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**Investment in Vietnam
through the Nominee
Structure**

1. Nominee Structure Overview

Nominee Structure is a new concept under the Vietnamese legal system, but this investment mechanism is commonly recognized and used in Vietnam. The Nominee Structure can be interpreted as a way under which a party (Nominee Party) is nominated or trusted to place a certain amount of money (tangible or intangible) from the nominator/trustor (the Nominating Party) in any venture that potentially generates profit in accordance with the Nominee Party and the Nominating Party agreement.

A typical situation requiring the Nominating Party to select Nominee Structure as a mechanism for investing in Vietnam is when Vietnam does not open its markets to the members of the World Trade Organization – WTO or invest in such business areas requiring additional licenses and/or permits;

Additionally, a Nominating Party utilizing the Nominee Structure helps them enter the market quickly and avoid the attraction of competitors if investing through a direct investment, or temporarily arrange their business overseas.

Therefore, the Nominating Party will expand their business in Vietnam without necessarily having its own enterprise presence in Vietnam, but through its partner(s).

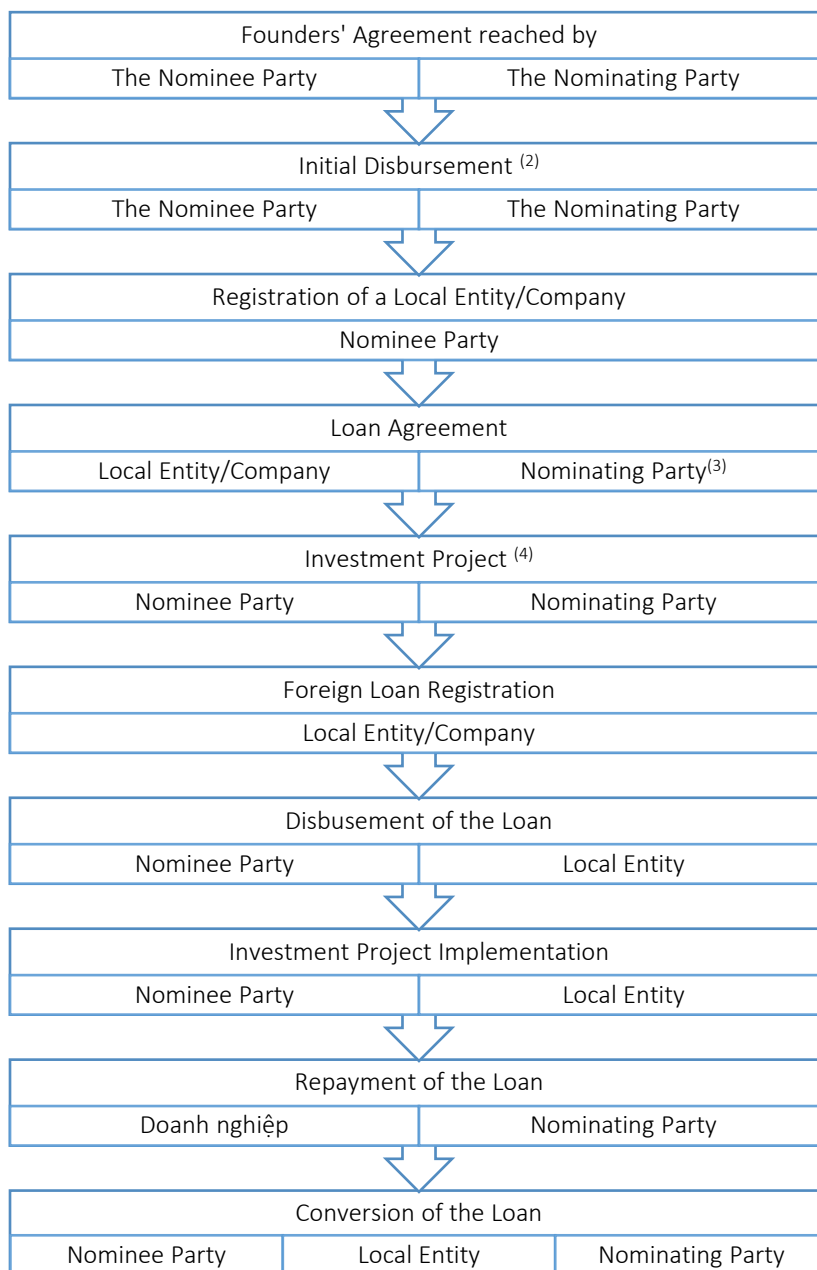
2. Nominee Structure Operation

Operation of the Nominee Structure is quite simple, in particular:

- 1.1. Assets are placed in the conservatorship of the Nominee Party through a loan agreement between a local enterprise - established by the Nominee Structure - and the Nominating Party.
- 1.2. The Nominee Party shall act on behalf of the Nominating Party to handle any potential legal issues and daily operations of the local enterprise pursuant to instruction, supervision, and direction of the Nominating Party.
- 1.3. Likewise, the Nominating Party will prepare and procure necessary resources, most prominently, financial arrangements to ensure smooth/proper performance and operation of the local enterprise and the outcome of the investment.
- 1.4. At an appropriate time, the Nominee Party will prepare an internal legal arrangement allowing the Nominating Party as the owner of the local enterprise through conversion of the aforementioned loan (in whole or in part) into equity/shares of the local company.
- 1.5. In recognition of the change in ownership of the local company, an exception is given in which the Nominee Party intends and subjects to the consent of the Nominating Party, to contribute a specified amount of money as company capital or to convert - salaries, shares, incentives etc. the Nominee Party is entitled to receive during the management - into equity/shares of

the company, or to simply retain its position – as a member - within the local company. In such a situation, the Nominee Structure will remain an owner of the company.

1.6. The simplified (step by step) procedure of how the Nominee Structure operates⁽¹⁾:



Legends:

(1): This flowchart varies greatly depending on the specific nominee structure.

(2): May or may not be available; Potentially concluded prior to or after the founder's agreement is concluded.

(3): Dependent upon the finance structure and conversion of the loan.

(4): May or may not be available. Registration of the foreign loan by the Local Entity is potentially feasible.

2. Nominee Structure Benefits

The Nominee Structure is used on a global scale as well as in Vietnam. Investors consider the Nominee Structure as an effective option with respect to foreign market investments. Both the Nominee and Nominating Parties will realize the following benefits of using the Nominee Structure.

- 2.1. Firstly, the Nominee Structure facilitates the Nominating Party with respect to the simplicity of investing in Vietnam. Establishment and operation of a legal entity thereof in another country/jurisdiction is challenging and involves the implication of risks. The implication of risks does not only come from the economic system, the investment environment, and/or administrative procedures, but also from in-depth experiences of the local market. All these factors can only be resolved by the Nominee Party – in which they have their own language, their own connections, their own culture, and their own resources for an ideal investment project.
- 2.2. Secondly, to divert the attention of direct competitors, or the commercial presence of the Nominating Party in a new market, the Nominating Party would likely prefer to refer to the Nominee Structure as their primary selection.
- 2.3. Thirdly, the Nominee Structure helps the Nominating Party overcome complicated legal and technical obstacles of the host country that are imposed upon foreign investments. It is an appropriate perspective that every country in the world treats domestic and international investments distinctively, and in almost every case introduce or liquidate any new law/policy in favor of domestic investors.
- 2.4. Fourthly, the local company will enjoy all the incentive schemes applicable to it in accordance with the law. There will be rare instances in which foreign-owned enterprises have a better business environment than domestic/local companies. Therefore, the Nominating Party will, indirectly, enjoy the benefits of the local company, especially with respect to tax, administrative matters, or the scope (capacity) of business conduct).

3. Nominee Structure Risks and Drawbacks

In addition to the notable benefits of the Nominee Structure, this investment mechanism comes with drawbacks that both parties must be made aware of.

- 3.1. The Nominating Party's management and control of investment capital in the local company is not definite. Almost everything related to this Nominee Structure, from the business operation, investment capital, use of the loan, purpose of the loan usage, etc. is derives from trust in the Nominee Party by the Nominating Party and from appropriate legal framework established between the Parties. Non-compliance by any Party of the aforesaid matter will result in difficulty securing investment capital by the Nominating Party.
- 3.2. Determination of the exact owner of the local company and its assets. On one hand, the local company is registered by the Nominee Party and therefore is the legal owner of the local company. Contrarily, the local company is set-up based on the founder's agreement and the financed funds of the Nominating Party – the true owner in fact. The determination of the exact owner of the local company is key to allocating (distributing) risks and responsibilities among the Parties. In the event the Nominee Party neglects to act upon changing

(transferring) ownership of the local company, it will require amicable settlement between the Parties, otherwise resulting in a cost and time dispute.

- 3.3. Settlement of ownership ratio, by the Nominating Party, with other investors or another Nominating Party is required should the Nominee Party acquires new capital without written consent of the Nominating Party. The ownership ratio will satisfy, whether or not, the Nominating Party is an entity within the local company. Provided that it is, determines to what extent the Nominating Party can vote upon key-decision matters.
- 3.4. As the legal owner of the local company, the Nominee Party is responsible for any breach of contract by the local company of any law/requirements and will be held liable to competent authorities for such breach. Normal operation and management of the local company is only assured upon the Nominating Party's provision of a stable and timely financial arrangement.
- 3.5. Incurrence of risk implication should the Nominee Party be identified as a joint venture or partnership of more than one or the Nominee Party's actions are subject to their partner (spouse). Typically, those occurrences are, but not limited to, death, dissolution of marriage and/or liquidation. As such, the Nominating Party's interest is adversely affected and can only be secured via very complicated procedures.

4. Founder's Agreement (Shareholders Agreement) Legal Status

- 4.1. In developing countries like Vietnam, Myanmar, Cambodia, Laos, China or in the emerging countries having received significant global investments, the legal status and validity of the founder's agreement (shareholders agreement) pertaining to the investment arrangement become issues.
- 4.2. Vietnam as an example established Civil Code 2015 (taking effect on 01/01/2017) which respects the freedom of Parties to negotiate, enter into any contract, and allow such agreement to have legal effect so long as said agreement is in agreement with public interest and/or does not breach the principle rules of Vietnam.
- 4.3. Moreover, the founder's agreement (shareholders agreement) is determined to be invalid if the Parties of the transaction intend to conceal another illegal transactional arrangement. Therefore, civil transaction arrangements made under false pretenses, concealing another transaction, or avoiding the performance of another obligation towards a third party, is invalid.¹
- 4.4. Wherefore, while preparing or adjusting the terms of the founder's agreement (shareholders agreement), relevant factors as to the effectiveness and validity of the agreement must be taken into account thereof. An attitude of dignity will provide each Party with an

¹ Civil Code 2015, Article 124.

understanding of what each item or issue will be considered as sensitive. Avoiding and mitigating the consequences of sensitive issues must be outlined in the contract.

- 4.5. Vietnam law, neither in caselaw or precedent, lacks defining provision of the element of a false transactional arrangement. There is nothing to distinguish between or provide clarity of the validity or invalidity of a specific matter in the founder's agreement or the shareholders agreement. Once a dispute has arisen, each Party must endeavor (depending on position thereof) to prove such agreement is valid or invalid.

5. Practical Legal Solutions

Established on the grounds of cooperation, trust, and agreement between the Nominee Party and the Nominating Party, this Nominee Structure recommended in limited situations as described (i) to investigate the market and test the business model to ensure feasibility in a foreign country; (ii) to overcome restrictions and limitations imposed by the host country upon foreign investors; or to settle short-term impediments that the Nominating Party could not arrange at the time of the Nominating/investment.

With exception of the foregoing circumstances, Parties are advised to select other investment mechanisms available to them (such as the establishment of a foreign-owned enterprise, purchase of an existing company, business cooperation contract), in an effort to secure its best interests.

On a short-term basis, relevant labor and employment regulations are considered to be a good tool which helps Parties to flexibly apply for their own relationship to supervise, manage, and monitor the operation of defined purposes.

Succinctly, the Nominee Structure is a good option as long as that care is taken by each Party to discuss each minute detail of any and all aspects before making any decisions. Nevertheless, lawyers contribute valuable advice or arrange a structure that best equips the Parties' relationship.

Taking everything into consideration, the Nominee Structure requires competent authorities to have better administrative management to support investment in Vietnam while ensuring accountability and oversight.

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