Managing change

„Vietnam is in a robust transition to becoming a true market economy – its openness to international trade and extraordinary economic growth in recent decades has made the country a highly interesting investment destination. We stand by your side with international know-how and local knowledge, all from a single source, allowing you to take advantage of this unique opportunity and reap the rewards in this growing and attractive market.“

Rödl & Partner

„The great artistry of the human towers lies in its variety. Our towers thus always differ by height, width and shape. The foundation however, remains unchanged, acting as a reliable, unyielding and open advocate of change.“

Castellers de Barcelona
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General Introduction

Vietnam, the easternmost country on the Indochina Peninsula, has experienced a rapid growth since it opened market for foreign investors in the 1990s. Although growth has slowed a bit in previous years, it is currently increasing again. Its geographical location in the centre of booming South East Asia, a young, industrious and comparatively well-educated population, low production costs and rich natural resources are some of the factors that make it an attractive destination to invest. For foreign businesses, Vietnam is a provider of natural resources, sourcing destination of labor-intensive products and services, manufacturing base, and outlet for infrastructure facilities, machines and consumer products. Splendid opportunities exist, amongst others, in production, tourism, mining, power generation, construction and education.

Vietnam is a member of the WTO and the ASEAN. Amongst the four countries that joint the ASEAN in the 1990s (apart from Vietnam, these are Cambodia, Laos and Myanmar), it is the most developed. Its economy is increasingly market-orientated. However, there are still strong elements of state control, and red tape continues to puzzle investors.

This booklet is not a comprehensive guide of Vietnam’s legal and tax system. We created it in order to assist foreign investors in their Vietnam-related business and focus on areas where, in our experience, questions frequently arise. Although we think that it is possible to determine opportunities and risks by reading this booklet, it can never substitute individual counsel.
Most of the laws and regulations relevant to foreign investment are accessible in English for a modest fee here: http://english.luativietnam.vn. For more comprehensive information, you can find from this database: http://www.vietnamlaws.com.

The key of being successful in any market, specifically in a developing economy, is a good preparation. Investors should spend time to do a detailed market research, and find reliable business partners and advisors. Roedl & Partner helps to find the right partner, assist in obtaining necessary licenses, structure the investment plan to mitigate risks and save taxes, draft required contracts and assist in completing compliance requirements. Please do not hesitate to contact us.

The entire team
Ho Chi Minh City, September 2017
Chapter I

Buying goods and services in Vietnam

Acting jointly
Buying goods and services in Vietnam

Introduction

Vietnam is one of the sourcing destinations for labor-intensive products and services. The Vietnamese dong has so far been in gentle, but constantly has declined against major international currencies, which adds to the competitiveness of Vietnamese exporters. Furthermore, Vietnam as a whole is geographically conveniently located for international trade.

Export from Vietnam into the EU enjoy the “Generalised System of Preferences” which is a tariff reduction granted by the EU in regards of goods from emerging markets. The US has accorded most favorable nation status to Vietnam. Preferential treatment to goods imported from Vietnam is, amongst others, also granted by the other ASEAN states, Korea and Japan.

On the other hand, foreign companies wanting to source goods in Vietnam may find that their supplier has difficulties in finding raw materials and components at a competitive price, because the local supplying industry is still underdeveloped and materials have to be imported. Apart from the price issue, the production process may be delayed because raw materials are stuck at custom borders. Further delays may occur due to electricity outages and logistics problems as roads are often in a bad condition and transport by railway is not available.

Services outsourced to Vietnam are often IT-related such as the creation of software or the keying-in of data. Vietnam has an educated workforce that is well capable of satisfying the needs of customers in this area. Data protection awareness is, however, underdeveloped.

In the following, we have listed, in alphabetical order, some of the most common law, tax and customs related to issues that foreign buyers come across in Vietnam, and some common questions concerning clauses in the sourcing contract.
Agency

The Vietnamese Commercial Code distinguishes between the following persons acting on the side of the buyer:

› **Representative:** conducts business in the name and under the instructions of the buyer; is (usually) paid irrespective of whether the buyer and the supplier sign a contract;

› **broker:** brokers contracts between the buyer and the supplier; is (usually) paid only if the buyer and the supplier conclude the contract;

› **agent:** conducts business in its own name, but on behalf of the buyer (which means that the buyer automatically becomes the owner of the goods purchased by the agent); is (usually) paid only if the agent concludes a contract with the supplier.

The Vietnamese Commercial Code provides that in some cases, the principal (foreign buyer) has to pay attention to a notice period and pay compensation if it terminates the contract with the intermediary, but the parties may deviate from these provisions in the contract.


CISG is an international treaty providing a uniform set of rules governing cross-border sales. Vietnam has not ratified CISG, and the treaty is not well-known in Vietnam. A general reference to CISG (“this contract is governed by CISG”) in a contract that is governed by Vietnamese law is invalid as CISG is not part of Vietnam’s legal system. However, the parties may use CISG as a template to draft their contract to the extent CISG and Vietnamese commercial law are consistent.

Customs

There is no export duty in Vietnam on most goods; exceptions apply in particular to natural resources. A list with goods to which export duty applies is contained in Appendix I of Circular 157/2011/TB-TBC.
Export procedures are explained here:
http://www.customs.gov.vn/English/Lists/CustomsFormalities/Exporter.aspx

Data protection

Services bought by foreign companies in Vietnam are often IT-related (data entry services, software development) and require the transfer of data to Vietnam from abroad. A number of laws contain data protection provisions (e.g. Art. 21, 22 IT Law), but public awareness of keeping personal and company data confidentially is almost non-existent. Sourcing contracts should, where sensitive data are concerned, contain a penalty clause that covers data leakage. To a certain extent, the local company can protect itself against careless use of customer data by its employees, by having clauses in the labor contract and/or its internal labor rules that prohibit the unauthorised use of customer data. However, the best protection is a comprehensive education of the workforce and technical barriers, e.g. systems where local employees can only remote-access data without the possibility to download them. If a foreign company wants to transfer personal data to Vietnam, it has to check the laws of its home jurisdiction whether and under which conditions the cross-border transfer of data shall be allowed.

Deposit

A supplier will usually ask for a deposit before purchasing raw materials and producing equipment. For the buyer, it is favourable if the investment of the supplier is higher than the deposit amount, such as in this case the supplier has an incentive to manufacture the goods as requested in order to recoup the part of the investment that is not covered by the deposit. A deposit can be secured by a bank warranty. The best precaution for a buyer to take is a careful background-check of the supplier.

Dispute resolution, choice of law

Foreign sourcing companies in Vietnam usually want the contract with their supplier to be governed by foreign law, and disputes to be resolved by a foreign court or arbitration body. In practical, it is, however, extremely difficult to enforce
A foreign arbitral award, let alone a foreign judgment, in Vietnam. Consequently, dispute settlement abroad, in our opinion, only makes sense for a foreign buyer if the Vietnamese supplier has assets outside of Vietnam against which the foreign buyer could enforce. If the Vietnamese supplier has assets only in Vietnam, we think that it is usually better to agree on Vietnamese arbitration (e.g. at the Vietnam International Arbitration Centre – VIAC, http://www.viac.org.vn, which has also foreign arbitrators on its panel).

The parties to a commercial transaction “with an international element” (i.e. where at least one party is a foreigner) are free to agree on the application of foreign law as long as the foreign law is not “contrary to the fundamental principles of Vietnamese law”. Unfortunately, there is no guidance to which constituting “fundamental principles of Vietnamese law”. One should be careful if the foreign law is less favorable to the Vietnamese party than Vietnamese law.

VIAC in principle accepts to settle disputes in according to foreign law, although one should, before agreeing on the application of the law of a specific jurisdiction, check whether it is likely that any of the arbitrators on VIAC’s panel are knowledgeable about this law.

**Force majeure**

The supplier of goods or services will usually request that its obligations expire in a force majeure event (e.g. natural disasters). Naturally, the supplier is interested in a wide force majeure clause that may also cover events of which the risk, on closer reflection, should be bonded by the supplier. Typically, a supplier does not want to be held responsible for electricity outages, strikes, and transport risks. However, it depends on whether the supplier prevents these events or mitigates risks associated with them. Electricity outages can be prevented by backup generators, the risk of strikes (at least in the supplier’s own company) can be mitigated by fair treatment of workers, and the supplier would have alternated against the transport company with regards of most transport risks.

A force majeure clause should only provide for the suspension of the obligations of the supplier during the force majeure event (instead of the complete expiry of the
obligations), and oblige the supplier to mitigate the effects to the furthest degree possible.

**Incoterms**

Incoterms are a set of commercial terms, which are drafted by the International Chamber of Industry and Commerce (ICC), defining which party is responsible for transport, costs, and when the risk of loss or damage of goods passed to the buyer. E.g. “CIF (‘cost, insurance and freight’) Incoterms 2010” means that the seller must deliver the goods to the port of destination (conclude a contract with the logistics provider and pay for the delivery and maritime transport insurance). The risk of loss or damage of goods passes to the buyer as soon as the goods are on board of the ship. In Vietnam, as in any other jurisdiction, Incoterms is only applied if the parties make specific reference to them in the sales contract. The ICC changes the definitions from time to time, so it is important to specify in the contract which Incoterms the parties have agreed on (e.g. “Incoterms 2010”).

**Intellectual property**

In some cases, the goods purchased in Vietnam are subjected to intellectual property rights (in particular trademarks) of third parties. Trademarks can be researched online on the homepage of the National Office of Intellectual Property (NOIP; search mask only in Vietnamese). According to Vietnamese commercial law, the seller is responsible for assuring that the goods sold shall not infringe on intellectual property rights of third parties. Nevertheless, the sourcing contract should, where appropriate, include a clause in according to which the supplier warrants that it owns, or has a license with regard to all relevant intellectual property rights. If a third party complains to the foreign buyer about a copyright infringement, the foreign buyer must inform the supplier promptly about this complaint. Otherwise, it risks losing its claim against the supplier.

Often, the foreign buyer transfers, at least temporarily, intellectual property to Vietnam (e.g. the design of shoes to be produced, or technology to be used, by the supplier). The sourcing contract should contain a clause that prohibits the supplier, on pain of penalties, from disclosing the intellectual property and using it
for other purposes than the production of the goods ordered by the foreign buyer. Depending on the case, it should clarify that the supplier is also prohibited from using remaining materials to produce an additional number of goods for sale in a parallel supply chain. Furthermore, the contract should make provisions for the equipment after used in production (e.g., what happens to the molds after the contractual relationship has ended?).

Foreign buyers should consider registering their trademarks even if they have no intention of selling in Vietnam. Otherwise, they risk that a local competitor might register these trademarks and try to prevent the goods ordered by the foreign buyer from leaving Vietnam that they violate the trademarks registered in the local competitor’s name.

Software is subject to intellectual property protection. The moral rights (right to give titles, attach his or her real name to the works, protection of the integrity of the works) rest with the author who is, in the case of software, the individual programmer creating it. It is possible for the author and third parties (e.g. the company employing the author) to agree that the third party should have the right to give titles and make modifications to the software. An organization investing in creating software has the right to publish the work, and exclusively holds the economic rights in it (such as making and distributing copies). In order to avoid any confusion (who is the “organization that makes a financial investment” – the Vietnamese software company that employs the individual programmer or the foreign buyer who orders the production of the software), a sourcing contract should state clearly the rights the foreign buyer is entitled with regard to the software.

“Know your business partner”

A foreign buyer should check very carefully with whom it enters into a contract with. In practice, it can occur that the person on the Vietnamese side who signed the contract was not authorised to do so. It helps to avoid respective frictions if the foreign buyer requests to see the business registration certificate of the Vietnamese party and insists on the contract being signed by the person registered as “legal representative”.
Liquidated damages and penalties

It is internationally common to specify, in the sourcing contract, the amount of damages to be paid by the supplier for faulty performance.

Examples:
“The supplier shall pay damages for each day the shipment delayed in an amount equivalent to XX% of the value of the order”, or “The damages payable by the supplier for each grade below the agreed quality grade shall be USD YY per unit”. A liquidated damages clause benefits the buyer because it (i) prevents the buyer from paying the amount of the actual loss and (ii) induces the supplier to deliver quality and on time. Technically, liquidated damages and penalties are not the same, although they are often confused in practice. Whereas liquidated damages are meant to compensate the buyer, penalties are meant to penalise the supplier. According to the Vietnamese Commercial Code, a party claiming damages must, prove the amount of the loss (Art. 304). It is doubtful whether the parties may deviate from this provision by agreeing on a liquidated damages clause that, in its nature, preventing the aggrieved party from paying the amount of the actual loss. Rather, a clause intended to be a liquidated damages clause may be construed as a penalty clause. Penalty clauses are allowed, but the Vietnamese Commercial Code provides for a cap on permissible penalties of 8% of the order value.

Non-disclosure agreement

The process of selecting suppliers or service providers often requires the disclosure of product or business specifications. Potential business partners should sign a non-disclosure agreement before being provided with sensitive information. See also “intellectual property”.

Payment

Vietnamese commercial law allows the parties to agree on the time and method of payment. The buyer usually pays after the goods are loaded onto the ship, which is evidenced by a bill of lading. The buyer transfers the money to the supplier after having been sent a copy of the bill of lading. Alternatively, payment is effected via
a letter of credit. A letter of credit offers more security to the supplier to receive payment, but requires more bank fees.

If a foreign buyer orders software in Vietnam, the payment clause shall provide that (i) XX % of the purchase price is to be paid after signature of the contract, (ii) YY % is paid after delivery, and (iii) ZZ % is kept by the buyer as a security deposit and transferred to the supplier after the software has run without problems for a specified period of time.

**Place of delivery**

Vietnamese commercial law allows the parties to agree on the place of delivery of goods (which is in practice often prepared by making reference to the Incoterms). If there is no specific agreement, the seller has to deliver the goods to the first carrier (if the contract contains a reference to the transport of goods), or at the place of storage, loading or manufacture (if this location is known to both parties), or at the seller’s place of business.

**Quality and time of delivery**

It is utmost importance for the foreign buyer to check – either by own employees or through a trusted inspection company – the quality of the goods before shipment is made, i.e. while the goods are still in Vietnam. Such checks usually take the shape of factory audits, visits during production and/or packaging and/or tests of product samples. The sourcing contract should contain a clause allowing the buyer to carry out such tests. It is nearly impossible to get money back if the goods have left Vietnam and later founded to be defective. Foreign buyers purchasing regularly in Vietnam might consider setting up a representative office to perform quality checks. Representative offices must not engage in profit-orientated activities, but they are allowed to monitor the performance of contracts concluded by the headquarter. Vietnamese law allows the parties to agree on the characteristics of the goods, the time of delivery and the consequences of faulty performance. It is wise to be very specific and detailed in regard of this will be the starting point for going after the supplier if the delivery was not satisfactory.
**Subcontracting**

Vietnamese law allows the parties to agree on a clause prohibiting the supplier from subcontracting, or limiting subcontracting to subcontractors approved by the buyer. This is an important clause if the buyer has conducted a background check on the supplier and now wishes to ensure that the goods are manufactured by the supplier and not by someone else.

**Taxes**

The VAT rate for exported goods is 0 (zero) %. The VAT rate for exported services is also 0 %.

However, there are exceptions:

- The normal VAT rate of 10 % shall be applied if the foreign recipient of the services has a permanent establishment in Vietnam. The Vietnamese tax authorities shall take a broad view of which constitutes a permanent establishment in order to protect the Vietnamese tax base.
- The reduced rate of 0 % only applies if (i) the foreign recipient of the services has no permanent establishment in Vietnam and (ii) confirms this fact in written form.
- A number of services (e.g. data entry services) are subject to the normal rate of 10 % even if they are exported.

If the Vietnamese service provider has to charge VAT on its services, the price that the foreign buyer pays shall increase. The foreign buyer cannot get an input VAT credit (unless it is – but this is often not an option – registered for tax purposes in Vietnam).

**Warranty**

With some exceptions (e.g. real estate, houses), there is no “automatic” warranty in Vietnamese law. This means that if the buyer wishes to have rights under a warranty (repair free of charge, reduction of the price, replacement of the goods, return of the goods with refund of the purchase price), it must agree so with the supplier in the sourcing contract.
Promoting success

Chapter II
Selling goods and services in Vietnam
Selling goods and services in Vietnam

Introduction

Vietnam is an emerging market with an estimated growth rate of 6.1% in 2017 and an inflation rate of 6.59% in the same year. Although the country as a whole is still quite poor (per capita GDP is around USD 1,350), there is a growing middle class, especially in the urban areas, they are people who demand good-quality, affordable foreign consumer products. Nevertheless, the major opportunities are probably found in infrastructure sector (construction of roads, power generation, telecommunication, oil and gas exploration) where the Vietnamese government obtains expertise from foreign companies with the help of ODA. Furthermore, good quality machines for production lines are in high demand.

In the following, we have listed, in alphabetical order, some of the most common law, tax and customs related to issues that foreign sellers or service providers come across in Vietnam, and some common questions concerning clauses in contracts with Vietnamese customers.

Agents

Foreign companies can sell their products in Vietnam through a local intermediary. Vietnamese law distinguishes between (i) representatives, (ii) brokers, (iii) agents and (iv) distributors. Representatives, brokers and agents act on behalf of the foreign seller. That means if the customer to whom the products are ultimately sold is not willing, or unable, to pay, the foreign seller has no claim against the intermediary for payment of the purchase price. In contrast, a distributor is a person who buys a product from the foreign seller and resells it in Vietnam. The foreign seller has a claim against the distributor for payment of the purchase price; it is the risk of the distributor if it cannot resell the product or its customer defaults.

A foreign seller should check carefully whether the local intermediary that it intends to work with has the necessary capacity (experience, staff) to sell its products successfully. As a minimum precaution, the business registration certificate of the
intermediary should be checked whether the business scope recorded in it includes the type of sales activities that the intermediary should undertake.

Vietnamese law provides that in some cases, the principal (foreign seller) has to pay attention to a notice period and pay compensation if it terminates the contract with the intermediary, but the parties may deviate from these provisions in their contract.

**CISG**

See “Chapter I: Buying goods and services in Vietnam”.

**Customs**

There are the following categories of tariff rates:

- General tariff rate;
- Preferential rate for imports from WTO countries (“most favoured nation rate”);
- Preferential rate for imports from ASEAN countries;
- Preferential rate for imports from countries that have concluded a free trade agreement with Vietnam.


A certificate of origin is required to benefit preferential rates. The orderly basis of valuation for customs purposes are (i) transaction value, (ii) value of identical goods, (iii) value of similar goods, (iv) deductive value, (v) computed value and (vi) default value. The transaction value is the purchase price that the buyer has to pay to the seller. The transaction value cannot be used if it is influenced by factors that cannot be expressed in a number, and therefore cannot be eliminated through mathematical operations (e.g. special price because seller and buyer are related parties). In this case, the value of identical or similar goods has to be used, i.e. the value of identical or similar goods that were imported into Vietnam within 60 days before or after the date of import of the goods which are being valued.
If there are no identical or similar goods, customs duty is based on the deductive or computed value, i.e. either (i) the local sales price minus profits and expenses, or (ii) the production costs plus profits and expenses. The default value is a value “determined using reasonable means on the basis of data available in Vietnam” and employed if nothing else fits.

In practice, customs procedures shall not be transparent. Importers complain about unreasonable delays, inconsistent and arbitrary classification, and corrupt officials. Usually, importers avail themselves of an import agency with an office near the customs office through which the goods in question should pass in the hope that this will ensure a smooth procedure.

**Dispute resolution, choice of law**

See: “Chapter I: Buying goods and services in Vietnam”.

**European – Vietnamese Free Trade of Law**

Vietnam and Europe have agreed to enter into a Free Trade Agreement. To date, the ratification of this agreement is pending. Tariffs shall be reduced to zero within 10 years from 2017 onwards.

**Force majeure**

See: “Chapter I: Buying goods and services in Vietnam”. If the foreign party is the seller, it may want to negotiate a force majeure clause as broad as possible.

**Foreign construction contractors**

**Foreign construction contractor permit**

Foreign construction contractors are only allowed to operate in Vietnam after obtaining a permit. “Construction” is a very broad concept in this case which includes, amongst others, the erection of buildings, architecture, design of buildings, construction survey, supervising construction, project management and
installation of (provided) equipment.

The rules pertaining to foreign construction contractors are particularly contained in the Law on Construction (No. 16/2003/QH11) and Regulations issued with Decision 87/2004/QD-TTg as amended by Decision 03/2012/QD-TTg. The amendment dropped the “installation of equipment and technological lines” from the definition of “construction” which could imply that it is unnecessary to apply for a foreign construction contractor permit for the installation of machines. However, wording in the Law on Construction suggests that a permit is still required.

Failure to obtain a foreign construction contractor permit means that the Vietnamese customer of the contractor cannot wire the contractor’s remuneration to a foreign bank account of the contractor as banks in Vietnam are required to request to perceive the foreign construction contractor permit before performing the money transfer.

**In order to apply for a foreign construction contractor permit, the following documents have to be prepared if the foreign contractor is a company:**

› Application form;
› Tender results or contract with the Vietnamese customer;
› Legalised copy of the business registration certificate of the foreign contractor;
› foreign practicing certificate if such a certificate was issued to the contractor in its home jurisdiction;
› If the contract was awarded without tendering: experience report about works undertaken in the last three years; audited financial statements for the last three years;
› Power of attorney issued by the foreign contractor to the person submitting the application.

Furthermore, the application must include a contract with a Vietnamese (sub-) contractor, because Vietnamese law requires that the foreign contractor shall either work in partnership with a Vietnamese contractor, or hire a Vietnamese sub-contractor. If the sub-contractor was not selected when the tender was submitted, or the foreign contractor was selected, then there would be a “contract or
agreement in principle” with a Vietnamese sub-contractor to which the Vietnamese customer of the foreign contractor has consented in written form. This requirement was regulated under Circular 01/2012/TT-BXD. Usually, the foreign contractor only need to submit a written notice undertaken that it would hire a Vietnamese sub-contractor. Nevertheless, in some cases the “contract or agreement in principle” might have to be more detailed.

Additionally, the application must include an official document (investment certificate or similar), which is issued to the Vietnamese customer, stating the investment amount of the project. The reason is the competent authority deciding on the application is either the Ministry of Construction, or the local Department of Construction, depends on the investment amount of the project. After the grant of the permit, the foreign contractor must register a “project office”.

**Foreign construction contractors: tax issues**

Foreign contractors are not required to register for tax purposes. They have the option to register (if certain conditions are met) in order to claims input VAT on invoices received from Vietnamese suppliers. However, tax registration means the foreign contractor has to pay VAT and corporate income tax in Vietnam, and has to satisfy onerous compliance requirements. Tax registration only attracts if substantial input VAT amounts are at stake.

If the foreign contractor does not register for tax purposes, its Vietnamese customer has to withhold part of the foreign contractor’s remuneration and pay the withheld amount to the Vietnamese tax authorities. See “Tax” in this chapter for details.

**Employees of foreign construction contractors working on site**

Foreigners working on the construction site are required a work permit if they stay in Vietnam for 3 months or longer. The application to obtain work permit is filed by the project office of the foreign contractor. The authorities have to be notified if the foreigner works for less than 3 months (the notification comprises almost the same documents as the application for a work permit). However, compliance with
the notification requirement is rare in practice.

Foreign employees have to pay Vietnamese personal income tax on their employment income from the first day of their presence in Vietnam. There is no rule to the effect that “personal income tax obligations only set in after the stay in Vietnam has exceeded 180 days”. However, the length of stay determines whether the foreign employee is taxed as a non-resident or a resident. If the foreign employee wants to be exempted from personal income tax by virtue of a double taxation agreement, he or she has to fill out an application for exemption before starting to work on the project in Vietnam. Otherwise, the foreign employee has to pay personal income tax in Vietnam, but may get a refund later.

In practice, there is not much enforcement of the personal income tax obligations of foreign employees of foreign contractors.

Foreign contractors can only withhold personal income tax (and, if applicable, social security contributions) from salary paid to their employees if they are registered for tax purposes in Vietnam. If they are not, they should make their employees sign a document in which the employee acknowledges that tax and social security payments are the sole responsibility of the employee.

**Incoterms**

See “Chapter I: Buying goods and services in Vietnam”

**Intellectual property**

Trademarks (and, eventually, industrial designs and layout designs) should be registered with the National Office of Intellectual Property (NOIP) in Hanoi in order to facilitate protection in Vietnam. Whether patents should be registered is subject to a risk assessment (possible legal protection on the one side, disclosure of the invention in the patent application on the other). It usually takes between one and two years to obtain registration for a trademark; however, protection starts with the date of filing.
Works protected by copyright include, amongst others, textbooks, teaching courses, music, films, architectural works, software, data collections. Copyright protection requires no registration. It is possible to register a work with the Copyright Office of Vietnam, but this requires disclosure of the work. Works of foreigners are protected if they are nationals, or residents, of a member state of the Berne Convention, or if their work was published in a member state of the Bern Convention for the first time. Most countries in the world are member states of the Berne Convention.

Intellectual property rights can be enforced in (i) administrative, (ii) civil, and/or (iii) criminal proceedings. Administrative proceedings are usually the most effective route available. They work comparatively well against infringements of trademarks, industrial designs and layout designs, but less so against patent and copyright infringements.

**Applications for administrative enforcement can be filed with the following authorities:**

› Inspectorate of the Ministries – or of the local Departments – of Science and Technology or of Information and Communications with respect to infringements of industrial property rights (trademarks, industrial design, layout design, patents);
› Inspectorate of the Ministry of Culture, Sports and Tourism with respect to copyright infringements;
› Inspectorate of the Ministry of Agriculture and Rural Development with respect to infringements of rights over plant varieties;
› Local market management bureau;
› Customs;
› People’s Committees at all levels;
› Economic police.

The most efficient way is filing the request for administrative enforcement with a competent inspectorate or market management bureau. A detailed description of the procedure and sanctions available to the authorities is contained in Decree 105/2006/ND-CP. Further information are also available on the homepage of the
Inspectorate of the Ministry of Science and Technology (http://iprenforcement.most.gov.vn).

It is possible for rights holders to request customs to detain shipments of goods suspected of infringing on their rights.

**Labelling**

Labeling requirements are specified in Decree 89/2006/ND-CP. The language for labels on products circulated in Vietnam is Vietnamese; translation into a foreign language is permissible if the foreign language portion is presented in smaller print than the Vietnamese text.

**Non-disclosure agreement**

The process of negotiating with potential buyers of goods or services sometimes requires the disclosure of product or business specifications. Potential business partners should sign a non-disclosure agreement before being provided with sensitive information.

**ODA projects**

Contracts in ODA projects are awarded by tendering; conditions are usually set by the donor (see “Selling to the Government or State-owned enterprises” in this chapter).

Tax incentives for contractors in ODA projects are specified in Circular 123/2007/TT-BTC. The Circular distinguishes between “non-refundable ODA projects” and “projects funded with concessional or mixed ODA loans”. Main contractors executing non-refundable ODA projects do not have to pay import duty, special consumption tax and VAT for goods that they import and can obtain a refund of VAT paid for goods and services purchased in Vietnam.

Main contractors executing loan-financed ODA projects and subcontractors are exempted from import duty and VAT only for goods that they import temporarily.
There is neither further VAT or corporate income tax concessions. Foreign individuals working in ODA projects can obtain an exemption from personal income tax if they possess a certificate from the Ministry of Planning and Investment as foreign specialist.

Payment

Vietnamese commercial law allows the parties to agree on the time and method of payment.

The most common methods to secure payment are as follows:

› Payment in advance;
› Letter of credit;
› Insurance against defaulting customers;
› Delivery of a new order only after complete payment of the last order;
› Technical mechanisms (e.g. blocking of software components via mobile phone or internet in case of non-payment).

Vietnamese law allows the seller to agree with the buyer on retention of title that means the seller remains the owner of the goods sold until full payment of the purchase price is made. However, enforcement relies on the judiciary which in Vietnam is sometimes not up to the same standard in more developed economies.

Place of delivery

See “Chapter I: Buying goods and services in Vietnam”.

Prohibited goods

A number of goods are prohibited from being imported into Vietnam, amongst others:

› Weapons, explosives for non-industrial purposes, ammunition, firecrackers;
› Second-hand consumer goods, used spare parts for vehicles, used internal
combustion engines of less than 30 horsepower;
› Right-hand drive motor vehicles;
› Waste, asbestos material;
› Products of “superstitious, reactionary or depraved nature”.

Import restrictions apply to a variety of products, usually related to the cultural or financial sector. Such products can only be imported with a license from the Ministry of Trade and Investment.

Providing services without a subsidiary in Vietnam

If services are to be provided without a registered presence (subsidiary) on the ground (i.e. on a fly-in basis), the foreign service provider has to check if a permit is needed in advanced. See “Foreign construction contractors”.

Selling machines or equipment together with installation services

See “Foreign construction contractors”.

Selling to the Government or state-owned enterprises

Procurement for investment projects (in particular construction projects; procurement of equipment, machinery and several other assets; planning for regional or industrial development; planning for construction of urban or rural areas; scientific research; development of technology; technical assistance) financed by the State as of 30 % requires a tendering procedure. Details are regulated in the Law on Tendering (Law No. 66/2005/QH11 as amended by Law No. 28/2009/QH12) and in Decree No. 85/2009/ND-CP as amended by Decree No. 68/2012/ND-CP).

Tenders are opened for foreign bidders if (i) the tender package belongs to an ODA project where the donor stipulates that international tendering must be held, or (ii) goods or services cannot be procured domestically. Foreign bidders may bid in domestic tendering through a subsidiary that is properly licensed and registered in
Vietnam. Decision-making in the procurement process is described as being opaque in practice. Infrastructure development is sometimes recognizable in the shape of BOT (build, operate, transfer) projects. Under a BOT scheme, a foreign developer (i) is granted a concession by the government to earn revenue from operating a piece of infrastructure (e.g. a toll road) and (ii) promises in return to build the piece of infrastructure, keep it operational and transfer it to the government after a certain period of time. The foreign investor has to incorporate a subsidiary in Vietnam to implement the project.

As the main security for lenders financing the project consists in the future revenues generated by the piece of infrastructure, lenders will insist on a mechanism that will allow them to operate the project instead of the (subsidiary of) the foreign investor in case of default. BOT projects are regulated in Decree 108/2009/ND-CP and Circular 03/2011/TT-BKHDT.

Variations of the BOT scheme are BT (build, transfer) and BTO (build, transfer, operate) projects. Other forms of public private partnership are not (yet) common and/or well developed. When contracting with State organizations or State-owned enterprises, the following should be borne in mind:

› It is necessary to carefully check – e.g. by reviewing the decision of establishment and/or the charter of the Vietnamese entity – whether (i) the Vietnamese entity is authorised to enter into the contract and (ii) the person to sign is authorised to do so. A contract entered into by an unauthorised entity, or signed by an unauthorised person, may be void. As a consequence, the foreign party may lose its claim for payment.

› There should be sufficient security to ensure payment.

› **Choice of law:** Contracts covering construction and related activities (such as consultancy related to construction activities) must be in conformity with Decree 48/2010/ND-CP if the project is at least 30% State-financed. The application of Vietnamese law is mandatory. The application of Vietnamese law is also mandatory with regard to BOT/BT/BTO contracts. Contracts in other areas can be governed by foreign law if the parties agree and to the extent that
the applicable foreign law does not violate principles of Vietnamese law. The Vietnamese party might, however, have difficulties in accepting a choice of law clause that establishes the application of foreign law.

› **Place of jurisdiction:** Foreign parties are often reluctant to accept Vietnam as the place of jurisdiction if their business partner has ties to the State. Vietnamese State organizations and, possibly, State-owned enterprises, are, however, unlikely to agree to a clause that establishes jurisdiction of “the ordinary courts of foreign country XY” over disputes out of the contract. Furthermore, ordinary courts in many jurisdictions will refuse to receive a case that has a sovereign State (such as the Socialist Republic of Vietnam) as defendant, and, even if they do receive the case, mostly a winning judgment will not be enforceable in Vietnam. However, the Vietnamese party might agree, to foreign arbitration. In practice, foreign arbitration is complicated by the fact that (i) it is difficult to enforce a foreign arbitral award in Vietnam and (ii) if the defending party is a State entity, it might try to raise the defense of sovereign immunity to avoid the initiation of arbitral proceedings and/or the enforcement of an arbitral award against assets outside of Vietnam (if there are any). The foreign party should try to negotiate an arbitration clause that reduces these risks. Vietnamese jurisdiction (ordinary courts or arbitral body) is mandatory in BTO/BT/BOT projects.

**Subsidiaries (import/export, distribution, or service companies)**

Foreign sellers might wish to set up an import/export or a distribution company in Vietnam. An import/export company is allowed to import goods and sell them to licensed wholesalers or retailers, but not to end-customers. Distribution companies exist as wholesalers or retailers. Wholesalers are allowed to sell goods to other licensed wholesalers and retailers. Retailers are allowed to sell goods to businesses for consumption (e.g. sale of components which the buyer uses in its production process) and to individual consumers. Wholesalers and retailers want to sell imported goods must have an import license as well.

It is legally possible to set up 100 % foreign-owned import/export and distribution
In which cases the duration is between 1-2 months after submission of the application. The difference is the charter capital which should be higher (and feasible) in case of distribution company. If a foreigner wants to provide services and such services do not belong to a restricted sector, it can be comparatively easy to set up a service company.

Further information on setting up a presence (representative office or subsidiary) in Vietnam is contained in the next chapter

**Tax (foreign contractor tax)**

If goods or services are provided through a registered presence (subsidiary), this subsidiary is subject to Vietnamese corporate income tax and VAT (see “Chapter 3: Setting up a presence in Vietnam – Setting up a subsidiary – “Tax”).

If the goods or services are not provided through a subsidiary, the foreign seller or service provider is (usually) subject to Vietnamese corporate income tax and VAT. Usually, these taxes are paid via a withholding mechanism referred to as “foreign contractor tax”. That means the Vietnamese party deducts part of the purchase price or service fee and transfers the corresponding amount to the Vietnamese tax authorities. The foreign party only receives an amount that is reduced by this deduction. The foreign party is not required to register in Vietnam for tax purposes.

Generally speaking, any remuneration paid by a Vietnamese party to a foreign party is subject to foreign contractor tax which is composed of (i) a corporate income tax (or personal income tax if the foreign party is an individual – for the sake of simplification, the following paragraphs refer to corporate income tax only) and (ii) a VAT component.

**There are only a few exceptions:**

- No foreign contractor tax applied if the goods or services are provided by a Vietnamese subsidiary because the subsidiary is registered for corporate
income tax and VAT purposes in Vietnam and has to pay tax like a purely local company.

› There is no foreign contractor tax if the foreign seller supplies goods on EXW, FCA, FAS or FOB terms. However, if the foreign seller later provides services in connection with such goods (e.g. installation of a machine), foreign contractor tax applies also to the supply of the goods.

› There is no foreign contractor tax if the foreign party provides services abroad, which are consumed outside of Vietnam.

Foreign contractor tax is regulated under Circular 60/2012/TT-BTC. It applies in irrespective of the existence of foreign party’s permanent establishment in Vietnam. In other words, to the extent that foreign contractor tax applied, a foreign seller or service provider shall not have to worry about creating a permanent establishment because no additional tax burden will arise over and above the foreign contractor tax.

The tax base is, roughly speaking, the turnover. The tax rates are as follows:

<table>
<thead>
<tr>
<th>Descriptions</th>
<th>VAT</th>
<th>Corporate income tax</th>
</tr>
</thead>
<tbody>
<tr>
<td>Supply of goods</td>
<td>No VAT under the foreign contractor tax mechanism. However, the buyer has to pay import VAT for which it can get an input VAT credit.</td>
<td>1 %</td>
</tr>
<tr>
<td>Most services, including leasing</td>
<td>5 %</td>
<td>5 %</td>
</tr>
<tr>
<td>Petroleum drilling services</td>
<td>10 %</td>
<td>5 %</td>
</tr>
<tr>
<td>Services of managing hotels, restaurants, casinos</td>
<td>5 %</td>
<td>10 %</td>
</tr>
<tr>
<td>Lease of aircraft, aircraft engines, aircraft spare parts and seagoing vessels</td>
<td>5 % (unclear)</td>
<td>2 %</td>
</tr>
<tr>
<td>Descriptions</td>
<td>VAT (%)</td>
<td>Corporate income tax (%)</td>
</tr>
<tr>
<td>------------------------------------------------------------------------------</td>
<td>---------</td>
<td>--------------------------</td>
</tr>
<tr>
<td><strong>Construction, assembly or installation together with the supply of materials, machinery or equipment</strong></td>
<td>3 %</td>
<td>2 %</td>
</tr>
<tr>
<td><strong>Construction, assembly or installation without the supply of materials, machinery or equipment</strong></td>
<td>5 %</td>
<td>2 %</td>
</tr>
<tr>
<td><strong>Insurance</strong></td>
<td>5 % (not subject to VAT in certain cases)</td>
<td>5 % (offshore reinsurance, commission for reinsurance: 0.1 %)</td>
</tr>
<tr>
<td><strong>Transportation</strong></td>
<td>3 %</td>
<td>2 %</td>
</tr>
<tr>
<td><strong>Royalties</strong></td>
<td>Not subject to VAT</td>
<td>10 %</td>
</tr>
<tr>
<td><strong>Interest</strong></td>
<td>Not subject to VAT</td>
<td>5 %</td>
</tr>
<tr>
<td><strong>Transfer of securities</strong></td>
<td>Not subject to VAT</td>
<td>0.1 %</td>
</tr>
<tr>
<td><strong>Derivative financial services</strong></td>
<td>Not subject to VAT</td>
<td>2 %</td>
</tr>
<tr>
<td><strong>Production, other business activities</strong></td>
<td>2 %</td>
<td>2 %</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>No.</th>
<th>Trade</th>
<th>VAT (%)</th>
<th>CIT (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Supply of goods in Vietnam or associated with services rendered in Vietnam (including in-country import-export and imports, distribution of goods in Vietnam or delivery of goods under Incoterms where the seller bears risk relating to goods in Vietnam)</td>
<td>VAT incurred as import period</td>
<td>1 %</td>
</tr>
<tr>
<td>2</td>
<td>- Service</td>
<td>5 %</td>
<td>5 %</td>
</tr>
<tr>
<td></td>
<td>- Services together with supply of machinery and equipment</td>
<td>3 %</td>
<td>2 %</td>
</tr>
<tr>
<td></td>
<td>- Restaurant, hotel, casino management services</td>
<td>5 %</td>
<td>10 %</td>
</tr>
<tr>
<td></td>
<td>- Derivative financial services</td>
<td>Exempted</td>
<td>2 %</td>
</tr>
<tr>
<td>3</td>
<td>Lease of aircraft, aircraft engines, parts of aircrafts and ships</td>
<td>Exempted</td>
<td>2 %</td>
</tr>
<tr>
<td></td>
<td>Description</td>
<td>Rate 1</td>
<td>Rate 2</td>
</tr>
<tr>
<td>---</td>
<td>----------------------------------------------------------------------------</td>
<td>--------</td>
<td>--------</td>
</tr>
<tr>
<td>4</td>
<td>Construction, installation without supply of materials, machinery or equipment</td>
<td>5 %</td>
<td>2 %</td>
</tr>
<tr>
<td></td>
<td>Construction, installation with supply of materials, machinery or equipment</td>
<td>3 %</td>
<td>2 %</td>
</tr>
<tr>
<td>5</td>
<td>Transportation</td>
<td>3 % / 0 % for international transport</td>
<td>2 %</td>
</tr>
<tr>
<td>6</td>
<td>- Insurance</td>
<td>5 % / Exempted</td>
<td>5 %</td>
</tr>
<tr>
<td></td>
<td>- Re-insurance, commission for re-insurance</td>
<td>Exempted</td>
<td>0.1 %</td>
</tr>
<tr>
<td>7</td>
<td>Loan interest</td>
<td>Exempted</td>
<td>5 %</td>
</tr>
<tr>
<td>8</td>
<td>Income from copyright</td>
<td>Exempted</td>
<td>10 %</td>
</tr>
</tbody>
</table>

If the contract contains several components (e.g. design and delivery of a machine), it can make sense to split the purchase price and allocate its portions to the respective component.

If negotiation is available, the foreign party can shift the foreign contractor tax burden to the Vietnamese party to receive the full purchase price or service fee (“gross-up clause”). In this case, the Vietnamese party can claim input VAT credit on the VAT portion of the foreign contractor tax.

Relief under a double taxation agreement is available only with respect to the corporate income tax portion of the foreign contractor tax.

Payments made by the foreign party to Vietnamese subcontractors may, depending on the circumstances, be taken out of the tax base of the foreign contractor tax. However, procedural reasons require that the foreign party discloses its Vietnamese customer the terms and conditions (in particular the price) it has agreed on with its subcontractors.

It is not possible for the foreign party to obtain an input VAT refund regarding goods or services that the foreign party purchased in Vietnam. As an exception, input VAT credit (or, as the case may be, refund) is available if the foreign party registers for corporate income tax and VAT purposes. Registration is possible if
(i) the foreign party has a permanent establishment in Vietnam, (ii) the duration of the project is 183 days or more, (iii) the foreign party keeps the books for its Vietnamese business in accordance with the Vietnamese accounting standard. If the foreign party obtains tax registration in Vietnam, it has to

› pay VAT on the turnover from the supply of goods or services to its Vietnamese customers like a local company (i.e. usually 10 % of the turnover) and
› pay corporate income tax either (i) like a local company (i.e. 25 % on the taxable income derived from the foreign party’s business in Vietnam) or (ii) on the basis of the turnover of the foreign party’s business in Vietnam and the specific foreign contractor tax rate (e.g. 5 % for most services).

Registering for tax purpose in Vietnam entails onerous compliance requirements and can, depending on the circumstances, increase the tax burden of the foreign party. The convenient withholding mechanism is not available any more. Tax registration therefore only makes sense if there are substantial input VAT amounts at stake.

**Warranty**

See “Chapter I: Buying goods and services in Vietnam”.  

Growing together

Chapter III

Setting up a presence in Vietnam
Setting up a presence in Vietnam

Introduction

Foreign companies want to do business in Vietnam with their own staffs must obtain a permit and register a presence in Vietnam. This presence can take the shape of a (i) representative office, (ii) branch, or (iii) subsidiary.

A representative office is allowed – within certain limits – to scout for business opportunities for, and promote the business of, the foreign headquarters. It must not have a business of its own aimed at generating profits. Although not a separate legal entity, a representative office may conclude employment contracts, rent office space and open a bank account in its own name. Liabilities incurred by the representative office are ultimately borne by the foreign parent company (headquarter).

A branch, in contrast, may engage in profit-orientated activities. It is in many aspects treated as a separate legal entity in practice, but does not shield the foreign company from liabilities incurred in Vietnam. Liabilities of the branch are ultimately borne by the foreign parent company (headquarter). In practice, it is only possible to open branches of law firms, insurance companies and banks as implementing guidelines are missing for other sectors.

A subsidiary is a separate legal entity with its own business aimed at generating profits. Liabilities of the subsidiary are – with the possible exception of cases where the parent company fraudulently uses a subsidiary to shield itself from liabilities vis-à-vis creditors – not borne by the foreign parent company. Therefore, a subsidiary can shield the foreign parent company from liabilities incurred in Vietnam.

Foreign companies doing business in Vietnam may choose to solicit the cooperation of a Vietnamese business partner and form a joint venture. A joint venture can be established in the shape of a (i) joint venture company or (ii) business cooperation contract. A joint venture company is a separate legal entity (usually in the legal form of a limited liability company – LLC – or, less commonly, joint stock company – JSC) having the joint venture partners as its shareholders. The joint venture company
shields the joint venture partners from liabilities derived from the joint enterprise. A business cooperation contract is an agreement between the joint venture partners to cooperate in, and share the profits of, a specific project. It does not create a separate legal entity and therefore does not shield the foreign investor from liabilities incurred in Vietnam, although for tax purposes, the business cooperation is treated as an entity of its own.

Contrary to what one might expect, a business cooperation is not “easier” to establish or dissolve when compared to a joint venture company. In both cases, the foreign investor has to obtain a permit to invest in Vietnam (so-called investment certificate), which can be a time-consuming and cumbersome procedure. The liquidation procedure is also essentially similar. It is sometimes suggested that a business cooperation is more flexible than a joint venture company because it allows the parties to agree freely on profit distribution. However, this should in practice also be possible for the shareholders (“members” in Vietnamese legal parlance) of an LLC.

**Setting up a representative office in Vietnam**

**Important sources of law:**

- Decree 72 dated 25 July 2006, as amended by Decree 120 dated 16 December 2011, providing detailed regulations implementation of the Commercial Law with respect to representative offices and branches of foreign business entities in Vietnam (Government, No. 72/2006/ND-CP)

Representative offices must not engage in own profit-generating business, but are restricted to the following activities: (a) exercise of the function of a liaison office; (b) facilitation of projects with Vietnamese parties; (c) market research to promote opportunities for the sale of the parent company’s products and services; and (d) monitoring performance of contracts which the parent company has signed with Vietnamese parties.
Representative offices can rent office space, hire staff, have their owned seal, and open a bank account. In this regard, they are treated like a legal entity. Other business transactions (e.g. the sale of goods, or the provision of a service) have to be conducted directly between the foreign parent company and the Vietnamese business partner. That means the contract with the Vietnamese business partner has to be signed by an authorised person from the parent company. The chief of the representative office can sign such a contract only if he or she has a power of attorney from the parent company. This power of attorney cannot be a general power of attorney for “all business transactions of the headquarter relating to Vietnam”, but must make reference to the specific transaction. The power of attorney has to go through a so-called legalisation procedure, by which a Vietnamese diplomatic mission to the home country of the parent company certifies that the power of attorney is genuine.

As a representative office is not allowed to engage in profit-orientated activities, money out of transactions between the parent company and a Vietnamese business partner should not flow through the bank account of the representative office in order to avoid misunderstandings. The permit to operate a representative office (so-called “representative office license”) is usually valid for 5 years and can be renewable. The application for renewal has to be filed 30 days prior to the expiry of the license at the latest. The license is granted for a shorter period if the business registration of the foreign company in its home jurisdiction expires in a shorter time.

A representative office must have a person registered to act on its behalf (so-called “chief representative” or “chief rep”). This person may be a foreigner who is not resident in Vietnam. However, in this case the chief rep has to issue a power of attorney to a person resident in Vietnam to assure that all obligations of the chief rep are met in time. The power of attorney does not have to be registered with the authorities.

The Vietnamese tax authorities are in practice of the opinion that a non-resident chief rep has to submit at least part of his or her income to Vietnamese personal income taxation. In order to register the exchange of a chief rep, or the closure of the rep office, proof is required that the previous chief rep met all his or her tax obligations in Vietnam. This proof is difficult to provide if the non-resident chief
rep did not file personal income tax returns, or the representative office did not withhold personal income tax from his or her salary.

The application for a representative office license requires, amongst others, the submission of a rental contract over office space to be used by the future representative office. Since the representative office is not yet in existence and therefore cannot conclude the rental contract, the parent company usually signs a memorandum of understanding with the landlord outlining the contents of the future rental contract. This memorandum of understanding is part of the application file for the representative office license. The authorities do not accept contracts with providers of virtual office space. Furthermore, unless the office space is rented from a company specializing in the letting of offices, it is necessary to check whether the landlord is allowed to let the office and whether the memorandum of understanding or the rental contract have to be notarized.

Because a representative office is not allowed to engage in profit-orientated activities, it is neither required to employ a chief accountant nor to have an accounting system in place. No corporate income tax or VAT returns have to be filed. There is no minimum taxation on the activities of representative offices like e.g. in China. Nevertheless, a representative office must obtain a tax registration number (so-called “tax code”) in order to enable it to withhold personal income tax from salary paid to its employees. A representative office is not allowed to issue so-called red invoices. These are invoices that can be used by the recipient to claim an input VAT set-off and deduct business expenses from their corporate income tax base. A red invoice issued to a representative office cannot be used by the representative office to claim an input VAT deduction.

A representative office must file an annual report about its activities with the local Department of Industry and Trade prior to the last business day in January of the following year. To date, there are no legal restrictions on the number of employees a representative office can have, but a high number of employees could indicate that the representative office operates beyond its permissible business scope. The orderly sanctions for engaging in commercial activities are (i) warning, (ii) fine, (iii) suspension or withdrawal of the license. The application dossier for a representative office license has to be filed with the local Department of Industry and Trade and
comprises, amongst others, (i) the application, (ii) legalised copies of the parent company’s articles of association, its audited financial statement of the previous year, evidence of business registration, (iii) notarised copy of the foreign passport or the Vietnamese ID card of the chief rep (must be legalised if notarisation was done by a notary abroad).

Documents issued outside of Vietnam (such as the business registration certificate, the articles of association or the audited financial statements of the parent company) have to be legalised. Legalisation is a procedure to certify the authenticity of foreign documents. In practice, most applicants (i) make a copy of the original, (ii) have a notary in their home jurisdiction certify that the copy corresponds to the original, (iii) have a competent body certify that the notary acted within his or her powers and finally (iv) obtain a statement from a Vietnamese mission to their home country that the procedure was followed correctly. All documents in a foreign language must be translated into Vietnamese; the translation must be certified as correcting by a Vietnamese notary. Sometimes, translation into Vietnamese is made by the Vietnamese diplomatic mission who is legalised the document.

The official time frame for the issuance of the representative office license is 15 days after the Department of Industry and Trade has received the complete (complete in the Department’s view) application dossier. Within 45 days after the issuance of the license, the representative office has to announce its establishment in the newspaper, inform the authorities of the details of its employees, open a bank account and register its seal (so-called “post-licensing procedure”).

Special rules exist for representative offices in particular domains (banks, financial services, legal services, culture, education, tourism, non-profit trade promotion organizations).

Setting up a subsidiary

Important sources of law

› Schedule of specific commitments in Services on the World Trade Organization accession of Vietnam (WTO Commitments);
Market access

Foreign companies wishing to set up a subsidiary have to obtain a permit, the so-called “investment certificate”. Before applying for an investment certificate, the foreign applicant must check in whether the industry sector in which the subsidiary should operate is open to foreign direct investment.

Roughly speaking, there are the following categories:

- A sector is completely open to foreign direct investment;
- A sector is open to foreign direct investment, but the investor is required to form a joint venture with a Vietnamese partner;
- A sector is closed to foreign direct investment;
- A sector is in theory open to foreign direct investment, but it is difficult in practice to obtain an investment certificate.
- A sector is closed to foreign direct investment in the following cases:
  - The business is prohibited to Vietnamese and foreigners alike, or
  - Vietnam’s WTO commitments allow Vietnam to keep its market shut, or

 REGARDLESS OF A SPECIFIC PROJECT, IF THIS PROJECT IS CONTRARY TO A MASTER PLAN OF THE GOVERNMENT FOR THE DEVELOPMENT OF THE NATIONAL ECONOMY.

If a sector is closed to foreign direct investment, a foreign company is not allowed to set up a subsidiary to operate in this sector.

A foreign investor is required to have a Vietnamese joint venture partner if Vietnam’s WTO commitments allow Vietnam to restrict market access. In this case, a foreign company is allowed to set up a subsidiary, but this subsidiary must, in addition to the foreign company, have at least one Vietnamese shareholder. The minimum shareholding of the Vietnamese joint venture partner depends on the sector.

All other sectors are at least in theory completely open to foreign direct investment. A foreign company is, according to the law, allowed to set up a 100% foreign-owned subsidiary in these sectors.

The investment certificate serves concurrently as the business registration certificate of the subsidiary. That means apart from evidencing that a specific project with foreign involvement is allowed to be carried out in Vietnam, the investment certificate also proves the registration of the subsidiary. Depending on the sector and other circumstances, it can take from a few weeks to many months (sometimes years) until an investment certificate is issued. In some sectors (e.g. telecommunications, casinos), it is in practice extremely difficult to obtain an investment certificate.

**Sectors closed to foreign direct investment**

**Sectors closed to foreign direct investment according to national law:**

- Production and processing of drugs;
- Most of secret investigation services; private detectives;
- Construction projects within the premises of, or adversely affecting, national historical relics or cultural works;
- Production of depraved cultural or superstitious products;
› Production of dangerous toys or toys which are detrimental to children, public security, social order or public safety;
› Prostitution; human trafficking;
› Experiments of human cloning;
› Production of veterinary medicines, plant protection agents, pharmaceutical products, cosmetics, chemical products, insecticides or bactericides which are not allowed to be used in Vietnam;
› Projects for the treatment of toxic wastes brought into Vietnam; projects for the manufacture of any type of toxic chemicals or for the use of chemical agents prohibited by international treaties;
› Marriage and adoption broker services involving a foreign element.

**Sectors closed to foreign direct investment according to Vietnam’s WTO commitments:**

› Construction and related engineering services, architectural services operated by individuals (only juridical persons of a WTO member may set up a presence in Vietnam);
› Entertainment services such as theatre, live bands and circus shows (restriction to be softened with effect 11 January 2012 according to WTO schedule: joint ventures with 49 % foreign ownership to be permitted)
› Legal services provided by individuals (only foreign law firms – i.e. lawyers established in a commercial corporate form – may set up a presence in Vietnam);
› Operation of hotels and restaurants, lodging services, catering business (exception: services are allowed if investor builds, renovates, or acquires a hotel in which these services are performed); restriction to be abolished with effect 11 January 2015 according to WTO schedule;
› Refuse collection directly from households;
› Sales and marketing of air product services, computer reservation services (exception: airlines may provide these services through their ticketing offices or agents);
› Veterinary services (exception: natural persons engaging in private professional practice under the authorisation by the veterinary authorities);
› Outbound services of travel agents and tour operators;
› social sciences training.
Sectors where foreign direct investment is restricted

The following sectors are only open to joint ventures with a Vietnamese party according to Vietnam’s WTO commitments:

› Advertising services (no minimum Vietnamese shareholding, but mere token shareholding will not be accepted – the Vietnamese party should probably have at least 20 %);
› Electronic games business (51 % minimum Vietnamese shareholding);
› Courier services (49 % minimum Vietnamese shareholding); restriction to be abolished with effect from 11 January 2012 according to WTO schedule;
› The WTO commitments provide that as of 11 January it is possible for a freight forwarding company to be 100 % foreign owner. This is, however, still in contraction with Vietnamese law, which does not allow a 100 % foreign owned freight forwarding company but requires a joint venture with a Vietnamese partner holding at least 1 %. It remains to be seen how this discrepancy will be solved.
› Maintenance and repair of equipment, not including maritime vessels, aircraft or other transport equipment (49 % minimum Vietnamese shareholding); restriction to be abolished with effect from 11 January 2012 according to WTO schedule;
› Motion picture production, distribution, projection service (49 % minimum Vietnamese shareholding);
› Securities services (51 % minimum Vietnamese shareholding); restriction to be abolished with effect from 11 January 2012 according to WTO schedule;
› services incidental to manufacturing, e. g. processing (50 % minimum Vietnamese shareholding); restriction to be abolished with effect from 11 January 2015 according to WTO schedule;
› services incidental to mining (49 % minimum Vietnamese shareholding); restriction to be abolished with effect from 11 January 2012 according to WTO schedule;
› Telecommunication services (minimum Vietnamese shareholding between 30 % and 51 %, depending on the service);
› travel agencies and tour operator services (no minimum Vietnamese shareholding, but mere token shareholding will not be accepted – the Vietnamese party should probably have at least 20 %);
**Banking services:** 100% foreign owned banks are permitted to provide the parent company’s asset is equivalent to more than 10 billion USD at the end of the year prior to the application for setting up the subsidiary in Vietnam. If a foreign bank wants to acquire shares of a Vietnamese bank incorporated as a joint stock company, the total foreign equity must not exceed 30% of the charter capital (registered equity) of the Vietnamese bank, unless the government has granted special approval for bigger foreign ownership.

**Stock market:** foreign investors are allowed to own up to 49% of the total stocks of a listed company.

**Freight Forwarding**

**Investment procedure**

In order to obtain an investment certificate and be able to set up a subsidiary in Vietnam, the foreign company has to submit documents and information explaining the investment. e.g., in order to set up a subsidiary which is to operate a production facility, the authorities want to have background information on the parent company such as the parent company’s financial capability and expect to be informed about, amongst others, the amount of the capital to be contributed to the subsidiary and the schedule for contribution, details of the production process (products to be manufactured, equipment, materials and technology to be used), the design of the production facility and the expected financial development of the project.

The authorities analyse the planned investment in either (i) the registration procedure or (ii) the evaluation procedure. “Registration procedure” is a misnomer because the authorities do not only check compliance with formal requirements, but also review the viability of the investment project. However, the registration procedure is usually less complex than the evaluation procedure. In the evaluation procedure, more documents have to be provided, the authorities scrutinise the project in greater detail, and – unlike in the case of the registration procedure – local licensing authorities have to obtain approval from one or several ministries in Hanoi.

The evaluation procedure applies to (i) projects with an investment capital of VND
300 billion (approx. USD 15 million) or more and, (ii) irrespective of the amount of invested capital, so-called conditional investment projects. Other projects go through the (simpler) registration procedure.

“Conditional investment projects” are projects that are defined in Appendix III of Decree 108 and Appendix III of Decree 59. Depending on the project, the investor has to fulfill certain additional criteria (e.g. minimum capital, past experience, employment of staff who have passed qualifying exams, etc.) in order to be granted an investment certificate.

The following projects are “conditional” according to Appendix III of Decree 108 and have to go through the evaluation procedure irrespective of the amount of the investment capital.

- Radio and television broadcasting;
- Production, publishing and distribution of cultural products;
- Exploitation and processing of minerals;
- Establishment of infrastructure for telecommunications network, transmission and broadcasting and provision of internet and telecommunications services;
- Establishment of public postal networks and provision of postal services and delivery services;
- Construction and operation of river ports, sea ports, air terminals and airports;
- Transportation of goods and passengers by railway, air, road, sea and inland waterways;
- Catching of sea products;
- Production of tobacco;
- Real estate business;
- Import, export, distribution;
- Education and training;
- Hospitals and clinics;
- Other investment sectors in international treaties of which Vietnam is a member and which restrict the opening of the market to foreign investors. This means that all projects in sectors in which a foreign investor is only allowed to invest together with a Vietnamese joint venture partner have to go through the (more complicated) evaluation procedure.
Furthermore, Decree 59 contains a long list of projects that are “conditional”. In particular, investors in the following sectors should check whether they have to go through the (more complicated) evaluation procedure: medical and health care, telecommunication, internet, post, electricity, transport, insurance, organization of artistic performances, securities market, labor export, legal services, auditing, valuation, advertising, printing, occupational training, staffing, construction, tourism, debt collection.

In some conditional sectors, foreign investors have to obtain a so-called sublicense in addition to the investment certificate in order to lawfully conduct the business.

The licensing authorities are either (i) the industrial zone, processing zone, high tech zone or economic zone authority for projects located in the respective zone or (ii) the provincial People’s Committee (acting upon recommendation of the local Department of Planning and Investment) for most other projects.

**The following documents have to be submitted if the investment vehicle is a single member LLC:**

- Investment registration and business registration request;
- Business registration certificate (excerpt from the commercial register) and articles of association of the parent company;
- Letters appointing (i) the legal representative of the subsidiary and (ii) the authorised representative(s). Simply speaking, an “authorised representative” exercises the parent company’s shareholders’ rights such as the voting right in the shareholders’ meeting (“members’ council” in Vietnamese legal parlance);
- List of authorised representative(s);
- Copies of passport (ID card copies certified as true in case of Vietnamese nationals) of the legal representative and the authorised representative(s);
- Letter of authorisation for the person(s) to deal with the licensing authorities during the licensing procedure;
- Report on the financial capability of the parent company;
- Charter (articles of association) of the LLC;
- Rental contract or memorandum of understanding with regard to the business premises or, if the subsidiary is to erect a factory building, land lease or sublease
agreement, and, depending on the case, other documents proving that the LLC can lawfully occupy the premises.

Further documents required may include amongst others: audited financial statements of the parent company (or bank statement if the investor is an individual), evidence that sufficient capital is available to fulfill minimum capital requirements (e.g. in real estate business), practicing certificates (e.g. for doctors), explanatory statement that all conditions are fulfilled if the investment is in a “conditional sector”, feasibility study (for projects with an investment capital of VND 300 billion or more).

Documents issued outside of Vietnam (such as the business registration certificate or the articles of association or the audited financial statements of the parent company) have to be legalized. Legalization is a procedure to certify the authenticity of foreign documents. In practice, most applicants (i) make a copy of the original, (ii) have a notary in their home jurisdiction certify that the copy corresponds to the original, (iii) have a competent body certify that the notary acted within his or her powers and finally (iv) obtain a statement from a Vietnamese mission to their home country that the procedure was followed correctly. All documents in a foreign language must be translated into Vietnamese; the translation must be certified correctly by a Vietnamese notary. Sometimes, Vietnamese translation is completed by the Vietnamese diplomatic mission that has legalised the document. Within 10 working days after its establishment, the subsidiary has to register for tax purposes. Within 30 days, the establishment of the subsidiary has to be announced in newspapers. Furthermore, the subsidiary has to register its company seal and open bank accounts (operating account in VND and/or foreign currencies, capital account in a foreign currency to transfer money such as the charter capital from the parent company to the subsidiary or dividends and other payments from the subsidiary to the parent company).

**Investment vehicles**

According to the Law on Enterprises, foreign investors can set up (i) a single member LLC, (ii) a multi member LLC, (iii) a joint stock company (JSC), and (iv) a partnership.
LLC stands for Limited Liability Company. A partnership requires at least two individuals to act as general partners (i.e. partners who are liable with their private assets for debts incurred by the partnership). This usually rules a partnership out as a suitable investment vehicle, although from a tax perspective, a partnership could be beneficial.

A single investor can only set up a single member LLC. If there are two owners, a multi member LLC must be chosen. Three or more owners have the choice between a multi member LLC and a joint stock company.

Both LLC and JSC protect their owners from liabilities incurred by the LLC or JSC, which means owners may lose the capital that they contributed or committed to contribute to the LLC or JSC, but are not liable with other assets for debts of the LLC or JSC. However, owners may be liable in excess of their capital contribution in the following cases: (i) remaining owners may have to contribute the missing portion if one owner fails to contribute promised capital, (ii) owners abusively harm creditors of the company or (iii) perform illegal acts in the name of the company.

**Minimum capital requirements**

When applying for an investment certificate, the applicant has to state the so-called “investment capital”. The investment capital is composed of (i) the subsidiary’s registered equity, the so-called charter capital, (ii) loans granted to the subsidiary by its parent company, group companies or third parties, and (iii), in case of a building contractor, the legal capital.

With a few exceptions, the law does not stipulate minimum requirements due to the amount of the charter capital. Exceptions exist in particular in the areas of banking, financial leasing, debt collection, film production, and aviation. A particularly relevant exception exists in real estate. Until 30 June 2015 the legal capital has to be a minimum of 9 Billion VND. As of 1 July this minimum will rise to 20 Billion VND.

In common practice, however, when the law does not stipulate a minimum amount the authorities review the viability of an investment project (amongst others) under
the angle whether, in their opinion, the subsidiary has sufficient funds. There are no official guidelines as to how much money needed to be “sufficient”. The higher the investment capital is (in particular, the charter capital), the easier to obtain an investment certificate.

**charter capital + loan capital (+ legal capital) = investment capital**

The total fund available to the subsidiary is the charter capital, the loan capital and the retained profits of the subsidiary. In case of a real estate enterprise, the additional legal capital is not available, but has to be deposited.

Capital can be contributed in cash and in kind but latest within 90 days after the issuance of the Entrepreneur Registration Certificate. Failure to do so, leads to reduction unregistered capital and/or liquidation of the company. Permissible assets for contributions are listed in Art. 2 para. 1 Decree 108. Contributions made at the time of the establishment of the subsidiary do not have to be valued by a professional, but the owners (members/shareholders) making the capital contribution are jointly liable for debts of the company in the amount by which the valuation exceeds the actual value of the asset.

Foreign investors must have a permit in order to set up a subsidiary, the so-called investment certificate. In the application for issuance of the investment certificate, the foreign investor must, amongst others, state the time frame for the contribution of the charter capital. Foreign investors should try to stick to the time frame because there is a (moderate) fine for delays; the investment certificate may be withdrawn if the delay is more than 12 months (Art. 68 para. 2 Decree 108). Until 30 June 2015 the charter capital has to be contributed in full at the latest 36 months after the issuance of the investment certificate in case of a limited liability company (LLC). As of 1 July 2014, however, the charter capital will have to be contributed in full within 20 days. In case of a JSC, founding shareholders have to pay in the registered amount within 90 days after the issuance of the investment certificate.
<table>
<thead>
<tr>
<th></th>
<th>Single member LLC</th>
<th>Multiple member LLC</th>
<th>JSC</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Minimum number of owners</strong></td>
<td>1</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>(“members” in case of an</td>
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<td>LLC, “shareholders” in</td>
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<td>case of a JSC)</td>
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<tr>
<td><strong>Maximum number of owners</strong></td>
<td>1</td>
<td>50</td>
<td>Unlimited</td>
</tr>
<tr>
<td>**Owners shielded from</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
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<tr>
<td>debts incurred by the</td>
<td></td>
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<td></td>
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<tr>
<td>company?</td>
<td></td>
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<tr>
<td>**Can owner be an</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
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<tr>
<td>individual?</td>
<td></td>
<td></td>
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<tr>
<td>**Can owner be a</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
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<tr>
<td>company?</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td><strong>Day-to-day management</strong></td>
<td>General director</td>
<td>General director</td>
<td>General</td>
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<tr>
<td>(sometimes only called</td>
<td>(sometimes only</td>
<td>(sometimes only</td>
<td>director)</td>
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<tr>
<td>“director”)</td>
<td>called “director”)</td>
<td>called “director”)</td>
<td></td>
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<tr>
<td><strong>Important decisions</strong></td>
<td>Owner (“member”),</td>
<td>Members’ council;</td>
<td>**Very</td>
</tr>
<tr>
<td>an owner that is a</td>
<td>an owner that is</td>
<td>owners (“members”)</td>
<td>important</td>
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<td>company must appoint one</td>
<td>a company must</td>
<td>that are companies</td>
<td>decisions:</td>
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<td>or more “authorized</td>
<td>appoint one or</td>
<td>must appoint one or</td>
<td>general</td>
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<td>representatives” to</td>
<td>more “authorized</td>
<td>more “authorized</td>
<td>meeting of</td>
</tr>
<tr>
<td>exercise its rights</td>
<td>representatives”</td>
<td>representatives” to</td>
<td>shareholders;</td>
</tr>
<tr>
<td>as member; if more than</td>
<td>to exercise their</td>
<td>exercise their</td>
<td>owners (share-</td>
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<tr>
<td>one authorized</td>
<td>rights in the</td>
<td>rights in the</td>
<td>holders)</td>
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<td>representative is</td>
<td>members’ council;</td>
<td>members’ council</td>
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<tr>
<td>appointed, the</td>
<td>owners (“members”)</td>
<td>which decides the</td>
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<tr>
<td>representatives form a</td>
<td>that are companies</td>
<td>important matters</td>
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<tr>
<td>“members’ council” which</td>
<td>must appoint one</td>
<td>concerning the</td>
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<tr>
<td>decides the</td>
<td>or more “authorized</td>
<td>company</td>
<td></td>
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<tr>
<td>important matters</td>
<td>representatives”</td>
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<td>concerning the</td>
<td>to exercise their</td>
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<td>company</td>
<td>rights in the</td>
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<tr>
<td><strong>Less important decisions</strong></td>
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<td>board of management,</td>
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<td>appointed by the</td>
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<td>general meeting of</td>
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<tr>
<td>shareholders</td>
<td></td>
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<tr>
<td>Legal representative of the company</td>
<td>Single member LLC</td>
<td>Multiple member LLC</td>
<td>JSC</td>
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<tr>
<td>Depending on the LLC’s articles of association (&quot;charter&quot;), either:</td>
<td>Depending on the LLC’s articles of association (&quot;charter&quot;), either:</td>
<td>Depending on the JSC’s statute (&quot;charter&quot;), either:</td>
<td></td>
</tr>
<tr>
<td>› general director or member (if an individual) or authorized representative (if member is a company and has appointed only one authorized representative) or chairman of the members’ council (if member is a company and has appointed more than one authorized representative)</td>
<td>› general director or chairman of the members’ council</td>
<td>› general director or chairman of the board of management</td>
<td></td>
</tr>
</tbody>
</table>

<p>| Nationality requirements for general director, authorized representative, members of the board of management of a JSC, legal representative? | No | No | No |
| Must a general director, authorized representative be resident in Vietnam? | No | No | No |
| Must members of the management board of a JSC be resident in Vietnam? | N/a | N/a | One or more member(s) of the management board must reside in Vietnam; the number of resident members is stated in the statute (&quot;charter&quot;) of the JSC (Art. 109 para. 1 Law on Enterprises) |</p>
<table>
<thead>
<tr>
<th><strong>Must a legal representative be resident in Vietnam?</strong></th>
<th>Single member LLC</th>
<th>Multiple member LLC</th>
<th>JSC</th>
</tr>
</thead>
<tbody>
<tr>
<td>In practice a non-resident legal representative is accepted if he or she issues a power of attorney to a resident person; no requirement to register the power of attorney with the authorities</td>
<td>same as single member LLC</td>
<td>same as single member LLC</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Minimum voting requirements to adopt a resolution</strong></th>
<th>Single member LLC</th>
<th>Multiple member LLC</th>
<th>JSC</th>
</tr>
</thead>
<tbody>
<tr>
<td>In practice usually n/a</td>
<td>Members’ council: number of votes must represent at least 65% (75% for some decisions) of the total charter capital of attending members, articles of association (“charter”) of the LLC may stipulate higher requirements</td>
<td>General meeting of shareholders: number of votes must represent at least 65% (75% for some decisions) of the total voting shares of attending shareholders, the statute of the JSC (“charter”) may stipulate higher requirements</td>
<td>Board of management: quorum of 3/4 of the board members; majority vote; in case of a tied vote the decision is made in favour of the chairman’s vote</td>
</tr>
<tr>
<td></td>
<td>Single member LLC</td>
<td>Multiple member LLC</td>
<td>JSC</td>
</tr>
<tr>
<td>--------------------------------------</td>
<td>-------------------</td>
<td>---------------------</td>
<td>------------------------------------------</td>
</tr>
<tr>
<td><strong>May owners dispose of their shares?</strong></td>
<td>Yes</td>
<td>Yes, but preemption right of the other owners if shares are to be sold to third parties</td>
<td>Yes, but within initial lock-in period of three years, consent of other shareholders required if shares are to be sold to third parties; after lock-in period no consent required; restrictions may apply with regard to preference shares</td>
</tr>
<tr>
<td><strong>Public disclosure of financial statements?</strong></td>
<td>No</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td><strong>Can company issue securities (common or preference shares, bonds) in order to raise money?</strong></td>
<td>Bonds: yes Shares: no</td>
<td>Bonds: yes Shares: no</td>
<td>Yes</td>
</tr>
</tbody>
</table>

Charter capital and loans provided by the parent company must be paid into a so-called capital account of the subsidiary. The capital account is governed by special foreign exchange control provisions aimed at enabling the Government to supervise the inflow and outflow of cash. The capital account must be opened in a foreign currency with a bank licensing to do business in Vietnam.

**Foreign holding companies**

Some foreigners investing in Vietnam set up a holding company in Singapore, Hong Kong or other jurisdictions and have the holding company establish the subsidiary in Vietnam.

*This has the following advantages:*

› Selling shares in a Vietnamese subsidiary is complicated and subjected to a lengthy administrative procedure. Selling shares in a Singapore or Hong Kong
holding company is easier. Therefore, having a holding company makes it easier to find a buyer for the project should the investor wish to sell it in the future. Furthermore, there may be less tax on a capital gain.

Taking up a loan in Vietnam is usually expensive because the present interest rate is at least 10%. Unless there are sufficient funds in the parent company or in the group, the parent company has to allocate loan abroad to provide the subsidiary with funds. If the parent company cannot provide other collaterals, it may want to offer a mortgage on the (future) assets of the subsidiary in Vietnam as security. However, a foreign bank might find such collaterals too risky as enforcement mechanisms in Vietnam are, in practice, not always up to standards that exist in more developed countries. If the investment is made via a foreign holding company, the parent company’s shares in the holding company might be pledged to the bank as collateral that might be more appealing to a foreign bank.

Nominee structures

Foreign investment in certain sectors is prohibited; in other sectors, it is difficult to obtain an investment certificate. In order to circumvent these restrictions, some foreign investors set up nominee structures: A Vietnamese person is used as a dummy holding a Vietnamese company “in trust” for the foreign investor. These nominee structures are risky because Vietnamese law does not recognise such trust relationships; the foreign investor risks losing its investment. Depending on the circumstances, franchise structures might be an alternative. In a franchise structure, the foreign investor provides a business concept to a Vietnamese franchisee and receives a fee in return. The concept of a foreign party franchising a business to a Vietnamese party is explicitly recognised in Vietnamese law and should provide more comfort in terms of legal reliability than a nominee structure.

Repatriation of profits

The subsidiary may pay dividends to a foreign shareholder once per year (Ministry of Finance Circular No. 186/2010/TT-BTC). The maximum distributable amount is the annual pre-tax profit minus losses carried forward for corporate income tax purpose minus the corporate income tax amount. For example, if the subsidiary
reports (i) a loss of VND 400 million in 2010, (ii) a profit of VND 300 million in 2011 and (iii) a profit of VND 700 million in 2012, the subsidiary cannot distribute dividends in 2011 since the profit of VND 300 million is eaten up by the losses carried forward from 2010. In 2012, the subsidiary has a taxable profit of VND 600 million (VND 700 million minus the remaining losses carried forward in the amount of VND 100 million). The subsidiary has to pay corporate income tax at the rate of 25% in 2012, which corresponds to an amount of VND 150 million. The maximum distributable amount in 2012 is therefore VND 550 million.

It is possible to convert the VND amount into foreign currencies for distribution to a foreign shareholder, although banks sometimes have difficulties in converting large amounts into USD. Amounts in foreign currencies must be remitted within 30 days after conversion from VND.

Profits can only be distributed after the subsidiary’s audited financial statements and annual corporate income tax return (“CIT finalization declaration”) have been submitted to the tax authorities and the tax amount has been paid. Vietnam has a self-assessment system, which means taxpayers compute the tax themselves and do not have to wait for an assessment notice to make payment. Furthermore, the subsidiary has to notify the tax authorities at least 7 working days in advance before paying dividends.

To date, there is 0% withholding tax on dividends.

Sometimes, foreign investors search for other ways than dividend distribution to extract profits from the subsidiary. The parent company shall, e.g., provide an interest-bearing loan to the subsidiary or deliver services for a fee. The interest or fees paid by the subsidiary reduce the subsidiary’s profit and increase the parent company’s, thus shifting profits to the parent company.

The following has to be borne in mind:

› A loan with a term of more than one year provided by a foreign entity has to be registered with the State Bank of Vietnam. Otherwise, the subsidiary cannot repay since the bank will not execute the money transferred from the subsidiary to the foreign parent company.
Payments regarding to loans with a term of more than one year provided by a foreign shareholder (the law is silent on short-term loans) and disbursements of capital or dividends to foreign shareholders must flow through the capital account of the subsidiary.

There are no thin cap rules in Vietnam. However, the subsidiary cannot take up higher loans than the investment amounts specified in the application for the investment certificate. If higher amounts are required, the investment certificate has to be changed.

Dividend income received by the parent company is often privileged tax-wise, meaning the tax burden of the parent company is often not such influenced by the receipt of dividends. In contrast, there are usually no tax privileges if the parent company receives interest or fees for services. Repatriation of profits via interest or service fees may therefore be not tax-advantageous if the parent company is located in a high-tax country. There is a withholding tax in Vietnam on interest and service fees, but not on dividends.

Vietnam has started implementing its transfer-pricing regime in 2010. Transactions between related parties, such as the grant of an interest-bearing loan or the provision of services by a foreign parent company to its subsidiary, have to be documented extensively. Otherwise, expenses of the subsidiary for payments made to the parent company may not be tax-deductible in Vietnam. Furthermore, services paid for by the subsidiary must have been (i) required for the subsidiary’s business and (ii) actually provided.

The amount of interest and the service fee have to conform to the so-called at-arm’s length principle. That means they must not be higher (or lower) than the amount an independent third party would pay in comparable circumstances. Otherwise, these payments may not be fully tax-deductible on the side of the subsidiary (or, conversely, the tax burden of the parent company may increase). It can be difficult to find an appropriate arm’s length amount.

Tax

The corporate income tax rate in Vietnam is 20%. Foreign-invested companies must implement accounting in accordance to the Vietnamese accounting standard. The tax base for corporate income tax is the annual profit/loss calculated based on the Vietnamese accounting standard, plus certain additions (expenses that
are not deductible for tax purposes), and minus certain subtractions (tax-exempt income, losses carried forward). Business expenses are deductible if there is a nexus between the business of the company and the expenses and a proper invoice exists (in case of foreign invoices: translation into Vietnamese necessary).

The deductibility of advertising expenses is subject to a cap of 15% of the other deductible expenses. Losses can be carried forward up to 5 years.

Tax incentives are available (2 - 4 years of tax holidays and reduction of the tax rate by 50% for subsequent 4 - 9 years) if (i) the investment project is located in an area that is recognised as lagging behind in terms of development, or for (ii) software production, (iii) high-tech projects, (iv) investments in the medical or educational sector, (v) in a few other cases. Some industrial zones promise their investors that there are “special tax incentives” if they invest in the industrial zone. Foreign investors should be careful with these promises. There is no board of investment e.g. in Thailand that has the power to grant tax incentives. If an investor does not engage in activities for which tax incentives are available in according to national tax law, back taxes will be assessed in a tax audit even if the investor obtained an investment certificate specifying tax incentives.

Vietnam has a system of self-assessment; i.e. the company calculates the corporate income tax by itself and pays the corresponding amount to the tax office. Preliminary tax returns have to be filed every quarter. The final tax return (“corporate income tax finalization”) is filed on the basis of the company’s audited financial statements. Financial statements of foreign-invested companies must be audited.

It is possible to request a tax audit every year in order to avoid the accumulation of “bad surprises” over many years. Since 2010, Vietnam has been vigorously enforcing its transfer pricing rules.

The VAT rate is 10% for the supply of most goods and services. The supply of certain goods and services deemed essential for life is subject to a reduced rate of 5%. A VAT rate of 0% applies to the export of goods or services (with certain exceptions, e.g. the keying-in of data for a foreign company is subject to 10%
VAT. The supply of certain goods and services is not subject to VAT; for some other transactions, it is not necessary to file VAT returns.

Vietnam has an input VAT credit/refund mechanism, whereby VAT on purchases related to the supply of goods or services which are subject to VAT at the rate of 10%, 5% or 0% can be set off with the VAT liability of the company (or the company may obtain a refund if there is an excess of input VAT over output VAT and certain conditions are met). Input VAT credit should also be available with regard to purchases related to the supply of goods and services for which it is not necessary to file VAT returns. It is not possible to claim input VAT on purchases related to the provision of goods or services which are not subject to VAT.

A special sales tax (luxury tax) applies to the supply special/luxury goods and services in addition to VAT.

There is a (small) annual business registration tax amounting to between 1 and 3 million Dong.

regard to purchases related to the supply of goods and services for which it is not necessary to file VAT returns. It is not possible to claim input VAT on purchases related to the provision of goods or services which are not subject to VAT.

A special sales tax (luxury tax) applies to the supply of the following goods and services in addition to VAT. Some of the special sales taxes are in the process of being being deleted. A decision has not been done yet.
Building confidence

Chapter IV
Human resources
Introduction

Vietnam’s labor legislation and its implementation in practice are well developed. It is a uniform set of rules that applies, with the exception of work permit requirements, the compulsory social security system and the right to join trade unions, to both Vietnamese and foreigners with a local employment contract. In comparison with some other countries in the region, the position of employees is rather well protected. Vietnamese labor law is mandatory in a one-sided way: Employer and employee may not agree on terms that are less favourable to the employee than the conditions set out in labor legislation, in particular the Labor Code. They may, however, agree on terms that are more favourable.

Vietnam’s labor laws do not distinguish between blue-collar and white-collar employees. The general director of a company has, if he or she has a local labor contract, the same level of protection as an assembly line worker.

The Labor Code provides that labor contracts concluded prior to 1 May 2013 must be amended to the extent that they do not contain clauses, which are less favourable to the employee than what is provided for in the new Labor Code (e.g. the minimum salary during probationary period or temporary assignment to a different job must be at least 85% of the ordinary salary under the new law as opposed to 70% presently). For the first time, the concept of labor outsourcing (labor sub-lease) is recognised in Vietnamese law. Furthermore, the new Labor Code introduced procedures aimed at reducing incidences of wildcat strikes.

Applicable laws

The following laws are relevant to labor relations:

Civil Procedure Code 2004;
Law on Trade Union 1990 and Law on Trade Union 2012 (which took effect as from 1 January 2013 and replaced the Law on Trade Union 1990);
Law on Social Insurance 2006;
Law on Health Insurance 2008;
Other regulations such as decrees, decisions, circulars and rules implementing the Labor Code.

Relevant Government authorities

Labor Issues on labor are solved by the Ministry of Labor, Invalids and Social Affairs (“MOLISA”), its local departments (“DOLISA”) and, if the factory of the employer is located in an industrial zone, the respective Industrial Zone Authority. The MOLISA drafts policies on labor, issues circulars, decisions and rules that create, or interpret, labor legislation, and the instance of appeal against decisions of the DOLISA. The DOLISA and/or the Industrial Zone Authorities are in charge of implementing labor legislation, e.g. the issuance of work permits or the hearing of complaints against bad employment practices.

Employees feeling aggrieved by acts of an employer would usually turn to the DOLISA or the People’s Committee or go to court.

The labor inspectorates within the DOLISA, and the chairman of a People’s Committee have the power to assess administrative penalties on an employer breaching labor legislation (Decree 47/2010/ND-CP). The competent court for labor disputes is the People’s Court at district level if both plaintiff and defendant are Vietnamese, and the People’s Court in a province or centrally run city if employer and/or employee are foreigners (“foreigner” includes foreign-invested enterprises). It is possible for an employee to file a lawsuit without going through conciliation first if the dispute is about the unilateral termination of a labor contract and in some other cases.

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**Labour contracts**

With the exception of short-term labor contracts (less than three months), labor contracts must be entered into in writing. Although, strictly speaking, this is not required by law, it is very recommendable to use the standard labor contract issued by the MOLISA as a template in order to avoid unnecessary explanations at the DOLISA. This may collide with the interest of multinational companies that prefer to have their own standard contracts for all jurisdictions they do business in in order to streamline internal procedures.

The labor contract must be written in Vietnamese. If one of the parties is a foreigner (this includes foreign-invested enterprises), the contract may be bilingual (Vietnamese, followed by a translation into the foreign language), but the Vietnamese version prevails in case of inconsistencies between the two versions.

The present Labor Code and also the Labor Code 2013 contain major terms and conditions that must be included in the labor contract (amongst others job description, working hours, salary, holidays).

The salary amount for a Vietnamese employee has to be stated and paid exclusively in Vietnamese Dong. The salary amount for a foreign employee can be stated in a foreign currency as expressly allowed in Art. 29.10 Decree 160 dated 28 December 2006. It is customary to pay a 13th month salary (“Tet bonus”). It is possible to split the salary into a regular portion and a bonus portion which depends on the
performance of the employee and/or the enterprise.

The term of a labor contract can be (i) indefinite, (ii) 12 to 36 months or (iii) less than 12 months. A labor contract for a term of less than 12 months is only possible for a specific job (e.g. project with duration of less than 12 months) or a seasonal job. From the perspective of an employer, the difference between an indefinite and a definite term contract is the ease with which the employee can unilaterally terminate it. A definite term contract can be terminated by an employee prior to the expiry of the term only for specific reasons stipulated in the Labor Code (e.g. prolonged illness, maltreatment by the employer), whereas he or she can walk away from an indefinite term labor contract simply with giving notice 45 working days in advanced. For an employer, it is as difficult to unilaterally terminate a definite term labor contract as terminate an indefinite term labor contract.

A definite term labor contract automatically becomes an indefinite term contract if it is renewed more than once.

Work permits for foreigners are issued for a maximum period of 2 years at a time. As a labor contract, which is contrary to the contents of the work permit, is invalid, foreign employees can only have a definite term labor contract with 2 years maximum duration.

**Seasonal Contracts**

It is possible for an employer to enter into a so-called seasonal contract with an employee. A seasonal contract has a maximum duration of 3 months. It can be extended once. If it is extended a second time, the seasonal contract “automatically” becomes an indefinite labor contract. It is unclear, if a seasonal contract, which is extended for the second time in the following year of the first, immediate extension, becomes an indefinite labor contract as well.

**Probation**

The parties may agree on the following probationary periods:
› Up to 60 days for jobs requiring professional or technical college qualification or above;
› Up to 30 days for jobs requiring an intermediate-level qualification, or for technicians or trained staff;
› Up to 6 days for any other position.

Presently, a probationary period can be included in either (i) the labor contract or (ii) a so-called offer letter. The offer letter is a notification by the employer to the employee stating that the employer wishes the employee to commence a job and specifying the conditions under which the employee is to work. If the probationary period is included in the offer letter, there is no obligation to pay social security contributions during the probationary period.

During the probationary period, the employer must pay a salary that corresponds to at least 85% of the ordinary salary for the job.

Either party may terminate the employment relationship at will during the probationary period without observing a notice period or paying compensation.

**Working hours, rest hours, holidays, overtime**

› Maximum working hours: 8 hours per day (including 30 minutes break; 45 minutes break during night time), 6 days per week (Labor Code 2013: 10 hours per day, 48 hours per week);
› 12 days paid leave, increased by one additional day for every 5 years of employment;
› 9 public holidays (Labor Code 2013: 10 public holidays, foreign employees are additionally entitled to a day off with pay on one traditional holiday and one national day of their country);
› Not more than 12 hours work per day, not more than 30 hours overtime per month and 200 hours per year (300 hours in textile, clothes, sportswear, fishing industry or with permission from DOLISA).

An employer requesting an employee to work overtime has to pay an overtime and, if the work is to be performed during the night, a nighttime premium.
The table above contains an example to visualise the amount of salary to be paid for overtime and night work in the following circumstances: Ordinary hourly salary = 100, working time according to the labor contract from 9 a.m. to 5 p.m., Saturday and Sunday off, place of work is Ho Chi Minh City.

Unless the labor contract or a collective labor agreement contains a stipulation to the contrary, unused annual leave is forfeited. Vietnamese law does not oblige the employer to “buy up” unused annual leave. As an exception, an employee who loses his or her job and could not take up his full annual leave of this particular year shall be paid in money for the leave days not taken. For the purpose of calculating this monetary compensation, the number of leave days that the employee is entitled to is calculated as a ratio corresponding to the time spent working during the year.

According to Art. 113 Labor Code 2013, an employee who takes annual leave is entitled to an advance payment of his or her salary corresponding to the days of annual leave taken; furthermore, he or she may ask the employer to cover his or her travelling expenses if his or her family live in a remote area.

An employee is entitled to paid leave of absence for certain personal reasons (marriage, death of a family member).
Minimum wage

One has to distinguish between the (i) general minimum wage and (ii) the regional minimum wage.

Contributions to compulsory social insurances are calculated on the basis of the salary stated in the labor contract. However, if the salary exceeds an amount corresponding to 20 times the general minimum wage, the basis of calculating the contributions is an amount corresponding to 20 times the general minimum wage. As from July 2017, the general minimum wage is VND 1,300,000/month.

The regional minimum wage is the monthly salary that an employee is entitled to at least. It is increased by 7 % for those employees who have been vocationally trained.

Based on the level of development, the Government divides the whole country into 4 regions (regions I, II, III and IV). The regional minimum wage depends on the place of employment. The table below shows the present and the planned regional minimum wages. Wages are generally increased, but are, compared to the region still low.

<table>
<thead>
<tr>
<th>Region</th>
<th>Regional minimum wages from 1 October 2011 to 31 December 2012</th>
<th>Regional minimum wages from 1 Jan 2013 (MOLISA proposal I)</th>
<th>Regional minimum wages from 1 Jan 2013 (MOLISA proposal II)</th>
</tr>
</thead>
<tbody>
<tr>
<td>I</td>
<td>VND 3,500,000</td>
<td>VND 3,750,000</td>
<td>VND 3,980,000</td>
</tr>
<tr>
<td></td>
<td>(including: Hanoi, Quang Ninh, Da Nang, Ho Chi Minh City, Binh Duong, Dong Nai, Vung Tau)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>II</td>
<td>VND 3,100,000</td>
<td>VND 3,320,000</td>
<td>VND 3,530,000</td>
</tr>
<tr>
<td>III</td>
<td>VND 2,700,000</td>
<td>VND 2,900,000</td>
<td>VND 3,090,000</td>
</tr>
<tr>
<td>IV</td>
<td>VND 2,400,000</td>
<td>VND 2,580,000</td>
<td>VND 2,760,000</td>
</tr>
</tbody>
</table>
Salary during illness and maternity leave

Unless the labor contract or a collective labor agreement contains a stipulation to the contrary, an employer is not required to pay salary to an employee who is ill or on maternity leave. Salary during this period is paid by the compulsory social insurance (capped at presently VND 26 million per month). Maternity leave is 6 months. No other causes for dismissal are recognizable.

Foreign employees

The employment of an expatriate by an enterprise is allowed but generally limited to a managerial position or to a position requiring a high level of expertise. Foreign employees, with a few exceptions, are required to obtain work permits when they work in Vietnam for 3 months. Work permits are issued by the local DOLISA where the foreign employee is working. They are issued for a maximum period of 24 months and may be renewed if no qualified Vietnamese national has been found in the meantime to replace the foreigner. Decree 46/2011/ND-CP requires that a vocational training contract with a Vietnamese national is submitted together with the application for renewal of a work permit if the foreigner has a local employment contract.

Before employing a foreigner on the basis of a local employment contract, the employer must run a job advertisement in national and local newspapers at least 30 days prior to hiring the foreigner; proof to this effect has to be submitted together with the application for issuance of a work permit. There is no such requirement if the foreigner (i) is seconded to Vietnam from the parent company or (ii) hired through a recruitment agency. In case of a seconded (“internal transfer”), the parent company has to confirm that the employee worked for the parent company for at least one year.

Foreigners working in Vietnam for less than 90 days presently do not need a work permit provided each stay is below 30 days. However, the employer has to inform the authorities 7 days prior to the commencement of the employment and submit most of the documents that are also required if a work permit is applied for. This notification requirement is often ignored in practice.
The Labor Code 2013 introduced the requirement that before an enterprise hires a foreigner, it should explain its need to employ the worker to, and receive written consent from the competent authorities.

Foreigners can either (i) have a local employment contract or (ii) be supported from the parent company (“internal transfer”). In case of an internal transfer, the parent company has to be able to confirm, in the application for the work permit, that the employee worked for the parent company for at least one year. An employee seconded from the parent company is not subject to Vietnamese labor legislation and not required to pay health insurance contributions. It is easier to obtain a work permit for a secondee as prior job advertisements in a Vietnamese newspaper – which are necessary in order to obtain a work permit in case a foreigner is hired locally – are not required. Furthermore, at least according to the opinion of the Ho Chi Minh City DOLISA, a local labor contract with a foreigner has to state the salary amount in VND (payment of the salary can still be made in a foreign currency after the VND amount has been converted into the foreign currency). A secondee, in contrast, has a labor contract with the parent company with his or her salary being expressed in a foreign currency. Unlike a locally hired foreigner, a secondee therefore does not run the risk of the value of his salary decreasing in line with inflation in Vietnam.

According to the wording of Art. 2 Circular 84/2008/TT-BTC as amended by Circular 62/2009/TT-BTC, not all personal income tax incentives are available to secondees, although they seem to be granted in practice. A secondee is (of course) subject to Vietnamese personal income tax, but there is a gray area whether the local company to which the person is seconded has to withhold personal income tax from his or her salary or whether the secondee alone is responsible for payment. At least if the salary is directly paid by the parent company to the secondee, there should be no obligation on the side of the Vietnamese subsidiary to make withholdings.

If the secondee’s salary is paid by the parent company and later reimbursed by the Vietnamese subsidiary, it shall be taken care of to avoid Vietnamese withholding tax (foreign contractor tax) on the payment by the Vietnamese subsidiary to the foreign parent company.
The Ho Chi Minh City tax authorities take the view that a foreign employee who becomes tax resident in Vietnam in a particular year is liable to Vietnamese personal income tax with regard to the income he or she achieved since 1 January of that particular year even if he or she started to work in Vietnam only on, for example, 1 March. That means the foreign employee is obliged to report his or her income earned abroad prior to his or her arrival and pay Vietnamese personal income tax on it. Credit for foreign personal income tax paid on this “pre-arrival” income is available in Vietnam, but requires a complicated procedure.

**Termination of the labor contract**

The employment relationship ends in the following cases:

<table>
<thead>
<tr>
<th>Reason for unilateral termination</th>
<th>Prior notice</th>
<th>Payments to employee</th>
</tr>
</thead>
<tbody>
<tr>
<td>Expiry of the labor contract</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Tasks stated in the labor contract have been completed</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Both parties agree to terminate the labor contract</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Employee is sentenced to serve a prison term or is prevented from performing his or her former job by a judgment or decision of a court</td>
<td>No notice requirement</td>
<td>Severance allowance of 1/2 month’s worth of salary for each year of employment (*)</td>
</tr>
<tr>
<td>Organizational restructuring or technological changes</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Termination due to merger, consolidation, division, separation, transfer of ownership of assets</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Employee dies or is declared missing by a court</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

(*) Severance allowance of 1/2 month’s worth of salary for each year of employment
| Lawful unilateral termination by the employer | 3 or 30 or 45 working days depending on the term of the labor contract and the reason for termination. | Depending on reason for termination, one of the following allowances applies (*):  
› Severance allowance of 1/2 months’ worth of salary for each year of employment (no termination for certain grave employee)  
› worth of salary for each year of employment but at least 2 months’ worth of salary (if termination is due to business restructuring) |
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Lawful unilateral termination by the employee</td>
<td>Definite term labor contract: 3 or 30 working days, depending on the reasons for termination Indefinite term labor contract: 45 working days. If termination due to prolonged illness: 3 working days</td>
<td>Severance allowance of ‘months’ worth of salary for each year of employment. (*)</td>
</tr>
</tbody>
</table>

(*) No severance allowance or job-loss allowance has to be paid for years in which contributions to compulsory unemployment insurance were made. Compulsory unemployment insurance was introduced with effect as from 1 January 2009 and applies to businesses with 10 or more employees.

An employee can unilaterally terminate a definite term labor contract prior to the expiry of the term only for specific reasons stated in the Labor Code (e.g. prolonged illness). The penalty for an employee who unlawfully terminates a labor contract consists in (i) payment of 1/2 months’ worth of salary as compensation, (ii) loss of the severance allowance, (iii) obligation to repay training expenses. The employee can terminate an indefinite term labor contract any time without any reasons by giving 45 working days prior notice.
An employer can unilaterally terminate a labor contract (independent of whether its term is definite or indefinite) only for the following reasons:

<table>
<thead>
<tr>
<th>Reason for unilateral termination by the employer</th>
<th>Consent of the trade union / notification to DOLISA required?</th>
</tr>
</thead>
<tbody>
<tr>
<td>The employee repeatedly fails to perform the work in accordance with the terms of the labor contract (2 warning letters within one month required)</td>
<td>Yes</td>
</tr>
<tr>
<td>Disciplinary dismissal (see “Disciplinary actions”)</td>
<td>Yes</td>
</tr>
<tr>
<td>Prolonged illness (12 months or more in case of an indefinite term contract; 6 months or more in case of a definite term contract)</td>
<td>Yes</td>
</tr>
<tr>
<td>Production is reduced due to force majeure</td>
<td>No</td>
</tr>
<tr>
<td>Organizational restructuring or technological changes</td>
<td>Yes</td>
</tr>
<tr>
<td>Termination due to merger, consolidation, division, separation, transfer of ownership of assets</td>
<td>Yes</td>
</tr>
<tr>
<td>Enterprise ceases operation</td>
<td>No</td>
</tr>
</tbody>
</table>

If there is no trade union in an enterprise but the law requires trade union involvement, the employer must ask the higher-level union to set up a temporary union executive committee to participate in the procedure.

If the consent of the trade union is required and the trade union refuses to grant its consent, the employer must notify DOLISA accordingly and can go ahead with the procedure for terminating the employment contract 30 days after the notification.

Whether it is possible for an employer to reduce staff if the amount of work is reduced (e.g. due to less orders coming in) is a grey area. The present Labor Code states that organizational restructuring or technological changes can be grounds for reducing staff. The employer must select staff whose employment contracts are terminated on the basis of business requirements, seniority, skills, and family conditions. The consent of the trade union and prior notification of DOLISA are required. The employer has to pay a job-loss allowance equivalent to one month's
worth of salary for each year of employment (minimum amount: 2 months’ worth of salary); no job-loss allowance has to be paid for years which are covered by unemployment insurance.

The consequences of unlawful termination on the part of the employer are as follows: If only the notice period was too short, the employer has to pay to the employee an amount equivalent to the salary for the missing days.

**In all other cases, one has to distinguish as follows:**

<table>
<thead>
<tr>
<th>Reason for termination</th>
<th>Payment of 2 months’ worth of salary as compensation</th>
<th>Payment of the salary for the period in which the employee was not allowed to work</th>
<th>Payment of a severance allowance of 1/2 month’s worth of salary (*)</th>
<th>Additional compensation agreed by the parties</th>
</tr>
</thead>
<tbody>
<tr>
<td>Employee agrees to return to work</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Employer asks employee to return to work, but employee refuses</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Both employer and employee agree to discontinue the employment relationship</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
</tbody>
</table>

(*) No severance allowance has to be paid for years in which contributions to compulsory unemployment insurance were made. Compulsory unemployment insurance was introduced with effect as from 1 January 2009 and applies to businesses with 10 or more employees.

If the termination is unlawful and the employer does not want the employee to return to work, it must reach an agreement with the employee to this effect. It is not possible under Vietnamese law for an employer to unilaterally prevent the employee from returning to the enterprise if the termination of the employment contract was unlawful.
Unlawful termination can be quite expensive for the employer: If the employee takes the case to court, it can be time-consuming until a final judgment is issued. If the court rules that the termination was unlawful, the employer has to pay the salary for the period in which it did not allow the employee to work.

**Internal labour rules**

An enterprise with 10 employees or more must have written internal labor rules covering working hours and rest breaks, rules and order in the enterprise, occupational safety and hygiene in the work place, protection of assets and confidentiality of technology and business secrets of the enterprise, conduct which is in breach of labor discipline, penalties for such breaches, responsibility for damages.

Carefully worded internal labor rules are important in order for the employer to be able to take disciplinary action against an employee, or to terminate a labor contract in case of poor performance. It is difficult for an enterprise to dismiss an employee for an offense if this offense is not specified in the internal labor rules, or if the enterprise does not have duly registered internal labor rules.

In order to be able to enforce internal labor rules, the employer must register with the local DOLISA. The rules take effect as from the date on which the local DOLISA approves them in writing or after 10 days from the date on which the rules are submitted. Once the internal labor rules are approved by the local DOLISA, they must be transferred to each individual employee and the major items must be posted at public places in the enterprise.

According to the law, the trade union at enterprise level must be consulted before the employer issuing internal labor rules. However, the DOLISAs appear to register internal labor rules also if there was no prior consultation, at least if the enterprise does not have a trade union.
Disciplinary actions

In order to have solid grounds to take disciplinary action against an employee, the employer must have filed internal labor rules with the local DOLISA. Depending on the seriousness of the breach, an employee who breaches labor rules may be disciplined in one of the following manners:

› Reprimand (oral or in writing) with regard to a minor breach committed for the first time;
› Delay of a salary increase (not more than 6 months) or transfer to another position with lower salary (not more than 6 months) or removal from the present position: This disciplinary action may be taken if an employee has been reprimanded in writing but commits another offense (the same or different offense) during 3 subsequent months;
› Dismissal: Dismissal as a form of disciplinary action is only permitted in the following cases:
   » Theft, embezzlement, disclosure of business or technological secrets, causing serious damage to the assets or interests of the enterprise (in addition to these cases, gambling, physical violence, drug use, infringement of intellectual property rights of the employer are also grounds for dismissal);
   » an employee disciplined by deferral of a salary increase or transfer to a position with a lower salary recommits an offence in the period in which the disciplinary measure is effective;
   » an employee disciplined by removal from office recommits an offence;
   » Absence without cause for 5 or more days in a month or 20 or more days in a year.

Disciplinary actions should be taken promptly as they are time-barred after 3 months (6 months in special cases). The Labor Code provides that disciplinary actions are time-barred after 6 months and 12 months in case of a breach directly relating to finance, property, or disclosure of technological or business secrets.

Disciplinary actions require a formalised procedure, which involves consultation with the trade union in the enterprise (except for oral reprimand). If there is no trade union
in an enterprise, the employer must ask the higher-level union to participate in the procedure.

Decreasing the salary as a disciplinary measure (with the exception of demotion to a lower paid job) is not permitted. An employer may, however, claim compensation from an employee who damages tools or equipment or who causes damage to the assets of the enterprise. In this case, if the damage is not serious (less than 10 times the general minimum wage) and is due to negligence on the part of the employee, the amount of compensation is limited to 3 months’ worth of salary and must be deducted gradually from the employee’s salary.

The employer may also claim compensation from an employee who loses tools, equipment or other assets given to him or her by the enterprise, or who uses work-related materials at an excessive rate. The compensation is equal to the market price of the assets (or, as the case may be, a part thereof). In case where a contract of responsibility has been signed by the parties, the amount of compensation must be in accordance with the terms and conditions of the contract of responsibility. In cases of force majeure, no compensation is required.

Compulsory social insurance, health insurance, unemployment insurance

Vietnam has a compulsory social, health and unemployment insurance scheme. Contributions are to be borne by both the employer and the employee. The basis for calculating the contributions is the monthly salary as stipulated in the labor contract (capped at presently 26 million dong). Compulsory unemployment insurance only applies to enterprises with 10 or more employees. Foreigners seconded to Vietnam by the parent company do not have to contribute to the compulsory insurance schemes. Foreigners with a local employment contract only have to pay contributions to the health insurance. They do not have to pay towards the social and the unemployment insurance. Seasonal workers are not subjects to social insurance contributions either.

An employer is obliged to withhold the employee’s portion of the insurance contribution from the salary of the employee and transfer the amount together with the employer’s portion to the insurance carrier.
<table>
<thead>
<tr>
<th></th>
<th>2016</th>
<th>2017</th>
<th>2018</th>
</tr>
</thead>
<tbody>
<tr>
<td>Employer</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Employee</td>
<td>17%</td>
<td>7%</td>
<td>18%</td>
</tr>
<tr>
<td>Social Insurance</td>
<td>17%</td>
<td>7%</td>
<td>18%</td>
</tr>
<tr>
<td>Health Insurance</td>
<td>3%</td>
<td>1.5%</td>
<td>3%</td>
</tr>
<tr>
<td>Unemployment Insurance</td>
<td>1%</td>
<td>1%</td>
<td>1%</td>
</tr>
<tr>
<td>Occupational accident and disease insurance</td>
<td>-</td>
<td>-</td>
<td>0.5%</td>
</tr>
</tbody>
</table>

**Personal income tax ("PIT")**

Vietnamese and foreigners working in Vietnam are subject to personal income tax ("PIT") on their salary. There is no regulation of PIT applied on foreigners working in Vietnam for less than 180 days. Foreigners have to pay personal income tax from the first day they work in Vietnam. The length of stay only decides whether they are taxed as residents or non-residents. If they wish to obtain an exemption under a double taxation agreement, they (or their employer) must apply for this relief (usually prior to their arrival according to the law). If they do not successfully apply for an exemption, they have to pay PIT first and may obtain a refund later.

An individual is resident in Vietnam if he or she:

› is physically present in Vietnam for 183 days or more in a calendar year or in 12 consecutive months commencing from the first date of being in Vietnam; or
› has a regular residential location, including a registered residence (i.e.: has a temporary residence card) or leased house in Vietnam under a fixed term.

If an individual stays in Vietnam for more than 90, but less than 180 days, this
person will be treated as a resident unless he or she can prove that he or she is a tax resident of another country. Residents are taxed on their worldwide income whereas non-residents are only taxed on their income from Vietnamese sources.

The PIT rate for salary income is 20 % for non-residents; for residents, it is between 0 % and 35 %.

<table>
<thead>
<tr>
<th>Level</th>
<th>Taxable income/month (VND million)</th>
<th>Tax rate (%)</th>
<th>Tax rate (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Up to 5</td>
<td>5 %</td>
<td>5 % * Income amount</td>
</tr>
<tr>
<td>2</td>
<td>Above 5 to 10</td>
<td>10 %</td>
<td>0.25 + 10 % * Income amount &gt; 5</td>
</tr>
<tr>
<td>3</td>
<td>Above 10 to 18</td>
<td>15 %</td>
<td>0.75 + 15 % * Income amount &gt; 10</td>
</tr>
<tr>
<td>4</td>
<td>Above 18 to 32</td>
<td>20 %</td>
<td>20 1.95 + 20 % * Income amount &gt; 18</td>
</tr>
<tr>
<td>5</td>
<td>Above 32 to 52</td>
<td>25 %</td>
<td>4.75 + 25 % * Income amount &gt; 32</td>
</tr>
<tr>
<td>6</td>
<td>Above 52 to 80</td>
<td>30 %</td>
<td>9.75 + 30 % * Income amount &gt; 52</td>
</tr>
<tr>
<td>7</td>
<td>Above 80</td>
<td>35 %</td>
<td>18.15 + 35 % * Income amount &gt; 80</td>
</tr>
</tbody>
</table>

Circular 84/2008/TT-BTC as amended by Circular 62/2009/TT-BTC provides for PIT exemption of certain parts of the salary. There is no general concept that employees may deduct business expenses (e.g. costs for books, a computer at home used for work) for PIT purposes.

An employer has to withhold PIT from the salary of the employee and pay the corresponding amount to the tax authorities.

Seasonal workers pay 10 % PIT flat. He has, in contrast to a regular employee, finalized his own final tax report.
Labour disputes

There are (i) individual and (ii) collective labor disputes. Individual labor disputes are disputes between an individual employee and an employer. The law provides that such disputes are resolved by either a labor conciliation council, or a labor conciliator. A labor conciliation council is a body that has to be set up in an enterprise with a trade union. Labor conciliators, in contrast, are appointed by the district, town, or province labor offices. It is possible to bring a case directly to court (without going through the conciliation process) in the following cases: unilateral termination, dismissal, and compensation for labor accidents, severance allowance and disputes related to social insurance.

Trade unions

There are multiple layers in the system of trade unions with the Vietnam General Confederation of Labor (VGCL) at the top and trade unions at enterprise level at the bottom. Trade unions tend to be cooperative by the fact that probably all strikes in recent years were wildcat strikes (i.e. strikes that were not led by a union).

Apart from collective negotiations, unions at enterprise level fulfill tasks that in other countries may be fulfilled by a works council (e.g. participation in the formulation of wage scales and internal labor rules, resolving labor disputes, consultation on issues of interest to employees, requesting remedies if the workplace is unsafe). Unlike in some European countries, unions are not entitled to participate in management decisions and presently have no right to be informed about the economic performance of the enterprise.

The Labor Code 2013 states, however, that the status of the production and business of the employer is subject to a formalized discussion between the employer and the employees (who are represented by the union). Furthermore, prior to collective negotiations, the employer must, according to Labor Code 2013, supply information about the status of production and business when the labor collective so requests, except for business secrets and confidential technology.

Employers are not obliged to establish a trade union, but they are supposed to
create a favorable environment for their establishment. In order for a trade union at enterprise level to be established, five or more employees have to unite and request recognition by the higher-level union. An employer cannot hinder representatives from higher-level unions from visiting the enterprise in order to persuade employees to establish a union. In practice, production companies tend to have a union whereas service companies do not.

The participation of enterprise level trade unions is required in a number of procedures (e.g. unilateral dismissal of employees in certain cases) and it can be complicated if there is no union in the enterprise. Usually, in such a case, the higher-level union would have to set up a temporary union executive committee, which participates in the procedure.

If there is a union in the enterprise, the employer should try to solicit the union’s cooperation in creating a friendly working atmosphere that, ultimately, is good for the performance of the enterprise.

If there is a trade union in an enterprise, the employer is required to contribute to its funding. The amount of the contribution is equivalent to 2% of the payroll, which is used as basis for payment of social insurance premiums with effect as from 1 January 2013. Their individual contribution is capped at 10% of the general minimum wage, i.e. presently at VND 105,000 per month, but members are encouraged to waive this cap.

Employers must provide the union in their enterprise with a suitable workplace and adequate facilities. Union officers are entitled to certain time off with pay in order to fulfill their functions.

The Labor Code 2013 introduces the concept of a formalised “discussion at the workplace” between employer and employees (represented by the union). These discussions are to be held at least every three months.
Collective negotiations and collective labor agreements

The Labor Code 2013 has clarified and amended the rules concerning collective negotiations. Topics subject to collective negotiations are in particular wages, rest breaks, holidays and safety at the workplace. Collective negotiations are a formalized process. If they are successful, employer and employees (represented by the trade union) conclude a collective labor agreement. Collective labor agreements are presently regulated in Decree 196/CP dated 31 December 1994 (from 1 May 2013: Section 3 of Labor Code 2013). They overrule provisions in labor contracts which are less favorable to the employee than the terms set forth in the collective labor agreement.

The employer must submit the collective labor agreement to the DOLISA within 10 days after its conclusion. The term of a collective labor agreement between the trade union and the enterprise must be between 1 and 3 years; the term of the first collective labor agreement concluded by the enterprise may be less than 12 months. However, either party may request amendments for the collective agreement after 3 or 6 months (depending on the term of the collective labor agreement) after its implementation (Art. 77 Labor Code 2013).

Strikes

If there is a strike, this is presently usually a wildcat strike, i.e. a strike that is not led by a union. Reasons for strikes occurred include the desire on the part of the employees to negotiate a higher salary, maltreatment at the workplace, unpaid social security contributions, too much overtime, unpaid salary or overtime premiums. Such strikes are illegal since the law provides that strikes must be led by a union and are allowed only after dispute resolution mechanisms have failed.

Employers faced with a wildcat strike usually request the DOLISA, the People’s Committees or the Industrial Zone Authority to intervene – with mixed success. Technically, employees participating in an illegal strike can be subject to disciplinary actions (e.g. dismissal as absence without cause for five days is grounds for the employer to unilaterally terminate the employment contract). However, as the court is the competent authority to decide on the legality of a strike (Art. 179 Labor Code
2006), a lawful dismissal would most likely require (i) a court decision declaring the strike illegal and ordering participants to go back to work and (ii) non-compliance with the court order on the side of the employee in question. We are not aware if there are court cases in practice in which a strike was declared illegal.

The best precaution against illegal strikes is the creation of a friendly atmosphere at the workplace.
Generating results

Chapter V
M&A
M&A

Introduction

M&A transactions have increased in the past years from 2014 to 2017.

Reasons for foreign companies to acquire a Vietnamese target may consist in the desire to acquire a strategic position in the market already obtained by the target, obtain its client base, its distribution network, its assets used for production, or its trained work force. The main stations of an M&A deal are (i) the selection of a target, (ii) negotiation of a memorandum of understanding / letter of intent, (iii) negotiation of a non-disclosure agreement, (iv) due diligence, (v) valuation and pricing, (vi) negotiation of a purchase agreement, (vii) payment and transfer of ownership. This is the same as in other countries. However, there are a lot of peculiarities (most of them due to red tape, the fact that Vietnamese sellers are often unfamiliar with international practice in M&A deals and the lack of clarity and reliability in the accounting of many Vietnamese enterprises) that make an M&A transaction in Vietnam different from a transaction in a more developed economy. The following overview highlights a few issues, but is far from complete.

(Note: The owners of a limited liability company are called members; the owners of a joint stock company are called shareholders in Vietnamese legal parlance. A member owns “shares of the charter capital” of the limited liability company whereas a shareholder owns “shares” of the joint stock company. For ease of expression, this article refers to both members and shareholders as shareholders who own shares.)

Selection of a target

Foreign investors have to be aware that foreign direct investment is restricted in certain sectors according to the law and/or in practice. There are sectors that are completely closed to foreign investment, sectors where foreign investors must have a Vietnamese joint venture partner and sectors where it is very difficult in practice to obtain an investment certificate in spite of the sector being open in theory.
For further details, please see Chapter 3: Setting up a presence in Vietnam. These restrictions not only apply to the set-up of new companies, but also to the acquisition of existing companies by foreigners. Before considering any acquisition, it is vital importance to check, in a first step, the chances of obtaining regulatory approval.

There is a national company database (accessible at: http://www.business.gov.vn – nationwide – or http://www.dpi.hochiminhcity.gov.vn for Ho Chi Minh City), which is, however, not completed and shall not offer more information than the company name, the date of incorporation, the registered equity (charter capital), the scope of business and the name of the legal representative of the company. More detailed information of a target such as history of changes, particulars of shareholders and their ownership of shares, branches or liaison offices can be obtained for a fee from the competent business registration offices. Often, an acquirer already has a business relationship with the target and/or its owner. If this is not the case, an acquirer in search of a suitable target could turn to foreign business associations in Vietnam, to the Vietnamese Chamber of Commerce and Industry and/or to specialised M&A advisers. Also lawyers and banks often know of potential targets.

**Memorandum of understanding (letter of intent)**

If a target has been identified and its owner is prepared to sell, acquirer and owner usually enter into a memorandum of understanding (called letter of intent if it is only signed by the acquirer and not by both parties). In the memorandum of understanding, the owner declares its intent to sell the target, and the acquirer its intent to buy.

**Furthermore, the memorandum of understanding usually also contains the following items:**

› Acquisition method: share deal or asset deal?

**In a share deal**, the acquirer buys shares of the target company. The advantage of share deal is an automatic consequence of buying the shares, the acquirer economically also acquires all the contracts that the target has concluded, the permits granted to the target (exceptions can apply) and all of the target’s assets. Conversely, the disadvantage is all open and hidden
liabilities of the target are economically transferred to the acquirer. In many jurisdictions, a share deal is tax-advantageous for the seller in comparison to an asset deal as the capital gain resulting from a transfer of shares is often privileged for income tax purposes. In Vietnam, however, this privilege is far less pronounced. A local seller usually has no or not much of an income tax incentive to insist on a share deal. Things can be different if the seller is a foreign company protected by a double taxation treaty from Vietnamese income tax on the capital gain.

**In an asset deal,** the assets of the target company are bought. The seller is not the owner of the target, but the target company itself. The advantage is that the acquirer is not, unlike in a share deal, burdened with liabilities of the target company as they are not attached to the object of the acquisition. If the acquirer takes over contracts concluded by the target, this requires the consent of the other parties to the contracts. Permits are also not automatically transferred from the target company to the acquirer in an asset deal. Furthermore, the transfer of certain assets (e.g. land use rights) requires special proceedings. An asset deal is tax-advantageous for the acquirer as the acquirer can depreciate the purchase price over the (remaining) useful life of the acquired assets provided that the seller has issued proper invoices;

- Description of shares or assets and ownership status (whether shares or assets are subject to encumbrances, e.g. pledges, mortgage, retention of title);
- Schedule until conclusion of the purchase contract;
- Scope and schedule of the due diligence;
- Method of determining the purchase price;
- Clause to the effect that the memorandum of understanding is not binding (i.e. that the conclusion of the memorandum of understanding does not oblige the parties to enter into a purchase contract);
- Events in which either party may stop negotiating with the other party; consequences as to the costs incurred by the parties so far.
Non-disclosure agreement

In most M&A cases in Vietnam, documents and information provided by the owner in the course of a due diligence are the only source to obtain knowledge about the target’s legal, tax and financial background. The owner will only agree to disclose information to the acquirer if the owner feels reasonable that the acquirer will neither make them available to third parties nor use those information to compete with the target should the M&A deal fail. To this end, the parties will conclude a non-disclosure agreement. Foreign acquirers should be aware that Vietnamese company owners are not often familiar with the practice of international M&A transactions, and usually are reluctant to disclose information even though the acquirer assured to secrecy by virtue of a non-disclosure agreement. It depends on the acquirer to make the owner aware of the inability to obtain sufficient information on the target’s background can be a deal breaker, or at least a reason to reduce the purchase price.

Due diligence

A due diligence is a review of whether there are risks in the target that would justify a reduction of the purchase price, or are severe that it would be better not to buy the target. The scope of the due diligence depends on the business of the company (e.g. one would probably review whether there are environmental risks in a target whose business is the tanning of leather whereas one would probably not do such a review in case of a target whose business is the development of software). Usually, an acquirer performs at least a commercial due diligence (analysis of the market and the value chain of the target) and has a law firm and/or accounting firm check the legal, tax and financial background of the target in case of a share deal. In case of an asset deal, the scope of the due diligence is narrower than liabilities of the target not transferred to the buyer.

It is usually very difficult to obtain information about Vietnamese companies unless the owner agrees to provide them.

Information, regarding to the financial statements, is publicly available only for joint stock companies (any individual or organization can request these information from the competent business registration office for a fee). However, transparency
standards are not comparable to other jurisdictions. Financial information has to be carefully verified, as bookkeeping standards in domestic companies have not reached to international standards. Also, keeping different sets of financial information for different purposes is common in domestic companies in Vietnam.

Sometimes, credit information can be obtained from the State Bank of Vietnam (www.creditinfo.org.vn or www.cic.org.vn) and from professional rating agencies (e.g. www.vietcr.com). Adverse information of a target and/or its owner may have appeared on newspapers or the Internet. Suppliers and customers of the target would be good sources of information, but are obviously difficult to tap.

In most M&A cases, documents and information provided by the owner in the course of a due diligence are the only source to obtain knowledge about the target’s legal, tax and financial background.

The following is a list of typical issues that turn up in a legal and a tax due diligence:

› **None or incomplete documentation:** Documents, which are important to determine potential liabilities, are not kept at the target company, or the owner is unwilling to provide them. The risk associated with incomplete information can be reduced by structuring the transaction as an asset deal. An acquirer should consider abandoning the transaction if there is too little information.

› **Formal requirements not met:** The owner claims that the target owns certain assets whereas in reality it does not as formal requirements (e.g. registration of ownership) are not met. Sometimes a lease agreement concluded by the target company is invalid if it is not notarized.

› **Risk of unpaid taxes:** Two accounting books are kept, one for tax purposes, one for internal information purposes. The chief accountant solves tax issues by relying on a personal relationship with a tax officer. The investment certificate (in case of a foreign-invested target company) shows tax incentives incompatible with the law (might happen if the target company is located in an industrial zone and the industrial zone is anxious to attract investors). The owner of the target company
has taken out money and requested the chief accountant to disguise the amount as business expenses. It is clear that these findings indicate unpaid taxes. This is a problem in a share deal, not in an asset deal. Presently, Vietnam does not have legislation that would burden the acquirer of assets (even if they constitute an entire business) with tax liabilities incurred by the previous owner of the business.

› **Business scope of the target company:** If the business scope of the target company, as recorded in its business registration certificate, contains lines of business for which it is impossible or difficult for a foreign investor to obtain an investment certificate, the business registration certificate of the target company should be changed prior to the acquisition. This issue can only occur in a share deal, not in an asset deal. However, also in an asset deal, the foreign acquirer has to check in advance whether it is possible to obtain an investment certificate for the business lines in which the foreign acquirer wishes to be active after the acquisition.

› **The “seller” of the shares of the target is not the owner of the shares:** This can happen if the seller is a foreigner who has used a Vietnamese nominee to hold the shares. Usually, this is happened in business lines where foreign investment is not allowed or restricted. There is no concept of shares being held in trust for somebody else in Vietnamese law, and the seller cannot validly transfer shares held by the nominee.

› **Unpaid social security, health insurance and unemployment insurance contributions:** This is a problem in a share deal, not in an asset deal, because these liabilities are not passed to the acquirer of assets.

› **Assets are mortgaged:** In a share deal, the fact that assets of the target company are mortgaged means that the target company is burdened with the risk to lose the respective assets if the security holder realizes the mortgage. In an asset deal, the security holder may be able to prevent the transfer of ownership of the assets to the buyer.

› **Automatic transfer of employment relationships:** An acquirer may not always want to take over the entire personnel of the target; especially against the background that Vietnamese labor law makes it difficult for an employer
to terminate an employment relationship. In a share deal, all employment relationships are transferred automatically together with the company of which the shares are transferred. With regard to an asset deal, Art. 31 Labor Code provides that where “an enterprise...transfers ownership of... the assets of the enterprise, the succeeding employer shall be responsible to continue performance of the labor contract of the employee”. It is, however, possible to terminate employment contracts of staff not needed. This involves the setting up of a plan for labor usage (requires trade union participation and notification to the labor management authorities) and payment of compensation.

› **Severance allowance:** Vietnamese law requires employers to pay a severance allowance to their employees who leave the company in the amount of half a month’s worth of salary for each year of employment. No severance allowance has to be paid to employees covered by unemployment insurance. However, unemployment insurance was only presented and went effective from 1 January 2009 and only applied to businesses with 10 or more employees; which means there is a latent severance allowance liability for years prior to 2009 in businesses with 10 or more employees, and a liability for the entire past in smaller businesses. There is a risk that this latent liability is passed on to the acquirer in both a share deal and in an asset deal.

› **Keeping key personnel:** Vietnamese labor law makes it very easy for employees to leave the company. If negotiable, the sale and purchase agreement should contain a clause with a mechanism to reduce the purchase price if certain key personnel leave the company within a certain period of time after the acquisition. This is in particular important against the background that many Vietnamese companies are truly family-owned and run, meaning that key positions are held by members of the family of the owner who would usually want to leave the company once it is sold.

› **Land ownership:** In Vietnam, all land is owned by the people and administered by the State. An individual or a company can obtain a land use right from the State. If the user is Vietnamese, this land use right can take the shape of either (i) a land allocation which can be close to ownership or (ii) a lease. A foreigner (this includes a Vietnamese company with at least one foreign shareholder) can
only lease land from the State (with very few exceptions). If a foreign entity wants to acquire a piece of land from a Vietnamese individual or entity, it has to negotiate with the Vietnamese seller a compensation for the seller returning the land to the State. The State will recover the land from the seller and lease it out to the foreigner with a lease term that is usually equal to the duration of the investment project of the foreigner (max. 50 years, 70 years in exceptional cases). The ownership structures of land use rights are often very unclear and should be examined carefully. Buildings, factories or construction works, on the other hand, which are attached to the land, can be owned by foreign invested enterprises in Vietnam.

Approval by other shareholders in an asset deal: The sale of assets amounting to 50% or more of the total assets of a company must have the approval of the members’ council (if it is a limited liability company with more than two members), of the owner (if it is a single member limited liability company), or of the general meeting of shareholders (if it is a joint stock company).

Buyer’s liability for warranty claims resulting from events prior to the transfer of a contract: As a general rule, the transfer of a contract in an asset deal also comprises the transfer of all claims and obligations related to such contract since the required consent of the other contractual party usually also covers such claims and obligations. The potential exposure can be mitigated if (i) the other contractual party can be persuaded to oblige itself to go only after the seller with regard to claims that pre-date the transfer to the contract, or (ii) the seller agrees to indemnify the buyer if such claims arise.

Valuation and pricing

Vietnamese law accepts all common valuation methods known internationally.

Most of these methods consist, or are a variation or combination, of the following approaches:

Discounted cash flow analysis: In this method, future incoming and outgoing cash flows are estimated and discounted to their present value. The sum of
the discounted cash flows is the net present value of the company. Apparently, disagreements are tended to arise between the seller and the buyer due to the expected amount of future cash flows, the appropriate discount rate and the time period. Buyers should be reasonable in their forecast and expect the same from the seller. If the differences of perception are significant, the deal will be cancelled.

- **Comparison with similar companies:** This approach aims to the purchase price in similar transactions to find an appropriate purchase price for the transaction in question. If, e.g., a company of similar size and in a similar line of business as the target company recently sold for a purchase price equivalent to 3 times its EBIT, the parties may find that the value of the target company is 3 times the target company’s EBIT. Unfortunately, it is often difficult to find comparable transactions in Vietnam.

- **Asset-based methods:** These methods only valuate the assets of a company without taking into consideration the profit- or loss-making potential attached to them. Asset-based methods usually yield comparatively low values. A seller might agree on this method of valuation if the business is loss-making and/or has immense liabilities, and the seller requests to liquate business’s remaining.

There are several adjustments to be made to arrive at the purchase price from the value of the target company determined according to the methods above.

**The most important adjustments are the following:**

- If the transaction is structured as an asset deal and the value of the business was determined in according to the discounted cash flow method, or by using the purchase price of recent (share deal) transactions as comparison: The purchase price usually has to be increased to reflect that, unlike in an asset deal, old liabilities of the business are not transferred to the buyer.
- If the transaction is structured as a share deal: It is international standard to increase the purchase price by the amount of cash available in the company at the time of closing (transfer of ownership of the shares); also decrease it by (certain) liabilities incurred by the company and withdrawals made by the owner between the time
of valuation (signature of the share purchase agreement) and closing in order to
give the owner no incentive to reduce the value of the company during the time
the transaction is pending. This time can be quite considerable in Vietnam since the
transfer of ownership is only registered after an often-lengthy procedure (“investment
procedure”). In practice, however, this approach is complicated by the fact that the
application to register the transfer of ownership of the shares requires the applicant to
provide proof that the purchase price was paid. Also, difficult calculations reaching the
ultimate purchase price do not facilitate this task.

**Purchase agreement**

**Asset deal**

In an asset deal, it is necessary to decide if the assets should be bought by the foreign
acquirer itself or by a subsidiary set up by the acquirer. In most cases, the acquirer will
only be able to operate in Vietnam through a subsidiary. The question is whether (i)
the acquirer should buy the assets, set up the subsidiary and contribute the assets to
the subsidiary or (ii) set up the subsidiary and contribute cash to the subsidiary for the
subsidiary to buy the assets by itself. Given that the acquirer cannot do business in
Vietnam without an investment certificate and it is often difficult to foresee whether
and when the investment certificate will be granted, it is reasonable for the acquirer
to set up the subsidiary first (the setting-up of the subsidiary is done in the investment
procedure) and have the subsidiary buy the assets. Otherwise the acquirer might be
stuck with the assets without being allowed to do business with them. The method
of buying the assets should, if possible, already be fixed in the memorandum of
understanding.

It is very recommendable to itemize the purchased assets and allocate the
contingent portion of the purchase price to them in order to avoid problems
with registration of ownership, notarization and certification, at least with regard to
assets such as factory buildings, land use rights, ships, cars, etc. where the transfer of
ownership requires registration. It may often be a good option to conclude separate
purchase agreements for each of these assets. Allocation of a reasonable portion of
the purchase price to each asset is also a condition for the acquirer to depreciate the
purchase price over time for corporate income tax purposes.
Under Vietnamese law, it is possible (and a sensible thing to do) to agree on a point of time at which ownership of the assets is transferred. Registration of the transfer of ownership is required regarding to land use rights, houses, construction works, ships, boats, aircraft, motorcycles, cars, trailers, semi-trailers.

**Share deal**

In a share deal, the consent of the remaining shareholders (if any) is required if shares of a (i) limited liability company or (ii) joint stock company within the first three years after its establishment are bought.

In light of the general lack of information that can be unearthed in a due diligence, the share purchase agreement should ideally contain a lot of reps and warranties and remedies for breaches of such reps and warranties, but it is of course not always easy to persuade the seller to agree to them as the seller may not always be convinced that it is necessary to conduct a due diligence and have reps and warranties in addition.

Usually, the charter (articles of association) of the target company will be changed after the acquisition. If there are still old shareholders left in the target company, it is international standard to include requests and put options or tag-along and drag-along clauses in the articles of association. These clauses are often very long and complicated. Vietnamese shareholders may not always be familiar with these concepts.

**Payment and transfer of ownership**

**Asset deal**

Payment and transfer of ownership are less complicated in an asset deal, at least if the foreign acquirer has already obtained an investment certificate and set up a subsidiary which buys the assets. Ownership of an asset is transferred at the point of time when the asset is delivered unless the parties have agreed to a different point of time. For the assets where registration of ownership is required (such as land use rights, factories, houses, construction works, ships, cars, etc.), ownership is transferred upon completion of the registration procedure (Art. 439 Vietnamese Civil Code).
Share deal

In a share deal, there are more complicated because ownership is transferred only upon the issuance of a new, or the amendment of an existing, investment certificate. In the investment certificate, the foreign acquirer is registered as new shareholder of the company. A previously local company becomes a foreign-invested company, its business registration certificate being replaced by the investment certificate.

The investment procedure can be lengthy and complicated, besides there is ultimately no guarantee that an investment certificate will be issued. The investment procedure has to be completed even if the foreign investor only acquires a minority shareholding. An argument arises that the distinction between companies with up to 49% foreign ownership and those with more than 49% foreign ownership in Decree No. 102/2010/ND/CP dated 1 October 2010 should be construed since the acquisition of minority shareholdings is subject to registration procedures applicable to local investors (who often do not have to go through the complicated investment procedure). However, this argument stretches the wording of the Decree and is not followed by the authorities in practice. It is also argued that after a holding period of three years, shares of a joint stock company can be sold to a foreign investor without the foreign investor having to go through the investment procedure, but it is doubtful whether this would hold water in practice.

It is not possible to go through the investment procedure in advance in order to be on the safe side when acquiring the shares; rather, proceedings can only be commenced after the share purchase agreement has been concluded.

When applying for the registration of the change of ownership of the shares, the applicant must, amongst others, provide proof that the “assignment has been completed” which is generally understood to mean proof that the purchase price has been paid. This contradicts the demands of the buyer whose interest it is to pay only after having received title to the shares. In practice, this issue can usually be solved by the establishment of an escrow account, which the buyer pays the purchase price. This may entail quite lengthy negotiations with the seller (who usually wants to receive the money immediately and may not see the need for an escrow account). It is necessary to involve the bank in these discussions ultimately, the bank has to agree to
the conditions upon which the amount in the escrow account is released to the seller or returned to the buyer.

If the seller is a foreigner and the buyer a Vietnamese, it can be a lengthy and complicated task for the buyer to transfer the purchase price out of the country to the seller.

**Taxation**

The following tax rates apply according to Vietnamese tax law:

<table>
<thead>
<tr>
<th></th>
<th>Corporate income tax on capital gain</th>
<th>Personal income tax on capital gain</th>
<th>VAT on purchase price</th>
<th>Registration fee on purchase price</th>
<th>Notarization fee</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Asset Deal</strong></td>
<td>25 %</td>
<td>Usually not applicable as a registered private enterprise is taxed as a company</td>
<td>Might not be subject to VAT pursuant to Art. 4.8 lit. c Circular 06/2012/TT-BTC (“sale of an enterprise to another enterprise for the purpose of production or business”)</td>
<td>› Housing and land: 0.5% of the “market price” fixed by the local People’s Committee; › ships, boats, yachts, aircraft: 1%; › motorcycles: 2%; › cars, trailers or semi-trailers: 2% › cars with less than 10 seats: rate set by the local People’s Committee (between 10% and 20%)</td>
<td>Depends on the asset, from min. VND 50,000 to max VND 5.2 million + 0.03% of asset value exceeding VND 10 billion › Fee cap: VND 10 million/case</td>
</tr>
<tr>
<td><strong>Share Deal</strong></td>
<td>25 %</td>
<td>20% (non-resident: 0.1% of turnover)</td>
<td>Not subject to VAT</td>
<td>No</td>
<td>No</td>
</tr>
</tbody>
</table>
If the seller of shares is a foreign company and the purchaser a Vietnamese, the Vietnamese purchaser has to withhold Vietnamese corporate income tax on the capital gain from the purchase price (Circular 123/2012/TT-BTC dated 27 July 2012). If both seller and purchaser of shares are foreign companies, the target company is responsible to pay Vietnamese corporate income tax on the capital gain on behalf of the foreign seller.

If shares in a foreign holding company are sold (“Vodafone scenario”), the foreign seller is not liable to Vietnamese corporate income tax on the capital gain (and, by extension, the Vietnamese subsidiary is not liable to pay corporate income tax on behalf of the foreign seller) if the following conditions are met (Official Letter 2268/TCT-CS dated 28 June 2012):

› The shares are transferred outside of Vietnam between two non-Vietnamese entities;
› The shareholding of the (direct) foreign parent company of the Vietnamese subsidiary is unchanged;
› The (direct) foreign parent company and the Vietnamese subsidiary do not generate any income from the transaction;
› The investment certificate of the Vietnamese subsidiary remains unchanged

Still, an Official Letter does not have the force of law, so a bit of prior research should be done before shares abroad are sold in the hope that the capital gain is not taxable in Vietnam.

Still, an Official Letter is not the enforcement of law; hence a prior research should be made before shares abroad are sold in the hope that the capital gain is not taxable in Vietnam.

If the seller is a foreigner, there may be a double taxation agreement preventing Vietnam from taxing the seller’s capital gain in a share deal. Relief is available in the shape of (i) exemption or (ii) refund. Exemption means that the capital gain is not taxed in Vietnam at all. Refund means that the seller has to pay Vietnamese (corporate or personal) income tax on the capital gain, but gets a refund later
(in Vietnamese dong). Obviously, exemption is preferable. However, this requires an application for exemption to be filed with the Vietnamese tax authorities 15 days prior to the date the seller declare the capital gain in Vietnam; the application dossier includes, amongst others, a tax residence certificate issued in the jurisdiction of the seller which must have gone through a potentially time-consuming legalisation procedure.
Chapter VI
Real Estate

Enhancing vision
Real Estate

Introduction

As in many countries in the region, business involving real estate is rather complicated. There is no private ownership of land, and foreigners face restrictions aimed at preventing the country from being sold out to foreign investors. This chapter provides an overview of Vietnamese real estate law with a focus on residential housing development.

Legislation

› Vietnam’s Schedule of Commitments for Trade in Services to the WTO, WT/ACC/VNM/48/Add.2 dated 27 October 2006;


› Law No. 60/2005/QH11 dated 29 November 2005 on Enterprises (“Law on Enterprises”) and Decree No. 102/2010/ND-CP dated 1 October 2010 providing detailed provisions and guidelines for the implementation of a number of articles of the Law on Enterprises;

› Law No. 45/2013/QH13 dated 29 November 2013 on Land (“Land Law”); the implementation of a number of articles of Decree 181;


Resolution 19/2008/QH12 dated 3 June 2008 ("Resolution 19") on a pilot scheme permitting foreign organizations and individuals to purchase and own residential houses in Vietnam; Decree 51/2009/ND-CP dated 3 June 2009 guiding a number of articles of Resolution 19;


Decree 198/2004/ND-CP dated 3 December 2004 (as amended by Decree 44 dated 9 April 2008 and Decree 120 dated 30 December 2010) and Circular 117 dated 7 December 2004 (as amended by Circular 93 dated 29 June 2011) on the collection of land use fees;


Decree 163/2006/ND-CP dated 29 December 2006 on security transactions; Decree 83/2010/ND-CP dated 23 July 2010 on the registration of security transactions; Circular 05/2011/TT-BTP dated 16 February 2011; Inter-Circular 20/2011/TTLT-BTP-BTNMT dated 18 November 2011 on guiding the registration of mortgages of land use rights and assets annexed to the land; Inter-Circular
“Ownership” of land in Vietnam

The laws of Vietnam vest ownership of land to the Vietnamese people and do not recognise private ownership of land by individuals and organizations. The State is responsible for the administration of land throughout Vietnam on behalf of the Vietnamese people. The State may grant rights to use land ("Land Use Rights" or "LUR") in the form of land use rights certificates ("LUR Certificates") to individuals and organizations by way of land allocation or lease. The relevant People’s Committees are authorised to supervise the use and management of land in their respective localities on behalf of the State.

Under the laws of Vietnam, the right to use land is distinct from the ownership of buildings constructed on the land. Although the laws of Vietnam do not recognise private ownership of land, they do accept and permit the private ownership of buildings constructed on such land.

Grant of land use rights

Only a legal entity established under the laws of Vietnam can acquire LUR or an interest in buildings attached to land. This means that a foreign investor must establish a Vietnamese subsidiary, either alone or together with a joint venture partner, in order to acquire LUR. In this and the following, such a subsidiary is referred to as “foreign invested enterprise”.

Land use duration

If land is allocated to a Vietnamese land user, the allocation can be, depending on the intended use of the land, on a “stable and long term basis” or for a definite term. Land lease is always for a definite term only.
A foreign developer can obtain a land lease only for the duration of the investment
project. The maximum duration of an investment project is 50 years according to the Law on Investment (exceptionally 70 years if the investment project involves large amounts of capital and recovery is expected to take long, or if the project is located in an area facing with difficult socio-economic conditions). If the foreign developer strictly complies with the Land Law during the initial duration of the LUR, the lease may be extended at the discretion of the Government. No additional rent has to be paid for the extension.

If the foreign developer obtains, in order to construct residential housing, a land lease for a lump-sum payment, or obtains land in an auction (Art. 32 Decree 84), or is assigned an investment project involving land that was initially allocated on a “stable and long term basis” (Art. 24 Decree 84), the duration of the land lease conferred to the foreign developer may be up to 70 years and may be extended on request with the same term without payment of additional rent.

**Land use fees, rent**

In case of allocated land, the amount payable by the land user to the State is called “land use fees” and in the case of leased land, the amount payable by the land user to the State is called “rent”.

The land use fees must be paid in a lump sum, while the rent can be paid in a lump sum or on an annual basis. However, if the rent is paid annually, the leased land can only be used by the foreign developer for the construction of residential housing for lease. If the rent is paid upfront for the entire lease term, the foreign developer is entitled to construct residential housing for sale and/or lease.

If a foreign developer leases land in order to construct a residential housing complex for sale, the lump sum rent payable upfront corresponds, simply speaking, to the market price of the land as defined by the local People’s Committee or to the successful auction bid (if the foreign developer obtained the land lease as a result of an auction). A Vietnamese purchaser may buy the entire housing complex or single apartments or a block of apartments in the housing complex.

The Vietnamese purchaser is entitled to obtain a land allocation for a stable and
long term from the State without paying land use fees for this allocation (if the Vietnamese purchaser buys apartments, this is a land allocation for common land use). However, the foreign developer will usually have included, in the purchase price of the housing complex or apartment, the rent that the foreign developer had to pay upfront, and any increase in the value of the land on which the housing complex was built. The foreign developer can keep the capital gain resulting from an increase of the value of the land and is not obliged to pay it to the State if the project was implemented on or after 1 July 2007 (effective date of Decree 84). The Vietnamese purchaser must pay a registration fee for registering ownership of the housing complex (or apartment) corresponding to 0.5% of the market value (set by the local People’s Committee) of the housing complex (or apartment).

Obtaining LURs

Obtaining a lease

A foreign developer (the subsidiary of a foreign investor engaging in the development of real estate) may obtain a lease in the following manners: (i) participating in an auction held by the State, (ii) contacting authorities to be presented with suitable land, (iii) contacting an existing user of suitable land, (iv) transfer of an existing investment project to the foreign developer if the investment project includes land.

› A foreign developer (or a foreign investor, if it has not established a subsidiary yet) may participate in an auction for land use rights held by the State. The rent payable for the lease equals the amount for which the land was auctioned off to the foreign developer.

› A foreign investor may, prior to establishing a subsidiary (the “foreign developer”) contact the competent authorities (the People’s Committee or the Department of Natural Resources and Environment or the Centre for Development of Land Resources or other relevant authorities) in order to be presented with suitable land. If the land is already empty, the foreign investor must apply for an “approval of investment” prior to concurrently with establishing a subsidiary, which is leasing the land from the State. If the land is unclear, the foreign investor must apply for an “approval regarding to the investment location”. This approval is the basis for the relevant authorise to
(i) recover the land from the existing land users, (ii) compensate the existing land users or relocate them to new land, and (iii) clear the land from existing buildings before leasing it to the foreign developer once it is established. The foreign investor (or its subsidiary, the foreign developer, if it is established already) may negotiate directly with the existing land users, suggest suitable compensation and present a compensation plan to the authorities for approval (the compensation can only be carried out by the authorities). If the foreign investor or the foreign developer has advanced amounts for compensating existing land users, these amounts are deducted from the rent payable to the State.

A foreign investor may, prior to establishing a subsidiary (the “foreign developer”) contact an existing land user who has suitable land (i.e. land where the planning of the local People’s Committee is not contradictory to the intended use by the foreign developer). The foreign investor may negotiate an appropriate compensation directly with the existing land user prior to or concurrently with establishing a subsidiary, which leasing such land from the State. If the land is subject to a so-called recovery procedure (usually, this is the case if there is something wrong with the existing land use), the State must recover the land before leasing it to the foreign developer; otherwise, no recovery procedure is required. Compensation is made in advanced by the foreign investor (or, as the case may be, the foreign developer) is deducted from the rent payable to the State.

According to Article 24 of Decree 84, a foreign developer may receive, amongst others, an investment project for development of residential housing for which construction of the common use infrastructure has been completed. If the transferor is a Vietnamese entity to which the State allocated land, then the value of the LUR has to be included in the total value of the project assignment contract and the transferee has to conduct procedures to lease land from the State (no rent is required to be paid).

**Contribution of a LUR by a Vietnamese joint venture partner**

If the foreign developer is a joint venture company established by a foreign and a
Vietnamese entity and the Vietnamese entity was allocated land, the Vietnamese joint venture partner may contribute this land allocation as capital to the foreign developer. If the Vietnamese entity has leased land from the State, it must transform the lease to an allocation first before contributing the LUR to the joint venture enterprise.

The foreign developer (the joint venture company) is not required to transform the land allocation into a lease and therefore in practice obtains a land allocation. This allocation is for a definite term; the term equals the duration of the project as recorded in the investment certificate of the joint venture company. The joint venture company does not have to pay land use fees to the State. If the joint venture ends, the Vietnamese former joint venture partner must apply for a new lease or allocation from the State if it wishes to use the land again.

**Indirect acquisition of LUR by acquiring shares of an existing developer**

A foreign investor may indirectly acquire LURs by buying shares of an existing developer that has already obtained LURs.

Foreign investors are allowed to invest in the creation of houses or construction works for sale, lease or hire purchase, and in infrastructure works on leased land in order to lease out the infrastructure once it is completed. Foreign investors are also permitted to conduct the following real estate business services: real estate brokerage, real estate valuation, real estate trading floor services, real estate consultancy, real estate auctioning, real estate advertising and real estate management.

A foreign investor can purchase shares of, or contribute capital to, an existing company that engages in these activities.

Foreign investors are not allowed to invest in companies that engage in the following business activities: (i) buying houses or construction works for sale, lease or hire-purchase, (ii) leasing houses or construction works for sublease, (iii) receiving an assignment of a LUR to invest in infrastructure works to assign or lease out, (iv) leasing a LUR for land with infrastructure in order to sublease it. That means
a foreign investor neither buys shares of, nor contributes capital to a Vietnamese entity engaging in these activities.

**Procedure for leasing land by foreign investors from the State**

This section discusses the lease of land by foreign developers from the State. The land authority is the People’s Committee and/or the Department of Natural Resources and Environment. The foreign developer has to apply for a land lease and a LUR Certificate.

The procedure is, generally speaking, as follows: Prior to establishing a subsidiary that is to engage in real estate development (the “foreign developer”), the foreign investor has to submit an application for lease of land together with other documents such as its incorporation certificate, explanation of the investment project, financial statements, report on land use status (if land is already used for different projects), extract of a land map, and other related documents in order to be issued with an “approval for investment” if the land is cleared, or an “approval concerning the investment location” if the land is not yet cleared. If the land is not yet cleared and the foreign investor has obtained the “approval concerning the investment location”, it is issued with a “decision to recover land” in order to enable it to coordinate, with the relevant authorities, the compensation of the existing land users and the clearance of the land. Concurrently with the compensation and clearance process, the foreign investor must enter into a contract with a land survey agency to draw up a map of the project land, submit a 1/500 master plan for approval and submit other investment project documents. Concurrently, the foreign investor has to carry out the investment procedure (i.e. has to apply for an investment certificate and set up a subsidiary, the “foreign developer”). If successful, the foreign developer will be issued with a “decision to lease land” (which sets out the rent, land use duration, purpose of the land use, etc.). The foreign developer then signs a land lease contract with the State and applies for the issuance of a LUR Certificate.

If the land has been cleared and the foreign investor has obtained the “approval for investment”, the procedure stays the same, but there is (obviously) no need to coordinate with the authorities to compensate existing land users and clear the land.
Financing and security

If the foreign developer borrows money from local credit institutions (these include branches or subsidiaries of foreign banks), the loan can be secured by a mortgage over movables, LUR and buildings. If the foreign developer borrows from a foreign bank, it can only provide a mortgage over movables as security. A mortgage over LUR and buildings is not permitted if the lender is a foreign bank without a presence (branch or subsidiary) in Vietnam. The foreign lender can, however, obtain security by entering into a warranty agreement with a local bank (who could receive a mortgage over LUR and/or buildings from the borrower as collateral). As the main assets of a developer are likely to be the LUR and the buildings constructed on the land, this puts a material constraint on the ability of the developer to obtain financing from overseas.

A mortgage over LUR or construction works on the land must be notarized at the Notary Office. Also, security over such property is required to be registered with the Land Use Rights Registration Office (under the Department of Natural Resources and Environment) of the province or city where the land is located. The security transaction concerning the LUR and buildings is valid against third parties from the time of registration (i.e. from the time that a valid application file is received and accepted by the Land Use Rights Registration Office) until it is cancelled. The registered security interest supersedes an unregistered security interest and gives priority of payment on a “first to register” basis.

Establishment of a subsidiary (“foreign developer”) in Vietnam

Market access

A foreign investor investing for the first time in Vietnam must obtain a permit (so-called “investment certificate”), which serves concurrently as the business registration certificate of the subsidiary (i.e. as evidence that the subsidiary was established).

A foreign developer can carry out more than one investment projects at the same
time. If a foreign developer has a new investment project, a new investment certificate has to be applied, but it is unnecessary for the foreign investor to establish a new subsidiary. Property development is a so-called “conditional sector”, which means the licensing authority has to obtain various opinions on the land issues (which tends to be the most complicated part), the feasibility of the investment project, the financial capacity of the investor, etc.

Real estate business is not covered by Vietnam’s WTO commitments. The laws of Vietnam allow foreign investors to invest in the creation of houses or construction works for sale, lease or hire-purchase, and in infrastructure works on leased land in order to lease out the infrastructure once it is completed. Foreign investors are also permitted to conduct the following real estate business services: real estate brokerage, real estate valuation, real estate trading floor services, real estate consultancy, real estate auctioning services, real estate advertising and real estate management.

A foreign investor can set up a subsidiary that engages in these activities. Foreign investors are not allowed to set up a subsidiary that engages in the following business activities: (i) buying houses or construction works for sale, lease or hire-purchase, (ii) leasing houses or construction works for sublease, (iii) receiving an assignment of a LUR to invest in infrastructure works to assign or lease out, (iv) leasing a LUR for land with infrastructure in order to sublease it.

**Capital requirement**

**Legal capital:**

The Vietnamese subsidiary of the foreign investor must have a legal capital (minimum registered equity) of at least VND 20 billion if it is to engage in the creation of houses or construction works for sale, lease or hire-purchase, or in infrastructure works on leased land in order to lease out the infrastructure once it is completed. The existence of sufficient amounts is to be proved as follows:

- Minutes of capital contribution from founding shareholders (in case of a joint stock company) or minutes of capital contribution from founding members (in
case of a multi members LLC) or decision of the owner on injection of capital (in the case of a single member LLC of which the owner is an organization) or letter of registration of investment capital by the enterprise owner (in the case of a single member LLC of which the owner is an individual).

› If the legal capital is contributed in cash: a certificate from a commercial bank licensed to operate in Vietnam, regarding the amount deposited by the founding shareholders/members, is required

› If the legal capital is contributed in kind: a certificate from a valuable licensee to operate in Vietnam is required

Financial capacity of the investor:

› In addition to the legal capital requirement, the investor of a residential housing project must have sufficient own (equity) capital, which can be used for the implementation of the project. Equity capital is the equity of the investor calculated up to the year immediately preceding the year in which the investor implements the project and is confirmed in the audited financial statements of the investor.

› For a residential housing project, the investor is required to have equity capital not be less than 15% of the total investment capital of the approved project (if the project uses less than 20 hectares of land) and not less than 20% of the total investment capital of the approved project (if the project uses 20 or more hectares of land). The investment capital of a project shall be determined in accordance with the current laws of Vietnam on management of costs of investment and construction. The existence of sufficient amounts is to be proved as follows:

› If the capital consists of Vietnamese dong or a foreign currency, the commercial bank where the enterprise has opened its account must certify the balance in the deposit account of the enterprise, and the certificate must show a date that is within 30 days prior to the date of lodging the application file for project approval.

› If the capital consists of other assets, there must be a certificate from a valuable operating in Vietnam on the results of valuing such assets of the enterprise, and the certificate must be valid until the date of lodging the application file for project approval.
Application procedure for the issuance of an investment certificate

According to the law, the investment certificate should be issued within 15 - 45 working days from the receipt of the application file but in practice, the issuance of the investment certificate may take several months or more if a project involves the use of land. The time frame also depends on the nature and scale of the investment project, its feasibility, the financial capacity of the foreign investor as well as the status of the land where the investment project is to be implemented.

Construction-related approvals

Before implementation of works construction, the foreign developer must supply a dossier to the relevant People’s Committee (after consultation with the Department of Construction) explaining the socio-economic efficiency of the investment project. A works construction investment project must satisfy the following principal requirements: Besides of the socio-economic development planning, the branch development planning and the construction planning; having an appropriate designing scheme and technological scheme; ensuring safety in the construction, operation, exploitation and use of the work, safety in fire and explosion prevention and fighting and environmental protection; and ensuring the socio-economic efficiency of the project.

The dossier includes:

› **Explanatory section:** objectives, location, size, capacity, technology, economic-technical solutions, capital source and total investment capital, investor and project management form, investment form, duration, efficiency, fire and explosion prevention and fighting and environmental impact assessment.

› **Basic design:** explanation and drawings demonstrating architectural solutions; size, main structure; site plan, elevation and cross section of the work; technical solutions and construction solutions; technology, equipment and facilities of the work, main category of construction materials used in works construction.
Implementation of a works construction investment project

After the works construction investment project is evaluated, assessed and approved by the relevant authorities, the foreign developer must create the technical designs for the project. A works construction design includes technological plans, utility, architectural plans, lifetime of the work, structure and technical plans, fire and explosion prevention and fighting plans, plans on high efficiency energy use, environmental protection solutions, and total cost estimates and construction cost estimates compatible with each construction designing step.

The construction design steps are as follows: basic design (including explanatory section and drawing section), technical design and working drawing design. Depending on the scale and nature of the particular construction of works, the design for construction of works may be formulated in: one step (comprising working drawing designs), two steps (comprising basic design and working drawing design) or three steps (comprising basic design, technical design and working drawing design).

Construction permit

The foreign developer must obtain a construction permit before beginning works construction. The application dossier includes in particular: application, LUR certificate, drawing designs showing horizontal surface, sectional section, main vertical sections and foundations of the works; diagram of the position or route of the construction works; diagram of the technical system and connecting points for power supply, water supply and rain water or sewage discharge. The competent authority to issue construction permits for projects with foreign-invested capital is the People’s Committee of the province or city where the construction project is located.
Completion of construction works and grant of construction works ownership certificate

A developer must perform the following upon completion of construction works:

› Report to the provincial or district People’s Committee on the project result;
› Complete files and documents for archiving as stipulated by lawss;
› Check the construction works;
› Deliver technical and social infrastructure works to the local authorities in accordance with the contents of the approved project or approval for investment;
› Send an accounting finalisation report to the competent authority;
› Conduct procedures for the issuance of ownership certificates for construction works, housing units or other buildings within the project;
› Co-ordinate with the local authority to resolve outstanding issues regarding the administrative management within the project;
› Organise management and operation of construction works which are not handed over to and under management of the local authority;

The application for issuance of ownership certificate of construction works within the project comprises: written request for being granted a construction works ownership certificate; investment certificate; the decision approving or confirming the investment; construction permit; LUR certificate; receipt of fulfillment of financial obligations; diagrammatic drawing of the construction work.

Persons who can purchase residential housing in Vietnam

After construction is completed, the foreign developer may, if its investment certificate allows, sell the entire complex, single units or blocks of units to purchasers who are permitted to own residential housing in Vietnam. The purchaser will receive a residential housing ownership certificate from the competent authority.

Certain foreigners are eligible to purchase residential housing. However, they have to transfer the ownership after 50 years at the latest.
The following persons may purchase residential housing:

- Vietnamese domestic organizations and individuals (regardless of either the place of business registration or the place of permanent residence).
- Vietnamese residing overseas who are permitted to reside in Vietnam for a duration of 3 months or more are entitled to own housing in Vietnam this person and his or her family to live in. These persons are: (i) a person with Vietnamese nationality; (ii) a person of Vietnamese origin who: returns to Vietnam for direct investment; whose work has contributed to the country; is a scientist, cultural activist or has special skills needed by a body or organization of Vietnam; and is working in Vietnam; whose husband or wife is a Vietnamese citizen living in Vietnam.
- Any person of Vietnamese origin who is issued by the competent Vietnamese authority with a visa exemption certificate and permitted to reside in Vietnam for a duration of 3 months or more is entitled to own one separate residence or one apartment in an apartment block in Vietnam for this person and his or her family members to live in.
- Foreign individuals who must be currently living in Vietnam and must have permission from the competent State body of Vietnam to reside in Vietnam for a period of one or more years, and must not be in the category of persons entitled to diplomatic or consular immunity and privilege as stipulated by the law of Vietnam, are entitled to own, at any one time, one apartment in an apartment building of a project for development of commercial residential housing.

These foreign individuals are:

- A foreign individual with a direct investment in Vietnam or who is hired by an enterprise currently operating in Vietnam to hold a managerial position;
- A foreign individual whose contribution to Vietnam has been rewarded with a decoration or medal from the President of the Socialist Republic of Vietnam; a foreign individual who has made a special contribution to Vietnam as stipulated in a decision of the Prime Minister of the Government;
- A foreign individual currently working in the socio-economic sector having a university or higher equivalent qualification and being a person having special technical knowledge or technical skills which Vietnam requires;
› A foreign individual married to a Vietnamese citizen.
› Foreign organizations have an investment certificate issued by the competent State body of Vietnam and for a demand of residential housing for people working at such enterprise. These foreign organizations are entitled to own one or a number of apartments in an apartment building of a project for development of commercial residential housing in Vietnam.

Duration of ownership of residential houses in Vietnam by foreign organizations and individuals:

› Foreign individuals are permitted to own a residential housing unit for a maximum period of 50 years as from the date of issuance of the residential house ownership certificate. Such foreign individual must sell or donate his or her residential house within 12 months from the date of expiry of the period of ownership of such house in Vietnam.
› Foreign organizations are permitted to own a residential house for a period corresponding to the duration stipulated in its investment certificate including any extended duration.

The sale of a housing unit to a qualifying purchaser will be accompanied by a transfer (via the State) of the LUR to the associated land to the purchaser. Accordingly, Vietnamese purchasers are entitled to a stable and long-term land allocation. Foreigners are entitled to a LUR in the form of a “lease with lump-sum payment of the rent” for the duration of the ownership of the residential housing. The LUR certificate recognizes the purchaser’s ownership of the residential housing as well as the purchaser’s right to use the associated land.

Procurement of capital for the construction of residential housing

An investor can procure capital from the following sources: capital of the investor itself; capital contributed from a joint venture or business co-operation with other organizations and individuals; loans provided by credit institutions; payments made in advance by purchasers.
If the investor asks purchasers for an advance payment: The investor may only
perform if the technical design of the residential housing has been approved and
the construction of the foundation has been completed. The total amount of money
arisen before delivery of the residential housing to the purchasers must not exceed
70% of the value of the residential housing specified in the contract. A “contract
for sale of residential housing formed in the future” can be entered into only after
notice has been given 15 days in advance by the developer to the Department of
Construction of the locality of the project.

Warranty with regard to residential housing

A developer selling residential housing has the following obligations after the sale:
settlement of breakdowns, repairing and replacement of damaged or defective
residential housing structures or equipment that does not operate normally, unless
the deficiency was caused by a fault of the residential housing user.

The warranty period or defects liability period is as follows: (i) 60 months or more
in respect of apartment buildings with 9 floors or more; (ii) 36 months or more in
respect of apartment buildings with 4 to 8 floors; and (iii) 24 months or more in
respect of other apartment buildings.

Lease of residential housing

Property developers often cannot sell to foreigners as Vietnamese law allows
foreigners to own an apartment only in very specific cases (and even in these cases,
the foreigner has to give up ownership after 50 years at the latest). Developers
therefore try to lease out the apartments and design the lease contract with an aim
to mirror a sale as closely as possible. This creates rather complicated legal issues: If,
e.g., the apartment burns down, the lease terminates and the lessee has the right to
claim a (partial) refund of the rent paid in advance (if the apartment burnt down due
to no fault of the lessee). The property developer, however, considers the apartment
to be sold (which it is only commercially, not legally) and the risk of deterioration of
the apartment to belong to the “purchaser”. Furthermore, the developer remains,
vis-à-vis the State, liable for taxes attached to the property as it continues to own it.
Successful together

Chapter VII
About us
As an integrated professional services firm, Rödl & Partner is active at 108 wholly-owned locations in 50 countries. Our clients trust 4,500 colleagues in the service lines audit, legal, management and IT consulting, tax consulting as well as tax declaration/BPO.

The history of Rödl & Partner goes back to its foundation as a solo practice in 1977 in Nuremberg. Our aspiration to be on hand wherever our internationally-active clients are led to the establishment of our first, own offices, commencing with Central and Eastern Europe in 1989. Alongside market entry in Asia in 1994, the opening of offices in further strategic locations followed, in Western and Northern Europe in 1998, USA in 2000, South America in 2005 and Africa in 2008.

Our success has always been based on the success of our German clients: Rödl & Partner is always there where its clients see the potential for their business engagement. Rather than create an artificial network of franchises or affiliates, we have chosen to set up our own offices and rely on close, multidisciplinary and cross-border collaboration among our colleagues. As a result, Rödl & Partner stands for international expertise from a single source.

Our conviction is driven by our entrepreneurial spirit that we share with many, but especially German family-owned companies. They appreciate personal service and value an advisor they see eye to eye with.

Our ‘one face to the client’ approach sets us apart from the rest. Our clients have a designated contact person who ensures that the complete range of Rödl & Partner services is optimally employed to the client’s benefit. The ‘caretaker’ is always close at hand; they identify the client’s needs and points to be resolved. The ‘caretaker’ is naturally also the main contact person in critical situations.

We also stand out through our corporate philosophy and client care, which is based on mutual trust and long-term orientation. We rely on renowned specialists who think in an interdisciplinary manner, since the needs and projects of our clients
cannot be separated into individual professional disciplines. Our one-stop-shop concept is based on a balance of expertise across the individual service lines, combining them seamlessly in multidisciplinary teams.

**What sets us apart**

Rödl & Partner is not a collection of accountants, auditors, lawyers, management and tax consultants working in parallel. We work together, closely interlinked across all service lines. We think from a market perspective, from a client’s perspective, where a project team possesses all the capabilities to be successful and to realise the client’s goals.

Our interdisciplinary approach is not unique, nor is our global reach or our particularly strong presence among family businesses. It is the combination that cannot be found anywhere else – a firm that is devoted to comprehensively supporting German businesses, wherever in the world they might be.
Our services in Vietnam

Company setups

Our experienced national and international lawyers perform the setup of companies such as:

› 100% foreign-owned companies
› Joint ventures
› Branches
› Representative Offices

The legal environment requires an understanding of not only the law but also about the business that will be conducted. We work in close cooperation with our clients and the authorities in order to gain sufficient investment licenses.

Legal and tax advice on foreign investments

Globally active companies have high demands. We provide professional services without restrictions throughout the world. We structure our client’s business not just legally but also tax-wise nationally and internationally. Our tax advisors are highly skilled in the area of cross-border tax structuring.

Contract negotiations and setups, contract enforcement

A crucial part of doing business in Vietnam depends on negotiation skills and abilities. Our lawyers have the necessary skills that are needed in order to come to a favorable yet sustainable outcome. We assist our clients throughout the whole process of contract management from first negotiations to the final execution of the contract and, if necessary, the enforcement of contracts.

Mergers and Acquisitions

Where businesses are planning to merge or one company acquires another one, a number of requirements have to be thought of, legally as well as tax-wise. Certain, particularly financial risks have to be determined and evaluated. Our experienced
team of lawyers and tax consultants performs due diligences and can advise on the risks and opportunities that a merger or takeover comes with.

**Accounting Services**

Accounting procedures are a necessity for any company. In Vietnam, a number of requirements have to be fulfilled and to be thought of. We offer accounting services through our accounting firm. We, at Rödl & Partner, understand that our clients want to focus on their business. Our accountants take over the whole accounting for companies and work closely with the clients’ accounting department in its home country.

**Labor law and expatriate services**

Our labor law specialists assist with full services starting from the application for work permits to the execution of employment contracts. Additionally we offer our international clients special expatriate services where we focus on the placements to Vietnam from overseas and vice versa.

**Compliance Health Check**

The legal and tax regulations in a rapidly growing country like Vietnam, are subject to permanent, partly substantial, changes. Incorporated companies have to comply with new or amended regulations they might not be aware of. Rödl & Partner targets this issue with a quick Compliance Health Check. Undergoing such check, companies can see whether or not they comply with the main legal and tax requirements.

**Audit**

Auditing services are performed through a close cooperation with auditing firms that are specialized in audits of international companies. These auditing firms have been picked carefully to assure they fulfill the same high standard that our clients expect from ourselves.
Contact

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Each and every person counts” – to the Castellers and to us.

Human towers symbolise in a unique way the Rödl & Partner corporate culture. They personify our philosophy of solidarity, balance, courage and team spirit. They stand for the growth that is based on own resources, the growth which has made Rödl & Partner the company we are today. „Força, Equilibri, Valor i Seny” (strength, equilibrium, valour and common sense) is the Catalan motto of all Castellers, describing their fundamental values very accurately. It is to our liking and also reflects our mentality. Therefore Rödl & Partner embarked on a collaborative journey with the representatives of this long-standing tradition of human towers – Castellers de Barcelona – in May 2011. The association from Barcelona stands, among many other things, for this intangible cultural heritage.