**What Type of Entity Should We Use to Set Up Our Business?**

**Shareholding Company and Limited Liability Company**

A shareholding company and a limited liability company are similar in that the investors’ potential legal liability in both is generally limited to the charter capital of the company. The charter capital is the capital registered with the licensing authorities and contributed by the investors to the company, that is, the equity of the company. Unlike a branch or a representative office (see below), both the shareholding company and the limited liability company are treated under Vietnam law as standalone legal entities with limited liability.

**Shareholding Company**

The shareholding company (also known as a joint-stock company) is owned by the shareholders. Shareholders may be organizations or individuals. The minimum number of shareholders is three and there is no restriction on the maximum number. The liability of each of the shareholders is limited to the total par value of their shares. The shareholders’ direct participation in company affairs is normally quite limited. The general meeting of shareholders is the highest decision-making body of a shareholding company. The board of management is the body managing the company and has full authority to make decisions in the name of the company and to exercise the rights and perform the obligations of the company which do not fall within the scope of authority of the general meeting of shareholders.

**Limited Liability Company**

In Vietnam, a limited liability company’s (LLC) paid-up/contributed capital is referred to as its charter capital. An LLC does not issue shares. Instead, its members make capital contributions (in cash or in kind) to the LLC. Such capital contributions are in essence the equity contributions of the investors to the LLC, and each member may transfer and deal with its capital contributions.

**Representative Office and Branch**

In some cases, a foreign investor may not want to establish or operate a shareholding company or a LLC. For example, where a multinational company seeks to establish some presence in Vietnam, but does not wish to establish a separate legal entity, or for accounting, tax, or other reasons, the multinational company may instead want its Vietnam presence to function as a part of the overseas head office. If that is the case, the multinational company may choose to establish a representative office or branch office, instead of a shareholding company or LLC. Vietnam law treats both a representative office and a branch as extensions of the overseas head office, and not as separate legal entities.

**Registration**

In order to establish either a representative office or a branch in Vietnam, the applicant will be required to obtain an Establishment License prior to commencing operations in Vietnam. This requires the foreign company to submit the designated application form, together with required supporting documents, to the government authorities. Generally, the government authority is required by statute to issue this license within ten days of receipt of a “complete and valid” file of application documents. However, as the government authority has a wide discretionary power to determine what is a “complete and valid” file and due to the lack of implementing regulations, this process may take longer.

**What are the Legal Issues Associated with the Start-Up of a Company?**

We discuss below some of the legal and practical requirements and issues associated with the establishment of a company (whether a shareholding company or a limited liability company) in Vietnam.

1. **Company Name**

A company name in Vietnam consists of two elements—a specification of the type of legal entity and the company’s proper name. For a limited liability company (LLC), the name is required to be presented as CONG TY TRACH NHIEM HUU HAN or CONG TY TNHH (Vietnamese language for LLC) + Proper Name (may be presented in foreign or Vietnamese language).

1. **Legal Representative**

At least one of the company’s legal representatives must reside in Vietnam. If a company has only one legal representative, he must reside in Vietnam and if he is absent from Vietnam for a period of thirty days or more, he must authorize in writing another person to act as the company’s legal representative in his absence. The above residence and authorization requirements still apply if a company’s sole legal representative is not a Vietnamese national.

1. **Company Seal**

Under the laws of Vietnam, a company is given the right to determine the number of corporate seals it maintains, as well as the form and the contents of the seal(s). The seal must however contain the company name and other identifying information.

1. **Charter**

The charter of a company sets forth the company’s scope of activities, the company regulations and authorizations of various parties, and the company’s organizational structure. A copy of the draft charter must be submitted together with other application documents for the establishment of the company.

**Foreign Company Start-Up Requirements**

In addition to the above requirements, Vietnamese law requires that before carrying out the procedures for establishment of a company, foreign investors must have an investment project and must apply for and obtain an investment registration certificate from the Department of Planning and Investment or the Management Authority of the industrial zones, export and processing zones, high technology zones, etc., in the city or the province where the site of the project will be located according to the below listed procedure and requirements.

**1.Investment Project and Investment Registration Certificate**

The law specifies that where an investment project falls within a category which requires in-principle approval as prescribed under the law, the investment registration certificate will be issued within five business days from the date the in-principal approval is granted by the appropriate authority. For other investment projects which do not require such approval, the investment registration certificate will be 50 • START-UP OF A FOREIGN-HELD COMPANY: VIETNAM 347 issued within fifteen days from the date of receipt of the complete set of application documents from the investor(s).

 **2. Legal Capital**

Vietnamese law sets forth minimum legal capital requirements for the Vietnam companies established by investors to engage in certain business sectors. This requirement (where applicable) is known as the Vietnam company’s legal capital.

 **3. Investment Capital**

Investment capital is different from legal/charter capital and represents the total amount of capital that is required for the project. It consists of paid-up equity capital (i.e. charter capital) and loan capital (either from the investor/s or third parties or both).

It is therefore recommended that investors consider the total amount of investment required for their project carefully from the beginning in order to avoid the inconvenience and added costs of amending their investment registration certificate later on.

1. **Land/Office Lease Agreement**

In the investment registration certificate application, the investor must state the location of the registered office in Vietnam and the location where the investment project is to be carried out (if it is a different place than the registered office location). In addition, in practice, the investor must also submit a document evidencing its right to use the land. For example, an executed lease contract, letter of intent or option agreement, or where the land for the investment project is to be granted by the government, the in-principle approval from the competent government authority for the use of the land, before the authorities will issue the investment registration certificate.

1. **Enterprise Registration Certificate**

Upon obtaining the investment registration certificate, the investor is required to carry out the procedures for the issuance of an enterprise registration certificate for its Vietnamese company.

1. **Tax Registration**

Within ten business days from the date of issuance of the enterprise registration certificate, the Vietnam company is required to register with the tax authorities of the provincial/municipal Tax Department.

1. **Bank Accounts**

A newly established Vietnam company must open a bank account in order to carry out business in Vietnam. Do note that bank account opening procedures will vary from bank to bank, and it is prudent to consult with the bank in advance.

**What are the Legal Issues Associated with Operating a Foreign-Held Company?**

1. **Definition of Foreign Invested Economic Organization**

According to Vietnam investment law, an economic organization is an organization established and operating in accordance with the law of Vietnam, including enterprises, co-operatives and unions of co-operatives and other organizations conducting business investment activities.

1. **Regulated Activities**

Foreign-invested companies seeking to engage in activities which are legally classified as “conditional businesses” are required to comply with sector specific requirements as set forth by Vietnamese law and international treaties. These requirements may be in the form of foreign ownership restrictions, or minimum capital requirements (as discussed earlier). Examples of conditional business activities include radio and television broadcasting, mining of minerals, banking and real estate development.

1. **Business License Application**

Foreign investors seeking to establish a company to engage in the trading and distribution of goods and directly related activities, such as retail and wholesale distribution, import or export of goods, provision of commercial appraisal services, logistics, goods rental (excluding finance leasing), commercial promotion (excluding advertising), trade intermediation or e-commerce services and services relating to tendering or bidding for goods, are required to follow the registration procedure to obtain an investment registration certificate as set forth in Chapter 53. The competent licensing authority (based upon business sector) will then seek opinions from the Ministry of Industry and Trade and the Ministry of Planning and Investment in order to further scrutinize the application before issuing the investment registration certificate to the investors.

1. **Nominee Shareholders**

The laws of Vietnam do not recognize the separation of legal and beneficial ownership of shares and, therefore, the use of nominee shareholders to establish a company in order to avoid legal restrictions is illegal. Further, any arrangements entered into to try to protect the foreign investor in this situation would also be unenforceable.

**What is the Process to Obtain a Work Permit?**

**Visa Requirement**

The employer must submit the application for the visa to the Immigration Department on the foreign employee’s behalf prior to the foreign employee entering Vietnam. After receipt of an in-principle approval of the application from the Immigration Department, the foreign employee may then collect the visa at the Vietnamese embassy or consulate in the foreign country where he is then residing.

1. **Single Entry/Re-Entry Permit**

A foreigner intending to make multiple trips to Vietnam should apply for a multiple entry visa. Otherwise, the visa that is issued will be valid only for a single entry.

1. **Dependents**

A foreign employee who has a temporary residence card may apply for a dependent visa for his spouse and under-18 aged children to stay with him during the validity period of his temporary residence card if his employer so agrees. The dependent visa application is submitted to the Immigration Department in Vietnam. The maximum validity period for a dependent visa is 12 months at a time. The dependents are also entitled to receive temporary residence cards.

**Work Permit Requirements**

A work permit is the authorization granted to a foreigner to work for a specific employer in Vietnam and within a specific scope of work. Work permit applications are processed by the Department of Labor – Invalids and Social Affairs (“DOLISA”). Upon issuance, the work permit remains valid for so long as the foreigner is working for the same employer within the period stated in the work permit, which may not exceed 2 years at a time

1. **Recruitment by Way of an Employment Contract**

Employers may recruit foreign employees directly or via employment services. However, the company must first request and receive approval from the Ministry of Labor, War Invalids and Social Affairs or the local provincial people’s committee where the employer is located. The application procedure is that the employer company must submit an explanatory report on its demand for the use of foreign employees to the DOLISA and receive approval.

Then, within fifteen working days prior to the date the foreign employee intends to start working, the employer is required to submit an application dossier for the work permit to the DOLISA, and DOLISA is required to provide its response within seven working days. In the event that the application dossier is rejected, the DOLISA shall issue a written reply clearly stating grounds for the rejection.

1. **Internal Transfer**

Under Vietnam law, a foreign employee who works for a foreign company which has established a commercial presence in Vietnam, holds a management position or is an expert in the company, and has worked for the company for at least twelve months, may temporarily work for the commercial presence of such foreign company in Vietnam by way of internal transfer and qualify to receive a work permit.

1. **Contract of Employment Services**

A Vietnamese company entering into a service contract with a foreign party in which the foreign party will be required to send a person(s) to Vietnam in order to perform the contract entered into by the foreign party may apply for a work permit for that foreign person(s).

1. **Exceptions to the Work Permit Requirement**

All foreigners working in Vietnam must obtain a work permit, subject to the following exceptions:

1. A foreigner enters Vietnam for a period of less than three months to provide a service;
2. A foreigner enters Vietnam for a period of less than three months to resolve a technical problem or situation involving a complicated technology that affects or threatens to affect production and is beyond the capability of Vietnamese nationals and foreign experts currently residing in Vietnam. If, however, the foreigner fails to resolve the issue within three months, he must apply for a work permit;
3. A foreigner is a member of a limited liability company with two or more members or is the owner of a single-member limited liability company (see Chapter 49);
4. A foreigner is a member of the board of management of a shareholding company (see Chapter 49);
5. A foreigner is a licensed foreign lawyer holding a certificate to practice in Vietnam issued by the Ministry of Justice under the Law on Lawyers;
6. A foreigner is the head of the representative office or the project of international organizations, non-governmental organizations in Vietnam;
7. A foreigner is a student studying in Vietnam and working in Vietnam. Employers are required to give seven days advance notice to the provincial labor management agency of such employment;
8. A foreigner works in Vietnam under the provisions of an international agreement of which Vietnam is a member;
9. A foreigner works as an intra-corporate transferee within eleven service sectors as stated in Vietnam’s Schedule of WTO Commitments on Services, including business, communication, construction, distribution, education, environment, finance, health, tourism, entertainment and transportation;
10. A foreigner who enters Vietnam to provide professional and technical consultancy services or performing other tasks involving research, development, appraisal, monitoring and evaluation, management and implementation of Official Development Assistance (“ODA”) funded programs and projects according to ODA treaties between competent authorities of Vietnam and other countries;
11. A foreigner who is licensed to carry out informational and press activities in Vietnam by the Ministry of Foreign Affairs of Vietnam;
12. A foreigner who is a teacher for a foreign agency and organization sent to Vietnam by the competent agency of a foreign country to teach in international schools under the management of foreign diplomatic missions or international organizations in Vietnam. In this situation, the teacher must have the certification of a foreign diplomatic mission or international organization in Vietnam;
13. A foreigner who is a volunteer and has certification from a foreign diplomatic mission or international organization in Vietnam. Volunteer here means an unpaid foreigner who voluntarily works in Vietnam in order to implement a treaty to which Vietnam is a contracting party;
14. A foreigner enters Vietnam to hold the position of manager, executive director, expert or technical worker for a period of under 30 days and an accumulated working period of under 90 days per year;
15. A foreigner who works to implement international agreements which central state agencies, local state agencies or central socio-political organizations have signed in accordance with law. It is required that such agencies and organizations shall send a written notification of the foreign employee’s employment to the agency authorized to grant work permit; or
16. Other cases decided by the Prime Minister and proposed to the Minister of Labor, War Invalids and Social Affairs
17. **Work Permit Reissuance**

In order to reissue the work permit at the end of the term, the foreign employee is required to submit one application dossier which includes the following documents to the DOLISA:

1. Request for reissuance of the work permit of the foreign employee made by the employer;
2. Two color photos (4cm by 6cm in size, bareheaded, frontal view, showing the face and ears clearly, without glasses, and on a white background) taken within six months of the date on which the application dossier is submitted;
3. Current work permit of the foreign employee;
4. Health certificate or medical examination report of the foreign employee issued by an authorized foreign or Vietnamese health organization or agency within 12 months of the date on which the application dossier was submitted;
5. Notification issued by the DOLISA on the approval of the recruitment of the foreign employee; and
6. Contract, agreement, certification, appointment or document
7. **Official Fees**

The official fee payable to the DOLISA at the time the work permit application is submitted is VND 600,000. For reissuance of a work permit, an official fee of VND450,000 is payable at the time a request for reissuance of a work permit is submitted to the authority.

**What Incentives are Available to Foreign Investors by the Government?**

**Investment Incentives Available**

The following are some investment incentives normally available to the qualifying foreign investment projects in Vietnam:

1. A lower corporate income tax rate than the normal one for a definite period or for the whole duration of implementation of the investment projects; and exemption from or reduction of corporate income tax;
2. Exemption from import duty in respect of goods imported to form fixed assets; raw materials, supplies and components for implementation of an investment project; and
3. Exemption from or reduction of land rent, land use fees and land use tax.

Investment incentives shall apply to new investment projects and expanded investment projects. The specific levels of incentives granted to investment projects shall be applicable in accordance with the Law on Taxation and the Law on Land.

1. **Tax Incentives**

Special tax rate of 10% for a period up to 15 years shall be applied to:

1. Income of the company from implementing new investment projects in a geographical area with extremely difficult socio-economic conditions, economic zones and high-tech parks;
2. Income of the company from implementing new investment projects in scientific research and technological development, certain high-tech sectors including high-tech incubation and high-tech incubator enterprises; venture investment in the development of high-tech; investment in construction and commercial operation of high-tech incubation and high-tech incubator enterprises; investment in development of specially important State infrastructure; manufacture of software products; manufacture of composite materials, various types of light building materials and of rare materials; production of recycled energy, clean energy and energy from destruction of waste; development of biological technology; and protection of the environment;
3. Income of high-tech enterprises, and income of agricultural enterprises applying high-tech; and
4. Income of the company from implementing new investment projects in the production sector (except for production projects for items subject to special sales tax and mineral mining projects) satisfying the required criteria of having a minimum investment capital being 6,000 billion Dong and such capital will be disbursed within a period of no later than 3 years from the date of issuance of the investment registration certificate, and (a) reaching the total turnover of at least 10,000 billion Dong per annum no later than 3 years from the year in which the company has turnover; or (b) employing more than 3,000 employees.

In addition to a preferential tax rate, the income derived by companies investing in the above described areas is also granted a tax exemption for the initial four years of the project, as well as a tax reduction of 50% for the subsequent nine years of the project.

1. **Exemption from Import Duties**

As mentioned above, an exemption on import duties may be applicable to goods imported to form fixed assets, raw materials, supplies and components for the implementation of an investment project.

1. **Land Rental Exemption**

Normally, manufacturing and certain other types of projects in Vietnam are required to lease the land required to house their production facilities from the Vietnam government. Projects promoted by the competent authorities, however, may be granted either an exemption from land rental payments entirely or a reduction in the rental. This incentive may be granted for the entire life of the project or for a fixed term.

What are the Legal Issues Associated with Foreign Ownership of Land?

1. **Land Use Rights**

As mentioned above, instead of allowing for land ownership, Vietnam law allows for varying degrees of land use rights, which rights are subsets of land ownership rights. These rights are granted by way of land allocation and land leases.

A land lease is a contract between the government and the lessee where the land use rights will be leased for a fixed duration (see rules concerning period of lease below), and the lessee pays rent to the government (see conditions below).

In addition, where a joint venture company has been established between a foreign investor and a locally owned Vietnamese company, the land use rights may be contributed by the Vietnamese company as its capital contribution to the joint venture company.

1. **Land Use Period**

Vietnamese residing overseas and foreign invested enterprises are allowed to lease land for the purpose of carrying out an approved investment project for a period up to fifty years or, in exceptional cases, up to seventy years. The land use duration will also co-terminate with the operational duration of the investment project.

1. **Application for Lease/Allocation**

Once the appraisal procedure has been fulfilled, or where not required, the foreign investor files an application for execution of a land lease with, or grant of decision for land allocation by, the government. The investor must thereafter apply for a certificate of land use rights (“LUR Certificate”) in respect of the lease over, or allocation of, the land. Do note that while the application for the land grant is made by the foreign investor, the investment project can only be carried out by, and the land use rights will only be granted to, a Vietnam incorporated entity. The foreign investor is therefore also required to file the usual application to establish a Vietnam entity to carry out the investment project and hold the land use rights.

1. **Assigning Leasehold Interests**

A foreign invested Vietnam entity leasing land from the State is generally allowed to assign its rights to the land (as lessee) to a third party as long as it has already paid the rent for the entire period of the lease term, and the party receiving the land rights applies for and receives a new LUR Certificate.

1. **Title Search**

Note that although the law does provide a mechanism to carry out title searches (by way of sending written request to DONRE), in practice, many provincial land authorities will only provide land title information to the land owner.