

## 1. INTRODUCTION

### 1.1 Please give a brief outline of the legal system in Vietnam. Is it based on common law, civil law, or some other system?

The legal system of Vietnam is influenced by the communist theory and Ho Chi Minh Ideology in addition to Western laws upon the introduction of a market economy ever since the adoption of the *Đổi Mới* (“renovation”) in 1986. The current private laws in Vietnam are based on the continental European civil law system. Since joining the WTO in 2007, Vietnam has been promoting modernization in the private law sector.

### 1.2 How are the courts organized in Vietnam?

The courts in Vietnam are organized into four tiers: The Supreme People’s Court, the Superior People’s Court, the Provincial People’s Courts, and the District People’s Courts.

The Supreme People’s Court is composed of one Council of Supreme Court Judges. The Supreme People’s Court is the highest judicial body of Vietnam. It is empowered to hold supervisory and review trials of cases with judgments which have already taken legal effect but have been protested. The Supreme People’s Court has the power to, among others, supervise the hearings conducted by the lower courts and manage people’s courts and military courts organizationally in accordance with law.

The Superior People’s Court is composed of one Committee of Superior Court Judges and separate special courts, namely, the criminal court, the civil court, the economic court, the labor court, the administrative court, and the family and juvenile court. The Superior People’s Court has jurisdiction to (a) conduct appellate trials of cases where the first-instance judgments and/or rulings of Provincial People’s Courts have not yet taken legal effect but have been appealed and/or protested against, and (b) hold supervisory and review trials of cases with judgments of Provincial People’s Courts within their territorial jurisdiction which have already taken legal effect but have been protested.

The Provincial People’s Court is composed of one Committee of provincial court judges and separate special courts, namely, the criminal court, the civil court, the economic court, the labor court, the administrative court and the family and juvenile court. According to the Code of Civil Procedure 2015, the Provincial People’s Courts are empowered to hold first-instance trials of cases, to conduct appellate trials of cases where the first-instance judgments or rulings of lower courts have not yet taken legal effect but have been appealed or protested against according to the procedural law, and to review effective judgments or rulings of lower court. Cases wherein one party or the related asset is located offshore or subject to judicial entrustment of representative agencies of Vietnam overseas or of foreign courts are subject to jurisdiction of the People’s Court of the relevant province.

A District People’s Court may include separate courts, namely, the criminal court, the civil court, the family and juvenile court and the administrative court. A District People’s Court has jurisdiction to hold first-instance trials in civil, commercial, criminal and labor cases according to the procedural law.

Military Courts are organized in the Peoples’ Army to resolve cases involving the accused who is an in-service army person.

**1.3 How are lawyers organized in Vietnam?**

To enter into the legal profession in Vietnam, a Certificate of Lawyer Practice issued by the Ministry of Justice is required. This certificate will be issued to a person who has a bachelor's degree in law, first completed a twelve-month legal professional training course, then satisfied a probation period of twelve months for legal practice at a legal practice organization (e.g., law firms), and subsequently passed a final examination. To practice law as a lawyer, registration with the Vietnam Bar Federation and the Provincial Bar Association of the applicant’s place of residence is required.

**1.4 What type of legal fee arrangements is common in Vietnam?**

By law, a lawyer’s remuneration may be determined by (a) hours of work performed by lawyers, (b) a fixed charge, or (c) a contingent fee agreement or fee agreement with conditions.

**2. STRUCTURES FOR DOING BUSINESS**

**2.1 Is it necessary to set up a business organization in Vietnam to provide services or sell goods in Vietnam?**

Under Vietnam’s WTO Commitments and other bilateral and multilateral agreements to which Vietnam

is a party, Vietnam undertakes to allow cross-border supply for a number of services with no limitation. This means that an offshore business entity should be able to provide such services to Vietnamese customers without having to set up a business organization in Vietnam.

Vietnamese law also allows offshore traders without presence in Vietnam, who are from countries and territories which are members of the WTO or countries and territories which have bilateral agreements with Vietnam on this issue, subject to specific conditions, to exercise the import and export rights for goods, to purchase goods for export and sell such imported goods to Vietnamese traders.

## 2.2 What forms of business organizations/ commercial presences can be set up in Vietnam?

Offshore investors may select one of the following business organizations/commercial presences to carry out their investment projects in Vietnam.

- (a) Limited liability company (“**LLC**”)
- (b) Joint stock company (“**JSC**”)
- (c) Incorporated partnership
- (d) Branch

A branch has no legal status independent from the offshore company but is allowed to conduct commercial activities that generate profits in Vietnam.

- (e) Representative office

A representative office does not have a separate legal personality from the offshore company. It is established under the Vietnamese law in order to conduct market research, and seek and promote trade and business opportunities, but it is not allowed to engage in any direct profit-making activities in Vietnam. The establishment of a representative office is generally cheaper and faster than other commercial presences.

## 2.3 What are the process and time required for setting up each?

### (a) LLC, JSC and Incorporated Partnership (individually referred to as a “Company”)

To establish a company in Vietnam, pursuant to the Law on Investment No. 67/2014/QH13 dated 26 November 2014 of the National Assembly, as amended (“**LOI**”) and the Law on Enterprises No. 68/2014/QH13 dated 26 November 2014 of the National Assembly (“**LOE**”), the foreign investor must prepare an investment project and apply for (i) an investment registration certificate (“**IRC**”) and (ii) an enterprise registration certificate (“**ERC**”).

In some special investment projects as listed in the LOI (e.g., nuclear power plant, airport projects, seaport projects, projects of exploration, production and processing of petroleum, projects to which the State allocates or leases out land without tendering, auction or transfer, etc.), the foreign investors also need to carry out in advance certain procedures to secure a written in-principle approval from the relevant authority on the investment (“**In-Principle Approval**”). An IRC will be issued to the foreign investor within five (05) working days from the date of receipt of the In-Principle Approval.

With respect to the projects which are not subject to the In-Principle Approval, the investment registration office will issue an IRC to the foreign investor within fifteen (15) days from the date of receipt of the proper file.

The business registration office is responsible for considering the validity of the enterprise registration application file and will issue an ERC within three (03) working days from the date of receipt of the file.

### (b) Branch

Foreigner investors satisfying conditions regulated by Vietnamese law and international treaties, of which Vietnam is a member, may establish a branch in Vietnam by applying for a license issued by the competent authorities. Currently, the establishment of a branch office is allowed only for certain types of business, such as banking services, legal services, franchising services, computer services, management consultancy services, construction services, and non-life insurance businesses. Under the law, a branch license will be granted within seven (07) working days from the receipt of proper dossier by the competent authorities, except for special cases.

(c) Representative office

To establish a representative office in Vietnam, a foreign investor must apply for a license issued by the competent authorities. A license for establishing a representative office will be granted within seven (07) working days from the receipt of proper dossier by the competent authorities, except for special cases.

## 2.4 Are there any fetters on the business activities that can be carried on by business organizations in Vietnam?

In Vietnam, business organizations are free to engage in any business activities that are not prohibited by law. However, the LOI sets out certain business and industry sectors in which investment in general is conditional. The conditions vary depending on each particular business sector, and the investors should inquire into the specific conditions applicable. These conditions include, among others, governmental licenses/approvals/permissions, financial capability, human resources, material facilities, minimum investment capital, practicing certificate, certificate of satisfaction of conditions, etc.

# 3. CORPORATIONS

## 3.1 What are the different types of foreign-invested companies recognized in Vietnam?

In Vietnam, a foreign-invested company may be set up in the form of a one member LLC (“**One-Member LLC**”), two-or-more members LLC (“**Multiple-Member LLC**”), a JSC, or an incorporated partnership. The differences among the types of companies mainly include the (i) requisite number of shareholders/members, (ii) corporate governance structure, (iii) ability to offer securities, (iv) liability regime, and (v) assignment of charter capital.

(a) **One-Member LLC**

A One-Member LLC is owned by only one organization or an individual who is liable for all the debts and other liabilities of the company within the extent of the company’s charter capital. If the company is owned by an organization, subject to the number of authorized representatives appointed by the owner, the corporate governance structure is different. In case only one authorized representative is appointed, the corporate governance structure of the company includes: a Chairman, a General Director and Inspectors. In cases where two or more authorized representatives are appointed, the company shall have a Members’ Council, General Director and Inspectors. If an individual is the owner, the corporate governance structure shall have a

Chairman and a General Director, and the Chairman can assume the position of a General Director, or hire a General Director. A One-Member LLC may offer bonds by way of private placement.

**(b) Multiple-Member LLC**

A Multiple-Member LLC has at least two (02) members but not more than fifty (50). The members can be organizations and/or individuals and they are liable for the debts and other liabilities of the company within the respective amount of capital contributed or committed to be contributed to the company. Each member may assign all or part of his capital contribution to other members or to non-members, provided that the other members have first refusal rights. The corporate governance structure of a Multiple-Member LLC includes: (i) Members' Council, (ii) Chairman of the Members' Council, (iii) General Director, and (iv) Inspection Committee (required if the company has eleven (11) members or more, and optional if there are fewer than eleven (11) members). A Multiple-Member LLC may offer bonds by way of private placement.

**(c) JSC**

A JSC is an enterprise having its charter capital divided into shares. Shareholders can be organizations and/or individuals. The minimum number of shareholders is three (03) and there is no limitation on the number of shareholders. Shareholders are liable for debts and other liabilities of the company within the amount of capital that they have contributed. A JSC may issue shares and securities. Shares are generally free to be transferred. A JSC may select either of the following corporate governance structures:

- (i) General Meeting of Shareholders ("**GMS**"), Board of Management, Inspection Committee and General Director (The Inspection Committee is not required if the JSC has less than eleven (11) shareholders and corporate shareholders holding less than fifty percent (50%) of the total amount of shares of the JSC); or
- (ii) General Meeting of Shareholders, Board of Management and General Director. In this case, at least 20% of the number of members of the Board of Management must be independent members and there must be an internal auditing committee under the Board of Management. Independent members shall perform the function of supervision and inspection of the management and operation of the JSC.

#### **(d) Incorporated Partnership**

An incorporated partnership is an enterprise having at least two members being co-owners of the company jointly conducting business under one common name (“**Unlimited Liability Partners**”). In addition, there may be limited liability partners. Unlimited Liability Partners must be individuals who shall be liable for the obligations of the company to the extent of all of their assets. Limited liability partners shall only be liable for the debts of the company to the extent of the amount of capital they have contributed to the company. All partners shall constitute the Partners’ Council. The Partners’ Council shall elect one of the Unlimited Liability Partners to be the chairman of the Partners’ Council who may concurrently act as a General Director unless otherwise stipulated by the company’s charter. An Incorporated Partnership is not allowed to offer any kind of securities.

### **3.2 Are there any rules on corporate governance?**

The LOE creates the regulatory framework of corporate governance for all types of companies incorporated in Vietnam. Public companies are also subject to the Law on Securities and its implementing guidelines with stricter corporate governance rules.

### **3.3 Are there any regulations prohibiting a foreign-owned Vietnamese company from raising capital/debt from Vietnamese markets?**

There are no regulations of Vietnamese law prohibiting a foreign-invested company in Vietnam from mobilizing capital in the Vietnamese capital market.

Foreign-invested companies may obtain loans from credit institutions and foreign bank branches licensed and operating in Vietnam, or from offshore individuals and organizations. LLCs and JSCs can issue bonds. JSCs can issue shares, convertible bonds and other securities in accordance with Vietnamese law.

### **3.4 Can a Vietnamese company have a foreign General Director?**

Yes, a Vietnamese company may have a foreign General Director. There are no restrictions on the nationality of a General Director. However, the General Director must satisfy the conditions imposed on him/her under the LOE and regulations relevant to foreign employment, among others. The General Director holding the title of “legal representative” of a company with only one legal representative must reside in Vietnam and if s/he is absent from Vietnam then s/he must provide written authorization to another person to perform his/her rights and obligations as a legal representative of the company.

### 3.5 Are there any norms for the sharing of profits?

A company is entitled to distribute its legitimate after-tax profit to members/shareholders in compliance with the relevant regulations. The following table shows in detail the right to enjoy dividends, the body which has authority pertaining to profit sharing, and other relevant issues on earnings distribution in a Multiple-Member LLC and JSC.

Issues	Multiple-Member LLC	JSC
Rights	Members are entitled to receive profit distributions in proportion to their capital contribution in the company.	(i) Ordinary shareholders are entitled to receive profit distributions in proportion to their shares in the company subject to the General Meeting of Shareholders' approval. (ii) Shareholders who hold dividend preference shares are entitled to receive either a higher dividend than that of ordinary shares or an annual fixed dividend.
Authority	Members' Council	General Meeting of Shareholders
Conditions	An LLC is entitled to distribute profits to its members only if it makes profits after paying taxes and other financial obligations; and after payment of profits, the company will be able to satisfy its debts and other property obligation which become due.	A JSC is entitled to pay dividends to its ordinary shareholders after (i) paying taxes and other financial obligations as required by law; (ii) making appropriation for all funds of the company; and making up fully for previous losses in accordance with law and the company's charter. In addition, the company shall ensure that it is able to pay in full all of its debts and other property obligations which become due after payment of dividends.
Form of profit distribution	Profits can be paid in the form of cash or assets as stipulated in the company's charter.	Dividends can be paid in the form of cash, shares of the JSC or other assets as stipulated in the company's charter.
Illegal dividend	Where profits are paid contrary to the law, all members of the LLC must refund the money or assets they received, or they are jointly liable for all debts corresponding to the amount of diminished capital or the amount of distributed profits until all members have refunded such.	Where dividends are paid contrary to the law, the shareholders must refund the money or assets they received to the JSC, and where the shareholder is not able to do so, the members of the Board of Management (" <b>BOM</b> ") are jointly liable for the debts and other property obligations of the JSC corresponding to the amount of uncollected money or assets.

### 3.6 What type of shares can a company issue?

Only a JSC can issue shares. The following types of shares may be issued by a JSC:

(a) Ordinary Shares

A JSC must have ordinary shares.

(b) Preference Shares

A JSC can also issue (i) voting preference shares, (ii) dividend preference shares, (iii) refundable preference shares, and/or (iv) others stipulated by the company's charter.

Note that only organizations authorized by the Government and founding shareholders may hold voting preference shares. Founding shareholders' voting preference is valid for three (03) years from the date of issuance of the ERC.

## 4. LIQUIDATION

### 4.1 Please give a brief outline of the procedure involved in the winding up or liquidation of a company in Vietnam.

Under the law of Vietnam, a company can put an end to its existence by way of liquidation (or "winding up"). The liquidation is triggered by (i) a decision of the owner/Unlimited Liability Partners/Members' Council/General Meeting of Shareholders of the company, (ii) the expiry of the company's operational duration regulated in the corporate charter without any extension thereof, (iii) failure to meet the regulatory minimum number of members/shareholders for six (06) consecutive months, or (iv) revocation of the company's enterprise registration certificate.

A liquidation process generally proceeds in the following manner:

- (a) Passing a decision on liquidation of the company;
- (b) Sending the decision on liquidation and meeting minutes and related documents (if required) to business registration authority, tax authority, and employees of the enterprise. The decision on liquidation must be posted on the National Business Registration Portal and in public places at the head office, branch and representative office(s) of the company. If there are unsettled financial obligations, the debt settlement plan shall be enclosed with the decision on liquidation and sent to the creditors and people with relevant rights, obligations, and interests;
- (c) Performing public notification procedures on the commencement of liquidation;

- (d) Liquidating residual assets and settling pecuniary debts of which employment-related payments and taxes must be put in top priority;
- (e) Sending dossier on liquidation to competent authorities; and
- (f) Updating by the competent authorities of the legal status of the company on the national business registration database.

With respect to the liquidation triggered by revocation of the company's enterprise registration certificate, the business registration office must announce the status of the company carrying out the procedures for liquidation on the National Business Registration Portal at the same time as it issues a decision revoking the enterprise registration certificate or immediately after receipt of the effective decision on dissolution from a court. Upon expiry of one hundred eighty (180) days from the date of notification of the liquidation of the enterprise, the business registration office shall update the legal status of the company on the national business registration database.

## **4.2 Please give a brief outline of the bankruptcy proceedings in Vietnam.**

### **(a) Bankruptcy Petition**

The bankruptcy proceeding of a company begins with the filing of a petition to the competent Court by a concerned person who believes the company to be insolvent. If the Court determines that the company is insolvent, the company will go through a Rehabilitation Procedure (see (b) below) and/or a Bankruptcy Declaration (see (c) below).

A company is deemed to be insolvent when it fails to repay a debt within three (03) months following the due date of such debt.

The legal representative of a company in any form, the owner of a private enterprise, the chairman of the BOM of a JSC, the chairman of the Member's Council of a Multiple-Member LLC, the owner of a One-Member LLC, or Unlimited Liability Partners of an incorporated partnership, is required to file a bankruptcy petition upon observing that the company has become insolvent.

In addition, the following persons have the rights (but are not required) to file a petition for bankruptcy upon observing that the company has become insolvent:

- (i) unsecured/partially secured creditors after three (03) months from the due date of the

debt;

- (ii) an employee, the grassroots trade union (or immediately higher grassroots trade union in a place where a grassroots trade union has not been established) after three (03) months from the date the company fails to make payment of wages and other employment-related debts; or
- (iii) a shareholder or group of shareholders of a JSC holding 20% or more of ordinary shares for at least six (06) consecutive months or those holding less than 20% of ordinary shares for at least six (06) consecutive months so entitled by the company charter.

The Court's decision on the commencement of bankruptcy procedures does not prohibit the company from conducting its business activities but certain acts of asset disposal are restricted or subject to approval of the asset management officer or asset management and liquidation enterprise to ensure the preservation of the assets of the company.

**(b) Rehabilitation Procedure**

The first creditors' meeting shall be held in order to decide whether to allow the rehabilitation of the company's business ("**Rehabilitation Procedure**"). The resolution must be approved by more than half of the number of unsecured creditors representing at least 65% of the value of the unsecured debts. The resolution of the creditors' meeting shall be binding on all creditors.

If the business operation rehabilitation plan is approved, the company must formulate and submit to the Judge, creditors and the asset management officer or asset management and liquidation enterprise a rehabilitation plan within thirty (30) days from the date on which the resolution of the creditors' meeting is passed. The rehabilitation plan shall subsequently be presented at the second creditors' meeting and shall be passed by the same requisite quorum for the resolution of the first creditors' meeting.

The Rehabilitation Procedure shall be initiated by the decision of the Judge after the rehabilitation plan has been approved at the creditors' meeting. Once such decision of the Judge comes into effect, several statutory prohibitions and the supervision on the business operations shall no longer apply.

**(c) Bankruptcy Declaration**

In contrast, the Bankruptcy Declaration shall be made by the decision of the Court if (i) the first creditors' meeting fails to be convened or fails to pass a resolution, , (ii) the second creditors' meeting fails to be convened or fails to pass a resolution on the rehabilitation plan, (iii) the company fails to formulate the rehabilitation plan within the statutory time-limit, (iv) the company fails to implement the rehabilitation plan, (v) the first creditors' meeting passes a resolution requesting declaration of bankruptcy, or (vi) the court implements the simplified bankruptcy procedure (please see below).

Where the Court issues a decision on bankruptcy declaration, the assets of the company shall be distributed in the following order:

- (i) Bankruptcy fees;
- (ii) Wages, severance allowances, social insurance, health insurance, and others payable to the employees;
- (iii) Debts arising after commencement of bankruptcy procedure which serve the Rehabilitation Procedure; and
- (iv) Financial obligations to the State; unsecured debts payable to the creditors named in the list of creditors; secured debts which remain unpaid due to the insufficient value of the secured assets.

If the value of the assets is insufficient to make the payments in accordance with the abovementioned order, each entity having the same priority shall be paid the corresponding proportion of his or her debt.

Simplified Bankruptcy Procedure: If the Court finds that the company is unable to pay bankruptcy fees, it may declare bankruptcy in the initial stage of the bankruptcy proceedings.

## 5. FOREIGN INVESTMENT REGULATIONS

### 5.1 What are the sources of law regulating foreign investment in Vietnam?

Foreign investment in Vietnam is subject to Vietnamese law and bilateral and multilateral treaties to which Vietnam is a member.

In addition to Vietnam's WTO Commitments, Vietnam has signed trade agreements within the ASEAN framework, and free trade agreements ("**FTAs**") with the United States, Japan, Chile, South Korea and the Eurasian Economic Union.

On 08 March 2018, Vietnam signed the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("**CPTPP**") accords with other nations across the Pacific rim in Asia, Oceania, and the Americas. On 12 November 2018, Vietnam ratified the CPTPP and it came into force on 14 January 2019.

Vietnam is now a negotiating party to a number of important FTAs, including bilateral FTAs with the European Union and the Regional Comprehensive Economic Partnership. The negotiations on the FTA with the European Union were completed on 02 December 2015.

The new corporate and investment laws, which became effective from 1 July 2015, are designed to rectify the deficiencies of the prior legislation and establish distinct procedures for registration of foreign investment and corporate business licensing. Vietnam also ushered in a new Law on Real Estate Business and Law on Residential Housing, both of which became effective on 1 July 2015, in an effort to stimulate the real estate market and in particular, increase foreign investment in the residential real estate market.

Decree 60/2015/ND-CP of the Government, which became effective on 1 September 2015 ("**Decree 60**"), represents a significant step towards enhancing the liquidity of listed companies. Decree 60 provides that, subject to certain exceptions, foreign ownership in publicly traded companies can reach 100%. In addition to stimulating liquidity on the Hanoi and Ho Chi Minh City bourses, this welcome change should increase M&As and private equity activities by offering more attractive exit options through listings and public offerings.

## **5.2 What are the various methods in which foreign investment in Vietnam is possible?**

The following methods of foreign investment are possible:

- (a) Establishment of a new economic organization;
- (b) Investment in the form of capital contribution or purchase of shares in an existing economic organization;
- (c) Investment in the form of business co-operation contract with other investor(s) ("**BCC**"); and

- (d) Investment in the form of a public-private partnership (“PPP”) contract with a competent authority.

### **5.3 What is the current foreign investment policy?**

Since Vietnam became a member of the WTO in 2007, the Vietnamese Government has opened up previously restricted or closed sectors to foreign investors. Investors have rights to invest in the business lines that are not prohibited by the LOI and other laws. These prohibited business lines include, among other things, business in illegal narcotics, business in certain chemicals or minerals, prostitution business, and human trafficking.

Vietnamese law also provides the investment conditions applicable to foreign investors which include: (a) ratio of foreign ownership in a company; (b) investment method; (c) scope of investment activities; and (d) conditions regarding Vietnamese partners participating in the investment.

As of 26 June 2015, almost all the foreign ownership limitations in the service sectors specified under the WTO Commitments have been abolished. Certain highly-specialized and sensitive sub-sectors, such as telecommunication, transportation, agriculture and audiovisual services still maintain foreign ownership restrictions. In addition, Decree 60 introduces a significant change to foreign investment in listed and other public companies. Previously, foreign investors could only hold up to 49% of the equity in public companies. Decree 60 now allows foreign investors to hold an unlimited proportion of voting shares in Vietnamese public companies (including listed companies) subject to certain exceptions.

### **5.4 Can an offshore company set up a wholly-owned subsidiary in Vietnam?**

Yes. An offshore company can set up a wholly-owned subsidiary in Vietnam except for certain industry areas such as advertising, audiovisual services, logistics, services incidental to agriculture, hunting and forestry and telecommunication services, which require investment in the form of a BCC or a joint venture.

### **5.5 Are there any limitations on foreign ownership in a Vietnamese company?**

A foreign investor is allowed to own an unlimited proportion of charter capital of a company, except for the following:

- (a) The ownership ratio for those sectors restricted in international treaties of which Vietnam is a member must follow the limits set out therein;

- (b) Permitted foreign ownership ratio in the banking, civil aviation, logistics, publishing and press sectors is restricted;
- (c) A foreign investor being an individual or organization which itself does not operate in banking, securities or insurance or has been operational for less than two (02) consecutive years immediately preceding the year of owning the charter capital, may own a maximum of 51% of the charter capital of a securities business organization;
- (d) For public companies, the cap on foreign ownership is currently 49% if the company operates in a business investment line with conditions applicable to foreign investors but there is not yet any specific provision on foreign ownership ratio; and
- (e) The ownership ratio of foreign investors in State enterprises which conduct equitization or convert their ownership into another form is restricted under the law on equitization and conversion of State enterprises.

## 5.6 Are there any restrictions on land ownership by a foreign-invested company?

Yes. In Vietnam, private ownership of land is not permitted conceptually; however, Vietnamese law allows ownership of a right to use land (Land Use Rights or “LUR”). The outline of restrictions on a foreign-invested company regarding LURs is as follows:

- (a) Acquisition of LURs
  - (i) There are two (02) main regimes for a foreign-invested company to acquire LURs directly from the State:
    - (A) A foreign-invested company can be allocated land with collection of land use fees to implement an investment project for the construction of residential housing for purposes of sale or for sale in association with leasing out.
    - (B) The State can lease land with collection of annual rent or with collection of a one-off payment of rent for the entire lease term to a foreign-invested company which is using land to implement an investment project in the following: agriculture production, forestry, aquaculture or salt production; non-agricultural business and production; construction of public utility buildings for business purposes; and to implement investment project for residential housing for the

purposes of leasing out.

- (ii) Joint ventures between foreign investors and Vietnamese investors are also allowed to obtain LURs through receipt of contribution of LURs as capital.
- (iii) A foreign-invested company is allowed to receive an assignment of investment capital being the value of LURs.
- (iv) In addition, under several conditions, foreign investors are allowed to obtain LURs when they are assigned a project which contains LURs from domestic economic organizations or Vietnamese individuals.

(b) Term of duration of LURs

The term of duration of LURs for foreign investors shall be considered and decided on the basis of their investment project, etc.; however, in principle, the term shall not exceed fifty (50) years and should be equal to the term of the investment project. With respect to investment projects with large capital but a slow capital recovery rate and investment projects in areas with difficult socio-economic conditions or especially difficult socio-economic conditions which require a longer period of land allocation or land lease, such period shall not exceed seventy (70) years. Upon expiry of the duration, the State shall, at its sole discretion, approve the extension of the duration of land use if the land user wishes to continue using the land and has strictly observed the laws on land during the period of use, and such land use conforms to the approved land use zoning.

(c) Rights and obligations of foreign-invested companies using land

Foreign-invested companies using land have different rights and obligations depending on the payment method of land use or rental fees. For example, in respect of foreign-invested company leasing land from the State, the land use rights may only be mortgaged if the land rental is paid in lump-sum and in advance, while those leasing land from the State and with payment of land rental on an annual basis may only mortgage assets owned by them attached to the leased land.

Foreign-invested companies established as a result of share purchase in a Vietnamese company have different rights and obligations depending on whether the foreign investor holds the controlling shareholding percentage. For example, a foreign-invested company having Vietnamese party holding the controlling shareholding percentage shall have rights and

obligations similar to those of a Vietnamese company.

## 6. LABOR

### 6.1 What are the principal regulations governing the rights and obligations of employees?

The principle regulations governing the rights and obligations of employees are the Labor Code 2012, as amended and its implementing guidelines.

### 6.2 Is there any maximum working hours prescribed for employees?

The law provides that the normal working hours must not exceed eight (08) hours per day or forty-eight (48) hours per week. The employer may determine work on an hourly, daily or weekly basis. If the employer and employee agree on working on weekly basis, the limit is ten (10) hours per day and forty-eight (48) hours per week. For employees doing extremely heavy, harmful or dangerous jobs as prescribed by law, the working times must not exceed six (06) hours per day.

Overtime work must not exceed 50% of normal working hours per day or twelve (12) hours per day (including normal working hours and overtime working hours) if working on weekly basis. In any case, the total overtime work shall not exceed thirty (30) hours per month, and two hundred (200) hours per year. In certain special cases stipulated by the Government, the overtime can be increased to a maximum of three hundred (300) hours per year.

### 6.3 How can the services of an employee be terminated?

- (a) A labor contract shall be terminated in the following events:
  - (i) The expiry of the labor contract, except for some statutory special cases;
  - (ii) The tasks stated in the labor contract have been completed;
  - (iii) Both parties agree to terminate the labor contract;
  - (iv) The employee is sentenced to serve a jail term or to death penalty, or is prevented from performing his job in the labor contract in accordance with a judgment or decision of a court;

- (v) The employee dies or is declared by a court to have lost civil act capacity, is missing or dead;
  - (vi) The employee fully meets the requirements on the time of payment of social insurance premiums and the age of retirement stated in the Labor Code 2012;
  - (vii) The individual employer dies or is declared by a court to have lost civil act capacity, is missing or dead; or the institutional employer terminates its operation;
  - (viii) The employee is dismissed under the Labor Code 2012;
  - (ix) The employee unilaterally terminates the labor contract; or
  - (x) The employer unilaterally terminates the labor contract; the employer lays off the employee due to structural or technological changes or because of economic reasons, merger, consolidation or division of the enterprise.
- (b) An employer can unilaterally terminate a labor contract in any of the following circumstances:
- (i) The employee repeatedly fails to perform the work in accordance with the terms of the contract;
  - (ii) Where an employee suffers an illness and remains unable to work after having received treatment for twelve (12) consecutive months if he works under an indefinite term labor contract, or for six (06) consecutive months if he works under a definite term labor contract, or more than half of the labor contract term if he works under a labor contract for seasonal job or a specific job of under twelve (12) months;
  - (iii) The employer is forced to reduce production and employment while trying to recover from a natural disaster, fire, or a force majeure event as prescribed by law; or
  - (iv) The employee is absent from the workplace after fifteen (15) days from the expiry of the suspension of labor contract in a case specified by the Labor Code 2012.

Notice requirement: An advance notice of forty-five (45) days is required to terminate an indefinite term contract and thirty (30) days for a definite term contract. For a seasonal job or a job with a term of less than twelve (12) months and in cases as mentioned at Section 6.3(b)(ii) above, an advance notice of three (03) working days is required.

- (c) An employee can be dismissed where:
- (i) The employee commits an act of theft, embezzlement, gambling, deliberate violence causing injury, use of drugs inside the workplace, disclosure of business or technology secrets or infringement of intellectual property rights of the employer, or acts which cause serious damage or threaten to cause serious damage to the assets or interests of the employer;
  - (ii) An employee who has been disciplined through deferral of the period for a wage increase commits a second offense during the period when the initial disciplinary measure had not yet been absolved, or the employee was disciplined in the form of demotion and thereafter committed a second offense (“second offense” means a case where the employee recommitts the same breach for which he has already been dealt with for a breach of discipline and for which the disciplinary action has not yet been removed in accordance with the Labor Code 2012); or
  - (iii) An employee takes an aggregate of five (05) days off in one month (30 days) or an aggregate of twenty (20) days off in one year (365 days) on his own without proper reasons.
- (d) An employer is not allowed to terminate a labor contract:
- (i) With an employee who is suffering from an illness or injury caused by a work-related accident or occupational disease and is under medical care, except for cases where such employee has received medical care for a set period of time but is still unable to work as stated in Section 6.3(b)(ii) above;
  - (ii) With an employee who is on annual leave, personal leave or any type of leave permitted by the employer;
  - (iii) With a female employee for reasons based on marriage, pregnancy, taking maternity leave, or raising a child under twelve (12) months old, except where the female employer dies or is declared by a court to have lost civil act capacity, is missing or dead, or the institutional employer ceases its operations; or
  - (iv) The employee is on leave pursuant to the regime on parental leave prescribed in the Law on Social Insurance.

## 6.4 Are there mandatory requirements for grant of leave or public holidays?

By law, an employee is entitled to the following fully-paid leave:

- (a) Annual vacation: An employee who works under normal working conditions is entitled to twelve (12) working days of annual leave for each year of service, or fourteen (14) working days of annual leave for an employee who works under heavy, hazardous or dangerous job, or sixteen (16) working days of annual leave for an employee who works under extremely heavy, hazardous or dangerous job. If an employee works for less than one (01) year, he is entitled to leave on a pro-rata basis. The number of days of annual leave increases by one (01) day for every five (05) years of employment.

The employer is entitled to fix the timetable for annual leave after consulting the opinion of employees and informing the employees in advance.

- (b) Public holidays: An employee is entitled to a total of ten (10) days leave on Vietnamese public holidays, which are:
- (i) New Year's Day: one (01) day (solar calendar January 1);
  - (ii) Lunar New Year Festival: five (05) days (the last day of the lunar year and the first four days of the new lunar year or the last two days of the lunar year and the first three days of the new lunar year);
  - (iii) Hung Vuong's Memorial Day: one (01) day (Lunar calendar March 10);
  - (iv) Victory Day: one (01) day (April 30);
  - (v) International Labor Day: one (01) day (May 1); and
  - (vi) National Day: one (01) day (September 2).

Where the said public holidays coincide with a weekly day off, the employee shall be entitled to take the following day off.

Foreign employees working in Vietnam shall, in addition to the public holidays prescribed in Section 6.4(b) above, also be entitled to one (01) traditional new year holiday and one (01) national day holiday of their country.

- (c) Personal Leave of Absence: An employee may take fully paid leave of absence for personal reasons in the following circumstances:
- (i) Marriage: three (03) days;
  - (ii) Marriage of his/her children: one (01) day; and
  - (iii) Death of a parent (including a parent of his/her spouse), spouse, or child: three (03) days.
- (d) Leave without pay: An employee may take leave of absence without pay for personal reasons by notifying to the employer in the following circumstances:
- (i) Death of a paternal or maternal grandparent or sibling, or on the marriage of a parent or sibling: one (01) day; and
  - (ii) Agreement with the employer on leave: Upon agreement between the employer and the employee.

## **6.5 Can employment contracts contain restrictive covenants such as non-compete clauses?**

Currently, there are no laws or regulations that explicitly allow restrictive covenants in Vietnam, and therefore, the law is open to interpretation. A non-compete covenant may run counter to the Labor Code 2012, which provides that an employee is free to work for any employer of his choice. However, a confidentiality clause may be enforceable when an employee does work which is directly related to business or technological secrets as defined by law.

In practice, these restrictive covenants are normally stated in separate agreements from a labor contract. Once the employment relation has been terminated, it is expected that such restrictions should be still valid as civil agreements.

## **6.6 Can the employment contract compel employees to work for an establishment for a minimum period of time?**

Under Vietnamese law, it is relatively easy for an employee to terminate a labor contract. That said, the law requires certain procedures to be met and in the event that an employee unilaterally terminates the labor contract in contravention of the law, he/she shall not be entitled to any severance allowance and

must pay the employer compensation equal to half of one month salary. If the employee breaches the advance notice requirement, he/she shall compensate the employer an amount equal to his/her wage during the period for which advance notice was not provided. In addition, the employee will be liable for payment of compensation for costs of training (if any) in accordance with the provisions of the Labor Code 2012.

## **6.7 Are female employees entitled to maternity leave?**

According to the Labor Code 2012, a female employee is entitled to maternity leave prior to and after the birth of her child for a total period of six (06) months, provided that the maximum period of prenatal leave shall be two (02) months. When a female employee gives birth to more than one child at a time, she is entitled to an additional one (01) month leave for every additional child.

## **6.8 Are male employees entitled to paternity leave?**

Yes, a male employee currently paying social insurance premiums whose wife gives birth is entitled to a paternity leave of:

- (a) Five (05) working days for normal birth delivery;
- (b) Seven (07) working days, if his wife undergoes a surgical birth or gives birth under thirty-two (32) weeks of pregnancy;
- (c) Ten (10) working days, if his wife gives birth to twins, and additional three (03) working days for each child counted from the third; or
- (d) Fourteen (14) working days, if his wife undergoes a surgical birth to twins or more.

# **7. INTELLECTUAL PROPERTY**

## **7.1 What types of intellectual property rights are protected in Vietnam?**

The intellectual property rights that are protected under the Civil Code 2015 and the Law on Intellectual Property (the “**IP Law**”), which was adopted in 2005 and revised in 2009, can be categorized into three principal groups, including (a) copyrights and related rights; (b) industrial property rights (trademarks, trade names, trade secrets, industrial designs, layout designs, inventions and utility solutions, and geographic indications); and (c) plant variety rights.

## 7.2 Is there any procedure to be made to protect intellectual property in Vietnam?

In order to protect intellectual property in Vietnam, registration is required except for copyright, trade name, trade secret and well-known trademarks which are widely known by consumers throughout the territory of Vietnam. Generally, proper registration shall be accomplished under a first-to-file priority basis, except for layout designs and geographic indications.

The application for registration may be lodged in Vietnam or overseas if so allowed under the law of Vietnam and the treaty regarding intellectual property to which Vietnam is a party. Where the application is lodged overseas, the applicant may however need to satisfy certain requirements as provided under the law of Vietnam; for instance, an application requesting protection of an invention belonging to a Vietnamese entity or which was created in Vietnam is only lodged overseas after an application for the registration of such invention has been lodged first in Vietnam for over six (06) months, otherwise such invention may not be protected by the State of Vietnam.

## 7.3 Are there any international treaties regarding intellectual property that Vietnam is a party to?

Yes, Vietnam has entered into several international treaties regarding intellectual property such as those mentioned below.

Vietnam became a member of the WTO in January 2007. According to the terms of its accession to the WTO, Vietnam agreed to immediately comply with the terms of the Agreement on Trade-Related Aspects of Intellectual Property Rights (**TRIPs**).

Vietnam is also a party to the World Intellectual Property Organization (**WIPO**) Convention and to the following WIPO-administered treaties:

- (a) Berne Convention for the Protection of Literary and Artistic Works;
- (b) Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite;
- (c) Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms;
- (d) Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting

Organizations;

- (e) Paris Convention for the Protection of Industrial Property;
- (f) Madrid Agreement Concerning the International Registration of Marks and Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks; and
- (g) Patent Cooperation Treaty (“PCT”).

Although not a party to the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks (“Nice Agreement”), Vietnam follows the international system of classifying goods and services prescribed in the Nice Agreement.

In addition, Vietnam has entered into multilateral and bilateral agreements that significantly provide for its commitments to the protection of intellectual property rights, such as the Agreement Between the Government of the United States of America and the Government of the Socialist Republic of Vietnam on the Establishment of Copyright Relations (1998), the Agreement between Switzerland and Vietnam on the Protection of Intellectual Property and Cooperation in this Area (2000), Chapter II - Intellectual Property Rights of the Agreement Between the United States of America and the Socialist Republic of Vietnam on Trade Relations (2001), Chapter 9 - Intellectual Property Rights of the Agreement between Japan and the Socialist Republic of Vietnam for an Economic Partnership (2009), and Chapter 18 - Intellectual Property Rights of the CPTPP. The commitments on protection of intellectual property rights under the EU-Vietnam Free Trade Agreement will be implemented after the parties’ completion of the ratification procedures.

#### **7.4 Are there any regulations or guidelines by public institutions, such as the Fair Trade Commission or some other competition authority, in regard to intellectual property licenses?**

No. The Vietnam Competition Administration Department (“VCAD”) and the Vietnam Competition Council (“VCC”) are the competition authorities delegated to administer the Competition Law 2004, but so far, there have been no specific regulations or guidance regarding intellectual property licenses issued by them.

Nevertheless, the Competition Law 2004 deals with the activities of using misleading instructions (which contain misleading information about trade names, trade logos and geographic indications as well as other elements in order to mislead customers in their understanding of goods and service for competitive purposes) and infringement of trade secrets (including unfair approach, disclosure and use of trade

secret) as unfair competitive practices.

VCAD and VCC will be replaced by the National Competition Commission, Anti-Competitive Settlement Council, Anti-Competitive Complaint Handling Council and Competition Investigation Agency which will take charge of competition cases involving intellectual properties under the Competition Law 2018 which will take effect on 01 July 2019.

## 8. EXCHANGE CONTROL

### 8.1 Are there any restrictions on the amount of local currency that may be brought into or taken out of Vietnam?

There is no limitation on the amount of local currency (VND) that is allowed to be brought into or taken out of Vietnam; however, a border gate customs declaration shall be required if the cash amount carried by an individual upon entry into or exit from Vietnam is more than VND 15,000,000.00. Other payment instruments such as traveller's cheques, bank cards, saving books, securities are not subject to the customs declaration requirement. Furthermore, a certificate issued by an authorized credit institution or an approval from the State Bank of Vietnam must be obtained when one tries to leave the country bringing an amount of local currency more than the said threshold.

### 8.2 Are there any restrictions on the amount of foreign currency that may be brought into or taken out of Vietnam?

Even though the Vietnamese laws do not impose any limit on the amount of foreign currency brought into or out of Vietnam, an individual who carries foreign currency over the threshold of USD 5,000.00 on entering into or exiting the country must declare the amount with the border gate customs. This requirement applies to cash only; other payment instruments such as traveller's cheques, bank cards, savings books, and securities are not subject to the customs declaration requirement.

If the person intends to deposit foreign currency in cash brought into Vietnam with an authorized credit institution, he must have it declared at customs regardless of the amount. The declaration, in this case, shall be valid for sixty (60) days from the entry date of such person.

When trying to exit Vietnam with an amount of foreign currency more than the above-mentioned threshold, the person carrying such must have a certificate issued by a Vietnam-based credit institution or an approval from the State Bank of Vietnam, as the case may be. Nevertheless, where the amount of foreign currency in cash (even if over the above threshold) is less than the amount brought in on the most recent entry into Vietnam which is conducted within the previous twelve (12) months, it is exempted

from such certification requirement.

### **8.3 Are there any restrictions on the inflow or outflow of foreign exchange?**

The laws on foreign exchange control of Vietnam set out a broad range of permitted transactions in which foreign exchange can be made, including capital transactions and non-capital (current) transactions.

Capital transactions are made for the purpose of transferring capital between a resident and a non-resident in, among others, (a) direct investment, (b) indirect investment, (c) borrowing and repayment of foreign loans, and (d) lending and collection of foreign loans. In general, all capital transactions must be made through an account opened at a credit institution licensed to operate in Vietnam. Credit institutions may open an offshore bank account to implement a foreign loan. Meanwhile, enterprises may open an offshore bank account to implement a foreign loan if the opening of such offshore bank account is permitted by the SBV.

Obtaining foreign loans are strictly controlled under the Vietnamese laws. Residents who wish to obtain foreign loans must satisfy certain regulatory conditions. Furthermore, medium and long-term foreign loans must be registered with the State Bank of Vietnam (or through its provincial branches, depending on the principal amount), except for foreign loans in the form of deferred payment for import of goods. Short-term foreign loans are also not required to be registered, unless the term of such short-term foreign loan is extended to become over one (01) year or there is outstanding principal amount after the first anniversary of the loan which is not settled within ten (10) days therefrom. The State Bank of Vietnam shall conduct certification of registration of the loans within the total foreign loan limit approved annually by the country's Prime Minister. Any foreign loan is subject to quarterly reporting requirement.

Non-capital transactions refer to transactions between residents and non-residents which are not for the purpose of transferring capital. Making payment for import and export of goods and services is typical for this kind of transaction. All transactions which are payments and remittance of money relating to import and export of goods and services must be conducted in the form of remittance via an authorized credit institution. Residents having foreign currency revenue derived from export of goods and services or from other non-capital transactions must remit such foreign currency amount into a foreign currency account opened at an authorized credit institution in Vietnam consistent with the payment term in the contract/payment document, except for some cases for which the State Bank of Vietnam shall consider granting permission to retain a part of or all foreign currency revenue overseas.

## 8.4 Can a foreign investor repatriate profits earned from investment in Vietnam?

Yes. The Law on Investment 2014, as amended provides that a foreign investor may remit income derived from business investment activities from Vietnam after it has met its financial obligations to the State. If the income is derived from its direct investment activities and in Vietnamese Dong, the foreign investor will be permitted to convert the income into foreign currency at an authorized credit institution and remit it overseas within thirty (30) working days from the date of conversion.

# 9. M&A

## 9.1 What are the various methods of mergers and acquisitions available to Vietnamese companies?

The following are the most common methods:

### (a) Share acquisition

Share acquisition is the most popular M&A method in practice in Vietnam. Investors (both foreign and domestic ones) are allowed to purchase shares or receive an assignment of charter capital (equity) from an existing shareholder of a JSC or member of an LLC (“**Share Transfer**”), subscribe to newly issued shares from the target company itself to become shareholders of the local company, or contribute additional capital to become a new member of an LLC.

### (b) Asset acquisition

An investor may choose to make an asset acquisition in which the investor purchases key assets of the target company.

In addition, in many cases, the investor acquires not only the target company’s assets but also those associated with the company such as intellectual property, client base, distribution systems, supplier lists, etc. This is also referred to as business acquisition.

### (c) Merger/Consolidation

- **Merger** means the transfer by one or more companies (referred to as “merging companies”) of all of its lawful assets, rights, obligations and interests for purpose of merging with another company (referred to as the “merged company”). The merging

companies shall no longer exist.

- **Consolidation** means the transfer by two or more companies (referred to as “consolidating companies”) of all of their lawful assets, rights, obligations and interests for the purpose of consolidating among themselves so as to become a new company. The consolidating companies shall terminate their existence.

Under the Competition Law 2004, any of the above cases (which is referred to as “economic concentration”) will be prohibited if the relevant parties have a combined market share of more than 50 per cent of the relevant market. Such threshold in the relevant market has been removed under the new Competition Law 2018 which will take effect on 01 July 2019. Instead, this new law prohibits an economic concentration, if it causes or probably causes substantial anti-competitive effects on the Vietnamese market. Substantial anti-competitive effects are assessed based on the following factors: (i) combined market share of enterprises engaging in the economic concentration on the relevant market; (ii) the degree of concentration on the relevant market before and after the economic concentration; (iii) the relationship of the parties engaging in the economic concentration in the production, distribution or supply chain for a certain kind of goods/service or the business lines of the parties engaging in the economic concentration which are inputs of or complementary to one another; (iv) competitive advantage brought about by economic concentration in the relevant market; (v) the ability of enterprises after the economic concentration for increasing significantly their prices or return on sales; (vi) the ability of enterprises after the economic concentration for removing or preventing other enterprises from market entry or expansion; and (vii) particular factors in the sectors and domains where enterprises are engaging in economic concentration.

## 9.2 What is the process and timing for each method?

### (a) Share acquisition

Share Transfer (private companies)

#### (i) Internal approval

The shares in a JSC are generally free to be transferred; however, if the foreign investor being a non-founding shareholder acquires shares from the founding shareholders within three (03) years as from the company’s incorporation, an approval of the GMS is required.

The assignment of charter capital in an LLC is subject to the right of first refusal by the members.

(ii) Competition notification

Under the Competition Law 2004, a share acquisition whereby the involved parties have a market share of between 30% and 50% of the relevant market could be considered as economic concentration, in which case the legal representative of the involved companies must notify the competition authority in advance, unless the target company still falls within the category of medium and small-sized enterprises. The regulatory time-limit for receiving a written reply from the competition authority is forty-five (45) days from receipt of the notification.

Under the new Competition Law 2018, the involved parties must notify the competition authority in advance if such economic concentration would meet a notification threshold, which is yet to be specified. Basically, the threshold shall be determined based on the total assets, total turnover or combined market shares of the involved companies, or transaction value of the economic concentration. The competition authority has thirty (30) days from the receipt of a valid and complete notification dossier to notify the involved parties as to the result of its preliminary assessment. However, if the competition authority decides that it needs to procure an official assessment after the preliminary assessment, the regulatory time-limit for the official assessment shall be ninety (90) days from the date the preliminary assessment result has been notified to the involved parties, which may be extendable to no more than sixty (60) days.

(iii) Registration for share purchase

A foreign investor must register its purchase of shares with the Department of Planning and Investment of the province in which the head office of the target company is located (“DPI”), in the following circumstances:

- (a) The target company is operating in industries or trades in which business investment is conditional in respect of foreign investors; or
- (b) The purchase of shares results in the foreign ownership in the target company reaching 51% or more of the charter capital of that company.

The DPI must issue a notice to the foreign investor within fifteen (15) days from the date

of receipt of a proper file if the foreign investor satisfies the applicable investment conditions.

(iv) Notice on Change to Shareholding

The target company being a JSC must notify the local DPI of any change to founding shareholders and shareholders being foreign investors.

The LLC must register for change of ERC in case of change to company members.

The DPI shall make changes to the contents above within three (03) working days from the date of receipt of the notice of the target company.

**(b) Asset acquisition**

(i) Internal approval

Where assets are valued at 35% or more of the total value of assets recorded in the most recent financial statement of a JSC, or smaller percentage or value as stipulated in the company's charter, the approval of the GMS on the sale must be obtained.

Where assets are valued at 50% or more of the total value of assets recorded in the most recent financial statement of an LLC, or smaller percentage or value as stipulated in the company's charter, the approval of the Members' Council on the sale must be obtained.

(ii) Competition notification

Please refer to the process and timing in (a)(ii) above.

(iii) Property ownership registration

In Vietnam, there are certain assets the ownership of which must be registered with the competent State agencies, such as land use rights, buildings, cars and ships. Asset transfer agreements concerning this type of asset are almost always required to be registered and some must be notarized. Upon registration, the new owner shall be recorded in the title documents of the assets.

(iv) Investment registration

In the case of an asset acquisition, the foreign acquirer would generally have to set up a subsidiary in Vietnam and therefore would be required to undertake the procedures for registration of the investment project.

The timing for completion of the related regulatory procedures for this type of M&A transaction depends on the type of acquired assets. Changing the title documents of immovable assets is time-consuming depending on specific regulations of every single provincial government. Furthermore, in the case of incorporation of local subsidiary, the procedures for registration of the investment project can take anywhere from fifteen (15) to forty-five (45) business days as stipulated in laws or even much longer time in practice.

**(c) Merger/Consolidation**

(i) Internal procedures

A consolidation/merger contract shall cover the plan for employment of employees; procedures and conditions for conversion of assets; and shares and bonds. The charter of the consolidated company/merged company shall also be drafted. These important documents must be approved by the GMS/Members' Council of the involved companies.

(ii) Notification

The consolidation/merger contract shall be sent to all creditors and notified to employees within fifteen (15) working days from the date of its approval.

(iii) Competition notification

Please refer to the process and timing in (a)(ii) above.

(iv) Business and investment registration

The consolidated company and the merged company will need to carry out the procedure for business registration. Under the law, the investment registration would take fifteen (15) to forty-five (45) days to accomplish.

### 9.3 What are the criteria for determining which method is most suited to a particular case?

The investor may effect the M&A by one of the above ways in contemplation of the following issues:

- (a) What is the type of the asset to be acquired?

This question is relevant in many instances because the land use right is the typical asset of interest to be acquired. When the land use right is the object of the acquisition, certain conditions apply; for example, land use right granted from an annual-pay land lease contract with the State shall not be allowed to be transferred if no immovable assets have been created on the land. However the same shall not apply in a share acquisition since the ownership of the land use right still remains under the name of the acquired company even though the company's owners have been changed.

- (b) What shall be left?

In share acquisition, merger or consolidation transactions, generally, the successors shall continue to enjoy preferential treatments that have been granted by the State to the predecessors and shall, at the same time, be liable for pending financial obligations of the predecessors. But this does not apply in asset acquisitions where the acquirers will generally not inherit any liability concerning the assets purchased from the sellers.

- (c) How cumbersome are the transfer procedures?

In an asset acquisition, the acquiring company will have to obtain new licenses, approvals, permits or registration necessary for its operations. Contracts may be novated by way of the acquired company assigning the contractual rights and duties to the acquiring company; such novation may require consents from other contractual parties. Employees who are subject to the transfer will at first terminate their employment with the acquired company and then enter into new employment with the acquiring entity on a voluntary basis. Furthermore, depending on the specific type of the assigned assets, the acquiring company will have to undergo necessary procedures for receipt of ownership of the assigned assets from the acquired company. These points may make an asset acquisition more cumbersome than share acquisition from the licensing perspective. Therefore, depending on the scale and nature of the business and asset that the acquirer is interested in, share acquisition may be a better choice if the acquirer wishes to undergo a simpler transfer process.

#### **9.4 What are the additional requirements, if any, if one of the companies involved in the restructuring is listed on one or more of the stock exchanges in Vietnam?**

A foreign investor acquiring shares in a listed company will be required to obtain a securities trading code with the Vietnam Securities Depository (“**VSD**”) via a securities company licensed as a depository member of the VSD. After that, such foreign investor needs to open a securities trading account and/or a securities depository account at a securities company in order to conduct the transaction.

Furthermore, if the acquisition results in a major ownership of 5% or more of shares in a public company (listed or unlisted), within seven (07) days of the successful acquisition, a notification on the ownership must be addressed to the State Securities Commission (“**SSC**”) and if the shares of such company are listed, the Stock Exchange where the shares of such company are listed.

#### **9.5 When do compulsory takeover regulations apply?**

There is no regulation on mandatory takeovers in Vietnam’s laws other than the tender offer requirement imposed on specific acquirers under the Law on Securities 2006 (amended in 2010).

An acquirer is required to make a tender offer where (a) it intends to purchase voting shares leading to ownership of 25% or more of currently circulating shares in any one public company, (b) it and its affiliated persons holding 25% or more of the voting shares in any one public company wish to purchase a further 10% or more of currently circulating voting shares in the public company, or (c) it and its affiliated persons holding 25% or more of the voting shares wish to further purchase an additional shares of more than 5% but under 10% of the voting shares in the public company within less than one (01) year from the date of completion of the previous public offer tranche.

The Law on Securities 2006 (amended in 2010) also provides certain circumstances where the tender offer requirement is waived; for example, purchase of shares of a public company newly issued under an issuance plan passed by the company’s GMS will not trigger a tender offer even though the deal can lead to ownership of 25% or more of the voting shares in such company.

Furthermore, after conducting a public offer to acquire, an offeree holding 80% or more of the number of shares of a listed company must continue to purchase the remaining number of shares within thirty (30) days on the same conditions on price and method of payments offered in the public offer.

## 9.6 Would the above forms of restructuring also be available to foreign companies?

Yes, but it would depend on the business line of the target company, and in any event, the laws in this area have not been developed to provide clear and sufficient regulations on these deals.

# 10. TAX

## 10.1 What determines the extent of a corporation's liability to pay Vietnamese income tax?

Vietnam imposes corporate income tax ("CIT") on any organization engaged in production and/or business in goods and services earning taxable income.

The amount of CIT payable is equal to the assessable income multiplied by the tax rate. Assessable income within any tax period shall be equal to taxable income less tax exempt income and losses carried forward from previous years. Taxable income shall equal turnover less deductible expenses plus other taxable income.

Tax incentives (i.e., tax exemption or reduction as well as preferential tax rates) are also available when statutory conditions are satisfied.

## 10.2 How is residence treated for tax purposes?

The outline of the tax laws in Vietnam is as follows, though it is affected by tax treaties.

With respect to CIT, generally, enterprises established pursuant to the law of Vietnam must pay CIT on certain global income while foreign companies without resident establishments in Vietnam are only obligated to pay the tax on income arising in the country. Foreign companies having resident establishments in Vietnam must pay tax on (a) taxable income arising in Vietnam and not related to the operation of the resident establishment; and (b) taxable income arising in connection with the operation of the resident establishment in Vietnam. The resident establishments of foreign companies include, among others, local agents, branches, operational offices, plants, workshops, means of transportation, mines, petroleum and gas fields.

Similar rules are applicable to personal income tax ("PIT"). Accordingly, residents are subject to PIT on their worldwide income but non-residents are taxed on their Vietnam-sourced income only. An individual

is a resident if he or she has (i) been in the country for one hundred eighty three (183) days or more in a calendar year or in consecutive 12 months counting from his/her first arrival date; or (ii) had a permanent residence in Vietnam (including a registered residence which is recorded on the permanent/temporary residence card or a rented house in Vietnam with lease term of one hundred eighty three (183) days or more in a tax year in case of foreigner) and unable to prove tax residence in another country.

### **10.3 What is the corporate tax rate and how is it applied?**

The taxable corporate income is subject to the standard tax rate of 20% applicable to both local and foreign-owned companies. The rates for companies operating in oil, gas and natural resources exploration sectors range from 32% to 50% depending on the specific project. Preferential rates of 10% or 17% shall be granted to corporate taxpayers for a limited period based on the business scope of, and location of the investment project implemented by, the taxpayers.

### **10.4 What is the tax rate applicable to foreign companies on their income earned in Vietnam?**

Foreign companies having Vietnam-sourced income shall be subject to a Foreign Contractor Tax (“**FACT**”). Please see the response to Section 10.5(c) below for further information on applicable tax rates.

### **10.5 What other taxes are payable in Vietnam?**

(a) Business Registration Tax (“**BRT**”)

BRT is paid annually. Currently, the BRT ranges from VND 1,000,000 to VND 3,000,000 depending on the registered charter capital of the enterprises.

(b) Value-Added Tax (“**VAT**”)

VAT is levied on goods and services used for production, trading and consumption in Vietnam (including those imported from abroad). VAT rates are 0%, 5% and 10% depending on the nature of goods and services. The tax rate of 0% applies to certain goods and services only, such as exported goods and services, international transportation and goods and services not liable to value-added tax when exported, except for transfer of technology and intellectual property; offshore reinsurance services; credit provision, capital transfer and derivative financial services; post and telecommunications services; and exported products which are unprocessed mined resources and minerals and products that are made from mineral resources and the total value

of the mineral resources and energy costs account for 51% or more of the prime costs. Certain goods and services are exempt from VAT.

(c) Foreign Contractor Tax (“**FCT**”)

FCT is, in fact, not a separate tax but a combination of VAT and CIT or PIT. This special tax is imposed on foreign organizations not having any Vietnamese legal entity status and on foreign individuals doing business or receiving income from Vietnam (“foreign contractors”).

A foreign contractor in the form of an organization is conditionally entitled to pay FCT in one of three ways. It can pay the tax (i) indirectly through its Vietnamese counter-party (the “Withholding Method”), (ii) directly to the State if it adopts Vietnamese Accounting Standards (the “VAS”) and satisfies other statutory conditions (the “Deduction Method”), or (iii) under a method that combines the first and the second in terms of payment mechanism and tax rates (the “Hybrid Method”), in which the foreign contractor will pay VAT based on the Deduction Method but pay CIT based on the Withholding Method.

If the foreign contractors apply the Deduction Method, the VAT and CIT rates are the same as those applicable to Vietnamese companies. Based on the nature of the provided products or services, VAT rates of 2%, 3% or 5% and CIT rates ranging from 0.1% to 10% (for example, construction (2%), general services (5%), loan interest (5%) and royalties (10%)) shall be imposed to calculate tax liability of the foreign contractors, in cases where the Withholding Method or Hybrid Method is taken.

Please see Section 10.5(d) below for further information on PIT rates applicable to foreign individuals.

(d) Personal Income Tax (“**PIT**”)

PIT, as can be inferred from its name, is imposed on individuals only. Income from business, salaries and wages, capital investment, capital transfers, real property transfers, winnings or prizes, franchises, royalties, inheritance and gifts are all subject to PIT.

With respect to residents the factor is determined as discussed in Section 10.2 above, progressive tax rates with 5% increment apply to income in the form of salaries and wages starting from 5% for the first VND 5,000,000 earned per month and capped at 35% for any monthly earnings over VND 80,000,000. Other income are taxed at specific rates, for example, 2% of transfer price for real property transfers, 20% of taxable income for equity transfers, 0.1%

of selling price for securities transfers.

On the other hand, non-residents pay PIT at a fixed rate of 20% for income from wages and salaries and at different rates for different income, for example 5% applies to income from provision of services and 0.1% for equity transfers.

- (e) In addition to the above, Vietnam also imposes tax on goods and services imported or exported (Import and Export Duties); specific goods and services that are not encouraged to be consumed (Special Sales Tax); natural resources (Natural Resources Tax); and land use (Agricultural Land Use Tax and Non-agricultural Land Use Tax).

## 10.6 Is there a tax on dividends?

- (a) Individuals

Dividends received by individuals (both residents and non-residents) are subject to PIT at 5% except for some statutory exemption cases.

- (b) Corporations

Dividends paid by local-based enterprises from their after-tax profits shall be exempt from CIT.

## 10.7 Are payments subject to withholding tax?

Yes. Personal income payments that are made in favor of non-residents are subject to withholding tax. In addition, corporate income payments that are taxed by FCT paid under a Withholding Method are also withheld.

## 10.8 Is capital gains tax payable in Vietnam?

Yes. Gains derived by investors (both local and foreign) on capital assignment or securities transfer are subject to CIT (applicable to the corporate) or PIT (applying to the individual). The applicable CIT and PIT rate differs between residents and non-residents as follows:

		Corporate residents	Corporate non-residents	Individual residents	Individual non-residents
Capital assignment		20% of the capital gain amount			
Securities transfer	Non-public JSC				
	Public JSC				0.1% of the transfer price

## 11. DISPUTE RESOLUTION

### 11.1 Please give a brief outline of the civil procedure in Vietnam.

To commence a civil action, the plaintiff files a petition enclosed with documents and evidence to the competent People's Court (the "Court"). The Court's jurisdiction over the case shall be determined based on territorial basis, subject matter in dispute and plaintiff's limited option. The Court only accepts the petition if it is in writing and if certain compulsory contents are contained therein. If the Court preliminarily finds the case to be within its jurisdiction, it shall issue a notice to the plaintiff for advance payment of the court fee. After the payment is made, the Court officially accepts the case and prepares for a session to check submission, approach and presentation of the evidences among the concerned parties (similar to hearings conducted in other jurisdictions) to be commenced.

The session normally includes the Court-supervised conciliation between the litigants in which the Judge in charge of the case shall play an intermediary role assisting the litigants to reach an amicable agreement on the dispute if allowed by the law. If no settlement of the whole case is reached at the session, the Court shall fix the date for a trial.

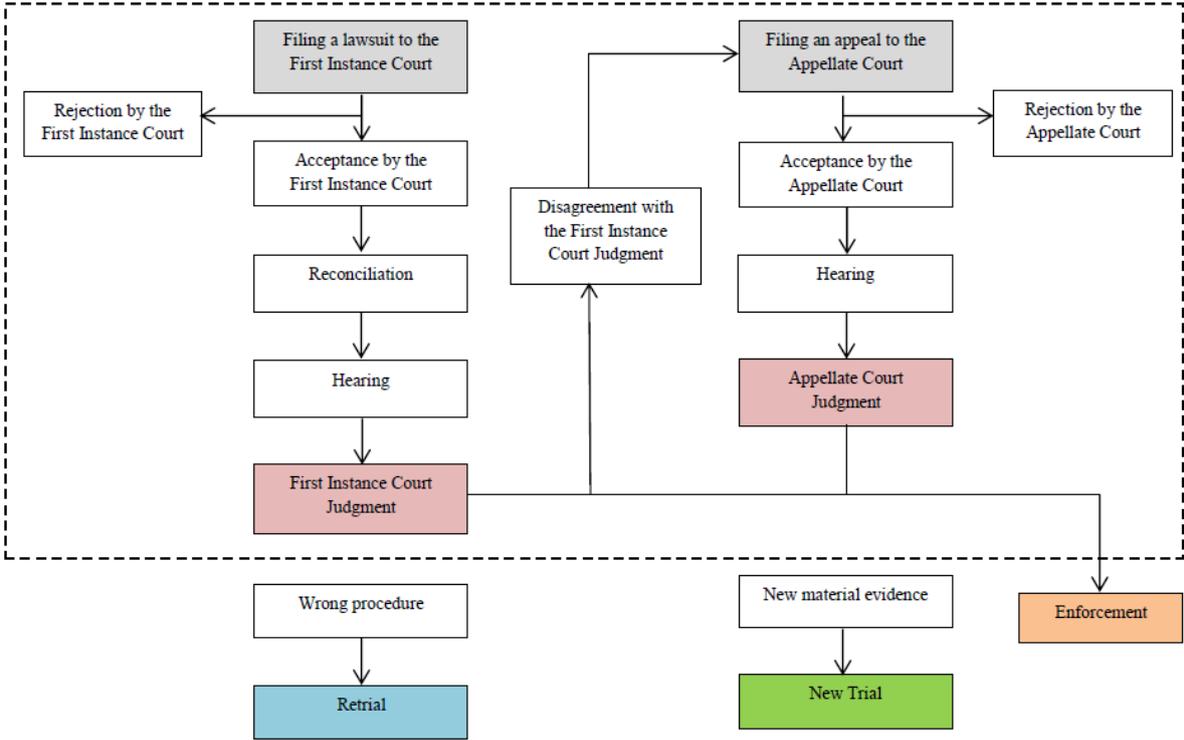
Standard civil cases shall be open to the public in the presence of all concerned persons. Generally, the Court shall act collectively when hearing the cases and make decisions on a majority basis. Litigants' rights to terminate or amend their claims or to agree voluntarily among themselves on the case are respected during the course of the litigation.

Judgments and decisions of first-instance Courts may be appealed. Furthermore, a legally enforceable judgment or decision of the Court shall be reviewed in accordance with the procedure for judicial review. If there is a serious breach of law or fresh evidence has been found, a new trial will be initiated.

During the proceedings, any concerned party shall have the right to petition the Court to apply, change or suspend one or more preliminary injunctive relief measures to protect evidence, to preserve the status quo, etc., in order to avoid irrecoverable damage or to secure legal execution.

A court judgment or decision, if not voluntarily enforced by the losing party, may be referred to the State agency named the Civil Judgment Enforcement Agency. Enforcement of a judgment is normally time-consuming in Vietnam due to the overload of cases that need to be enforced. Since 2009, establishment of certain Ho Chi Minh City-based private bailiff offices have been allowed with limited power to execute the Court’s judgment.

**Brief summary of civil proceedings in Vietnam**



Nishimura & Asahi

**11.2 How are foreign judgments enforced in Vietnam?**

A civil judgment issued by a court in the countries that have entered into a judicial agreement with Vietnam will be considered for enforcement in Vietnam. In absence of the judicial agreement, a foreign judgment shall be considered for recognition and enforcement on a reciprocal basis.

**11.3 What are the alternative methods of dispute resolution available in Vietnam?**

- (a) Commercial Arbitration

Under Vietnamese law, commercial arbitration centres may settle commercial cases if the parties have agreed to bring their case to arbitration. Currently, there are twenty three (23)

commercial arbitration centres in Vietnam. Vietnamese law allows both ad hoc and institutional arbitration.

(b) Commercial Mediation

To establish an alternative dispute resolution along with commercial arbitration, a decree on commercial mediation was passed by the Government in 2017. Under this decree, if mediation is successful, the mediation result shall be binding upon the involved parties and either party has the right to request the court to recognize such mediation result.

#### **11.4 What types of disputes are settled by foreign/international arbitration?**

The LOI permits the parties in a dispute, either of which is a foreign investor or a company having 51% or more of its charter capital held by foreign investors (or some other companies specified by the LOI), to agree and specify foreign arbitration or an international arbitration institution or an arbitral tribunal established by the parties in dispute, in addition to a court or an arbitration in Vietnam, to resolve the dispute. However, any dispute between a foreign investor and a local State administrative body relating to investment activities in Vietnam shall be resolved by a Vietnamese court or arbitration, unless otherwise provided in a contract signed between the competent State body and the foreign investor or in an international treaty of which the Socialist Republic of Vietnam is a member.

#### **11.5 How are arbitral awards enforced in Vietnam?**

(a) Domestic arbitral awards

Recognition of courts is not required for enforcement of domestic arbitration awards. If the award debtor fails to carry out the award voluntarily in a timely manner, the award creditor shall have the right to request the competent Civil Judgment Enforcement Agency to enforce such award.

(b) Foreign arbitral awards

Unlike domestic arbitral awards, foreign arbitral awards are subject to the recognition and enforcement by the local courts. A foreign arbitral award shall be considered being recognized and enforced in Vietnam if it is made in the territory of a foreign country which is a party to an international treaty on recognition and enforcement of foreign arbitral award with Vietnam. With respect to foreign arbitral awards made in the territories which are non-contracting States of a treaty to which Vietnam is a party, they shall be considered for recognition and enforcement on a reciprocal basis.

Vietnam is a member of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, thus, an award rendered by a convention State member is enforceable in Vietnam.

An application for recognition and enforcement of foreign arbitration award shall be first lodged with the Ministry of Justice of Vietnam and shall be subsequently transferred to the competent Court. The Court shall consider the recognition and enforcement of the arbitral award under the procedure specified in the Code of Civil Procedure.

## **11.6 What are the grounds on which an arbitration award can be challenged in the courts in Vietnam?**

### **(a) Domestic arbitral awards**

The court may, at the request of a party to the dispute, set aside an arbitral award given under one of the following circumstances:

- There was no arbitration agreement or the arbitration agreement is void;
- The composition of the arbitration tribunal and/or the arbitration procedure was inconsistent with the agreement of the parties or contrary to the provisions of the Law on Commercial Arbitration;
- The dispute was not within the jurisdiction of the arbitration tribunal; where an award contains an item which falls outside the jurisdiction of the arbitration tribunal, such item shall be set aside;
- The evidence supplied by the parties on which the arbitration tribunal relied to issue the award was forged; an arbitrator received money, assets or some material benefit from one of the parties in dispute which affected the objectivity and impartiality or the arbitral award; or
- The arbitral award is contrary to the fundamental principles of the laws of Vietnam.

### **(b) Foreign arbitral awards**

In order for a foreign arbitral award to be enforced in Vietnam, it must first be recognized by a competent court in Vietnam. However, a competent court may deny the recognition of foreign

arbitration award in the following circumstances:

- The parties to the arbitration agreement did not have the capacity to sign the arbitration agreement in accordance with the law applicable to each party;
- The arbitration agreement is unenforceable or invalid in accordance with the governing law;
- The award debtor had not received due notice of appointment of arbitrators or arbitration proceedings; or for other legitimate reasons, the respondent could not exercise its rights in the proceedings;
- The foreign arbitral award was entered into where no settlement was requested or was beyond the request of the disputing parties;
- The composition of the arbitration body and/or the arbitration proceedings was not in accordance with the arbitration agreement of the parties or the applicable law;
- The award is not yet enforceable or binding on the parties;
- The award has been overruled or suspended by the competent authorities of the countries where the award was made or whose law was the governing law;
- The relevant dispute cannot be resolved by arbitration in accordance with the laws of Vietnam; or
- The recognition and enforcement of the foreign arbitration award in Vietnam is contrary to the basic principles of the laws of Vietnam.

A Vietnamese court is not empowered to re-hear the case but only to review the documents to ensure that they are in compliance with Vietnamese law and the relevant treaty.

(As of January 2019)

This article is intended to provide only general, non-specific legal information and does not purport to give a legal opinion or advice on specific facts.