# Vietnam

# Chapter 1: Business and corporate structures

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In Vietnam, there are four forms of enterprises: limited liability company (LLC), joint stock company (JSC), partnership company (PC) and private enterprise (PE). Of these four forms, the LLC and JSC are the most preferred and common forms of enterprise for foreign investors due to their significant advantages compared with the PC and the PE.

Below is a brief comparison of the basic characteristics of each enterprise:

| Criteria | LLC | JSC | PC | PE |
|---|---|---|---|---|
| **Ownership** | Quantity: 1–50<br>Qualification: a member can be either an individual or an organisation | Quantity: ≥ 3<br>Qualification: a shareholder can be either an individual or an organisation | Quantity: ≥ 2 general partners; and ≥ 0 limited partners<br>Qualification: a general partner must be an individual; a limited member can be either an individual or an organisation | Quantity: 0<br>Qualification: the sole owner must be an individual |
| **Liability of owners** | Members of an LLC generally bear liability for the debts and obligations of the LLC only to the extent of their contributed capital | Shareholders of a JSC generally bear liability for the debts and obligations of the JSC only to the extent of their contributed capital | General partners bear liability for the debts and obligations of the PC to the extent of all their assets<br>Limited partners bear liability for the debts and obligations of the PC to the extent of their contributed capital | Sole owners bear liability for the debts and obligations of the PE to the extent of all their assets |
| **Securities issuance** | LLCs cannot issue shares<br>LLCs may issue only straight corporate bonds to raise capital | JSCs may issue all kind of shares and corporate bonds to raise capital | PCs cannot issue securities of any kind | PEs cannot issue securities of any kind |

## 1.1 Incorporation process

Upon completion of investment procedures specifically designated to investment projects by foreign investors, that is, obtaining an in-principle approval and an investment registration certificate (IRC), a foreign investor must complete an enterprise registration certificate (ERC) application in order to set up his/her business. The content of the ERC includes material corporate information, such as corporate name, tax code, charter capital, registered address, legal representative(s), information on general partners in the case of a PC and information on the owner or members in the case of an LLC. Upon issuance, information contained in the ERC is published on the National Portal of Business Registration (NPBR).

## 1.2 Ongoing reporting and disclosure obligations

Vietnamese law sets forth various obligations on the disclosure and reporting of information related to Vietnamese enterprises and their investors.

For instance, enterprises must have the content of their ERC and other corporate information made available on the NPBR. Vietnamese enterprises also have an obligation to report to licensing authorities any changes to the ownership of foreign shareholders, board of management (BOM) members, controllers and directors/general directors.

Moreover, in the case of a JSC with an operational website, information on the charter; resumes of all the JSC's BOM members, controllers, directors and general directors; the JSC's annual financial statements approved by its General Meeting of Shareholders (GMSs), as well as operation outcome assessment reports of the JSC's BOM and control committees must be publicised on the JSC's website.

In addition, public JSCs are subject to more onerous disclosure obligations, including, but not limited to, the disclosure of any information that might affect their securities' prices, information on stock offerings and capital utilisation reports.

## 1.3 Management structures

In practice, PEs are not a common enterprise form used for foreign investment in Vietnam, therefore this section concentrates on the three other forms: LLCs, JSCs and PCs.

### *1.3.1 LLC (multi-member LLC and single-member LLC)*

#### Multi-member LLC

The management structure of a multi-member LLC comprises the Members' Council (MC), the Director/General Director and the Control Committee.

#### MC

The MC is composed of all members of the multi-member LLC and is the highest decision-making body of the multi-member LLC.

Meetings of the MC can be held periodically as prescribed in the charter of the multi-member LLC, but not less than once per year. Extraordinary meetings of the MC can be held upon the request of the Chair of the MC, or one or more members of the MC representing no less than ten per cent of the charter capital of the multi-member LLC.

The quorum for an MC meeting of a multi-member LLC is constituted when no less than 65 per cent of the charter capital of the multi-member LLC is represented at the meeting.

Resolutions of the MC in a physical meeting are passed by the affirmative votes of no less than 65 per cent of the total capital contribution of the members in attendance. The affirmative votes of no less than 75 per cent of the total capital contribution of the attending members are required for resolutions approving: (1) disposals of assets worth 50 per cent or more of the total asset value of the multi-member LLC stated in its latest financial statements; (2) any amendments and/or supplements to its charter; and (3) restructuring and/or dissolution of the multi-member LLC.

Where the resolutions are passed in writing in the form of opinion polls, the resolutions are passed upon the affirmative votes of MC members representing no less than 65 per cent of the charter capital of the multi-member LLC.

### Director/General Director

A Director/General Director is the person in charge of managing day-to-day business affairs of the multi-member LLC and bears responsibility before the MC for the exercise and the performance of his/her rights and duties. The Chair of the MC can also hold the position of a Director/General Director.

### Control Committee

The management structure of any multi-member LLC with 11 members or more must include a Control Committee. In cases of multi-member LLCs with fewer than 11 members, a Control Committee may be established if requested by the multi-member LLCs.

The rights, obligations, appointment criteria, conditions and working regulations of the Control Committee (including the head of the Control Committee) are set out in the charter of the multi-member LLC.

## Single-member LLC

The management structure of a single-member LLC comprises the MC or President, the Director/General Director and the Controller. Generally, the management structure of a single-member LLC is of similar features to that of a multi-member LLC, except for those stated below.

### MC

The MC is not part of the management structure of a Single Member LLC owned by an individual.

Unlike the MC in a multi-member LLC, the MC in a single-member LLC is composed of three to seven authorised representatives appointed by the owner of the single-member LLC.

The quorum for a meeting of a single-member LLC is constituted when no less than two-thirds of MC members are present.

Resolutions of the MC in a physical meeting are passed by the affirmative votes of a simple majority of MC members in attendance. The affirmative votes of three-quarters of MC members in attendance are required for resolutions approving: (1) assignment of all or part of the charter capital of the single-member LLC; (2) any amendments and supplements to the charter; and (3) restructuring of the single-member LLC.

### President

Unlike a multi-member LLC, the owner of a single-member LLC may opt to appoint only one authorised representative as the President in lieu of an MC. In the case of a single-member LLC owned by an individual, the owner holds the position of President.

### Controller

In the case of a single-member LLC owned by an organisation, the owner decides and appoints one or Controllers. However, a single-member LLC owned by an individual is not required to have a Controller.

### *1.3.2 JSC*

The management structure of a JSC comprises the GMS, BOM, Control Committee and Director/General Director.

### GMS

The GMS is the highest decision-making body of a JSC and is composed of all shareholders owning shares in the JSC with voting rights.

The GMS is convened periodically once per annum. Extraordinary Meetings of Shareholders can be convened where: (1) the BOM deems it necessary; (2) the minimum number of members of the BOM and/or Control Committee are not satisfied; (3) upon the request of the Control Committee or a shareholder/a group of shareholders holding ten per cent or more of the total ordinary shares for a consecutive period of six months; and (4) other circumstances prescribed in the charter of the JSC.

The quorum for the GMS is constituted when no less than 51 per cent of the total number of voting interests in the JSC are in attendance.

Resolutions of the GMS are passed by the affirmative votes of no less than 51 per cent of the voting interests in attendance. The affirmative votes of no less than 65 per cent of the voting interests in attendance are required for resolutions approving: (1) amendments to the classes of shares and number of each class of shares; (2) changes to the scope of business or management structure; (3) investment projects or disposals of assets worth 35 per cent or more of the total asset value of the JSC stated in its latest financial statements; (4) restructuring and dissolution of the JSC; and (5) other matters so prescribed in the charter of the JSC.

Where the voting is conducted in the form of opinion polls, resolutions shall be passed upon agreeing votes of shareholders representing no less than 51 per cent of the total number of votes in the JSC.

### BOM

The BOM is the managing body of a JSC and has the power to exercise rights and perform the obligations of the JSC on behalf of the JSC, save for those rights and powers reserved for the GMS. The BOM is composed of three to 11 members elected by the GMS by means of cumulative voting.

Meetings of the BOM can be convened periodically or extraordinarily, but no less than once per quarter, by the Chair of the BOM.

The quorum for meetings of the BOM is constituted when no less than three quarters of the BOM members are present.

Resolutions of the BOM are passed by the affirmative votes of a simple majority of members in attendance. The Chair of the BOM shall have the casting vote in the case of even votes.

#### Control Committee

The Control Committee is the body responsible for, among other things, supervising the BOM and the Director/General Director in their management and administration of the JSC. The Control Committee is composed of three to five members elected by the GMS.

The management structure of the JSC can be organised without a Control Committee, so long as at least 20 per cent of the BOM members are independent members and an internal Auditing Committee is organised subordinate to the BOM.

#### Director/General Director

The Director/General Director is the person in charge of managing the day-to-day business affairs of the JSC, and is subject to the supervision of and bears responsibility before the BOM for the exercise and the performance of his/her rights and duties. The Director/General Director is elected among the BOM members or hired by the BOM.

### *1.3.3 PC*

The management structure of a PC is outlined below:

#### Partners' Council

The Partners' Council is the highest decision-making body of the PC and is composed of all general partners of the PC. Any general partner may convene meetings of the Partners' Council to discuss and decide business matters of the PC. The Law on Enterprises, 2014 sets forth no quorum for meetings of the Partners' Council.

Resolutions of the Partners' Council shall be passed by the affirmative votes of no less than two-thirds of the general partners. The affirmative votes of least three-quarters of the general partners is required for resolutions approving: (1) business plan development; (2) amendments or supplements to the charter; (3) acceptance of new partners, or withdrawal or removal of existing partners; (4) investment projects, lending or other forms of capitalisation and borrowing to the value of 50 per cent or more of the PC's charter capital; (5) acquisition and disposal of assets to the value of the PC's charter capital or higher; (6) approval of annual financial statements, total profits, profit distributions and shares of profits to each partner; and (7) dissolution of the PC.

#### Director/General Director

The Chair of the Partners' Council holds the position of Director/General Director unless otherwise provided for in the charter of the PC.

## 1.4 Liability of directors, officers and shareholders

Like many other jurisdictions, under Vietnamese law directors and those holding other managerial posts (eg, Chair of the MC, Controllers and BOM members) generally bear a duty of care and fiduciary duty towards and a duty to act in the best interest of the enterprise and the members/shareholders of the enterprise.

Members/shareholders of enterprises have the right to bring civil lawsuits against directors and other managerial personnel to seek indemnification in any case of violation or omission of any delegated rights and obligations.

# Chapter 2: Takeovers (friendly M&A)

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## 2.1 Overview of a tender offer

In Vietnam a friendly takeover can be conducted by the submission of a tender offer, by either entities or individuals, for a part of or all the voting shares of a public company with the intention to obtain the controlling right of such a listed company.

## 2.2 Transactions of which a tender offer is required

According to the Law on Securities, 2006, as amended in 2010, a tender offer should be submitted by a party in one of the scenarios:

1) it intends to purchase voting shares leading to the ownership of 25 per cent or more of the number of currently circulating shares in any one public company;

2) it and its related persons holding 25 per cent or more of the voting shares in any one public company wish to purchase a further ten per cent or more of the currently circulating voting shares in the public company;

   – this requirement is supplemented by Circular 194/2009/TT-BTC, which requires a tender offer to be submitted in instances where purchase of shares results 'in ownership of 51 per cent, 65 per cent or 75 per cent' of a public company; or

3) it and its related persons holding 25 per cent or more of the voting shares wish to purchase a further interest of between five and ten per cent of the voting shares in the public company within one year from the date of completion of the acquisition of a previous tender offer tranche.

Furthermore, after conducting a public offer, an acquirer holding 80 per cent or more of the number of shares of a public company must continue to purchase the remaining number of shares within 30 days on the same conditions on price and method of payments offered in the public offer.

The Law on Securities was made in 2006, and has been amended and supplemented during the implementation process. Many provisions of the Law on Securities are not amended and supplemented directly into the law, but are amended, supplemented and clarified through the provisions of guiding decrees and circulars. In order to provide a clear and consistent legal ground for the securities sector, on 26 November 2019 the National Assembly of Vietnam adopted the Law on Securities, 2019, which will replace the current Law on Securities and take effect from 1 January 2021. The Law on Securities, 2019 essentially maintains the spirit of the current Law on Securities, brings critical contents currently prescribed in guiding decrees and circulars directly into the provisions of law, and at the same time, clarifies some of the content. In particular, the Law on Securities, 2019 supplements the applicability of the scenario set out in scenario (1) above from just the acquirer to the acquirer and its related persons. For the scenario set out in scenario (2), instead of specifying the number of shares to be offered for purchase being '10% or more of the voting shares in in the public company' and the thresholds of '51%, 65% or 75%', the Law on Securities, 2019 supplements and specifies ownership thresholds that require a tender offer to be 'leading to direct or indirect ownership of or in excess of 35%, 45%, 55%, 65% or 75% of the number of voting shares of the public company'. The Law on Securities, 2019 also removes scenario (3) above and replaces it with the requirement for an acquirer holding 80 per cent or more of the number of shares of a listed company to continue purchasing the remaining number of shares held by the other shareholders.

## 2.3 Procedure for conducting a tender offer

The process for conducting a tender offer includes the following steps:

- the offeror sends the tender offer dossier to the State Securities Commission (SSC) for approval and, at the same time, sends the tender offer to the target company;
- the target company makes a public announcement on receiving the tender offer dossier within three days from its receipt of the tender documents;
- the board of directors of the target company sends its opinion regarding the tender offer to the SSC and the shareholders of the target company within ten days from receipt of the tender documents;
- the SSC sends its reply to the tender offer dossier to the offeror (either an approval or request for further information) within 15 days from receipt of the tender documents;
- the offeror makes three consecutive public announcements regarding the tender offer on one electronic newspaper or written newspaper and on the relevant stock exchange within seven days from receipt of the SSC's approval;
- the term of a tender offer must be no fewer than 30 days and no longer than 60 days from the date of the tender offer application submitted to the SSC; and
- the offeror reports the results of the tender offer to the SSC within five days of completion, and at the same time, makes a media announcement regarding the results of the tender offer.

The tender offer may only be implemented after the SSC has provided its opinion and after the public announcement about the tender offer. In addition, the acquirer must appoint a securities company to act as an agent for conducting the procedures implementing the tender offer. Furthermore, a foreign investor cannot submit any tender offer that would result in a breach of any foreign ownership limitation applicable to the target company prescribed by Vietnamese law.

### 2.4 Cases where the tender offer requirement can be waived

Under the Law on Securities, the purchase of shares of a public company newly issued under an issuance plan passed by the public company's GMS will not require a tender offer even if the envisaged share acquisition results in the ownership of 25 per cent or more of the voting shares in the company. A tender offer is also not required in relation to a share transfer of a shareholder in a public company to another organisation or individual, resulting in changing ownership in excess of 25 per cent, where such transfer has been approved by the GMS of the public company.

The new Law on Securities, 2019 maintains the stance that the acquisition of shares with voting rights will not be subject to a tender offer if such a waiver is approved by the GMS.

# Chapter 3: Foreign investment

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In general, the Law on Investment No 67/2014/QH13, passed by the National Assembly of Vietnam on 26 November 2014 as amended and supplemented with the latest amendment by Laws No 90/2015/QH13, No 03/2016/QH14, No 04/2017/QH14, No 28/2018/QH14 and No 42/2019/QH14 regulates almost all business investment activities of both foreign and local investors in Vietnam. The Law on Investment sets out prohibited business investments, conditional business investments, and the relevant procedures for making investments and so on. In addition to the Law on Investment, the business investment activities of foreign investors in Vietnam are regulated by: various Vietnamese laws and international treaties to which Vietnam is a signatory. In particular, with the exception of provisions regulating business investment prescribed in the Law on Securities, the Law on Credit Institutions, the Law on Insurance Business and the Law on Petroleum, in the event there is any discrepancy between provisions of the Law on Investment and the provisions of any other Vietnamese laws relating to prohibited business investments, conditional business investments, and procedures for making investments, the provisions of the Law on Investment shall prevail (pursuant to Article 4.2 of Law on Investment). If an international treaty to which Vietnam is a signatory contains provisions that differ from or conflict with the provisions of the Law on Investment or other provisions of Vietnamese law, then the provisions of the relevant international treaty shall prevail (pursuant to Article 4.3 of the Law on Investment and Article 6.1 of the Law on International Treaty).

### 3.1 Forms of investment

Foreign investors are able to invest in Vietnam through the following forms of investment as prescribed by the Law on Investment: (1) establishment of an economic organisation;

(2) investment in the form of capital contribution, or purchase of shares or portion of capital in an existing Vietnamese economic organisation; (3) investment in the form of business cooperation contract (BCC); or (4) investment in the form of public–private partnership (PPP).

For the establishment of an economic organisation, foreign investors must prepare an investment project and register it in Vietnam to obtain an IRC (Article 22.1 of the Law on Investment). After obtaining the IRC, foreign investors must register the establishment of an economic organisation and receive the ERC for such economic organisation.

In order to make a capital contribution or purchase shares or a portion of capital in an existing Vietnamese economic organisation, foreign investors must obtain a notification on satisfaction of investment conditions from the provincial department of planning and investment (the 'DPI') if either: (1) the contribution or purchase results in 51 per cent or more of charter capital of the Vietnamese economic organisation being held by foreign investors; or (2) the Vietnamese economic organisation operates in a business sector with conditions to foreign investment (Article 26.1 of the Law on Investment). In theory, other than these two scenarios, foreign investors investing in Vietnam in this form are not required to go through the above procedure with the provincial DPI. However, in practice, many provincial DPIs request all foreign investors investing in their provinces in this form to perform such procedures.

In order to make investments into Vietnam through a BCC, foreign investors must obtain an IRC, but the parties to the BCC are not required to establish a new economic organisation to implement the investment project (Article 28.2 of the Law on Investment).

To make an investment in Vietnam in the form of a PPP, foreign investors must sign the PPP contract with the authorised state agency in accordance with the Vietnamese regulations governing PPPs (the primary legislation governing the PPP is Decree No 63/2018/ND-CP ('Decree 63'), dated 4 May 2018 on investment in the form of a PPP). Foreign investors are not required to obtain an IRC when investing in the form of a PPP.

In the cases where foreign investors are required to go through the aforementioned procedure to obtain an IRC (in relation to the establishment of an economic organisation or investment through a BCC), if the sector, scope and impact of foreign investors' investment projects require an in-principle approval from the National Assembly, the Prime Minister or provincial People's Committee, then the in-principle approval for such investment project must be obtained before the issuance of the IRC (Article 37.1 of the Law on Investment).

## 3.2 Restriction on foreign investment

The Law on Investment specifies six sectors in which foreign investment is prohibited: (1) trading of narcotics; (2) trading of hazardous chemicals and minerals; (3) trading of endangered flora and fauna; (4) business dealing with prostitution; (5) human trafficking, trading of human tissue and body parts; and (6) human cloning (Article 6, Appendices 1 and 2 of the Law on Investment).

Furthermore, the Law on Investment also lists 243 conditional investment sectors applicable to both foreign investors and local investors in Vietnam (Article 7 and Appendix 4 of the Law on Investment), such as financial and professional services; certain types of education; trading and exploration for energy and minerals; operation of ports, railroads and airports; and trading in medical services. In general, if operating in one of the conditional investment sectors, the economic organisation in Vietnam may be required to obtain specific licences (Article 9 of Decree 118/2015/ND-CP). The specific conditions applicable to these conditional investment sectors are detailed in specialised laws regulating the particular sector or in international treaties to which Vietnam is a signatory.

Apart from the conditional business applicable to all investors, foreign investors are also required to satisfy further investment conditions when investing in certain sectors that have conditions regarding foreign investment set out in laws, ordinances, decrees and international treaties on investment (Article 2.6 of Decree 118/2015/ND-CP). Examples of such conditions include: (1) limitation on foreign ownership; (2) form of investment; (3) conditions on the scope of investment activities; (4) conditions on qualification of Vietnamese partners; and (5) other conditions prescribed in laws, ordinances, decrees and international treaties on investment (Article 10.1 of Decree 118/2015/ND-CP).

## 3.3 Foreign exchange control relating to the foreign investment

The main legislation regulating foreign exchange in Vietnam is the Ordinance on Foreign Exchange Control, 2005 as amended in 2013 (the 'FX Ordinance'). The Vietnamese government and State Bank of Vietnam have issued numerous guiding decrees and circulars to supplement the FX Ordinance.

Vietnamese laws (and, in particular, the FX Ordinance) generally regulate foreign exchange issues relating the foreign investment (eg, capital injection into Vietnam or remittance of profits abroad) via a system of investment capital accounts. Because the FX Ordinance is drafted based on the Law on Investment, 2005, which classifies investment as direct investment and indirect investment, the FX Ordinance and its guiding supplements are not completely compatible with the Law on Investment, 2014, which does not make a distinction between direct and indirect investment. Pursuant to the FX Ordinance and its guiding supplements, foreign exchange issues relating to foreign investment are settled via either: (1) a direct investment capital account (which is mainly regulated by Circular 06/2019/TT-NHNN); or (2) an indirect investment capital account (which is mainly regulated by Circular 05/2014/TT-NHNN). In other words, depending on the investment forms identified under the FX Ordinance and its guiding legal documents, foreign investors are allowed to inject capital into Vietnam or repatriate profits via direct or indirect investment capital accounts.

## 3.4 Investment incentives available to foreign investors

Under Vietnamese law, investment incentives are given to investment projects of both foreign investors and local investors when such investment projects are performed in certain geographic areas and business sectors (Article 15.2 of the Law on Investment). In addition, investment incentives are given to enterprises or organisations in the high-tech and scientific/technology sector, investment projects where the investment capital is VND 6tn or more (of which at least VND 6tn will be disbursed within a period of three years or less from the date investment approval), and for investment projects located in rural areas and employing 500 employees or more.

According to Article 15.1 of the Law on Investment, investment incentives offered under Vietnamese laws are:

- application of a lower rate of corporate income tax (CIT) for a definite period or for the whole duration of implementation of the investment project, or exemption from or reduction of CIT;
- exemption from import duty in respect of goods imported to form fixed assets, raw materials, supplies and components for implementation of an investment project; and
- exemption from and reduction of land rent, land use fees and land use tax.

The current standard CIT rate is 20 per cent (Article 1.6 of Law No 32/2013/QH13). There are also preferential tax rates set at ten per cent, 15 per cent or 17 per cent and applied for a period of either 15 years or ten years (Article 1.7 of Law No 32/2013/QH13 and Article 1.7 of Law No 71/2014/QH13). It is also possible to receive CIT exemption for a period of either two or four years, and 50 per cent CIT reductions for a period of either four or nine years (Article 1.8 of Law No 32/2013/QH13). For example, except for projects relating to the production of goods subject to special consumption tax and exploitation of mineral resources, manufacturing projects are eligible for a ten per cent tax rate for 15 years, a four-year tax exemption and a nine-year 50 per cent tax reduction, if one of the following conditions are met (Articles 1.7–8 of Law No 32/2013/QH13):

- investment capital of at least VND 6tn to be disbursed within three years from the issuance date of the IRC, and total annual revenue of at least VND 10tn three years after the year the enterprise begins earning revenue; and
- investment capital of at least VND 6tn to be disbursed within three years from the issuance date of the IRC and employing more than 3,000 employees.

No tax incentives are applicable to income arising from the transfer of capital; transfer of real estate; transfer of investment projects; income from business activities outside Vietnam; or income from precious mineral resources, oil and gas exploration and exploitation and so on (Article 1.12 of Law No 32/2013/QH13).

# Chapter 4: Restructuring and insolvency

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## 4.1 Petition for bankruptcy

The primary of legislation governing the insolvency of companies incorporated in Vietnam is the Law on Bankruptcy of Vietnam No 51/2014/QH13, dated 19 June 2014. The Bankruptcy Law applies to enterprises, cooperatives and units of cooperatives. The scope of the Bankruptcy Law does not extend to natural persons.

Pursuant to the Bankruptcy Law, an enterprise is deemed insolvent when it fails to meet its financial obligations and pay its debts within three months following the date that such debts become due. An enterprise is bankrupt only when it is declared so by the People's Court.

Upon the insolvency of the enterprise, the following persons have the right to file a bankruptcy petition to the court:

- unsecured creditors or partially secured creditors;
- labourers or trade union representatives; and
- shareholders of the insolvent enterprise.

On the other hand, the owner of a sole proprietary, the chairman of the board of directors of a JSC, the chairman of the MC of an LLC, a partner of a partnership and the legal representative of the insolvent enterprise are obliged to file a bankruptcy petition upon an enterprise becoming insolvent. Failure to comply with this obligation will bring the above persons subject to liability under the Bankruptcy Law and also give rise to the obligation to pay compensation if there is any damage caused due to such non-compliance.

## 4.2 Asset protection

With the intention to preserve assets in the event of insolvency, the following transactions conducted by the insolvent enterprises during a six-month period prior to the decision on the commencement of bankruptcy proceedings will be deemed invalid and declared so by the People's Court:

- asset transfer or assignment not at the market price;
- conversion of unsecured debt(s) into debt(s) secured or partly secured by the assets of the enterprise;
- payments or setoffs that benefit a creditor in respect of a debt that has not yet become due or with a sum that is larger than a debt that has become due;
- donation of movable or immovable assets to another person; and
- other transactions for the purpose of dispersing assets of the debtor.

Furthermore, transactions between insolvent entities and their related persons within 18 months before the People's Court issues the Commencement Decision will also be deemed invalid.

## 4.3 Steps of the bankruptcy procedure

In general, the bankruptcy procedure may last over a year. A summary of the bankruptcy procedure is as follows:

1. The petitioner files the application with the court to commence bankruptcy proceedings.
2. The petitioner and the insolvent enterprise negotiate on withdrawal of the petition.
3. The court accepts the bankruptcy petition after the payment of required court fees by the petitioner and notifies such acceptance to various relevant entities, including the petitioner,

the insolvent enterprise, the relevant procuration authority and other authorities dealing with cases relating to the insolvent enterprise. Upon acceptance of the bankruptcy petition, all ongoing judicial proceedings and enforcement against the insolvent enterprise's assets must be suspended.

4. The court decides on the commencement of bankruptcy proceedings and circulates its decision to the petitioner; the insolvent enterprise; (other) creditors; the relevant procuration authority, judicial enforcement authority, tax authority and local licensing authority; and makes a public announcement on the national enterprise registration information portal, the court's official website and two consecutive volumes of a local newspaper.
5. The judge in charge appoints an asset administrator or an asset management liquidation firm.
6. The insolvent enterprise conducts an inventory and evaluation of its assets.
7. The judge in charge calls for the creditors' meeting, which decides whether to suspend the bankruptcy proceeding, conduct a restoration plan or declare bankruptcy.
8. The insolvent enterprise conducts the restoration plan if it is resolved by the creditors' meeting or the court declares bankruptcy, if the restoration is not resolved or is unsuccessful, such a declaration shall be circulated to relevant entities.
9. The judicial enforcement authority conducts the liquidation procedure under the supervision of the asset administrator or asset management liquidation firm.

Upon the decision on the commencement of bankruptcy proceedings (Step 4) and the appointment of an asset management liquidation firm (Step 5), all operations of the insolvent enterprise are put under supervision of the judge in charge and the asset administrator or the asset management liquidation firm.

# Chapter 5: Employment, industrial relations, and work health and safety

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## 5.1 Employees rights and statutory protection method

The main law regulating the employment relationship is the prevailing Labor Code, 2012, which will be replaced by Labor Code, 2019 from 1 January 2021. The employment relationship is also further governed by the Law on Social Insurance, Law on Labor Hygiene and Security, and other governmental regulations, decrees and circulars.

An employee shall have the following rights, among others:

- to participate in vocational training, and to improve occupational skills and suffer no discrimination; furthermore, employers are prohibited from discriminating on the basis of gender, race, skin colour, social strata, marital status, belief, religion, HIV infection, disabilities and for the reason of establishing or joining trade unions and participating in trade union activities;
- to receive a wage commensurate with his/her occupational knowledge and skills on the basis of an agreement reached with the employer; skilled labourers can receive a salary at least seven per cent higher than the minimum wage;
- to receive protection and be able to work in conditions that ensure labour safety and labour hygiene; employers are required to provide appropriate tools, equipment and a safety plan for employees to prevent labour accidents and occupational diseases;
- to work normal working hours and be paid additional wages for overtime work, where eight hours per day and 48 hours per week is considered normal working hours; for overtime work, employees can receive additional pay, but the maximum overtime hours shall not exceed four hours per day, 30 hours per month (from 1 January 2021, the maximum overtime hour will be increased to 40 hours per month) and 200 hours per year; and a gross maximum annual overtime of 300 hours is permitted in some special scenarios;
- to take at least 12 days of paid annual leave and to enjoy collective welfare benefits;
- to take leave on the ten public holidays, including: (1) Calendar New Year Holiday: one day; (2) Lunar New Year Holidays: five days; (3) Victory Day: one day; (4) International Labour Day: one day; (5) National Day: one day; and (6) Commemorative Celebration of Vietnam's Forefather – Hùng King: one day; under the Labour Code 2019, an additional one day will be added to the National Day holiday; and if employees are required to work on public holidays, they will be paid 300 per cent of their normal salary;
- to form and join and participate in activities of trade unions, occupational associations and other organisations in accordance with Vietnamese law; employers are prohibited from obstructing or causing difficulties to employees in the establishment, joining and operation of trade unions;
- to request and participate in dialogue with employers, implement democratic regulations and be consulted at the workplace to protect his/her rights and legitimate interests;
- unilaterally to terminate the labour contract in accordance with Vietnamese law, although employees are required to provide prior notice to employers; and
- to go on strike in certain circumstances provided by Vietnamese law; an employees' collective is permitted to carry out the strike in order to achieve its demands in the process of a labour dispute settlement.

Recognising that an employer holds a stronger position than its employees, in order to protect the legitimate rights and benefits of employees, Vietnamese law provides certain statutory protection for employees. Firstly, the laws provide the legal basis to protect the job of the employee, according to which any termination by employers must be based on statutory grounds, and are subject to strict formal requirements and procedures. Employers are also required to provide severance payment to employees with more than 12 months' service and who choose to terminate their labour contracts as allowed by law. Secondly, Vietnamese law ensures suitable labour conditions for the employee by providing for minimum wages applicable for various regions, working hours, annual leave and equipment for employees for dangerous and/or hazardous work. Such labour conditions must be explicitly set out in the labour contract, internal regulations, collective labour agreements and other documents required under law. Moreover, Vietnamese law prescribes some specialised regulations applicable to female employees (eg, six-month maternity leave), juvenile labour or elder labour, and disabled labour. Last but not least, Vietnamese law grants labour unions 'the role of representing and protecting the rights and legitimate interests of trade union members and employees' and, in certain disciplinary processes, the participation of the trade union is mandatory to ensure the legitimacy of the disciplinary decision of the employer.

## 5.2 Statutory contributions and minimum wage

By law, both the employee and employer are required to make payments towards mandatory insurance (including social insurance, healthcare insurance and unemployment insurance) at the following rates:

| Contribution subject | Percentage for mandatory insurance (based on the monthly salary of the employee) | | | |
|---|---|---|---|---|
| | Social insurance | Healthcare insurance | Unemployment insurance | Total |
| Contribution of the employer (per cent) | 17.5 | 3 | 1 | 21.5 |
| Contribution of the employee (per cent) | 8 | 1.5 | 1 | 10.5 |
| **Total (per cent)** | **25.5** | **4.5** | **2** | **32** |

Social insurance contributions apply to foreign employees working in Vietnam who satisfy the following requirements: (1) they obtain work permits, practising certificates and practising licences issued in Vietnam; (2) they enter into indefinite-term or definite-term labour contracts valid for at least one year with employers in Vietnam; (3) they have not reached the age of 60 for males and 55 for females; and (4) they are not intra-company transferees, including employees who have been managers, chief executive officers, experts or technicians of a foreign enterprise for at least 12 months, and have been transferred to work in the commercial presence of such an enterprise within the territory of Vietnam.

Minimum wages differ depending on the location of employment. In comparison with 2019, the minimum wage of employees has increased by an average of approximately five per cent due to the proposals and opinions from the General Trade Union and National Salary Council, as follows:

| Region | Minimum wage in 2019 (under Decree 157/2018/ND-CP) (VND) | Minimum wage in 2020 (under Decree 90/2019/ND-CP) (VND) |
|---|---|---|
| Region I | 4,180,000 | 4,420,000 |
| Region II | 3,710,000 | 3,920,000 |
| Region III | 3,250,000 | 3,430,000 |
| Region IV | 2,920,000 | 3,070,000 |

The above regional minimum wages are only applicable for unskilled employees, whereas the minimum wage applied for skilled/educated employees is higher by at least seven per cent.

### 5.3 Work permits and residence card

At least 15 working days before the day on which a foreign employee begins work, the employer must submit an application for a work permit to the provincial Department of Labour, Invalids and Social Affairs ('DOLISA'). The maximum term of a work permit is currently two years. Upon expiry of the two-year term, it is possible for an employer to renew the work permit for a foreign employee for another two-year term.

For certain foreigners working in Vietnam who would not normally receive exemption from the requirements for a work permit, at least seven working days before beginning work, the employer may request the DOLISA to certify that such foreign employees are eligible for exemption from work permits. A foreign worker who receives a work permit exemption can be: (1) a capital contributing member or owner of an LLC; (2) a member of the BOM of a shareholding company; (3) the head of a representative office or of a project of an international organisation or non-governmental organisation in Vietnam; (4) entering Vietnam for a period of less than three months in order to offer services; (5) a foreign lawyer issued with a certificate to practise law in Vietnam in accordance with the Law on Lawyers; (6) an employee who is internally reassigned in a company that engages in one of the 11 service industries for which Vietnam's World Trade Organization (WTO) commitments on services apply.

A foreign employee who holds a valid work permit or is legally exempt from obtaining a work permit will receive a temporary residence card issued by the police authorities, which is valid throughout the term of his/her work permit or work permit exemption notice. A foreign employee who has received a temporary residence card can enter and exit Vietnam without a visa throughout the term of his/her temporary residence card.

# Chapter 6: Tax law

*Thanh Minh Vu, LNT & Partners, Hanoi*

### 6.1 Overview of taxation

Knowledge of tax regulations is a must for enterprises doing business in Vietnam. Vietnam only has national taxes centrally managed by the Ministry of Finance (MOF), which is also responsible for releasing implementation guidance for tax laws and regulations. The General Department of Taxes (the 'GDT') and the General Department of Customs administer almost all the taxes that companies need to be aware of when doing business in Vietnam. Tax agencies and customs offices are established at the provincial and district levels.

Enterprises operating in Vietnam are required to pay: (1) VAT; (2) CIT; (3) personal income tax (PIT); (4) foreign contractor; (5) special sale tax import/export tax; and (6) certain other specific taxes.

On 26 November 2019 the National Assembly of Vietnam adopted the Law on Securities, 2019, which will replace the current Law on Securities and take effect from 1 January 2021. The promulgation of the Law on Securities, 2019 focused on reviewing tax risk management, promotion of electronic transactions and administrative procedure, and enhancement of international cooperation on tax management. The Law on Securities, 2019 has the following new provisions:

- tax authorities will be granted more competence to collect tax;
- taxpayers and tax authorities will be required to conduct electronic transactions for tax purposes if they fully satisfy certain requirements;
- providing guidance on electronic invoicing;
- enhancing the cooperation between Vietnamese tax authorities and their overseas counterparts in various areas;
- changing various regulations on tax filing and payment procedures;
- reaffirming general principles of the existing transfer pricing regulations, such as the arm's length principle or the principle that adjustment of prices shall not reduce taxable profits; and
- providing more guidance in relation to tax audit, admin penalties and late payment interest.

## 6.2 Taxes imposed on enterprises

### *6.2.1 VAT*

VAT is levied on supplies of goods and services made in Vietnam by a taxable person, including the import of goods and services into the country during the course of business. VAT payers include organisations and businesspersons that purchase services from foreign organisations (or individuals) that do not have a permanent establishment in Vietnam and are not registered for VAT in Vietnam.

There are two VAT calculation methods: tax deduction and direct calculation. Under the former, the VAT payable is determined by deducting the input VAT from the output VAT charged. Under the latter, VAT is applied on the added value of the goods or services. Taxpayers must file VAT returns on a monthly basis by the 20th of the following month, or on a quarterly basis by the 30th day of the subsequent quarter.

There are three categories of VAT rates:

- zero per cent, which mainly applies to exported goods and services;
- five per cent, which mainly applies to essential goods; and
- ten per cent, which is the standard VAT rate applicable to most types of goods and services.

There are, however, areas where VAT is exempt, the most important being:

- certain agricultural products and transfer of land use rights;
- financial derivatives and credit services;

- medical services;
- teaching and training;
- transfer of technology and software services; equipment, machinery and spare parts; and specialised means of transport;
- necessary materials used for the prospecting, exploration and development of oil and gas fields that cannot be produced in Vietnam; and
- goods and services imported under official development assistance (ODA) programmes.

### *6.2.2 Corporate income tax (CIT)*

Foreign enterprises doing business under the Law on Investment, 2014, the Law on Petroleum and the Law on Credit Institutions, 2010 are subject to taxation imposed under CIT laws. The standard rate is 20 per cent.

CIT-taxable income is the difference between an enterprise's total revenue, whether domestic or foreign-sourced, and its deductible expenses, plus other assessable income. CIT taxpayers are required to prepare an annual CIT return, which must include a section setting out the adjustments between accounting profits and taxable income. CIT taxpayers may carry forward their tax losses for five years. The carrying-back of losses is not permitted. There is no provision for any form of consolidated filing or group loss relief.

Expenses are tax deductible if they relate to the generation of income and are properly supported by suitable documentation, such as a contract, invoice or bank transfer voucher.

The following is a non-exhaustive list of non-deductible expenses under current laws:

- depreciation of fixed assets that are not in accordance with the prevailing regulations;
- employee remuneration expenses that are not stated in a labour contract or collective labour agreement; and
- provisions for stock devaluation, bad debts, financial investment losses, product warranties or construction work that are not in accordance with prevailing regulations.

There are three preferential tax rates available: (1) ten per cent, either for 15 years or the lifetime of the project; (2) 17 per cent for the lifetime of the project; and (3) 17 per cent for ten years. Preferential tax rates start from the commencement of operating activities. When the preferential rate expires, the CIT rate reverts to the standard rate of 20 per cent.

### *6.2.3 Foreign contractor tax (FCT) – withholding tax*

FCT applies to certain payments to foreign parties, such as interest, royalties, service fees, leases, insurance, transport, transfers of securities and goods supplied within Vietnam or associated with services rendered in Vietnam. FCT comprises a CIT and VAT element at varying rates and can also include PIT for payments to foreign individuals.

There are three methods for tax payment: direct method, deduction method and hybrid method. Under the direct method, the foreign contractor does not have to register for VAT purposes, nor file CIT and VAT returns. Instead, CIT and VAT will be withheld by the Vietnamese customer at prescribed rates from the payments made to the foreign contractor, whereas the deduction method requires the foreign contractor to register for VAT and file CIT and VAT returns in the same way as a local entity. The foreign contractor needs to issue VAT invoices and charge VAT similar to a local company. CIT is paid at 20 per cent on net profits.

Foreign contractors can apply the deduction method if they meet the following requirements:

- they have a permanent establishment or are tax resident in Vietnam;
- the duration of the project in Vietnam is more than 182 days; and
- they adopt the full Vietnam Accounting System, complete a tax registration and are granted a tax code. The Vietnamese customer is required to notify the tax office that the foreign contractor will pay tax under the deduction method within 20 working days of the date of signing the contract.

If the foreign contractor carries out several projects in Vietnam and qualifies for the application of the deduction method for one project, the contractor is then required by law to apply the deduction method to all its other projects as well.

Under the hybrid method, the foreign contractor registers for VAT and accordingly pays VAT based on the deduction method (ie, output VAT less input VAT), but with CIT being paid under the direct method rates on gross turnover. Foreign contractors wishing to adopt the hybrid method must:

- have a permanent establishment in Vietnam;
- operate in Vietnam under a contract with a term of more than 182 days; and
- maintain accounting records in accordance with the accounting regulations and guidance set out by the MOF.

### *6.2.4 Double taxation avoidance agreements (DTTA)*

Vietnam has entered into Double Taxation Avoidance Agreements with over 75 countries and regions in the world, which helps to reduce an enterprise's tax liability in Vietnam. For example, capital gains are normally subject to 25 per cent CIT, but for residents of some contracting countries, capital gains are only taxed in the resident's home country and exempt from CIT in Vietnam. Accordingly, if these capital gains are not taxed in the home country, the taxpayer will be exempt from any CIT against capital gains in Vietnam.

### *6.2.5 Special Excise Duty (Special Sales Tax or SST)*

SST applies to the production or import of certain goods, the domestic sales by the importers of these goods and the provision of certain services. The Law on SST classifies SST objects into the following two groups:

- commodities, which include cigarettes, liquor, beer, automobiles that have less than 24 seats, motorcycles, aeroplanes, boats, petrol, air-conditioners up to 90,000 British thermal units, playing cards and votive papers; and
- services, which include discotheques, massage, karaoke bars, casinos, gambling, lotteries, golf clubs and entertainment with betting.

SST rates depend on the object and currently range between five and 150 per cent. Taxpayers must file SST returns on a monthly basis by the 20th of the following month.

### *6.2.6 Import and export duties*

Import duty at various rates is imposed on goods imported into Vietnam. Import duty exemptions are provided for projects classified as encouraged sectors and goods imported in certain circumstances.

There are three import duty rates in Vietnam:

- ordinary rates;
- preferential rates; and
- special preferential rates, which apply to imported goods from countries that have free trade agreements (FTA) with Vietnam. Vietnam has signed many FTAs with nations and areas, such as the Association of Southeast Asian Nations (ASEAN), Australia and New Zealand, Japan, South Korea and the EU-Vietnam FTA.

Vietnam also has an anti-dumping tax, anti-subsidy tax and self-defence tax.

Export duties are levied on a few items comprising natural resources, such as sand, chalk, marble, granite, ore, crude oil, forest products and scrap metal.

The General Department of Customs and its agencies are central to imported/exported goods and services issues in Vietnam, particularly in determining the value of goods and services for tax calculations.

### *6.2.7 Personal Income Tax (PIT)*

A personal income taxpayer is any resident individual with taxable income arising either within or outside the territory of Vietnam, or any non-resident individual with taxable income arising within the territory of Vietnam.

Residents are those residing in Vietnam for 183 days or more in a calendar year, or for 12 consecutive months from the first date of arrival; or those having a permanent residence in Vietnam.

Tax residents are subject to Vietnamese PIT on their worldwide taxable income, wherever it is paid or received. Employment income is taxed on a graduated tax rates basis, while non-employment income is taxed at a variety of different rates.

Individuals who do not meet the definition of a tax resident are considered to be taxed non- residents. Taxed non-residents are subject to PIT at a flat tax rate of 20 per cent on the income received as a result of working in Vietnam in the given tax year. Non-employment income is taxed at various other rates subject to any applicable DTAA.

For residents with regular income, depending on their monthly income, the rate shall be five per cent to 35 per cent. For residents with irregular income, the capital gains tax (CGT) as PIT is due and payable when the transaction is completed, with the following range: 0.1 per cent for a security transfer; five per cent for interest/dividends, income from copyright and franchising/royalties; ten per cent for income from winning prizes and inheritance/gifts; and 20 per cent for capital transfer.

In addition, there is a list of taxable income and non-taxable income. This list is complex and changes depending on the policy of the government. Therefore, advice from a qualified tax consultant should be sought.

### 6.3 Tax compliance, audits and penalties

To reform the tax administration, as well as to modernise tax administration systems and procedures, taxpayers are now required to self-assess their taxes, and there is a shift towards declaring and paying taxes online.

There are detailed regulations setting out penalties for various tax offences. For discrepancies identified by the tax authorities upon audit/inspection, a 20 per cent penalty is imposed on the amount of tax that is under-declared. Late payment of tax is subject to interest of 0.03 per cent of the tax liability for each day that the tax is late instead of 0.05 per cent previously.

# Chapter 7: Intellectual property

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### 7.1 Patents

Vietnam distinguishes between invention patents and utility solution patents.

An invention patent is a technical solution in the form of a product or process intended to solve a problem by the application of natural laws. An invention shall be eligible for protection in the form of the grant of an invention patent when it satisfies the following conditions: it is novel, it is of an inventive nature and it is susceptible to industrial application. Rules for utility solution patents are similar to those for invention patents, but the item is not required to demonstrate an inventive nature.

The following objects are ineligible for protection as inventions: (1) scientific discoveries or theories and mathematical methods; (2) schemes, plans, rules and methods for performing mental acts, training domestic animals, playing games and doing business; (3) computer programs; (4) presentations of information and solutions of aesthetic characteristics; (5) plant varieties and animal breeds; (6) processes of plant or animal production that are principally of a biological nature, other than microbiological processes; and (7) human and animal disease prevention methods, diagnostic and treatment methods.

Invention patents are protected for a maximum of 20 years, while utility solution patents are valid for ten years.

## 7.2 Trademarks

A trademark is any sign in the form of letters, words, drawings or images, including holograms, or a combination thereof, represented in one or more colours, used to distinguish goods or services of different organisations or individuals. Vietnam laws provide another nearly similar definition of 'trade name', which can be interpreted as the designation of an organisation or individual used in business activities in order to distinguish the business entity bearing such a trade name from other business entities in the same business sector and area.

However, the following signs are ineligible for protection as marks: indistinctive (eg, simple shapes and geometric figures, numerals, letters or scripts of uncommon languages or signs indicating time, place and method of production, category, quantity, quality, properties, ingredients, use, value or other characteristics descriptive of goods or services); identical with or confusingly similar to national flags or national emblems; causing misunderstanding or confusion or deceiving consumers as to the origin, properties, use, quality, value or other characteristics of goods or services.

Trademarks are generally protected by registration. Unregistered trademarks may still be protected in Vietnam if such trademarks are deemed to be 'well-known' based on the number of customers, territories for sales, sales turnover and so on.

A trademark is valid for ten years; after which it may be renewed indefinitely for additional ten-year periods.

## 7.3 Copyright

Copyright means rights of an organisation or individual to works (any creation in the literary, artistic or scientific sector) that such an organisation or individual created or owns, whereas copyright-related rights mean rights of an organisation or individual to performances, audio and visual fixation, and broadcasts and satellite signals carrying coded programs.

Copyright in works shall comprise moral rights (eg, to give titles to their works, to publish their works, to authorise other persons to publish their works or to forbid other persons from modifying, editing or distorting their works in whatever form) and economic rights (eg, to display their works to the public, to reproduce their works, or to communicate their works to the public by wireless or landline means, and electronic information networks or other technical means).

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. Furthermore, the copyright-related rights shall arise at the moment a performance, audio and visual fixation, broadcast or satellite signal carrying coded programs is fixed or displayed without causing loss or damage to copyright.

To be protected as copyrights in Vietnam, works that are created in another country and exist in a definite form, or that are first published or disseminated in another country, must be published in Vietnam within 30 days from the first publication. Provided, however, that if such a foreign country is a member of the international treaties to which Vietnam is also a signatory (eg, the Bern Convention for the Protection of Literary and Artistic Works or any other bilateral convention regarding national treatment), Vietnam extends its national treatment in copyright protection to such a member country.

## 7.4 Design

Design (literally referred to as 'industrial design' under Vietnamese law) is defined as the outward appearance of a product embodied in three-dimensional configurations, lines, colours or a combination of such elements. Similar to a patent, a design shall be protected if it satisfies the following conditions: (1) it is novel; (2) it is of an inventive nature; and (3) it is susceptible to industrial application. There are three types of designs deemed as ineligible for protection: (1) outward appearance of a product that is necessary due to the technical features of the product; (2) outward appearance of civil or industrial construction works; or (3) shape of a product that is invisible during the use of the product.

An industrial design patent shall be valid from the grant date until the end of five years after the filing date and may be renewed for two consecutive terms, each of five years.

## 7.5 Other remarks

To enjoy most types of intellectual property rights in Vietnam, the intellectual property should be registered. The application for registration may be lodged in Vietnam or overseas if so allowed under the law of Vietnam and the treaty regarding intellectual property to which Vietnam is a party. Vietnam laws apply the 'first to file' principle, under which if two or more applications for registration are filed by different parties, a protection title may only be granted to the valid application with the earliest priority or filing date among applications that satisfy all conditions for the grant of a protection title.

Any organisation or individual who commits an act of infringement of the intellectual property right of another organisation or individual may be dealt with by the application of civil, administrative or criminal remedies.

Preliminary injunctions and compensation for damages are available through the civil courts. Administrative remedies can include caution or monetary fines and additional penalties (eg, confiscation of intellectual property counterfeit goods, raw materials, and materials and facilities used mainly for the production or trading of such intellectual property counterfeit goods; or the suspension of business activities for a fixed period in the sector in which the infringement was committed). In certain cases, criminal proceedings may be launched against persons who violate trademarks, geographical indications, copyrights and other related rights.

# Chapter 8: Financing

*Samuel Son Tung Vu, Bae, Kim & Lee, Hanoi*

## 8.1 Types of banks

A foreign bank is permitted to provide banking operations and other related business operations in Vietnam through one or more of the following forms after it has obtained an establishment and operation licence (the 'Licence') issued from the State Bank of Vietnam (the 'SBV'):

1. a wholly foreign-owned bank;
2. a joint venture bank (between a foreign bank and a Vietnamese bank); and/or
3. a branch of a foreign bank in Vietnam.

Under Vietnamese law, banks operating in form (1) and/or (2) are independent legal entities, while entities operating in form (3) do not have legal entity status. In addition, a foreign bank may also set up a representative office in Vietnam for the purpose of acting as a liaison office (without providing any banking services in Vietnam). A representative office is also not an independent legal entity and may not conduct revenue-generating activities.

The scope of operation of a wholly foreign bank, joint venture bank and branch of a foreign bank will be specified in the Licence issued by the SBV, which may include some or all of the below activities as stipulated under Article 98 of Laws on Credit Institutions, 2010 (as amended in 2017):

- taking demand deposits, time deposits, saving deposits or other deposit types;
- issuing deposit certificates, promissory notes, treasury bills and bonds to raise capital within and outside Vietnamese territory;
- extending credits in forms as approved by the SBV;
- opening current accounts for clients;
- providing payment instruments; and
- providing payment services as approved by the SBV.

## 8.2 Licensing requirement for banks

The specific licensing conditions may vary depending on whether the bank is a wholly foreign-owned bank, joint venture bank or branch of a foreign bank. Generally, an application for a Licence may be granted upon satisfaction of the following conditions:

- having funded capital at least equal to the minimum legal capital as required by laws; for instance, VND 3,000bn for wholly foreign-owned and joint venture banks, and $15m for a branch of a foreign bank;

- the foreign bank/foreign credit institution (CI) must be a legal entity currently operating lawfully and must have sufficient financial capacity to participate in capital contribution. In the case of a branch of a foreign bank, the total asset value of the foreign parent bank must be at least $20bn in the preceding year. In the case of a wholly foreign-owned bank or joint venture bank, the requirement on total asset value is at least $10bn in the preceding year;
- managers, executives and members of the board of controllers must satisfy all the criteria and conditions in accordance with Vietnamese law;
- having a charter with provisions in accordance with Vietnamese law;
- having a proposal for establishment and a feasible business plan that do not adversely affect the safety and stability of the Vietnamese CIs system and do not create a monopoly or restrict competition, or create unfair competition within the Vietnamese CI system;
- the foreign bank/foreign CI is permitted to conduct banking operations in accordance with the law of the country where its head office is located;
- the proposed operations for which the Licence is applied to conduct in Vietnam must be the operations that the foreign bank/foreign CI is permitted to conduct in the country where its head office is located;
- the foreign bank/foreign CI must have a healthy operation and satisfy all conditions on total assets, financial status and prudential ratios in accordance with the SBV's regulations;
- the competent authority of the foreign country has agreed in writing with the SBV on the inspection and supervision of the banking operation, and on the exchange of information about the supervision of banking safety, and has given a written commitment on the unified supervision of the operation of the foreign bank/foreign CI in accordance with international practice; and
- the foreign bank must give a written commitment that it accepts liability for all obligations and commitment of its branch in Vietnam; ensures that the actual value of the funded capital of its branch will be maintained at no less than the minimum capital as required by law; and that it will comply with Vietnamese banking regulations on safety requirements. On the other hand, the foreign CI must give a written supporting commitment on the finance, technology, administration and operation of the joint venture bank or the wholly foreign-owned bank, and ensure that those entities shall maintain funded capital at least equal to the minimum legal capital and comply with provisions on the prudential ratios as required by laws.

The procedure for issuing a Licence for a wholly foreign-owned bank, joint venture bank or branch of a foreign bank in Vietnam is as follows:

- The applicant submits to the SBV the applications dossier as required by Vietnamese laws. Within 60 days from the receipt of the complete application documents, the SBV will issue a letter of acknowledgment of such receipt.

- Within 90 days from the letter of acknowledgment, the SBV will issue an in-principle approval for the establishment of the applicant. In the case that the SBV refuses to issue an in-principle approval, the SBV will explain the reasons for such a refusal in writing.
- Within 60 days from the receipt of the in-principle approval from the SBV, the applicant will submit to the SBV additional documents as required by Vietnamese laws. Failure to supplement the additional documents as required by Vietnamese laws within the aforesaid period shall result in the in-principle approval no longer being in effect.
- Within two days from the receipt of the complete additional documents, the SBV will issue a letter of acknowledgment of such receipt.
- Within 30 days from the receipt of the complete additional documents, the SBV will issue the Licence. In the case that the SBV refuses to issue the Licence, the SBV will explain the reasons for the refusal in writing.

With respect to the issuance of a Licence for representative offices, within 60 days from the receipt of a complete application dossier, the SBV must either issue the Licence or explain the grounds for its refusal of such an application.

# Chapter 9: Privacy laws and data protection

*Anh Dung Tran, Bae, Kim & Lee, Hanoi*

Despite rights to privacy and confidentiality of information being stated as one of the fundamental rights under the 2013 Constitution, there is no single unified legislative document regulating this matter in Vietnam.

## 9.1 Regulations on privacy and data protection

Although the National Assembly has repeatedly proposed to issue a single law on privacy and data protection, in practice there has been no movement to introduce such a law. For the time being, several regulations on privacy and data protection are found across various legislative documents, such as the Civil Code, 2015, Law on Telecommunication, 2009, Law on Post, 2010, Consumers' Rights Protection Law, 2010, Cyber-Information Safety Law, 2015, Cybersecurity Law, 2018, Criminal Code, 2015, Law on Children, 2016, Law on Medicine, 2016, Law on Statistics, 2015, Law on Press, 2016 and Law on Citizen Identification, 2014. However, these regulations merely provide general regulations, and most of them are overlapping in content. Due to the current situation, the application of privacy and data protection regulations is rather difficult in Vietnam.

Because privacy and data protection are regulated in different pieces of legislation and without cross reference, it is difficult to achieve a consistent understanding of privacy and data protection. Nevertheless, privacy and data protection are recognised principles in Vietnam. In practice, unless otherwise permitted by Vietnamese law, no collection, processing or usage of personal data can be conducted without consent being sought from the data subjects by target entities. Data subjects also have the right to request that any target entities furnish them with their personal data so that the data subjects are able to check, correct, remove and prevent the disclosure or transmission of their personal data to other parties.

## 9.2 Remedies against violations related to privacy and data protection

Infringements of privacy and data protection will result in the imposition of administrative sanctions or even criminal penalties depending on the severity of the violations. An individual may also pursue civil procedures to protect his/her privacy and personal information, such as requesting the relevant authority or the court recognise his/her right or terminate the infringement, or requesting compensation for any damages or loss.

The three different remedies mentioned above are provided for under law, but in practice, such remedies are ineffective. This is due to a lack of detailed implementing regulations. Moreover, the sanctions and penalties are not strong enough to prevent the violation of the relevant regulations. Ultimately, the unclear and troublesome nature of such remedies discourage entities from pursuing them.

# Chapter 10: Competition law

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The recently passed Competition Law, 2018 No 23/2018/QH14 introduces significant changes to the competition landscape in Vietnam, most notably the shift to an effects-based regulatory approach that focuses on the significant competition-restraining impact of a conduct rather than the form in which it is carried out. The Law also applies to offshore transactions that have an impact on domestic market competition. Decree 35/2020/ND-CP, which guides a number of provisions of the Competition Law, and provides for, among other matters, detailed merger filing thresholds and pertinent factors for substantive assessment, took effect on 15 May 2020.

This chapter outlines three key areas regulated by the Competition Law: (1) abuse of monopolisation and dominance; (2) cartels; and (3) merger control.

## 10.1 Abuse of monopolisation and dominance

Under the Competition Law, an undertaking is deemed to be in a dominant market position if it possesses: (1) a market share of at least 30 per cent in the relevant market, or (2) significant market power. Significant market power is determined based on, inter alia, financial capacity, market barriers and market share ratio, among undertakings in the relevant market. A group of two, three, four or five undertakings is deemed to have a collective dominant market position if the group has a combined market share of at least 50 per cent, 65 per cent, 75 per cent or 85 per cent in the relevant market, respectively.

An undertaking is monopolistic if it has no competitors in the same relevant market.

An undertaking or (where applicable), a group of undertakings, having monopolistic or dominant market power, is not in and of itself unlawful. Legal concerns are only raised if such an undertaking or group of undertakings abuses the monopolisation or dominance that it enjoys. As such, the Competition Law prohibits the following abusive conduct:

| Prohibited conduct | Dominance | Monopolisation |
|---|---|---|
| Predatory pricing | ✓ | |
| Resale price maintenance (RPM) practice | ✓ | ✓ |
| Restraining production or distribution of goods or services, limiting the market, or impeding technical or technological development | ✓ | ✓ |
| Applying different commercial conditions to the same transaction | ✓ | ✓ |
| Imposing unrelated conditions | ✓ | ✓ |
| Hindering the participation in, or expansion of, the market by other undertakings | ✓ | ✓ |
| Imposing disadvantageous conditions on customers | | ✓ |
| Unilaterally changing or terminating signed contracts without justification | | ✓ |
| Conducting acts prohibited by other laws | | ✓ |

Of note, not all of the aforementioned conduct is prohibited per se. Except for those for which the prohibition is exclusive to monopolistic undertakings, abusive conduct is only illegal if it is actually or potentially harms competitors or causes loss to customers.

## 10.2 Cartels/restrictive agreements

Article 3.3 of the Competition Law defines a ‘restrictive agreement’ as an agreement in any form that has an actual or potential competition-restraining effect.

Under the Competition Law, cartels are no longer prohibited solely on the basis of the undertakings’ combined market share as outlined under the former regime. The law instead adopts a new approach, according to which a given cartel is assessed on the basis of its restrictive impact on the domestic market. Accordingly, certain types of restrictive agreements, such as price fixing or market allocation between undertakings having a combined market share lower than 30 per cent in the relevant market than were permitted under the former competition law, are now prohibited.

Furthermore, certain cartels are now criminally prosecutable. Prohibited and criminalised cartels include the following:

| Cartels | Illegal per se[1] | | Conditionally prohibited[2] | | Criminally prosecutable | |
|---|---|---|---|---|---|---|
| | Horizontal | Vertical | Horizontal | Vertical | Horizontal[3] | Vertical |
| Bid rigging[4] | ✓ | ✓ | | | ✓ | ✓ |
| Removal of non-members from the market | ✓ | ✓ | | | ✓ | ✓ |
| Restriction of non-members' market access or business development | ✓ | ✓ | | | ✓ | ✓ |
| Price-fixing | ✓ | | | ✓ | ✓ | |
| Allocation of market and/or customer | ✓ | | | ✓ | ✓ | |
| Quota fixing | ✓ | | | ✓ | ✓ | |
| R&D restriction | | | ✓ | ✓ | ✓ | |
| Agreements on the refusal to deal | | | ✓ | ✓ | | |
| Agreements to limit the upstream/downstream market | | | ✓ | ✓ | | |
| Agreements to impose businesses conditions not directly related to the subject matter of the contract | | | ✓ | ✓ | ✓ | |
| Other restrictive agreements | | | ✓ | ✓ | | |

The Competition Law provides for a leniency programme, under which co-conspirators participating in a cartel may turn themselves in and assist with the competition authority's investigation in exchange for either full immunity from, or a reduction of, fines for breach of competition law that the authority would have otherwise imposed on them. This is the first time a leniency programme has been formally introduced in Vietnam. Nevertheless, it is designed to create a so-called 'race to court' effect with conditions and levels of immunity similar to those of the conventional leniency programme recommended by the Organisation for Economic Co-operation and Development (OECD).

## 10.3 Merger control

Under the Competition Law, a contemplated economic concentration that crosses any of the filing thresholds must be notified to the competition authority prior to its completion. An economic concentration encompasses a merger, consolidation, acquisition, joint venture or other type of concentration provided by law.

1 Illegal cartels are considered hard-core cartels, in that their mere existence is in and of itself detrimental to market competition, and thus strictly prohibited.

2 Conditionall prohibited cartels are only prohibited if they actually or potentially restrict competition significantly.

3 Except for bid rigging and agreements on the removal of non-members from the market or restriction of non-members' market access or business development, horizontal cartels are only considered criminally prosecutable if the co-conspirators' combined market share is at least 30 per cent.

4 For bid rigging, only individuals are criminally prosecuted.

The Competition Law no longer relies on market share as the sole jurisdictional threshold, but adds a new set of criteria to its filing test, namely total assets, total turnover and transaction value. This means there will be no merger prohibited per se as under the former competition law regime. Two sets of thresholds are set out in Decree No 35/2020/ND-CP, one applicable to transactions in virtually all sectors, the other reserved for transactions involving CIs, insurers and/or securities companies.

### *10.3.1 General thresholds*

A contemplated concentration, except for one involving any of the above listed undertakings, must be notified to the competition authority if any of the following thresholds is met:

| Criteria | Threshold |
|---|---|
| Total sales or purchase turnover or total assets on the Vietnamese market of either undertaking to the transaction or group of affiliated undertakings | VND 3tn |
| Transaction value of the merger[5] | VND 1tn |
| Combined market share of the parties to the transaction in the fiscal year prior to the year of merger filing | 20 per cent |

### *10.3.2 Specific thresholds*

A contemplated transaction involving CIs, insurers and/or securities companies must submit a notification if it crosses any of the following thresholds:

<table>
<tr><th>Threshold</th><th>CIs</th><th>Insurers</th><th>Securities companies</th></tr>
<tr><td>Total assets of either transaction undertaking or the respective group of related undertakings</td><td>20 per cent of total assets of all CIs on the Vietnamese market</td><td colspan="2">VND 15tn</td></tr>
<tr><td>Total sales/purchase turnover of either transaction undertaking or the respective group of related undertakings</td><td>20 per cent of total revenue of all CIs on the Vietnamese market</td><td>VND 10tn</td><td>VND 3tn</td></tr>
<tr><td>Transaction value</td><td>20 per cent of total charter capital of all CIs on the Vietnamese market</td><td colspan="2">VND 3tn</td></tr>
<tr><td>Combined market share</td><td colspan="3">20 per cent</td></tr>
</table>

Of note, the total assets/turnover and combined market share values refer to those as of the fiscal year prior to the year of the anticipated transaction. The transaction value thresholds in both cases do not apply to offshore deals.

The substantive assessment of a notified transaction comprises two phases. At the preliminary appraisal stage, the authority will assess the parties' combined market share and/or post-merger Herfindahl–Hirschman Index (HHI) to decide whether the contemplated transaction falls within any of the safe harbours and should consequently be cleared. It is noteworthy that if the authority does not issue a decision within the statutory timeframe, the transaction will be automatically cleared.

If the transaction fails the preliminary appraisal, the review moves to the second phase, where the authority employs a substantial lessening of the competition test to decide whether to issue an approval and on what conditions (if any). Accordingly, a concentration, even a foreign-to-foreign one, which causes or is capable of causing significant anti-competitive impact on the Vietnamese market, is prohibited.

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5 This threshold does not apply to offshore transactions.

# Chapter 11: Dispute resolution

*Net Le, LNT & Partners, Hanoi*

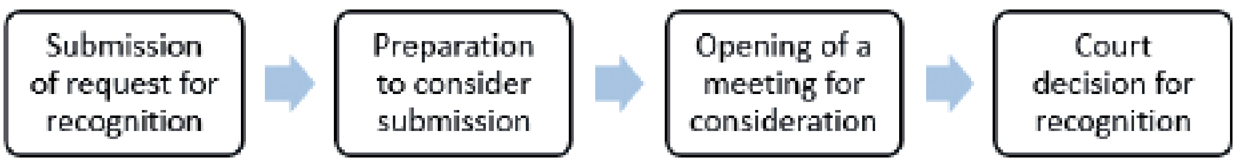
There are three potential means of dispute resolution under the Vietnamese legal system: mediation, arbitration and litigation.

## 11.1 Mediation

Due to certain drawbacks in the Vietnamese court system, it is essential that the parties to any dispute attempt to reach an amicable settlement outside of the court system. Vietnamese law acknowledges this by requiring the parties to certain disputes (including civil, labour and family disputes) at least to attempt mediation before commencing litigation. Decree No 22/2017/NDCP on commercial mediation was established on 24 February 2017, making commercial mediation an independent and effective form of dispute resolution, as well as making the result of mediation legally binding on the involved parties.

If the parties reach a settlement during mediation, that arrangement is enforceable as a normal contractual agreement. One or both parties to the mediation settlement agreement can apply to the court for the recognition of their settlement agreement. After being recognised, the mediated settlement agreement is enforceable as a full and final court judgment in compliance with the law of Vietnam on civil enforcement, which means it shall take effect immediately upon issue and can neither be appealed nor protested against through appellate procedures.

The process for recognising the successful result of mediation is as follows:




## 11.2 Arbitration

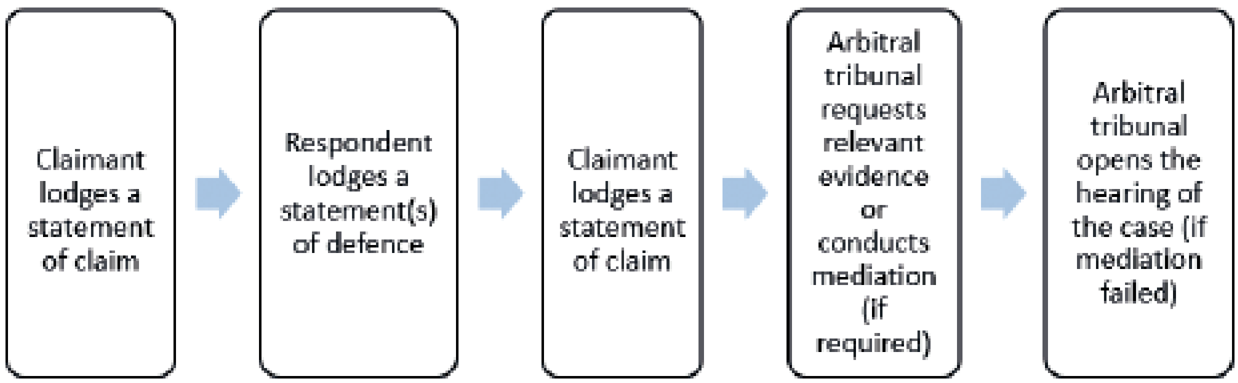
### *11.2.1 Legal framework of arbitration*

The Law on Commercial Arbitration No 54/2010/QH12 (the 'LCA') is the main legal instrument governing Vietnamese law on arbitration. According to the LCA, arbitration in Vietnam covers:

- disputes arising from commercial activities;
- disputes between the disputants, with at least one carrying out commercial activities;
- disputes between goods or services provider and consumer by consent of the consumer; and
- other disputes to be settled by arbitration as provided by law.

Disputes between the involved parties can be settled by an arbitral tribunal organised by an arbitration centre, such as the Financial and Commercial Centre for Arbitration (the 'FCCA') or the Vietnam International Arbitration Centre (VIAC), in accordance with its procedural rules ('Institutional Arbitration'), or through ad hoc arbitration set up by the parties involved in accordance with the procedures as agreed by the parties ('Ad hoc Arbitration'). Unless otherwise agreed, if the parties cannot agree on the number of arbitrators, the tribunal will be composed of three arbitrators.

Commercial disputes shall be settled by arbitration through the following basic procedural steps:




Decisions from Vietnam's arbitration centres are final and binding on the parties, and may be enforced by the Enforcement Department in the same manner as an enforceable court decision.

### *11.2.2 Foreign arbitration*

Under the Civil Procedure Code (CPC), foreign arbitral awards are arbitral awards rendered outside Vietnam or those rendered by non-Vietnamese arbitrators within Vietnam. As the law currently stands, Vietnamese courts will only consider an application for recognition and enforcement of a foreign arbitral award if the award has been made in or by arbitrators of a member state of the New York Convention or to the extent that the country in question grants reciprocal treatment to Vietnam. Vietnam ratified the New York Convention in 1995. There have been many instances where Vietnamese courts have enforced foreign arbitral awards.

An award recognised by a Vietnamese court will have the same legal effect as a judgment given by a Vietnamese court and can be enforced in Vietnam.

On the other hand, a Vietnamese court may reject an application for recognition and enforcement of a foreign arbitral award if the respondent can provide evidence. Interestingly, the procedures prescribed by law in relation to the recognition and enforcement of foreign arbitral awards appear to grant only the respondent (the party who is subject to enforcement of the arbitral award) the right to participate in the court hearing. The applicant (the party seeking recognition and enforcement of the arbitral award) does not appear to enjoy a similar right.

Although the law states that the courts should ratify awards that meet the aforementioned requirements without assessing their merits, the Vietnamese courts have historically gone beyond this legal rule. However, since Vietnam's accession to the WTO in 2007, the Vietnamese government has made considerable efforts to strengthen the enforcement regime by introducing new legislation and detailed guideline regulations. The current Law on Enforcement of Civil Judgment, which was amended and supplemented in 2014, has helped to improve the recognition and enforcement of foreign arbitral awards in Vietnam.

## 11.3 Litigation

### *11.3.1 Foreign court*

Vietnamese law generally allows foreign investors to refer their disputes to courts in a foreign jurisdiction if parties have a choice of law clause, unless statutorily exempt under the Civil code 2015. These include:

- cases where the consequences of referring such a foreign court are inconsistent with the fundamental principles of Vietnamese law;
- the disputes over immovable property located in Vietnam, particularly disputes over the ownership rights, other rights with respect to such immovable property, and lease or use of such immovable property as security property; and
- the applicable law in a labour contract or a consumer contract adversely affects the minimum interests of employees or consumers as prescribed by Vietnamese law.

There are two points that investors should take note of when choosing to litigate in foreign courts under the Vietnamese system. Firstly, Vietnamese courts might not uphold choice of law contract provisions. Therefore, an investor should either include a clause referring disputes to arbitration or be prepared to enforce their rights in Vietnamese courts under Vietnamese law. Secondly, a judgment issued by a foreign court is only enforceable in Vietnam if Vietnam has signed a bilateral treaty with the country in question. The CPC does offer some hope in this regard, as it provides that Vietnamese courts will recognise and enforce foreign court judgments on a reciprocal basis.

### *11.3.2 Domestic court*

Under the Law on Organisation of the People's Courts and the CPC, there are four main People's Courts in Vietnam, excluding military tribunals, other tribunals provided by law and special tribunals set up by the National Assembly under special circumstances, namely the Supreme People's Court, Superior People's Court, Provincial People's Court and District People's Court. Excluding the District People's Court, these courts have separate specialised courts, namely the criminal court, civil court, economic court, labour court and administrative court.

The court process in Vietnam can be lengthy. Parties begin proceedings at the first instance, where parties are required to disclose evidence and attend mediation meetings. If the parties still maintain their claims afterwards, then a council of adjudicators consisting of one judge and two jurors (usually) will commence the hearing. Afterwards, the council will render a judgment. If a party disagrees with such holding, an appeal must be heard in the court that held the trial at first instance within 15 days.

Parties may also petition for a second review on grounds of legal error or newly discovered evidence, subject to a decision by the Chief Judge or the Chief Procurator of a competent court or procuracy. The grant of a review can also be accompanied by an order for stay of enforcement. The review will take place in closed courtrooms and can be lengthy.

Vietnam is a civil law jurisdiction, so judges in Vietnam base their decisions mostly upon the applicable law and principles of interpretation. However, under the new CPC, from 6 April 2016 the Council of Supreme Court has officially issued nine precedents for lower-level courts to consider and apply. As of the end of 2017, there have been 16 precedents enacted by the Council of the Supreme Court.

In an attempt to streamline what was a very complex system of enforcement, the Law on Judgment Enforcement, 2008, amended and supplanted in 2014, was introduced to replace the Ordinance on Judgment Enforcement, 2004. The new system provides for two steps:

- Firstly, the court will serve judgment to litigants and the judgment enforcement authority (JEA), and the successful claimant may request the enforcement of the judgment. The person who is responsible for satisfying the judgment has the right to lodge an application to the JEA for enforcement within the time limit of five years from the effective date of the judgment.
- Secondly, the JEA will issue a decision to enforce the judgment and serve it on the obligatory party within three days from issue. Subsequently, the obligatory party will have 15 days voluntarily satisfy the judgment. If the obligatory party fails to do so, the JEA will enforce the judgment in accordance with the law.

Foreign investors should be aware of the statute of limitations and the time-consuming nature of court proceedings. In general, the new CPC does not provide a statute of limitations for initiating court proceedings as stipulated in the Civil Proceedings Code 2004. The statute of limitations is subject to specific laws. Although Vietnamese law sets strict time limits for courts to dispose of cases (eg, two to four months for first instance proceedings), each party involved in a dispute must bear in mind that court procedures are time-consuming and sometimes unpredictable. In practice, some disputes have been heard and reviewed in various court proceedings over a period of several years.

# Chapter 12: Infrastructure

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## 12.1 Overview of infrastructure in Vietnam

As the backbone of urbanisation and key to smooth economic operation, infrastructure is one of the most important sectors in Vietnam. A blooming infrastructure sector needs legislative coherence and consistency, yet in Vietnam the sector is subject to a plethora of regulations, from construction and planning to land and environment.

In an attempt to tackle this issue, the National Assembly passed a new Planning Law on 24 November 2017 and a Law amending 37 laws related to planning on 20 November 2018, both of which came into force on 1 January 2019. These legislative measures are long-awaited and designed to enhance consistency in the infrastructure regulatory regime. One point to note in particular is that the new Planning Law has abolished the planning permission requirement, thereby removing the gray area in the application for a construction permit under the previous legislation.

One of the recent areas of great interest in Vietnam is PPPs. The first legislative measure concerning PPPs surfaced in 1992, when for the first time the amended Foreign Investment Law defined build–operate–transfer contracts (BOTs). In recent years, given the intense demand for new and improved infrastructure fuelled by rapid industrialisation and urbanisation, the development strategy of Vietnam is to prioritise investment in the form of PPPs. As a result of these developments, the government is now in the process of developing an improved legal framework for PPP projects, the most recent being Decree 63.

## 12.2 Construction projects characteristics

### *12.2.1 General construction projects*

Foreign investors wishing to conduct construction business in Vietnam are allowed to do so by setting up a foreign-invested company incorporated under Vietnamese laws. Alternatively, they can directly partake in a construction project as a foreign bidder then either enter into a joint-venture agreement with a Vietnamese party or use local contractors to carry out the project. If there is no local contractor capable of performing the entire construction process as required, the project may be conducted solely by foreign contractors, provided that they satisfy all local requirements.

Subject to capacity, experience and education, individuals and organisations, including foreign-invested companies, in the construction sector must obtain a capacity licence in order to do business in Vietnam. The construction works performed by the individual or organisation shall be based on the licence granted. As of 15 September 2018, a foreign bidder may lose its construction licence if it fails to resolve an infringement of administrative regulations after a second notice from the authority, or if it has incurred a penalty in relation to construction works covered by the second operation licence.

The procedure of a construction project is the same as that of a real estate project. The investors must prepare and obtain approvals for the pre-feasibility study report, feasibility study report and construction economic-technical report for the construction project prior to the process in relation to the land use right and construction.

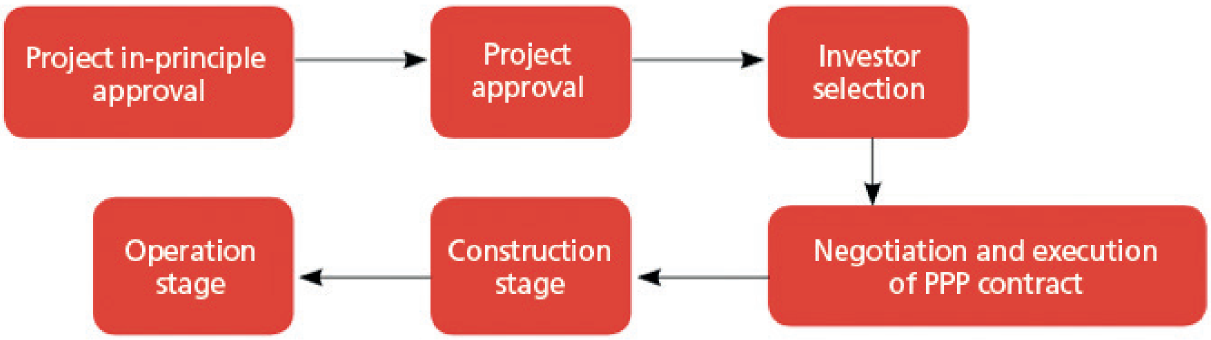
### *12.2.2 Public–private partnership (PPP) projects*

A PPP refers to a contractual cooperation between the state (public sector) and investors (private sector) (the ‘PPP Contract’) jointly to build, innovate, operate and manage infrastructure and public services projects.

A PPP Contract can be a BOT, build–transfer–operate contract (BTO), build–transfer contract (BT), build–own–operate contract (BOO), build–lease–transfer contract (BLT) and operate–manage contract (O&M), or a combination of any of the above.

Depending on the scale, a project may be classified into grade A, B or C, and a certain ministry or provincial level People's Committee shall be authorised to execute the project contracts within the scope of its functions, duties and powers and to perform the rights and obligations and comply with the commitments under the project contract. For example, a development project with investment capital of more than VND 2,300bn (equivalent to $100m) is regarded as a Grade A project subject to the approval of the Prime Minister.

The procedures required for a PPP are outlined in the below flow chart:




### Project in-principle approval

The authority shall consider and approve the PPP project in principle based on the project's preliminary proposal, which is known as the 'pre-feasibility study report', and is prepared by either the public investment authority or the investor to present results of the preliminary research into and assessment of the necessity, feasibility and efficiency of the project. After granting an approval at this stage, the authority shall publicise general information on the PPP project in question for bidding purposes.

### Project approval

The authority shall consider and officially approve the PPP project based on a 'feasibility study report' prepared by either the public investment authority or the investor. If the investor is to prepare the feasibility study report, it shall sign an agreement with the authority, which usually requires it to waive any claim for the costs of preparing the feasibility study report should the report be subsequently rejected by the authority. However, investors who prepare a feasibility study report often enjoy advantages at a later stage when the authority conducts the public tender to select the investor of the PPP project.

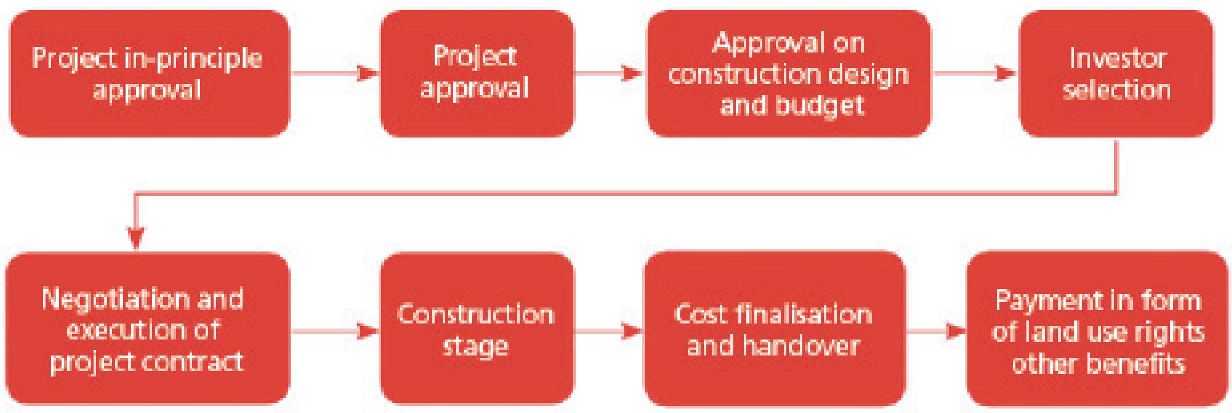
### Selection of investor

The authority shall select the investor for the PPP project either by: (1) holding a public tender; or (2) directly appointing an investor. Option (2) shall only apply in cases where (i) there is only one registered bidder; or (ii) only one investor is able to perform the project due to matters concerning intellectual property, commercial secrets, technologies or capital arrangements; or (iii) the investor proposing the PPP project is able to implement it at the highest efficiency under the Prime Minister's approval.

Negotiation and execution of PPP contract

The investors and the authority will negotiate and execute the PPP contract, which will last for two rounds: (1) preliminary negotiation; and (2) official negotiation and execution of PPP contract.

For BT projects in which the authority grants land to the investor, the procedures are as follows:




## 12.3 Requirements for a construction project

In general, a PPP project must fall within one of the statutory sectors. It should be economically and financially feasible to the investor and affordable to the state in respect of finance, the environment and other matters required by laws.

### *12.3.1 Investment capital*

The investor shall be responsible for contributing the equity and mobilising other capital (ie, obtaining loan from banks/other third partners) to implement the PPP project. For example, for projects with investment capital of up to VND 1,500bn (US$64m), the investor's contributed capital shall account for at least 20 per cent of the project's total investment capital.

### *12.3.2 Assignment of project*

Decree 63 sets out more stringent requirements for private investors that wish to assign rights and obligations under the project contracts to lender(s) or other investors. In particular, the investor is now restricted from assigning part or all rights and obligations in a PPP contract prior to completion of construction works or commencement of the project's operation. To receive the assignment, the proposed assignee must satisfy the financial and managerial capability and other requirements to implement the PPP project.

### *12.3.3 Lender's step-in right*

The lender may assume or designate another qualified investor to assume any or all the rights, interests and obligations of the investor under the PPP contract if the investor fails to perform its obligation under the PPP contract or the loan agreement. In doing so, the lender must request a tripartite agreement between the investor, lender and authority concerning the lender's step-in right.

### *12.3.4 Construction permit*

As a fundamental part of any real estate development project or any other infrastructure investment project, a construction permit must be obtained before the commencement of construction and must suit the project's timeline and plan. As mentioned above, obtaining a construction permit is one of the last steps in registering a real estate project. It is granted subject to the land use right recognised by a legitimate certificate and the suitability of the construction project to the local plan at province and district levels.

Depending on the type and characteristics of the project, the construction permit may or may not have to be obtained from the Ministry of Construction or the People's Committee at the respective level (in practice, from the respective Department of Constructions, who is authorised by the People's Committee) prior to the construction process. Normally, infrastructure projects that have been approved by the President of the People's Committee at the provincial level or higher competent authorities shall not require a construction permit. Specifically, any seven-story residential housing project that has a 1/500 master plan approval and an area of less than $500m^2$ shall be exempt from the construction permit requirement.