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LEGAL UPDATE

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NEW REGULATION AFFECTING THE NOMINEE ARRANGEMENT INVESTMENT MECHANISM

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INTRODUCTIONS

With a stable political environment and a potentiality of the economy for development, Vietnam becomes an attractive destination for investment from abroad. For the purpose of making investment promptly and going through certain legal obstacles on market access conditions of the country, one of the investment tools that foreign investors (“**Foreign Investor**”) is to make investment under the form of “nominee arrangement”.



NOMINEE ARRANGEMENT

Thereby, the foreign investors will appoint the Vietnamese nominee(s) (“**Vietnamese Nominee**”) to conduct investment projects in Vietnam (i.e. to appoint the Vietnamese Nominee to conduct the project by itself (forming a 100% local entity) or together with the Vietnamese Nominee conduct the project (forming a “**Joint Venture**”), in details:

- (i) Setting up a 100% local entity: Foreign Investors to finance (via a loan agreement/other equivalent agreements) the Vietnamese Nominee to establish a local company (having 100% domestic capital) to conduct an investment project; or
- (ii) Setting up a “Joint Venture”: Foreign Investors to finance (via a loan agreement/other equivalent agreements) the Vietnamese Nominee to establish a so-called “joint venture” company (with capital contribution of both foreign and Vietnamese parties) to conduct an investment project.

(“**Nominee Arrangement Tool**”)

The below might be the main reasons for Foreign Investors in using the Nominee Arrangement Tool:

- (i) To take advantage of investment/business conditions applicable for domestic investors. E.g.: Pawnshop, Wine Trading, Customs Clearance Services.
- (ii) To avoid regulations on investment prohibition in certain investment fields applicable for foreign investors. E.g.: Rice distribution, pharmaceuticals distribution
- (iii) To own real estate properties in Vietnam.



Nominee Arrangement Tool seems to be popular in Vietnam in the last decade. As legal advisor for the deals, we have dealt with several cases. By way of giving examples:

No.	Contents	Details
1.	Time: January 2018	(i) Foreign Investors: ABC LOGISTIC PTE. LTD, a company duly incorporated and operating under the laws of Singapore (“ABC Singapore”); (ii) Contemplated business lines: Customs clearance services; (iii) Investment conditions under then-applicable Vietnamese laws: ABC Singapore is required to enter into a joint venture with a Vietnamese entity, though ABC Singapore's equity ownership shall not be limited. ¹
2.	Solutions	The following solutions were deployed: (i) Type of corporate: ABC Vietnam LTD (a multiple members LLC); (ii) Capital contribution ratio: ABC Singapore: 99%, Vietnamese Nominee: 1% (In this case, the Vietnamese Nominee is an individual having close personal tie with ABC Singapore).

¹Customs clearance service: No limitation, except that from the date of accession, joint ventures may be established in which the capital contribution of foreign parties does not exceed 51%. After 05 years, there is no limitation on capital ownership of the foreign investor (Extracted from WTO Commitments); For customs clearance services classified as auxiliary services for sea transport, the foreign investor may establish an enterprise or contribute capital or purchase shares or stakes in another enterprise which is invested in by a domestic investor. The foreign investor may establish a commercial presence in Vietnam under a business cooperation agreement (Article 4.3(d) Decree 163/2017/ND-CP).



No.	Contents	Details
2.	Solutions	To ensure the safety of ABC Singapore’s investment, a shareholder agreement was drafted having main clauses as follows: (i) <u>Advanced Approval</u>: All actions, tasks and powers performed by Vietnamese Nominee must be approved in advance by ABC Singapore; (ii) <u>Dividend Distribution</u>: Vietnamese Nominee receives profit/dividend per ABC Singapore's decision (as a consideration instead of nominee fee); (iii) <u>Forcible Transfer</u>: Vietnamese Nominee is obliged to unconditionally transfer all of its contributed capital/shares to a third party designated by ABC Singapore (or to ABC Singapore itself upon the changes of law which allows 100% foreign-invested company in the field) (iv) Vietnamese Nominee to make a will to leave the inheritance of its capital portion and all related interests thereof in ABC Vietnam to ABC Singapore or a third party designated by ABC Singapore.

Due to certain concerns about potential risks from the Nominee Arrangement Tool, given the current investment law. i.e. Law on Investment 2014, does not have explicit provisions regulating this investment mechanism, Vietnamese law-makers have added to Law on Investment 2020 (Article 48), provisions on (forcible) termination of an investment project because of conducting investment activities originated from factitious civil transactions, i.e./consequently, revocation of investment registration certificate and enterprise registration certificate.²

²Among other, the investment registration authority shall terminate an investment project in part or in full in the case the investor conducted the investment activities on the basis of a factitious civil transaction (Article 48.2 Law on Investment 2020)



Under the new Law, Foreign Investors should take a careful consideration prior to making decision on using the Nominee Arrangement Tool, this is because:

- (i) Facing the risk of being detected as Nominee Arrangement Tool, this would be more realistic when there is an unresolved dispute between the Foreign Investors and the Vietnamese Nominee;
- (ii) Facing the risk of being inspected from the investment registration authorities, in light of the fact that the Vietnamese Government will definitely promulgate further legislative instruments guiding this new provision;
- (iii) The civil transaction, i.e. loan/financing agreement between Foreign Investors and Vietnamese Nominee, would be declared invalid (the revocation of investment registration certificate and enterprise investment certificate of the company arise subsequently), parties then shall be obliged to recover “the original status”, reimburse to each other what was received (Article 131.2 of Civil Code 2015). In such circumstance, the Foreign Investors will suffer the risks of:
 - Profit: May not receive profits/dividends accumulated from business activities from Vietnamese Nominee;
 - Investment Amount: The remittance of capital abroad may be subject to practical obstacles and difficulties from the bank.



COMMENT

From an objective view point with respect to investment activities under Nominee Arrangement Tool, we believe that the applicable sanction to Nominee Arrangement Tool should be more “diversified”, noted that Nominee Arrangement Tool in some cases might be "Taking advantage of (favorable) investment conditions applicable to domestic investors" but in other cases might be "Avoiding regulations on investment prohibition in investment sectors", accordingly, the level of danger and risks of the former should be lower than the latter.



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