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Doing Business In... 2021

Vietnam
Mark Oakley, Hieu Pham,
Leif D. Schneider and Huyen Pham
ACSV Legal

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Law and Practice

Contributed by:

Mark Oakley, Hieu Pham, Leif D. Schneider and Huyen Pham
ACSV Legal see p.24



CONTENTS

1. Legal System	p.3	6. Competition Law	p.18
1.1 Legal System and Judicial Order	p.3	6.1 Merger Control Notification	p.18
2. Restrictions to Foreign Investments	p.3	6.2 Merger Control Procedure	p.18
2.1 Approval of Foreign Investments	p.3	6.3 Cartels	p.18
2.2 Procedure and Sanctions in the Event of Non-compliance	p.4	6.4 Abuse of Dominant Position	p.19
2.3 Commitments Required from Foreign Investors	p.4	7. Intellectual Property	p.20
2.4 Right to Appeal	p.5	7.1 Patents	p.20
3. Corporate Vehicles	p.5	7.2 Trade Marks	p.20
3.1 Most Common Forms of Legal Entities	p.5	7.3 Industrial Design	p.21
3.2 Incorporation Process	p.8	7.4 Copyright	p.22
3.3 Ongoing Reporting and Disclosure Obligations	p.9	7.5 Others	p.22
3.4 Management Structures	p.9	8. Data Protection	p.22
3.5 Directors', Officers' and Shareholders' Liability	p.10	8.1 Applicable Regulations	p.22
4. Employment Law	p.11	8.2 Geographical Scope	p.23
4.1 Nature of Applicable Regulations	p.11	8.3 Role and Authority of the Data Protection Agency	p.23
4.2 Characteristics of Employment Contracts	p.11	9. Looking Forward	p.23
4.3 Working Time	p.11	9.1 Upcoming Legal Reforms	p.23
4.4 Termination of Employment Contracts	p.12		
4.5 Employee Representations	p.14		
5. Tax Law	p.14		
5.1 Taxes Applicable to Employees/Employers	p.14		
5.2 Taxes Applicable to Businesses	p.15		
5.3 Available Tax Credits/Incentives	p.16		
5.4 Tax Consolidation	p.17		
5.5 Thin Capitalisation Rules and Other Limitations	p.17		
5.6 Transfer Pricing	p.17		
5.7 Anti-evasion Rules	p.18		

1. LEGAL SYSTEM

1.1 Legal System and Judicial Order

The legal system in Vietnam follows the civil law tradition and is noticeably influenced by continental European codifications of civil law (particularly the French Civil Code). The Vietnamese legal system consists of a Constitution, codes, laws, ordinances, decrees, decisions, circulars, directives and resolutions. Legal texts are published in the Official Gazette. Decrees and circulars contain guidelines to implement laws, codes and ordinances. Local governmental agencies may also issue official letters further guiding the implementation of any of these pieces of legislation.

Vietnam is a one-party socialist republic, and the judiciary falls under the leadership of the Communist Party of Vietnam and is accountable to the National Assembly. Judges and procurators are members of the Party. The judicial order of Vietnam's court system is separated into the local, regional and national levels. Usually, a civil case brought before a competent Vietnamese court will undergo a maximum of two instances: the first instance and the appellate instance. The Constitution of Vietnam governs the Vietnamese judicial system, together with the Law on the Organisation of People's Courts and the Law on the Organisation of People's Procuracies.

The Supreme People's Court is the highest court. Below that, there are three levels of People's Courts: the High People's Courts, the Provincial-Level People's Courts and the District-Level People's Courts. The High Courts in Hanoi, Da Nang and Ho Chi Minh City are appellate and cassation courts, and responsible for the northern, central and southern regions of the country, respectively. The Provincial Courts are both trial and appellate courts, and the district courts are trial courts.

Business, commerce or labour-related cases in which one party or the related asset is located offshore, or that require judicial assistance by an overseas representative agency of Vietnam, a foreign court or other foreign competent authority, are generally subject to the jurisdiction of the Provincial Court.

2. RESTRICTIONS TO FOREIGN INVESTMENTS

2.1 Approval of Foreign Investments

Foreign investment into Vietnam requires approval and licensing by the local authorities, the scope and shape of which largely depend on the nature of the envisaged business. The (new) 2020 Law on Investment, which entered into force as of 1 January 2021, retains clear distinction between a foreign and Vietnamese investor. A variety of procedures apply to foreign investors, defined by the volume and type of their desired Vietnamese engagement. A foreign investor is required to register their investment or to obtain certain documents before they can start with the investment project.

According to the law, a foreign investor is, or is considered as such, with respect to investment conditions and procedures:

- an individual with foreign nationality;
- an organisation incorporated in a foreign jurisdiction; or
- a Vietnamese-incorporated enterprise in the following cases:
 - (a) more than 50% of its charter capital is held by a foreign investor(s), or a partnership has a majority of partners being foreign individuals in the case of a partnership enterprise;
 - (b) more than 50% of its charter capital is held by an enterprise(s) prescribed in point (a) above;

- (c) more than 50% of its charter capital is held by a foreign investor(s) and an economic organisation(s) prescribed in point (a) above.

From the perspective of a foreign investor, Vietnamese investment law makes a general distinction between “conditional/restricted” and “unconditional/unrestricted” business lines. The conditional/restricted ones, in which certain additional requirements may apply, are designed to regulate foreign activities in Vietnam in industries that are considered “sensitive” or “crucial to the national interests of Vietnam”. Some restricted business lines may not be performed under foreign ownership at all.

Under the 2020 Law on Investment, there are currently 227 conditional business lines, which include:

- accounting services;
- insurance services;
- securities trading;
- betting and casinos;
- oil and gas;
- healthcare-related businesses;
- businesses related to transport;
- real estate businesses;
- educational businesses;
- banking and finance-related businesses; and
- agriculture-related businesses

A foreign investor in the market to purchase an existing (Vietnamese) entity – depending on the nature and scope of its business – may need to obtain prior approval of the Department of Planning and Investment (DPI) (“M&A Approval”) before capital can be contributed or acquired in an existing enterprise.

2.2 Procedure and Sanctions in the Event of Non-compliance

A foreign investor generally needs to undergo a two-step procedure in order to obtain a licence to operate in Vietnam. In a first step, the investor licenses their investment into Vietnam (obtaining an Investment Registration Certificate). In the second step, through the issuance of the Enterprise Registration Certificate (ERC), a new (foreign-owned) company is born.

For local investment by means of M&A, there is a special rule set, which requires the investor to announce the acquisition to the competent authorities and obtain their approval.

Due to the close monitoring of the local business landscape through the competent authorities (DPI) and a tight grip of the State Bank of Vietnam (SBV) on compliance with strict foreign exchange regulations, investing in Vietnam without authoritative approval is hard to imagine in practice.

Should a foreign investor find a way to pour their money into a local business illegally, possible consequences may include mandatory termination of part of, or the entire operations of, the investment project.

2.3 Commitments Required from Foreign Investors

Commitments from investors (in addition to the investment capital they promise to deploy during their engagement in Vietnam) are not generally regulated. In practice, there are situations where the Vietnamese licensing authority will make its discretionary agreement dependent on certain commitments from the investor (eg, contribution to infrastructure developments in the location of the business). There are, however, no generally imposed commitments for foreign investors, outside the general obligation to comply with all

laws of the Socialist Republic of Vietnam while doing business there.

2.4 Right to Appeal

There may be possibilities for a foreign investor to challenge the negative decision of an investment-related authority (mostly the DPI) in court under the 2015 Law on Administrative Procedures. However, such a challenge is not likely to have a positive result. In fact, only when the investor is able to prove that the decision affects their legitimate rights and benefits. This should be difficult as, due to the absence of relevant laws and regulations, any dispute over the requirements of an investment endeavour or the legality of an intended corporate structure and business model will generally be solely governed by the discretion of the competent authority.

Vietnamese (investment) law therefore grants to the authorities a high level of decision power, which can pose an obstacle to the feasibility or efficacy of some investment types. In these situations, in which the DPI or another authority communicates that it deems an investment to be problematic, investors will often be given the chance to – through their local counsel and advisers – reiterate their intentions and amend their business plans according to the DPI's agreement.

3. CORPORATE VEHICLES

3.1 Most Common Forms of Legal Entities

A foreign investor will usually choose one of two main types of legal entities to carry out a project. Currently, typical options for a foreign-owned legal entity include:

- a limited liability company (LLC) in the form of a single-member limited liability company or

- a multiple-member limited liability company; and
- a shareholding or joint-stock company (JSC).

There are two other types of common commercial presences that could be established to represent foreign investors in Vietnam:

- the representative office; and
- the branch.

The activities these presences can perform depend on treaties between Vietnam and the country in which the head office is based. For business activities that are outside the scope of a treaty or where no treaty exists, an authorisation from the competent Vietnamese authorities is needed.

Considering that these are not independent legal entities, the parent company is liable for various aspects, such as debts and obligations. Legal claims can be brought against the parent company.

Representative Office

If a foreign investor desires to have a presence in Vietnam, but does not wish, or is not ready yet, to invest in Vietnam, it may set up a representative office if certain conditions are met. In general, setting up a representative office is quicker and less complicated than acquiring licences and approval for the setting up of a commercial company.

One of the conditions is that the business of the foreign investor must have been in operation for at least one year before the foreign investor can submit an application.

Vietnamese law prohibits a representative office from performing activities that generate profit. It cannot conclude agreements for selling or providing products, but it can, for example, conduct

business enhancement or marketing activities such as displaying goods or services at its office. A representative office can also play an important role in facilitating operations and business objectives on behalf of the offshore company by liaising with the authorities.

The head of the representative office can sign economic or commercial contracts with businesses in Vietnam on behalf of the offshore company on the condition that there is a specific power of attorney from the offshore company for each contract. A representative office can employ foreign and Vietnamese staff to work at the representative office in accordance with the law of Vietnam.

Branch

Foreign investors in certain business sectors – such as banking, IT, construction, franchising, non-life insurance and some securities services – could set up a branch as an alternative to establishing a new company. However, certain requirements need to be met. A foreign investor must have operated its offshore business for at least five years before the foreign investor can establish a branch in Vietnam.

Branches are permitted to conduct a wide range of commercial activities, including the purchase and sale of goods, unless this is specifically prohibited in the licence granted to the branch or under the local laws.

As these latter types of engagement do not represent independent legal entities, they can be neglected in the following.

Definitions of Independent Legal Entities

- A single-member limited liability company (“single-member LLC”) is an enterprise under the ownership of an organisation or individual;
- a multiple-member limited liability company (“multiple-member LLC”) is an enterprise

under the ownership of two to 50 organisations or individuals; and

- a JSC is an enterprise with at least three shareholders. There is no restriction on the maximum number of shareholders. Shareholders may be organisations or individuals.

Liability

- The single-member LLC’s owner is liable for debts and other liabilities up to the single-member LLC’s charter capital;
- the members of a multiple-member LLC are liable for debts and other liabilities to the extent of their contributed capital; and
- the shareholders of a JSC are liable for the debts and other liabilities of the JSC to the extent of their own contributed capital.

Minimum Investment Capital

General

There is no defined minimum investment capital in unconditional businesses. However, a certain amount of capital contribution might be required in particular fields, where investment requires a high cash flow or poses large financial liabilities and risks upon the investment vehicle:

- the charter capital of a single-member LLC and a multi-member LLC shall be the total value of capital contributed by the member(s) to the company;
- the charter capital of a JSC consists of the total aggregated par value of shares of all classes sold by the company; and
- at the time of the registration of establishment, the charter capital is the total value of assets or capital that the member(s) undertake to contribute to the LLC, or the total aggregate par value of shares of all classes that have been registered for subscription and stated in the charter of the company.

Capital contribution can be in the local currency (Vietnamese dong, or VND), freely convertible

foreign currency, gold, land use rights, intellectual property rights (IPR), technology, technical know-how, or other assets that can be valued in VND.

Capital contribution time limit

- The owner of a single-member LLC and the members of a multi-member LLC must contribute assets or capital as registered with the relevant authorities within 90 days from the date of issuance of the ERC.
- The shareholders of a JSC must pay, in full, the number of shares registered for subscription within 90 days from the issuance date of the ERC unless the company's charter or share subscription agreement stipulates a shorter time limit.
- If the capital is not contributed within the required period of 90 days or as agreed, the following procedure will apply.
 - (a) The owner of a single-member LLC must register an adjustment of the charter capital equal to the actual value of the contributed capital within 30 days from the last day on which the charter capital should have been fully contributed. The owner is responsible to the extent of the capital they have undertaken to contribute for financial obligations of the company arising before the adjustment of the charter capital is registered.
 - (b) The member of a multiple-member LLC who fails to contribute all the capital as undertaken automatically ceases to be a member of the company; the member of a multiple-member LLC who fails to pay part of the capital as undertaken shall have the rights corresponding to the capital already paid. The capital of a multi-member LLC that has not been contributed will be offered for sale pursuant to the decision of the member's council. A multi-member LLC must register adjustment of the charter capital in the aforesaid cases within 30 days from the last

day on which the charter capital should have been fully contributed.

- (c) The shareholder of a JSC who fails to contribute capital for all the number of shares registered automatically ceases to be a shareholder of the company; and the shareholder of a JSC who fails to pay for part of the number of shares registered for subscription will have rights in proportion to the number of shares paid.
- (d) If shares have not been fully or partially paid, the shareholder of a JSC who did not pay in full cannot assign the right to purchase the number of unpaid shares to someone else, and the shares of a JSC that have not been paid for are deemed unsold shares and the board of members (BOM) has the right to sell such shares; and a JSC must register adjustment of the charter capital and founding shareholders in the aforesaid cases within 30 days from the last day on which the shares should have been fully paid.

Management Structure/Corporate Governance

The 2020 Law on Enterprises has set out different management structures for the various legal entities.

- With respect to a single-member LLC, the management structure shall include a president or a members' council and a director or general director if owned by an organisation, or a president and a director or general director if owned by an individual. As for those owned by a state-owned enterprise (SOE), the structure must also include an inspection committee.
- With respect to a multiple-member LLC, the management structure shall include a members' council, a chairperson of the members' council and a director or general director. As for the SOEs or their subsidiaries, the struc-

ture must also include an inspection committee.

- With respect to a JSC, except for public ones that may need to be managed under another structure if stipulated so in the laws on securities, the management structure shall include a general meeting of shareholders (GMS), a BOM, and a director or general director. The structure must also include an inspection committee if it has at least 11 shareholders or the institutional shareholder(s) hold(s) at least 50% of the total shares. Otherwise, at least 20% of the BOM's members must be independent and there must be an audit committee under the BOM.

The director or general director is the person who manages the day-to-day business operations of a Vietnamese company. Vietnamese law does not set out the difference between a director and general director. In practice, an enterprise can opt to appoint this person as either director or general director, based on its business models and management requirements. They are usually also the (only) person endowed with legal representation rights for the company, which makes them the entity's most important executive organ in practice.

Within the permissible realm of Vietnamese company and investment laws, investors can structure their investment vehicle according to their needs and preferences. Their choices will be recorded in the company charter, which will also make denominations about the timing and procedure of (obligatory, annual) board meetings and other organisational standards.

3.2 Incorporation Process

A foreign investor must generally apply for an investment registration certificate (IRC), which is issued by the competent DPI before an economic organisation can be incorporated. The economic organisation shall be incorporated in

accordance with the laws on enterprises or other local laws corresponding with its form.

Enterprise Registration Certificate

All private business enterprises in Vietnam must have an ERC, and some also require an IRC. For instance, domestic investors or enterprises where foreign investors hold 50% or less of equity only need an ERC for a newly established enterprise. The ERC is issued by the licensing authority. It contains information about the company registration, such as the name of the enterprise and enterprise code number, which serves as its identification number for its entire corporate life cycle; address of the head office of the enterprise; full name; permanent residential address; nationality and identity card or passport number of legal representatives; and charter capital.

Investment Registration Certificate

Foreign investors and companies in which foreign investors hold more than 50% of equity, in addition to the ERC, may be required to obtain an IRC for a newly established enterprise.

Foreign investment in an existing enterprise through an M&A transaction does not require an IRC. Instead, the application for an M&A Approval may be required in certain cases.

The IRC is also issued by the licensing authority. The IRC is required if a foreign investor, or an enterprise treated as a foreign investor, carries out an investment project by establishing a company in Vietnam. When investors apply for an ERC, the IRC must be included in the application file. It contains information registered by the investors about an investment project, such as information of the investor, place of implementation of the investment project, scale and objective of the project.

Timeline and Required Documentation

IRC

The procedure, including the translation and execution of all documents, of the application dossier for an IRC might take from two to four months to prepare for submission.

Investors will need a variety of documents translated, legalised and notarised to be included in the application file. Documents such as a copy of their passport, financial documents and the investment proposal may also need to be notarised.

Once the file has been submitted, the IRC should, in principle, be issued within 15 days of the submission of the complete file. Practically, it might take longer.

ERC

In general, it takes about three business days to obtain an ERC. In practice, it might take longer.

Post-Establishment Formalities

Once the ERC has been obtained, several administrative formalities need to be fulfilled within the respective time limits, such as the payment of licence tax and publication on the national enterprise registration information portal.

3.3 Ongoing Reporting and Disclosure Obligations

Tax Declarations

Companies have to submit monthly or quarterly reports to the regional tax office for VAT returns, corporate income tax (CIT) returns, personal income tax (PIT) returns and a report of using the VAT invoices. Reports for VAT and CIT may also need to be submitted on a receipt basis in certain circumstances, such as in transferring real estate. The company has to pay VAT, CIT and PIT by the deadline when the reports have to be submitted. If the reporting or payment is not done before the deadline, a fine can be imposed.

Auditing

Foreign-owned entities, credit institutions, insurance enterprises, public companies and institutional securities traders must be audited at least once a year, and the audit must be completed within 90 days from the end of the calendar year. All auditing activities will follow the Vietnam Accounting Standards, which differ from the International Financial Reporting Standards (IFRS). These Vietnamese standards are issued by the Ministry of Finance based on the international standards on auditing.

Vietnam is expected to adopt the IFRS shortly, which will likely impact the current way of doing business in Vietnam.

3.4 Management Structures

The two most common legal entities in Vietnam are (i) the limited liability company and (ii) the joint-stock company. They are distinguished by a defined management structure under the Vietnamese Law on Enterprises, which prescribes the following bodies of corporate governance.

LLC

- With respect to a single-member LLC, the management structure shall include a president or a members' council and a director or general director if owned by an organisation, or a president and a director or general director if owned by an individual. As for those owned by an SOE, the structure must also include an inspection committee.
- With respect to a multiple-member LLC, the management structure shall include a members' council, a chairperson of the members' council and a director or general director. As for SOEs or their subsidiaries, the structure must also include an inspection committee.

JSC

- With respect to a JSC, except for public ones, which may need to be managed under

another structure if so stipulated in the laws on securities, the management structure shall include a GMS, a BOM and a director or general director.

- The structure must also include an inspection committee if having at least 11 shareholders or the institutional shareholder(s) to hold at least 50% of total shares. Otherwise, at least 20% of the BOM's members must be independent and there must be an audit committee under the BOM.

The director (or general director, or GD) is the person who manages the day-to-day business operations of the company. Vietnamese law does not set out a terminological difference between a director and general director. In practice, an enterprise can opt to appoint this person as director or general director based on its business models and management requirements.

3.5 Directors', Officers' and Shareholders' Liability

Overview

As of 1 January 2018, a new Penal Code came into force, bringing Vietnamese law more in line with international standards. A broad range of Penal Code violations can lead to criminal liability for a business. Certain violations, particularly ones committed by individual employees, may not lead to criminal liability; however, they may still damage the business' reputation. It is important to note that violations on tax, competition, environment, business and trading, which are not crimes, can be administratively sanctioned both for an individual and a corporate entity. The main difference between the two systems is that the statute of limitations under the administrative procedure is much shorter, and the punishments are lower.

The Penal Code applies to foreign and Vietnamese commercial juridical persons. However, for a subsidiary, the parent company will not be

responsible as it is an independent entity, but for a representative office or branch, the parent company could be responsible as they are not independent legal entities. In the Penal Code there is no provision on criminal offences committed in a corporate group (parent and subsidiary). So, it is not yet clear under what conditions the foreign parent company could be held criminally responsible for offences committed by directors, managers or representatives of local Vietnamese entities.

If a convicted commercial juridical person is divided, separated, consolidated or merged, the succeeding corporate legal entity inherits rights and duties from the convicted corporate legal entity and will be responsible for any pecuniary penalties and damages.

The fact that a corporate legal entity is criminally liable does not exempt an individual from criminal liability.

Liability of Legal Representatives

Legal representatives may be charged with certain violations of the 2019 Labour Code regarding the dismissal or laying off of staff, forcing someone to resign, anti-competitive behaviour, or evasion of social, unemployment or health insurance payments. Further to this, it is important to realise that in Vietnamese law there is no relevant provision dealing with the liability of directors or managers for not having adopted (intentionally or negligently) measures to prevent a crime. However, according to the Penal Code, any person (with some exceptions) who conceals a crime or who knows that a crime is being prepared, being carried out, or has been carried out but fails to report it could be criminally liable.

Consequences

Depending on the offence and the person or entity having committed the offence, the punishment can be a monetary fine, restraining

measures, a forced suspension or termination of business operations, or a ban on conducting certain business activities and/or raising capital. In the case of aggravating circumstances such as recidivism, committed in a professional way or by a group, and in the case of abuse of power and position, committed in the name of an agency or organisation, punishments can be higher.

Additional measures that can be applied include:

- compulsory dismantlement of works;
- compulsory removal from Vietnam's territory;
- destruction of goods; and
- bans and confiscatory measures.

4. EMPLOYMENT LAW

4.1 Nature of Applicable Regulations Governing Law

The 2019 Labour Code, which came into effect on 1 January 2021, applies to all individuals – foreign and Vietnamese – working for Vietnamese-based organisations or Vietnamese individuals, but also to Vietnamese nationals working overseas. Exceptions to this rule exist where an international treaty to which Vietnam is a party states otherwise.

The 2019 Labour Code sets out the provisions to protect the rights of employees and employers. Its provisions define the nature of the employment relationship and lists the permissible clauses of labour contracts.

Labour Contracts

A labour contract sets out an agreement between an employee and an employer on a paid job, that details the wage, the working conditions and the rights and obligations of each party. An agreement, though agreed by the parties to be named otherwise, still remains a labour contract so long as it has contents demonstrating a paid job

with wage, administration, management and/or supervision by a party.

Minimum Wage

The wage rate of an employee working in the private sector must not be lower than the minimum wage rate stipulated by the government. There are various regional minimum wage rates, which might have to be considered in the investment decision when scouting for ideal locations within Vietnam. The minimum wage rate of a region links to its respective cost of living and the pricing structure of the commercial environment, both of which are under regular review by the government.

4.2 Characteristics of Employment Contracts

Under Vietnamese law, there are two types of labour contracts:

- definite-term labour contract (term of up to three years); and
- indefinite-term labour contract (no duration defined).

Labour contracts can only be concluded and terminated in written form, except that a labour contract with a term of less than one month may be concluded and terminated verbally in certain cases. Definite-term contracts (depending on the employed individual) may not be subject to additional limitation. Generally, Vietnamese law is in favour of indefinite-term labour contracts and does not allow employers to renew definite-term labour contracts more than once with one individual.

4.3 Working Time

The regular working time is a maximum of eight hours a day and 48 hours a week. With respect to work requiring contact with dangerous and/or harmful factors, employers are responsible for

applying the work time limits in accordance with national technical regulations and related laws.

Employers are entitled to require employees to work overtime under the following conditions:

- the employee agrees; and
- overtime hours will not exceed 50% of the normal working hours per day; with a maximum of 12 hours per day, 40 hours per month and 200 hours per year.

In some special sectors and industries, such as textile and garment, leather, electronic products, aquaculture processing and telecommunications, and in extraordinary cases such as a lack of necessary workforce for urgent work, overtime is higher and capped at 300 hours per year.

An employer is required to notify the relevant Department of Labour, Invalids and Social Affairs (DOLISA) in writing to implement an overtime policy exceeding 200 hours per year.

4.4 Termination of Employment Contracts

Unilateral Termination by the Employer

An employer is entitled to unilaterally terminate a labour contract in the following circumstances:

- (a) the employee repeatedly fails to perform work in accordance with the terms of the labour contract as determined based on the assessment criteria of work performance level in the rule issued by the employer upon consulting opinions of an organisation representing employees at the grassroots level, which includes the trade union at grassroots level and other organisation of employees at an enterprise (labour union), if any;
- (b) the employee is ill or injured and remains unable to work after having received treatment for 12 consecutive months

(indefinite-term contract) or six consecutive months (definite-term contract with a duration between 12 and 36 months), and more than half of the contract duration (definite-term contract with a duration less than 12 months);

- (c) the employer, although having taken all measures to remedy the problem, has to reduce the number of jobs due to natural disasters, fire, epidemics or other force majeure reasons;
- (d) the employee fails to attend the workplace within 15 days from the expiry of the suspension of the labour contract;
- (e) the employee reaches retirement age;
- (f) the employee arbitrarily leaves their work without proper reason for five consecutive working days or more; or
- (g) the employee provides untruthful information affecting their recruitment.

In the case of (a), (b), (c), (e) and (g), the employer must send the employee a written notice of termination as detailed below; at least:

- 45 days for indefinite-term contracts;
- 30 days for definite-term contracts with a duration between 12 and 36 months; or
- three working days for definite-term contracts of less than 12 months; or three working days for termination of the contract due to illness or injury of the employee.

Unilateral Termination by the Employee

An employee may unilaterally terminate the labour contract prior to its expiry by sending a prior notice of at least 45 days for indefinite-term labour contracts, 30 days for definite-term contracts with a duration between 12 and 36 months, or three working days for definite-term contracts less than 12 months.

However, the prior notice is not required in the following cases:

- the employee is not assigned to the job or workplace, or is not provided the working conditions as agreed upon in the labour contract, except for extraordinary cases where the employer is permitted under laws to assign jobs other than those agreed in the labour contract;
- the employee is not paid in full or on time, except for force majeure cases where the payment is delayed as permitted under law;
- the employee is maltreated or is subject to forced labour or other behaviour affecting their health, dignity or honour, including sexual harassment at the workplace;
- a female employee is pregnant and must quit the job as prescribed by a competent health establishment;
- the employee reaches retirement age; or
- the employer provides untruthful information affecting the implementation of the labour contract.

Collective Labour Agreements

Vietnam also recognises the concept of collective labour agreements. These are written agreements that have been agreed between the employer and the labour collective following a collective bargaining session. The labour collective only needs a simple majority to vote in favour of the collective labour agreement. It is binding and both the employers and employees, whether starting work prior to or as from the binding date, must implement it, and comply with it, when it has been signed by legal representatives of the employer and the labour collective.

The collective labour agreements shall prevail over labour contracts and other rules of the employer if it stipulates greater rights, obligations and interests for the parties. In Vietnam, sector-specific agreements, known as industry collective labour agreements, exist. An industry collective labour agreement may also apply to a

non-member enterprise if it has a scope of application covering more than 75% of employees or enterprises in the same industry in the industrial zone, economic zone, export processing zone or hi-tech zone as decided by the competent authority.

Trade Unions

A trade union at an enterprise is the most common type of labour union in Vietnam. According to the Law on Trade Unions, the trade union is formed on a voluntary basis as a grassroots-level unit of the national trade union, and together with state agencies, and economic and social organisations, cares for and protects the legitimate and legal rights and interests of the employees at the company (labourers).

The trade union can also participate in investigating and monitoring operations of the company. All employees are entitled to form a trade union and the employer is required to acknowledge the status of a legally established trade union, and, on request, to assist with the formation and provide facilities for the trade union to function.

Both a public and private sector employer is required to contribute to a fund for trade union activities with a contribution that is equal to 2% of the employer's salary fund, based on that social insurance (SI) is paid for its employees, irrespective of whether a trade union has been established at the workplace.

Workers' Union

Aside from the trade union, employees may also establish, access and take part in operations of a workers' union at an enterprise, which is a new type of labour union introduced under the 2019 Labour Code, if granted with a registration certificate by the competent authority.

A workers' union can operate in parallel with, and with the rights and obligations equal to

those of, a trade union protecting the legitimate and adequate rights and interests of employees in the labour relationship at the enterprise. However, it cannot, at the same time, have both members who are ordinary employees and who are employees directly involving in making decisions on working conditions, labour recruitment, labour discipline, termination of labour contracts, or assigning employees to do other work.

At the time of registration, a workers' union must have at least the number of members who are the employees working at the enterprise as stipulated by the government.

4.5 Employee Representations

In addition to the powers and rights given to trade unions, it is not mandatory for employees to be represented, informed or consulted by management in Vietnam.

5. TAX LAW

5.1 Taxes Applicable to Employees/Employers

Personal Income Tax

Scope

The Personal Income Tax Law (the "PIT Law") applies, in principle, to Vietnamese and foreign individuals who are residents in Vietnam or have income sourced from Vietnam. An individual is considered a resident if they:

- (a) are present in Vietnam for 183 days or more in a calendar year or 12 consecutive months from the date of entry into Vietnam (can be checked from entry/exit stamps in their passport);
- (b) hold a temporary or permanent resident card with respect to foreigners, or a regular residential location registered as a permanent residence address in Vietnam with respect to Vietnamese citizens; or

- (c) have an irregular residential location or locations in Vietnam such as a hotel room(s) and/or leased house(s) in Vietnam with an aggregated lease term of 183 days or more in a tax year.

If these criteria are not met, an individual will be considered a non-tax resident in Vietnam. In the second and third cases, an individual may be considered a non-resident if they are present in Vietnam for less than 183 days in a tax year and able to prove that they are considered a resident of another tax jurisdiction.

Taxable Income

Generally, taxable income comprises ten main types: income from employment, business, capital investments, capital transfers, real estate transfers, winnings or prizes, royalties, franchises, inheritances and gifts.

Tax Rates (PIT)

For employment incomes of residents, a progressive system applies ranging from 5% to 35% depending on the annual or monthly taxable income. As for non-tax residents, a flat rate of 20% shall be imposed on the income derived from Vietnam.

For non-employment-related income, the rates vary from 0.1% to 20% subject to whether the taxpayer is a resident or non-resident and depending on the type of income; the way PIT is calculated also depends on the type of income.

Nevertheless, if a resident performs services but does not have a labour contract, or the labour contract is of a term under three months with payments each time amounting to VND2 million or more in total, in general 10% will be withheld and paid directly to the tax authorities.

Mandatory (Social) Insurance

Vietnamese employees and their employers are required to contribute to social insurance, healthcare insurance (HI) and unemployment insurance (UI). Foreign employees, together with their employer, are not required to contribute to UI, but are subject to SI and/or HI in certain circumstances.

The rates of SI, HI and UI contributions paid for Vietnamese employees are:

- employee – 8% SI, 1.5% HI, 1% UI, 10.5% total; and
- employer – 17.5% SI, 3% HI, 1% UI, 21.5% total.

The salary used for calculation of the contributions consists of the monthly salary rate and certain allowances prescribed in the labour contract. However, the amount of contribution is capped.

5.2 Taxes Applicable to Businesses

Corporate Income Tax

Scope

The Corporate Income Tax Law (the “CIT Law”) applies to a corporate taxpayer in Vietnam. Unlike the PIT Law, the CIT Law does not explicitly include the concept of resident or non-resident. Instead, it adopts the principle that a corporate taxpayer, whether located in Vietnam or overseas, must pay CIT for its incomes raised in Vietnam, or raised worldwide through its business facilities in Vietnam, unless otherwise stipulated in treaties to which Vietnam is a party.

For instance, if a foreign investor has a subsidiary company incorporated in Vietnam or has a permanent establishment in Vietnam, this foreign investor must pay the CIT to the Vietnamese authorities on its worldwide income earned through the Vietnamese subsidiary company or in connection with operations of the per-

manent establishment. However, the CIT Law also applies to companies without a permanent establishment in Vietnam. If this is the case, the company is only required to pay tax on income raised in Vietnam.

CIT is also imposed on earnings obtained through the trading of goods or services, or from other activities such as capital transfers, or real estate transactions.

Tax Rates

The general tax rate is 20% and applies to all companies, except for those exploring and extracting oil, gas and other rare resources, which are subject to higher tax rates. Tax incentives of a 10% or 17% CIT rate may be applied under certain conditions.

Calculation

CIT is calculated based on the taxable profit of a company. The elements needed for this calculation are:

- total revenue that is domestic or foreign sourced;
- deductible expenses;
- non-taxable income; and
- carry-forward losses and other assessable income.

For expenses to be deductible, the following criteria need to be satisfied:

- the expenses arose and are related to the activities of production and business of the enterprise; and
- the expenses are supported by complete invoices, source vouchers and/or bank statements as stipulated by law.

Fines, penalties and taxes are not deductible. Under certain conditions, and sometimes limited to a maximum duration, start-up expenses,

charitable contributions, payments to foreign affiliates (royalties, loan interest, and service fees), depreciation and amortisation of tangible and non-tangible assets, and interest expenses can be deducted; net operating losses can be carried forward for a certain amount of time.

Capital Gains Tax

It is important to realise that under Vietnamese law, gains on disposal of capital or securities in a Vietnamese entity, such as an LLC or JSC, are subject to CIT or PIT.

For a corporate entity disposing of capital or securities in a Vietnamese entity, the gain is treated as other income and will be taxed at the standard rate of 20%.

However, for a foreign corporate entity that has not had a permanent establishment in Vietnam, performs business in Vietnam for a period of under 183 days, or has not adopted Vietnamese accounting regimes or been issued with a tax code, the CIT rate is 0.1% of the proceeds when disposing of securities of a JSC; and when capital of an LLC is disposed, CIT on gains from transfers of capital will be levied at a rate of 20% on the respective income.

Foreign Contractor Tax

Foreign organisations and individuals carrying out business in Vietnam or deriving income raised in Vietnam may be subject to foreign contractor tax (FCT). Generally, FCT is comprised of CIT and VAT. The FCT rates, and the income used for calculating FCT, vary depending on the transaction and taxpayers' tax filing status.

The applicable tax rates and taxable incomes may be different from those stated above where the taxpayer fails to meet any of the following requirements:

- the taxpayer possesses a permanent establishment in Vietnam in the case of a corporate one, or is a tax resident in Vietnam in the case of an individual one;
- the taxpayer performs business in Vietnam for a period of 183 days or more; and
- the taxpayer has adopted Vietnamese accounting regimes, registered with a tax authority and been issued with a tax code.

The foreign contractors may benefit from double taxation agreements between Vietnam and their home country.

5.3 Available Tax Credits/Incentives

Tax Incentives

Vietnam grants tax incentives to its foreign investors, in order to attract more investment and to be more competitive for investors on the global stage. The existing regimes for these incentives vary greatly and differ between sectors and industries.

Industries and Sectors

Tax and land use incentives can be granted to new investment projects, or projects extended from the existing ones, in “investment-encouraged” geographical areas located across the country or business sectors, including education, healthcare, high technology, scientific research, environmental protection, infrastructural development, or projects with capital of at least VND6 trillion (in which at least VND6 trillion is paid within three years from the date the IRC or in-principle approval was granted).

Incentives are also given to producers of high-priority products, which include accessories, components and spare parts used for assembling goods in the textile and garment industry, footwear and leather industry, electronics industry, agricultural machinery industry, automobile industry, shipbuilding industry, prioritised mechanical sector and supporting products

used in hi-tech industries. Investors can also be entitled to certain incentives where investing in product distribution chains, technical or other purpose facilities or co-working spaces supporting small and medium-sized enterprises and start-ups.

Auxiliary Industrial Zone (AIZ)

Projects on the infrastructure development of an AIZ, including subzones, can be entitled to tax exemption and reduction of land rent, a land lease term of up to 70 years, and priority access to loans from the Vietnamese state, ODA funds, foreign loans under government guarantees and other kinds of loans.

Investment projects related to manufacturing supporting industry products as listed in Decree No 111/2015/ND-CP of 3 November 2015 might enjoy certain tax incentives relating to CIT, export and import duties. Additionally, these projects may have priority to participate in training or assistance programmes for start-ups, small and medium-sized enterprises, and relevant other programmes of competent authorities.

Eco-industrial Zone (EIZ)

Eco-enterprises in EIZs can enjoy preferential loans from the Vietnam Environment Protection Fund, Vietnam Development Bank and/or other financial sources related to clean industry. They will have priority to participate in technical support or investment enhancement programmes. Finally, they shall be given priority in providing information related to the technology market and the possibility of co-operating in effecting industrial symbioses in the scope of production and business activities of these enterprises.

Specific Areas

Investors who invest in areas with poor socio-economic conditions – such as areas that have weak infrastructure, lack an experienced labour

force, or are situated in remote rural areas – can qualify for tax reduction and exemption.

Tax Holidays

Tax holidays can consist of a tax rate reduction of 10% and 17% for 15 years and 10 years respectively, starting from the commencement of the operation. It can also consist of a 50% reduction for two to nine years; or consist of a tax exemption for two to four years, followed by a tax rate reduction.

Other Incentives

If they meet the relevant criteria, enterprises may qualify for participation in training or assistance programmes, and other programmes organised by the competent authorities. Qualifying enterprises may also receive preferential loans, participation in technical support or investment enhancement programmes, receive information on the technology market and co-operation opportunities, exemption from import duty on goods imported, and exemption from and reduction of land rental fees and non-agricultural land-use tax.

5.4 Tax Consolidation

There is currently no regime in place that allows for tax consolidation.

5.5 Thin Capitalisation Rules and Other Limitations

Vietnam does currently not have any thin-capitalisation rules or similar limitations in place.

5.6 Transfer Pricing

The Vietnamese government released tax administration regulations applicable “to enterprises having controlled transactions” (“Decree 20”) in April 2017, which was replaced by Decree 132/2020/ND-CP (“Decree 132”) as from 20 December 2020. Before Decree 20 was issued, transfer pricing rules in Vietnam were considered to be rather lax. Investors could enter the market

without any major concerns about their transfer pricing policies.

Today, under the new regulations, companies that are considering investment into Vietnam, as well as those companies that are already operating in the country, need to comply with the stricter regulatory requirements of Decree 32. It makes an attempt at replicating the standards set forth by the OECD guidelines and base erosion and profit shifting (BEPS) actions.

5.7 Anti-evasion Rules

Vietnam's new Law on Tax Administration (No 38/2019/QH14) took effect on 1 July 2020. Under the law, tax authorities have been endowed with additional enforcement powers, which directly translate into more stringent and successful prosecution of tax evaders.

6. COMPETITION LAW

6.1 Merger Control Notification

The Competition Law defines the concept of economic concentration, which covers mergers, consolidations, acquisitions of control stocks, and joint ventures between enterprises.

An economic concentration is prohibited if it causes or potentially causes substantial anti-competitive effects on the Vietnamese market. Enterprises must file a dossier of notification to the National Competition Commission (NCC) regarding their planned economic concentration that falls within any of the following circumstances:

- total assets in the Vietnamese market of the enterprise or a group of affiliated enterprises to which such enterprise is a member are valued at VND3 billion or more in the fiscal year preceding the expected year of the economic concentration;
- total sales or purchase volume in the Vietnamese market of the enterprise or a group of affiliated enterprises of which such enterprise is a member are valued at VND3 billion or more in the fiscal year preceding the expected year of the economic concentration;
- the transaction value of the economic concentration is valued at VND1 billion or more;
- or
- the joint market share of the enterprises planning to participate in the economic concentration accounts for 20% or more of total share in the relevant market in the fiscal year preceding the expected year of the economic concentration.

Greater thresholds are applied with respect to an economic concentration performed by enterprises that are credit institutions, insurance enterprises and securities companies.

6.2 Merger Control Procedure

The aforementioned economic concentration may only be implemented after the NCC's confirmation has been obtained, stating that the economic concentration is not prohibited under the Competition Law. Certain economic concentrations, though not prohibited, can only be performed and maintained where relevant conditions are satisfied, as stipulated in the confirmation of the NCC.

6.3 Cartels

Under the regulations of Vietnamese competition law, there are a number of agreements that restrict competition, and therefore risk illegality. To determine whether an agreement is legal, it is important to look at the relevant contents of the agreement, the relevant market of the parties to the agreement, the trade life cycle of the parties' products and services, and/or the level of restrictive effect on competition assessed by the NCC.

- Such agreements are absolutely prohibited if they:
 - (a) prevent, restrain, or disallow other enterprises from entering the market or developing business;
 - (b) abolish from the market enterprises other than the parties of the agreements; or
 - (c) conspire in biddings.
 - If the parties have the same relevant market, prohibited agreements include:
 - (a) directly or indirectly fixing prices;
 - (b) distribute outlets, sources of supply of goods, or provision of services; or
 - (c) restrict or control produced, purchased or sold quantities or volumes of goods or services.
 - If the parties have the same relevant market and the agreements may cause an appreciable restrictive effect on competition, prohibited agreements are those that:
 - (a) restrict technical or technological development and investments;
 - (b) impose conditions or unrelated obligations on the signing of purchase/sale contracts for goods/services;
 - (c) prevent transactions with parties other than the parties thereto;
 - (d) limit consumption or supply of goods or services of parties other than the parties thereto; or
 - (e) may cause other restrictive effects on competition.
 - If the parties have different production, distribution or supply businesses constituting a trade life cycle of a product or service and the agreements may cause an appreciable restrictive effect on competition, prohibited agreements are those that:
 - (a) directly or indirectly fix prices;
 - (b) distribute outlets, sources of supply of goods, or provision of services;
 - (c) restrict or control produced, purchased or sold quantities or volumes of goods or services;
 - (d) restrict technical or technological development and investments;
 - (e) impose conditions or unrelated obligations on the signing of purchase/sale contracts for goods/services;
 - (f) prevent transactions with parties other than the parties thereto;
 - (g) limit consumption or supply of goods or services of parties other than the parties thereto; or
 - (h) may cause another restrictive effect on competition.
- If the agreement benefits consumers and certain criteria are met, such as leading to technical innovation, an exception may be granted.

6.4 Abuse of Dominant Position

An enterprise or a group of enterprises with a dominant or monopoly position in the market is prohibited from performing the following acts:

- (a) selling goods or services at prices below the total cost price, resulting in eliminating competitors;
- (a) imposing unreasonable purchase or sale prices of goods or services, or fixing minimum resale prices, causing damage to customers;
- (a) restricting production or distribution, limiting the market, or hindering technical or technological development, causing damage to customers;
- (a) applying different commercial terms on similar transactions, causing restrictions to market entry or expansion by other enterprises or elimination of other enterprises;
- (a) imposing conditions or unrelated obligations on the signing of sale or purchase contracts, causing restrictions to market entry or expansion by other enterprises or elimination of other enterprises;
- (a) preventing competitors from entering or expanding the market; or

- (b) other acts abusing the dominant position as prescribed by other laws.

An enterprise or a group of enterprises with a monopoly position is prohibited from performing acts mentioned in items (b) to (f) and from imposing adverse conditions on consumers, taking advantage of the monopolistic position to unilaterally change or cancel an executed contract without legitimate reasons or performing other acts abusing the monopolistic position as prescribed by other laws.

7. INTELLECTUAL PROPERTY

7.1 Patents

Generally, Vietnam allows protection for the following subject matters of patent rights:

- process or method;
- products; and
- formula, composition, chemical mixture.

Vietnamese regulations distinguish two types of patents:

- utility solutions (petty patent); and
- patent for invention.

A patent in Vietnam can be filed in one of the three following ways:

- direct filing – a foreign patent applicant could file their patent in Vietnam directly;
- PCT Patent – 31 months from the first filing date; and
- Paris conventions – 12 months from the first filing date.

Vietnamese regulations stipulate that a patent shall be locally protected if it meets (all) the following requirements:

- a novelty step;
- an inventive step (not applicable to utility solution); and
- industrial applicability.

The validity for patents for utility solutions is ten years from the filing date.

The validity for patents for inventions is 20 years from the filing date.

In order to maintain the validity of a Vietnamese patent, the owner must pay the annuity fee annually, subsequent to the granting of the patent.

Documentation required to file a Vietnamese patent:

- specification of the patent; if it is a PCT patent, it could be downloaded from the World Intellectual Property Organization's (WIPO's) website;
- claims of patent or amended claims, if any;
- drawing (if any);
- certified copy of a priority document (if any); and
- name and address of the inventor and the applicant.

7.2 Trade Marks

The trade mark system in Vietnam protects symbols, three-dimensional objects, colours and other visual devices that are used to identify a business's products or services.

Trade name rights are established through perpetual and public use rather than having to be formally registered. With respect to online domains, these are handled on a first-come, first-served basis by the respective authority.

Locally registered trade marks last for ten years and can be renewed indefinitely for further ten-year periods. Costs related to the maintenance

of these assets are low. The registration of a trade mark can take up to 15 months to complete. Trade marks can be registered in Vietnam or by employing the mechanisms of the Madrid Protocol.

7.3 Industrial Design

Industrial design means the outward appearance of a product embodied in three-dimensional configuration, lines, colours or a combination of such elements. Under Vietnamese law, industrial property rights to an industrial design shall be established on the basis of a decision of the competent state body. This authority grants a protection title in accordance with the registration procedures stipulated in the Law on Intellectual Property of Vietnam or the recognition of international registration pursuant to an international treaty to which Vietnam is a party.

Generally, an industrial design shall be eligible for protection when it satisfies the following conditions:

- it is novel;
- it is of a creative nature; and
- it is susceptible to industrial application.

However, the following items shall be ineligible for protection as industrial designs:

- outward appearance of a product that is necessarily due to the technical features of the product;
- outward appearance of civil or industrial construction work; and
- shape of a product that is invisible during the use of the product.

Generally, the following organisations and individuals shall have the right to register industrial designs:

- authors who have created industrial designs through their own labour and at their own expense; and
- organisations or individuals who have supplied funds and material facilities to authors in the form of job assignment or hiring, unless otherwise agreed by the parties involved.

Applications for registration of industrial designs under the Law on Intellectual Property of Vietnam must be prepared in a regulatory template and attached with certain documents and photos describing the registered subject matter and specifying the registration rights. The application shall be submitted to the Intellectual Property Office of Vietnam (the “IP Office”), which shall examine and consider if the applications are valid. By law, it shall take one month from the submission date. In practice, it could take longer. For applications that are considered valid, the IP Office shall issue a notice of acceptance of the valid application or carry out procedures for granting a protection title.

Per the applicable “first to file” principle, where two or more applications for registration are filed by different parties for registration of industrial designs identical to, or insignificantly different from, each other, a protection title may only be granted to the valid application with the earliest priority or filing date amongst applications that satisfy all conditions for the granting of a protection title.

Where there are two or more applications satisfying all the conditions for the granting of a protection title and having the same earliest priority or filing date, a protection title may only be granted to a single application from such applications with agreement from all applicants. Without such an agreement, all such applications shall be refused the granting of a protection title.

A protection title, also known as an industrial design patent, shall recognise the owner of the industrial design; the author of the industrial design; and the subject matter, scope and term of protection. An industrial design patent shall be valid throughout the entire territory of Vietnam as from the grant date until the end of five years after the filing date and may be renewed for two consecutive terms, each of five years.

7.4 Copyright

Registration of Copyright

The registration of copyright is conducted at the National Copyright Office, which is the competent authority for all copyright issues within the Vietnamese jurisdiction. In Vietnam's definition of the term, "copyright" also applies to computer programs, which cannot be patented because they lack (one or more) of the requirements for being granted a patent. Vietnam's copyright IP is governed by the Berne Convention on copyright, which states that the minimum protection from publication will be:

- 75 years for cinematographic works, photographic works, dramatic works, works of applied art and anonymous works; and
- 50 years after the death of the author for other works.

While no copyright registration is required in Vietnam, most patent experts suggest registering copyright with the country's copyright authorities.

7.5 Others

IP protection, though improving over the last few years, has always been one of Vietnam's biggest issues, and a strong reason for a drawback of foreign direct investment from the country. Despite recent efforts by Vietnamese lawmakers to close the gaps in the regulatory framework, it is the implementation that still causes issues in practice. Lacking an appropriate IT infrastructure

and specialised training, the competent authorities lag behind in trying to implement the laws and enforce powers to protect the IP of registered owners.

8. DATA PROTECTION

8.1 Applicable Regulations

There is no unified comprehensive data protection law in Vietnam. Instead, regulations on data protection and privacy can be found in various legal instruments. Vietnam is thus not at the forefront of data protection policies and has only recently jumped on the "bandwagon", following the issuance of the first version of the Draft Decree on Personal Data Protection (the "Draft Decree") in 2019. Shortly thereafter, on 9 February 2021, the Ministry of Public Security (MPS) released a second version of this draft to collect further public opinions until 9 April 2021. The legislative process is still under way, and it is not entirely clear what the final version of the law will look like, or how it will be implemented.

The present draft is divided into six chapters and 30 articles, providing comprehensive coverage of personal data protection and some brand-new requirements. Notable contents of the draft include the following regulations:

- re-categorisation of personal data into basic personal data and sensitive personal data;
- new data processing requirements, including new legal bases for data processing and disclosure without consent; specification of the forms of consent; regulations for data processing for research and statistical purposes, and automated data processing; and time limits for data retention;
- new data protection measures, including de-identification/encryption requirements, appointment of data protection officers, data accessibility from government authorities,

and registration for processing of sensitive data and cross-border transfer of data;

- establishment of a new Personal Data Protection Commission (PDPC) under the MPS; and
- new administrative sanctions for violations, including fines of up to 5% of the revenues earned from violating activities.

8.2 Geographical Scope

Vietnamese data protection regulations bind foreign and local companies to the same standards of protection without making any difference between the geographical origin of the data collector or processor. Where foreign rules for data protection are stricter than the Vietnamese regulations, no conflict needs to be expected. However, should a foreign individual or company coming from a jurisdiction with a lower level of protection than the Vietnamese regulations wish to ascertain compliance with Vietnamese data protection laws, they will have to assess their risk exposure according to their business model(s) and adjust their policy of handling their data within the laws of Vietnam.

8.3 Role and Authority of the Data Protection Agency

The MPS and the newly established PDPC, which is a subsidiary of the MPS, will be in charge of execution and implementation of the new Data Security Law, once it has entered into force.

9. LOOKING FORWARD

9.1 Upcoming Legal Reforms

As already stated, data protection and cybersecurity are two crucial and rapidly developing fields, in which the lawmakers and affected companies will have a lot of work to do in the coming months and years. With the Vietnamese commercial markets relying heavily on e-commerce and online marketing, this trend will probably accelerate in the foreseeable future.

Contributed by: Mark Oakley, Hieu Pham, Leif D. Schneider and Huyen Pham, ACSV Legal

ACSV Legal is a vibrant and dynamic Vietnamese-based law firm that is located in Ho Chi Minh City and has unparalleled domestic expertise. The firm has one of the premier corporate/M&A practices in Vietnam and has extensive experience in private equity transactions, with a strong commercial focus. ACSV Legal has advised various clients on (re-)structuring their businesses in the light of investments in or outside Vietnam. The firm's clients are typically businesses within South-East Asia that are experiencing significant growth, as well as leading international and local corporations

that need advice on a broad array of multi-jurisdictional transactions. ACSV Legal has advised clients on matters in a wide range of sectors and industries, such as healthcare, beauty and fitness, pharmaceutical, food and beverage, IT and technology, hospitality and leisure, education, retail, manufacturing and distribution, apparel and fashion, fintech and payment services. The firm has a team of about 30 experienced lawyers who are qualified in Vietnam, the UK, the USA, Germany and Malaysia in civil and common law jurisdictions.

AUTHORS



Mark Oakley is managing partner of ACSV Legal and has been advising on foreign direct investments into South-East Asia for more than a decade. Prior to establishing ACSV

Legal, Mark worked at large international firms in London, Singapore, the Middle East and Vietnam. Mark was admitted as a Solicitor of the Senior Courts of England & Wales in 2003 and is a registered foreign lawyer in Vietnam. Besides being a native English speaker, Mark is fluent in German. Mark has advised multinational clients on various international transactions involving large-scale energy and infrastructure projects, banking, structured finance, M&A, joint ventures, acquisition finance and commercial agreements.



Hieu Pham is a special counsel at ACSV Legal. Hieu earned his LLB at the University of Economics and Law in August 2012. He has been a qualified lawyer since August 2017 and

was admitted to the Ho Chi Minh City Bar Association in 2017. Hieu is a native Vietnamese speaker and fluent in English. Hieu focuses on cross-border M&A, private equity, joint ventures and FDI, in sectors including health and fitness, food and beverages, IT, hospitality, fintech and digital marketing. Hieu provides counsel to high net worth clients on estate and tax planning, and family assets holding structuring. Hieu helps clients transfer significant family wealth while minimising tax liability across jurisdictions including the USA, Singapore, Australia, Hong Kong and Malaysia, working with banks, trustees, local counsel and tax advisers. Hieu also advises clients on pre-immigration tax planning, the creation of family trusts and the acquisition of overseas assets.

Contributed by: Mark Oakley, Hieu Pham, Leif D. Schneider and Huyen Pham, ACSV Legal



Leif D. Schneider is a senior associate of ACSV Legal and head of the German Desk at the firm. After earning his legal credentials in Germany, he has worked for high-profile clients at

various international law firms in the EU and Asia (Germany, France, Hong Kong, Thailand and Vietnam) before joining ACSV in 2021. He is a member of the German Bar and a foreign-registered lawyer in Vietnam. His practice focuses on corporate/M&A, foreign direct investment, international arbitration, IP and data security. He regularly contributes to publications on Vietnamese legal developments. Leif is fluent in English, German and French.



Huyen Pham is a senior associate and heads the Japanese Desk. Prior to joining ACSV Legal, Huyen worked at Nishimura & Asahi, the largest Japanese law firm, and in

various positions at Vietnamese subsidiaries of Japanese companies. Huyen has expertise in legal due diligence and drafting various types of contracts. She has also supported numerous companies in establishing an entity in Vietnam and obtaining the relevant licences. She has published articles on solar power regulations and private-public partnerships in Vietnam. Huyen has been a member of the HCMC Bar since 2015. Besides being a native Vietnamese speaker, Huyen is fluent in Japanese and English.

ACSV Legal

Level 11, Empress Tower
138-142 Hai Ba Trung Street
District 1
Ho Chi Minh City
Vietnam

Tel: +84 28 3822 4539
Fax: +84 28 3822 4239
Email: info@acsvlegal.com
Web: <https://acsvlegal.com>



Trends and Developments

Contributed by:

*Mark Oakley, Hieu Pham, Leif D. Schneider and Huyen Pham
ACSV Legal see p.31*

Low Impact of COVID-19 on Most Domestic Industries, Foreign Investment and Trade

At the time of writing this contribution, Vietnam remains largely unaffected by the global economic fallout of the COVID-19 crisis. The country's highly effective combating of the domestic spread of the virus, achieved through the implementation of carefully devised and readily prepared national action plans and emergency policies, had Vietnam's economy (GDP) grow at a remarkable 2.9% in 2020. The country's current COVID-19 death toll of less than 100 bears testimony to Vietnam's outstanding position in times of global uncertainty and economic volatility.

Despite the pandemic and the related knock-on effects, which impacted even those economies managing to successfully "shut out" the virus, Vietnam's outlook remains very positive. Forecasts for 2021 see Vietnam's GDP grow at a staggering 6.6% and foreign investment into the country is already back at an all-time high. While some sectors of Vietnam's economy have, of course, significantly contracted since the first quarter of 2020 (particularly in the tourism and hospitality sector), even to the most conservative and sceptical onlookers, Vietnam still shows quite impressive indicators. Considering the size and value of the local tourism industry before the COVID-19 crisis, which had to grind to a halt due to international travel restrictions and the suspension of international flights, these figures look even more awe-inspiring. Vietnam's import and export turnover was USD543 billion in 2020, which constitutes a 5% increase year on year.

Even before the world went into a collective and involuntary shutdown due to the spread of the

novel coronavirus, Vietnam had good reasons to be optimistic about the future of its economic development. Now, against the backdrop of regional and even global competitors falling behind, Vietnam has a chance to make another big leap ahead, as the world slowly starts opening up again. The Vietnamese leaders and lawmakers seem aware of the opportunity this crisis fosters for the country and are prepared to tackle the challenges that the accelerated influx of foreign capital and interest present for its domestic workforce and infrastructure.

Untapped Potential in Renewables, Infrastructure and Manufacturing

Renewable energy has been the focal point of several investment incentives given to foreign and local investors (and consisting of benefits, such as tax holidays or the provision of appropriate real estate at discounted rates). The Vietnamese government has doubled down on its efforts to develop the domestic power grid by attracting more overseas global players and other foreign investors to increase their interest in Vietnam.

As is common in Vietnam, the government has accompanied this development with a resolution (No 55-NQ/TW), which was published on 11 February 2020 and clusters around the "orientation of Vietnam's National Energy Development Strategy to 2030 with a vision to 2045". In this public statement, the Vietnamese government announced its plans to develop the national power supply and distribution towards a more sustainable and self-sufficient future. As one of its core motivations, it names "[...] Developing breakthrough mechanisms and policies to

encourage and promote the strong development of renewable energy sources, so as to fully replace fossil energy sources.” With this in mind and following the government’s proclamation that it intends to double the capacity of domestic power production by 2030, the conditions for investment in the renewable energy industry are currently more favourable than ever.

Infrastructure is poised to remain one of the most important and lucrative segments for development and expansion in Vietnam for many years to come. Sectors including freight infrastructure (ports, warehouses, industrial zones, road and rail), water supply, waste treatment, or telecommunications infrastructure – much like the national electricity supply mentioned above – are currently underdeveloped and cannot cater to Vietnam’s hunger for growth. Foreign companies coming into this environment can add a lot of value through their know-how and expertise, which domestic contractors often lack. Here, Vietnam is also undergoing a gradual shift towards “Goldilocks conditions”.

Recently, the regulations for public tenders have been relaxed to facilitate the admission of foreign bidders to the game. Additionally, the Vietnamese regulator has created the legal framework for entering into PPP agreements, which are supposed to further bolster the integrity and development of domestic infrastructure. As of today, Japan, China and South Korea lead the pack as the strongest foreign sources of domestic infrastructure development and know-how transfer. As an immediate consequence of the recent integration of the European and larger Asia-Pacific (APAC) markets through free trade agreements, an increasing shift of Western investment into Vietnam is in progress.

Manufacturing (alongside tourism) has long been the backbone of Vietnam’s domestic economic growth and – especially in recent times, driven

by the political and economic tensions between the USA and China – has put Vietnam in the sights of many global companies, looking to redistribute liabilities and reduce manufacturing and tariff risks.

Compared to its much larger and better developed neighbour, Vietnam boasts a lower cost of labour and a striking (and growing) number of free trade agreements with global trade partners (see below), which allow companies to creatively structure their import and export activities. As Vietnam has limited capacity to absorb the vast amount of business, which is currently spilling over the border from China to relocate to Vietnam and slowly filling up the remaining slots in free trade zones and industrial parks, first movers will be rewarded with better real estate in more favourable locations as well as lower costs and better access to affordable labour. With a low unemployment rate (oscillating around 2.0% for almost a decade), larger operations might struggle to fill their factories, if they do not wish to compromise on their budgeted expenses, paying above-market salaries to their local staff.

Promising Consumer Market

Vietnamese demographics suggest a sizeable – and growing – consumer market of nearly 100 million people, of which the majority are under 30 years of age and rapidly prospering. Over the last decade, the stability and beneficial circumstances for economic success in most sectors have created a Vietnamese middle class with increasing income and a highly sophisticated segment of wealthy Vietnamese, who are craving to develop an affluent lifestyle with all available modern amenities. This has created a large demand for consumer goods and luxury products, which can be distributed through a network of local (Vietnamese) distributors or through the establishment of a (foreign-owned) subsidiary in Vietnam.

Following other examples from the surrounding Association of Southeast Asian Nations (ASEAN) community of countries, e-commerce is also booming in Vietnam and bolstering the exponential growth of many local and regional businesses (eg, Grab, Tiki, Lazada, Gojek, Baemin – to name a few), which understand how to harness the huge potential of online marketing and sales in these developing markets. A very young and tech-savvy local population is thirsting for merchandise and lifestyle products to support the diversity of their life's trajectories and individual preferences. Following the Chinese model, Vietnam has thus truly embraced the comfort and ease of online transactions for everyday purposes, as well as grown accustomed to executing one-off investments of significant value through online platforms. Foreign investors are therefore well advised to incorporate this aspect of business into their prospect engagement in Vietnam and to create infrastructure that supports this strong trend in domestic commercial transactions.

Bearing this in mind, the data protection and cybersecurity landscape in Vietnam is still in its infancy. However, Vietnamese lawmakers have recently stepped in to start closing this gap in the regulatory framework and devising fresh guidance on both of these hot topics (in both 2020 and 2021). In light of these developments and the increasing importance of (big) data in almost all branches of modern business, commerce and marketing, investors should ascertain compliance with these regulations early on. Especially, investors with a background in the European Union (which need to be General Data Protection Regulation compliant) or similar jurisdictions sensitive to data protection issues should sound off their respective business models with qualified local experts before entering the market.

Workforce: Well Educated, but Hard to Get

Vietnam's workforce boasts a growing base of well-educated, young and motivated individuals, who are looking to bring their acquired skills to market. Confident and eager to bolster their personal and professional development, it is getting increasingly hard to source and keep young, local staff with high potential on the payroll, as Vietnamese employees are getting more versed and confident at voicing their demand for fringe benefits and, of course, monetary compensation. The same trend can be seen in the segment of unskilled or semi-skilled workers, who are partaking in the increasing market value of their labour, due to permanently low unemployment rates.

The market for qualified and reliable staff is therefore getting more heated and competitive each year – a trend that the COVID-19 crisis has also not been able to break. This will foreseeably have a mid- to long-term effect on the level of salaries paid to local staff and therefore must be reflected in the business plans of potential investors, depending on their respective industries.

Incentives for Implementation of Hi-Tech Projects (Decision 38)

The recent Decision No 38/2020/QĐ-TTg ("Decision 38") approving the "List of High technologies prioritized for development and investment" and the "List of High technology products encouraged for development" has fortified Vietnam's political commitment to becoming one of South-East Asia's hi-tech hubs in the coming decade. To further this goal, Decision 38 introduces and expands investment incentives for hi-tech industries by broadening the scope of defined "hi-tech" industries and products. Decision 38 took effect from 15 February 2021, replacing Decision No 66/2014/QĐ-TTg ("Decision 66") dated 25 November 2014.

Vietnam Tied in Favourably through Multilateral FTAs

Vietnam has positioned itself well, regarding its rank and importance in the global network of free trade agreements (FTAs).

AFTA (ASEAN) – 1992

The member states of the AFTA, the FTA backing the ASEAN community, are Brunei, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam. The AFTA was first signed between its six original members on 28 January 1992 in Singapore.

EVFTA (Europe) – 2020

The EVFTA was ratified in mid-2020 and entered into force upon Vietnam's ratification thereof. The EVFTA is an ambitious trade pact between Vietnam and the 27 member states of the European Union, providing the elimination of almost 99% of customs duties between the signatories, at a staggered rate over the next ten years. As per an estimate by the Vietnamese Ministry of Planning and Investment (MPI), the FTA is expected to help increase Vietnam's GDP by 4.6% and its exports to the EU by 42.7% by 2025.

RCEP – 2020

The Regional Comprehensive Economic Partnership (RCEP) is a free trade agreement that currently accounts for the world's largest trading bloc and marks an entry point for Vietnam to gain access to new export markets, regionally and globally. RCEP is a free trade agreement between the Asia-Pacific nations of Australia, Brunei, Cambodia, China, Indonesia, Japan, Laos, Malaysia, Myanmar, New Zealand, Philippines, Singapore, South Korea, Thailand and Vietnam. The agreement was devised to reduce tariffs and red tape between participating markets and jurisdictions. It includes unified rules of origin, which may facilitate international supply chains and trade within the region. It also

counteracts or prohibits a number of tariffs and facilitates and unifies customs procedures.

UKVFTA (United Kingdom) – 2021

The UKVFTA establishes an economic partnership between the UK and Vietnam and is supported by a comprehensive free trade area between the two signatory states. As the UK exited the EU with effectiveness as of 31 January 2020, the UKVFTA constitutes one of the first FTAs the UK has signed since its exit. Much like the EVFTA, the agreement contains several new provisions on preferential tariffs, tariff-rate quotas and rules of origin. It also touches on other measures to promote financial, e-commerce and other services, while upholding the EVFTA's reciprocal access in public procurement, competition and subsidies.

With these strategic partnerships in place, Vietnam can now serve as western countries' primary gateway into (South-East) Asia, for most significant trade and investment streams. On the flipside, Vietnam has opened global markets for the export and distribution of its own domestic products, which will promote the growth of Vietnam's economy for decades to come.

Real Estate

A chapter about a developing market would not be complete without giving a flavour of the local real estate market, which links in closely to the surrounding infrastructure, as detailed above. Vietnam forms no exception to that rule, as real estate and rental prices have skyrocketed over the last decades, particularly since the financial crisis of 2008.

As local foreign exchange regulations are tightly observed and enforced by the State Bank of Vietnam (SBV), Vietnamese citizens have limited access to investment into overseas assets. This fact further aggravates the situation and caused

prices for office and residential real estate to multiply over recent years.

From the perspective of a foreign investor, however, real estate in Vietnam constitutes a bit of a “hot potato” that does not lend itself well to speculation. The Vietnamese Law on Land, in the tradition of its socialist ideals, is very restrictive towards the ownership of land – particularly towards foreigners (both individuals and foreign-invested entities, or FIEs). Even locals acquiring real estate will only obtain a so-called land use right (LuR), which explicitly does not equal ownership.

For foreign investors, these restrictions are even tighter, as Vietnam intends to prevent the sell-off of local land resources to foreign principals, as can be witnessed in surrounding states, such as Cambodia and Laos.

Foreign investors who require (large areas of) land to support their operations in Vietnam should therefore assess their needs together with experienced counsel, in order to obtain reliable information about the legal feasibility and ideal location of their endeavour.

Legal and Administrative Framework: Need for Speed

As a rapidly developing market for business and foreign direct investment (FDI), the domestic legal framework accompanying the surge of projects driven by an influx of MNCs and SMEs alike keeps lagging. As is common in less mature jurisdictions, new laws often lack clarity and require an in-depth understanding of the entire legal system, domestic policy and tax incentives, as well as good connections to the local authorities, in order to facilitate projects that are novel to a developing market.

The efficiency and shape of administrative procedures in Vietnam, particularly in areas where there still is pioneer work to be done, does not compare to what most providers of FDI would be used to from their home jurisdictions. Authorities work slowly and, depending on the envisaged business lines of an endeavour, multiple public offices will be involved in licensing and approval processes. Within the (sometimes very narrow) realm of provided regulatory guidance, authorities often have discretionary authority over final decisions, which negatively impacts the transparency of public procedures, but also allows the investor and their advisers to impinge on the authorities through strategic communication, negotiation and explanatory statements. Generally, the authorities are instructed to work together with investors to create “favourable circumstances” for foreign investment. It therefore can be a matter of negotiation and compromise to implement a project and/or transaction in the local market. In this case, hands-on experience in working together with Vietnamese authorities as well as a good local network and knowledge of the country can be crucial for the success of a project.

Overall, particularly in the areas that are attractive for foreign investment (eg, infrastructure, energy, real estate, trade), there is a strong need for further legal guidance, particularly on the implementation and enforcement side of most codified law. Laws and regulations are often too vague to provide the comfort and certainty needed for sound business and investment decisions made at the board level of foreign entities. It is therefore even more crucial to collaborate with trusted and experienced advisers, who understand the local landscape and help navigate the shoals of Vietnamese authoritative governance amidst an ever-changing but still quite restrictive legal framework.

ACSV Legal is a vibrant and dynamic Vietnamese-based law firm that is located in Ho Chi Minh City and has unparalleled domestic expertise. The firm has one of the premier corporate/M&A practices in Vietnam and has extensive experience in private equity transactions, with a strong commercial focus. ACSV Legal has advised various clients on (re-)structuring their businesses in the light of investments in or outside Vietnam. The firm's clients are typically businesses within South-East Asia that are experiencing significant growth, as well as leading international and local corporations

that need advice on a broad array of multi-jurisdictional transactions. ACSV Legal has advised clients on matters in a wide range of sectors and industries, such as healthcare, beauty and fitness, pharmaceutical, food and beverage, IT and technology, hospitality and leisure, education, retail, manufacturing and distribution, apparel and fashion, fintech and payment services. The firm has a team of about 30 experienced lawyers who are qualified in Vietnam, the UK, the USA, Germany and Malaysia in civil and common law jurisdictions.

AUTHORS



Mark Oakley is managing partner of ACSV Legal and has been advising on foreign direct investments into South-East Asia for more than a decade. Prior to establishing ACSV

Legal, Mark worked at large international firms in London, Singapore, the Middle East and Vietnam. Mark was admitted as a Solicitor of the Senior Courts of England & Wales in 2003 and is a registered foreign lawyer in Vietnam. Besides being a native English speaker, Mark is fluent in German. Mark has advised multinational clients on various international transactions involving large-scale energy and infrastructure projects, banking, structured finance, M&A, joint ventures, acquisition finance and commercial agreements.



Hieu Pham is a special counsel at ACSV Legal. Hieu earned his LLB at the University of Economics and Law in August 2012. He has been a qualified lawyer since August 2017 and

was admitted to the Ho Chi Minh City Bar Association in 2017. Hieu is a native Vietnamese speaker and fluent in English. Hieu focuses on cross-border M&A, private equity, joint ventures and FDI, in sectors including health and fitness, food and beverages, IT, hospitality, fintech and digital marketing. Hieu provides counsel to high net worth clients on estate and tax planning, and family assets holding structuring. Hieu helps clients transfer significant family wealth while minimising tax liability across jurisdictions including the USA, Singapore, Australia, Hong Kong and Malaysia, working with banks, trustees, local counsel and tax advisers. Hieu also advises clients on pre-immigration tax planning, the creation of family trusts and the acquisition of overseas assets.



Leif D. Schneider is a senior associate of ACSV Legal and head of the German Desk at the firm. After earning his legal credentials in Germany, he has worked for high-profile clients at

various international law firms in the EU and Asia (Germany, France, Hong Kong, Thailand and Vietnam) before joining ACSV in 2021. He is a member of the German Bar and a foreign-registered lawyer in Vietnam. His practice focuses on corporate/M&A, foreign direct investment, international arbitration, IP and data security. He regularly contributes to publications on Vietnamese legal developments. Leif is fluent in English, German and French.



Huyen Pham is a senior associate and heads the Japanese Desk. Prior to joining ACSV Legal, Huyen worked at Nishimura & Asahi, the largest Japanese law firm, and in

various positions at Vietnamese subsidiaries of Japanese companies. Huyen has expertise in legal due diligence and drafting various types of contracts. She has also supported numerous companies in establishing an entity in Vietnam and obtaining the relevant licences. She has published articles on solar power regulations and private-public partnerships in Vietnam. Huyen has been a member of the HCMC Bar since 2015. Besides being a native Vietnamese speaker, Huyen is fluent in Japanese and English.

ACSV Legal

Level 11
Empress Tower
138-142 Hai Ba Trung Street
District 1
Ho Chi Minh City
Vietnam

Tel: +84 28 3822 4539
Fax: +84 28 3822 4239
Email: info@acsvlegal.com
Web: <https://acsvlegal.com>

