Global Private M&A Guide - Limited External Content - Vietnam

Common deal structures

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# What are the key private M&A deal structures?

The acquisition of an enterprise can take different forms: (i) the purchase of shares (with respect to the target being a JSC) or charter capital (with respect to the target being an LLC); (ii) the acquisition of assets; or (iii) the reorganization of an enterprise (by way of merger, consolidation, division and separation). A share acquisition is the most common structure in the Vietnamese market, given that certain types of assets (e.g., land use rights, assets attached to lands, and workforce) may not be transferrable or can only be transferred upon satisfaction of certain regulatory approvals.

For the purpose of a business combination, the Enterprise Law contemplates two types of reorganization: (i) merger; and (ii) consolidation of enterprises. All of these forms of enterprise reorganization take effect upon the approval of the relevant licensing authorities. Depending on the specific form of the enterprise reorganization, various rights and obligations cease to exist and others are assumed by the parties involved in the process. In particular:

(i) Merger

Under the Enterprise Law, an enterprise merger is defined as a process whereby one or a number of enterprises transfers all of its assets, legal rights, liabilities and benefits for the purpose of merging with another enterprise.

After a merger has been completed, the target enterprise will cease to exist and the surviving enterprise will assume the legal rights and interests of the target enterprise. Additionally, the surviving enterprise will be liable for unpaid debts, labor contracts, property obligations and other liabilities of the target enterprise.

(ii) Consolidation

An enterprise consolidation is a process whereby two or more enterprises combine all of their assets, legal rights, liabilities and benefits for the purpose of consolidating among themselves so as to become a new enterprise.

In terms of consolidation, the consolidating enterprises will be extinguished upon completion and the new consolidated enterprise will assume the legal rights and interests, and is liable for the unpaid debts, labor contracts and other liabilities of the consolidating enterprises.

A merger is more common than consolidation in practice, although the application depends on the business objectives for the restructuring.

# Which entity is likely to be the target company (on a share sale) or the seller (on an asset sale)?

Under the Enterprise Law, companies in Vietnam are referred to as "enterprises." In Vietnam, the following types of enterprises are most commonly seen in practice:

Single member limited liability company (SMLLC)

Multiple member limited liability company (MMLLC)

JSC

# What are the different types of limited liability companies?

(i) SMLLC

An SMLLC is owned by one organization or individual member (company owner), who is liable for the debts and liabilities of the enterprise to the extent of the amount of the charter capital of the enterprise. An SMLLC has the same legal status as an MMLLC and a JSC, but the company owner has more autonomy concerning decisions made about the enterprise. The company owner may appoint either a representative to be president, or more than one representative to create a board of management (BOM) (comprising three to seven persons), which will implement the company owner's rights and obligations on its behalf.

In addition, there is no statutory term of office for the president. However, the statutory term of office for BOM members cannot exceed five years.

Similar to an MMLLC, an SMLLC must have a director or general director appointed or hired by the president or the BOM, who is responsible for the day-to-day operation of the enterprise and is usually the legal representative of the enterprise, although the charter may provide otherwise. An SMLLC is allowed to have several legal representatives, as long as one of them resides in Vietnam, and must authorize another person if they need to travel abroad. The president or the chairperson of the BOM will be the default legal representative if the charter is silent on that point.

The company owner must appoint controller(s) in a number at its discretion. Controllers bear responsibility for supervising the performance of the BOM (or the president) and the director (or general director), and carrying out other tasks assigned by the company owner. The controllers can have a term of office not exceeding five years.

A company owner must contribute capital in a full and timely manner. An SMLLC can decrease its charter capital in two cases:

When the limited liability company returns part of its contributed charter capital to the limited liability company owner, as long as the limited liability company is continuously operating for more than two years from the date of enterprise registration and the limited liability company ensures that it is able to pay all debts and other liabilities after returning the capital to the company owner

When the company owner fails to contribute the charter capital as committed

An SMLLC may increase its charter capital by way of additional investment from the company owner or by obtaining capital contributions from other persons. In the event that part of the charter capital is contributed by or transferred to another organization or individual, the enterprise must register to convert into an MMLLC or a JSC within 10 days of the date of complete transfer.

The company owner shall contribute the registered charter capital within 90 days from the issuance of the ERC. If the company owner does not fully contribute the registered charter capital, it must register for the decrease in charter capital within 30 days from the deadline of capital contribution and shall be liable for the financial obligations of the SMLLC to the extent of all assets owned by them for failing to contribute prior to the registration of the charter capital decrease. However, the deadline for capital contributions in the form of assets (such as land use rights and equipment) is extended until the completion of the transfer of the ownership of these assets into the legal entity.

(ii) MMLLC

An MMLLC is an enterprise that has more than one but no more than 50 members, which may be organizations, individuals or a combination of both. A member can transfer, dispose of or ask the enterprise to buy back its capital contribution portion in accordance with the Enterprise Law or as stipulated in the enterprise charter.

An MMLLC must have one director or general director of the company appointed by the BOM, who may or may not be a member of the enterprise. The general director is responsible for the day-to-day operation of the enterprise and can be appointed by the BOM as the legal representative of the company. Similar to an SMLLC, an MMLLC can have many legal representatives, as long as one of the legal representatives resides in Vietnam, and must authorize another person if they need to travel abroad. The BOM is the highest decision-making body of an MMLLC, and its members' voting rights are allocated in proportion to their respective capital contribution. An MMLLC with more than 11 members must also establish a control committee.

(iii) JSC

A JSC is an enterprise whose charter capital is divided into shares held by three or more organizations or individuals. Shareholders are responsible for the debts and liabilities of the enterprise to the extent of the amount of their contributed capital. A JSC has the right to issue securities in order to raise capital, and it may list on a stock exchange if it satisfies the stock exchange's requirements. A shareholder can transfer, dispose of or ask the enterprise to buy back its shares in accordance with the Enterprise Law or as stipulated in the enterprise charter.

Similar to an SMLLC and an MMLLC, a JSC can have many legal representatives as long as one of the legal representatives resides in Vietnam, and must authorize another person if they need to travel abroad. In cases where there is only one legal representative, the chairperson of the board of management or the (general) director shall be the legal representative of the JSC.

A JSC must have common shares and may have preferred shares and/or issue bonds.

A JSC has the right to select its organizational, managerial and operational structure in accordance with one of the two following methods (except where securities laws provide otherwise):

General meeting of shareholders (GSM), the board of management, control committee and the (general) director. Where a JSC has fewer than 11 shareholders, and the shareholders are organizations holding less than 50% of the total company shares, there is no requirement for a control committee.

GSM, board of management and (general) director. In this case, at least 20% of the members of the board of management must be independent and an internal auditing committee must be established directly under the board of management.

# Is there a restriction on shareholder numbers?

An SMLLC can only have one owner. An MMLLC must have at least two members and no more than 50 members. A JSC must have at least three shareholders and there is no limitation on the maximum number of shareholders.

If a JSC has a paid-up charter capital of VND 30 billion or more and at least 10% of its voting shares owned by 100 or more investors who are not major shareholders, it must register to become a public JSC.

# What are the key features of a share sale and purchase?

Acquisitions via equity investment may take place through the issuance of new shares/rights to contribute more capital, or through the purchase of existing shares/capital contribution portion. In either case, certain pre-transaction approvals/filings may be triggered, including foreign investment approvals (for further information on these, see the more detailed section on "Foreign investment restrictions"  below) and/or merger filing requirements (for further information on these, see the more detailed section on "Antitrust/merger control" below), depending on the structure of the transaction.

An acquisition of equity is often simpler than an acquisition of assets, as it is generally only necessary to transfer the shares/capital contribution portion in the target company, which is relatively common in Vietnam.

# What are the key features of an asset sale and purchase?

A foreign buyer cannot purchase assets directly from the Vietnamese seller. The buyer will need to set up a NewCo in Vietnam in order to acquire the target company's assets. To set up a NewCo in Vietnam, the foreign buyer needs to have an "investment project" in Vietnam for the NewCo.

The following types of assets are commonly seen in an asset sale and purchase:

Valuable papers.

Bonds, debts and other forms of borrowing.

Contractual rights comprising intellectual property rights, including trademarks, industrial designs, inventions, trade names, and origin or appellations of origin of goods.

Rights with respect to real property, including the right to lease out, assign, mortgage and to provide guarantees.

Items of revenue derived from investment activities, including profits and interest on shareholding, dividends, royalties and all types of fees, and other assets and rights with economic value in accordance with the law and international treaties of which Vietnam is a member.

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