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Bringing Brands to Vietnam

A recent Nielsen survey concluded that Vietnam ranks third in the world in terms of consumer fondness for branded goods, with 73 percent of Vietnamese participants responding that they liked to buy products of famous brands. In addition, 56 percent said they were willing to pay more for designer products than for others of a similar nature. Owners of global brands that are looking to enter Vietnam's promising market have several options available.

Establishing a Company

A foreign investor may directly sell its goods in Vietnam by establishing a wholly foreign-owned enterprise (WFOE), forming a joint venture company with a local Vietnamese entity, or acquiring or subscribing for equity in an existing Vietnamese company.

Vietnam practices the doctrine of corporate *ultra vires*, meaning that all enterprises, including WFOEs, may only engage in business lines that are approved by the licensing authorities. Before forming a Vietnam subsidiary, a foreign investor would need to determine its intended business lines (e.g., retail and restaurant services), then assess whether there are foreign-ownership restrictions or other regulatory requirements in place for such business lines.

In retail, for example, foreign investors are permitted to incorporate WFOEs in Vietnam. There are no foreign-ownership restrictions for retail business lines. But certain regulatory requirements must be considered. Any additional outlets set up beyond the first must satisfy an Economic Needs Test, which consists of several highly subjective factors. The result is that the establishment of retail outlets beyond the first by WFOEs would be at the discretion of the authorities.

Establishing a company may be a good choice for foreign investors who want to do long-term business with stability. This method also gives them the ability to manage and operate their businesses directly. However, the investor would likely face greater expenses in establishing, maintaining, and expanding its business as compared to the other methods discussed below, and establishing a company may also require a greater outlay of time and resources for the investor to sufficiently acquire or develop knowledge of the local market.

Franchising

Franchising is one of the fastest ways for foreign brands to bring their goods or services to the Vietnam market. As of mid-2015, 137 foreign franchisors had registered in Vietnam, largely in the sectors of restaurants (43.7 percent), fashion (19.3 percent), and education (14.1 percent).

The most obvious advantage of franchising is the ability to expand a business by using the manpower, capital, and local market knowledge of franchisees, while still maintaining control over the quality of goods and services. A franchisor can also direct how it would like the local franchisees to develop the business, such as by setting up minimum targets for opening outlets.

A foreign franchisor entering Vietnam through a franchising arrangement with a Vietnamese partner does not need to have a legal presence in Vietnam. The franchised business system, however, must have been operating for at least one year prior to franchising.

A foreign franchisor must register its franchise with the Ministry of Industry and Trade. But the definition of what constitutes a "franchise" under the current law is broad and ambiguous. The definition is:

> "A commercial activity in which a franchisor gives a franchisee the right to independently purchase and sell goods or provide services in accordance with the business system specified by the franchisor, and for such goods and services to be associated with the trademark, trade name, business know-how, business logo, and advertising of the franchisor; and the franchisor has the right to control and provide support to the franchisee in conducting the business."

This is problematic because other business arrangements, such as distribution or agency arrangements, are often linked with intellectual property (e.g., trademarks and business know-how) or technology transfer agreements, and such business arrangements could potentially qualify as a "franchise" under this definition.

Current franchising regulations are unclear on how to precisely determine whether a particular commercial arrangement would trigger franchise registration requirements. For example, because there is no further legal guidance on what constitutes a "business system," merely requiring a local partner to fit out its premises in a certain manner in selling branded goods or services could arguably trigger franchising regulations.

Using an Agent or Distributor

A foreign investor may also have its branded goods or services sold in Vietnam through contractual arrangements with local agencies or distributors, referred to as "commercial agencies" and "representatives of a business entity," respectively, under Vietnam's Commercial Law. A commercial agency conducts business activities under its own name for the principal, while a representative of a business entity is authorized and instructed by the principal to conduct business activities in the name of the principal.

The specific responsibilities of a Vietnamese agent or distributor will depend on its agreement with the foreign investor. Foreign investors should conduct sufficient due diligence on potential local partners to ensure that they have the requisite licenses, facilities, and other requirements necessary to meet their responsibilities. Commercial agreements should clearly set out the rights and obligations of each party as well as dispute resolution mechanisms, among other matters. Often, these arrangements involve aspects of intellectual property, at least in respect of the goods or services.

These arrangements, unlike franchising, do not need to be registered. However, given the unclear definition of franchising, a foreign investor should carefully consider whether a proposed arrangement with a local partner would trigger franchising regulations or other legal requirements.

As each of the methods above has its pros and cons, brand owners should choose the method that best suits their particular business goals.