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Company, M&A and Employment Law Guide 2023

This is the annual complimentary guide combining the Company Law Guide, M&A Law Guide and Employment Law Guide

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Jurisdiction: **JAPAN**

Firm: **Nishimura & Asahi**
Authors: **Katsuyuki Yamaguchi, Stephen D. Bohrer, Yusuke Urano**

NISHIMURA & ASAHI

1. What are the key laws and regulations that govern company law in your jurisdiction?

Japan's Companies Act (Act No 86 of 26 July 2005, as amended to date), along with its subordinate regulations (collectively "Companies Act"), governs the formation of a company and corporate governance in Japan. A Japanese company is also required to establish articles of incorporation, which is an internal document that impacts a company's corporate governance.

2. What are the most common types of companies in your jurisdiction?

A *kabushik-kaishi* (**KK**), which is the equivalent of an ordinary corporation, and a *godo-kaisha* (**GK**), which is the equivalent of a limited liability company, are the two most common forms to establish an operating company in Japan.

A GK offers the following advantages in comparison to a KK:

(a) the capital registration tax and periodic maintenance/reporting costs associated with a GK are less than the corresponding costs associated with a KK;
(b) a GK offers considerable flexibility with respect to corporate governance and designation of management responsibilities;
(c) a GK can receive pass-through tax treatment for US income tax purposes, while a KK cannot; and
(d) completing a contribution-in-kind can be accomplished more quickly and with lower administrative costs, which can be helpful if a member plans to contribute assets (such as intellectual property rights, assets necessary to conduct the subject business, shares of a company, etc) to a GK in exchange for a membership interest.

A KK offers the following advantages in comparison to a GK:

a) a KK is led by its Representative Directors, a title that is highly revered in Japanese business circles and may make it easier to attract quality executives;
b) if equity in the Japan subsidiary will be granted to directors, employees or other third parties or if a capital markets transaction is contemplated, then a KK is the only practical corporate form to provide such equity participation;
c) a KK offers practical advantages to a parent company that wishes to maintain tight control over the operations of a Japan subsidiary with minority shareholders since only a Representative Director of a KK is entitled to bind the company in contracts with third parties (absent a board delegation to an additional person), while each member (or a designated executive officer) of a GK has such power of representation; and
d) a KK takes its origins back to 1873, whereas a GK has been available only since 2006, so Japanese statutes, case law and local market practices are more developed with respect to a KK than with a GK (although such difference is likely to wane over time).

3. How long does it take to set up a company in your jurisdiction? Are there any ways to speed up the entire process?

It normally takes approximately one month to establish a company in Japan (regardless of whether a KK or a GK form is selected). Approximately two weeks is required to complete the paperwork for submission to the

Legal Affairs Bureau, which is the Japanese governmental body responsible for the registration of companies. While the paperwork is not complex or detailed, original signatures are required (ie no fax or scans) for documentation submitted to the Legal Affair Bureau; all documentation is in the Japanese language; and certain documents must be notarised (despite the pandemic). Upon receipt of a full submission, it normally takes the Legal Affairs Bureau up to two weeks to complete the registration of the establishment of the company. The date of establishment of the company is the date the application for registration was made, and the company may start its business operations from this date. There are no fast track setup procedures available in Japan.

The formation process can be completed more smoothly if a resident of Japan serves as the incorporator due to the local requirement that evidence from a local bank must be submitted to demonstrate receipt of the purchase price for the initial subscription of shares. A foreign investor new to Japan may have difficulty producing such documentation since it most likely will not have a local bank account. We can assist in satisfying this funds receipt delivery requirement.

4. What are the main registration requirements for companies in your jurisdiction?

A Japanese company, such as a KK or a GK, is established by commercial registration at the Legal Affairs Bureau. In general, among other things, the corporate name, the address of the headquarters office (and branch office, if any), the business purposes, the amount of capital, the total number of authorized shares, the types and numbers of the outstanding shares, the rules on the limitation of share transfer (if applicable), the name of the directors, the name and address of the representative directors, and the method of public notice are required to be registered. For an application for commercial registration, certain documents evidencing the matters to be registered are required.

Foreign investors may also conduct business in Japan by establishing a branch office. A branch office is also required to be registered at the Legal Affairs Bureau to begin its business operations in Japan. In general, among other things, the address of the branch office, the name and address of the representative in Japan, the date of establishment of the branch office, and the method of public notice are required to be registered.

After establishment, a company is required to promptly make various notifications, including a notification of incorporation to the national tax authority and the prefectural tax authority, and a notification to the Labor Standards Inspection Office and the Public Employment Security Office if it has employees.

5. What are the main post-registration reporting requirements for companies in your jurisdiction (eg annual reporting requirements and documents filing)?

A company is required to publicly disclose a simplified balance sheet for each fiscal year in the official gazette ("*kampo*") or a daily newspaper, or a full balance sheet on a website in accordance with its articles of incorporation. If a company falls under the definition of "large company" (a company with capital of JPY500 million or more or total debts of JPY20 billion or more), it is required to publicly disclose both its balance sheet and profit and loss statement. There is no similar reporting obligation for a branch office.

In the event of changes to the registered information of a company, it is required to update its commercial registry within two weeks.

Further, both companies and branch offices are required to file annual tax returns with the relevant tax office.

If a company is listed, there are extensive disclosure obligations under the Financial Instruments and Exchange Act ("FIEA") and the various rules of the relevant stock exchanges.

6. How to set up foreign companies in your jurisdiction?

There is no formation process specialised for a foreign owned entity in Japan (wholly or in part). See questions 2 and 3 for information about the company formation process in Japan.

In addition to setting up a subsidiary, a foreign

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Katsuyuki Yamaguchi has been a Managing Partner of Nishimura & Asahi NY LLP since 2018. He provides a wide range of advice on M&A/corporate legal affairs to many domestic and overseas listed and unlisted companies. He has engaged in a substantial number of transactions in the field of M&A over the years, ranging from complex, large-scale projects to small-scale projects, including business integration, acquisitions, organizational restructuring, joint ventures, and capital and business alliances for operating companies. He also has provided advice on corporate legal affairs common to many operating companies, including shareholder meetings, corporate governance, various commercial transactions and contracts, financing, personnel and labor affairs, disputes, crisis management, intellectual property, information technology, life sciences, and business succession. In recent years, he has supported a number of business acquisitions by Japanese companies in the United States, Europe, and Asia, as well as overseas expansion by Japanese companies, including into Latin America, Africa, and other developing countries, and has provided local support services after such expansion. He makes full use of his network with local law firms around the world and has significant experience with handling complex multi-country transactions. He also has developed a reputation for providing practical and clear legal advice that is consistent with modern business practices. Currently, he is also serving as an outside director or statutory auditor for several listed companies and is deeply involved in their management decisions.

Qualifications

- Admitted in Japan (1991)
- Admitted in New York (1998)

Education

- University of Paris II (D.S.U., Commercial Law) (1998-99)
- Columbia University School of Law (LL.M., Stone Scholar 1997)
- The University of Tokyo (LL.B.) (1989)

Other Professional Experience

- Managing Partner, Nishimura & Asahi NY LLP (2018-Present)
- Director, Lex Mundi (2016-2020)
- Statutory Auditor, Hakuhodo DY Media Partners Inc. (2015-Present)
- Statutory Auditor, Hakuhodo DY Holdings Inc. (2015-Present)
- Statutory Auditor, BrainPad Inc. (2013-Present)
- Statutory Auditor, Jupiter Telecommunications Co., Ltd. (2011-2018)
- Statutory Auditor, FreeBit Co.,Ltd. (2007-Present)
- Statutory Auditor, Rakuten, Inc (2001-Present)
- Simeon & Associes, Paris (1999)
- Debevoise & Plimpton, Paris (1998)
- Debevoise & Plimpton, New York (1997-1998)

Work Highlights

<<Deal list to be provided upon request>>

ABOUT AUTHOR

Representative Publications

<<English publications only>>

- LexisNexis Company Law Guide 2021 (Japan Chapter) (2021)
- The Legal 500: Corporate Governance Comparative Guide (Japan Chapter) (2019, 2020)
- Corporate Governance and Directors' Duties: Japan (Practical Law Global Guide: Corporate Governance and Directors' Duties 2018, 2019, 2020)
- Corporate Governance and Directors' Duties Global Guide (Japan Chapter) (Practical Law Corporate Governance and Directors' Duties Global Guide 2015/16, 2016/17)
- Corporate Governance and Directors' Duties Multi-jurisdictional Guide (Japan Chapter) (Practical Law Corporate Governance and Directors' Duties Multi-jurisdictional Guide 2012/13, 2013/14, 2014/15)
- Cross-border Corporate Governance and Directors' Duties handbook 2008-2011 (Japan Chapter) (PLC Cross-border Corporate Governance and Directors' Duties handbook 2008-2011)

<<Japanese publications upon request>>

Recognitions

- The Legal 500 Hall of Fame (2020)
- The Legal 500 Asia Pacific (2007-2019)
- Best Lawyers (2013-2021)
- ALB Japan Law Awards 2017
- The American Lawyer Global Legal Awards 2017

Languages

Japanese, English

company wishing to engage in business operations in Japan can also elect to establish a branch office in Japan. Establishing a branch office is the simplest way for a foreign company to establish a base for business operations and engage in continuous transactions in Japan. A branch office of a foreign company should be registered with the Legal Affairs Bureau. A branch office does not have its own legal corporate status. It is deemed to be encompassed within the corporate status of the foreign company, and therefore such foreign company is ultimately responsible for all debts and credits generated by the activities of its Japanese branch office (which is the reason few companies engaging in substantial business operations in Japan operate through a branch structure). A Japanese branch office of the foreign company, however, may open bank accounts and lease real estate under its own name as a Japanese branch office of the foreign company.

7. Are there any controlling factors or restrictions on foreign companies in your jurisdiction?

The Foreign Exchange and Foreign Trade Act (**FEFTA**) primarily governs foreign investments in Japan and provides some restrictions on foreign investment in certain restricted businesses. The Ministry of Finance and the Ministry of Economy, Trade and Industry are primarily responsible for enforcing the FEFTA.

Under the FEFTA, a foreign investor is generally required to file a prior notification with Japan's Ministry of Finance and the competent ministry overseeing the industry in which the target is operating its business and wait for a specified period for the purchase of: (i) one share or more of a private company; or (ii) more than 1% of the outstanding voting rights or the issued shares of a listed company, in each case if the company engages in certain businesses that the Japanese government has deemed critical. This includes not only the industries that are regarded as critical from a traditional national security perspective, such as weapons, aircraft, nuclear and energy, but also an expanded range of businesses including certain types of IT related manufacturing businesses, software development businesses and telecommunication services related businesses (**Regulated Business Segments**), unless an exemption applies. After its review of the notification, the government may recommend a change to the transaction scheme or order the

cancellation of the investment.

In addition, certain investments by a foreign investor that do not require prior notification require a post-acquisition report to be submitted, depending on the type and size of the investment.

Even after the investment, if the company conducts business in a Regulated Business Segment, foreign investors will be required to obtain Japanese government approval to vote their shares for: (i) their nominees (or those of a closely related person) to serve as a director or company auditor of such Japanese company if the nomination is made by the foreign investor or a third party; and (ii) the transfer or cessation of a Regulated Business Segment if the proposal is made by the foreign investor.

8. Are there any incentives to attract foreign companies to your jurisdiction?

The Japanese government offers incentives to attract foreign companies to Japan, including tax incentives that are available for companies opening or expanding their headquarters' functions in local areas, incentives regarding Special Zones, incentives based on the Industrial Competitiveness Enhancement Act, incentives based on the Act on Special Measures for Productivity Improvement, the tax deduction system based on the Regional Future Investment Promotion Act, tax incentives for research and development, etc.

In addition to the central government's incentives, many local governments (prefectures and municipalities) also offer their own unique incentives to facilitate investment into their respective regions.

9. What is the typical structure of directors (or family management structure) and liability issues for companies in your jurisdiction? What are the key challenges for directors during the pandemic?

There are numerous corporate governance forms available for a company in Japan, especially if the company is listed. However, an overwhelming majority of privately held Japanese companies have adopted the corporate governance form of a KK that has a board of directors and a company auditor. A company having capital stock of JPY500 million or more or having liabilities of JPY20 billion or more is also required to appoint an accounting auditor.

The principal duties of directors under the Companies Act include the following:

a) duty of care (ie directors must manage the business with the care of a good manager);
b) duty of loyalty (ie directors must perform their duties for the company in a loyal manner);
c) duty to monitor (ie directors must monitor the performance of other directors, including the Representative Directors); and
d) duty to establish a risk management system (ie directors must establish internal control systems to manage risks associated with the business).

Despite the name, a company auditor is not an independent accounting firm. For a privately held company, a company auditor is an individual who monitors the execution of the directors' activities to help ensure compliance with Japanese law and reviews the company's internal control systems to help ensure the accuracy of the financial statements. See question 21 for further information about company auditors.

Directors and company auditors who neglect their duties can be held liable to the company for damages arising as a result thereof. In addition, directors and company auditors will be liable to third parties (eg creditors) for damages arising as a result of willful misconduct or gross negligence in the performance of their duties. Shareholders also may seek enforcement action against a director or company auditor by initiating a lawsuit on behalf of the company (ie a derivative claim).

One of key challenges during the pandemic for directors from a corporate governance perspective was the difficulty to hold shareholders' meetings in-person in consideration for the prevention of the spread of COVID-19. Before the COVID-19 pandemic, it was generally understood in Japan that holding a

shareholders' meeting on a virtual basis only was not permitted (though the possibility of holding a virtual meeting was a topic of interest). The COVID-19 pandemic accelerated discussions on the ability to hold virtual shareholders' meetings, and the Industrial Competitiveness Enhancement Act was amended on 16 June 2021 to add provisions that supersede the Companies Act in order to permit a listed company to hold a shareholders' meeting on a virtual basis only (subject to certain conditions).

10. What is the minimum number of directors and shareholders required to set up a company? Are there any requirements that a director must be a natural person?

A Japanese company can be owned by one shareholder (if organised as a KK) or one member (if organised as a GK).

If a KK has adopted a corporate governance form of directors without a board of directors, then at least one director must be appointed who has the authority to enter into contracts on behalf of the company. If a KK has adopted a board of directors corporate governance form, then at least three directors must be appointed, at least one of whom is designated a Representative Director (which provides such person with the authority to enter into contracts on behalf of the company). Only a natural person can serve as a director.

A GK does not have directors. Among the members, one or more managing members must be designated to undertake responsibilities similar to directors. A managing member can be a natural person or an entity. If an entity is designated to serve as the sole managing member, then such entity must select individuals to serve as executive officers and perform the duties of the managing member. An executive officer does not need to be an employee of the member.

11. What are the requirements on how shares are offered in your jurisdiction?

Under the Companies Act, the same procedure is required to be followed when a company either issues new shares or sells outstanding shares that the company held as treasury shares. There are three methods of issuing new shares or selling outstanding shares, which are a public offering, a third party allotment and a shareholder allotment.

In the case of a company with share transfer restrictions, the company generally issues new shares or sells outstanding shares by way of a shareholder allotment or a third party allotment, which generally requires a special resolution at a shareholders' meeting. On the other hand, in the case of a company not subject to share transfer restrictions (ie including a listed company), the issuance of new shares or sale of outstanding shares requires the approval of a board of directors meeting. However, the approval of a shareholders meeting will also be required if the shares are to be issued at an especially favorable price to the subscribers. Further, if such issuance of new shares or sale of outstanding shares would cause a change in control, the company is required to notify each existing shareholder or make a public notice, and opposing shareholders who hold 10% or more of the outstanding voting rights may request approval of a shareholders meeting in order to validate such issuance.

In addition, under the FIEA, when a company offers newly issued shares or sells outstanding shares, in general, a securities registration statement has to be filed with the Prime Minister. The securities registration statement includes detailed information regarding the company and the shares and is publicly available online once registered. There are some exemptions to the requirements under the FIEA including, similar to other jurisdictions, the equivalent of a private placement, where, among other conditions, the company is not offering securities to 50 or more investors, but this exemption does not apply if the company is listed.

In the case of a listed company, the Tokyo Stock Exchange's Securities Listing Regulations will also apply. If a listed company either issues new shares or sells outstanding shares corresponding to 25% or more of the existing issued voting shares or that changes the control of the listed company, then the company is required to obtain an opinion from an independent third party or

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Mr. Bohrer is a Partner of our Firm and a leader of our Cross-Border Transactions Group. Mr. Bohrer was previously associated with top-tier U.S. international law firms for 12 years, and has experience running cross-border transactions on the ground in the United States, Japan, Singapore, India, Indonesia, and Thailand. Mr. Bohrer has represented U.S. and non-U.S. buyers and sellers in cross-border corporate transactions in various industries and deal forms, including stock and asset acquisitions, mergers, private equity and venture capital investments, joint ventures and strategic alliances.

Since joining Nishimura & Asahi in 2004, Mr. Bohrer has represented numerous multi-national clients in connection with their investments into Japan and their ongoing general commercial transactions (including insurance matters, franchising, licensing, employment, corporate governance and commercial real estate leasing matters). Mr. Bohrer also has extensive experience leading and documenting Japanese and cross-border due diligence exercises with respect to various industries, and representing Japanese clients in connection with their multi-jurisdiction corporate acquisitions.

Mr. Bohrer has represented U.S. issuers in the United States, foreign private issuers from numerous jurisdictions in Asia and global investment banks in connection with their various capital markets transactions, including registered initial and follow-on public offerings in the United States, Rule 144A/Regulation S equity and debt offerings, block trades, dual listings and privatizations, and also assessing whether exemptions exist to the application of U.S. securities laws to overseas business transactions.

Mr. Bohrer writes and lectures widely on these and other topics.

Qualifications
- Admitted in New York (1993)
- Registered as a Gaikokuho Jimu Bengoshi (Primary Jurisdiction: New York, U.S.A.) (2005, voluntarily deregistered in 2018 and reregistered in 2020) (Not engaged in a Gaikokuho Kyodo Jigyo)

Education
- Georgetown University Law Center (J.D.) (1992)
- Wharton School of Business, University of Pennsylvania (1988)

Other Professional Experience
- Nishimura & Asahi (2020-Present)
- Nishimura & Asahi NY LLP (2018-2020)
- Nishimura & Asahi (2004-2018)
- Shearman & Sterling LLP (1999-2004)
- Morgan, Lewis & Bockius LLP (1997-1999)
- Mayer Brown (1992-1997)

Work Highlights
Available upon request

Representative Publications
Over 30 articles written on Japanese law
For full list of publications, please see below:
https://www.jurists.co.jp/en/attorney/0081.html

Languages
English

obtain the approval of its shareholders.

12. What are the key laws and regulations on employment in your jurisdiction that companies should be aware of? Are there any aspects of employment law that are heavily regulated?

The two principal sources of employment law in Japan are the Labor Standards Act (Act No 49 of 7 April 1947, as amended to date) and its Enforcement Ordinance (Ordinance of the Ministry of Health and Welfare, No 23 of 30 August 1947), both of which provide minimum standards for the terms and conditions of employment contracts and general employment matters. Other important sources of employment law include the Labor Contracts Act, the Industrial Safety and Health Act, the Employment Security Act, the Act on Improvement of Employment Management of Part-Time Workers, and the Act for Securing the Proper Operation of Worker Dispatching Undertakings and Improved Working Conditions for Dispatch Workers.

An aspect of Japanese labor law that frequently catches foreign investors off guard is that employment is not "at will", so an employer in Japan cannot terminate an employee without good cause. Even if an employment contract stipulates that an employer may terminate the employment relationship for any reason, such provision normally will be held unenforceable as an unlawful attempt to bypass Japanese labor laws. The threshold for "good cause" in Japan is extremely high in comparison to many other countries. Japanese labor law stipulates that the termination of an employee is invalid unless there is "objective good reason" for the termination and it is "acceptable in light of socially accepted standards." The foregoing standard is not defined or explained by Japanese statutes, which has given Japanese courts great latitude to determine when this standard is satisfied. Accordingly, employers in Japan normally negotiate a severance package with the affected employees, which calls for the employer to pay several months' wages (or more) as a separation payment in exchange for the employee's voluntary resignation. A company's Representative Directors and most likely its directors who hold executive authority are not considered employees and, therefore, do not benefit from the pro-employee provisions of Japanese labor laws.

13. What is the corporate governance regime in your jurisdiction?

As explained in question 1, all Japanese companies are generally regulated by the Companies Act. The Ministry of Justice is responsible for administering and enforcing the Companies Act.

In addition, listed companies in Japan are also regulated by the FIEA, which the Financial Services Agency of Japan ("FSA") is responsible for enforcing and the Securities Listing Regulations published by the Tokyo Stock Exchange, the largest securities exchange in Japan. The other stock exchanges generally follow the Tokyo Stock Exchange's Securities Listing Regulations and publish quite similar regulations.

In addition to these laws and regulations, there are two important codes that work in tandem to encourage better corporate governance by listed companies in Japan:

a) The Corporate Governance Code, which was introduced by the Tokyo Stock Exchange in 2015 (and revised in 2018 and 2021), stipulates important corporate governance principles for all companies listed on securities exchanges in Japan. The latest revision to the Corporate Governance Code (which became effective on 11 June 2021 and enhances various corporate governance requirements) was made in tandem with the restructuring of the Tokyo Stock Exchange, in which the total market segments of the exchange was reduced from five to three, with one segment being referred to as the "Prime Market" (the segment available only to those companies that achieve a higher level of corporate governance as required under the recently revised Corporate Governance Code). An aim of the latest revision to the Corporate Governance Code and the restructuring of the Tokyo Stock Exchange is to attract investments by global institutional investors in Japanese listed companies. See question 20 for further information about this restructuring of the Tokyo

Stock Exchange.

b) The Stewardship Code, which was introduced by the FSA in 2014 (and revised in 2017 and 2020), serves as a principle-based guide for institutional investors to promote sustainable growth of investee companies and enhance the medium- and long-term investment return for clients and beneficiaries.

14. Does establishing a company in your jurisdiction grant any kind of residency rights? Are there any conditions that in order to receive these residency rights (if applicable) one must partner or establish a joint venture with a local (eg a citizen of your jurisdiction)?

A foreign investor who wishes to work in Japan must obtain an appropriate work visa in advance of entering Japan. Merely establishing a company in Japan does not automatically provide a foreign investor owner with a working visa or residency rights. However, the so-called Investor/Business Manager Visa may be obtained if a foreign investor establishes a company in Japan and satisfies certain conditions, including those relating to the scale of the business.

15. When is a company subject to tax in your jurisdiction? What are the main taxes that may apply to companies in your jurisdiction?

The most important tax that applies to companies in Japan and their business activities is corporation tax. Corporation tax is a tax imposed on companies that are engaged in business activities in Japan on the profits generated by such business activities. The taxable income of a company is calculated by reducing the amount of gross revenue by the amount of deductible expenses. The current corporation tax rate is generally 23.2% with an exception for companies whose capital amount is JPY100 million or less. The company must file its tax return with the relevant tax office and pay the tax within two months from the end of each fiscal year. In addition to the national corporation tax, the local government where the company is located also imposes taxes on the company, including local corporation tax and local corporation inhabitant tax. The applicable rate of these taxes varies depending on the local government, which generally ends up with an effective corporate tax rate in the lower to middle 30% range on taxable income.

Another important tax that applies to companies in Japan is consumption tax, which is quite similar to the value-added tax or sales tax in various countries. The current consumption tax rate is generally 10% of the sales amount with a reduced tax rate of 8% for certain sales transactions.

16. How does the competition law in your jurisdiction regulate companies?

The Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Act No 54 of 14 April 1947, as amended to date, **Anti-monopoly Act**), along with its subordinate regulations, governs competition matters in Japan. The Japan Fair Trade Commission (JFTC) is the competition authority in Japan and oversees competition matters. In addition to the above law and regulations, the JFTC publishes various guidelines on competition matters.

The Anti-monopoly Act prohibits private monopolisation and unreasonable restraint of trade, including cartels and bid rigging. It also prohibits unfair trade practices, such as the unjust use of a superior bargaining position over the counterparty. The Act also governs merger filing matters.

17. What are the main intellectual property rights companies should be aware of in your jurisdiction?

Japan has various laws to protect intellectual property in various forms, such as patents, trademarks, designs and copyrights. The Japan Patent Office (JPO) administers all applications for patents, trademarks and designs.

Patents

The Patent Act (Act No 121 of 13 April 1959, as amended to date) governs patent matters in Japan. An invention, which is defined as a highly advanced creation of technical ideas by utilizing

the law of nature, can be patented if it involves novelty, an inventive step, and the potential for industrial application. Patented inventions can be registered with the JPO. The patent registration is valid for 20 years from the filing date of the application.

Trademarks
The Trademark Act (Act No 127 of 13 April 1959, as amended to date) governs trademarks matters in Japan. Marks that can be registered as trademarks are any character, figure, sign or three-dimensional shape or colour, or any combination thereof; sounds, or anything else specified by Cabinet Order that is used by a person in connection with the goods of a person who produces, certifies or assigns the goods as a business, or is used by a person in connection with the services that the person provides or certifies as its business. Trademarks can be registered with the JPO. Registered trademarks are valid for 10 years from the date of registration (validity term can be extended if the registration is renewed).

Designs
The Design Act (Act No 125 of 13 April 1959, as amended to date) governs registered design matters in Japan. Designs that can be registered are any shape, pattern or colour, or any combination thereof, of an article, that creates an aesthetic impression through the eye, which has novelty, industrial utility and creativeness. A design that is identical or similar to a design filed for registration previously cannot be registered. Designs can be registered with the JPO. The design registration is valid for 25 years from the filing date of the application. Unregistered designs can be protected by the Unfair Competition Prevention Act (Act No 47 of 19 May 1993, as amended to date).

Copyright
The Copyright Act (Act No 48 of 6 May 1970, as amended to date) governs copyright matters in Japan. Authors of qualifying works are provided certain rights under the Copyright Act without any registration. Work means a creatively produced expression of thoughts or sentiments that falls within the literary, academic, artistic, or musical domain. Voluntary registration is available, but it is not commonly used. Copyright-eligible works are protected for 70 years after the death of their author.

18. How is data privacy protection regulated in your jurisdiction?

The Act on the Protection of Personal Information (Act No 57 of 30 May 2003, as amended to date) and various guidelines issued thereunder (collectively **APPI**) is the primary law regarding data protection in Japan. Many view the APPI as having requirements as rigorous as Europe's GDPR. An amendment to the APPI became fully effective on 1 April 2022. This amendment changed portions of the APPI relating to: (i) individual rights; (ii) responsibilities of businesses; (iii) measures concerning the utilisation of data; (iv) penalties; and (v) cross-border transfer and extraterritorial applications. The following overview of the APPI takes into account these 2022 amendments to the APPI.

The APPI applies to three categories of information and data used during the course of business, each of which is governed by different rules: (i) personal information (which is broadly defined to include any information that alone or in combination with other data can identify a living individual); (ii) personal data (personal information contained within a personal information database); and (iii) retained personal data (personal data that a business operator handling personal information has the authority to disclose, correct, add to or subtract, erase or discontinue the provision of to a third party).

Generally speaking:

a) for personal information, a "business operator handling personal information" (defined as any person using personal information databases for business) must specify the purpose of use for personal information it handles to the extent possible, and must comply with the following rules: (i) a business operator must not use the personal information beyond the scope necessary to achieve the purpose (unless the individual's consent is obtained); and (ii) must not change the purpose of use beyond a scope that has a reasonably substantial relationship with the original purpose of use;

b) for personal data, a business operator handling personal information must: (i) not acquire personal information by deception or other wrongful means; and

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Yusuke Urano has advised on numerous M&A transactions, such as domestic/cross-border acquisitions and alliances, TOB transactions, going private/MBO transactions, joint venture transactions, venture capital investments, and group reorganizations. He has also handled various cross border cartel cases for domestic and foreign clients. He also regularly provides domestic and foreign clients with corporate governance, compliance, risk management, labor, intellectual property and other general corporate advice.

Qualifications
- Admitted in Japan (2006)

Education
- New York University School of Law (LL.M, Advanced Professional Certificate in Law & Business) (2017)
- Keio University (LL.B.) (2003)

Other Professional Experience
- 2018 - Nishimura & Asahi NY LLP
- 2015 - 2016 Schulte Roth & Zabel LLP, New York
- 2015 JOLED Inc. (part-time)
- 2006 - Nishimura & Asahi

Representative Publications
- "Company and Foreign Investment Law Guide 2022 (Company Law Jurisdictional Q&As: Japan Chapter)" (LexisNexis) (December, 2021)
- "Company and Foreign Investment Law Guide 2021 (Company Law Jurisdiction: Japan Chapter)" (LexisNexis) (December, 2020)
- "Legal Practice in the Age of Cloud Computing" (Shoji Homu) (Co-Author) (January 2011)
- "Issues concerning Cloud Computing" (Shoji Homu) (Feb - June 2011 (serial publication))
- "Legal Practice in International Business" (Co-Author) (LexisNexis Japan) (January 2009)
- "Practical Use of Short Form Reorganization under the Companies Act" (Chuokeizai-sha) (March 2007)

Languages
Japanese (Native), English

(ii) upon acquisition, it must notify the individual of or publicly announce the purpose of use (unless an enumerated exception applies); and

c) for retained personal data, a business operator handling personal information must take necessary and proper measures for the prevention of leakage, loss, or damage, and for other security control of the personal information, and must endeavor to promptly delete personal information when its use is no longer required.

The APPI also generally stipulates that business operators handling personal information must not provide personal information to a third party without obtaining the individual's prior opt-in consent. A "third party" means any person other than the business operator handling personal information (including an affiliate) that is provided with personal information. There are significant exceptions to the foregoing rule allowing the provision of personal data to a third party without obtaining the individual's prior consent, including if notice and certain details are provided to individuals, if the personal data is transferred as a

result of a merger, acquisition or similar succession transaction, or if the personal data is transferred to a third party service provider to process the personal data solely on behalf of the business operator handling personal information.

19.What is the law on corporate insolvency in your jurisdiction?

Court procedures for corporate insolvency are roughly categorized into liquidation procedures and restructuring procedures. Liquidation procedures include bankruptcy proceedings governed by the Bankruptcy Act (Act No 75 of 2 June 2004, as amended to date), which is similar to the Chapter 7 proceedings in the United States, and special liquidation proceedings governed by the Companies Act. Restructuring procedures include civil rehabilitation proceedings governed by the Civil Rehabilitation Act (Act No 225 of 22 December 1999, as amended to date) and corporate reorganisation proceedings governed by the Corporate Reorganization Act (Act No 154 of 13 December 2002, as amended to date).

20. Are there any major reforms in the company law regime and corporate governance in your jurisdiction?

The Companies Act was amended in December 2019 (**Amended Act**), and the amended Companies Act became effective on 1 March 2021 (other than the amendment discussed in paragraph 3 below, which became effective on 1 September 2022.

The Amended Act includes various corporate governance changes, such as (i) requiring listed companies to appoint at least one outside director (although most companies trading on the Tokyo Stock Exchange already have at least one outside director in accordance with listing regulations, the amendment is intended to reinforce corporate governance by aligning Japanese corporate law); (ii) compelling a company to explain the company's policy on its directors' compensation scheme at a shareholders' meeting; (iii) allowing companies to distribute shareholders meeting materials in electronic form to shareholders through the Internet without the shareholder's prior consent to this distribution method; and (iv) permitting companies to limit the number of shareholder proposals per single shareholder to 10.

Apart from the Companies Act, on 11 June 2021, amendments to Japan's Corporate Governance Code came into effect, which encourage listed companies through the creation of new market segments (as explained immediately below) to: (i) enhance board independence by increasing the number of independent directors from at least two to at least one-third; (ii) promote diversity in senior management by appointing more females, non-Japanese and mid-career professionals; (iii) develop and disclose sustainability and ESG initiatives; and (iv) use electronic voting platforms and publish periodic reports in English.

21.Are there any features regarding company law in your jurisdiction or in Asia that you wish to highlight?

A unique feature of the Companies Act is the company auditors system ("kansayaku"). Company auditors supervise the performance of directors' duties. For this purpose, company auditors are entitled to procure a report concerning the business from directors and employees, and further investigate the status of the business and finances of the company. The term of office for company auditors generally expires at the end of the general shareholders meeting for the last business year ending within four years of the date of appointment. A company with a restriction on assignment of shares may extend such period to a maximum of 10 years by stipulating so in its articles of incorporation

22. What changes in company law have been implemented in light of current events? Are there any "new normal" practical tips in your jurisdiction parties should be aware of when dealing with company law?

There is an impetus to modernise the way Japanese companies conduct business due to COVID-19. Japanese companies have traditionally used a "paper and seal culture" to bind agreements, which is now thought to be an impediment to productivity. Japan recognised e-signatures as a valid legal form of signature under the Act on Electronic Signatures and Certification Business

(Act No 102 of 31 May 2000). However, there has been uncertainty whether common e-signature methods provided by vendors are permitted under the legislation. Consequently, even though it has been 20 years since the legislation was enacted, the use of e-signatures is uncommon in Japanese companies. However, in September 2020 the Japanese government announced its opinion that the most common e-signature methods available in Japan create a valid legal form of signature. As the remote work style stemmed from the COVID-19 pandemic has been continuing for a longer period than generally expected, this announcement has accelerated the adoption of e-signatures by companies operating in Japan (though original signatures are still required for many documents submitted to Japanese government agencies).

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NISHIMURA & ASAHI

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1.What are the key laws and regulations that govern company law in your jurisdiction?

The key laws governing company law in Vietnam are the Law on Enterprises, the Law on Support for Small and Medium-Sized Enterprises, the Law on Securities, the Law on Investment, the Commercial Law and the Law on Corporate Income Tax.

2.What are the most common types of companies in your jurisdiction?

There are three most common types of companies in Vietnam, which include: (i) sole member limited liability company; (ii) limited liability company with two or more members; and (iii) joint stock company.

A sole member limited liability company (LLC) is an enterprise owned by one organisation or individual. A sole member LLC is not permitted to issue shares, except in case of conversion to become a joint stock company.

An LLC with two or more members is an enterprise which has two to 50 members being organisations and individuals. An LLC with two or more members may not issue shares, except in case of conversion to become a joint stock company.

A joint stock company is an enterprise which has at least three shareholders being organisations or individuals; and there is no restriction on the maximum number of shareholders. A joint stock company has the right to issue shares, bonds and other types of securities of the company.

3. How long does it take to set up a company in your jurisdiction? Are there any ways to speed up the entire process?

3.1 The average time for setting up a company in Vietnam is as follows:

a) local companies (companies with wholly domestic capital): three to five working days;
b) foreign-invested companies being small and medium-sized creative start-up enterprises, and creative start-up investment funds: three to five working days;
c) foreign-invested companies which have an investment project not in the category requiring an investment policy approval in accordance with the Law on Investment: one to six months, subject to specific business lines; and
d) foreign-invested companies which have an investment project in the category requiring an investment policy approval in accordance with the Law on Investment: at least two months, subject to specific business lines and the investment project.

3.2 There does not exist any procedure under the prevailing laws to speed up the entire process.

4.What are the main registration requirements for companies in your jurisdiction?

The main registration requirements for local companies (companies with wholly domestic capital) and foreign-invested companies, which are small and medium-sized creative start-up enterprises, and creative start-up investment funds are as follows:

a) applying for an Enterprise Registration Certificate;
b) applying for a sub-licence if the company conducts the business line for which a sub-licence is required before its operation;

c) registering the opening of a bank account

for contributing capital to the company; and
d) registering the digital signature (token device) for tax declaration.

The main registration requirements for foreign-invested companies are as follows:

a) applying for an investment policy approval if the investment project falls within the category requiring an investment policy approval;
b) applying for an Investment Registration Certificate;
c) applying for an Enterprise Registration Certificate;
d) applying for a sub-licence if the company conducts the business line for which a sub-licence is required before its operation;
e) registering the opening of a direct investment capital account at a commercial bank licensed in Vietnam for contributing capital to the company; and
f) registering the digital signature (token device) for tax declaration.

5.What are the main post-registration reporting requirements for companies in your jurisdiction (eg annual reporting requirements, documents filing)?

Companies in Vietnam must perform the following main post-registration reporting requirements:

a) Investment reports: on a quarterly and annual basis, they shall submit to the investment registration authority and the statistical agency reports on the status of implementation of their investment projects (if they have investment projects), comprising the following items: realised investment capital, results of business investment activities, information about labour, payments to the State budget, investment in research and development, environmental treatment and protection, and specialised norms depending on the operational sector.
b) Labour reports: they shall submit a declaration of labour use within a period of 30 days from their commencement of operation and periodically report any labour changes during the operational process. On a biannual and annual basis, they shall submit reports on labour changes to the Department of Labour, War Invalids and Social Affairs and also notify same to the social insurance agencies in districts where their head offices, branches and representative offices are located; and they shall send first-half-year reports and annual reports on the use of foreign employees (in cases where they employ foreigners).
c) Accounting reports: they shall prepare financial statements at the end of the annual accounting period. Annual financial statements must be submitted to the tax management authority and relevant authorities within a period of 90 days from the date on which the annual accounting period ends. Annual financial statements of companies with foreign owned capital, credit institutions, branches of foreign banks in Vietnam, financial organisations, insurance enterprises, reinsurance enterprises, insurance brokerage enterprises, branches of foreign non-life insurance enterprises, public companies, issuing organisations and securities business organisations, and enterprises with state capital must be audited before such financial statements are submitted to the competent authorities.

Document retention regime of enterprises: depending on the form of enterprise, an enterprise must retain the following documents at its head office or another place stipulated in the charter of the company; the duration for retaining documents shall accord with law.

a) Charter of the company; rules on internal management of the company; and register of members or register of shareholders;
b) Certificate of protection of industrial property rights; certificate of registration of quality of products, goods and services; and other licences and certificates;
c) Documents and papers certifying ownership of assets of the company;
d) Voting slips, vote counting minutes, minutes of meetings of the Members' Council, the General Meeting of Shareholders or the Board of Management; decisions of the enterprise;
e) Prospectus for offer for sale or listing of securities;
f) Reports of the Inspection Committee, conclusions of inspection agencies and

conclusions of auditing organisations;
g) Books of accounts, accounting records and annual financial statements.

6.How to set up foreign companies in your jurisdiction?

6.1 Market approach conditions

Foreign investors establishing an economic organisation in Vietnam must satisfy the market approach conditions applicable to foreign investors as prescribed in the list of industries and trades for which market approach is restricted for foreign investors.

Market approach conditions applicable to foreign investors as prescribed in the list of industries and trades for which market approach is restricted for foreign investors consist of the following:

a) ratio of foreign investors' ownership of charter capital in economic organisations;
b) forms of investment;
c) scope of investment operation;
d) capacity of investors and other parties participating in the investment activity;
e) other conditions pursuant to laws and resolutions of the National Assembly, ordinances and resolutions of the Standing Committee of the National Assembly, decrees of the government and international treaties of which the Socialist Republic of Vietnam is a member.

The list of industries and trades for which market approach is restricted for foreign investors and which is announced by the government comprise: (i) industries and trades for which there has not yet been market approach; and (ii) industries and trades for which market approach is conditional.

6.2 Procedures

a) Issuance of Investment Registration Certificate (IRC): before establishing an economic organisation, a foreign investor must have an investment project and carry out the procedures for issuance of the IRC, except for establishment of a small or medium-sized creative start-up enterprise or creation of a creative start-up investment fund in accordance with the law on support for small and medium-sized enterprises.

In case where an investment project in the category requiring an investment policy approval provided by the National Assembly, the Prime Minister or the People's Committee of a province or city under central authority, the foreign investor must obtain an investment policy approval from the said authority before performing the procedures for issuance of the IRC.

With respect to an investment project which is not subject to investment policy approval in accordance with the law, the investment registration authority shall issue the IRC to the foreign investor within 15 days from the date of receipt of a valid application dossier for issuance of the IRC, if the investment project satisfies the following conditions:

i) the investment project is not in an industry or trade in which business investment is prohibited;
ii) there is a location for implementation of the investment project;
iii) the investment project is compliant with the national-level master plan, regional master plan, provincial master plan, urban master plan and special economic-administrative unit master plan (if any);
iv) the project satisfies the conditions on the investment rate per unit of land area and with number of workers employed (if any);
v) the market approach conditions applicable to a foreign investor are satisfied.

b) Issuance of Enterprise Registration Certificate (ERC): after obtaining the IRC, a foreign investor shall conduct the procedures for establishment of an economic organisation so that it can be issued with the ERC in accordance with the law on enterprises for each form of economic organisation, (namely sole member LLC, LLC with two or more members, or joint stock company as mentioned in question 2 above). From the date of issuance of the ERC or any other document of equal validity, the economic organisation established by the foreign

investor shall be the investor implementing the investment project in accordance with the provisions of the IRC.

7.Are there any controlling factors or restrictions on foreign companies in your jurisdiction?

There is not any particular controlling factor on foreign companies in Vietnam. Foreign companies carrying out investment activities in Vietnam are permitted to apply the market approach conditions as stipulated for domestic investors, except for the industries and trades for which there has not yet been market approach, and the industries and trades for which market approach is conditional, as announced by the government.

8.Are there any incentives to attract foreign companies to your jurisdiction?

The prevailing law on investment provides for certain forms of investment incentives, including:

a) Corporate income tax (CIT) incentives, comprising:

   i) application of a lower rate of CIT than the normal tax rate for a definite period or for the whole duration of implementation of the investment project; and
   ii) exemption from and reduction of tax and other incentives in accordance with the law on CIT.

b) Exemption from import duty on goods imported to form fixed assets; or on raw materials, supplies and components imported for production in accordance with the law on import and export duties;
c) Exemption from and reduction of land use fees, land rent and land use tax;
d) Accelerated depreciation and increase in the amount of deductible expenses when calculating taxable income.

It should be noted that the following entities shall be entitled to the aforementioned incentives:

a) Investment projects in the preferential investment industries and trades (as stipulated in the Law on Investment);
b) Investment projects located in preferential investment geographical areas (as stipulated in the Law on Investment);
c) Investment projects with a scale of capital being VND6,000 billion or more of which at least VND6,000 billion is disbursed in a period of three years from the date of issuance of the Investment Registration Certificate or investment policy approval, and at the same time satisfying one of the following criteria: having a total minimum turnover of VND10,000 billion per year in no later than three years from the year in which such projects have turnover, or employing more than 3,000 employees;
d) Investment projects for construction of social residential housing; investment projects located in rural areas and employing 500 employees or more; and investment projects employing disabled people in accordance with the law on the disabled;
e) High-tech enterprises, and scientific and technological enterprises or organisations; projects with transfer of technologies on the list of technologies encouraged to be transferred in accordance with the law on transfer of technologies; technology incubators, scientific and technological enterprise incubators in accordance with the law on high-tech or the law on science and technology; and enterprises producing or supplying technologies, equipment, products and services serving the requirements for environmental protection as stipulated in the law on protection of the environment;
f) Innovative start-up investment projects, innovative renovation centres, and research and development centres;
g) Investment in commercial operation of product distribution chains of small and medium-sized enterprises; investment in commercial operation of technical establishments/facilities supporting small and medium-sized enterprises, and small and medium-sized enterprises incubators; and investment in commercial operation of a co-working space for supporting creative start-up small and medium-sized enterprises in accordance with the law on support for small and medium-sized enterprises.

The investment incentives may be applicable

to new investment projects and expanded investment projects.

9.What is the typical structure of directors (or family management structure) and liability issues for companies in your jurisdiction? What are the key challenges for directors during the pandemic?

9.1What is the typical structure of directors (or family management structure) and liability issues for companies in your jurisdiction?

The organisational and managerial structures of the common types of companies in Vietnam are as follows:

Types of companies	Organisational and managerial structures
Sole member LLC owned by an organisation	There are two models to be chosen: a) Chairman of the company and a Director or General Director; or b) Members' Council (comprising three to seven members appointed by the owner) and a Director or General Director.
Sole member LLC owned by an individual	Chairman of the company and a Director or General Director.
LLC with two or more members	Members' Council (comprising all members of the company being individuals and authorised representatives of members of the company being organisations); Chairman of the Members' Council; and a Director or General Director.
Joint stock company	There are two models to be chosen: a) a General Meeting of Shareholders, a Board of Management (having three to 11 members), an Inspection Committee (having three to five inspectors) and a Director or General Director. Where a joint stock company has less than 11 shareholders and the shareholders being organisations together own less than 50% of the total shares of the company, it is not required to have an Inspection Committee; or b) a General Meeting of Shareholders, a Board of Management (having three to 11 members) and a Director or 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 Auditing Committee under the Board of Management.

Companies shall bear civil liability of a legal entity as follows:

a) A legal entity must bear civil liability for the performance of civil rights and obligations established and performed in the name of the legal entity by its representatives. A legal entity bears civil liability for the obligations established and performed by its founders or the representatives of its founders in order to establish and register the legal entity, unless otherwise agreed or prescribed by law.
b) A legal entity shall fulfil its civil liability by recourse to its property and shall not bear civil liability on behalf of personnel

of the legal entity with respect to the civil obligations established and performed by personnel of the legal entity other than in the name of the legal entity, unless otherwise prescribed by law.

c) Personnel of the legal entity shall not have civil liability on behalf of the legal entity with respect to the civil obligations established and performed by the legal entity, unless otherwise prescribed by law.

9.2 What are the key challenges for directors during the pandemic?

During the phase of the current COVID-19 pandemic, the key challenges for directors involve actively changing or transforming the way of doing business and business thinking, formulating contingency plans to prepare for unexpected situations, and optimising the processes and products of the company during the period of social distancing in order to enable the company to accelerate in the year 2023 when the economy is currently in a state of recovery.

10.What is the minimum number of directors and shareholders required to set up a company? Are there any requirements that a director must be a natural person?

Pursuant to the current Law on Enterprises, a sole member LLC has only one member; an LLC with two or more members must have at least two members; a joint stock company must have at least three shareholders; and members and shareholders of companies may be organisations or individuals.

Furthermore, a company is required to have a Director or General Director. The position of Director or General Director, and other managerial positions must be held by natural persons.

Additionally, in general, a company must have at least one legal representative being a person holding the position of the Chairman of the Members' Council or the Chairman of the Company or the Chairman of the Board of Management or the Director or General Director.

11.What are the requirements on how shares are offered in your jurisdiction?

In Vietnam, only joint stock companies are entitled to offer to sell shares. There are two types of joint stock companies which are a joint stock company not being a public company and a public company. Accordingly, joint stock companies may offer to sell shares by way of: (i) offer for sale of shares to existing

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shareholders; (ii) private share placement; or (iii) public offer for sale of shares. The public offer or offer to sell shares of public companies and other organisations shall be implemented in accordance with the Law on Securities. The company shall register any change to its charter capital within a period of 10 days from the date of completion of a tranche of sale of shares.

The private share placement by a joint stock company not being a public company must satisfy the following conditions:

a) the placement is not made via the mass media; and
b) the placement is made to less than 100 investors excluding institutional securities investors or is only made to institutional securities investors.

The private share placement by a public company must satisfy the following conditions:

a) there must be a decision of the General Meeting of Shareholders approving the issue plan and a plan for use of proceeds from the placement tranche, specifying the criteria and number of investors;
b) entities participating in the placement tranche must only consist of strategic investors and/or institutional securities investors;
c) strategic investors must be restricted from assigning shares, convertible bonds or bonds with securities rights attached in the private placement tranche for at least three years, and institutional securities investors must be restricted from doing so for at least one year, from the date of completion of the placement tranche, except for the case of: (i) assignment among institutional securities investors or implementation pursuant to a legally effective verdict or decision of a court or a decision of an arbitrator; or (ii) inheritance in accordance with law;
d) the time between placement tranches of shares, convertible bonds or bonds with securities rights attached must be at least six months from the date of completion of the latest placement tranche; and
e) the private placement of shares, the conversion of bonds into shares or the exercise of securities rights must comply with the regulations on the ratio of ownership by foreign investors in accordance with law.

Public offers of shares include initial public offers of shares of a joint stock company and additional public offers of shares of a public company.

Requirements for an initial public offer of shares

Pursuant to the Law on Securities, the initial public offer of shares of a joint stock company must satisfy the following requirements:

a) the amount of paid-up charter capital at the time of registration of the offer must be VND30 billion or more calculated at the value recorded in the accounting books;
b) business operations for two consecutive years immediately preceding the year of registration of the offer must have been profitable, and there must not be accumulated losses calculated up to the year of registration of the offer;
c) there must be an issue plan and a plan for utilisation of the proceeds earned from the share offer tranche, passed by the General Meeting of Shareholders;
d) a minimum of 15% of the number of voting shares of the issuing organisation must be sold to at least 100 investors not being major shareholders; if the charter capital of the issuing organisation is VND1,000 billion or more, the minimum ratio shall be 10% of the number of voting shares of the issuing organisation;
e) prior to the time of the initial public offer of shares by the issuing organisation, major shareholders must undertake to jointly hold at least 20% of the charter capital of the issuing organisation for at least one year from the date of completion of the offer tranche;
f) the issuing organisation is not an entity which is currently subject to criminal prosecution or which was convicted of any one of the crimes of violation of economic management order for which the police record has not yet been expunged;
g) there must be a securities company which provides consultancy on the application file to register the public offer of shares, except for the case where the issuing organisation is a securities company;
h) there must be a commitment to, and it is

required to, conduct listing or registration of trading shares on the securities trading system after completion of the offer tranche; and

i) the issuing organisation must open an escrow account to receive payments for purchase of shares in the offer tranche.

Requirements for an additional public offer of shares

Besides, the Law on Securities stipulates that an additional public offer of shares of a public company must satisfy the following requirements:

a) the provisions referred to in points (a), (c), (f), (g), (h) and (i) above must be satisfied;
b) business operations in the year immediately preceding the year of registration of the offer must have been profitable, and there must not be accumulated losses calculated up to the year of registration of the offer;
c) the value of additionally issued shares according to the par value must not be higher than the total value of currently circulating shares calculated at par value, except where there is an issue guarantee with a commitment to accept to purchase all of the shares of the issuing organisation for re-sale, or to purchase the amount of the remaining undistributed shares of the issuing organisation, to issue shares to increase capital from the equity, or to issue shares for exchange, consolidation or merger of enterprises;
d) in the case of a public offer tranche for the purpose of raising capital to implement a project of the issuing organisation, shares sold to investors must account for at least 70% of the number of shares proposed to be offered for sale. The issuing organisation must formulate a plan to cover the deficit of capital proposed to be raised from the offer tranche in order to implement the project.

Foreign companies participating in investment and activities in the securities market of Vietnam must comply with the regulations on the foreign ownership ratio, and the conditions, sequence and procedures for investment in accordance with the law on securities and securities market. Foreign companies registering the purchase of shares must carry out the procedures for purchase of shares in accordance with the Law on Investment before purchasing such shares.

12.What are the key laws and regulations on employment in your jurisdiction that companies should be aware of? Are there any aspects of employment law that are heavily regulated?

The key laws and regulations on employment in Vietnam comprise the Labour Code, the Law on Employment, the Law on Occupational Safety and Hygiene, the Law on Social Insurance, the Law on Health Insurance, the Law on Vietnamese employees working overseas under contracts, and legal documents providing detailed regulations on implementation thereof.

The Labour Code aims at protecting and ensuring lawful and legitimate rights and interests of employees. The labour discipline or dismissal of employees must comply with the provisions of the Labour Code and the employer must prove employees' faults.

13.What is the corporate governance regime in your jurisdiction?

The corporate governance in Vietnam shall be conducted within the framework of the laws of Vietnam.

The corporate governance applicable to companies not being public companies must comply with the provisions of the Law on Enterprises and other relevant legal documents.

The corporate governance applicable to public companies must comply with the provisions of the Law on Securities, the Law on Enterprises and other relevant legal documents and the following principles:

a) having a reasonable and effective managerial structure;
b) ensuring effectiveness of the operation of the Board of Management and the Board of Controllers; and increasing the responsibility of the Board of Management with respect to the company and shareholders;
c) ensuring rights of shareholders, and equal treatment of all shareholders;
d) ensuring the role of investors, the securities

market and intermediary organisations in supporting activities of corporate governance;

e) respecting and ensuring legitimate rights and interests of parties with interests related to corporate governance;

f) making timely, complete, accurate, and transparent disclosure of information about operations of the company; and ensuring that shareholders have fair access to information.

14.Does establishing a company in your jurisdiction grant any kind of residency rights? Are there any conditions that in order to receive these residency rights (if applicable) one must partner or establish a joint venture with a local (eg a citizen of your jurisdiction)?

The establishment of a company in Vietnam does not grant any kind of residency right. Instead, the prevailing laws of Vietnam provide that foreigners entering Vietnam through DT1, DT2 or DT3 visas shall be granted temporary residence cards in accordance with the Law on amendment and supplementation of articles of the Law on foreigners' entry into, exit from, transit through, and residence in Vietnam, which has been effective since 1 July 2020.

The aforesaid types of visas are defined as follows:

a) DT1 visa - to be granted to foreign investors in Vietnam and representatives of foreign organisations investing in Vietnam and contributing a capital amount of VND100 billion or more or investing in preferential investment industries and trades, and preferential investment geographical areas decided by the government.

b) DT2 visa - to be granted to foreign investors in Vietnam and representatives of foreign organisations investing in Vietnam and contributing a capital amount of VND50 billion to less than VND100 billion or investing in industries and trades of which investment for development is encouraged and which are decided by the government.

c) DT3 visa - to be granted to foreign investors in Vietnam and representatives of foreign organisations investing in Vietnam and contributing a capital amount of VND3 billion to less than VND50 billion.

"Temporary residence card" means a document issued by the immigration management agency or a competent agency of the Ministry of Foreign Affairs to a foreigner permitted to reside in Vietnam for a certain period of time. This card has the same validity as a visa.

In respect of the validity duration of the temporary residence card, the validity duration of a DT1 temporary residence card is at most 10 years; the validity duration of a DT2 temporary residence card is at most three years; and the validity duration of a DT3 temporary residence card is at most three years.

15.When is a company subject to tax in your jurisdiction? What are the main taxes that may apply to companies in your jurisdiction?

a) Corporate income tax: a company established in accordance with Vietnamese law must pay a tax on taxable income arising in Vietnam and on taxable income arising outside Vietnam. A foreign company with a permanent establishment in Vietnam must pay a tax on taxable income arising in Vietnam and on taxable income arising outside Vietnam and relating to the operation of such permanent establishment. A foreign company with a permanent establishment in Vietnam must pay a tax on taxable income arising in Vietnam and not relating to the operation of such permanent establishment. A foreign company which does not have a permanent establishment must pay a tax on taxable income arising in Vietnam.

Taxable income comprises income from activities of production of, and/or business in goods and services and other income, comprising income from capital transfers, transfers of the right to contribute capital; from real property transfers, from transfers of investment projects, from transfers of the right to participate in investment projects, and from transfers of the right to explore, mine and process minerals; income from the ownership of or right to use assets, including income from intellectual property rights in accordance with the laws; income from transfer, leasing out or liquidation of

assets including valuable papers; income being interest on deposits, loans or sales of foreign currency; income earned from bad debts which were written-off and are now recoverable; income being debts payable to unidentifiable creditors; income from business omitted in previous years, and other income.

The corporate income tax rate shall be 20%, except for the enterprises carrying out the activities of prospecting, exploring and exploiting petroleum and gas and other rare and precious natural resources in Vietnam and for the entities entitled to corporate income tax incentives.

b) Value-added tax: there are three value-added tax rates of 0%, 5% and 10% applicable to types of goods and services.
c) Other taxes which may apply to companies depending on activities of such companies comprise export duty, import duty, special consumption tax, environmental protection tax, natural resources tax and non-agricultural land use tax.

16.How does the competition law in your jurisdiction regulate companies?

The 2018 Law on Competition regulates practices in restriction of competition (which consist of practices of agreement in restraint of competition, abuse of dominant market position, and abuse of monopoly position) and economic concentrations which have or may have a competition-restraining impact on the Vietnamese market; unfair competitive practices; competition legal proceedings; dealing with breaches of the law on competition; and State administration of competition.

The parties participating in an agreement in restraint of competition which satisfy the conditions for entitlement to an exemption are permitted to perform such agreement only after they have a decision permitting exemption issued by the National Competition Committee.

Enterprises or groups of enterprises holding a dominant market position are not permitted to conduct the prohibited acts of abuse of a dominant market position. Enterprises holding a monopoly position are not permitted to conduct the prohibited acts of abuse of a monopoly position.

Enterprises participating in an economic concentration (merger, consolidation, acquisition or joint venture) must submit a dossier for notification of the economic concentration to the National Competition Committee before carrying out the economic concentration if such economic concentration reaches the threshold requiring notification of economic concentration. The threshold requiring notification of economic concentration is determined on the basis of one of the following criteria:

a) total assets in the Vietnamese market of the enterprise participating in the economic concentration;
b) total turnover in the Vietnamese market of the enterprise participating in the economic concentration;
c) transaction value of the economic concentration;
d) combined market share in the relevant market of the enterprises participating in the economic concentration.

17.What are the main intellectual property rights companies should be aware of in your jurisdiction?

The 2005 Law on Intellectual Property as amended by Law No 36/2009/QH12, and Law No 42/2019/QH14 (the "Law on IP") regulates copyright, copyright related rights, industrial property rights (comprising inventions, industrial designs, designs of semi-conducting closed circuits, marks, trade names, geographical indications and trade secrets), rights to plant varieties and protection of such rights:

a) Copyright shall arise at the moment a work is created and fixed in a certain material form, irrespective of its content, quality, form, mode and language and irrespective of whether or not such work has been published or registered.
b) Copyright related rights shall arise at the moment a performance, audio and visual fixation, broadcast or satellite signal carrying coded programmers is fixed or displayed without causing loss or damage to copyright.
c) Industrial property rights shall be established as follows:

i) Industrial property rights to an invention, industrial design, layout design or mark are established on the basis of a decision of the competent state agency granting a protection title in accordance with the registration procedures stipulated in the Law on IP or the recognition of international registration pursuant to an international treaty of which the Socialist Republic of Vietnam is a member.

   Industrial property rights to a well-known mark are established on the basis of use and are not dependent on registration procedures.

   Industrial property rights to a geographical indication are established on the basis of a decision of the competent state agency granting a protection title in accordance with the registration procedures stipulated in the Law on IP or pursuant to an international treaty of which the Socialist Republic of Vietnam is a member.

ii) Industrial property rights to a trade name shall be established on the basis of lawful use thereof;

iii) Industrial property rights to a trade secret shall be established on the basis of lawful acquirement of the trade secret and maintaining confidentiality thereof;

iv) The right to prevent unfair competition shall be established on the basis of competitive activities in business.

d) Rights to a plant variety shall be established on the basis of a decision of the competent state body to grant a plant variety protection title in accordance with the registration procedures stipulated in the Law on IP.

Furthermore, Vietnam has participated in, and has been a party to numerous conventions regarding intellectual property rights, such as Trade-Related Aspects of Intellectual Property Rights (TRIPS); Convention Establishing the World Intellectual Property Organization; Paris Convention for the Protection of Industrial Property; The Patent Cooperation Treaty (PCT); Madrid Agreement Concerning the International Registration of Marks; Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks; Berne Convention for the Protection of Literary and Artistic Works; International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations; Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of Their Phonograms; Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite; Trademark Law Treaty; The Hague Agreement Concerning the International Registration of Industrial Designs; WIPO Copyright Treaty; WIPO Performances and Phonograms Treaty (WPPT); ASEAN Framework Agreement on Intellectual Property Cooperation, etc.

18.How is data privacy protection regulated in your jurisdiction?

Until now, Vietnam has not yet promulgated a single law on data privacy. Instead, the regulations on data privacy are now separately included in various legal documents governing each field. The rights to private life, personal privacy, and family privacy are basically set out in the Civil Code as follows:

a) Private life, personal privacy, and family privacy are inviolable and protected by law. The collection, storage, use, and publication of information related to the private life or personal privacy of an individual must have the consent of that person, and the collection, storage, use, and publication of information related to family privacy must have the consent of the family members, except where otherwise prescribed by law;

b) The safety of the mail, telephone, telegraph, electronic database and other forms of private information exchange of an individual shall be ensured and kept confidential. The opening, control and seizure of the mail, telephone, telegraph, electronic database and other forms of private information exchange of another person may only be allowed in cases if provided by law;

c) A party to a contract may not disclose information on the private life, personal privacy or family privacy of the other parties known to it during the process of contract establishment and performance, unless otherwise agreed.

19.What is the law on corporate insolvency in your jurisdiction?

The 2014 Law on Bankruptcy shall apply upon resolution of bankruptcy of enterprises and co-operatives established in the territory of Vietnam. This Law stipulates the order of and procedures for filing for, acceptance of jurisdiction over and commencement of bankruptcy procedures; determination of asset obligations and measures for preservation of assets in the course of resolution of bankruptcy; procedures for recovery of business operations; declaration of bankruptcy and implementation of decisions declaring bankruptcy.

20.Are there any major reforms in the company law regime and corporate governance in your jurisdiction?

Law on Enterprises No 59/2020/QH14, passed by the National Assembly of Vietnam on 17 June 2020, has taken effect since 1 January 2021.

21.Are there any features regarding company law in your jurisdiction that you wish to highlight?

Under the Law on Enterprises, Vietnam recognises the long-term existence and development of the types of enterprise, ensures the equality of enterprises before the law irrespective of their form of ownership and economic sector; and recognises the lawful profit-making nature of business activities. Vietnam recognises and protects the ownership of assets, invested capital, income and other lawful rights and interests of enterprises and owners of enterprises.

Lawful assets and invested capital of enterprises and their owners shall not be nationalised or expropriated by administrative measures. Where it is absolutely necessary for the State to compulsorily acquire or requisition assets of an enterprise, the enterprise shall be paid or compensated in accordance with the law on compulsory acquisition and requisition of assets. The payment or compensation must ensure the interests of the enterprise without discrimination as between types of enterprise.

22.What changes in company law have been implemented in light of current events? Are there any "new normal" practical tips in your jurisdiction parties should be aware of when dealing with company law?

Until now, the 2020 Law on Enterprises (which contains new provisions and which has come into effect since 1 January 2021) has been amended by Law No 03/2022/QH15 of the National Assembly dated 11 January 2022, effective from 1 March 2022. There is no "new normal" practical tip with regards to company law in Vietnam.

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1. What are the key laws and regulations that govern mergers and acquisitions in your jurisdiction?

Creation, ownership, control, and management of private companies and partnerships are generally governed by the Civil and Commercial Code. Public companies are, on the other hand, governed by the Public Companies Act.

Public companies listed on the Stock Exchange of Thailand or otherwise offering their shares or any other types of securities to the public are also additionally subject to the Securities and Exchange Act and regulations issued thereunder.

The Trade Competition Act also has merger control provisions which would be applicable to any merger that could significantly impact competition in any relevant market of products or services in Thailand.

M&A activities in Thailand could also be affected by other laws which limit foreign direct investment in respect of particular businesses. For example, the Land Transport Act requires 51% shares of land transport businesses to be owned by Thai shareholders. As another example, the Foreign Business Act limits foreign participation in more than 40 types of other businesses in Thailand.

2. What is the process of a typical M&A transaction and how long would it take?

Typical M&A transactions generally involve the following key steps:

a) high-level discussions between the parties;
b) negotiations and signing of an indicative term sheet or a non-binding MOU and a Non-Disclosure Agreement (NDA);
c) due diligence exercises (legal, tax, financial, HR, engineering, operations, ESG, etc);
d) negotiations and signing of definitive agreements, such as, a share purchase agreement, a shareholders agreement, and other transition agreements;
e) completion of conditions precedent which may include obtaining a regulatory approval from the relevant government agency (if applicable);
f) completion of the M&A transaction (ie delivery of documents and other items, transfers of shares or assets in question, payment of the purchase price, and registration of changes with relevant government agencies (if applicable));
g) completion of conditions subsequent (if any); and
h) post-acquisition reorganization.

M&A transactions could take a few months or a few years to complete, depending on the circumstances.

3. What documents are required for the transfer of shares of a company?

The following documents are typically required to transfer shares in a company:

a) a duly executed share transfer instrument;
b) duty stamps;
c) internal shareholder registry of the issuer company (to record the share transfer); and
d) original share certificate of the transferor;
e) new share certificate issued to the transferee;
f) an approval from the board of directors and/or other shareholders (if applicable, depending on the Articles of Association of the issuer company).

In cases where the transferee acquires a significant portion of shares in the issuer company (or otherwise take control over the

issuer company) following the acquisition, it is also a common practice to also prepare the following documents and submit the relevant items to the company registrar:

a) shareholders meeting's resolution to appoint the transferee's designees as new directors of the company and approve the new authorized signatories;
b) resignation letters of current directors of the company who were originally designated by the transferor;
c) an application to register changes of directors and their signing authority; and
d) a new list of shareholders reflecting the share transfer.

4. Are there any statutory requirements on the transfer of assets?

Transfers of certain assets must be registered with the relevant government agency, such as, transfers of land and/or buildings or transfers of registered intellectual property rights (trademarks, patents, etc).

Transfers of machinery generally do not require a registration. However, if any machines have previously been registered with the Department of Industrial Works (which is not compulsory), transfers of such registered machinery must also be registered.

Transfers of certain restricted items may require a government approval, for example, radioactive materials and other hazardous materials.

Transfers of other assets, such as, inventories, raw materials, and other goods in general do not have any particular statutory requirements and can be completed upon conclusion of an agreement (and fulfillment of its conditions) between the parties.

Licences and permits issued under Thai laws may or may not be transferrable, depending on the circumstances. If not transferrable, the buyer will need to reapply for such licences and permits with the relevant government agency. Even if they are legally transferrable, an approval from the relevant government agency is usually required. Therefore, the timing required for such approvals should always be taken into account by the parties.

5.Would transactions in particular industries be subject to consent or approval from certain stakeholders, such as employees union, regulators or governmental body?

Transfers of shares or businesses in a particular company may require a government approval, depending on industry-specific laws and the types of licences held by the company under such laws and conditions of such licensing. For example, to transfer any insurance business, whether in whole or in part, an approval from the Office of the Insurance Commission is required.

Certain business operations require a particular licence to operate. If the acquisition is carried out by way of a business transfer (as opposed to a transfer of shares), the parties may need to obtain an approval from the relevant government agency to also transfer the relevant licence (or if the required licence is not legally transferrable, the business transferee will need to apply for a new one).

In addition, licences for certain types of businesses, although technically issued to a licence holding company, are particularly linked to a certain individual who is approved by the regulator to manage the business of the licence holding company. These individuals are named in the licences, although the licence holders are still technically the companies. For example, companies holding private school licences or recruitment licences must have a qualified manager who is approved by the regulator to be responsible for the overall operations of the company. If the individual who is named in the licence of the company as the qualified manager is the party selling the business, the buyer must ensure that it has a new qualified person to replace the seller as the qualified manager (which replacement must be approved by the regulator) or there is an alternative arrangement in place to retain the seller as the qualified manager of the company (so that the company can maintain the licence) until a new qualified manager can be appointed and approved by the regulator. In such circumstances, the regulator's approval should be made a condition precedent or a condition subsequent of the transaction completion.

6. Are cross-border transactions subject to certain special legal requirements?

There are many Thai laws which limit foreign direct investment activities in Thailand, notably the Foreign Business Act (FBA) which has an expansive application covering most industries and businesses.

Companies which have 50% or more of their total issued shares owned by "foreigners" - a term which is defined under the FBA to include foreign entities, foreign individuals, and majority foreign-owned locally-established entities – are not allowed to engage in various business activities described in one of the three lists attached to the FBA unless they have a foreign business licence, which is not easy to obtain in practice.

Apart from the FBA, there are many other industry-specific laws which also limit foreign direct investment in Thailand to a different degree, especially in transport, finance, telecom, agriculture, and other sensitive industries.

Foreigners are also generally not allowed to own land in Thailand, except for land in certain industrial estates or except where the foreigners receive a special approval from the Board of Investment (BOI) to own land in Thailand for a specific investment project approved by the BOI. The term "foreigners" in this context (foreign land owning restrictions under the Land Code) is, however, not the same as the term "foreigners" used under the FBA. By having more than 49% of their total issued shares owned by foreigners, locally-incorporated companies are already treated as foreigners under the Land Code.

Therefore, parties interested in acquiring businesses in Thailand must fully understand the applicable limits and their implications in order to ensure that the acquired business would still be legally allowed to operate in Thailand following the acquisition.

In addition to the above, foreign exchange regulations should also be considered in connection with the acquisition. In particular, if it is necessary to remit funds from Thailand to another country as part of the transaction, the parties must ascertain whether or not such remittance would be approved by the Bank of Thailand under the foreign exchange regulations.

7.Any there any law, regulation, policy or directive that would subject the transaction (whether inbound or outbound) to government scrutiny for the purposes of protecting national security?

As discussed above, foreign direct investment activities (inbound) are heavily regulated in Thailand under the FBA, the Land Code, and other industry-specific laws. National security is one of the main reasons to limit foreign direct investment activities in certain areas in Thailand under the FBA.

By contrast, outbound investment activities are not as much regulated under Thai laws. However, the foreign exchange regulations must still be considered, as the Bank of Thailand regulates capital flows in and out of Thailand.

8. Are companies required by law to implement policies relating to ESG? If so, what types of companies need to satisfy this requirement (eg particular industry, minimum revenue) and what are the relevant requirements?

Generally speaking, ESG is not yet in and of itself a separate legal requirement in Thailand, although certain areas comprising the overall ESG concept are already subject to laws and regulations in Thailand, such as, environmental laws, employment laws (including occupational safety, health and environment regulations), etc. Corporate governance is also part of the current company laws (Civil and Commercial Code and the Public Companies Act), although transparency and protection of minority shareholders still have a lot of room for improvement in Thailand.

9. What is the scope of due diligence in M&A deals in your jurisdiction?

In a typical share acquisition transaction, the scope of legal due diligence usually covers:

a) reviews of the current shareholding and management structures of the company;
b) reviews of historical share subscriptions and transfers and proper recordation thereof in the internal shareholder registry of the

company to confirm the seller's rights and title over the sales shares;
c) reviews of share encumbrances (if any);
d) reviews of share transfer restrictions and special procedures, whether in the Articles of Association of the company or in the shareholders or joint venture agreements (if any);
e) reviews of corporate minutes and other statutory records;
f) reviews of key assets of the company, especially real estate and intellectual properties (if any);
g) reviews of permits and licences required for operations of the company under various laws applicable to its business operations;
h) reviews of key agreements, whether financial, operational, security, etc;
i) reviews of employment practices and circumstances;
j) reviews of pending or threatened litigation, arbitration, investigation, and other disputes; and
k) reviews of other information and documents which may give rise to conflict of interest or regulatory compliance issues.

10.Do directors and controlling shareholders owe a duty to the stakeholders in connection with a deal?

Directors owe a fiduciary duty to the shareholders collectively and must act in the best interest of the company. However, such duty may not necessarily include facilitating an M&A deal, especially in a share sale transaction.

Typically, it is a duty of the selling party to procure full and timely cooperation from the company's directors and/or controlling shareholders if the selling party wishes to close the deal. Without the full and timely cooperation of the directors and/or controlling shareholders, it would be almost impossible for the selling party (presumably a minority shareholder) to produce any internal documents and information relating to the company to the buying party because minority shareholders have very limited rights under Thai company laws to access such documents and information.

11. What are the typical obligations/ covenants placed upon the buyer and the seller in M&A deals in your jurisdiction?

The following obligations and covenants are typically required in M&A deals in Thailand:
a) confidentiality and non-disclosure;
b) deal announcements;
c) non-competition;
d) non-solicitation;
e) business as usual pending completion;
f) indemnity for past non-compliance; and
g) other transition mechanisms.

12. How is financing dealt with in the transaction document? Are there regulations that require a minimum level of financing?

There are no regulations that require a minimum level of financing in Thailand.

Typically, financing arrangements are separately documented and separately entered into between the buyer and the financing party, although shares in the target company or its important assets may be required by the financing party as security for the financing arrangements.

13. What government charges or fees apply to these transactions?

For share acquisition deals, the transferor is legally required to affix on the original share transfer instrument stamp duties at the rate of 0.1% of the share purchase price or the par value, which ever is higher. A faction of THB1,000 is considered THB1,000 for the stamp duty calculation purpose.

For sales of real estate, the following taxes and fees will be applicable:
a) a title transfer registration fee at the rate of 2% of the government-assessed value;
b) a special business tax at the rate of 3.3% or stamp duty at the rate of 0.5% (depending on the circumstances) of the actual purchase price or the government-assessed value, whichever is higher;
c) a withholding tax (income tax) at the rate of 1% (if the property seller is a company) or at progressive rates (if the property seller is an individual).

For sales of other assets, value added tax (VAT) at the rate of 7% may or may not be applicable, depending on the circumstances.

It is legally fine for the parties to agree to shift the above tax and fee burdens between themselves. However, such agreement would only bind the parties and cannot be used against the Thai government, meaning that the party required by law to pay the above taxes and fees is still legally liable to the Thai government no matter what is stated in the agreement entered into between the buyer and the seller. Such party's recourse would only be to separately seek a reimbursement of the relevant taxes and fees from the other party who has agreed to absorb them under the relevant agreement.

14. Are hostile bids permitted? If so, are they common in your jurisdiction?

Yes, hostile bids are legally allowed. However, they are not quite common in Thailand.

15. Can minority shareholders be squeezed out? If so, what procedures must be observed?

Conceptually, yes, especially in private companies. This would require a capital reduction by way of eliminating the minority shareholders' shares and returning the share capital to the minority shareholders.

It is also a common tactic for majority shareholders to redirect revenues and profits of the company through the use of various agreements, such as, sales commissions agreements, consultancy agreements, technical support agreements, licensing agreements, etc. to a different entity which is under the full control and ownership of the majority shareholders, intentionally reducing the value of the company shares with an ultimate goal to buyout the minority shareholders' shares at a nominal value.

16.In what circumstances are break-up fees payable by the target company?

Imposing break-up fees on the target company is an uncommon practice in Thailand. Such fees are usually imposed on the buyer and/or seller instead, especially when a party walks away from the deal without proper justification.

17.What is the waiting or notification period that must be observed before completing a business combination?

To legally merge (amalgamate) two or more private companies together, each company must first separately hold its own shareholders' meeting to pass a special resolution to merge with other companies, with a minimum notice period of 14 full days to all of its shareholders. Such special resolutions must also be registered with the company registrar within 14 days from the date of the shareholders meeting.

Then, each company must inform all of its creditors of the proposed merger and give the creditors a minimum of 60 days to object the proposed merger. The proposed merger cannot be proceeded with if it is objected by any creditor.

If no creditor objects (or if there was such an objection but the creditor was subsequently satisfied with an appropriate security), a joint meeting of all shareholders of the merging companies must be held to ultimately approve the merger and to determine details of the new company that will be created as a result of the merger. For this meeting, a notice must be provided to all shareholders at least seven full days in advance of the meeting. After the meeting, an application must be submitted to the company registrar to legally incorporate the new company. The new company would, by operations of Thai law, receive all assets and liabilities of its predecessors (merging companies).

By contrast, transfers of assets or acquisitions of shares do not require the above process and waiting period.

Regardless of the methods of business combination, if the combination could significantly affect competition in any particular market of products or services, and if the combined annual turnover of the relevant business reaches the legal threshold (currently, THB 1 billion), either a pre-merger approval or a post-merger notification could be triggered under the Trade Competition Act. If a pre-merger approval is required, the merger cannot proceed until an approval is granted. On the other hand, if a post-merger notification is required, the parties simply have to submit a

report to the regulator within 7 days from the date of the business combination.

18.How will the labour regulations in your jurisdiction affect the new employment relationships?

Employees cannot be legally transferred without their consent. This is also true in scenarios where two or more companies merge together and form a new company under the law.

Employees who do not consent to the employment transfer would ultimately be entitled to receive from their current employer a statutory severance pay (from 30 days' wages to 400 days' wages, depending on their length of service with the employer) similar to employees whose employment is terminated by the employer without any legal cause.

19.Have there been any recent proposals for reforms or regulatory changes that will impact M&A activity?

We are not aware of any proposed reforms or regulatory changes in this regard.

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1. What are the key laws and regulations that govern mergers and acquisitions in your jurisdiction?

Generally, a transaction on mergers and acquisitions (**M&A**) is governed by the international treaties to which Vietnam is a member, as well as the Law on investment, the Law on enterprises, the specialised laws (depending on the business lines of the target company) and other relevant laws (if any).

Since 1 January 2021 onwards, there were many new laws which came into force and which directly govern M&A transactions in Vietnam. These new laws include the Law on Enterprises, the Law on Investment, the Law on Securities, the Labour Code and so forth.

1.1 Pursuant to the Law on Investment, the M&A activities by an investor (either local investor or foreign investor) may be performed in the following forms of investment: capital contribution to an economic organisation (which is an organisation duly incorporated and operating under the laws of Vietnam), or purchase of shares or portion of capital contribution of such economic organisation, or receipt of the transfer of an investment project or other cases of receipt of investment projects.

Nevertheless, in order to perform either of the said forms of investment, the foreign investor shall be required to satisfy the following conditions:

a) the foreign investor must satisfy the conditions for market approach applicable to foreign investors under the Law on Investment;
b) the foreign investor must ensure national defence and security; and
c) the foreign investor must comply with the legislation on land pertinent to the conditions for receipt of land use right and the conditions for using land in islands and in border and coastal communes, wards and towns.

Please note that the foregoing are new conditions under the existing Law on Investment, and are not provided in the former Law on Investment.

1.2 The foreign investor may contribute capital to an economic organisation in three following forms:
a) purchase of shares on the initial public offering or of additional shares issued by shareholding companies;
b) capital contribution to limited liability companies or partnerships; or
c) capital contribution to economic organisations other than those as prescribed above.

1.3 The foreign investor may purchase shares or a portion of capital contribution of an economic organisation in four following forms:
a) purchase of shares in the target company (which is a shareholding company) from such target company or its shareholders;
b) purchase of a portion of capital contribution of member of the target company (which is a limited liability company) to become a member of such target company;
c) purchase of a portion of capital contribution of a capital contributing member of the target company (which is a partnership) to become a capital contributing member of such target company;
d) purchase of a portion of capital contribution of members of other economic organisations not covered by three aforementioned cases.

1.4 In addition to the satisfaction of the forms of investment, the foreign investor must also, upon making capital contribution to or purchase of shares or portion of capital contribution in the target company, satisfy the conditions for: (i) the ratio of ownership of charter capital of the target company (also known as the shareholding ratio); and (ii) the scope of operation, the participation by the Vietnamese parties in implementation of investment activities and other conditions subject to international treaties of which the Socialist Republic of Vietnam is a member.

1.5 Depending on each business line of the target company, the transaction on M&A may also be governed by specialized laws and other laws relevant to such business line. Accordingly, the investor and the target company must fully satisfy conditions for the said business line as required by the specialised laws. For example, if a local target company has a business line of real estate business and it now becomes a foreign-invested company (eg the foreign investor holds more than 50% of the charter capital of the target company), the operation on the real estate business of this target company may be restricted to certain operations permitted by the Law on Real Estate Business, instead of all operations permitted by law to a local company.

1.6 In Vietnam, land belongs to the entire people (of Vietnam) with the State as the representative owner and is under unified management by the State. The State grants land use rights to land users in accordance with the Law on Land.

In the event that a local company has the right to use a land parcel under the laws of Vietnam and it now becomes a foreign-invested company (via the transaction on M&A), then the rights and obligations of the target company towards the land shall be subject to the controlling shareholding ratio of the foreign investor in such target company, in particular as follows:

a) If the target company is an enterprise with 100% foreign owned capital or a foreign invested enterprise in which the foreign investor holds the controlling shareholding percentage in accordance with the legislation on enterprises, the target company only has certain rights and obligations towards the land, depending on the method of payment of land use fees and land rent;
b) If the target company is an enterprise in which the Vietnamese party holds the controlling shareholding percentage in accordance with the legislation on enterprises, such enterprise has the same rights and obligations as applicable to the (local) economic organisations (which includes enterprises, co-operatives and other economic organisations prescribed in the civil legislation, excluding foreign-invested enterprises).

2. What is the process of a typical M&A transaction and how long would it take?

The process and the time of completion of an M&A transaction will often vary depending on the size, the complexity and the concerns derived from the deal.

In normal cases, the seller and the potential acquirer shall take the following fundamental steps to deal in an M&A transaction:

a) Step 1 - Preliminary discussion and non-disclosure agreements (**NDA**)

This first step is usually the top-level discussion between the potential acquirer and the seller (also the owners of the target company). It may be deemed as a general discussion about overall revenue, earnings, industry and other preliminary information (if any) without the buyer knowing the actual name of the target company.

If the acquirer is truly interested in and is qualified to purchase the company, the parties will enter into an NDA whereby the seller will provide essential and confidential information to the acquirer for the purpose of due diligence in respect of the target company. Sometimes, the said information may be prepared by the seller in the form of "a book" which contains "just enough" information about the target company, for the buyer to submit an indication of interest, which may lead to a meeting with the company owner.

b) Step 2 - Valuation and synergy

After both parties have more information about each other, they may make an assessment of the target company and the deal as a whole. The sellers will offer a good price that can make profit for themselves (as the company owner or major shareholders) while the potential acquirer will also assess the extent of synergies in M&A that they can gain from this transaction.

c) Step 3 - Offer and negotiation

After the potential acquirer has completed their valuation and assessment, they will reach an agreement with the seller on the major terms of the transaction. This agreement may be made in the form of a Letter of Intent (LOI), or a Term Sheet, or a framework agreement, or principle agreement, or likewise (as long as it is agreed by both parties in writing).

This agreement is usually a non-binding document which outlines primary principles in order for the acquirer to purchase the target company, the proposed price and terms. It shall be signed by the parties before the acquirer proceeds the due diligence (step 4 below).

This step may be delayed if either the seller or the acquirer wishes to do so for any reason (eg they do not want to show off that they need to close the deal in a hurry, or there are two potential acquirers or more at the same time, or the acquirer needs to seek the directive from the headquarter but it is postponed by the headquarter).

d) Step 4 - Due diligence

If the seller accepts an offer from a potential acquirer by entering into the aforesaid agreement, the due diligence will be made and presented to the acquirer (or to both parties if it is agreed by the acquirer). The due diligence shall consist of a thorough review of every aspect of the target company.

e) Step 5 - Sale and purchase agreement (SPA)

Pursuant to the results of the due diligence, both parties may: (i) clarify the concerns which the target company is now facing; and (ii) re-negotiate the price. Then, the parties will enter into a sale and purchase agreement (or share purchase agreement, or likewise) which may include the condition precedents for the transaction, the action plan for remedy of the concerns via each phase (namely pre-closing, upon closing and post-closing of the deal), steps for licences and other formalities, payment schedule, closing conditions, post-closing conditions and other issues (if any).

f) Step 6. Closing and integration

When all the closing conditions are fully satisfied, both parties may close the deal by signing relevant documents and the acquirer may also gain control of the target company.

After the deal's closure, the management teams of both parties will work together to integrate them into the target company.

3.What documents are required for the transfer of shares of a company?

3.1 The documents required by law for transfer of shares of a company will vary depending on the following matters because the prevailing laws may provide different statutory requirements for each specific case:

a) What is the type of the target company, either listed company or unlisted company?
b) Where is the target company domiciled, either inside or outside an industrial park, an export processing zone, a high-tech zone or an economic zone (collectively the "park/zone")?
c) What is the type of the shares to be transferred, either voting preferred shares or ordinary shares?
d) If they are the voting preferred shares, whether or not the transfer falls within the permissible cases?
e) If they are ordinary shares, (i) whether the transfer will occur within or beyond three years from the date of incorporation of the company; and (ii) who is the transferee, either an existing shareholder or an external entity who is not the existing shareholder of the company?

f) What are the conditions (by law) for market approach that the company is currently observing?

g) With regard to the foreign shareholding ratio of the target company:

   i) How about the existing foreign shareholding ratio in the target company? Whether it is less than or more than 50% of the charter capital?
   ii) How about the foreign shareholding ratio after the transfer is made? Whether it will remain lower or be greater than 50% of the charter capital of the company?
   iii) Whether the company is currently acting as the user of the land parcel located either in an island; or in a coastal or border commune, ward or town; or in another area which affects national defence and security?

h) With respect to the local shareholders (acting as the transferor), whether or not they have fully paid-up for the shares (i) which are currently held by them and (ii) which will be transferred to the transferee (or the acquirer)?

i) Whether the target company is acting as the enterprise implementing a project which was formerly subject to the cases of requisite for the investment policy approval (which may be known as the "investment in-principle approval")?

   If this is the case, which authority acted as the issuer of the said approval, either the National Assembly, the Prime Minister, the provincial People's Committee, or the management authority of the park/zone? and

j) Whether or not the transfer of shares will give rise to any "add-on"?
   For the avoidance of doubt, the aforementioned add-on means the actions to be taken by the target company for the purpose of reaching objectives of the parties under the M&A transaction. Particularly, it may include the following cases:

k) Other legal issues (if any).

3.2 For the purpose of reference, the following

N0	Actions
1	Division of the target company
2	Separation of the target company
3	Consolidation of certain companies into a new company
4	Merger of companies
5	Other actions:
5.1	Relocation of head office address of enterprise (or also the target company)
5.2	Change of enterprise name
5.3	Change of legal representative of the target company
5.4	Change in charter capital, capital contribution, or ratio of capital contribution
5.5	Change of (i) members of multiple member LLC, or (ii) owner of sole member LLC
5.6	Addition or change to business lines
5.7	Change of information about founding shareholder (in case of unlisted shareholding company)
5.8	Change of shareholder being a foreign investor (in case of unlisted shareholding company)
5.9	Change of information about foreign shareholders; or of the authorized representative of foreign shareholders
5.10	Change of registered tax items
5.11	Change of registered business contents in case of the company being separated or the merged company
5.12	Change of registered operational items of a branch, representative office or business location
5.13	Update on information in the business (registration) profile
5.14	Registration for enterprise in case of transformation of the target company
5.15	Other actions (if any) as stipulated by law.

provides an application file for transfer of ordinary shares from local shareholders of a target company (which is an unlisted shareholding company) to a foreign investor. Assuming that in this case, the transfer of shares shall not require any further add-on, except for item #5.8 as mentioned above:

(a) Internal approval from the General Meeting of Shareholders (GMS) if it is required by law;
(b) Notification of change of registered business contents;
(c) List of foreign shareholders after change (of shareholders);
(d) Share Transfer Agreement or documents evidencing completion of the share transfer;
(e) Legal documents of the transferee (which are consular-legalised for use in Vietnam);
(f) Approval from the investment registration agency (IRA) for the share transfer if the said transfer falls within the cases of requisite for registration of the share purchase.

3.3 If the transferor is an individual, the documents relevant to declaration and payment of personal income tax (PIT) should be prepared as well.

3.4 For the avoidance of doubt, the "General Meeting of Shareholders (GMS)" is not a meeting in nature. From the legal standpoint, this term refers to a council (or a large group) of shareholders of a joint stock company. Under the Law on Enterprises, the GMS plays the role of the entity having the highest decision-making authority of the joint stock company.

4. Are there any statutory requirements on the transfer of assets?

Yes, depending on the type of assets, the prevailing laws may provide specific requirements for transfer of assets of the said type, expressly as follows:

a) In case of machinery, equipment, raw materials and goods (or products), the transfer of assets of this type shall follow the legislation on civil transactions and/or commercial issues.
b) In regard to land use right (LUR), workshops, warehouses, construction works, residential housing units for employees (if any), vehicles, or certain assets of other types, it is required to follow particular requirements for transfer of assets of this type. Accordingly, it is required to register for (i) the right to use the land (in case of LUR) and/or (ii) the ownership of assets, with the State authority.

   Furthermore, in the event that the aforementioned asset is located inside the park/zone, the approval from the management authority of the park/zone may be required before the transfer of assets. Of course, the mentioned transfer of assets must fall within the transferable cases as permitted by law.
c) For corporate bonds, shares and securities, the transfer of assets must follow the specialized law for each type of assets.
d) With respect to subject matters of industrial property right (including inventions, industrial designs, designs of semi-conducting closed circuits, marks, trade names, geographical indications and trade secrets), the transfer of assets of this type shall follow particular requirements for each type of assets under the Law on Intellectual Property.
   It should be noted that if the asset to be assigned is the copyright of a work, the asset of this type shall exclude the mortal rights of the author. In other words, the author is not permitted to assign his or her moral rights to another entity, except for the right to announce the work to public.
e) In case of debts (or account receivables), the sale and purchase of debts must follow strict requirements under the prevailing laws.
f) For assets of other types, the transfer shall be governed by the Civil Code and/or the specialised laws, as the case may be.

5.Would transactions in particular industries be subject to consent or approval from certain stakeholders, such as employees' union, regulators or governmental body?

In Vietnam, almost all M&A transactions shall be subject to (i) multiple approvals (or consents) from various stakeholders in normal cases and (ii) particular approvals from the governmental body, depending on each industry (or each sector), type of target company (either public company or non-public company) the type

NO	Circumstances	Approval maker
I	INVESTMENT SECTOR	
1	Foreign investor makes capital contribution to the target company or purchases shares of target company, or purchase of a portion of contributed capital in the target company, which results in the following consequences: a) There is an increase in the shareholding ratio of the foreign investors in the economic organisation which has its business lines subject to the conditions by law for market approach applicable to foreign investors; b) The foreign shareholding ratio of all foreign investors in target company shall become more than 50% of the charter capital of the target company; c) The target company is holding the land use right certificate (LURC) for land on islands or on a coastal or border commune, ward or town, or for land in another area which affects national defence and security.	Investment registration agency
2	The target company has the business lines which are subject to the conditions for market approach applicable to foreign investors	Case-by-case basis
3	The M&A results in any change to the investment policy approval (for the project) which have been formerly approved by either the National Assembly, the Prime Minister or the provincial People's Committee (PC).	The body who has formerly approved the investment policy approval.
4	Other circumstances (if any).	Case-by-case
II	CORPORATE SECTOR	
5	Transfer of ordinary shares held by founding shareholders within three years from the date of incorporation.	GMS
6	Private placement of shares to foreign investors.	See item #1
7	The target company redeems the issued shares.	BOM or GMS
8	Make decision on or change the organisational and managerial structure of the target company.	GMS
9	13 cases of requisite for the approval from the GMS, eg to amend the charter of the company; to pass the annual financial statements; or to elect, remove or discharge members of the Board of Management (BOM) or members of the Supervisory Board, etc.	GMS
10	16 cases of requisite for the approval from the BOM.	BOM
11	Transactions between the target company and its related persons.	BOM or GMS
12	Other circumstances (if any).	Case-by-case

N0	Circumstances	Approval maker
III	SECURITIES SECTOR	
13	Public offering for sale of shares (even IPO)	GMS and SSC (and/or the court)
14	Guarantee of the public offering for sale of shares	Securities company
15	Private placement of shares (or securities)	GMS and SSC
16	Public offering for acquisition of shares	GMS and SSC
17	Other circumstances (if any).	Case-by-case
IV	LABOUR SECTOR	
18	Eight cases of requisite for the approval from the employees' union (as stipulated in 178 of the Labour Code); and 10 cases where the employees' union has the right to represent and protect the lawful and legitimate rights and interests of the employees (as prescribed in Article 10 of the Law on Trade Union). Below are certain circumstances where the opinions (or approval) from the employees' union shall be required by law:	Employees' union
	a) Unilateral termination of labour contract by the employer;	
	b) The employee is retrenched due to the restructuring, the change of technology, or economic reasons made by the employer;	
	c) Formulation or change of labour usage plan;	
	d) Collective bargaining;	
	e) Formulation of wage scales, wage tables and labour rates;	
	f) Rules of bonuses (given to employees);	
	g) Formulation, change and registration of internal labour rules;	
	h) Dealing with breach of labour discipline; and	
	i) Other circumstances (as stipulated by law)	
19	Labour dispute	Labour conciliators, labour arbitration council, or the court.

N0	Circumstances	Approval maker
V	COMPETITION SECTOR	
20	Economic concentration where the M&A transaction will cause significant impact on, or will have the possibility of causing, restraint of competition.	NCC
VI	OTHER SECTORS	
21	Dealing with the existing foreign loan of the target company.	SBV
22	Transfer of a part or the whole of a real estate project.	Investment registration agency, or the provincial PC, or the Prime Minister
23	Other issues.	Case-by-case

Abbreviations: "GMS" means General Meeting of Shareholders, "BOM" means Board of Management, "SSC" means State Securities Commission, "NCC" means National Competition Commission, "SBV" means State Bank of Vietnam, and "PC" means People's Committee.

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Leading the team of over twenty lawyers, legal consultants, and legal assistants is Mr. Ngo Duy Minh, Deputy Director of VB LAW. With 25 years of legal practice, Mr. Minh has been recommended by various international legal guides including Benchmark Litigation Asia-Pacific, IFLR1000, Legal 500, Asia Law Profiles and Chambers & Partners for dispute resolution & litigation, corporate and M&A, banking & finance, intellectual property and real estate & construction.

of the projects which the target company is implementing, and derivative transactions (which are transactions derived from and necessary for the M&A transaction).

In practice, the stakeholders may include internal and external stakeholders. For the internal stakeholders, they may be the shareholders, boards of all kinds, and the employees' union of the target company. For the external stakeholders, they may be comprised of the regulators, the governmental bodies, the judicial bodies, the creditors, the commercial partners and relevant entities of other kinds (if any).

For the purpose of reference, the following provides certain circumstances where the approval from the approval makers shall be required by law and which may usually occur during the course of the M&A transaction.

6. Are cross-border transactions subject to certain special legal requirements?

The cross-border M&A transactions are understood as follows:

a) An investment from a foreign company into Vietnam, including:

   i) foreign investors purchasing shares or capital contribution in local company; and
   ii) foreign investors purchasing securities listed by a public company via the Stock Exchange or Securities Trading Center.

b) An investment of a company in Vietnam to a foreign country (or known as offshore investment).

In those types of transactions, the inflow investment from foreign companies to Vietnam is much higher than the outflow of Vietnamese companies. The reasons are: firstly, most Vietnamese companies are still in the first or second growth stage; only a small number of them are in the maturity stage but most still struggle with capital; and second, the foreign currency reserve of Vietnam is still small.

In this question, we mainly focus on investment by Vietnamese investors into a foreign country because the cross-border M&A activity via the inflow investment into Vietnam has been presented in other questions herein so far.

6.1 Forms of offshore investment

Investors shall conduct offshore investment activities in the following forms:

a) establishment of an economic organisation in accordance with the law of the investment recipient country;
b) investment on the basis of an offshore contract;
c) capital contribution, purchase of shares, or purchase of a capital contribution portion in an offshore economic organisation to participate in management of such economic organisation;
d) purchase or sale of securities or other valuable papers or investment via securities investment funds or other intermediary financial institutions in a foreign country;
e) other investment forms in accordance with the law of the investment recipient country.

6.2 Power and authority to make decision on offshore investment policy (or known as in-principle resolution)

a) The National Assembly shall make the decision on the offshore investment policy in respect of the following projects: (i) projects with offshore investment capital of VND20,000 billion (about USD826.45 million) or more; and (ii) projects which require application of a special mechanism or policy which should be decided by the National Assembly.
b) Except in the cases prescribed in sub-section (a) above, the Prime Minister of the Government shall make the decision on the offshore investment policy in respect of the following projects: (i) projects in the banking, insurance, securities, press, broadcasting, television or telecommunications sector having offshore investment capital of VND400 billion (about USD16.53 million) or more; and (ii) other cases which are not covered by the aforementioned cases and/or which have offshore investment capital of VND 800 billion (about USD33.06 million) or more.

6.3 Conditions for issuance of an offshore investment registration certificate

(a) The offshore investment activities conform to the principles for implementation of offshore investment activities as prescribed by the Law on Investment;
(b) The business lines under the offshore investment activities must not fall within the prohibited business lines (as stipulated by the Law on Investment). In case of conditional business lines (including banking, insurance, securities, press, broadcasting, television and real estate business), the investor must fully satisfy the conditions for the said conditional business lines as stipulated by law;
(c) The investor makes an undertaking to itself arrange for foreign currency or obtains an undertaking to arrange for foreign currency from an authorized credit institution for implementation of the offshore investment activities;
(d) There is the offshore investment decision as prescribed in the Law on Investment; and
(e) There is a written certification issued by the tax authority regarding the fulfillment by the investor of tax obligations. The date of certification must not exceed three months counted up to the date of submission of the investment project file.

6.4 Offering for sale of shares in a foreign country by Vietnamese joint stock companies

At present time, in order to offer for sale of shares in a foreign country, Vietnamese joint stock companies must: (i) obtain the approval from the State Securities Commission (SSC) for registration for overseas offering of shares; and (ii) satisfy the regulations of the investment recipient country.

In particular, the conditions for approval of overseas offering for sale of shares (made by the SSC) shall be comprised of:

a) The issuance of shares must satisfy the regulations on the holding rate of foreign parties (in Vietnamese companies as the issuers) as prescribed by laws;
b) To obtain a resolution of the GMS approving the offering for sale of shares offshore and the plan for utilization of proceeds earned;
c) To comply with the regulations on foreign exchange control;
d) To obtain approval from the competent state authorities, namely: (i) the approval from the State Bank of Vietnam for the overseas offering for sale of shares under the legislation on credit institutions if the issuer is a credit institution; and/or (ii) the approval from the Ministry of Finance for the overseas offering for sale of shares under the legislation on insurance business if the issuer is an insurance business organisation.

Then the joint stock company shall apply for registration of the offering for sale of shares in a foreign country to the SSC. Within 10 days from the date of receipt of valid application file, the SSC shall give the issuing organisation a written notice of whether or not to accept the said dossier together with reasons for acceptance or rejection.

7. Any there any law, regulation, policy or directive that would subject the transaction (whether inbound or outbound) to government scrutiny for the purposes of protecting national security?

Yes, there are multiple laws, regulations, policies or directives which would subject the transactions to the government scrutiny for the purpose of national security protection. For the purpose of this question, we would like to present this matter in three perspectives below.

7.1 General scope

a) Vietnam has three noteworthy laws (among others), including the Law on National Security, the Law on Anti-Money Laundering and the Law on Cyber-Security.
b) The Law on National Security provides seven groups of prohibited acts, namely:

   i) Organising, operating, colluding with, instigating, controlling, inciting, buying off, deceiving or dragging other persons to oppose the people's administration, to abolish the leadership role of the Communist Party of Vietnam, to divide the country, to disrupt the national unity bloc.
   ii) Undertaking the tasks of organisations, individuals to conduct activities of infringing upon the national security or participating in, assisting, providing finance, weapons and means for,

organisations and/or individuals to conduct activities of infringing upon the national security.

iii) Illegally gathering, storing, transporting, trading in, using, disclosing, supplying or distributing information, documents and articles classified as State secrets.

iv) Infringing upon important national security targets.

v) Opposing or hindering agencies, organisations and/or individuals from performing the tasks of national security protection.

vi) Abusing the performance of national security protection tasks to infringe upon the interests of the State, the legitimate rights and interests of organisations, individuals.

vii) Other offences against the national security, as prescribed by the Penal Code and relevant legal documents.

c) It should be noted that protection of national security is an obligation of all citizens. Any citizen has the right denounce any act of infringement upon the national security upon detection thereof, and all agencies and organisations (irrespective of whether they are specialised in national-security protection or not) shall take necessary measures (as provided by law) for the purpose of national-security protection.

d) The Law on Anti-Money Laundering also stipulates the compulsory cases where financial institutions and entities doing business of non-relevant non-financial business lines (as the reporting entity) must give State Bank of Vietnam (SBV) the reports on high-value transactions, suspicious transactions, transactions on remittance of money by electronic method, money-laundering acts for terrorist financing (collectively, "**suspicious transaction**"). Therefore, if a transaction is regarded as a high-value transaction (which is valued at VND 300 million or more, or approximately USD12,397 or more), the bank where the transaction is carried out (as the reporting entity) must report the State Bank of Vietnam (SBV) on the said transaction, regardless of whether the remittance is made on one or more occasions within one day.

e) The Law on Cyber-Security also requires that any local or foreign entity: (i) who provides telecom network service, the internet service and other value-added services in cyberspace in Vietnam; and (ii) who has the activities of collecting, exploiting, analysing and processing data (being) personal information, data about service users' relationships and data generated by service users in Vietnam must store such data in Vietnam. Furthermore, if the entity is a foreign enterprise, it must have a branch or a representative office in Vietnam.

The guidelines of this Law (Decree No. 53/2022/ND-CP) also figures out the issues on storage of users' data, period of storage, measures to be taken by various entities for the purpose of cybersecurity protection and other relevant issues.

7.2 Inbound transactions

a) The Law on Investment also requires that:

i) the foreign investor must assure national defence and security in the even that it makes capital contribution to, purchase of shares of, or purchase of portion of contributed capital in, an economic organisation.

ii) in the event that the target company is currently acting as the user of the land parcel located either in an island; or in a coastal or border commune, ward or town; or in another area which affects national defence and security, then it is required to register for the transaction as mentioned above. Under this procedure, the licensing authority may carefully examine and decide whether or not to approve the said transaction.

b) The Law on Land also provides the cases and the purposes (or the objectives) where an FIE may implement the projects with use of land.

For example, an FIE may be allocated with land in the form of land allocation with collection of land use fee, provided that the objective of the project in this case shall be "to construct residential housing units for the purpose of either sale, or sale combined with lease-out (of residential housing units). In the event that the FIE leases the land, the

objective of the said project shall be "lease-out" (of residential housing units).

c) In case of doing business of real estate, the Law on Real Estate Business also separates the cases where an FIE can do, as compared to the cases where a local enterprise can do.

7.3 Outbound transactions

a) The Law on Investment also regulates the cases of offshore investment where the investment policy approval and the offshore IRC shall be required. Via the procedure for issuance of the offshore IR, the licensing authority may carefully examine and decide whether or not to approve the said transaction.

b) Furthermore, the Ordinance on Foreign Exchange and its guidelines also provide strict regulations on outbound transactions (on remittance of money abroad) such as offshore investment, borrowing and repayment of foreign loans, recovery of offshore loans, issuance of securities overseas.

It should be noted that the government may apply the following measures when it deems it necessary in order to guarantee national security in financial and currency sectors:

i) impose restrictions on any purchase, carrying, remittance or payment under transactions through transaction accounts and capital accounts;
ii) apply regulations on the obligation to sell foreign currency of non-residents being organisations;
iii) apply economic, financial and monetary measures; and
iv) apply other measures

8. Are companies required by law to implement policies relating to ESG? If so, what types of companies need to satisfy this requirement (eg particular industry, minimum revenue) and what are the relevant requirements?

8.1 With regard to the polices relevant to environmental, social and governance (ESG) issues, this matter may be considered from two sides, including one issued by the government and one issued by the companies.

8.2 From the side of the government, both of the law and the government set out multiple regulations and strict requirements for ESG issues which are mandatory to companies and entities of various types.

a) Environmental issues

The prevailing legislation on environmental protection also provides the State policies, recommended actions, prohibited acts and sanctions pertinent to environmental protection. Accordingly, it regulates various legal requirements for mining of natural resources, climate change, each kind of terrain, each group of manufacturing and business operations, urban and residential areas, waste of all kinds, water drainage and so forth.

The manufacturers and/or the entities which have negative impacts on the environment shall be subject to strict requirements and/or standards for environmental protection. If the said entities or their projects are located inside a park/zone, they must follow specific requirements given by the authority of the said park/zone. If they are located outside the park/zone, they may be subject to the specific requirements for environmental protection (i) as stipulated by law and (ii) as issued by the provincial people's committee.

b) Social issues

Many social issues have been codified and stipulated into relevant laws and guidelines which become mandatory to all companies and other entities who act as the employer.

In addition, the Law on Enterprises also provides a particular type of company named as "social enterprise". The operational objective of a social enterprise is aimed to solve environmental and social issues for the benefit of the community. It should be noted that the company of this type must use at least 51% of its annual profit after tax (PAT) to make re-investment for the purpose of implementing the registered objectives.

The Labour Code of Vietnam and its guidelines provide specific requirements for junior workers (who is under 18 years of age), senior workers (who continues to work after he or she has reached the age of retirement), disable workers

(who are disable persons) and household workers (who do household jobs). Furthermore, it also regulates other social issues like gender equality, sexual abuse at workplace, discussion at workplace (or known as workplace dialogue), collective bargaining (which is the negotiation between one side comprised of one or more workers' representative organisations and the other side including one or more employers or employers' representative organisations in order to establish working conditions, to regulate the relations between the parties, and to develop progressive, harmonious and stable labour relations).

c) Governance issues

At present, public companies are required by law to issue certain rules relevant to the governance of their own companies, namely the internal rules of corporate governance, the rules of operation of the Board of Management (BOM), the Supervisory Board and the Audit Committee.

8.3 From the side of the corporate, it may issue ESG policies which contain matters not mentioned by law, provided however that they must conform to and/or not be contrary to the law.

9. What is the scope of due diligence in M&A deals in your jurisdiction?

9.1 The scope of due diligence will vary on case-by-case basis, depending on the industry of the deal (eg commercial centres, hotels and resorts, residential housing units, solar power plants, etc) and the objectives of the acquirer (which means how far the due diligence should go).

9.2 Basically, the due diligence in an M&A deal shall include at least three separate subordinate due diligence, namely: (i) legal due diligence; (ii) financial due diligence; and (iii) tax due diligence.

9.3 The purpose of the due diligence is aimed to find out the whole picture of the target company in order to identify and negotiate a proper price of the target company. In particular, the whole picture may include the following matters:

a) Pros and cons in business operations of the target company.
b) Gaps, offences, concerns and/or outstanding issues as committed by the target company in various sectors from time to time, all of which may become possible risks to the target company and may directly affect the target company after the M&A deal, whether in short term or in long term (collectively, "Concerns").
c) Classification of Concerns

   i) How many Concerns are the target company taking? which ones are essential and which ones are minor? and which ones are remediable and irremediable?
   ii) If remediable, how long will it take, either in short term or in long term. If irremediable, how many irremediable Concerns are there?
   iii) How about a schedule (or an action plan) for remedy of the essential Concerns before and/or after closing the deal?
   iv) What are concerns and troubles (caused by the prevailing laws) that the target company and/or relevant parties may cope with, during and after the M&A deal? How about the solutions to deal with the said concerns?
   v) What are the current debts and the current financial obligations of all kinds (if any) which have been owed and not fully paid by the target company to the State and/or the third party? Whether they can be paid right now or must be paid gradually?
   vi) What is the remaining duration of the project which the target company is currently implementing (or how long the project will survive)?
   vii) How far the parties wish to deal with the Concerns (or how far the parties agree to fill in the gaps) for compliance with the laws?
   viii) Other matters (if any).

9.4 For the purpose of reference, the following provides an example of certain major issues under due diligence applicable to an M&A deal in which the target company is an unlisted shareholding company implementing a project for development of an apartment building:

a) incorporation and operation of the target company;
b) project, land and construction works;
c) intellectual property rights;

d) taxation, finance and accounting;
e) loans, debts and secured transactions;
f) legal proceedings;
g) commercial and business contracts;
h) insurance;
i) labour; and
j) other issues (if any).

10. Do directors and controlling shareholders owe a duty to the stakeholders in connection with a deal?

In common practices, the condition precedents shall be specified in the share acquisition agreement or the capital contribution transfer agreement. The parties may discuss and agree on the condition precedents, provided that such condition precedents are not contrary to the law and conflict with social ethics. Otherwise, the agreement on such condition precedents shall become null and void.

Most relevant conditions usually are amendments of licence and/or charter of the company or appointment of the acquirer's nominated representatives to managerial positions. Payment for acquisition of shares is usually made in accordance with completion of the condition precedents and disbursement schedule.

11. What are the typical obligations/ covenants placed upon the buyer and the seller in M&A deals in your jurisdiction?

11.1 Pre-closing covenants

The following are the most common covenants made by the seller:

a) The seller will continue to operate the target company in the ordinary course and will not take any major action without the prior consent of the buyer.
b) The seller promises to give the buyer any notice if there is any event which may cause a material adverse effect on the target company, its business operations or its assets.
c) The seller agrees to grant the buyer's team reasonable access to the seller's confidential information, data, documents, premises, personnel and assets to allow the buyer to carry out the due diligence.
d) The seller will obtain all governmental and third party approvals and consents required for the M&A deal.
e) The seller also agrees that based on the results of the due diligence (where the Concerns are figured out), the seller will try its best effort to remedy: (i) a part of the Concerns which can be done before closing the deal; and (ii) the rest within a specific period of time after closing the deal.
f) The parties may also reach an agreement on "no-shop" clause where the seller will not enter into any competitive negotiations with another buyer, and/or "break-up fee" clause where the buyer will pay a sum of money to the seller if the M&A deal is not completed as a result of the actions caused by the buyer.

11.2 Post-closing covenants

Depending on the condition precedents set out by the M&A Agreement (or the share transfer agreement, or likewise), both parties will give specific covenants of their own accord to make the deal completed.

In common practices, the post-closing obligations/covenants may include particular jobs which both parties will do, in order to handle the Concerns (including legal issues, tax issues and other outstanding issues of the target company) under an agreed schedule.

It should be noted that each covenant, each obligation and each job given by the parties to each other should be carefully reviewed and verified by lawyers from both sides because it can be done under the laws of a jurisdiction but it cannot be enforceable under the laws of the other jurisdiction, and vice versa.

12.How is financing dealt with in the transaction document? Are there regulations that require a minimum level of financing?

The financing in an M&A transaction may be made through various methods, including payment in the form of cash, share exchange, loan stock, convertible loan or preferred shares.

In the recent years, the most practicable method of financing in an M&A transaction in Vietnam was the payment in cash; the target companies were owned either by the Vietnamese or foreign

parties.

From the end of 2019 up to now, Vietnam has issued multiple new laws which were effective from 1 January 2021 and which have impacts on the M&A transaction. Thus, the matters on the direct investment capital account (DICA) and indirect investment capital account (IICA), as mentioned below may be changed and governed by new "under-law" guiding documents from time to time.

In case of capital contribution, purchase of shares or portion of capital contribution of the target company:

a) If the foreign investor makes investment in the FIE (as described below), the foreign investor or the FIE (as the case may be) must first open a direct investment capital account (DICA) with a licensed bank in Vietnam, the DICA may be a payment account in VND and/or in foreign currency.

   With regard to the DICA, an FIE shall be the one which falls within one of the three following cases:

   i) Any enterprise which is incorporated in the form of investment and establishment of an economic organisation in which the foreign investor acts as a member or a shareholder (of such organisation) and (this case) is subject to the case where the IRC is required;

   ii) Any enterprise which is not enlisted in the first case, but it has foreign investors holding 51% of its charter capital or more, including the following circumstances:

A) The enterprise which has the foreign investors (has the transaction on) making capital contribution to, purchasing shares of, or purchasing portion of capital contribution of, the said enterprise (which operates in business lines with or without conditions applicable to foreign investors) and (the said transaction) results in the fact that the foreign investor holds 51% of the charter capital of the said enterprise or more;

B) The enterprise is established after (the transactions on) separation, merger and acquisition, consolidation which results in the fact that the foreign investor holds 51% of the charter capital of the said enterprise or more; and

C) The enterprise which is newly established in accordance with the specialised laws.

   iii) The project enterprise which is established by the foreign investors for the purpose of implementation of the public-private partnership (PPP) projects.

For the avoidance of doubt, "PPP project(s)" may be understood as the projects in which the State and the investor shall coordinate with each other to develop the infrastructure works and provide public services based on the project contract. It appears to us that the wording "51% of the charter capital or more" as mentioned in sub-section (a)(ii) above will be amended to "more than 50% of the charter capital" for compliance with the new Law on Enterprises and the new Law on Investment.

It should be noted that the capital contribution in money made by foreign and local investors must be made in the form of wire transfer into the DICA.

In respect of the entity opening the DICA with the licensed bank, the FIE shall open the DICA if the foreign investor makes investment in the FIE (of the types as described above). Meanwhile, the foreign investor shall open the DICA if the said investor participates in a business cooperation contract (BCC), or the foreign investor directly implements the PPP project without establishment of the project enterprise.

b) In the event that the foreign investor makes investment (by way of capital contribution, sale and purchase of shares or portion of capital contribution) in an enterprise (i) which is not enlisted in the cases mentioned in sub-section (a) above, and (ii) which is not a listed company or not yet registered for transactions with the Stock Exchange; or in the event that the foreign investor makes investment in a listed company or a company which has registered for transactions with the Stock Exchange; and in other events stipulated by law, then the foreign investor must first open an indirect investment

capital account (IICA) with a licensed bank in Vietnam. The IICA means a payment account in VND, opened by the foreign investor with a licensed bank in Vietnam in order to perform transactions on collection (or receipt) of payments or disbursements (or withdrawal) relevant to the indirect investment in Vietnam.

In brief, it may be simply understood that: (i) the DICA may be deemed as a joint account (or a joint playground) where the local and foreign investors will make remittance of money to this account for the purpose of the direct investment; or make payment of money for the purpose of transfer of shares or portion of capital contribution in the FIE via this account; meanwhile, the IICA may be deemed as a private account of the foreign investor; and (ii) if the foreign investor makes investment in the FIE as mentioned in sub-section (a) above, the remittance of money shall be made via the DICA. Otherwise, the remittance shall be made via the IICA.

Any transfer of capital into and out of Vietnam must be conducted via the aforesaid investment capital account, including remittance of capital into Vietnam and repatriation of capital, profit and other lawful income back to their foreign country.

Even though Vietnam has suffered from the COVID-19 pandemic from January 2020 up to now, the M&A transactions have still occurred.

Certain M&A transactions spotlighted during the phase between the end of 2021 and 1 October 2022 include the ones in:

a) SHB (Saigon Hanoi Commercial Joint Stock Bank) entered into certain agreement on assignment of their charter capital in SHB Finance to Bank of Ayudhya (Krungsri).

b) Vincommerce. In particular, SK Group (the third largest group of Korea) informed that they will make payment of USD410 million to purchase 16.3% of shares of Vincommerce.

c) M Service JSC, the owner of MOMO, an e-wallet with the largest user of Vietnam. Particularly, Mizuho Bank (Japan) will purchase 7.5% of M-service with the value estimated up to USD170 million.

Financing an M&A transaction via a convertible loan takes place in the following manner with this example: a shareholder named A, a foreign investor, owns 30% of the equity of XYZ company in which two other shareholders named B and C possess 35% and 35%, respectively. Shareholder A provides a convertible loan (which is a shareholder loan) to XYZ. At the time of repayment of the loan, if XYZ fails to repay the loan, the loan shall be converted into equity of shareholder A in XYZ company. Then, the equity of A will be increased, say, to around 40%. As a result, the equity of B and C will be reduced down to around 30% and 30%, respectively; or the value of the equity of XYZ will be increased in proportion to the value of the loan. In either case, A gets more shares in XYZ. If the value of the loan is large, the new equity of A shall constitute an M&A.

Share exchange, another practicable method of financing an M&A transaction, has been gaining popularity. Highlights included the share swap between BV Land (whose full name in English is "BV Land Joint Stock Company" and securities code of BVL at UPCoM) and Lilama Invest (whose full name in English is "Lilama Construction Investment Joint Stock Company"). In the beginning of 2022, BV Land has completed the procedure for issuance of more than 34.2 million shares to perform the share swap with Lilama Invest at the swap rate of 1:1 which means that the shareholders who own 1 share of Lilama Invest may exchange it for 1 share of BV Land after the M&A.

In respect of a minimum level of financing, there is no requirement by law so far. However, this requirement may be agreed by the parties and specified in the share acquisition agreement or the capital contribution transfer agreement.

It should be noted that the documents evidencing the completion of payment for shares shall be required before the licensing authority issues the new enterprise registration certificate to record that the acquirer is a shareholder or a capital contributing member of the target company.

Also, in case of acquisition by the investors of the listed securities, a securities company (broker) shall be permitted to perform the orders

for purchase or sale of securities from their clients only if such securities company ensures sufficient amount of money (for purchase of securities), and/or securities (in case of sale of securities) and shall take necessary measures to assure the solvency of such clients when trading orders are executed.

13. What government charges or fees apply to these transactions?

13.1 In an M&A transaction, the government charges or fees for the following purposes may be required:

a) Enterprise registration, including new issuance, re-issuance, change of contents of either (i) the enterprise registration certificate (the "ERC"), or (ii) the certificates of registration for operation of branches, representative offices, business locations of an enterprise (collectively, the "Certificate of Operation"). The government charge for such purposes is VND50,000 (approximately USD2.07) per each occasion;
b) Provision of information about the ERC or the Certificate of Operation. The government fee for such purposes is VND20,000 (approximately USD0.83) per copy;
c) Provision of information about the application file for enterprise registration; or provision of the financial statements of all kinds of an enterprise. The government fee for such purposes is VND40,000 (approximately USD1.65) per copy;
d) Provision of a consolidated report on an enterprise. The government fee for this purpose is VND150,000 (approximately USD6.20) per report;
e) Public announcement of the enterprise registration contents (of an enterprise). The government fee for this purpose is VND100,000 (approximately USD4.13) per each occasion; and/or
f) Provision of information of an enterprise under an account from 125 copies per month or more. The government fee for this purpose is VND4,500,000 (approximately USD185.95) per month.

13.2 In addition to the aforementioned government fees and charges, depending on the nature of each specific M&A transaction, additional government fees and charges may be required by law to perform necessary procedures for: (i) transfer of the ownership of the property of the company; (ii) conversion of the form of land use right; or (iii) the investment projects whose investor is the target company; and/or (iv) other legal procedures required for the M&A transaction.

14. Are hostile bids permitted? If so, are they common in your jurisdiction?

The laws of Vietnam do not address hostile bids as well as any restriction on hostile bids because the economic growth for companies in Vietnam has not fully developed.

In developing countries, hostile bids are made to make big profits out of listed companies whose market price are far below their book value and a successful hostile bid enables the acquirer to delist and dismantle the target company. Companies in Vietnam have not reached this state.

In Vietnam, a hostile bid, if any, is merely an expression. It occurs in both listed and unlisted companies in the sense that an acquirer uses different nominees to buy shares of a target company on the market or via the securities trading floors. In this way, the target company's management team is not aware of the takeover until the acquirer holds enough shares to summon an extraordinary meeting of the GMS for changing the management. Parallel to the acquisition of as many shares as possible, the acquirer also approaches the company's minority shareholders to persuade them to support its proposal in the said meeting.

15. Can minority shareholders be squeezed out? If so, what procedures must be observed?

a) A shareholder or a group of shareholders holding 5% or more of the total ordinary shares, or holding a smaller percentage as stipulated in the charter of the company, has the following rights:

    i) to examine, research and make an extract of the book of minutes, resolutions and decisions of the BOM, semi-annual and annual financial statements, reports of

the Supervisory Board, contracts and transactions which must be approved by the BOM and other documents, except for the documents pertinent to the commercial secrets, trade secrets of the company;

ii) to request for convention of a meeting of the GMS in the special cases;

iii) to request the Supervisory Board to inspect each issue relating to the management and administration of the operation of the company where it is considered necessary; and

iv) other rights as stipulated in the Law on Enterprises and the charter of the company.

We would like to note that pursuant to the former Law on Enterprises, the minority shareholders may be construed as the shareholder or the group of shareholders holding 10% or more of the total ordinary shares for six consecutive months. However, such percentage is now reduced to 5% and the condition for six consecutive months is now removed from the prevailing Law on Enterprises.

b) In respect of the nomination to members of the BOM and of the Supervisory Board, a shareholder or a group of shareholders holding from 10% or more of the total ordinary shares, or holding a smaller percentage as stipulated in the charter of the company shall be permitted to do so; and the voting to elect members of the BOM must be implemented by the method of cumulative voting whereby each shareholder shall have its total number of votes in proportion to the total number of shares it owns multiplied by the number of members to be elected to the BOM or the Supervisory Board, and each shareholder has the right to accumulate all or part of its total votes for one or more candidates.

Persons who are elected as members of the BOM or inspectors shall be determined on the basis of a descending vote count, starting with the candidate with the highest number of votes until the number of members required by the company charter have been elected. If there are two or more candidates who obtain the same number of votes for being the last member of the BOM or the Supervisory Board, such member shall be elected amongst the number of candidates having an equal number of votes or selected in accordance with the criteria in the regulations on election or the charter of the company.

The provisions on accumulation of votes as mentioned above shall be applied to both listed and non-listed joint stock companies.

16. In what circumstances are break-up fees payable by the target company?

In nature, a break-up fee is an indemnity that a party agrees to pay in the event that a proposed transaction is not completed. Usually, the parties participating in the M&A transaction shall agree upon various events as being the triggering event for the payment of the break-up fees.

The break-up fees payable by the target company may occur in the following circumstances:

a) The tranche of public offering for sale of securities is rescinded in either of the following cases:

i) Upon the expiry of the period of suspension of the public offering for sale of securities (which is 60 days maximum) as required by the SSC but the defects resulting in the said suspension have not yet been remedied;

ii) The initial public offering (the "IPO") of shares failed to satisfy the condition for minimum percentage of the number of voting shares of the issuing organisation sold to at least 100 investors who are not major shareholders of the issuing organisation;

iii) The tranche of offering of additional shares fails to satisfy the condition for raising sufficient capital to implement the project of the issuing organisation as prescribed in the Law on Securities; or

iv) Under a judgement or a decision of the court which came into force and effect, or pursuant to arbitral award, or a decision of the competent authority.

In such case, the target company (as the issuer of securities) must: (i) recall all issued securities; (ii) refund investors; and (iii) compensate

investors for their losses in accordance with the undertakings made by the issuing organisation to investors.

b) In case of discovery, in the context of due diligence, of a defect of the target company which had not been previously disclosed; provided that the target company is also a party to the M&A transaction and the break-up fees may not require the parties to conclude the deal.
c) Other cases (if any) in which the target company is a party participating in the M&A transaction.

17. What is the waiting or notification period that must be observed before completing a business combination?

We understand that you wish to mention the statutory waiting period before completing the proposed M&A transaction as specified in Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act) which is a set of amendments to the antitrust laws of the United States, principally known as the Clayton Antitrust Act. Under this Act, the acquiring person and the person whose business is being acquired must submit information about their respective business operations to the regulatory agencies and wait for a specific period before consummating the proposed M&A transaction. During the waiting period, the regulatory agencies shall review the proposed M&A transaction and may request for further information in order to help them assess whether the proposed transaction violates the antitrust laws of the United States or could cause an anti-competitive effect in the parties' markets.

The laws of Vietnam do not provide any regulations on the waiting or notification period before completing a business combination.

18. How will the labour regulations in your jurisdiction affect the new employment relationships?

In the event of division, separation, merger, or consolidation; sale, lease-out or transformation of enterprises; or transfer of the ownership of, or transfer the right to use the assets of the enterprises which impacts on the jobs of many employees, the employer must formulate a labour usage plan.

Upon formulation of this plan, the employer must exchange opinions with the organisation representing employees at the grassroots level (which may include the grassroots trade union and/or the organisation of employees in the enterprises) if there is an existence of the said organisation in the enterprises (or also the target company). This plan must be publicly notified to the employees for their awareness within 15 days from the date of adoption thereof.

The current employer (or known as the target company) and the succeeding employer (or known as the new employer after the M&A) shall be liable to continue to implement the aforesaid plan which has been adopted.

If the employees are retrenched (due to the aforementioned M&A), they shall be entitled to receive the job-loss allowance, expressly as follows:

a) The employer shall pay a job-loss allowance to an employee who had regularly worked for the employer for 12 months or more. The allowance in this case shall be one month's wages for every working year but at least two months' salary.
b) The length of a working period for calculating the job-loss allowance shall be the total working time which the employee actually worked for the employer minus the period for which the employee participated in unemployment insurance in accordance with the legislation on unemployment insurance and (minus) the working period for which the severance allowance and/or the job-loss allowance have already been paid by the employer (to the employee).
c) Wages for the purpose of calculating the job-loss allowance shall be the average wage pursuant to the labour contract for six consecutive months immediately preceding job loss of the employee.

In addition, the new employer and the organisation representing employees shall have the right to conduct the collective bargaining based on the labour usage plan in order to consider and select whether to resume, make amendment and/or addition to the former collective labour

agreement, or enter into a new collective labour agreement.

19. Have there been any recent proposals for reforms or regulatory changes that will impact M&A activity?

Up to now, Vietnam has continued to carry out various reforms in order to improve the legal system. The following provides certain reforms or regulatory changes which may impact M&A activity:

19.1 On 15 September 2022, the Prime Minister signed Decision No. 1085/QD-TTg providing the plan for review and simplification of internal administrative procedures in the State administrative system for the period of 2022-2025.

Under the said plan, the following points should be noted:

a) 100% of internal administrative procedures under control of Ministries, agencies and local authorities must be statistically analysed and publicly disclosed on the National database on administrative procedures. This issue must be made before 1 April 2023.
b) 20% of administrative procedures and 20% of the fee for compliance therewith must be removed and/or reduced before 1 January 2025.
c) The reform shall be made via three timelines:

    i) Before 1 October 2023, the Ministries and the ministry-level agencies must preside over the review (of internal administrative procedures under their control), and submit the plan for reform to the key sectors to the Prime Minister;
    ii) Before 1 October 2024, they must review and submit the plan for simplification of at least 50% of the internal administrative procedures under their control; and
    iii) Before 1 January 2025, they must review and submit the plan for simplification of 100% of the internal administrative procedures under their control, for the purpose of approval.

d) The administrative reform must be made in a unified manner as guided by the Government Office.

19.2 In 2020, the government issued Decree No. 153/2020/ND-CP on private placement of corporate bonds and trading of privately placed corporate bonds in the local market and offering for sale of corporate bonds to the international market.

After implementation of this decree, the value of issued securities reached VND 637 thousand billion in 2021 and the scale of the market up to the end of 2021 was equivalent to 15% of GDP.

During the past time, certain enterprises with weak financial conditions issued corporate bonds with high interest rate in large volume. However, the regulations by law at this time only allowed the professional securities investors to trade the privately placed corporate bonds. Furthermore, various small individual investors did not carefully master the regulations and information about bonds. So they have infringed the regulations, in order to become the professional investors, purchase the said bonds, or make capital contribution in the form of business cooperation contract (BCC).

Certain service providers on consultancy of the documents regarding offering for sale of bonds, audit firms, valuators, and agencies for placement, registration and depository of bonds did not comply with the laws and the professional ethics. In particular, they committed the wrongdoings on the file of professional securities investors, or intentionally offered the bonds to inappropriate investors.

On 16 September 2022, the government issued Decree No. 65/2022/ND-CP amending the aforementioned Decree 153. The objective of the new decree is aimed to develop the market of corporate bonds in the transparent and stable manner, to protect the rights and interests of both bond issuers and investors and remedy the gaps on the market during the past time. It also provided new regulations on enhancement of duties on the management and supervision and inspection of corporate bond market, especially the supervision of the interconnection among financial market sector, credit institution sector and other sectors of the economy.

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IWATA GODO
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1. What are the main laws and regulations relating to employment law in your jurisdiction?

a) the Civil Code;
b) the Law on Securing Equal Opportunity and Treatment between Men and Women in Employment;
c) the Act on Comprehensively Advancing Labor Measures, and Stabilizing the Employment of Workers, and Enriching Workers' Vocational Lives;
d) the Law concerning the Stability of Employment of the Elderly;
e) the Law concerning the Proper Operation of Worker Dispatch Undertakings and Improved Working Conditions for Dispatched Workers;
f) the Law on Special Measures to Improve Work Hours Arrangements;
g) the Law on the Improvement of Employment Management for Part-Time Workers and Fixed-Term Contract Workers;
h) the Law on Childcare Leave, Caregiver Leave and Other Measures for the Welfare of Workers Caring for Children or Other Family Members;
i) the Industrial Safety and Health Law;
j) the Labour Tribunal Dispute Resolution Law;
k) the Labour Union Law;
l) the Labour Relations Adjustment Law;
m) the Employment Security Law;
n) the Minimum Wage Law;
o) the Law on Promoting the Resolution of Individual Labour-Related Disputes;
p) the Law on the Succession to Labour Contracts upon a Corporate Split; and
q) the laws governing labour insurance and social insurance.

Ordinances, orders, guidelines, etc implementing the foregoing (including the Ordinance for the Enforcement of the Labour Standards Law) are also relevant.

Also relevant to foreign employees are the Immigration Control and Refugee Recognition Law, and to trainees: the Law on Proper Technical Intern Training and Protection of Technical Intern Trainees (Training Law); the Ordinance for the Enforcement of the Training Law; Enforcement Regulations of the Training Law; Basic Policies on Proper Technical Intern Training and Protection of Technical Intern Trainees; Guidelines for Supervising Organizations to Deal Properly with Matters Concerning the Clear Specification of Labour Conditions and the Handling of the Personal Information of Implementing Organizations and Technical Intern Trainees of Supervising Organization-type Technical Intern Training, industry occupational guidelines, etc.

In addition to the above, Japan has entered into social security agreements with more than 20 countries, including the People's Republic of China, Germany, the UK, the US, Belgium, France, Switzerland, Canada, Ireland, Australia, South Korea, Brazil, India, the Philippines and the Netherlands.

2. How are these laws and regulations enforced (eg government agencies or other bodies)?

Various supervisory bodies ensure due compliance with labour laws, including the Labour Standards Bureau at the Ministry of Health, Labour and Welfare, a Metropolitan labour standards bureau in Tokyo and prefectural labour standards bureaus in each prefecture and labour standards supervision offices within each prefecture. Labour standards inspectors are assigned to these bureaus and offices. They have the authority to inspect business offices and facilities, require the submission of documents

and records including accounting books, wage ledgers, employee rosters, etc to search for and investigate violations of labour laws.

Labour standards supervision offices are mainly engaged in the following activities: supervision of businesses, provision of labour law advice and guidance; punishing serious violations of laws; handling applications for approval and reports submitted by business owners; dealing with declarations and consultations; conducting safety inspections of premises and manufacturing facilities; investigating accidents and conducting statistical surveys; and payment of workers' accident compensation insurance monies.

3. Are employee representatives required by law in your jurisdiction? If so, what are their powers and what responsibilities are placed on the employer regarding employee representatives?

There is no general formal requirement for employee participation in Japan (subject to certain exceptions, such as the adoption of, or changes to, the work rules or labour-management agreements). Employees are not statutorily entitled to representation at board level. There is no works council system.

Labour-management agreements are designed to exempt employers from criminal penalties under the Labour Standards Law (eg the obligation to make and file an agreement to have the right to request overtime) or deal with the special treatment of employees (eg restrictions on care leave eligibility). When there is no labour union, an employee representative needs to be elected to represent the employees but this is not a standing position and a representative needs to be elected on each occasion.

Collective agreements between employers and labour unions can also be entered to regulate a broad range of matters such as working conditions, health and safety, redundancies, etc. Enterprise-based bargaining is more frequent than industry-based bargaining.

The Labour Union Law (**LUL**) defines labour unions as organisations or federations of unions formed voluntarily and composed mainly of workers for the main purposes of maintaining and improving working conditions and raising the economic status of the workers. A labour union is simple to establish. A labour union has the right to force an employer to enter into collective bargaining on a very broad range of subjects. Mandatory subjects are those within the employer's control concerning working conditions and other treatment of union members and the management of collective labour relations. In principle, the employer must negotiate in good faith, otherwise a refusal to do so may be deemed to be an unfair labour practice prohibited under the LUL. A labour union can decide industrial action (right to strike) but this is generally strictly regulated to prevent acts of violence, etc.

4. What are the key differentiators between an independent contractor and an employee (full-time or part-time) in your jurisdiction?

The Labour Standards Law defines a worker as a someone who is employed at and is paid wages from a business or office and a worker is protected by labour laws. An independent contractor is distinct from an employee and the relationship is governed by contract law. The borderline is sometimes thin. One of the consequences of misclassifying a worker as an independent contractor is that the contractor can avail himself of the protection of labour laws. To determine whether a person is an employee or an independent contractor, certain factors are considered to identify the degree of control a company has in the relationship with the person. Does the company control or have the right to control what the worker does and how the worker does the job (working hours, instructions and supervision, title, business cards, etc)? Does the company control the business aspects of the worker's job? These include arrangements such as how the worker is paid, whether expenses are reimbursed, and who provides equipment, tools and supplies. Will the relationship continue and is the work a key aspect of the business?

In principle, a representative director of a joint stock company may not be an employee of the company that he or she is heading. As such, a contract for services or an entrustment agreement is generally advisable to clarify the representative director's rights and obligations. Directors are otherwise regulated by the Companies Act.

Regular employees are hired under an indefinite contract, while fixed-term contracts are used for non-regular employees and temporary workers (although they can be used for long-term employees). Part-time workers can have fixed-term or indefinite contracts, and their working hours are shorter than those of regular full-time employees. Part-time workers who are categorised as arubaito can be hired by the day or the hour. Fixed-term contracts cannot exceed three or five years depending on circumstances. The Employment Contract Law provides that, unless the employer has objective and socially acceptable reasons, it cannot refuse to renew a fixed-term employment contract which has been repeatedly renewed, as refusal may be construed as termination of an indefinite contract. The same applies where the employee can reasonably expect his contract to be renewed. A fixed-term contract renewed for more than five years can be converted into an indefinite contract at the employee's request.

5. What discrimination protections are available in your jurisdiction? Is there legislation regarding equal pay and transparency?

Although there is protection on paper, the reality is sometimes less rosy but much progress has been achieved over the last few years. The Act on Comprehensively Advancing Labor Measures, and Stabilizing the Employment of Workers, and Enriching Workers' Vocational Lives prohibits discrimination based on age in connection with recruitment, except in certain circumstances. The Law Concerning the Stability of Employment of the Elderly addresses the employment of senior citizens. The Employment Security Law prohibits employers from discriminating against a person by reason of their race, nationality, creed, sex, social status, family origin, previous employment or labour union membership. The Labour Standards Law (**LSL**) and the Constitution prohibit discrimination based on nationality or ethnic or national origin during employment and in relation to termination. Under the Law on Employment Promotion, etc of Persons with Disabilities, disabled individuals should represent a certain percentage of an employer's workforce (hire or pay). This Law prohibits undue discrimination against people with disabilities. The Law on Securing Equal Opportunity and Treatment between Men and Women in Employment (Equal Opportunity Law) prohibits discrimination based on gender in relation to recruitment and treatment (assignments, promotions, training, housing loans, fringe benefits, etc) and termination. Under the LSL, men and women must receive equal pay. The LSL prohibits discrimination based on social status, religion or political beliefs during employment and in relation to termination. No law expressly prohibits discrimination based on sexual orientation or health status/pre-existing health condition. Discrimination on the ground of trade union membership is unlawful under the Labour Union Law. The Worker Dispatch Law protects dispatched workers from discrimination on the basis of several factors.

Fixed-term contract employees/part-time employees must be treated no less favourably in respect of their terms and conditions of employment than comparable permanent/full-time employees. Recent amendments to the Law on the Improvement of Employment Management for Part-Time Workers and Fixed-Term Contract Workers aim at further reducing status inequalities between the various categories of worker (such as regular employees and non-regular workers such as part-time workers, fixed-term contract workers and temporary work agency staff workers). Guidelines on the Prohibition against the Unreasonable Treatment of Part-Time Workers, Fixed-Term Workers, and Dispatched Workers and Guidelines for the Measures, etc concerning Employment Management Improvement, etc for Part-Time Workers and Fixed-Term Workers published in December 2018 clarify the rules and provide some guidance. The compensation level for non-regular employees (fixed-term/part-time employees and temporary staff) must not be unreasonably lower than that of regular staff and they should not be excluded from benefits, unless the lower pay or exclusion is justified by the nature and purpose of the compensation or benefits. An employer treating irregular employees differently must be able to explain the rationale behind the differences in treatment at the request of employees. If disparities between the labour conditions of fixed-term employees and indefinite-term employees are found to be unreasonable (based on the content of their duties and the responsibilities attached to the job, the

extent of changes in the content of duties and work locations, and other circumstances), the employer is required to compensate for the harm suffered by the fixed-term employees. To ensure the elimination of irrational differences in treatment and discriminatory treatment between regular workers and part-time/fixed-term workers, alternative dispute resolution (**ADR**) procedures operated by the government are available to help employees solve related disputes. Employers have the obligation to take measures to prevent harassment or bullying on account of pregnancy, delivery or taking childcare leave or family care leave.

6. Are foreign workers permitted in your jurisdiction? What is the process for securing visas (if any) and are there any limitations placed on the employer (such as a cap)?

Foreign nationals must satisfy immigration requirements to work in Japan. They must be granted a residence status which enables them to be employed in accordance with the Immigration Control and Refugee Recognition Law (**Immigration Law**).

The Immigration Law sets out a list of occupations for which residence status may be granted. The list has been traditionally limited to skilled and technical occupations such as management, lawyers and accountants, researchers, engineers, etc. Visas are applied for and received at Japanese diplomatic missions abroad. The Immigration Bureau in Japan screens applications to determine whether the intended activities correspond to the visa conditions. In the affirmative, a Certificate of Eligibility is issued. If this certificate is presented to a Japanese diplomatic mission abroad together with a visa application, a visa will be issued. It usually takes about one to three months to obtain a Certificate of Eligibility.
There are variations depending on the circumstances. Based on a point system, preferential treatment can be given to "Highly Skilled Professionals" (eg those engaged in advanced specialised technical activities or advanced business and management activities). Student visa holders may be employed in Japan subject to a specific permission while Technical Trainee visa holders are treated as de facto labourers in labour-intensive industries such as manufacturing and agriculture. These schemes have been criticised as responsible for the exploitation of foreign workers. While the Technical Trainee visa is not disappearing, workers will be allowed to apply for (or apply to switch to) the "Specific Skilled Worker" visa scheme which came into force in April 2019 to alleviate labour shortages due to Japan's shrinking population. The latter visa type allows skilled workers with a certain level of Japanese proficiency and industry experience to apply for jobs in a number of industries, including nursing care, cleaning, manufacturing, construction, hospitality, agriculture and restaurants.

Resident cards are issued to foreign nationals residing legally in Japan for the mid to long-term who have resident status under the Immigration Control Act when they are granted a residence-related permit, such as landing permission. Foreign nationals newly arriving in Japan must go to their competent municipal office to notify their place of residence within 14 days of establishing a place of residence. At Narita, Haneda, Chubu, Kansai, Shinchitose, Hiroshima and Fukuoka airports, in addition to the seal of landing verification stamped on their passports, mid to long-term residents will be issued with a resident card. At other ports of entry, a resident card will be issued after a mid to long-term resident follows the residency procedure at a municipal office, and will be mailed by the Regional Immigration Bureau to the reported place of residence.

7. What employment-related taxes are prescribed by law in your jurisdiction?

Individuals are taxed in Japan depending on their status of residence (permanent or non-permanent residents). Residents are individuals who have had their residence in Japan for one year or more. Non-permanent (or temporary) residents are non-Japanese residents who have had their residence in Japan for five years or less within a 10-year period. Those with over five years' residence in Japan are classified as permanent residents.
Permanent residents are taxed on their worldwide income, regardless of where it is earned or paid. Non-permanent residents are taxed on all income except foreign-source income which is not paid in or remitted to Japan. Capital gains arising from the sale of

securities acquired on or before 1 April 2017 may be excluded. Non-residents are taxed on their Japan-source income (salaries, wages, bonuses, certain allowances and so on). The possible impact of double tax treaties should be considered.

Income tax is charged at progressive rates, which range from 5% to 45%. Certain payments (which are categorised as special income, such as retirement allowance and severance pay) are subject to concessionary tax treatment.
Non-residents who earn a salary which is paid for services rendered in Japan that are not subject to withholding tax in Japan must file a tax return and pay tax at a rate of 20.42% on that income from salary.

Under an exit tax regime targeting specified wealthy individuals, individual income tax is imposed on unrealised capital gains on financial assets at the time of their departure from Japan to prevent them from avoiding capital gains tax in Japan by moving out of Japan and subsequently disposing of their appreciated financial assets.

8. If a worker who is paid in cryptocurrency does not receive what they are owed, can they bring an unlawful deduction of wages claim to the employment tribunal?

Under Japanese law, crypto assets are not treated as money or fiat currency but as assets/property. According to Article 24 (1) of the Labour Standards Act, wages must be paid in currency (meaning Japanese yen), in full and directly to the worker, subject to multiple exceptions: payment other than in currency may be lawful where this is otherwise provided for by laws and regulations or under a collective bargaining agreement with a labour union (distinct from a labour-management agreement) or in case a reliable method of payment of wages defined by Ordinance of the Ministry of Health, Labour and Welfare is provided for. One such exception exists when there is a partial deduction of wages pursuant to a labour-management agreement. Certain companies have introduced cryptocurrency-based compensation schemes and offered their employees the option to receive part of their salary payment in bitcoins, for instance (a portion of salary is used to purchase crypto). Theoretically, payment of salary is made in full without deductions and withholdings other than those prescribed by law. If cryptocurrencies are used as payment within the framework of a collective bargaining agreement, claims of unlawful deduction should not be entertained by the courts or labour tribunal but if what is due is not paid by the employer, the employee can sue before the courts.

9. Are whistleblowers protected in your jurisdiction and are companies required to have procedures in place to deal with whistleblowers?

The Whistleblower Protection Act (**WPA**) protects those who expose corporate or government misconduct from unfair treatment and retribution (eg dismissal, demotions or salary cuts). Under the WPA, a "public interest disclosure" involves the disclosure of relevant disclosure information by a worker to his employer, a government agency or official with relevant jurisdiction, or any other person, to prevent a matter from occurring or worsening. Relevant disclosure information means information regarding criminal conduct or statutory violations relating to the protection of consumer interests, the environment, fair competition and generally the life and property of the general public. There is no statutory obligation to have procedures in place but this is generally advisable and many companies have introduced hotlines or similar schemes. However, further to amendments to the WPA which became effective in June 2022, companies employing more than 300 employees in Japan must establish a system to properly respond to whistleblower reports and designate a person responsible for whistleblowing-related matters. The definition of "whistleblower" under the amended WPA now includes retired workers, temporary workers and officers. Reportable facts covered under the WPA now include "not only criminal acts subject to criminal punishment, but also acts subject to administrative surcharges". Detailed guidance on how business operators should establish whistleblowing systems (Guidelines for Appropriate and Effective Implementation of the Whistleblowing System) has been issued by the Consumer Affairs Agency together with commentaries on the said Guidelines. The requirements include having a proper policy, a helpline, disciplinary sanctions in case of breach

of the internal whistleblowing rules, rules prohibiting retaliation and the inappropriate treatment of whistleblowers and rules dealing with confidentiality and information leakage.

10. Can an employer ask a candidate on the application form or at interview if they have ever been arrested, cautioned or charged with an offence, even if not prosecuted or convicted?

Yes, they can ask. Employers cannot access criminal records. They can check social media accounts to check information on references, past convictions or any trouble with the law. Over the years, the practice of screening employees has been significantly curbed as a result of the enactment of new or tougher legislation relating to discrimination, data protection and privacy. Article 5-5(1) of the Employment Security Law provides that public job placement offices, recruitment agencies and employers who are collecting, retaining and using the personal information of job seekers and those intending to become workers in response to recruitment ads, offers or solicitation should do so within the scope necessary to achieve their business purpose and should use and retain the information in compliance with the purpose of use, except where the person concerned consents or there is some other good cause.

Guidelines of the Ministry of Health, Labour and Welfare (MHLW) clarify the prohibition imposed on employers against obtaining certain background information (except as permitted by law or where the information is essential for their business and the applicant is informed of the purpose of use):

a) race, ethnicity, social status, family origin, registered domicile, birthplace or other information that may cause discrimination;
b) creed or personal beliefs; and
c) union membership or activities (unless permitted by law or a collective agreement).

These Guidelines apply whether an employer directly conducts the background checks or hires a third party to do so.

In principle, the MHLW does not support drug and alcohol testing but testing is permissible provided this is done with the employee's consent and for a legitimate business-related purpose. Employers can inquire about an applicant's medical history, provided that inquiries are consistent with the purpose of the interview. Medical examinations can be performed during initial hire and at least yearly. The immigration status of foreign national employees must be checked, as it is a criminal offence to employ someone who is subject to immigration control without the appropriate permission to work in Japan.

11. Does an employer have a legal obligation to collect information on the race and ethnicity of new employees?

Please see question 10 above.

12. How are dismissals managed in your jurisdiction (in terms of cause, notice and any other such formalities an employer must undergo)?

There is a minimum 30-day notice period before an employer can dismiss an employee under the Labour Standards Law. If the employer does not wish the employee to work any part of this notice period, it can pay the employee's salary in lieu of notice. In contrast with certain other jurisdictions, there are few procedural requirements. In the case of an individual dismissal, a discussion will generally take place with the employee, followed by dispatch or hand delivery of a termination notice. However, employers generally seek to obtain the employee's "resignation" before doing so (see below).

Employers may terminate an employment contract for just cause only. Dismissed employees can claim reinstatement and salary based on the invalidity of the dismissal or compensation for unfair dismissal, unless the employer can show that there was a serious and objective reason for dismissal (eg misconduct, incapacity, illegality, redundancy or some other substantial reason). The misconduct or breach of law must be serious enough to meet the stringent Japanese court standards. Unless the employer's case is strong, a safer alternative to dismissal is for the employer to request that the employee resign. Resignation offers are made

on an individual basis and employees need not accept them (a resignation letter should not be obtained under duress). Financial incentives are offered to encourage employees to accept resignation requests. The arrangement is typically documented in a separation agreement covering the separation package, waivers and releases and restrictive covenants.

Redundancies: employers can terminate employees for compelling reasons only, for example where the employer faces significant economic necessity or reasonable operational necessity and thus a reduction in workforce is unavoidable. The Supreme Court has established the following conditions, which employers must meet to lay off employees in this context:

a) the employer must be in a poor financial situation, making the need to act imperative;
b) the employer must attempt to cut costs and expenses, and reassign employees to other positions within the employer's organisation;
c) the employer must establish appropriate and rational selection criteria; and
d) the employer must provide proper explanations to the employees concerned.

Where a company is being liquidated, the employer has more flexibility.

Where the above Supreme Court conditions for redundancy are met, employers must provide the affected employees with a minimum of 30 days' notice (or payment in lieu). As mentioned, there is no specific statutory provision which makes the payment of compensation mandatory. However, compensation payments are usually made to smooth out the process. When these conditions are not met, employers can try alternative approaches (eg voluntary termination). Early retirement plans allow employers to offer financial packages to employees in order to encourage them to leave. In contrast, in more customary voluntary retirement plans, employees are offered a financial package to encourage them to resign within a short period (eg a couple of weeks). The key to success is to determine which package to offer, target employees without discrimination and get the timing right. This can be a costly process. Packages vary depending on the employee's industry, rank, age and length of service. Certain compensation figures are published which can be used as a benchmark. As a simpler and relatively cheaper alternative, voluntary termination (at the employer's request) should be considered where the number of redundancies is limited.

13. Is immediate dismissal possible in your jurisdiction? Under what circumstances is this permissible and what steps should employers take during such a dismissal?

Although this procedure is cumbersome and seldom used in practice, no notice is required where the employer summarily dismisses the employee for serious misconduct, provided that it has obtained the local Labour Standards Supervision Office's consent. However, employers can only terminate an employment contract for just cause under the Employment Contract Law (the dismissal must be based on objectively reasonable grounds and must be socially acceptable).

14. Are there rules on mass terminations? How should these be handled in your jurisdiction?

Under the Act on Comprehensively Advancing Labor Measures, and Stabilizing the Employment of Workers, and Enriching Workers' Vocational Lives, if 30 employees or more are to be made redundant at a given workplace within one month, a new employment support plan must be prepared listing the employees and detailing the measures taken or to be taken by the employer to facilitate job searches. Any comments from the relevant labour unions (or, in the absence of a union, an employee representative) must be included. The employer must notify the competent public job placement office (known as "Hello Work") of the proposed redundancies and submit the plan for approval before implementation. Hello Work should also be notified when a disabled employee or when five or more employees aged 45 or older are to be made redundant within a period of one month.

15. How are post-termination clauses enforced in your jurisdiction (eg non-compete clauses)?

Non-competition, non-poaching and

confidentiality agreements (see question 8 above) are generally recognised and enforceable.

Non-competition agreements can generally be used to prevent an employee from competing with his employer both during and after employment. However, as post-termination restrictions can be considered to infringe an individual's freedom to work, they will generally only be enforceable if they have been expressly agreed, they are reasonable in terms of their duration and territorial scope, and the employer is protecting a legitimate interest. No particular class of employees is targeted or exempted by law. However, it may be difficult to justify a non-competition agreement for a menial job or a job with no exposure to trade secrets, proprietary knowledge or specific know-how. At present, no compensation is formally required to enforce a non-competition agreement (although post-termination compensation or the amount of salary or retirement allowance can be factors considered by the courts to validate a non-competition covenant).

Criminal penalties apply under the Unfair Competition Prevention Law (UCPL) to punish the disclosure of trade secrets (ie technical or business information useful for commercial activities such as manufacturing or marketing methods that is kept secret and that is not publicly known) by employees and officers. The latest amendments to the UCPL broaden the scope of the claims and remedies available to claimants and increase the maximum fine that can be levied in cases involving the misappropriation of trade secrets (up to 10 years imprisonment and/or fine of up to JPY20 million for individuals, a fine of up to JPY1 billion for juristic persons).

16. Are there regulations on how employee privacy and personal data are handled by the employer? What penalties can be imposed on the employer for failure to maintain any prescribed standards?

The Personal Information Protection Law (**PIPL**) regulates, among other things, the collection, storage and use of employee information. The Ministry of Health, Labour and Welfare has issued guidelines on handling employees' personal data. Infringements of the guidelines can lead to fines or imprisonment in case of violation of a PPC orders, compensation claims from aggrieved employees or regulatory action. Sectoral guidelines have been issued.

The monitoring of employee e-mails, internet and telephone usage and closed-circuit television recording are permissible, provided that they are carried out in accordance with the PIPL and its guidelines. The Personal Information Protection Commission's (**PPC**) guidelines on the PIPL state that employers should specify the purpose of the monitoring and cover such monitoring in internal rules such as the work rules, appoint a person responsible for the monitoring and enforce these rules. No express statutory rules address the protection of social media passwords or employer monitoring of social media accounts.

Under the PIPL, an entity handling personal information which has an employee handling personal information must exercise proper supervision over the employee to ensure data security. The PIPL requires employers to disclose the retained personal data it is keeping on an employee at the employee's request, unless there is a reason not to disclose the data which falls within one of the exceptions to disclosure (eg disclosure may seriously impede the proper execution of the business).

Cross-border transfers of personal information are restricted under the PIPL.

17. Is there any legislation with regards to transfer of undertakings in your jurisdiction? If so, to what extent does this protect employees and what should employers be aware of?

Share deals generally do not affect employment relationships.

With the exception of corporate splits (see below), there is no legislation similar to Council Directive 2001/23/EC of 12 March 2001 on the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses and this absence allows the parties to do some cherry-picking or an employee to resist a transfer. In the event of a business transfer where there is no collective agreement providing for information or consultation with employee representatives,

the employer has no obligation to inform the employees of the proposed transfer except to the extent that employee transfers (individual consent must be secured) or redundancies are contemplated. Even if an employer has consultation obligations under a collective agreement, there is generally no obligation to reach an agreement. However, Ministry of Health, Labour and Welfare guidelines provide guidance which the transferor and transferee companies should follow in dealing with employees in a business transfer, in particular to ensure that they provide sufficient information on working conditions and economic prospects and obtain the genuine and informed consent of the employees to be transferred through timely consultations.

In the case of a corporate split or division (*kaisha bunkatsu* - that is, the carve-out of part of a business), the employer must consult with the employees engaged (primarily or not) in the transferred business individually, and with the labour union that represents the majority of the employees, or a representative of the majority of the employees, under the Law on the Succession of Employment Contracts in a Corporate Split and its related guidelines. The split company must try to secure the understanding and co-operation of its employees. In particular, it should hold discussions at each place of business with the labour union representing a majority of employees (or their representative if there is no union) and consult with the employees to be transferred (whether or not they are engaged in the business). Under the corporate split system, the successor company comprehensively assumes and succeeds to the rights and obligations of the split company in accordance with the corporate split agreement executed between the split company and the successor company. Workers primarily (generally meaning solely or substantially based on certain factors) engaged in the business to be succeeded are automatically transferred subject to the same terms and conditions of employment (which can be amended through a labour-management agreement or through reasonable changes to the work rules). Conflicts may still arise between the companies and workers who are not fully dedicated to a specific business and are not satisfied with their assignment to one or the other company.

18. What are the most common difficulties faced by employers when terminating employment?

Employees in Japan generally have a very high degree of legal protection and the standards for individual dismissal and redundancy are stringent. Employers must be very cautious when terminating any employment relationship and ensure that they comply with the legal and contractual requirements regarding dismissal. Employers may terminate an employment contract for a just cause only; otherwise the termination will not be seen as merely unfair or wrongful, but invalid. Meeting the very high standards set by the courts and collecting proper evidence can be very challenging and as a result when the grounds for dismissal are not strong enough, the traditional route of securing a "resignation" at the request of the employer can prove to be costly. A disgruntled employee has several options if the parties fail to reach an amicable settlement, including bringing a claim against the employer before the court or the labour tribunal, asking them to confirm the employee's position or determine the dismissal is void and invalid. If the court or labour tribunal so rules, the employer must reinstate the employee and pay backpay. A settlement can also be reached before the court or tribunal and the parties will typically be strongly encouraged by the judges/panel to settle their dispute.

An employee cannot be dismissed while he or she is unable to work due to the treatment of a work-related injury or illness and for 30 days thereafter. Special protection applies to dismissals connected with pregnancy and maternity, parental and family care leave, labour union membership or activities and whistleblowing.

19. Are there any changes in legislation planned in the future that will affect employment law in your jurisdiction? How should employers prepare for these changes?

The Law on the Arrangement of Related Acts to Promote Work Style Reform amending the Labour Standards Law and other employment-related laws has introduced a plethora of new rules subject to a staggered implementation process. The three pillars of the reform are:

curbing overtime; also in relation to overtime, introducing the "white-collar exemption" for employees meeting specific criteria; and the "equal work, equal pay" principle between regular and non-regular employees. The main changes came into force between April 2019 and April 2021; others will take effect in the short run. In the wake of COVID-19, promoting life-work balance is still very much on the government's agenda.

The Law on the Comprehensive Promotion of Labour Measures and the Stabilisation of the Employment of Employees and the Enrichment of Their Working Lives, etc (revised in 2019) is intended to tackle workplace harassment and prevent bullying/power harassment in particular. These changes came into force in 2020 for large companies and in April 2022 for small and medium enterprises. The law defines power harassment as "remarks or behaviour by people taking advantage of their superior position that go beyond business necessity, thereby harming the workplace environment". Employers are obliged to take HR management action and preventive measures to combat power harassment, including setting up structures necessary to offer internal consultation services and respond to claims. Employers must provide training to develop their employees' awareness and understanding and ensure that the relevant employees pay attention to their verbal and physical behaviour. Employers are prohibited from dismissing employees reporting harassment cases (or co-operating in an investigation or consultation process) or from treating them unfavourably. The Director-General of a Prefectural Labour Bureau can give advice, instructions or recommendations to assist with the dispute resolution, and employers who fail to comply with a recommendation and a related administrative notice can be publicly named and shamed. Guidelines issued by the MHLW elaborate on the measures to be taken.
Amendments to the Law Concerning the Stability of Employment of the Elderly which came into effect in April 2021 require employers whose employees have reached the age of 65 to make efforts (basically, this is voluntary) to apply certain measures to continue to employ these employees until they become 70. These measures include raising the mandatory retirement age to 70; abolishing the employer's mandatory retirement age; introducing a continuous employment system enabling those reaching mandatory retirement age to continue to be re-employed until they reach 70; adopting alternative measures agreed upon under a labour-management agreement to allow elderly employees to engage in social contribution activities, whether in-house or outsourced.

A bill of law enacted in June 2021 to revise related laws including the Law on Childcare Leave, Caregiver Leave and Other Measures for the Welfare of Workers Caring for Children or Other Family Members and aimed at promoting participation by men in child rearing and supporting the continued employment of women gives fathers more flexibility when taking paternity leave soon after childbirth. Under the new scheme which started in October 2022, fathers can take a total of four weeks off within eight weeks of a child's birth and give shorter notice of their intention to go on leave. Up to 67% of their pre-leave salary is guaranteed through the payment of employment insurance benefits. In addition, since April 2022, employers are required to: (i) take measures to facilitate childcare leave (eg by offering training or through a help desk); and (ii) disseminate the childcare rules and take measures to confirm their employees' intentions when they inform their employer of a pregnancy, childbirth, etc. Employers employing more than 1,000 employees must disclose certain data on how their employees take childcare leave as from April 2023.

The Japanese government is set to introduce a system allowing companies to pay salaries digitally without going through bank accounts which was the contractual alternative to the statutorily prescribed cash remittance (most probably in 2023). Companies will be able to remit salaries to workers using smartphone payment apps (smartphones will be used as wallets). This move will make it easier for foreign workers who have difficulties opening a bank account in Japan and help expanding the financial services market and deregulation and promote growth.

20. What procedural changes in resolving employment disputes have been implemented in light of current events? Are there any "new normal" practical tips in your jurisdiction parties should be aware of when resolving employment disputes?

As a result of the COVID-19 pandemic, telework and flex-time have become increasingly popular. Telework (working from home or WFH) is encouraged as per governmental announcements and initiatives. A number of ministries have been developing a variety of measures for encouraging companies to introduce teleworking into their working styles. The March 2020 Second Batch of Emergency Measures against Coronavirus by the Coronavirus Response Taskforce states that "Japan should strongly promote teleworking and establish this new working-style as a role model." There are no legal requirements (the same rules for working in the office apply). The employer should follow statutory procedures to change the work rules if the employer wants to implement or change rules other than letting employees working from home, including those dealing with:

a) rest hours and breaks;
b) weekly days off;
c) who bears what costs, such as the internet, mobile phone, electricity and phone bills;
d) equipment loans; and
e) confidentiality.

There are no mandatory requirements regarding equipment but the Ministry of Health, Labour and Welfare recommends that its visual display terminals Guidelines (2002) be shown to WFH employees. It is not unusual for employers to lend or provide equipment in a long-term telework context (eg PC). If the employees are using their own equipment, there are certain security risks and issues (hacking, virus, etc). Employers should record employees' working time even if they work from home.

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1. What are the main laws and regulations relating to employment law in your jurisdiction?

In Vietnam, the issues on labour, employment and other relevant matters are primarily governed by the following code and laws:

a) Labour Code - this code shall govern matters on labour standards; the rights, obligations and responsibilities of employees, employers, organisations representing employees at the grassroots level, and organisations representing employers in labour relationship and in other relationships directly related to labour relationship; and stipulates the State administration of labour.
b) Law on Employment - this law shall regulate matters on policies on supporting job creation; labour-market information; assessment and issuance of certificates of national occupational skills; organisation and activities of employment service; unemployment insurance; and the State administration of employment.
c) Law on Occupational Health and Safety (OHS) - this law shall prescribe matters on assurance of OHS; policies and regimes for victims of labour accidents and occupational diseases; responsibilities and powers of organisations and individuals involved in OHS activities and state management of OHS.
d) Law on Social Insurance - this law shall provide matters on social insurance regimes and policies; the rights and responsibilities of employees and employers; agencies, organisations and individuals involved in social insurance, representative organisations of employees' collectives, and organisations representing employers; social insurance agencies; social insurance funds; and procedures for social insurance implementation, and state management of social insurance.
e) Law on Health Insurance - this law shall stipulate matters on health insurance regimes and policies, including participants, premium rates, responsibilities and methods of payment of health insurance premiums; health insurance cards; scope of entitlement to health insurance; medical examination and treatment for participants in health insurance; payment of costs of medical examination and treatment covered by health insurance; health insurance fund; and rights and responsibilities of parties involved in health insurance.
f) Law on Vietnamese Employees Working Overseas under Contracts - this law shall govern matters on the rights, obligations and responsibilities of Vietnamese employees working overseas under contracts; enterprises, non-business entities, and agencies, organisations and individuals pertinent to the mentioned sector; training in occupational skills, foreign language and education in order to give orientations to employees; the fund to support overseas employment; policies towards employees; and the State management in the mentioned sector.
g) In addition, the aforementioned issues are also governed by various "under-law" legal documents which may exist in the form of guidelines issued by the government, relevant Ministries and agencies from time to time.

2. How are these laws and regulations enforced (eg government agencies or other bodies)?

With regard to the legislation on labour, employment, OHS, social insurance, health insurance, and Vietnamese employees working

overseas under contracts, it is primarily enforced by the following entities:

a) The government shall perform the State administration of the aforementioned matters in a unique manner nationwide.
b) In the sector of health insurance, the Mininstry of Health (MOH) shall be responsible to the Government for the State administration [of matters in this sector]. In other sectors, the Ministry of Labour, War Invalids and Social Affairs (MOLISA) shall be responsible to the government for the State administration [of matters in such other sectors].
c) Other Mininstries and/or Ministry-level agencies shall, to the extent of their powers and duties, cooperate with MOLISA in the State administration of the said matters.
d) In the sector of social insurance, Vietnam Social Security (VSS) shall cooperate with MOLISA, the Ministry of Finance (MOF), provincial People's Committee in management of matters on [money] collection, payment, preservation, development and balancing of the social insurance fund.
e) The People's Committee at all levels shall carry out the State administration of the aforementioned matters, within the scope of their power and duties.
f) In addition to the mentioned entities, there shall be certain other entities which may get involved in the enforcement of the legislation on the aforesaid matters, expressly as follows:

    i) State Inspectors in each appropriate sector;
    ii) Entities who have the power and authority to deal with penalties for administrative offences;
    iii) Civil judgment enforcement agencies; and
    iv) Other entities (if any) as stipulated by law.

3. Is employees' representative required by law in your jurisdiction? If so, what are their powers and what responsibilities are placed on the employer regarding employees' representative?

It is our understanding that the term "employees' representative" in this question refers to the "organisation representing the employees at grassroots level" which means an organisation established on a voluntary basis by the employees at an entity acting as the employer, for the purpose of protecting the lawful and legitimate rights and interests of the employees in labour relationship via collective bargaining or via other forms under the legislation on labour. The employees' representative shall include the trade union at grassroots level and the employees' organisation at the enterprise.

For the avoidance of doubt, the term "employees' organisation at the enterprise" may be simply construed as another version of the trade union at the enterprise [or also at grassroots level]. However, the grassroots trade union may be deemed as a part of or attributed to the system of the public-sector trade union known as Vietnam General Confederation of Labour (VGCL) while the employees' organisation at the enterprise is not; and it is a new concept defined by the Labour Code.

3.1 Is employees' representative required by law?

The answer to this question is "no". Nonetheless, certain practical issues should be considered in the absence of the employees' representative. Please find the explanation below.

a) From the side of the employer

It is neither a responsibility nor an obligation of the employer to establish the employees' representative. In other words, it is not mandatory for the employer.

Nevertheless, the employer shall be subject to certain restrictions by law whereby the employer shall be prohibited from taking certain actions in regard to the establishment of, participation in, and operations of, the employees' representative. In particular, the employer shall not be allowed to:

i) discriminate against employees and members of the leadership of the employees' representative, for the reason that they establish, join, or operate the employees' representative; and
ii) interfere in, or manipulate the process of establishment, election, or the formulation

of operational plans and the operations of the employees' representative.

In other words, the employer cannot prohibit, hinder or cause difficulties to the employees in the event that they wish to establish and/or participate in the employees' representative. If the employer tries to do so, it may breach the law.

b) From the side of the employees

i) The Labour Code clearly state that the employees' representative shall be established on a voluntary basis by the employees.
ii) Due to the aforesaid provision, it should be noted that:
A) if the employees decide to establish or participate in the trade union, this case shall be governed by the Law on Trade Union;
B) if the employees participate in the employees' organisation at the enterprise, this case shall be governed by the prevailing regulations. At present, the matters on the employees' organisation at the enterprise are stipulated by the Labour Code only and they are not yet guided by the Government (as mentioned in the Labour Code).

iii) Pursuant to the Law on Trade Union and its guidelines, the employees' representative shall be established [by the employees] if there are at least five trade union members [at the enterprise], or five employees (who are not Trade Union members) voluntarily apply for participation in Vietnam Trade Union. If this is the case, the said employees' representative may be recognised by law.

c) The prevailing laws require that the employees' representative must give their opinions (which may be deemed as the approval, as the case may be) in the following circumstances:

i) When the employer formulates pay scales, payroll and labour rates;
ii) Before the employer makes decision on and publicly announce the rules of bonuses at the workplace;
iii) Before the employer issues or makes any amendment to the internal labour rules. It should be noted that the internal labour rules shall be required if the enterprise has 10 employees or more;
iv) When the employer deals with any breach of labour discipline; and
v) Other cases (as stipulated by law).

d) In brief, the requisite for the existence of the employees' representative may be understood as follows:

i) From the side of the employer, it shall not be required by law for the employer to establish the employees' representative.
ii) From the side of the employees, it shall not be required by law if no employee agrees to establish and participate in the employees' representative.
iii) It may become compulsory if the employees decide to establish and participate in the employees' representative and the conditions by law for incorporation of the employees' representative are fully satisfied. In such case, the employer shall be subject to certain restriction relevant to the said incorporation.
iv) The existence of the employees' representative may become necessary because it is required in certain activities in labour sector (as mentioned above). In the absence of the opinions given by the employees' representative in certain circumstances where it is required by law, the employer may breach the law.

3.2 Powers of employees' representative

The employees' representative has the following noteworthy rights:

a) To be consulted [by the employer, or to give their opinions to the employer] about the formulation and performance of pay scales, payroll, labour rates, rules of payment of salary, rules of bonuses, internal labour rules and matters related to the rights and interests of employees who are members of the employees' representative;
b) To act as the representative of an employee during the course of personal claims and/or personal labour disputes if the employees'

representative is authorised [by the employee];
c) To hold and become leader of the strike as prescribed by law; and
d) To conduct collective bargaining with the employer and/or dialogues at the workplace; and
e) Other rights as stipulated by law.

3.3 Responsibilities of the employer regarding employees' representative

In addition to the responsibilities of the employer as mentioned above, the employer shall take the following noteworthy obligations regarding the employees' representative:

a) If the employee is a member of the board of leadership of the employees' representative, the employer must:

   i) extend the labour contract of the said employee up to the end of the office term if the labour contract becomes expired during the office term [where he/she is acting as the member of the said board];
   ii) reach a written agreement with the mentioned board of leadership in the following events:
      A) the employer unilaterally terminates the labour contract;
      B) the employer seconds the employee to another job;
      C) the employer imposes the discipline in the form of dismissal, on the employee.
   iii) take other responsibilities for the employer if the said employee is a member of the trade union.

b) Not to hinder or cause difficulties [to the employees] when the employees conduct lawful activities in order to set up, join [become a member of], participate in the operations of the employees' representative;
c) To recognise and respect for the rights of the employees' representative which has been legally incorporated.
d) To take other responsibilities and/or obligations as stipulated by law.

4. What are the key differentiators between an independent contractor and an employee (full-time or part-time) in your jurisdiction?

4.1 In other countries, an independent contractor may be understood as a self-employed person, or an individual (as a natural entity) contracted to perform work for, or provide services to, another entity as a non-employee. The independent contractor may be also known as the "freelancer".

4.2 In Vietnam, the jobs or the services to be rendered by the freelancer may be classified into three following groups:

a) Jobs and/or services which the freelancers shall be recognised by law as individual practitioners.
   In this case, the practitioners may be required by law to have the appropriate practising certificates, register for doing business, and perform the procedure for tax registration of the business of this kind. In other words, they may be deemed as the accredited independent contractors, eg lawyer, architect, document-filing service provider, real estate broker, certain titles in construction sector, etc.
   It should be noted that even though the lawyer job may be classified into this group, it is a special job and it is different from other jobs, expressly as follows:

   i) The lawyer acting as an individual practitioner shall be required to enter into a labour contract with the employer which is not a legal practising organisation.
   ii) For other jobs, the freelancer shall enter into an agreement (rather than the labour contract) with the service user or the party engaging the freelancer to do the work.

b) Jobs and/or services which the laws prohibit the practitioner from acting as an individual practitioner (or also an independent contractor), eg auditor, practising auditor, practising price evaluator, etc.
c) Jobs and/or services which the laws do not mention whether or not it falls within the two aforementioned types. In this case, the freelancer may be regarded as the non-accredited independent contractor.

4.3 The following provides key differentiators between an independent contractor and an employee (who works under a labour contract):

Criteria	Independent contractor	Employee
1. Type of contract	Freelancer agreement, or likewise	Labour contract
2. Relationship between the parties	Parties to a civil transaction.	Employer and employee in labour sector
3. Primary laws governing the contract	Civil Code, Law on Commerce and/or other relevant laws (if any).	Labour Code and/or other relevant laws (if any).
4. Social insurance	Payment for the insurance of this kind shall be based on a free-will basis.	Payment for the insurance of this kind shall be based on a mandatory basis.
5. Health insurance	Payment for the insurance of this kind shall be based on a free-will basis.	Payment for the insurance of this kind shall be based on a mandatory basis.
6. Tax		
a) Tax declaration and payment	Made by either the freelancer and/or the entity who pays money (also the income) to the freelancer, as the case may be.	Made by the employer.
b) From the side of the employer	The payments to the freelancer may not be treated as "deductible expenses" [or it may be deemed as invalid expenses of the corporate].	The payments to the employee may be legally recorded under the prevailing laws.
7. Dispute (if any)		
a) Type of dispute	Civil dispute.	Labour dispute.
b) Dispute resolving body	Court or arbitration, as the case may be.	Labour mediator, labour arbitration council, or court.

5. What discrimination protections are available in your jurisdiction? Is there legislation regarding equal pay and transparency?

5.1 What discrimination protections are available in your jurisdiction?

"Labour discrimination" means the act of discrimination, exclusion or priority on the grounds of race, colour skin, national origin or social origin, ethnicity, gender, age, maternity status, marital status, religion, belief, political opinion, disability, family responsibility, or on the basis of HIV infection status, or due to the establishment, joining or operation of either a trade union or an organisation of employees at the enterprise, which causes an effect on equality of occupational or employment opportunities. It should be noted that any distinction, exclusion or priority derived from special requirements for a job, and any act of retention or protection of jobs for vulnerable employees shall not be deemed as discrimination.

Labour discrimination is a strictly prohibited act in Vietnam. Furthermore, any offence against gender equality [or sexual discrimination] in the sectors of politics, economics, labor, education and training, science and technology, culture, information, physical excerises, sports and health may be either subject to the penalties for administrative offences or prosecuted for criminal charge, as the case may be.

The following provides certain penalties for administrative offences relevant to labour discrimination in which the employer acts as the corporate offender:

NO	Circumstances	Penalties
1	Labour discrimination upon recruitment and management of employees.	Fine ranged from VND10 million to VND20 million.
2	Discrimination on working conditions between the outsourced employees and its own employees in the event of labour sourcing.	Fine ranged from VND6 million to VND10 million, depending on the quantity of employees [who are suffered from the discrimination].
3	To interfere in or manipulate the process of establishment, election, and formulation of operational plans and organisation of activities of grassroots employees' representative, in the event of the employer imposes economic measures or other measures which cause adverse effect to the grassroots employee's representative and/or its operations.	Fine ranged from VND40 million to VND80 million.
4	In the event of the employer provides the service of bringing Vietnamese labourers abroad for working purpose [or known as labour export service]:	
	a)the employer fails to provide legal aid in circumstances where the labourers need legal assistance when they are suffered from abuse, violence or discrimination during the course of working abroad.	Fine ranged from VND80 million to VND100 million.
	b)the employer commits discrimination against the labourers, or offends their honour or dignity during the course of bringing them abroad for working purpose.	Fine ranged from VND150 million to VND180 million.

5.2 Is there any legislation regarding equal pay and transparency?

In Vietnam, the employer must ensure that salaries are paid in an equal manner, without sexual discrimination against employees who do the jobs with equal value.

With regard to the transparency in labour sector, there are multiple regulations on this matter under the prevailing laws of Vietnam, among of which are noted as follows:

a) Labour usage plan - when the employer formulates the labour usage plan, it must consult with [or in other words, obtain the consent of] the grassroots employees' representative. Then, this plan shall be publicly disclosed to the employees;
b) Collective bargaining - the collective bargaining shall be conducted on the principles of free-will, co-operation, goodwill, equality, publicity and transparency;

   For the avoidance of doubt, it may be simply understood that "collective bargaining" means the negotiation and/or the agreement made between the employees' representative and the employer, in order to constitute [or formulate] the labour conditions and the provisions on labour relationship between the parties, which make the labour relationship progressive, harmonious and stable.

   The [meeting of] collective bargaining shall be recorded in minutes which will publicly disclosed to the employees;

c) Pay scales, payroll and labour rates - they shall be formulated by the employer, approved by the grassroots employees' representative and then publicly disclosed to the employees at the workplace;
d) Payment of salary [or wages] - on each occasion of payment of salary, the employer must provide a list of salary payments settled to the employee which includes the following items: the salary, overtime payment, night work payment, and the description, and the withheld or deducted sum of money (if any);
e) Rules of bonuses - the employer shall make decision on and publicly disclose the rules of bonuses after consulting with the grassroots employees' representative [or in other words, after obtaining the consent of the grassroots employees' representative]; and
f) Other matters (if any) as stipulated by law, from time to time.

6. Are foreign workers permitted in your jurisdiction? What is the process for securing visas (if any) and are there any limitations placed on the employer (such as a cap)?

6.1 Conditions for working in Vietnam

Foreign workers may be permitted to work in Vietnam, provided that the following conditions are fully satisfied:

a) Having a foreign nationality;
b) Having full 18 years of age or more, and having full capacity for civil acts;
c) Having professional qualifications, technical and work skills, work experience and good health as stipulated by the Minister of Health;
d) Not being the person: (i) who is currently serving a penalty; (ii) whose criminal conviction has not yet been absolved/ removed from the criminal record; or (iii) who is subject to prosecution for criminal liability in accordance with the laws of foreign country or of Vietnam; and
e) Having a work permit issued by a competent Vietnamese State authority, except in certain cases as stipulated by law where foreign workers are exempt from work permit.

For further information, in addition to the aforementioned conditions, the foreign worker and/or the employer must also satisfy other conditions as follows (as the case may be):

a) The employer may be required to perform the procedure for employment of foreign workers.
b) At present, there are 20 cases where foreign workers are exempt from work permit, in which:

   i) there are 13 cases where the foreign workers must obtain the certification of exemption from work permit; and
   ii) there are seven cases where foreign workers shall not be required to have the certification of exemption from work

permit. However, the employer must give a report [on certain required information about foreign workers] to MOLISA or the DOLISA [in the provinces or cities] where the foreign workers are expected to work [before they officially start to work in Vietnam].

c) It should be noted that the said 20 cases are provided for various purposes which may or may not include the purpose of working in Vietnam. Therefore, the foreigners who enter Vietnam for the purpose of working in Vietnam should apply for visa and work permit [or certification of exemption from work permit] appropriate to his/her case.

6.2 Entry visa (for working in Vietnam)

a) Type of visa - for the purpose of working in Vietnam, foreign workers need to have the entry visa marked as "LD1" (which means the first group of labour cases) or "LD2" (which means the second group of labour cases) on the top right of the visa. LD1 visa shall be issued to foreign workers who have certificate of exemption from work permit while LD2 visa shall be issued to those who must have work permit.

b) Conditions for issuance of entry visa - in order to obtain the visa of the said types, a foreign worker must fully satisfy the following conditions by law for issuance of entry visa:

i) Having a passport or equivalent travel document;
ii) Invited and/or guaranteed by an agency, an organisation, or an individual in Vietnam (known as the "guarantor" in Vietnam or the "sponsor" in other countries);
iii) Not subject to the cases where the entry is not permitted; and
iv) Having documents evidencing the purpose of entry (as stipulated by law).

c) Formality - the local guarantor shall apply to the immigration authority for the entry visa to be issued to the foreign employee. Within five business days, the immigration authority will give a response to the guarantor. In case of acceptance, it will also give a notice to the visa-issuing authority of Vietnam located in

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Leading the team of over twenty lawyers, legal consultants, and legal assistants is Mr. Ngo Duy Minh, Deputy Director of VB LAW. With 25 years of legal practice, Mr. Minh has been recommended by various international legal guides including Benchmark Litigation Asia-Pacific, IFLR1000, Legal 500, Asia Law Profiles and Chambers & Partners for dispute resolution & litigation, corporate and M&A, banking & finance, intellectual property and real estate & construction.

a foreign country. Then, the guarantor will come to the said visa-issuing authority of Vietnam located in a foreign country in order to receive the visa.

For the avoidance of doubt, the "visa-issuing authority of Vietnam located in a foreign country" includes diplomatic missions (ie the embassy, the consulate general, or the consulate of Vietnam) or other agencies of Vietnam which are located in foreign countries and which are authorised to carry out the functions of a consulate.

6.3 Limitations imposed on the employer

The laws of Vietnam do not impose the quota of foreign workers which the employer may apply for. Nonetheless, the employer may be subject to the following noteworthy limitations (as the case may be):

a) In the scenario of entry visa where the employer acts as the guarantor, the guarantor must cooperate with the competent authority of Vietnam in: (i) resolving matters arising out of or in connection with the foreigner who was invited and/or guaranteed; and (ii) requesting the said foreigner to exit from Vietnam.
b) In the context where the employer is a foreign contractor, the foreign contractor may only register for foreign employees who will work in Vietnam and who must be the experts of economic management, experts of technical management, or well-skilled persons that Vietnamese [workers] are not qualified [for the same job/position].
c) Under normal circumstances of recruitment and employment of foreign workers, the employer may only, based on the demands for business and production, recruit foreigners to work in certain positions (such as managers, operators, experts and technicians) that Vietnamese workers are not qualified.
d) The employer must observe the procedure for employment of foreign workers. The outcome of this procedure shall be letter of approval issued by either the Ministry of Labour, War Invalids and Social Affairs (MOLISA) or the provincial People's Committee, as the case may be. It should be noted that this procedure must be made before [physical] recruitment and/or employment of foreign workers.

7. What employment-related taxes are prescribed by law in your jurisdiction?

7.1 Kinds of taxes and/or levies

Under the laws of Vietnam, any employee (irrespective of local or foreign employees) may have to pay the following kinds of taxes and sums of money extracted from the monthly salary of the employee (so-called as levies), as the case may be:

a) Personal income tax (PIT);
b) Social insurance (SI) premium;
c) Health insurance (HI) premium;
d) Unemployment insurance (UI) premium; and
e) Trade union (TU) fee (if any).

For the avoidance of doubt, PIT, SI premium and HI premium shall be applicable to both local and foreign employees. However, UI premium shall be applicable to local employees only, and TU fee shall be applicable to local employees who are members of the grassroots trade union only.

7.2 Personal income tax (PIT)

The Law on PIT classifies taxpayers into two types, namely residents and non-residents.

Residents means individuals who may satisfy either of the following conditions: (i) being present in Vietnam for 183 days or more within a calendar year or within 12 consecutive months from the first date of their presence in Vietnam; or (ii) having a permanent dwelling place in Vietnam (ie having a registered place of permanent residence, or a rented house in Vietnam under a definite-term rental agreement for dwelling purpose).

Non-residents means individuals who do not satisfy any condition for residents.

For residents with income from salary and remuneration, they will pay the PIT under the following progressive tariff:

Tax bracket	Portion of annual assessable income (million VND)	Portion of monthly assessable income (million VND)	Tax rate
1	0 – 60	0 – 5	5%
2	> 60 – 120	> 5 – 10	10%
3	> 120 – 216	> 10 – 18	15%
4	> 216 – 384	> 18 – 32	20%
5	> 384 – 624	> 32 – 52	25%
6	> 624 – 960	> 52 – 80	30%
7	> 960	> 80	35%

For non-residents with income from salary and remuneration, the PIT amount shall be the taxable income multiplied (x) by the tax rate at 20%.

7.3 Brief of levies

At present, the monthly levies shall be paid by both sides of the employer and the employee, expressly as follows:

Index	Levies	Paid by the employer	Paid by the employee
1	Social insurance (SI) premium	17.5%	8%
2	Health insurance (HI) premium	3%	1.5%
3	Unemployment insurance (UI) premium	1%	1%
4	Trade union (TU) fee	2%	1%

Remarks:

a) The payments for the aforesaid levies from the side of the employer shall be accounted for the expenses of the corporate while the same from the side of the employee shall be extracted from the salary of the employee.
b) The employer shall pay the [monthly] trade union fee [at 2% of the salary fund used as the ground for payment of SI premiums for the employees], regardless of whether the company has the grassroots trade union or not.
c) The employee shall pay the [monthly] trade union fee [at 1% of his/her salary used as the ground for payment of SI premium] only if he or she acts as a member of the grassroots trade union.

8. If a worker who is paid in cryptocurrency does not receive what they are owed, can they bring an unlawful deduction of wages claim to the employment tribunal?

8.1 Based on this question, we understand and assume that the employee and the employer (collectively, the parties) have reached an agreement that the employer shall pay the employee salaries, wages and/or other remuneration (if any) in cryptocurrency. If this is the case, please find our response and explanation below.

8.2 At present, the laws of Vietnam do not recognise cryptocurrency as a legal currency used for any and all operations in Vietnam. Furthermore, the issuance, provision and/or use of cryptocurrency (as an invalid payment instrument) shall be attributed to prohibited conducts as stipulated by law. As a consequence, the offenders may be subject to administrative or criminal sanctions, as the case may be.

8.3 In the event that the parties have reached the said agreement, it shall become invalid because this agreement (or this civil transaction) falls within the prohibited conducts as stipulated by law.

8.4 The consequences of the invalid civil transaction shall be dealt as follows:

a) An invalid civil transaction shall not give rise to civil rights and obligations with respect to the parties or to changes and termination of such rights and obligations as from the time the transaction is entered into.
b) Where a civil transaction is invalid, the parties shall restore [everything] to its original state and shall return to each other what they have received. If restitution is not able to be made in kind, it shall be valued in terms of money to return.
c) The bona fide party in collecting benefits or income is not required to return such benefits or income.
d) The party at fault which caused loss and damage must compensate.
e) Resolution of consequences of invalid civil transactions relating to personal rights (as provided by Civil Code and other relevant laws).

8.5 Furthermore, the parties may, depending on the nature and the degree of the offences, be either: (i) subject to the relevant penalties for administrative offences; or (ii) prosecuted for the relevant criminal charge.

8.6 Back to the question, we would like to give the following comments:

a) The "unlawful deduction of wages claim" to be made by the employee against the employer may be regarded as a labour dispute under the laws of Vietnam.
b) Thus, if the employee does not fully receive his/her salary as agreed with the employer [in other words, the employer owes the employee a sum of money which has the nature of salary payable to the employee], the employee may refer the dispute to either of the following entities: labour mediator, labour arbitration council, or the people's court.

9. Are whistleblowers protected in your jurisdiction and are companies required to have procedures in place to deal with whistleblowers?

In other countries, the whistleblower may be anyone who reports insider knowledge of illegal, immoral, illicit, unsafe or fraudulent activities occurring in an organisation. In the context of a business, a whistleblower can be any employee, supplier, contractor, client, or any individual who becomes aware of dubious business operations.

In Vietnam, the whistleblower may be known as the "denunciator" who gives the authority, organisation and/or individual of competent jurisdiction a notice of an illegal act which is committed by any agency, organisation or individual, and which causes damage to, or threatens to cause damage to the interests of the state, or the lawful rights and interests of any agency, organisation or individual.

For the purpose of this question, the whistleblowers (as mentioned below) shall be construed as the denunciator in labour sector only. For the avoidance of doubt, the whistleblower shall not be the labour claimant who makes a claim of any decision given by, and/or any act committed by, the employer in the

event that the claimant has any ground proving that the said decision and/or act breaches the legislation on labour and/or infringe upon the lawful rights and interests of the claimant.

9.1 Whether whistleblowers are protected?

Under the legislation on denunciation in labour sector, the denunciator (also the whistleblower in this question) shall include any person who works under a labour contract and his or her relatives (ie spouses, biological parents, adoptive parents, offspring and adopted children of the denunciator). These entities shall be treated as the protected persons.

The whistleblower shall be protected by law, expressly as follows:

a) The denunciation handler (which means any agency, organisation, or individual who has the power to deal with the denunciation) must take necessary measures to protect the safety of the whistleblower;
b) In order to become a protected person, the whistleblower must follow the formality as stipulated by law. In particular, he/she must give a written request for application of protective measures to the denunciation handler, and show them any ground evidencing that:

    i) his/her work position, job, life, health, property, honor and dignity are currently infringed, or threatened to be infringed immediately; or
    ii) he or she has suffered from repression or discrimination.

    In case of emergency, the whistleblower may give a request for protection to the denunciation handler in person, or via phone call; provided however that such request shall be backed up in writing.

c) The scope of protection includes confidential information, work position, job, life, health, property, honour and/or dignity of the protected persons.

d) If the denunciation handler finds that the grounds [given by the whistleblower] are reasonable and accurate, it shall promptly make a decision on application of protective measures. Otherwise, it shall give a written notice of non-application of the same with reasons therefor.

9.2 Whether the company (as the employer) is required to have procedures in place to deal with whistleblowers?

The company (as the employer) is not required to have procedures in place to deal with the whistlerblowers. Nevertheless, the employer shall be required to take the following responsibilities:

a) Not to exercise job discrimination against the protected person;
b) Not to take revenge on, victimise and/or threaten the protected person, which causes an effect to the job, income and other lawful job-related interests of the protected person;
c) To perform job-protection measures for the protected person promptly and adequately, at the request of the authority which issues the decision on application of protective measures (so-called the "decision-issuer");
d) To give the decision-issuer and the grassroots employees' representative a statement of the results of job-protection measures [as taken by the employer]; and
e) To cooperate with and provide the competent authority with information, documents and records during the course of receiving, verifying and taking job-protection measures.

It should be noted that in the scenario of denunciation [where the decision on application of protective measures has been issued], other entities (including the labour union at district/province level and the people's committee at district/province level and other related entities, if any) may get involved in the process of dealing with the denunciation.

10. Can an employer ask a candidate on the application form or at interview if they have ever been arrested, cautioned or charged with an offence, even if not prosecuted or convicted?

Yes, the employer can do so. Please find our explanation below.

Pursuant to Article 16.2 of the Labour Code, the

employee must also provide the employer with truthful information being the employee's full name, date of birth, gender, place of residence, educational qualificaton, work-skill qualification, certification of health status and other matters directly relevant to the entry into the labour contract at the request of the employer.

Via the question, it is our understanding that:

a) information about whether or not the candidate [for a job] have ever been arrested, cautioned, or charged with an offence, prosecuted and/or convicted may be deemed as "other matters [of the employee] directly relevant to the entry into the labour contract";
b) the action on posing a question about the information of this kind is not enlisted in the prohibited conducts where the employer cannot do upon execution of the labour contract as stipulated by law; and
c) thus, the employer may ask the candidate about information of this kind.

In addition, if the employer is either of the entities (including State agencies, political organisations and socio-political organisations), it shall have the right to request for judicial records (or known as criminal records in other countries) of the employee, for the purpose of personnel management.

11. Does an employer have a legal obligation to collect information on the race and ethnicity of new employees?

No, the employer is not required to do so, due to the following reasons:

a) The scope of information about the employee which shall be gathered by the employer does not include information about race and ethnicity of the employee.

b) Furthermore, information about race and ethnicity is not included in the mandatory contents of the labour contract. In other words, such information is not compulsory.

12. How are dismissals managed in your jurisdiction (in terms of cause, notice and any other such formalities an employer must undergo)?

12.1 Permissible cases

The employer may dismiss the employee in four following cases:

a) The employee commits any act of theft, embezzlement, gambling, deliberate attempt to cause bodily injury, or use of drugs in the workplace;
b) The employee discloses the trade secrets, technological secrets and/or infringes upon intellectual property rights of the employer; causes serious damage, or threatens to cause severe damage to assets and/or interests of the employer, or commits any act of sexual harassment in the workplace as regulated in the internal labour rules;
c) The employee is subject to the sanction of labour discipline in the form of either: (i) delay in the period of pay-raise; or (ii) demotion but he or she commits the repeated offence when the mentioned sanction [under the initial offence] has not been removed. For the avoidance of doubt, the duration of delay in the period of pay-raise shall be six months.
d) The employee arbitrarily leaves the job for five accumulative days out of 30 days, or 20 accumulative days out of 365 days, as counted from the first day of leaving the job, without any legitimate reason. For the avoidance of doubt, the circumstances with legitimate reasons shall include natural disasters, fire, illness suffered by the employee or his or her relatives with certification made by the competent facility of examination and treatment, and other cases as stipulated in the internal labour rules.

12.2 Prohibited cases

The employer shall not be permitted to dismiss the employee in the following circumstances [or the following durations]:

a) The employee is on sick leave, is on leave for medical treatment or recuperation, or is on leave with the consent of the employer;
b) The employee is detained or temporarily held in prison;
c) Pending for the results of investigation or verification made by the competent authority in regard to the offences as mentioned in Section 12.1(a) and/or Section 12.1(b) above;

d) A female employee is pregnant, or on maternity leave, or nursing her baby under 12 months of age; and
e) The employee breaches the labour discipline when he/she is suffering from mental illness or another disease which causes lack of awareness, or inability to control his or her actions.

12.3 Formality

The process of dealing with the breach of labour discipline in the form of dismissal shall be briefed as follows:

Step 1 - Recording the offence

a) At the time of discovery of the offence committed by the employee, the employer shall record it into the minutes and give a notice [of the said offence] to the grassroots employees' representative where the employee is a member. If the employee (then acting as the offender) is under 15 years of age, the said notice must be given to his/her legal representative.

   For the avoidance of doubt, the legal representative of an individual shall be either of the following entities (as the case may be):

   i) The father or mother if the said individual is a minor;
   ii) The guardian if the individual is a ward;
   iii) The person appointed by the court in the event that it is impossible to identify the legal representative of the minor or the ward;
   iv) The person appointed by the court if the mentioned individual is suffered from restricted capacity for civil acts.

b) If the discovery is made after the occurrence of the offence, the employer shall be required to collect proofs evidencing the faults of the employee.

Step 2 - Convention of the discipline meeting

a) The limitation period for dealing with the breach of labour discipline shall be six months from the date of the offence. If the offence directly relates to the issues on finance, assets, disclosure of technological secrets and/or trade secrets of the employer, the mentioned limitation period shall be 12 months. This period may be extended but the extended period shall not exceed 60 days.
b) At least five business days before the date of the meeting for dealing with the breach of labour discipline, the employer must give a notice [with mandatory contents as stipulated by law] to the mandatory attendants [who are required by law to attend the said meeting] (ie the grassroots employees' representative and the employee) and must make sure that they successfully receive the notice before occurrence of the meeting.
c) When the mandatory attendants receive the mentioned notice, they must give a confirmation of whether or not they can participate in the meeting. If any attendant cannot join in the meeting at the given time and/or venue, the employer and the employee shall reach an agreement on any change of the meeting time and venue. If the parties fail to do so, the employer shall make decision on the meeting time and venue.

Step 3 - Holding the discipline meeting

a) The employer shall hold the meeting at the proper time and in proper venue as prescribed in the mentioned notice.
b) In the event that either of the mandatory attendants (including the employee and the grassroots employees' representative) fails to give the confirmation of participation in the meeting, or is absent from the meeting, then the employer still conducts the meeting.
c) The employee has the right to defend himself or herself, or request his/her lawyer or the employees' representative to defend him or her. If the employee is under 15 years of age, the presence of his or her legal representative shall be required.
d) The meeting agenda [or also all contents of the meeting] must: (i) be made in writing [in the form of the meeting minutes]; (ii) be adopted before the end of the meeting; and (iii) contain the signatures of the mandatory attendants. If any attendant does not sign the minutes, the person in charge of recording the minutes [normally the secretary of the meeting] must record full name [of the said attendant] and the reasons [of rejection] (if any) into the [same] minutes.

Step 4 - Issuing a decision on dismissal of the employee

Within limitation period for dealing with the breach of labour discipline as mentioned above (which is either six months, 12 months, or the extended period, as the case may be), the person who has the power to deal with the breach of labour discipline from the side of the employer shall: (i) issue the decision on dealing with the breach of labour discipline [which will be appliable to the employee acting as the offender]; and (ii) deliver the said decision to the mandatory attendants.

For the avoidance of doubt, the person who has the power to deal with the breach of labour discipline from the side of the employer shall be either:

i) the person who has the power to enter into the labour contract (ie the legal representative or the authorised representative of the corporate; or the head of agencies or organisations having legal entity or his or her authorised person; or other entities, as the case may be); or
ii) another person who is specified in the internal labour rules.

12.4 Post-dismissal

a) If the employee finds the decision [on dismissal] unsatisfactory, he/she shall be entitled to make a claim to the employer and the competent authority. In such case, this claim shall be deemed as the claim in labour sector and he/she shall become a labour claimant.
b) If the decision made by the employer on dismissal of the employee is contrary to the law, the employer must fulfill the obligations and take responsibilities as provided by law for the employer in case of labour claim, labour dispute, and in the case where the employer unilaterally terminates the labour contract in an illegal manner.

It should be noted that in case where the employer unilaterally terminates the labour contract in an illegal manner, the prevailing laws set out three following situations in which the additional sum(s) of money payable by the employer to the employee shall be different:

i) The employer agrees to receive the employee back to work;
ii) The employer disagrees to do so; and
iii) The employee refuses to continue to work [for the employer].

13. Is immediate dismissal possible in your jurisdiction? Under what circumstances is this permissible and what steps should employers take during such a dismissal?

The laws of Vietnam do not allow immediate dismissal. If the employer wishes to dismiss an employee who commits an offence falling within the permissible cases of dismissal, the employer must observe the regulations on dealing with the breach of labour discipline. Otherwise, the employer may become an offender. In such case, the employer may be subject to the penalties for administrative offences in labour sector, or be prosecuted for the criminal charge, depending on the nature and the degree of the offence.

For further information, in the criminal case of dismissal of employees contrary to the law, the individual who illegally dismisses the employees shall become the criminal offender (as opposed to the employer acting as a commercial legal entity) because this criminal charge is applicable to individual offender only. In such case, the offender may be either: (i) fined a sum of money ranged from VND10 million to VND200 million; or (ii) subject to a community sentence of up to one year; or (iii) subject to the penalty for three months to three years' imprisonment, as the case may be. Furthermore, the said offender may be also prohibited from holding particular positions for one year to five years.

14. Are there rules on mass terminations? How should these be handled in your jurisdiction?

14.1 What is mass termination?

In other countries, "mass termination" or "mass lay-off" means a situation where 50 or more employees within the same establishment (or facility) are laid off by the employer within a particular period as stipulated by law.

The aforesaid concept is not prescribed by the

laws of Vietnam. However, Vietnam has certain regulations on termination of labour contracts of multiple employees concurrently or within a specific period of time. In nature, it may be similar to mass termination but the laws of Vietnam do not stipulate the specific number of employees whose labour contracts are terminated like the laws of other countries.

14.2 Causes

In practice, mass termination may be derived from the following causes:

a) The employees commits certain offences, or there exist certain circumstances as stipulated by law where the employer has the right to unilaterally terminate the labour contract (the "permissible cases");
b) The employer wishes to do so even if the employer does not fall within the permissible cases, or it is simply an arbitrary decision of the employer;
c) The employer wishes to narrow the extent of business operations;
d) The employer wishes to re-structure its organisation or re-organise its workforce; or change its business/production process, technology, machinery and/or equipment; or change the products or the product structure (so-called as "restructuring or change of technology");
e) Occurrence of economic depression or rescission; or the employer follows the State policies for or legislation on restructuring of the economy, or the international commitments (so-called as "economic causes");
f) Occurrence of division or separation, consolidation or merger of the company which the employees are working for; or the employer sells or transfers the ownership of the said company and/or the assets of the company to the acquirer (collectively, "M&A reason"); or
g) Other causes (as the case may be).

14.3. Permissible cases

a) At the present time, the Labour Code of Vietnam provides seven groups of cases where the employer is permitted to unilaterally terminates the labour contract.

Among those cases, we would like to mention two following circumstances:

i) The employer may unilaterally terminate the labour contract in the event of dangerous epidemic; and
ii) The employer narrows [the extent of] business and production at the request of the competent authority even though the employer has taken all [necessary] remedies but it is required to reduce the number of jobs.

Under the second circumstance, the employer may perform the "mass termination" due to the narrowing of its scope of business and production, provided that such narrowing must be derived from the request of the competent authority and the employer has taken all necessary remedies [to prevent the mass termination].

b) Nonetheless, the law also provides certain cases where the employer is not permitted to exercise the right to unilaterally terminate the labour contract.
c) Thus, if the unilateral termination of the labour contract by the employer does not conform to the laws, it shall be deemed as "unilateral termination of labour contract in an illegal manner" by the employer.
d) Pursuant to the prevailing laws, the following issues should be noted:

(i) If the mass termination is derived from dangerous epidemic, or the narrowing of business and production at the request of the competent authority, or other permissible causes, then the employer shall be entitled to unilaterally terminate the labour contract.
ii) If the mass termination is originated from the cases (including restructuring or change of technology, economic causes, or M&A reason), this termination shall be deemed as [normal] termination of labour contract under the circumstances as provided by law for this matter. This also means that neither the employee nor the employer shall have the right to unilaterally terminate the labour contract.
iii) If the mass termination by the employer does not fall within either the [normal] cases of termination of labour contract, or the permissible cases, the said termination

may be regarded as illegal termination of labour contract by the employer.

14.4 Effect

Upon termination of the labour contract, the employer must take the following noteworthy actions (among others):

a) To give the employee a prior notice [of unilateral termination of the labour contract by the employer] if it is required by law;
b) To pay the employee particular sums of money within the period as stipulated by law. The avoidance of doubt, the said sums of money may include salary, mandatory insurance premiums, severance allowance or job-loss allowance (as the case may be), other interests (if any), and an additional sum of money (in case of unilateral termination of labour contract contrary to the law);
c) To re-formulate and perform the labour usage plan (as the case may be);
d) To certify the period of payment of social insurance premium and unemployment insurance premium for the employees;
e) To return certain kinds of documents to the employees; and
f) To fulfill other obligations and/or responsibilities as stipulated by law (if any).

15. How are post-termination clauses enforced in your jurisdiction (eg non-competition clauses)?

15.1 Types of post-termination clauses

In Vietnam, the employer and the employee may enter into the following types of agreements [or contracts] during the course of labour relationship between the parties:

a) Labour contract;
b) Agreement on trade secret [which is normally made in the form of a non-disclosure agreement (NDA) or a confidentiality agreement];
c) Job training agreement;
d) Non-competition agreement (NCA); and
e) Other agreements (if any).

It should be noted that the labour contract shall be entered into by the parties on a basis of [or under the principles of]: (i) free-will, equality, goodwill, co-operation and honesty; and (ii) not contrary to law, or to the collective labour agreement, or to social morals. These principles may be similarly applicable to the agreements of other types in labour sector.

15.2 Where are they stipulated?

In common practice, the agreements between the parties on certain issues (such as confidentiality of trade secret, data protection, data privacy, and non-competition) can be incorporated into or separated from the labour contract and they shall survive the termination of the labour contract. Thus, they are known as post-termination clauses [in the context of labour sector].

15.3 How does the survival of post-termination clauses work after termination of the labour contract?

a) Under the laws of Vietnam, "labour relationship" means social relations arising during the hiring and employment of workers and during wage payment, among the relevant parties, including the employee, the employer, organisations representing the parties (ie the employees' representative and the employers' representative) and the competent State agency.
b) In normal circumstances [where the termination of the labour contract is deemed as legal], the labour relationship between the employee and the employer shall be terminated when the labour contract is terminated.
c) Because the labour relationship between the parties is terminated [due to the termination of the labour contract], the post-termination clauses may be regarded as the civil transactions between the individual (the ex-employee) and the legal entity (the ex-employer).

d) In order for the said clauses to come into effect [or remain in effect], they must fully satisfy the following conditions:

   i) The entities participating in a civil transaction must have civil legal capacity and capacity for civil acts appropriate to the established civil transaction;
   ii) The transaction must be made on an absolutely voluntary basis; and

iii) The objectives and contents of the civil transaction are not contrary to the law or social morals.

e) It should be noted that the post-termination clauses (which may be deemed as the civil transactions after termination of the labour contract) may become invalid if they fall within the cases of invalidity of civil transactions as stipulated by law (eg due to breach of legal prohibitions or contravention of social morals; due to falsification; due to misunderstandings; due to deception, threat or coercion, etc.)

f) Thus, the post-termination clauses may remain enforced and in effect if they fully satisfy the conditions by law [for validity of a civil transaction] and they do not fall within the cases of invalidity of civil transactions.

15.4 What is the type of the dispute over the post-termination clauses?

a) The Labour Code of Vietnam provides a definition of "labour dispute" which means a dispute about the rights, obligations and interests arising between the parties during the process of establishing, implementing or terminating the labour relationship; [or] a dispute between organisations representing employees; or a dispute arising from relationships directly relevant to the labour relationship. Labour dispute includes, among others, the dispute between the employee and the employer.

Via this definition, we would like to note that the labour dispute only mentions the disputes which occurs during the course of establishment, implementation and termination of the labour relationship. Nevertheless, it does neither mention nor include the circumstance on the dispute which occurs after the termination of the labour relationship.

b) Under the prevailing laws, if an employee commits any act of breach of the agreement on trade secret and/or technological secret, and such offence is discovered during the course of the labour contract, then the issue on compensation for loss or damage shall be governed by the Labour Code. If it is found after termination of the labour contract, it shall be governed by legislation on civil matters and other relevant laws.

c) From our perspective of this matter:

i) If the dispute over the post-termination clauses occurs during the course of implementation and termination of the labour relationship (or also the labour contract), it shall be regarded as labour dispute which arises between the employer and the employee. If this is the case, it shall be governed by the Labour Code, and other relevant laws (if any).

ii) In the event that the said dispute occurs after termination of the labour contract, or the ex-employee commits any breach of the said clauses after termination of the labour contract, it may be deemed as the dispute over the civil transaction between the individual (the ex-employee) and the legal entity (the ex-employer). If this is the case, it shall be governed by the Civil Code, and other relevant laws (if any).

d) At present, the Supreme People's Court of Vietnam has issued 56 case-laws. Nonetheless, there is no case-law referring to the post-termination clauses.

16. Are there regulations on how employee privacy and personal data are handled by the employer? What penalties can be imposed on the employer for failure to maintain any prescribed standards?

The laws of Vietnam in general and the legislation on data privacy in particular are in the phase of construction. Up to now, there is no single comprehensive, unified and integrated code or law on protection of personal information (or known as data privacy) in Vietnam. Instead, specific cases relevant to personal information protection can be found in more than 50 separate laws on different subject matters, which also impose certain requirements for gathering, storage, protection, disclosure and/or transmission of personal information. Although the said laws do not directly refer to data privacy in a systematic manner, they may be deemed as the law on personal data/information protection.

Subject to each specific matter [or each specific case], the employer may be required by law to take appropriate actions pertinent to employee

privacy and protection of employees' personal data or information. The following provides the most common cases where the employer must take the responsibilities and/or fulfill the obligations relevant to the captioned matter.

No.	Subject matters and circumstances	Penalties
1.	Personal papers, degrees and certificates of the employee. The employer is not permitted to keep original documents of personal papers, degrees and certificates of the employee during the course of entry-into or performance of the labour contract.	a) Fine - it shall be ranged from VND40 million to VND50 million. b) Mandatory remedy - the employer must return the said original documents to the employee.
2.	Claim or denunciation of sexual harassment a) The employer must ensure that the rules [issued by the employer] of any claim or denunciation of sexual harassment and dealing with the acts of sexual harassment can protect secret, honor, reputation, dignity and safety of the victim who is suffered from sexual harassment, of the claimant, the defendant, the denunciator and the denounced person. b)Upon occurrence of any claim or denunciation of sexual harassment in the workplace, the employer must have measures to protect secret, honor, reputation, dignity and safety of the victim who is suffered from sexual harassment, of the claimant, the defendant, the denunciator and the denounced person.	Not provided by the current legislation for the case where the employer (as the corporate offender) fails to takes the given actions. However, the individual offender who commits the act of sexual harassment in the workplace shall be fined VND15 million to VND30 million if the degree of the said offence is not serious enough for the offender to take criminal liability.
3	Photograph of an individual a)If the employer uses the photograph of the employee, the employer must have the consent of the employee, unless otherwise stipulated by law. b)If the employer uses the said photo for commercial purpose, the employer must pay remuneration to the employee, unless otherwise agreed by the parties.	Depending on the specific offence, the law may regulate appropriate penalties for the said offence.

No.	Subject matters and circumstances	Penalties
4	Honour, dignity and reputation of an individual a)These subject matters of an individual are protected by law. b)Any information which adversely affects honour, dignity and reputation of an individual and which is posted on any mean of public media must be removed and/or corrected by the same mean of public media. If this information is stored by any organisation, it must be destroyed. c)The victim of the aforesaid offence has the right to request for refutation [of the aforementioned information], request the information provider to make a public apology, a public correction, and make compensation for any loss or damage.	Depending on the specific offence, the law may regulate appropriate penalties for the said offence.
5	Private life, personal privacy and family privacy [of an individual] a)These subject matters are protected by law. b)The gathering, storage, use, or public disclosure of any information about (i) private life and/or personal privacy must be agreed by the said individual; or (ii) family privacy must be agreed by the family members [of the said individual], unless otherwise stipulated by law. c)With regard to mail, telephone, telegraph, electronic database [of an individual] and other forms of exchange of private information of an individual, it is required to assure the safety thereof and shall be ensured and keep them confidential. d)The parties to a contract are not allowed to disclose any information about private life, personal privacy or family privacy of each other which they know during the course of entry-into and performance of the contract [to another entity], unless otherwise agreed [by the parties].	Depending on the specific offence, the law may regulate appropriate penalties for the said offence.
6.	Confidential information [in the context of entering into a contract] If a party receives confidential information from the other party during the course of entering into a contract, it must keep such information confidential, and must not use the said information for its own purposes, or for any other illegal purpose.	Depending on the specific offence, the law may regulate appropriate penalties for the said offence.

No.	Subject matters and circumstances	Penalties
7	Infringement upon confidential information, mail, telephone, telegraph privacy, or private information exchanged in other forms a)To appropriate another person's mail, telegraph, telex, fax, or other document which is transmitted by postal service or via telecommunications (hereinafter abbreviated as "telecom") network in any form; b)Deliberately to cause damage or loss to, or obtain, another person's mail, telegraph, telex, fax, or other document which is transmitted by the postal service or telecom network; c)To listen or record conversations contrary to the law; d)To search, confiscate mail or telegraph contrary to the law; e)To commit other acts which infringe upon the confidentiality or the safety of another person's mail, telegraph, telex, fax or other private information exchanged in other forms.	a) Situation The offender has been disciplined or subject to an administrative penalty but recommits the mentioned offences. b) Penalty The said offender may be subject to the penalty in the form of warning, or fine ranged from VND20 million to VND50 million, or a community sentence for up to 3 years, or imprisonment for 1 to 3 years, as the case may be. c) Additional penalty The offender may also face an additional fine ranged from VND 5 million to VND20 million, or be prohibited from holding certain positions for 1 to 5 years.

No.	Subject matters and circumstances	Penalties
8	Illegal provision or use of information on computer networks or telecom networks a) To upload information to a computer network or a telecom network illegally, except in certain cases as stipulated by law; b)To trade, exchange, give as a gift, alter, change, or publicly disclose private information of an individual on the computer network or telecom network without consent of the owner of such information; c)To commit any other acts which illegally use information on the computer network or telecom network.	a) Situation The offender commits any of the mentioned offences, and: i)earns an illegal profit ranged from VND50 million to less than VND200 million; or ii)causes any damage valued from VND100 million to less than VND500 million; or iii)causes bad public opinion which reduces reputation of an individual. b) Penalty The said offender may be subject to the following sanctions (as the case may be): i)fine ranged from VND30 million to VND200 million, or subject to a community sentence for up to 3 years, or imprisonment for 6 months to 3 years; or ii)fine ranged from VND200 million to VND1 billion, or imprisonment for 2 to 7 years. c) Additional penalty The offender may also face an additional fine ranged from VND20 million to VND200 million, or be prohibited from holding certain positions, or from practising or doing specific jobs for 1 to 5 years.
9	Other cases as stipulated by law.	Depending on the specific offence, the law may regulate appropriate penalties for the said offence.

17. Is there any legislation with regards to transfer of undertakings in your jurisdiction? If so, to what extent does this protect employees and what should employers be aware of?

17.1 Transfer of undertakings

The transfer of undertakings occurs when the ownership of a business moves to a new owner.

In other countries, the transfer of undertakings may be made upon occurrence of the following events: merger and acquisition (M&A), sale of a business by sale of assets, any change of licensee or franchisee, the inherited gift of a business, transfer from companies in administration, contracting out of services, changing contractors, or selling or transferring all or part of a sole trader's business or a partnership.

In Vietnam, the transfer of undertakings happens upon occurrence of the following circumstances which impacts on the jobs of multiple employees:

a) Division or separation, consolidation or merger [of an enterprise or known as the target company];
b) Sale, lease out or transformation of an enterprise; or
c) Transfer of the ownership or the right to use assets of an enterprise or a cooperative.

The caption matter is governed by the Labour Code, the Law on Enterprises and other relevant laws of Vietnam.

17.2 Protection of employees

a) Upon occurrence of transfer of undertakings, the current employer and the subsequent employer must follow the approved labour usage plan. This plan must be consulted with the grassroots employees' representative where the target company has the grassroots employees' representative, and publicly disclosed to employees within 15 days from the date of adoption.
b) In the event that the employees are retrenched [or also lose their jobs] due to the transfer of undertakings, they shall be entitled to receive the retrenchment allowance for job loss [or known as job-loss allowance].

In this case, the retrenchment allowance shall be computed in accordance with the following rules [as stipulated by law]:

i) Conditions for entitlement to this allowance

The employees must have regularly worked for the employer for a full 12 months or more, and they loss their jobs due to the transfer of undertakings.

ii) Formula

The retrenchment allowance shall be one month' salary for each year of work, but it must be at least two months' salary.

It should be noted that if the duration accounted for this allowance applicable to the said employee is less than 24 months, the employer shall be required to pay at least two months' salary.

iii) Computation of the duration accounted for the retrenchment allowance

The mentioned duration shall be the total period of work which the employee has physically worked for the employer minus the period for which the employee has participated in unemployment insurance and minus the period of work for which the employer has already paid the severance allowance or the job-loss allowance [for the said employee].

The computation of the said duration as well as each factor of the formula must follow the prevailing laws.

It should be noted that the time of work accounted for the retrenchment allowance shall be calculated per year (full of 12 months). In the event that it contains odd [number of] months which is less than or equal to 6 months, it shall be counted as half a year (1/2 year). If it is greater than 6 months, it shall be counted as one year of work.

c) With regard to the employees who continue to work for the target company under the adopted labour usage plan, the employer must determine the period which the employee has physically worked for the employer in order to compute the payment for job-loss allowance or for severance allowance, as the

case may be.

17.3 Noteworthy issues for employers

Upon transfer of undertakings, the employers should be aware of the following matters:

a) Labour usage plan - this plan should be considered by both current employer and subsequent employer because they must follow the adopted plan, as required by law.
b) Regulatory obligations - depending on each specific case, the prevailing laws may provide certain obligations for the new company after the transaction (eg new company after division, separated company and new company after separation, consolidated company, merged company, or transformed company). Basically, the new company must inherit all lawful rights and interests of the former one, and be liable for unpaid obligations, outstanding debts, labour contracts and other property obligations of the former one.
c) Compliance - the new owner of the target company should also consider the compliance with the prevailing laws in regard to the following documents:

    i) Labour contract templates applicable to each group of positions held by the employees (eg normal employees, directors and deputy directors, etc);
    ii) Internal documents as issued by the former employer, such as internal labour rules, collective labour agreements (if any), collective bargaining, grassroots democracy in the workplace, and other internal rules and policies (if any).

d) Disadvantage or possible risks - the new owner may also have concerns about whether or not any gap, matter, or possible risk currently exists in, or is derive from, the aforementioned documents. If this is the case, they may become unfavourable to the employer upon occurrence of any labour dispute.

18. What are the most common difficulties faced by employers when terminating employment?

It appears that the following events may be deemed as the most difficulties which the employers commonly cope with upon termination of labour contract (also termination of employment relationship):

18.1 Illegal termination of labour contract from the side of the employer

a) The prevailing Labour Code provides seven groups of cases where the employer is permitted to unilaterally terminates the labour contract. However, it also regulates five circumstances where the employer cannot exercise the right to unilaterally terminate the labour contract.
b) In the event that the termination by the employer of the labour contract does not fall within the permissible cases, it may become illegal. If this is the case, the employer may be required to fulfill certain regulatory obligations and/or be subject to certain regulatory sanctions, as the case may be.

18.2 Outstanding debts owed by the employer to the employee

Upon termination of the labour contract, the employer may owe the employees outstanding debts (including monthly salary, mandatory insurance premiums and other interests).

With regard to the debts being the mandatory insurance premiums payable by the employer for the employees during the course of the labour contracts, the following issues should be noted:

a) In the event that the employer commits any act (ie fails to pay the said premiums, pays the premiums insufficiently, pays the premiums for improper quantity of employees, appropriates the premiums, etc.) which falls within the administrative offences, the employer may be subject to the penalties for the said offences.
b) In addition, if the said offences fall within the circumstances as provided by law for the criminal charge [named as "evading payment of social insurance, health insurance, unemployment insurance for employees"], both of the related individuals (as individual offenders) and the employer (which is deemed as a commercial legal entity acting as the offender) may be prosecuted for criminal liability.

If this is the case, the maximum penalty imposed on individual offenders may include the following punishments, as the case may be:

i) The fine ranged from VND500 million to VND1 billion, or two to seven years of imprisonment; and/or
ii) Additional fine ranged from VND20 million to VND100 million and/or prohibition of holding certain positions, practising or doing certain jobs for one to five years.

The penalty applicable to the employer (as a commercial legal entity) shall be the fine ranged from VND200 million to VND3 billion, as the case may be.

18.3 Invalid labour contract

During the course of termination of the labour contract, if the labour contract is found partially or wholly invalid, and this case is referred to the court (which has the power to declare the invalidity of the labour contract), then this case shall be resolved in accordance with the prevailing laws.

Under the said circumstances (including partial or entire invalidity of the labour contract), the following consequences may occur:

a) Both parties (including the employer and the employee) shall make amendment to the invalid provisions under the labour contract (applicable to the first circumstance).
b) Both parties shall be required to re-enter into a [new] labour contract which conforms to the prevailing laws (applicable to the second circumstance).
c) The rights, obligations and interests of the employee arising from the beginning date of work until the date on which the labour contract is declared as invalid shall be determined in accordance with the laws.
d) If either party disagrees to amend the labour contract (in the first circumstance) or sign a new labour contract, the existing labour contract shall be terminated. In this case, the employer must pay the employee the amounts of money as stipulated by law.
e) It should be noted that only the court shall have the right to declare the labour contract invalid.

18.4 Labour discipline

The prevailing Labour Code regulates four groups of cases where the employer may dismiss the employee. Nonetheless, it also provides: (i) five cases where the employer cannot deal with the breach of labour discipline; and (ii) three groups of prohibited conducts which the employer should follow when dealing with the breach of labour discipline.

Thus, if the employer performs the immediate dismissal of the employee, it shall breach the Labour Code. Instead, the employer should follow the regulatory sequence and procedure for dealing with the breach of labour discipline.

Furthermore, in the event that an employee concurrently commits multiple acts of breach of labour discipline, he/she shall be subject to one penalty only which is the highest penalty appropriate to the most serious breach. In case of dealing with the breach of labour discipline, the employer must bear the burden of proof of the fault as committed by the employee.

19. Are there any changes in legislation planned in the future that will affect employment law in your jurisdiction? How should employers prepare for these changes?

19.1 Draft framework of the amendment to the Law on Employment

The Ministry of Labour, War Invalids and Social Affairs (MOLISA) has a draft framework of the amendment to the Law on Employment (dated 21 September 2022). However, this draft does not provide detailed regulations. Instead, it contains only the name of article headlines and certain fundamental intentions.

Under this draft, any employee who has a labour contract with a definite term of one or more (among others) shall become a participant in the mandatory unemployment insurance.

With regard to this matter, the prevailing Law on Employment states that the employee who has a labour contract for a seasonal job or a specified job, with a definite term ranged from the full three

months to less than 12 months shall become a participant in the mandatory unemployment insurance.

In comparison of the same matter between the prevailing law and the draft, it may be understood that:

a) The criterion for the said type of labour contract (which means "labour contract for a seasonal job or a specified job") was removed.

   It is our understanding that this removal is reasonable because the said type of contract is no longer prescribed in the prevailing Labour Code.

b) The time-limit which is currently ranged from 3 months to less than 12 months shall be shortened and reduced down to one month only.

It should be noted that the foregoing are only the fundamental suggestions under the draft, and they are not detailed into specific regulations.

19.2 Draft of the new Law on Health Insurance

The Ministry of Health (MOH) has a draft of the new Law on Health Insurance (dated 15 February 2022). This draft mentions the matters related to health insurance applicable to the employees of all kinds.

20. What procedural changes in resolving employment disputes have been implemented in light of current events? Are there any "new normal" practical tips in your jurisdiction parties should be aware of when resolving employment disputes?

20.1 At present, Vietnam has got back to new normal conditions whereby everything happens nearly similar to the former conditions [before occurrence of COVID-19]. In comparison of the legislation between 01 January 2021 and the present time, it appears that there is no change in the legislation on the procedures for resolving labour disputes due to the impact of COVID-19.

20.2 The prevailing Labour Code classifies the labour disputes into two types:

a) "individual labour dispute" which means the labour dispute between an employee and the employer; or between an employee and an enterprise or an entity which brings the employees to work overseas under contracts; or between the outsourced employee and the employer who [receives and] uses the outsourced employee [or whose jobs are done by the outsourced employee]; and
b) "collective labour dispute over the rights or interests" which means the labour dispute between: (i) one employees' representative or more; and (ii) the employer or one employers' representative or more, arising in certain circumstances as stipulated by law.

20.3 For the purpose of this question, we will mention the individual labour dispute only. The following provides a brief of key points on the sequence and procedure for resolving individual labour dispute:

a) The Labour Code states that the entities who have the power and authority to resolve the dispute of this type shall include the labour mediator, the labour arbitration council, and the court.
b) It is required by law that the individual labour dispute must be first resolved via mediation procedure conducted by labour mediators before [the parties in dispute] files a petition to the labour arbitration council or the court to resolve the dispute, except in six groups of cases as stipulated by law where it is not mandatory to go through the mediation procedure [or known as the exclusions].

   It should be noted that the labour dispute over the dismissal or the unilateral termination [by the employer] of the labour contract shall be attributed to the aforementioned exclusions. This means that the said dispute may not follow the mediation procedure. Instead, it may be referred to either the labour arbitration council or the court of competent jurisdiction.
c) In the event that the dispute is subject to the mandatory mediation procedure, the petition for resolving the labour dispute shall be filed to the [provincial] Department of Labour, War Invalids and Social Affairs (DOLISA) or the [district-level] Division of Labour, War Invalids and Social Affairs, or the labour mediator. Then, the mentioned authority shall

appoint the mediators who shall resolve the dispute.

d) The parties in dispute must be present at the session of mediation. If the parties reach a settlement, the minutes on successful mediation shall be made. Otherwise, the mediator shall give a mediation plan for the parties' consideration. If the parties accept this plan, the minutes on successful mediation shall be made.

   If the plan is not accepted, or either party is still absent without legitimate reasons even though such party is convened on the second occasion, the minutes on unsuccessful mediation shall be made instead.

e) In case of successful mediation, if a party fails to observe the agreements under the minutes thereon, the other party shall be entitled to file a petition to either the labour arbitration council or the court to resolve the dispute.

20.4 With regard to the limitation period for petitioning the relevant entities to resolve the individual labour dispute, it shall be either: (i) six months, in case of labour mediator; (ii) nine months, in case of labour arbitration council; or (iii) one year, in case of the court; all of which shall be counted from the date of discovery of the conduct which the disputing party claims that his/her lawful rights and interests are infringed.

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Company, M&A and Employment Law Guide 2023

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