If the MLLC has less than 11 Members, installing a Supervisory Board is still possible but not required by law.

3.2.2 The LLC's institutional bodies:

- **The Members' Council (SLLC and MLLC):** Is composed of the Members and the highest decision-making body of the company. The Members' Council comprises 3 to 7 members with terms not exceeding 5 years. The Members are appointed or relieved by the Company Owner. The rights and obligations of the Members' Council shall be detailed in the Company Charter. The Members' Council decides on strategic matters of the company, while the GD decides on the company's day-to-day business. The Members' Council shall adopt resolutions by voting at meetings, collecting written opinions or other forms as provided in the Company Charter. The Members' Council decides on:
    - Development strategies, the company's annual business plan, increase or reduction of the charter capital, investment projects of the company, solutions for market development, marketing and technology transfer.
    - Approval of loan agreements and contracts for sale of assets valued at 50 or more percent of the total value of assets recorded in the most recently publicized financial statement of the company.
    - Election, relieving of duty or removal of the Chairperson.

- Appointment, relieving of duty, removal of the GD, chief accountant and other management personnel.
- Wages, bonus and other benefits for the Chairperson, the GD, chief accountant and other management personnel.
- Approval of the annual financial statements and plans for use and distribution of profits or plans for dealing with losses.
- Establishment of subsidiaries, branches and representative offices.
- Amendments and supplements to the Company Charter.
- Adoption of annual financial statements.
- Reorganization, dissolution or request of insolvency.

For a **quorum to be present** at the first meeting of the Members' Council, Members representing 65% of the Charter Capital must be present. If there is no quorum at the first meeting, a second meeting must be held within 15 days. In the second meeting, a quorum is reached if 50% of the Charter Capital is present. If there is still no quorum, a third meeting is held within 10 working days at which there is no necessary minimum attendance to obtain a quorum.

A **resolution is adopted** (after a quorum is reached) if it is approved by the number of votes representing at least 65 percent of the total Contributed Capital amount of the attending Members. However, 75 percent of the votes are needed for decisions relating to the sale of assets valued at 50 or more percent of the total value of assets recorded in the latest financial statement of the company, or a smaller percentage or value as per the Company Charter, the amendment and supplementation to the Company Charter and the reorganization or dissolution of the company.

- **Chairperson of Members' Counsel (MLLC and SLLC):** The Members' Council shall elect a Member to be its Chairperson. While the term of the Chairperson of the Members' Council must not exceed 5 years, the Chairperson may be re-elected for an unlimited number of terms. The Chairperson of the Members' Council may concurrently work as the company's GD. The Chairperson has, amongst others, has the rights and obligations to:

  - Prepare the Members' Council's working programs and plans as well as the agenda and documents for meetings of the Members' Council and for collecting Members' opinions.
  - To convene and preside over meetings of the Members' Council or to organize the collection of opinions of Members.

  - To supervise, or to organize the supervision of, the implementation - of resolutions of the Members' Council.
  - To sign resolutions of the Members' Council on the Members' Council.

- **Company President (SLLC only):** The Company President of a SLLC shall be appointed by the Company Owner and exercise the rights of the Company Owner, except the rights and obligations of the GD.

- **General Director (MLLC and SLLC):** The Members' Council or the Company President appoints/hires the GD for a term not exceeding 5 years each to manage day-to-day business operations of the company. The Chairperson of the Members' Council, another member of the Members' Council or the Company President may concurrently act as the GD, unless otherwise provided in the Company Charter. The GD's rights and obligations include:
  - To decide on all matters related to the day-to-day business operations of the company.
  - To organize the implementation of decisions of the Members' Council or the Company President.
  - To organize the implementation of business plans and investment plans.
  - To appoint, relieve of duty and remove from office managers and other staff in the company, except those falling within the competence of the Members' Council or the Company President.
  - to sign contracts, except cases falling within the competence of the Members' Council or the Company President.
  - To submit annual financial statements to the Members' Council or the Company President for approval.
  - To make recommendations on the use of profits or handling of losses.

- **Supervisors (only SSLC with institutional ownership):** The Company Owner shall appoint at least one Supervisor for a term not exceeding 5 years. A supervisor has the following rights and obligations: To check the lawfulness, honesty and prudence of the company's organs in managing and running the business of the company; to evaluate financial statements, reports on business situations, reports on assessment of management work and other reports before submitting them to the Company Owner or relevant state agencies, submit evaluation reports to the Company Owner and to examine any documents or papers of the company.

3.3 Shareholding Company / Joint Stock Company

3.3.1 Overview:

The shareholding company / joint stock company ("JSC") is an enterprise in which the Charter Capital is divided into equal portions called shares. Shareholders may be organizations or individuals. The minimum number of shareholders is three, no maximum number applies. Shareholders are liable only with the amounts of capital contributed to the enterprise (or the share price paid). Shareholders may freely assign their shares to other persons, except where there are contractual holding obligations or other specific legal requirements. A JSC must have ordinary shares. In addition to ordinary shares, a JSC may have preference shares. Each share of the same type must entitle its holder to the same rights, obligations and interests. Ordinary shareholders have the following rights:

- To attend and express their opinions at the General Meeting of Shareholders and to exercise their voting right with each ordinary share carrying one vote.
- To receive dividends as decided by the General Meeting of Shareholders.
- To be given priority in purchasing new shares offered for sale in proportion to the number of ordinary shares the shareholder holds.
- To freely transfer their shares to other parties, except where contractual restrictions (shareholders' agreement) or legal restrictions exist.
- To examine and extract information in the list of shareholders with voting rights and to request modification of incorrect information.
- To examine, extract or copy the Company Charter, the meetings of the General Meeting of Shareholders and the resolutions of the General Meeting of Shareholders.
- Upon dissolution or insolvency of the company, to receive part of the residual assets in proportion to their number of shares.

A shareholder or a group of shareholders holding 10 percent of the total ordinary shares for a consecutive period of at least 6 months or more, or holding a smaller percentage provided in the Company Charter has the right to:

- Nominate candidates to the Board of Directors / Supervisory Board.
- Examine and extract the book of minutes and resolutions of the Board of Directors, mid-year and annual financial statements made according to Vietnamese accounting standards and reports of the Supervisory Board.
- Request convening of a General Meeting of Shareholders in specified cases.

- Request the Supervisory Board to inspect each particular issue related to the management and administration of the company.

3.3.2 The JSC's organizational structure:

JSCs may choose between two models:

- General Meeting of Shareholders, Board of Directors, Supervisory Board and GD. A Supervisory Board is not compulsory where the JSC has fewer than 11 shareholders and institutional shareholders own less than 50 percent of the total number of shares.
- General Meeting of Shareholders, Board of Directors and GD. In this case at least 20 percent of the members of the Board of Directors must be independent members and an "Independent Auditing Committee" shall be established within the Board of Directors.

3.3.3 The JSC's institutional bodies:

- **The General Meeting of Shareholders ("GMS"):** The GMS includes all shareholders with voting rights and is the highest decision-making body of the JSC. The annual GMS must take place at least once a year. In addition to the annual meeting, the GMS may meet on an extraordinary basis. The venue of a meeting of the GMS must be within the territory of Vietnam. The GMS shall hold the annual meeting within 4 months from the end of the financial year. The annual GMS must at least debate and approve/pass resolutions regarding:
  - The annual financial statements and business plan of the JSC.
  - The report of the Board of Directors on the governance and results of operations and performance of each member of the Board of Directors.
  - The Report of the Supervisory Board on the business results of the company, results of performance of the Board of Directors and GD.
  - The self-evaluation reports on the operation of the Supervisory Board and performance of each member of the Supervisory Board.
  - The dividend amounts payable on each type of share.

. The GMS and other shareholders' meetings need at least 51% of voting shares to be present to reach a quorum. If there is no quorum, within 30 days of the first meeting a second meeting is held. The second meeting requires 33% of voting shares to be present to reach a quorum. If still no quorum is reached, a third meeting will be held within 20 days without a required quorum.

Resolutions shall be adopted if approved by a number of shareholders representing at least 51 percent of the total votes of all attending shareholders, except for resolutions on the following topics that require at least 65 percent: i) Types of shares and total number of shares of each type, ii) Change in business sectors, trades and fields, iii) Change in organizational and management structure of the company, iv) Investment projects or sale of assets equal to or more than 35 percent of the total value of assets recorded in the latest financial statements of the company, or a smaller percentage or value provided by the company charter and v) Reorganization or dissolution of the company.

- **The Board of Directors:** The Board of Directors ("BOD") is the management body of the company, comprised between 3-11 members. The term of BOD members must not exceed 5 years and the members may be re-elected for an unlimited number of terms. The BOD has the following rights and obligations:
    - To decide on medium term development strategies and plans and annual business plans of the company and to decide on investment plans and investment projects within the competence and limits prescribed by law.
    - To decide on the organizational structure and internal management regulations of the company.
    - To decide on the establishment of subsidiaries, branches and representative offices and the capital contribution to or purchase of shares from other enterprises.
    - To recommend the types of shares and total number of shares of each type which may be offered, to decide on offering new shares or raising funds in other forms, to decide on the selling prices of shares and bonds of the company and to decide on the redemption of shares.
    - To decide on solutions for market expansion, marketing and technology.
    - To approve contracts for purchase, sale, borrowing and lending and other contracts valued at 35 or more percent of the total value of assets.
    - To appoint, remove or dismiss the Chairperson of the BOD.
    - To appoint, remove and sign contracts or terminate contracts with the GD and other key managers of the company and to decide on salaries and other benefits of such managers.
    - To appoint an authorized representative to participate in the Members' Council or the GMS in another company and decide on the level of remuneration and other benefits of such persons.

  - To supervise and direct the GD and other managers.
  - To approve the agenda and contents of documents for the GMS; to convene the GMS or to solicit written opinions for the General Meeting of Shareholders to pass decisions.
  - To submit annual final financial statements to the GMS.
  - To recommend dividends to be paid and the time limit and procedures for payment of dividends or for dealing with losses.
  - To recommend reorganization or dissolution of the company or to request insolvency of the company.

- **The Chairperson of the Board of Directors:** The BOD must elect a member of the BOD as its Chairperson. The Chairperson of the BOD may concurrently be the GD of the company. The Chairperson of the BOD has the following rights and obligations: i) To prepare working plans and programs of the BOD, ii) To prepare agendas, contents and documents for meetings of the BOD, iii) To convene and chair meetings of the BOD, iv) To organize the adoption of resolutions of the BOD, v) To monitor the implementation of resolutions of the Board of Directors and vi) To chair the GMS and meetings of the BOD.
- **The General Director:** The BOD shall appoint one of its members or hire another person as the GD, who shall manage day-to-day business operations of the company. The term of office of the GD must not exceed 5 years, however the GD may be re-appointed for an unlimited number of terms. Similar to the GD of a LLC, the GD is responsible for the day-to-day business operations of the company and decide on all matters that are not in the competence of the BOD or GMS. The GD’s rights and obligations include: i) the implementation of decisions and resolutions of the BOD, ii) the organization and implementation of business plans and investment plans of the company, iii) proposing internal management regulations of the company, iv) appointing and removing managers and staff of the company, and v) deciding on salaries, wages and other benefits for employees of the company.
- **Supervisory Board:** The Supervisory Board has between 3 and 5 members. The term of office of Supervisors must not exceed 5 years. Supervisors shall elect one of them to be the head of the Supervisory Board on the majority principle. The Supervisory Board must have more than half of its members permanently residing in Vietnam. The head of the Supervisory Board must be a professional accountant or auditor and work on a full-time basis in the

company. A Supervisor must not be a spouse, natural father, adoptive father, natural mother, adoptive mother, natural child, adopted child or sibling of any member of the BOD, the GD or other manager in the company, and must not hold any other managerial position in the company. The Supervisory Board's main task is to supervise the BOD and the GD in the management and administration of the company. Its rights and obligations include:

- To inspect the reasonableness, legality, truthfulness and prudence in the management and administration of business operations, the consistency and appropriateness of accounting and statistical work and preparation of financial statements.
- To appraise the completeness, legality and truthfulness of the company's business reports and annual and biannual financial statements, and reports evaluating management work of the BOD and to submit appraisal reports at the annual GMS.
- To review, inspect and evaluate the effect and efficiency of internal controls and audit, risk management and early warning systems.
- To review accounting books, accounting entries and other documents of the company, and examine management and administration activities of the company when finding it necessary or pursuant to a resolution of the GMS or as requested by a shareholder or a group of shareholders.
- To propose to the BOD or the GMS measures to modify, supplement and improve the organizational structure for the management, supervision and administration of the company's business operations.
- When detecting that a member of the BOD or the GD violates the law, to immediately send a written notice to the BOD and request the violator to stop the violation and take remedial measures.
- To participate in and discuss at the GMS, meetings of the BOD and other meetings of the company and to consult the BOD before submitting reports, conclusions and recommendations to the GMS.

3.4 Representative Offices and Branches

3.4.1 Representative Offices:

Representative Offices ("ROs") are the simplest form of "presence" for foreign enterprises in Vietnam. They are not independent legal entities under Vietnamese laws. The practical importance of ROs has steadily decreased over the years, mainly because ROs are now strictly limited to exercise the function of a liaison office, promote the formulation of co-operative projects of a foreign business entity in Vietnam and conduct market research activities. ROs must not conduct any business- or revenue-generating activities, they are prohibited to enter into commercial contracts in their own name and they are now even prohibited to monitor the implementation of contracts concluded by their foreign headquarters. ROs must also not sublet their office, represent other business entities in Vietnam or do anything which is not specifically permitted under the RO legislation. Therefore, rather than opening a RO, foreign companies will usually operate from outside Vietnam for a while, without any legal presence, and then directly set up a FIE after they have decided that Vietnam is a suitable and profitable market for them.

3.4.2 Branches:

Branches are not independent legal entities under Vietnamese laws. For **foreign enterprises** to open a branch in Vietnam it must have operated for at least five years since its legal establishment or valid business registration in the country of origin. In the past, foreign branches have been established primarily where foreign companies were not entitled to establishing an FIE in Vietnam (e.g., in the banking and airline sectors, which now is no longer the case). The practical relevance of foreign branches is therefore low in practice.

For **domestic enterprises**, including FIEs, however, establishing of branches may be more useful. For example, where the FIE would like to operate all over Vietnam, it may set-up branches in different locations in Vietnam and operate them as separate accounting units without having to set-up additional legal entities with their numerous regulatory and administrative requirements.

3.4.3 Establishment

Art. 45 LOI provides that when establishing a domestic branch or representative office, the enterprise shall apply for branch/representative office registration to the business registration authority in charge. Such an application shall consist of:

- The notice of establishment of the branch/representative office;
- Copies of the Establishment Decision and minutes of the meeting on the establishment of the enterprise’s branch/representative office, legal documents of the head of the branch/representative office.
- Within 03 working days from the receipt of the application, the business registration authority shall consider the validity of the application and decide

whether to issue a Certificate of Branch/Representative Office Registration. The business registration authority shall inform the applicant of necessary supplementation in writing if the application is not satisfactory or inform the applicant and provide explanation if the application is rejected.

- The enterprise shall apply for revision of the Certificate of Branch or Representative Office Registration within 10 days from which a change occurs.

Within 10 days from the decision on the business location, the enterprise shall send a notice of business location establishment to the business registration authority.

3.5 Business Cooperation Contracts

According to Art. 27 LOI 2020, a Business Cooperation Contract ("BCC") is an agreement between one or more foreign investors and one or more Vietnamese partners with the objective of cooperating to operate one or more specific business activities. The BCC does not require the parties to establish a new FIE, however during the execution of a BCC, the parties may reach an agreement on using assets derived from the business cooperation to establish an enterprise in accordance with the regulations of the LOE. The parties to a BCC shall establish a coordinating board to execute the BBC. Functions, tasks and powers of the coordinating board shall be agreed upon by the parties. A BCC must at least contain:

- Names, addresses and authorized representatives of parties to the BCC as well as business or project address.
- Objectives and scope of the BCC.
- Contributions by the parties to the contract, and distribution of business investment results between the parties.
- Schedule and duration of the BCC.
- Rights and obligations of the BCC's parties.
- Provisions on adjustment, transfer and termination of the BCC.
- Responsibilities for breaches of the BCC and method of dispute settlement.

The procedures for issuance of IRCs apply to BCCs signed between a domestic investor and a Foreign Investor, or between Foreign Investors. A Foreign Investor to a BCC may establish an operating office in Vietnam to execute the BCC. The location of the operating office shall be decided by the Foreign Investor depending on the requirements for BCC execution. The operating office has its own seal. The Foreign Investor may open a bank account, hire employees, sign contracts and carry out business activities under the BCC and its "Certificate of Registration."

3.6 Public Private Partnerships

Public-Private Partnership ("PPP") investments are governed by the Law No. 64/2020/QH14 on Public-Private Partnership Investment ("PPP Law") which took effect on 1st January 2021. The PPP Law provides the rights, obligations and responsibilities of entities, organizations and individuals involved in PPP investments.

3.6.1 Permitted PPP projects and capital requirements:

Under Art. 4 (1) PPP Law, PPP investments are permitted in the following five sectors:

- Transportation;
- Power grids, power plants, except hydropower plants;
- Water resources and irrigation, clean water supply, water drainage and wastewater treatment, waste management and waste disposal.
- Healthcare, education and training.
- Information Technology infrastructure.

Art. 4 (2) PPP Law requires the following minimum investment capital:

- A minimum capital requirement of not less than VND 200 billion applies to PPP projects in the above sectors, except for healthcare, education and training projects. If PPP projects are executed in areas facing socio-economic difficulties or extreme socio-economic difficulties as defined in the LOI, a minimum capital requirement of at least VND 100 billion applies instead.
- A minimum capital requirement of at least VND 100 billion applies to PPP projects in the healthcare, education and training sectors.

3.6.2 Types of PPP contract types and minimum content:

Art. 45 PPP Law provides for these types of standard PPP contracts:

- **Build - Operate - Transfer contract (BOT contract):** Contract under which a PPP project investor or enterprise is assigned the right to build and operate infrastructure works and systems within a predetermined term; upon expiry of such term, the PPP project investor or enterprise transfers these works or systems to the State.
- **Build - Transfer - Operate contract (BTO contract):** Contract under which a PPP project investor or enterprise is assigned the right to build infrastructure works and systems; after the construction is complete, the PPP project investor or enterprise transfers these works or systems to the State and is accorded the right to operate these works or systems within a specified period of time.

- **Build - Own - Operate contract (BOO contract):** Contract under which a PPP project investor or enterprise is assigned the right to build, own and operate infrastructure works and systems within a predetermined term; upon expiry of such term, the PPP project investor or enterprise terminates the contract.
- **Operate - Manage contract (O&M contract):** O&M contract means a contract under which a PPP project investor or enterprise is assigned the right to operate and manage part or the whole of existing infrastructure works and systems within a predetermined term; upon expiry of such term, the PPP project investor or enterprise terminates the contract.
- **Build - Transfer - Lease contract (BTL contract):** BTL contract means the contract under which a PPP project investor or enterprise is assigned the right to build infrastructure works or systems and transfer them after completion; is accorded the right to supply public products and services on the basis of operating and exploiting these works or systems within a predetermined term; the transferee signs a service lease and pays the PPP project investor or enterprise.
- **Build - Lease - Transfer contract (BLT contract):** BLT contract means the contract under which a PPP project investor or enterprise is assigned the right to build infrastructure works or systems and supply public products and services on the basis of operating and exploiting these works or systems within a specified period of time; the transferee-to-be signs a service lease and pays the PPP project investor or enterprise; upon expiry of such term, the PPP project investor or enterprise transfers these works or systems to the State.

Mixed contracts are possible and contain elements of different standard contracts as mentioned above. The Government provides sample contracts (templates) applicable to each of the above contract types, which are the basis on which the parties will negotiate the specific legal, financial and other commercial terms of the contemplated PPP investment. Deviations from the Government templates is possible in theory; however, Art. 47 PPP Law requires that any PPP contract must contain at least the following information and terms:

- Objectives, scale, location and schedule of implementation of a project; time and duration of an infrastructure work or system; the effective date of the contract; contract term;
- Scope of and requirements concerning engineering, technology and quality of the infrastructure work or system, supplied public products or services;

- Total investment; capital structure; financial plan, including the financial arrangement plan; public product and service prices and charges, including methods and formulas for setting or adjusting them; state capital invested in a PPP project and the corresponding form of management and use (if any);
- Conditions for use of land and other natural resources; plans to organize the construction of auxiliary works; requirements for compensation, support and resettlement; assurance of safety and environmental protection; force majeure cases and plans for response to force majeure events;
- Responsibilities for carrying out licensing procedures according to regulations of relevant laws; design; organization of construction; quality inspection, supervision and management at the construction phase; acceptance testing, settlement of investment capital and confirmation of the completion of infrastructure works and systems; provision of main input materials used for production and business activities of the project;
- Responsibilities for the operation and commercial use of infrastructure works and systems so that public products and services are provided in a continuous and stable manner; conditions, order and procedures for transfer of infrastructure works and systems;
- Performance security; rights of ownership, management, and exploitation of assets related to the project; rights and obligations of the PPP project investor or enterprise; the agreement on use of a third-party guarantee service with respect to the obligations of the contract signatory;
- Plans for response to the circumstances substantially changing in accordance with civil law to continue to perform the contract; response, compensation and punitive measures in case one of the contracting parties breaches the contract;
- Responsibilities of parties related to information security; reporting regime; provision of information, related documents and explanation about the contract performance at the request of competent authorities, inspection, examination, auditing, and supervising authorities;
- Principles and conditions for amendment, supplementation and termination of the contract before its expiry; assignment of rights and obligations of the parties; the lender's rights; procedures, rights and obligations of the parties upon contract discharge;
- Investment incentives, guarantees, revenue increase and decrease, assurance of balancing of foreign currencies, types of insurance (if any);
- Laws governing the contract and dispute resolution mechanism.

3.6.3 Equity contributions, bid- and performance guarantee:

According to Art. 77 (1) PPP Law, the investor's equity contribution must be at least 15% of total investment in a PPP-project. In addition, Art. 48 (1)-(3) PPP Law PPP require that the PPP project investor must provide a contract performance security before the effective date of the contract.

Prior to contract conclusion, Art. 33 (1) PPP Law requires a bid guarantee amounting to 0.5-1.5% of total investment in the project. Bid solicitors must return or release bid guarantees to unsuccessfully bidding investors within the time limit specified in the invitation for bid, but not longer than 14 days from the date on which the results of investor selection are approved. With regard to the selected investor, their bid guarantee shall be returned or released after the PPP project enterprise established by the investor has fulfilled their obligations specified in the contract performance security (or performance bond) as prescribed in Art. 48 PPP Law. Bid guarantees shall not be returned if: i) investors withdraw their bids during the validity of these bids; ii) the investor violates the law on bidding to the extent that such violation leads to the bid cancellation, iii) the investor has not conducted or refused to negotiate or finalize the contract within 30 days of receipt of the bid-winning notice from the bid solicitor, or has negotiated and finalized the contract but refused to sign the contract, except in force majeure cases or iv) PPP project enterprises established by investors have failed to fulfil their obligations specified in the contract performance security (or performance bond).

Based on the scale and nature of each project, the value of a contract performance security shall be specified in the invitation for bid at a determined rate of between 1-3% of total investment in the project. The validity period of the contract performance security shall start on the effective date of the contract and end on the date on which the PPP project enterprise completes its contractual obligations during the stage of construction of infrastructure work or system under the contract; In cases where it is necessary to prolong the construction period. The PPP project investor shall be entitled to return or release the contract performance security after discharge of their contractual obligation to build the construction work or infrastructure system.

3.6.4 Foreign currency balancing guarantee:

For significant PPP projects, i.e., those under the investment policy decisions of the National Assembly and the Prime Minister, Art. 81 PPP Law stipulate that PPP investors who have exercised their right to buy foreign currency to meet the needs of current, capital and other transactions, or transfer capital, profits, or other liquidated investments remitted abroad and who cannot accommodate their legal foreign currency demands, shall be entitled to use up to 30% of VND revenues generated from each project after deduction of VND spending amounts as a guarantee for foreign currency balancing.

3.6.5 Sharing of increased and reduced PPP project revenues:

Art. 82 (1) PPP Law provides that if the actual project revenue is 125% higher than the revenue specified in the financial plan under a PPP project contract, the investor and the PPP project enterprise will share with the State 50% of the difference between the actual revenue and 125% of revenue in the financial plan. The increased revenue may be shared after adjustment in the prices and costs of public products and services or the PPP contract term according to the provisions of Art. 50, 51 and 65 of the PPP Law and must be audited by the State Audit.

If the actual project revenue is 75% lower than the revenue specified in the financial plan under a PPP project contract, the State will share with the investor or PPP project enterprise 50% of the difference between 75% of revenue in the financial plan and the actual revenue. Sharing of reduced revenues may occur if the following requirements are satisfied: i) Projects are developed and executed under BOT, BTO or BOO contracts; ii) Changes in relevant planning, policies and laws result in a reduction in revenue; iii) Measures to adjust prices and charges of public products and services, and PPP contract terms, according to the provisions of Articles 50, 51 and 65 of this Law, have been fully taken, but the minimum revenue requirement of 75% has not been met yet; iv) The reduced revenue has been audited by the State Audit.

3.6.6 Dispute resolution:

According to Art. 97 PPP Law, disputes between investors with at least one foreign investor; disputes between investors or PPP project enterprises and foreign organizations or individuals shall be settled by: i) Vietnamese Arbitration; ii) Vietnamese Court; iii) Overseas Arbitration; iv) International Arbitration or v) Arbitration established under agreements between disputing parties' agreement. As far as a Vietnamese state authority is party to a dispute, only Vietnamese Arbitration or Vietnamese Courts are available. Negotiation and sometimes mediation may be agreed between the parties which precede arbitration or court proceedings. However, Art. 55 PPP Law requires that *"PPP project contract, its annexure and other relevant documents signed between a Vietnamese state authority and a PPP project investor or enterprise shall be governed under Vietnamese legislation. With respect to the matters that are not regulated under Vietnamese law, the parties may reach specific* *agreements in a PPP contract on condition that such agreements are not in breach of basic rules of Vietnamese law."* This may be problematic as many project investors may be reluctant to agree to Vietnamese laws because they will be more familiar with common law jurisdictions such as English or Singaporean law, which govern many international PPP projects. In addition, conflicts may also arise for project financing if PPP project documentation is governed by Vietnamese law but the (overseas) financing documents are governed by a different legal system.

3.7 Mergers & Acquisitions

3.7.1 Licensing requirements under the LOI (IRC):

Mergers & Acquisitions (M&A) in Vietnam are governed by the LOE, the LOI, and in addition by the general principles of the Vietnamese Civil and Commercial Codes. Certain M&A transactions may in addition be subject to merger control under the Competition Law No. 23/2018/QH14 (LOC), in force since 1st July 2019, and its implementing Decree No. 35/2020/ND-CP (Decree) which came into force on 15th May 2020. The LOI/LOE acknowledge Foreign Investors' rights to invest in Vietnamese companies. The acquisition of capital contributions or shares in a Vietnamese LLC or JSC operating in certain conditional sectors, for instance in the banking, financial services and insurance industries, is further regulated by specialized laws complementing the provisions of the LOI/LOE.

Foreign investors must only obtain an IRC according to the licensing procedures in the LOI if their acquisition of (or subscription to) LLC capital contributions or JSC shares:

- Increases the permitted foreign ownership ratio in Vietnamese companies conducting business in certain conditional or restricted business sectors.
- Results in the foreign investor, after closing of the transaction, holding 50% or more of the LLC's or JSC's Charter Capital.
- Results in co-owning economic organizations which LURs in island and border or coastal communes, wards and towns or in other areas affecting national defense and security.

The above is regardless of whether the acquisition of LLC capital contributions or JSC shares follows a purchase from an existing investor or by way of capital increase. Based on the above, it is not required to conduct additional investment procedures under the LOI upon transferring contributed capital or shares between Foreign Investors if the ownership percentage of Foreign Investors remains unchanged.

3.7.2 Types of M&A transactions:

Acquisition of shares / capital contributions ("share deal"):

The share deal is the most common M&A transaction, in which the purchaser acquires from the seller capital contributions in a LLC or shares in a JSC, either by way of acquiring existing capital contribution / shares or by way of subscription to newly issued capital contributions or shares in case of capital increases and (public) offering of shares. Sometimes, the purchaser will also acquire newly-issued shares of a public company by way of subscription or otherwise shares or share options from existing shareholders of a company. The share deal has the advantage that the purchaser acquires from the seller automatically not only all assets but also all licenses and contracts that the target company has obtained or concluded. The share deal also allows Foreign Investors the acquisition of certain types of assets that cannot be sold to them as individual assets in an asset deal, such as e.g., land (LURs), certain real estate and related fixtures). However, a share deal also means that the purchaser automatically acquires the target's liabilities, which means that the purchaser needs to conduct a thorough due diligence before signing a Share Purchase Agreement ("SPA") / Share Subscription Agreement ("SSA") in cases of capital increases.

Acquisition of assets (asset deal):

Investors may also acquire a Vietnamese target company by way of purchasing the entirety of the target's assets, but not the target's liabilities. For above state reasons, this type of M&A transaction is less common in Vietnam than a share deal. There are no licensing requirements with regards to amending the IRC in an asset deal, as the ownership structure remains unchanged. While the purchaser does not automatically acquire the target company's liabilities, the asset deal is more complicated with regards to transferring the target's contracts, as every single contract needs the consent of the other contract party. In addition, operational licenses and permits are not automatically transferred to the purchaser and must be newly applied for. One of the advantages of an asset deal is that accounting-wise, the purchaser is able to depreciate the purchase price of the assets over the remaining accounting life of the acquired target assets.

3.7.3 M&A transaction procedures:

Memorandum of Understanding ("MOU"):

Once the investor has identified an acquisition target, and the company owner is willing to sell, purchaser and seller acquirer will usually sign a "Memorandum of

Understanding" ("MOU") in which the parties express their willingness to enter into the transaction and lay out the basic terms and timelines of the prospective transaction. While the MOU is only binding if it expressly states so (unusual), it is an important "symbolic" document that provides clarity and documents the commitment and seriousness of the parties to the MOU. Usual contents of the MOU that seller and purchaser will address, include: i) a description of the target and ownership, ii) existing encumbrances, iii) scope and time of the due diligence, iv) purchase price components and determination, v) timelines for signing, executing and closing of the transaction, vi) exclusivity, vii) termination. In most transactions, confidential information will be disclosed by both parties therefore it is common practice that the MOU also includes a confidentiality provision with regards to both the transaction and the information revealed in the due diligence.

Due diligence of target company:

A thorough due diligence of the target company is essential for the purchaser to identify any hidden liabilities or other legal-, tax or commercial/financial issues with the target company. For private companies, the purchaser's main source of information will be documents and information provided by the target company's owners. The scope and depth of the due diligence usually depends on the business of the company and the size of the transaction. Generally, a purchaser in a share deal conducts at least a legal due diligence covering ownership structure, third-party rights, existence and validity of licenses, assessment of contract risks as well as existing and potential liabilities and litigation.

In addition, a financial due diligence is essential in which the accounts and financial data of the target company need to be verified. However, in practice it is often hard to obtain complete and accurate information, as bookkeeping and transparency standards in Vietnamese domestic companies are often below international standards. This is particularly true with regards to accounting information, as keeping different sets of financial data for different recipients is still not uncommon. Additional sources of information include public databases, keyword searches in Vietnamese online media, credit rating agencies and information obtained by customers of the target company.

Share Purchase Agreement / Sale and Purchase Agreement:

After successful due diligence, seller and purchaser will negotiate, in a share deal, the Share Purchase Agreement and in an asset deal, the Sale and Purchase Agreement relating to the target's assets (both: "SPA"). In both cases, the SPA is the formal agreement that sets out the terms and conditions relating to the sale and purchase of shares in or assets of the target company. If the acquisition relates to less than 100% of the target company's capital contributions/shares and therefore old shareholders remain, a Shareholders' Agreement ("SA") will often complement the SPA. The SA regulates the rights and obligations of old and new shareholders amongst each other after closing of the transaction. The new shareholders will often request tag-along and drag-along clauses in the target company's company charter, allowing them to force the old shareholders, under certain conditions, to sell their remaining shares to themselves or third parties. While these clauses are international standard, Vietnamese shareholders are often unfamiliar with them.

The SPA should very clearly set out what is being sold, to whom and for how much, other obligations and liabilities as well as representations and warranties. The latter are particularly important where the due diligence was limited in scope and/or based on incomplete documentation. The purchase price provisions should address not only the composition and calculation of the purchase price, but also how the price will be satisfied, when the price must be paid and whether the price is a fixed sum, or subject to a price adjustment mechanism. A tax covenant / indemnity offers the purchaser protection for any tax liabilities that may not have been revealed by the due diligence. In certain situations, it may be necessary for the completion of the SPA to be conditional on certain matters, such as obtaining tax clearances or regulatory approval. In such cases, a "conditions precedent" or "closing conditions" clause will usually be added into the SPA. This is also true if the purchase price or closing of the transaction depends on certain outcomes of the due diligence that will only be available later. In this context, the SPA will often include a "material adverse change" clause which is generally known and not uncommon in Vietnam. Overall, the completion / closing mechanics can be difficult as the parties will need to agree upon timings, place of completion, the actions and what is to be delivered at completion. The latter normally include the post-completion formalities such as amending the company's IRC/ERC.

3.8 Common Formation Mistakes

- **Using a Vietnamese nominee to establish a company:** In order to avoid the delays and complications in getting a company established (specifically to circumvent the IRC procedures), a Vietnamese individual is asked to establish the company as the sole owner (on behalf of the foreigner/foreign entity, and using the foreign money), with the intention that the ownership of the Vietnamese company will subsequently be transferred to the foreigner/foreign entity. This is problematic, because “nominee-agreements” are invalid and thus unenforceable in Vietnam.

- **Missing the 90-day timeline to pay up the committed Charter Capital:** In Vietnam, the Charter Capital of the FIE must be transferred to the FIE’s DIA within 90 days after the ERC has been issued. The foreign currency amount transferred must match exactly the agreed Charter Capital in VND as mentioned in the company’s ERC. Failure to transfer within 90 days can have significant consequences for the company, including revocation of the ERC.
- **Personal loans to the FIE:** If loans to the FIE are proceeded through private bank accounts rather than the DIA, the loan will not be able to be deposited back into the Foreign Investor’s personal bank account. The Foreign Investor is then stuck with VND cash if the FIE repays. Therefore, investors should always loan funds to the FIE from abroad from their bank account into the FIE’s DIA.
- **Residency requirement for Legal Representative:** Each company in Vietnam requires at least one Legal Representative (“LR”), and at least one LR must reside in Vietnam. This means: If one LR is not permanently residing in Vietnam, a second LR needs to be appointed.
- **Not registering promptly for tax:** Tax registration is important, and it is time sensitive to avoid penalties. Also, if you don’t undertake your tax registration and VAT election promptly, you may not be able to enter the VAT credit system for the first year, denying you the ability to receive refunds or VAT credits to carry forward. For start-up companies, the refunds or credits can be substantial.
- **Undocumented or unregistered loans:** Loans from abroad must go through the DIA which will ensure loans can be repaid back to where they came. Loans from domestic sources can be made into the company’s current bank account. However, loans that are not documented with proper loan agreements are often regarded as revenue by the tax authorities and taxed accordingly. Foreign currency loans with a term of at least 12 months loans that are not registered with the State Bank of Vietnam can potentially result in the loss of the ability to repatriate the loans and the loans becoming taxable revenue to the company.
- **Not appointing a chief accountant:** Except for some cases, every company must have a Chief Accountant. Vietnamese Law treats the Chief Accountant position in high regard – they are required for opening bank accounts, signing bank withdrawal documents, registering and lodging taxes, and complying with many compliance requirements with authorities.