

# **VIETNAM INVESTMENT GUIDE**

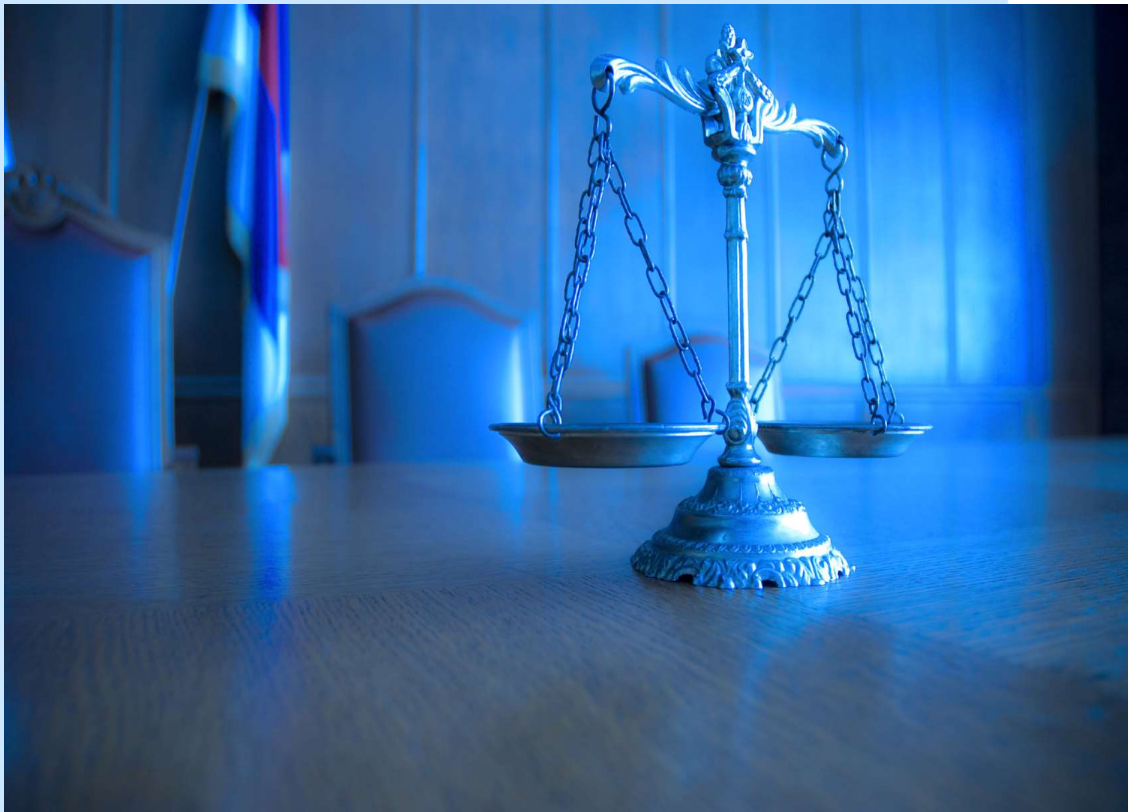
2<sup>nd</sup> Edition 2022

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VIET DILIGENCE LEGAL LAW FIRM

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Hanoi, 3<sup>rd</sup> January 2022

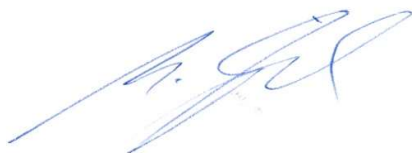
Dear Readers,

After more than five years, we are proud to present to you the Vietnam Investment Guide in its 2<sup>nd</sup> edition. It is again the goal of our guidebook to provide foreign investors and entrepreneurs with an overview of the legal framework for investment and doing business in Vietnam. Even though the regulatory framework has continued to improve over those past five years, investors and businesses, especially small- and medium sized enterprises, are still struggling with seemingly unnecessary bureaucracy, overly formalistic licensing and procedural requirements as well as widespread corruption, particularly on the lower levels.

While this 2<sup>nd</sup> edition again focuses on foreign direct investment, it also aims at covering some basic characteristics of the Vietnamese legal system and selected broader aspects of market entry into Vietnam. Therefore, we have included chapters on taxation, employment and IPR protection. While such a broad range of topics covered can neither be comprehensive nor go into every detail, it is our aim to at least raise awareness that some matters could be problematic and therefore need attention. As there remains a pronounced difference between the “law in books” and the “law in action”, we have also included in the revised edition many examples and tips on how to practically deal with selected legal problems.

The information contained in this guidebook neither constitutes nor substitutes individual legal advice, because a short guidebook cannot analyze and consider the details of each potential case. In addition, laws and regulations in Vietnam are subject to frequent change. To improve future editions, we also welcome your feedback on the structure, content and examples contained in this guidebook.

Yours sincerely,



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# 1. INTRODUCTION

## 1.1 Legal System

### 1.1.1 Hierarchy of laws:

Since Vietnam's accession to the WTO in 2007, Vietnam has developed a modern legal system, with many laws having been introduced, modernized and sometimes completely renewed. However, as a side effect of Vietnam's rapid modernization of its legal framework, many conflicting and overlapping laws exist. This is aggravated by so-called "implementing regulations" such as Decrees, Circulars or Decisions, which in practice carry a much greater weight than the hierarchically superior laws passed by the National Assembly. Simplified, this hierarchy is as follows:

Legal Document	Responsible Institution
Constitution, National Laws	National Assembly (NA)
Ordinance, Resolution	Standing Committee of the NA
Resolution	Supreme People's Court
Decree	Government
Decision	Prime Minister
Circular, Joint Circular	Ministries

Moreover, as Vietnamese legal education remains formalistic and administrative in nature, Vietnamese lawyers and legal practitioners are still struggling with legal methodology, specifically the interpretation of laws (legal methodology).

### 1.1.2 Statutory and case law:

The Vietnamese legal system is largely based on statutory law (codified laws and regulations), while case law (precedent) is not binding legal authority. However, since the Supreme People's Court Resolution No. 03/2017/NQ-HDTP, Vietnam has been building a database of legal precedent, which will play an increasingly larger practical role in the future. According to Resolution No. 03 since 1<sup>st</sup> July 2017 certain judgments and decisions must be publicised within 30 days. These include - amongst others - first-instance judgments which have not been appealed or protested; appellate judgments; decisions on cassation and reopening in criminal, administrative, civil, marriage and family, business, trade and labour cases; decisions on settlement of civil matters. Publication of above judgements happens on the "Electronic Judgments Portal" (<https://congbobanan.toaan.gov.vn/0tat1cvn/ban-an-quyet-dinh>). However, there are many types of decisions and judgments which are not permitted to be published.

### 1.1.3 Vietnamese court structure:

The Vietnamese court system is four-tiered:

- The highest court is the Supreme People's Court.
- Three Superior People's Courts in Hanoi, Danang, and Ho Chi Minh City serve as appellate courts for specific case groups.
- 63 provincial-level People's Courts serve as both first-instance trial and appellate courts.
- District-level People's Courts are first-instance trial courts only.

In addition, military tribunals exist at various levels in the Vietnam People's Army, the highest being the Central Military Tribunal, which is subordinate only to the Supreme People's Court. The People's Procuracies - amongst other tasks - supervise and inspect compliance by courts and judges. For example, motions to replace judges can be filed here. For every People's Court, there is a People's Procuracy. The military has its own military procuracies, the highest being the Supreme People's Procuracy.

## 1.2 Enforcement of Judgements & Arbitral Awards

Enforcement mechanisms in Vietnam are not yet comparable to western standards, although significant progress has been made in recent years. The enforcement of foreign court decisions or judgments in Vietnam is practically difficult, because in principle, the recognition of foreign judgments in Vietnam is only possible if the foreign state has concluded an enforcement treaty or accord with Vietnam or reciprocity of enforcement is otherwise legally warranted, i.e., the foreign state acknowledges the corresponding Vietnamese judgments. However, such agreements on the recognition and enforcement of judgments in civil and commercial matters mostly do not exist between Vietnam and Europe (specifically: Germany, Austria, Switzerland).

Foreign arbitral awards, unlike VIAC arbitral awards, are also not automatically recognized by Vietnamese courts and enforcement agencies: Although Vietnam has been a member of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards since 1995, Vietnamese courts and enforcement agencies often refuse immediate, automatic enforcement of foreign arbitral awards because of their potential violation of “*basic principles of Vietnamese laws*”. Therefore, foreign arbitral awards must first be “recognized” by a Vietnamese court before they can subsequently be enforced by the Vietnamese enforcement agencies. In practice, foreign investors and entrepreneurs are therefore forced to conduct two different, subsequent procedural steps:

- First, the foreign arbitral award must be recognized by the competent court in Vietnam. Specifically, the court will double-check whether the award and its contents are “*contrary to basic principles of Vietnamese laws*”. Also, the court will double-check whether all formalities have been adhered to in the original arbitration proceedings abroad.
- Second, and only once the Vietnamese court has recognized the foreign arbitral award, procedures with regards to enforcing the (now recognized) award may be initiated.

Although Vietnamese courts are becoming increasingly more favourable to the recognition and enforcement of foreign arbitral awards, the refusal rate for foreign award recognition is still quite high at 30-35%. Foreign investors are therefore advised to settle disputes primarily by arbitration at the Vietnam International Arbitration Centre (“VIAC”) at the Vietnamese Chamber of Commerce and Industry (VCCI). Agreeing with your Vietnamese business partner to arbitration at the VIAC has the advantage that the VIAC’s arbitral awards are not subject to the above recognition procedure and are thus directly enforceable in Vietnam. In addition, English can be agreed as the language to be used in arbitration proceedings at the VIAC, the parties can choose their arbitrators freely at the VIAC and the cost of VIAC proceedings are significantly lower than at the SIAC or other foreign arbitration centres. Accordingly, agreeing with your Vietnamese business on arbitration abroad is generally recommended only in exceptional and complex cases such as for example in multinational and- / or multijurisdictional disputes.

### 1.3 Selection of Business Partners

In Vietnam, the likelihood of encountering an untrustworthy contract partner is generally higher than in western countries. Therefore, foreign investors should screen in advance their potential business-, contract and joint venture partners thoroughly. This is particularly true for potential joint venture (JV) partners, It is noteworthy that reliable and professional Vietnamese JV partners are not easy to be found, as most of the better ones have often found their foreign business partners already and are thus no longer actively looking for other or additional foreign JV partners. In addition, only a few potential JV partners have certain mandatory qualifications (specifically in terms of know-how, licenses and capital).

Once one or more potential JV partners are identified, the recommended background screening should identify amongst others the company’s shareholders and management, use company-, audit- and external credit rating reports (where



available), research information on the company's reputation and violations of the law in the past, and/or information about personal relationships to government officials. If the prospective JV partner poses a high risk, one should approach the potential JV partner to explain the due diligence findings.

## 1.4 Use of Intermediaries

Caution is required when including agents and / or other intermediaries (e.g., brokers, dealers, customs agents or other "service providers") in business transactions in Vietnam. As these intermediaries are formally and legally independent of the companies they advise, some entrepreneurs and investors view their hiring as a smart way to avoid their own involvement and awareness of certain doubtful or illegal business practices, particularly if these agents and intermediaries are used by business-, contract- or JV partners to facilitate the success of their investment project and/or to secure lucrative contracts.

Common cases include using agents and intermediaries as "deal brokers", "sales agents", "distributors" and "suppliers". In this context, payments will be made to an agent or broker to secure a lucrative contract or the opportunity to conclude a contract or enter a business relationship with a third party. The agent or broker, in turn, uses part of the fees paid to bribe these potential customers and/or business partners. Such payments are then often referred to as "special charges", "consulting fees" or "sales commission expenses" and recorded in the books of the company accordingly.

However, corruption cannot be outsourced and "accounting tricks" will often not remain undetected by the financial and tax authorities, which then poses a large legal risk to the foreign investor and his investment project in Vietnam. Therefore, while the use of agents and other intermediaries, as well as the payment of commissions, is not prohibited per se, they must be selected with the highest care and continuous supervision and monitoring.

If it seems essential to use an intermediary, the intermediary should contractually commit to "act in full compliance with the applicable anti-corruption laws". The agreement with the intermediary should further allow for immediate termination of the contract in case of corruption offenses, or if such offenses seem likely. An audit right is useful in this context. To prevent corruption from the outset, a comprehensive activity report of the intermediary's activity should be mandatory, including specifically which activities the intermediary has performed at which cost. Fees for the intermediary's services should be at market rates, and any doubtful amounts should be carefully questioned.



## 1.5 Principles of Contract Law

### 1.5.1 Contract contents, form and language:

Art. 3 (2) of the Vietnamese Civil Code No. 91/2015/QH13, effective since 1<sup>st</sup> January 2017, explicitly recognizes the parties' rights to *“freely and voluntarily entering into commitments and/or agreements”* and therefore *“each commitment or agreement that does not violate regulations of law and is not contrary to social ethics shall be bound by the contracting parties and must be respected by other entities.”* For most civil matters, the referral to “social ethics” is practically not a problem, unless for example “sensitive” areas, such as trade in weapons, toxic waste, etc. are concerned. Overall, the contracting parties are therefore free in their decision as to whether contracts should be concluded with whom and at what conditions.

Contracts can generally be concluded without legal form requirements in Vietnam, except for certain areas of the law, such as for example in family and real estate law, where official notarization is required for contracts to be valid. For reasons of evidence and documentation, however, written form is urgently recommended even where no form requirements exist. Therefore, commercial contracts will usually be made in writing. Furthermore, a written form clause is recommended in each contract in order to avoid objections of the other party that certain side agreements exist.

Although English is increasingly spreading in business transactions, Vietnamese remains the only official language both in legal documents and in Vietnamese courts. In practice, it is therefore advisable to always create bilingual versions of the relevant contracts and documentation. While it is in principle possible to have the English-language version prevail over the Vietnamese version, there are certain limitations if Vietnamese laws provide for the exclusive validity of the Vietnamese-language version (for example in certain family and real estate matters). If one party of a contract is a Foreign Investor, the contract language may be English only. If the foreign and Vietnamese contract party agree to domestic arbitration at the Vietnamese International Arbitration Centre (VIAC), the VIAC Rules of Arbitration provide that the parties may agree on English-language proceedings at the VIAC. The VIAC’s “Model Arbitration” Clause can be accessed at: <https://www.viac.vn/en/model-clause.html>

### 1.5.2 Use of General Terms and Conditions:

The use of “General Terms and Conditions” (GTCs) is becoming increasingly more widespread in Vietnam. There are no specific statutory regulations for GTCs, and therefore the admissibility of the use of GTCs results from above general contractual freedom of the parties. While certain limitations under consumer protection rules exist,

these in most cases do not affect the use of GTCs if the other party agrees and/or is a commercial party. For reasons of evidence and to avoid disputes, it is recommended to include the GTCs in the form of an annex/appendix to the written individual contract (or order confirmation) with the Vietnamese contract partner, even though a simple link to the company's website (on which the GTCs are published) would be sufficient from a legal point of view.

For business transactions of a foreign-owned Vietnamese subsidiary with domestic Vietnamese customers the Vietnamese version of the GTCs will usually be binding, even though agreement on the English version is possible and potentially advantageous if arbitration at the VIAC is agreed on (see above). In practice, it is recommended to always make a bilingual English-Vietnamese version of the GTCs. While not mandatory, this can for example be useful if the foreign-owned Vietnamese subsidiary does not only have domestic business but also cross-border transactions in the region. In that case, the GTCs can determine that the Vietnamese version prevails for domestic transactions while the English version governs cross-border transactions.

Important terms to include into GTCs are - amongst others - provisions on contract scope, payment terms including late payment or default, service/delivery terms such as time and place of performance, subsequent change of such service/delivery terms, consequences of partial and/or delayed performance, customer obligations, guarantees, liability for damages, indemnification, goods shipping and risk transfer, insurance requirements, contract termination, data protection, protection of intellectual property rights and dispute resolution. As every business is different, it is important not to rely on templates but to seek advice with regards to drafting the GTCs.

## 1.6 Common Drafting Mistakes

- **Use of international (headquarters) contract templates:** Headquarters of multinational companies often prefer to use their own contract templates for matters of internal (group) consistency in all jurisdictions they are active in. While this is understandable from a group point of view, at least local compliance with Vietnamese laws should be carefully checked. In addition, suitability of the template for the specific case should be reviewed, as no template can fully anticipate all details and specifics of the case at hand. An additional problem with international templates is that these are often very comprehensive and therefore too detailed for the Vietnamese side that generally works with simpler and shorter contract versions.

- **Use of invalid contract templates:** Sometimes, investors use contract templates that may work in other jurisdictions, however for Vietnam they would be regarded as a circumvention of Vietnamese laws and are therefore invalid. This is for example true for trustee or nominee agreements with Vietnamese nationals as far as they intend to circumvent i) certain licensing requirements (e.g., investment licensing procedures under the LOI or ii) applicable maximum foreign ownership restrictions regarding shareholdings or holding of capital contributions in companies in specific business areas. In addition, for some areas of the law, certain Vietnamese templates exist. While not strictly legally binding, these should at least be considered both in form and content.
- **Use of English contract versions only:** If templates are used, they are often English-language only. While this is possible, contracts in Vietnam should always be made bilingual English-Vietnamese versions even where the English version could prevail and be basis for arbitration proceedings. If - however - no arbitration was agreed on and Vietnamese courts are therefore competent, the Vietnamese version will generally be prevailing. In such case, it is important that an accurate Vietnamese translation is available. This is often underestimated, as even certified Vietnamese translation companies are often unable to translate legal terms precisely. For example, Vietnamese translations of English terms often confuse and/or do not clearly distinguish between legal and commercial meaning of certain terms, even with common terms such as e.g., “capital”, “investment”, “revenues” and “profits”.
- **Lack of definitions and inconsistency of contract terms:** Specifically in cases where the Vietnamese party provides the first contract draft, there are often no clear definitions of terms which may result in misunderstanding about their meaning. It is therefore important to introduce terms either in a separate paragraph, or where the term is first mentioned, a contract definition which in the following will only be used in capitalized form. Where annexes / appendixes are made, they must explicitly be made “integral part” of the contract and their use of defined terms must be consistent.
- **Disregard of Vietnamese legal terminology:** Vietnamese laws often have legal terms that deviate from internationally common terms. This is particularly true in the area of commercial and corporate law. For example, shareholders in a limited liability company are called “members” in Vietnam. And these “members” do not hold shares but “capital contributions” in the limited company. The meeting of shareholders in a limited company in Vietnam is called

“Members’ Council” meeting instead of shareholder meeting. Articles of association or bylaws are referred to in Vietnam as the “Company Charter” and there is a dogmatic difference between the investment and the charter capital in Vietnam. Therefore, English templates should be reviewed with regard to deviating terminology in Vietnam.

- **Missing and/or incomplete contract provisions:** Where the Vietnamese side provides contract drafts, there will often be a focus on certain (rather commercial) provisions such as payment and delivery terms, while other terms are either missing or incomplete. This is often true for e.g., liability-, confidentiality and data protection clauses, termination clauses, compliance clauses and entire agreement-, severability- and written-form clauses. In addition, some legal terms, concepts and clauses are still not very well known in Vietnam, which may cause additional confusion on the Vietnamese side. This is for example the case with hold-harmless and indemnification clauses and tag-along/drag-along clauses in share purchase agreements.
- **Insufficient dispute resolution clause:** A good dispute resolution clause should generally include a two-step approach with the first step being negotiation or mediation, however with a clear procedure including at least notification requirements and timelines for amicable resolution (e.g., 30 days). Only if negotiation fails, the dispute should be referred to in a second step to arbitration centres or Vietnamese courts. As mentioned above, referral to the VIAC often makes sense.

### 2.1 Overview

#### 2.1.1 Foreign and domestic investors:

The amended Law on Investment No. 61/2020/QH14 (“LOI”) came into effect on 1<sup>st</sup> January 2021 and is supplemented by Decree 31/2021/ND-CP (“Decree 31/2021”) effective since 26<sup>th</sup> March 2021. Art. 3 LOI generally defines as investor an *“organization or individual that carries out business investment activities”* in Vietnam. Auch investors include domestic investors, foreign investors and foreign-invested business entities as follows:

- A **domestic investor** means an individual holding Vietnamese nationality or a business entity whose members or shareholders are not foreign investors.
- A **foreign investor** means an individual holding a foreign nationality or an organization established under foreign laws and carrying out business investment activities in Vietnam.
- A **foreign-invested business entity** means a legal entity whose members or shareholders are foreign investors, with business entities only including entities established and operating in accordance with Vietnamese laws.

Under Art. 23 (1) LOI, certain foreign investors and foreign invested business entities, unlike domestic investors and business entities, must follow the investment registration procedures of the LOI when i) establishing a business entity, ii) making investments by contributing capital, purchasing shares or purchasing stakes of a business entity or iii) making investments under a business cooperation contract. In detail, the **investment registration procedures of the LOI apply** if:

- 50% or more of the investor’s charter capital is held by (a) foreign investor(s) or the majority of partners are foreigners (if the business entity is a partnership).
- 50% or more of the investor’s charter capital is held by one or more foreign invested business entity/entities.
- 50% or more of the investor’s charter capital is held by one or more foreign investor(s) and one or more foreign invested business entity/entities.

According to Art. 37 LOI, investment projects of above defined investors (“Foreign Investors”) must first be issued an Investment Registration Certificate (“IRC”). Other investors only need to follow investment procedures also applied to Vietnamese domestic investors (if any). Therefore, unlike domestic investors, Foreign Investors are subject to two subsequent licensing procedures:

- Obtaining the IRC which approves the Foreign Investor's investment project in Vietnam, and then
- Obtaining the Enterprise Registration Certificate ("ERC"), with which the legal entity operating the foreign investment project is formally established ("Foreign Invested Enterprise" or "FIE").

Accordingly, Foreign Investors carrying out their **first investment project** in Vietnam must not establish a FIE without a valid, approved investment project and the IRC issued prior to applying for the ERC which established the legal entity. If a Foreign Investor who has already licensed an investment project in Vietnam pursues a new investment project, procedures for executing such new, additional investment project shall be followed, however without necessarily having to establish a new, additional legal entity.

The same applies if a Foreign Investor wants to **expand their existing investment project**: In this case, they can either use their existing FIE (and its ERC) or establish a new FIE (and then a new, additional ERC needs to be issued).

### 2.1.2 Applying for the IRC:

The IRC application includes the Foreign Investor's:

- Investment Project Proposal, and
- Application for Investment Project Execution.

The IRC application must be supported with a number of documents, including:

- The Foreign Investor's certificate of incorporation (aka business registration).
- The Foreign Investor's legal representatives' passport copies.
- The Foreign Investor's articles of association (aka bylaws or charter).
- The Foreign Investor's decision / resolution to establish a FIE in Vietnam.
- The Foreign Investor's appointment decision of Authorized Representative(s), Legal Representative(s) and the General Director of the future FIE.
- Passport copies of Authorized Representative(s), Legal Representative(s) and the General Director of the future FIE.
- The Foreign Investor's audited financial statements for the last two fiscal years.
- Memorandum of Understanding (MOU) regarding the lease of office space in Vietnam (the MOU will commit that the future FIE will then take over the lease after the ERC is issued).
- Commitment letter or bank statement to pay up the charter capital (sometimes asked for even though not legally required).



These supporting documents (except for the commitment letter / bank statement) need to be “legalized” in the Foreign Investor’s home country so that they can be used in Vietnam. The legalization procedure varies from country to country, but generally includes at least three steps:

- **Step 1:** The document must be authenticated by a competent notary public of the country where the documents were issued (usually within the district where the Foreign Investor is headquartered or residing).
- **Step 2:** The notarized documents must then be certified by the competent diplomatic body of the country where the documents were issued. This can be the Ministry of Foreign Affairs, or in some countries the President of the Regional Court in which the notary public is located.
- **Step 3:** The certified (pre-legalized) documents must then be legalized by the Vietnamese Embassy in the Foreign investor’s home country.

The legalized foreign documents must then be translated into Vietnamese and certified before they can be submitted to the licensing authorities in Vietnam. Even though the translation can be done abroad, it is preferable to have the legalized documents translated in Vietnam, because your advisors can then better double-check the translations provided by the Vietnamese certified translation company.

### **2.1.3 IRC/ERC licensing timelines:**

According to Art. 38 (1) LOI, the deadline is within which the investment authority must grant or reject issuance of the IRC is 15 days from the date of receipt of the complete application documents. The additional ERC must be granted within three (3) working days. In practice, however, the licensing authorities will hardly ever meet those deadlines. Rather, they will often delay approvals with various arguments why the submitted application dossiers were not accurate or complete and therefore the legally prescribed timelines could not be kept or were not started in the first place. In this context it is not uncommon that direct or indirect demand for “acceleration payments” are made by the licensing authorities. Therefore, in practice, investors should rather calculate with at least twice the statutory timelines and include in their planning the additional time required to obtain and legalize the documents required to submit the IRC and IRC applications.

### **2.1.4 Distribution and retail license:**

In some cases, in addition to IRC and ERC, the granting of additional licenses, permits and thus the participation of other agencies, authorities or ministries may be required.



This is for example required in certain other business areas such as e.g., in education, banking and financial services, construction, hospitality, real estate and certain other limited investment areas.

Practically important for many investors is the area of retail- and distribution, in which, in addition to the IRC and ERC, a distribution license (in Vietnam rather confusingly referred to as “business license”) and potentially an additional retail outlet license must be obtained by the competent Department of Industry and Trade (“DOIT”). Retail and distribution activities are governed by Decree No. 09/2018/ND-CP dated 15 January 2018 (“Decree 9”), which contains comprehensive regulations regarding *“activities directly related to sale of goods of foreign investors and foreign-invested business entities in Vietnam”*. According to Art. 5 of Decree 9, a business license must generally be issued to a foreign-invested business entity to exercise the retail distribution right, importation rights and wholesale distribution rights. A foreign-invested business entity must in addition apply for a license for establishment of a retail outlet after obtaining the business license, with retail outlets being defined as places in which *“goods are sold to individuals, households, other organizations for consumption purpose.”*

Art. 12 of Decree 9 requires – amongst others – that the foreign business must provide the following documentation to be issued a business license:

- Business plan: business activities and methods of doing business; presentation of business plan and market development; labour need; evaluation of the implications and socio-economic effectiveness of the business plan;
- Financial plan: An income statement made on the basis of the last audited financial statement if the enterprise has been established in Vietnam for at least 1 year; representation of capital, sources of funds and fund-raising plans; enclosed with other financial documents;
- A document justifying that the enterprise incurs no overdue tax issued by the tax authority; and
- Copies of the ERC; certificate of registration for sale of goods and other related activities (if any).

Once issued, the validity period of a business license is five (5) years.

Art. 22, 23 of Decree 9 contain the requirements for establishment of retail outlets and obtaining the retail outlet license. In particular, Art. 23 prescribes the criteria for the “Economic Needs Test” in case foreign businesses want to set up additional retail outlets. These criteria include e.g., i) The number of existing retail outlets in the relevant geographic market; ii) the impact of the retail outlet on the market stability

and operating activities of other retail outlets and traditional markets in the relevant geographic market; iii) the impact of retail outlet on traffic density, environment hygiene, fire safety in the relevant geographic market and iv) the potential contribution of the retail outlet to the socio-economic development of the relevant geographic market, in particular: employment creation for domestic workers, potential contribution to the development and modernization of the retailing sector in the relevant geographic market, improvement of environment and living conditions of inhabitants in the relevant geographic market and potential and actual contribution to the state budget.

### **2.1.5 Investment guarantees:**

Art. 10 LOI guarantees all investors that their lawful assets shall generally not be nationalized or confiscated by administrative measures. Only where an asset is bought or requisitioned by the State for reasons of national defense and security, national interests, state of emergency or natural disaster management, the investor shall be reimbursed or compensated in accordance with regulations of law on asset requisition and relevant regulations of law. In addition, Art. 12. LOI guarantees the transfer of Foreign Investors' assets overseas if all tax/financial obligations are fulfilled. Those assets specifically include the Foreign Investors' i) investment capital and proceeds from liquidation of their investment, ii) income obtained from business investment activities and iii) money and other assets under their lawful ownership.

Art. 13 LOI further provides investment guarantees for foreign investors in cases of changes in legislation: Where a new law provides more favourable investment incentives, investors are generally entitled to enjoy the new incentives for the remaining period of the incentive enjoyment of the project. Where a new law that provides less favourable investment incentives than those previously enjoyed by investor is promulgated, investors shall generally keep enjoying the current incentives for the remaining period of the incentive enjoyment of the project. Where an investor is no longer eligible for investment incentives, the following options exist: i) Deduction of the damage suffered by the investor from the investor's taxable income, ii) Adjustment of the objectives of the investment project or iii) Assisting the investor in remedying the damage.

## **2.2 Market Access Restrictions**

### **2.2.1 Market access restrictions for all investment:**

Under the LOI, investors, both foreign and domestic, may conduct freely all business activities in Vietnam, unless these business lines are either banned or conditional.

### **Banned business lines:**

Art. 6 LOI lists as banned business lines:

- *Trade in the narcotic substances specified in Appendix I of the LOI.*
- *Trade in the chemicals and minerals specified in Appendix II of the LOI.*
- *Trade in specimens of wild flora and fauna specified in Appendix 1 of the Convention on International Trade in Endangered Species of Wild Fauna and Flora; specimens of rare and/or endangered species of wild fauna and flora in Group I of Appendix III of the LOI.*
- *Prostitution, human trafficking, trade in human tissues, corpses, human organs and human fetuses.*
- *Business activities pertaining to asexual human reproduction.*
- *Trade in firecrackers.*
- *Provision of debt collection services.*

### **Conditional Business Lines:**

Like many other countries, Vietnam restricts or conditions investment into so-called “conditional sectors”, which in Vietnam include certain sensitive sectors with impact on social order and state security, the education, healthcare and financial services sector, production, publication and distribution of cultural goods as well as the exploration of natural resources (mining industry). In addition, certain investments are limited to foreign investments with a particular threshold, such as investments in Vietnamese banks (30%) or investment in public enterprises (49%). The classification of a business line as a conditional investment sector also has an impact on registration and approval procedures and may therefore also determine the competent licensing authority. Art. 7 (2) in connection with Appendix IV of the LOI lists 227 such conditional business lines.

### **2.2.2 Foreign Investors’ additional market access restrictions:**

For Foreign Investors, Art. 15-18 in connection with Appendix I of Decree 31/2021 provide an additional “*list of business lines with prohibited and restricted market access*”. Specifically, Art. 17 (1)-(2) of Decree 31/2021 provide that Foreign Investors are only treated like domestic Vietnamese investors when investing in business lines which do not fall under the “**Negative List for Market Access**”, which is comprised of two sub-lists: A “**Prohibition List**” of business lines which Foreign Investors are not allowed to invest in, and a “**Market Entry List**” of business lines in which Foreign Investors must satisfy certain market entry conditions to invest in.

The “**Prohibition List**” lists 25 business lines prohibited for Foreign Investors because their foreign investment may harm Vietnam’s national security and -defense, social order, community health, Vietnamese historical traditions, culture and customs and/or damage or destroy natural resources and the environment as follows:

1. *Trading goods and services on the list of goods and services on which monopoly is held by the State in the commercial sector.*
2. *Press activities and information gathering in any form.*
3. *Fishing.*
4. *Security and investigation services.*
5. *Judicial administration services, including judicial assessment services, poste restante services, property auction services, notary services, liquidator services.*
6. *Overseas contracted employment agency services.*
7. *Investment in the construction of infrastructure of cemeteries and graveyards to transfer land use rights associated with such infrastructure.*
8. *Waste collection services directly from households.*
9. *Public opinion polling service (public opinion polling).*
10. *Blasting services.*
11. *Manufacture and trade in weapons, explosives and supporting tools.*
12. *Import and dismantling of used seagoing vessels.*
13. *Public postal services.*
14. *Goods transshipment business.*
15. *Temporary import for re-export business.*
16. *Exercise of the right to export, import, and distribution of goods on the list of goods for foreign investors, foreign-invested economic organizations are not allowed to exercise the right to export, import, distribute.*
17. *Collection, purchase and handling of public goods in armed forces units.*
18. *Trading in military materials or equipment and supplies for the people's armed forces, military weapons, technical equipment, ammunition and specialized vehicles used for the army and police; components, accessories, spare parts, supplies and specialized equipment and technology used for their production.*
19. *IPR representation services and industrial property assessment services.*
20. *Services of the establishment, operation, maintenance and maintenance of aids to navigation, water zones, water areas, public navigational channels and maritime routes; service of surveying water zones, water areas, public navigational channels and maritime routes serving maritime notices; services of surveying, constructing and*

*publishing nautical charts for waters, seaports, navigational channels and maritime routes; building and publishing marine safety documents and publications.*

*21. Navigation services to ensure maritime safety in water areas, water areas and public navigational channels; marine electronic information service.*

*22. Inspection and certification services for means of transport (including systems, components, equipment, components of vehicles); inspection and issuance of certificates of technical safety and environmental protection for vehicles, specialized equipment, containers, and dangerous goods packaging equipment used in transportation; inspection services and issuance of certificates of technical safety and environmental protection for oil and gas exploration, exploitation and transportation means and equipment at sea; technical inspection service of occupational safety for machines and equipment with strict requirements on occupational safety installed on means of transport and means, exploration and exploitation equipment and oil and gas transportation at sea; fishing vessel registry services.*

*23. Natural forest investigation, assessment and exploitation services (including gathering wood and hunting, trapping rare wild animals, management of the sources genes for plants, livestock and microorganisms used in agriculture).*

*24. Researching or using genetic resources of new livestock breeds before being appraised and evaluated by the Ministry of Agriculture and Rural Development.*

*25. Tourism services, except international tourism services for international tourists to Vietnam.*

The “**Market Entry List**” lists 58 business lines in which Foreign Investors must satisfy certain market entry conditions and one “opening item” No. 59 which allows the issuance of “pilot mechanisms” on new business lines (rather than existing ones) Accordingly, if there is no pilot mechanism on a business line which falls within neither the Prohibition List nor the Market Entry List, Foreign Investors are equal to domestic investors in terms of market entry conditions. In detail:

*1. Production and distribution of cultural products, including visual recordings.*

*2. Production, distribution and broadcast of television programs and music, stage performance and motion picture works.*

*3. Supply of radio and television services.*

*4. Insurance, banking, securities brokerage, and other services related to insurance, banking, and securities.*

*5. Postal services, telecom services.*

*6. Advertising services.*

*7. Printing service, publication issuance services.*

8. *Measurement and mapping services.*
9. *FlyCam services.*
10. *Educational services.*
11. *Exploration, extraction and process of natural resources, minerals, oil and gas.*
12. *Hydropower, offshore wind power and nuclear energy.*
13. *Transport of goods and passengers by railway, airway, road, waterway and conduit [pipeline].*
14. *Aquaculture cultivation or breeding.*
15. *Forestry and hunting.*
16. *Betting and casino business*
17. *Security guard services.*
18. *Construction, operation and management of river ports, seaports and airports.*
19. *Real estate business.*
20. *Legal services.*
21. *Veterinary services.*
22. *Goods sale and purchase activities and activities directly related to goods trading activities of foreign service providers in Vietnam.*
23. *Technical inspection and analysis services.*
24. *Travelling [tourism] services.*
25. *Health and social services.*
26. *Sports and entertainment services.*
27. *Paper production.*
28. *Manufacture of transport vehicles with more than 29 seats.*
29. *Development and operation of wet markets.*
30. *Commodity Exchange operations.*
31. *Domestic LCL collection services.*
32. *Auditing, accounting, bookkeeping and tax services.*
33. *Valuation services, consulting services on corporate valuation for equitization.*
34. *Services related to agriculture, forestry and fishery.*
35. *Aircraft manufacturing.*
36. *Manufacture of railway locomotives and wagons.*
37. *Trading tobacco products, tobacco raw materials, and specialized machinery and equipment for the tobacco industry.*
38. *Publishers' activities.*
39. *Ship building, and repair services.*



40. *Waste collection services, environmental observation services.*
41. *Commercial arbitration services, arbitration and mediation services.*
42. *Logistic services.*
43. *Coastal shipping.*
44. *Cultivation, production or processing of rare crops, breeding of rare wild animals, processing and handling of these animals or plants, including products thereof.*
45. *Production of construction materials.*
46. *Construction and related technical services.*
47. *Motorcycle assembly.*
48. *Services related to sports, art activities, performing arts, fashion shows, beauty and model contests, and other entertainment.*
49. *Air transport support services; airport ground technical services; catering services on the aircraft; navigation information services, aviation meteorological services.*
50. *Sea transport services; shipping tugboat [ship towing] services.*
51. *Services related to cultural heritage, copyright and related rights, photography, video recording, recording, art exhibitions, festivals, libraries, museums.*
52. *Services related to tourism promotion.*
53. *Agent, recruitment and scheduling, management for artists, athletes' services.*
54. *Family related services.*
55. *E-commerce activities.*
56. *cemetery business, cemetery services and funeral services.*
57. *Airborne seeding and chemical spraying services.*
58. *Maritime pilotage services.*
59. *Investment sector, business lines under the pilot mechanism of the National Assembly, The Standing Committee of the National Assembly, the Government, and the Prime Minister.*

In summary, according to Art. 17 of Decree 31/2021, Foreign Investors are subject to the following additional market access restrictions:

- Foreign Investors must not invest in the prohibited business lines specified in the **Prohibition List** (Section A, Appendix I of Decree 31/2021).
- For restricted business lines specified in the **Market Entry List** (Section B, Appendix I of Decree 31/2021), Foreign Investors shall fulfil the conditions that are published in accordance with Article 18 of Decree 31/2021.



A Foreign Investor carrying out investment activities in different business lines specified in the Prohibition or Market Entry List must fulfil all market access conditions applied to those business lines. In business lines without above market access restrictions, Foreign Investors and domestic investors have equal market access, subjects to the applicable Vietnamese laws and regulations. If a **new Vietnamese legislative document** contains market access restrictions for Foreign Investors in the business lines without market-access commitment of Vietnam:

- Foreign Investors to whom the conditions for market access mentioned have been applied **before the new legislative document takes effect** may carry on their investment activities under the said conditions.
- Foreign Investors that carry out investment activities **after the effective date of the new legislative document** shall fulfil the market access conditions prescribed by such document.
- In case of **establishment of a new business organization**, execution of a new investment project, receipt of an investment project, purchase of stakes/shares of another business organization under a contract or change to the objectives or business lines that is subject to fulfilment of market access conditions prescribed by the new legislative document, such conditions must be fulfilled. In this case, the competent authority shall not reconsider the conditions for market access in the business lines granted to the investor previously.

Foreign Investors from countries that are not WTO members shall apply the same conditions for market access by investors from countries that are WTO members, unless otherwise prescribed by the law of Vietnam or international treaties between Vietnam and those countries. Foreign Investors that are regulated by an investment-related international treaty which prescribes more favourable conditions for market access than those prescribed by the law of Vietnam, the former may be applied. Foreign Investors that are subject to investment-related international treaties which prescribe different market access conditions may apply the conditions prescribed by any of those treaties to all of the investor's business lines. Once the conditions prescribed by one of the international treaties have been chosen, the foreign investor shall perform their rights and obligations in accordance with the chosen treaty.

### 2.3 Investment Incentives

Tax incentives may apply for both new investment projects and expansion of existing investment projects, however restrictions may apply for the expansion of existing

investment projects or investment projects resulting from certain acquisitions or restructuring transactions. Tax incentives only apply to the promoted investment activities and not for other, indirect or accidental income resulting from the investment activities (such as e.g., interest income, foreign currency income).

### **2.3.1 Types of tax incentives:**

The available tax incentives may comprise:

- Reduced corporate income tax (“CIT”) rates between 10% and 17% are granted for 15 or 10 years, starting with the beginning revenue generation from the tax-funded activities. The duration of the application of the preferred tax rate may be extended in certain cases. The preferential rate of 15% applies in certain cases for the entire project period. Certain sectors (e.g., education, health) also enjoy the 10% preferential tax rate throughout the project life.
- Tax exemption means a time period in which the investment project is completely exempted from CIT, starting from the first financial year in which the company generates a profit.
- Tax reduction refers to the subsequent period of time to the period of tax exemption, in which a 50% reduction is granted to the relevant CIT rate. If the company does not generate a profit within three years, the tax exemption or tax reduction begins in each case from the fourth financial year.
- Exemption from import duties may apply for certain investment projects with special investment incentives or those in socio-economically difficult areas if the imported goods are part of the fixed assets of the investment project in Vietnam.
- Exemption from and reduction of land levy and land rents may be granted based on the nature of the investment project.
- Accelerated depreciation, increasing the deductible expenses upon calculation of taxable income.

### **2.3.2 Incentivised projects, entities, activities and areas:**

Investment incentives exist for the following projects, entities, activities and areas:

#### **Projects and entities eligible for investment incentives:**

- Investment projects, outside the mining sector or such projects whose products are subject to special sales tax, with an investment volume of 6,000 billion VND or more (within three years from licensing), if they meet at least one of the following criteria: Revenue of at least 10,000 billion VND per year, starting with

the fourth year of business, or more than 3,000 employees at the latest in the fourth year of business operations.

- Investment projects on establishment or expansion of innovation- or research and development centres with a total investment capital of 3,000 billion VND or more and which disburses at least 1,000 billion VND within a period of three years from the date of being granted the IRC or Investment Policy Approval or national innovation centres established under the decision of the Prime Minister.
- Investment projects in industries and trades eligible for special investment incentives with an investment capital of at least 30,000 billion VND and which disburses at least 10,000 billion VND within a period of three years from the date of being granted the IRC or Investment Policy Approval.
- Investment projects with an investment volume of at least 12,000 billion VND distributed within five years of licensing, except for mining projects or projects whose products are the subject to special sales tax.
- Social housing construction projects; investment projects located in rural areas and employing at least 500 employees, investment projects that employ persons with disabilities in accordance with the laws on persons with disabilities.
- High-technology enterprises, science and technology enterprises and science and technology organizations, projects involving transfer of technologies on the “list of technologies the transfer of which is encouraged” in accordance with the Law on Technology Transfer, science and technology enterprise incubators prescribed by the Law on High Technologies and Law on Science and Technology, enterprises manufacturing and providing technologies, equipment, products and services aiming at meeting environment protection requirements prescribed by the Law on Environment Protection.
- Business investment in small and medium-sized enterprises (SMEs) product distribution chains eligible for investment incentives or in a network of intermediaries that distribute products of such SMEs to consumers and meet the following conditions: At least 80% of enterprises joining the chain are SMEs, there are at least 10 places for distribution of goods to consumers and at least 50% of revenue of the chain are generated by SMEs joining the chain.
- Investment in SME incubators, technical establishments supporting SMEs, co-working spaces supporting start-up SMEs eligible for investment incentives (those established in line with the laws on provision of assistance for SMEs).
- Start-up investment projects on manufacturing of products created from inventions, utility solutions, industrial designs, semiconductor integrated circuits

layout-designs, computer software, applications on mobile phones, cloud computing, production of new livestock breed or line, new plant varieties, new aquatic breeds, new forest tree cultivars, technological advances which have been granted protection certificates in accordance with the laws on intellectual property or copyrights or international registration certificates in accordance with international treaties to which Vietnam is a signatory or recognized by competent authorities.

- Projects on manufacturing of products obtained from projects on trial production, sample products and technology completion, manufacturing of products given awards at start-up competitions, national start-up competitions, scientific and technological awards in accordance with the laws on scientific and technological awards.

**Business activities eligible for investment incentives:**

- High-tech activities, high-tech ancillary products, research, manufacturing and development of from science and technology products in accordance with the law on science and technology.
- Manufacturing of new, clean and renewable energies, manufacturing of products with an added value of 30% or more and energy-saving products.
- Manufacturing of key electronics, mechanical products, agricultural machinery, automobiles, automobile parts, shipbuilding.
- Manufacturing of products on the list of prioritized supporting products.
- Manufacturing of IT products, software products, digital contents
- Breeding, growing and processing of agriculture products, forestry products, aquaculture products, afforestation and forest protection, salt production, fishing and fishing logistics services, production of plant varieties, animal breeds and biotechnology products.
- Collection, treatment, recycling or re-use of waste.
- Investment in development, operation, management of infrastructural works; development of public transportation in urban areas.
- Pre-school, higher and general education, vocational education.
- Medical examination and treatment; manufacturing of medicinal products and medicinal materials, storage of medicinal products; scientific research into preparation technology and biotechnology serving creation of new medicinal products; manufacturing of medical equipment.
- Investment in sports facilities for the disabled or professional athletes.

- Investment in protection and promotion of value of cultural heritage.
- Investment in geriatric and centres for elderly, mental health centres, treatment for agent orange patient, the disabled, orphans and street children.
- Investment in people's credit funds, microfinance institutions.
- Manufacturing of goods and provision of services for the purposes of creating or participating in value chains and industrial clusters.

#### **Areas eligible for investment incentives:**

- Disadvantaged areas and extremely disadvantaged areas.
- Industrial parks, export-processing zones, hi-tech zones and economic zones.

## **2.4 Investment Approvals**

As a general rule, investment approval is granted by **IRC issuance** by either the provincial Department of Planning and Investment (DPI) or the Management Boards of industrial parks, export-processing zones, hi-tech zones and economic zones (if the investment project is executed in such industrial park, export-processing zone, hi-tech or economic zone).

However, for below selected special investment projects, an **Investment Policy Approval (IPA)** is required in addition to the IRC. In these cases, the licensing authority in charge depends on the type and scale of the investment project as follows:

### **2.4.1 Large-Scale Investment Projects:**

The **National Assembly** approves the following investment projects:

- i) Investment projects that exert great effects or potentially serious effects on the environment, including nuclear power plants, projects that require repurposing of special-use forests, headwater protection forests or border protection forests of at least 50 hectares; of sand-fixing and windbreak coastal forests or protection forests for wave prevention of at least 500 hectares or production forests of at least 1,000 hectares.
- ii) Investment projects that require repurposing of land meant for wet rice cultivation during with two or more crops of at least 500 hectares.
- iii) Investment projects that require relocation of 20,000 people or more in mountainous areas or 50,000 people or more in other areas.
- iv) Investment projects that require application of a special mechanism or policy that needs to be decided by the National Assembly.

### 2.4.2 Medium-Scale Investment Projects:

Except for the investment projects under the approval authority of the National Assembly, the **Prime Minister** approves the following investment projects:

- i) Investment projects regardless of capital sources in the following cases:
  - Investment projects that require relocation of 10,000 people or more in mountainous areas or 20,000 people or more in other areas.
  - Investment projects on construction of airports and aerodromes, runways of airports and aerodromes, international passenger terminals, cargo terminals of airports and aerodromes with a capacity of at least one million tonnes per year.
  - New investment projects on passenger air transport business.
  - Investment projects on construction of ports and wharves of special seaports, ports and wharves in which investment is at least VND 2,300 billion within the category of class I seaports.
  - Investment projects on petroleum processing.
  - Investment projects which involve betting and casino services, excluding business in prize-winning electronic games for foreigners.
  - Projects on construction of residential housing (for sale, lease or lease purchase) and urban areas that use at least 50 hectares of land or less than 50 hectares of land but with a population of at least 15,000 people in an urban area; or investment projects that use at least 100 hectares of land or less than 100 hectares of land but with a population of at least 10,000 people in a non-urban area; or investment projects regardless of the area of land used or population within the safety perimeter of relics recognized by the competent authority as the national and special national relics.
  - Investment projects on construction and operation of infrastructure in industrial zones and export processing zones.
- ii) Investment projects of Foreign Investors in the following fields: provision of telecommunications services with network infrastructure, afforestation, publication and press.
- iii) Investment projects which at the same time fall within the power of at least two provincial People's Committees to grant approval for investment guidelines.

- iv) Other investment projects subject to approval for their investment guidelines or subject to issuance of decisions on investment guidelines by the Prime Minister as prescribed by law.

#### **2.4.3 Small-Scale Investment Projects:**

The remaining special “small-scale” investment projects which are not under the approval authority of the National Assembly or the Prime Minister are approved by the provincial **People’s Committees**:

- i) Investment projects that request the State to allocate or lease out land without auction or bidding for or receipt of land use rights, and investment projects that request permission to repurpose land, except for cases of land allocation, land lease or permission for land repurposing by family households or individuals not subject to the written approval by the provincial People's Committee as prescribed in the law on land.
- ii) Projects on construction of residential housing (for sale, lease or lease purchase) and urban areas that use at least 50 hectares of land or less than 50 hectares of land but with a population of at least 15,000 people in an urban area; or that use at least 100 hectares of land or less than 100 hectares of land but with a population of at least 10,000 people in a non-urban area; or investment projects regardless of the area of land used or population within a restricted development area or within an historic inner area (determined in accordance with urban area planning projects) of a special urban area.
- iii) Investment projects on construction and operation of golf courses.
- iv) Investment projects of foreign investors and foreign-invested business entities executed on islands or in border or coastal communes, in other areas affecting national defense and security.

#### **2.4.4 Industrial and Economic Zones:**

Hundreds of industrial and economic zones have been established all over Vietnam, their main benefits being their good infrastructure, the legal certainty of land titles and the reliability of tax benefits. There are the following different types:

- **Industrial Zones (IZs):** The IZs specialize in the production of various industrial goods. The 150 IZs in operation or construction occupy a total area of about 100,000 hectares within Vietnam. The IZs in operation often have an occupancy rate of over 75%, with some very popular IZs being practically fully occupied.



- **High-Tech Zones (HTZs):** HTZs are multifunctional zones which companies can use to produce high-tech goods, conduct research and development or train personnel, which can be later be employed in the HTZs. Foreign Investor's interest in HTZs has recently been lower, mainly because of the benefits and incentives offered are very similar to those offered in IZs, and only small clusters for science and technology having arisen in and around the existing HTZs.
- **Economic Zones (EZs):** The EZs are defined as certain geographical areas where investment privileges are granted just like in the IZs. As EZs are mostly located in structurally weak regions, foreign investors are usually offered better incentives as in the IZs, mostly with regards to favourable rates for land use rights. Currently there are around 20 EZs in Vietnam.

## 2.5 Foreign Investors' Land Use Rights

### 2.5.1 Types and duration of Land Use Rights

Land Use Rights ("LURs") are governed by the Vietnamese Land Law No. 45/2013/QH13, effective since 9<sup>th</sup> December 2013 ("Land Law"). Art. 4 Land Law provides that the *"Land belongs to the entire people with the State acting as the owner's representative and uniformly managing land. The State shall grant land use rights to land users in accordance with this Law."* Accordingly, the Land Law only recognizes land "ownership" in form of LURs. While the Land Use Right Certificate ("LURC") is similar to a title deed in many countries, it is technically speaking only a certificate of "ownership" of the LUR. Art. 5 No. 7 Land Law includes as potential land users *"Foreign-invested enterprises, including 100% foreign-invested enterprises, joint-venture enterprises, Vietnamese enterprises in which foreign investors purchase shares, merge or acquire in accordance with investment law."* Art. 5 Land Law stipulates that a number of "land users" may be allocated land or leased land, have LURs recognized by the State, or acquire LURs" as follows:

- **"Allocation" of LURs:** In such case, the LUR will be granted on a long-term basis, i.e., without a specific duration of use. However, LURs will mostly be allocated to Vietnamese citizens or organizations for limited purposes. Accordingly, allocation most closely resembles "real" ownership. Allocated land must be paid for in a lump-sum payment.
- **"Recognition" of LURs:** In such case, the LUR will be first granted for the stable land use which does not originate from allocation or lease. As the state

can "recognize" LURs for national entities only, this method can play a practical role only in cases where LURs are recognized for a Vietnamese JV partner.

- **“Acquisition” of LURs:** In such case, the LUR will be granted for a specific duration of time against the payment of a usage-fee. Accordingly, even where sometimes referred to as “ownership”, the granting of the LUR by acquisition mostly resembles a long-term lease contract with the lease paid upfront.

### 2.5.2 LURs in foreign investment projects:

With regards to investment projects, Foreign Investors may obtain LURs by way of:

- Acquiring the LUR from the State by entering into a lease-agreement and payment of the LUR fee annually or in one upfront lump-sum payment.
- Acquiring an existing investment project from other investors, and taking-over the project’s current lease-agreement.
- Entering into a Joint Venture (“JV”) with a Vietnamese party and obtaining the LUR as the Vietnamese JV partner’s capital contribution to this JV.
- Receiving a land allocation from the state, with payment of the land use fee for specific investment projects, e.g., on the construction of houses for sale or for a combination of sale and lease.

A lot of cases in which foreign investors “acquire” land relate to JVs between Foreign Investors and a domestic investor who contributes the LUR into the JV in kind, valued at its current market price. The reason being that Foreign Investors in most cases cannot legally obtain that land without jointly investing with the Vietnamese LUR owner (and JV partner). In addition, sometimes the relevant land is located in attractive investment areas and has been in use by local entities (often state-owned enterprises) who would neither sell, lease or allocate the LUR to the Foreign Investor alone, but only to a Vietnamese party.

According to Art. 126 (2) Land Law, the term for land allocation or land lease shall be considered and decided on the basis of the investment projects or applications for land allocation or land lease but must not exceed 50 years. For certain large investment projects with slow recovery of capital, projects in areas with difficult or especially difficult socio-economic conditions which require a longer term, the term of land allocation or land lease must not exceed 70 years.

### 2.5.3 Payment of land lease fee:

Foreign Investors who acquire LURs from the Government by entering into a LUR lease agreement may pay rent either on an annual basis or as a lump-sum payment:

- **Annual rental payment:** Under a land lease with annual payment, the Foreign Investor may use the land for the approved investment purposes only, and is only allowed to transfer, sub-lease or mortgage the assets attached to the land, but not the LUR itself. If paid annually, the rental price is generally at market price (often between 1-3% of the land value is applied, and a lower rate of 0.5-1% may be applied for “low-yield” or agricultural land).
- **Upfront payment for entire lease term:** Foreign Investors paying upfront for the entire lease term are entitled to transfer both the LUR and the assets attached to the land, subleasing land and assets attached to the land, contributing the LUR and assets attached to the land as capital to JVs, mortgaging or guaranteeing the LUR to credit institutions in Vietnam. Where the rental is paid in one lump-sum, the amount is generally the same as it would have been if the land had been allocated rather than leased.

## 2.6 Investment Accounts & Profit Repatriation

### Requirement to open Foreign Investor’s investment accounts:

Circular No. 06/2019/TT-NHNN (“Circular 6”), effective since 6<sup>th</sup> September 2019, provides, amongst others, guidance on foreign exchange management for foreign direct investment (FDI) in Vietnam, including capital contributions, opening and use of foreign currency and Vietnamese Dong direct investment accounts as well as the transfer of capital and profits and legal revenues to foreign countries. Circular 6, Art. 4 (3) provides that Foreign Investors’ “capital contributions” (i.e., the investment amount) for an investment project must be transferred to the Foreign Investor’s “direct investment account” (“DIA”). DIAs are defined as *“foreign currency or Vietnamese Dong demand accounts opened by FDI enterprises and foreign investors at authorized banks to perform transactions regarding the foreign direct investment in Vietnam.”*

A DIA must generally be opened in the name of the FIE. Only exceptionally, the DIA will be opened in the name of the Foreign Investor if no FIE is established, such as in a business cooperation contract (“BCC”) or in public-private partnership contracts (“PPP”). Practically, Foreign Investors shall open their foreign currency DIA at one licensed bank in Vietnam in order to receive and make payments in that foreign currency during their investment project in Vietnam. Generally, only one foreign currency DIA shall be opened, however in case of investing in Vietnamese Dong, the investor may open one Vietnamese Dong DIA at the same bank where the foreign currency DIA is opened in order to receive and make payment in VND during the term of the Foreign Investor’s investment project. If a Foreign Investor participates in

several BCCs or directly implements several PPP projects, such foreign investor shall open DIAs for each single BCC or PPP project.

Documents to be provided to open a DIA can be the IRC or “Establishment and Operation Certificate, the M&A approval or a BCC / PPP contract signed with an authorized state body or any other documents showing that the Foreign Investor’s project is permitted.

**Transfers required to be made through the DIA:**

Foreign Investors’ overseas transfers of foreign currency funds relating to their investment project must be made through the DIA. These include, amongst others, the Foreign Investor’s following (foreign currency) transactions:

- Capital contributions to the FIE or transfers relating to Foreign Investors’ BCCs or PPP projects.
- Transfers related to the increase or decrease of the FIE’s charter capital.
- Transfers relating to foreign currency loans to the FIE.
- Payment for the transfer of investment capital and investment projects.
- Overseas transfers of capital, lawful revenues and profits from the FIEs foreign currency DIA, including Foreign Investor’s implementing BCCs or PPP projects.
- Termination of investment projects and transfer of investment / charter capital overseas, including funds relating to BCCs and PPP projects.

Foreign Investors who do not open a DIA, or do not make required payments through the DIA risk being subject to a capital gains tax amounting to 20 percent.

**Transfer of capital for the pre-investment stage:**

Before obtaining the IRC, the “Establishment and Operation Certificate” or before signing BCCs and PPP contracts, Foreign Investors are allowed to transfer their investments from overseas or from their accounts in foreign currencies or Vietnamese Dong opened at authorized banks to pay for legal expenditures in the pre-investment stage in Vietnam.

**Closing of DIAs & shifting to Indirect Investment Accounts:**

FIE’s shall close their DIAs where the foreign ownership ratio in the FIE falls below the threshold to qualify as a Foreign Investor as a result of i) the Foreign Investor transferring capital contributions or shares, or ii) the FIE is issuing additional capital contributions / shares in charter capital increases or iii) The FIE is becoming a publicly listed company. FIE’s shall also close their DIAs where the FIE is dissolved the

investment project is terminated or a transfer of the ownership of the investment project occurs, or where such transfer results in the change of the FIE's legal status. In these cases, Foreign Investors have the right to use their foreign currency and Vietnamese Dong accounts opened at authorized banks to purchase foreign currency and transfer their direct investments and lawful revenues overseas in foreign currency.

In some of the above cases where Foreign Investors close their DIA, they may then be required to open an "Indirect Investment Account" ("IIA") to continue their now indirect investment activities in Vietnam. Foreign indirect investment means that foreign investors make an investment into Vietnam by buying securities, capital and purchase of shares, and investment funds without direct participation in the management of investment activities. Transaction related to indirect investments must be done through an IIA at a licensed bank in Vietnamese Dong. Profits that are obtained from indirect investment activities must also be remitted by using the IIA.

#### **Profit Repatriation:**

Profits must be deposited into the above DIA or IIA. Only once all tax- and other obligations relating to profits and distributions have been met, profits and proceeds of investments may then be converted back into foreign currency and remitted abroad. Profits may only be transferred abroad once annually at the end of each fiscal year.

## **2.7 Practical Tips**

- **Check if restrictions or conditions apply for your investment project:** It is essential for potential investors to carefully examine if and under which conditions their investment project can be licensed in Vietnam. Sometimes, foreign ownership restrictions exist or there must be at least one Vietnamese shareholder to be active in certain business lines.
- **Check local licensing differences and interpretation of regulations:** Local differences in terms of interpreting the applicable licensing requirements exist: While in some cities or provinces, an "investor-friendly" approach will be taken, other cities or provinces may be far less supportive. Therefore, prior to applying for the approval of an investment project, it is advisable to informally clarify with the licensing authority, which procedures and peculiarities should be observed, which documents should be submitted in which form and how specific procedural rules are interpreted by the licensing body in practice.
- **Invest in industrial or economic zones where possible:** Industrial and economic zones are often preferable to "greenfield" investments, as they mostly

have a good infrastructure and the legal certainty of land titles and the reliability of tax benefits is better. The management of the IZs or EZs will mostly be keen on supporting with licensing requirements. However, some IZs and EZs are better than others and there is often limited space in popular IZs or EZs.

- **Check available tax- and other investment incentives:** The granting of certain investment incentives, primarily tax incentives, will often be essential for potential investors' investment decision for Vietnam (as opposed to investing in other countries in the region). Therefore, a thorough check of tax incentives available should be conducted, also with regards to the specific licensing authority in charge.
- **Be aware of investment capitalization requirements:** Investment licensing authorities require applicants, as part of the investment approval procedure, to state in their investment proposal an investment capital for implementation of their investment project. Even though no legal thresholds exist, the licensing authority will validate if the stated amount is in their view sufficient to seriously implement the project. As a rule of thumb, they will usually consider whether the stated investment capital is sufficient to start and sustain the investment project for at least one year. Accordingly, while 25K USD may be sufficient investment capital for a consulting business, it cannot be sufficient to set up a manufacturing facility with hundreds of workers or a logistics warehouse. In those cases, amounts starting from 200K USD will be more likely.
- **Have complete, accurate and legalized documentation:** The applications for obtaining the IRC and ERC contain a large number of supporting documents that must be obtained in the Foreign Investors' home countries. Some of the documents, such as resolutions and decisions, ideally need to be prepared by lawyers familiar with the Vietnamese legal terminology to avoid rejection by the Vietnamese licensing authority. It is also important to consider the additional time to have certain documents legalized so they can be submitted to a Vietnamese licensing authority. Checklists are helpful in this regard.
- **Consistently use your DIA for all investment-related transactions:** Foreign Investors' overseas transfers of foreign currency funds relating to their investment project must be made through the DIA. If not, this can not only result in difficulties with regards to repatriation of profits and proceeds, but also in taxation or non-deductibility of the transfers made into Vietnam. The same is true with regards to private loans that are made to supplement investment financing or for other investment-related purposes.



### 3.1 Overview

The “Limited Liability Company” (“LLC”) is by far the most popular company form for a Foreign Invested Enterprises (“FIEs”) and therefore chosen by the majority of Foreign Investors when investing in Vietnam. While the “Joint Stock Company” or “Shareholding Company” (“JSC”) is another option, it is chosen more rarely because of its more complicated corporate governance requirements. It may, however, be suitable in case of larger capital needs, if Foreign Investors want to access the domestic capital markets for further funding in the future and/or if funding and voting shall be separated for example by issuing preferential shares next to ordinary shares. In practice, however, Foreign Investors mostly take a two-step approach and open a LLC first before they would then convert it into a JSC if the need arises.

#### 3.1.1 Legal Representatives:

Both LLC and JSC must have at least one so-called Legal Representative (“LR”) and at least one LR must reside in Vietnam. The LOE defines the LR of the FIE as the *“individual who represents the enterprise to exercise the rights and perform the obligations arising from transactions of the enterprise, and represents the enterprise in the capacity as plaintiff, respondent or person with related interests and obligations before the arbitration or court, and other rights and obligations as prescribed by law.”* If there is more than one LR, the FIE’s Company Charter needs to precisely specify the number, managerial titles and rights and obligations of the FIE’s LR(s). Under the LOE, LRs have the obligation to:

- Exercise vested rights and perform assigned obligations in an honest, prudent and best manner in order to protect the lawful interests of the enterprise.
- Be faithful to the interests of the enterprise; not to use the business information, know-how and opportunities of the enterprise; not to abuse his/her title, position and assets of the enterprise for personal purposes or for the interests of other organizations or individuals.
- Notify the enterprise in a timely, sufficient and accurate manner about him/her and his/her affiliated persons owning or having controlling shares or contributed capital amounts in, other enterprises.

Note that the LOE strictly distinguishes between the company’s LR(s) and the company’s General Director (“GD”) who will regularly be employed by the company. Even though the GD will, for practical reasons, usually also be appointed as a LR, it is not legally required that the company’s GD also be its LR. On the contrary, the company may appoint a LR without the LR being the GD or having any other corporate



function in the company (even though this is rather uncommon). This is important, as the company's LR - other than the GD - is personally liable under the LOE for any damage caused to the enterprise by breaches of his/her obligations, even if the LR (not being the GD at the same time) was unaware of any breaches by the acting GD.

Foreign expatriate employees requested or instructed by their overseas employers to act as the GD and LR of the employer's FIE abroad should therefore request their (overseas) employers to indemnify and hold them harmless against any personal liability resulting from their appointment as the FIE's GD & LR. This is even more urgent if they are requested to act as the GD or LR of several subsidiaries abroad. Ideally, a comprehensive indemnification Agreement should be entered into, covering scope of indemnification, exceptions and procedure. A very basic indemnification clause could be the following: *The Employer shall indemnify and hold Indemnitee harmless in respect of all Claims and Losses arising out of, or in connection with, the actual or purported exercise of, or failure to exercise, any of the Indemnitee's powers, duties or responsibilities as the General Director & Legal Representative.*

### **3.1.2 The FIE's Company Charter:**

The FIE's Company's Charter is the most important corporate governance document of the FIE and should be carefully drafted. It must contain at least the:

- FIE's name, headquarters address, branches and representative offices, its business lines and its Charter Capital (or total quantity of shares, types of shares and face value of each type for joint stock companies).
- FIE's organizational structure (management model).
- Full names, mailing address, nationality of each Member (for limited liability companies) or the founding shareholders (for joint stock companies) as well as the Charter Capital held by each Member (for limited liability companies) or quantity of shares, types of shares and value of each type held by founding shareholders (for joint stock companies).
- Rights and obligations of the Members (for limited liability companies) or shareholders (for joint stock companies).
- Number, titles, rights and obligations of the FIE's Legal Representatives.
- Procedure for ratifying the FIE's decisions.
- Rules for settlement of internal disputes.
- Basis and method for determination of salaries and bonuses of the executives.
- Cases in which members/shareholders may request the company to repurchase their capital contributions/shares.

- Rules for distribution of profits and settlement of business losses.
- Cases and procedures for dissolution and liquidation of the company's assets.
- Procedures for amending the Company Charter.

### **3.1.3 Applying for the Enterprise Registration Certificate:**

The establishment of legal entities in Vietnam is governed by the Law on Enterprises No. 59/2020/QH14 effective since 1<sup>st</sup> January 2021 ("LOE"). After issuance of the IRC, Foreign Investors must in addition apply for the Enterprise Registration Certificate ("ERC"), with which their FIE will be established as a legal entity. The following information shall be provided in the enterprise registration application form:

1. The enterprise's name;
2. The enterprise's headquarters, phone number, fax number, email address;
3. The enterprise's business lines;
4. The charter capital;
5. Types of shares, face value of each type and total authorized shares of each type if the enterprise is a joint stock company;
6. Tax registration information;
7. Expected quantity of employees;
9. Full name, signature, mailing address, nationality and legal documents of the legal representative (for limited liability companies and joint stock companies).

In addition, the following documentation has to be submitted in legalized (foreign documents) or notarized form (domestic documents):

- The enterprise registration application form.
- The Foreign Investor's IRC.
- The FIE's draft Company Charter.
- The FIE's list of members (LLC) or founding shareholders (JSC) and list of shareholders that are Foreign Investors.
- Articles of association of members or shareholders (for legal entities) or passport copy for members or shareholders who are individuals.
- Other legal documents of members or shareholders as the case may be.

While the LOE requires no minimum capitalization, the investment licensing approval authorities require a minimum investment with regards to the prior investment approval (i.e. issuance of the IRC, see above). In addition, certain minimum capital requirements are required e.g., in the areas of real estate development and trade,

construction and design, banking and finance (including finance leases and collection activities), film production and aviation.

In principle, Foreign Investors may contribute their capital in cash or in kind (e.g. through land use rights, technology, know-how etc). However, Foreign Investors' contributions in kind are unusual, mostly because of time delays caused by validating and evidencing that the value of the contribution in kind matches the stated amount.

The charter capital ("Charter Capital") of the LLC must be transferred to the FIE's company bank account within 90 days from the issuance of the ERC. The amount to be transferred must correspond exactly to the Charter Capital as stated in the ERC. In practice, it will be transferred in foreign currency to the FIE's DIA and then converted by the Vietnamese bank into Vietnamese Dong ("VND"). The non-fulfilment of this obligation can have serious consequences up to the revocation of the ERC.

#### **3.1.4 Post-licensing procedures:**

After the Foreign Investor has established the FIE, the following so-called "post-licensing procedures" are required to make the FIE operational:

- Opening of the Company's bank account (to which the investment capital of the company is to be revoked within 90 days of the exhibition of the ERC),
- Registration of the company seal and VAT invoices,
- Registration for CIT, VAT and, etc., certain customs declarations,
- Payment of the business license fee,
- Tax and social security registration for employees,
- Appointment of a "Chief Accountant" unless exempted.

### **3.2 The Limited Liability Company:**

The LLC can be established either as a 100% foreign-owned subsidiary or with both domestic and foreign participation. While the latter case is often referred to as "Joint Venture" (JV), the JV does not exist as a separate company form. In practice, most Foreign Investors prefer the establishment of a 100% foreign-owned subsidiary whenever possible. Both legal entities and individuals may become "shareholders" of an LLC, which are referred to in Vietnam as "Members".

The LLC can have a up to a maximum of 50 Members. Depending on the number of Members, the LOE distinguishes between a "Single Member Limited Liability Company" ("SLLC") and a "Multiple Member Limited Liability Company" ("MLLC"). For

both, liability is limited to the amount of the Members' equity contribution ("Capital Contribution").

### 3.2.1 The LLC's organizational structures available:

- **SLLC with individual ownership:** Must only have a Company President and a GD. The Company President may work as the GD concurrently or hire another person to work as the GD. The rights and obligations of the GD shall be provided in the Company Charter and the GD's employment contract.
- **SLLC with institutional ownership:** Can choose between two organizational models with the following bodies: i) Members' Council, GD and Supervisor, or ii) Chairman/President, GD and Supervisor. While the first model is needed to implement a "four-eye"-principle in the company, the second model simplifies the decision-making and efficiency as only the Chairman decides.
- **MLLC:** Must have a Members' Council, the Chairperson of the Members' Council and a GD. In addition, MLLCs with 11 or more Members must set up a Supervisory Board. If the MLLC has less than 11 Members, installing a Supervisory Board is still possible but not required by law.

### 3.2.2 The LLC's institutional bodies:

- **The Members' Council (SLLC and MLLC):** Is composed of the Members and the highest decision-making body of the company. The Members' Council comprises 3 to 7 members with terms not exceeding 5 years. The Members are appointed or relieved by the Company Owner. The rights and obligations of the Members' Council shall be detailed in the Company Charter. The Members' Council decides on strategic matters of the company, while the GD decides on the company's day-to-day business. The Members' Council shall adopt resolutions by voting at meetings, collecting written opinions or other forms as provided in the Company Charter. The Members' Council decides on:
  - Development strategies, the company's annual business plan, increase or reduction of the charter capital, investment projects of the company, solutions for market development, marketing and technology transfer.
  - Approval of loan agreements and contracts for sale of assets valued at 50 or more percent of the total value of assets recorded in the most recently publicized financial statement of the company.
  - Election, relieving of duty or removal of the Chairperson.

- Appointment, relieving of duty, removal of the GD, chief accountant and other management personnel.
- Wages, bonus and other benefits for the Chairperson, the GD, chief accountant and other management personnel.
- Approval of the annual financial statements and plans for use and distribution of profits or plans for dealing with losses.
- Establishment of subsidiaries, branches and representative offices.
- Amendments and supplements to the Company Charter.
- Adoption of annual financial statements.
- Reorganization, dissolution or request of insolvency.

For a **quorum to be present** at the first meeting of the Members' Council, Members representing 65% of the Charter Capital must be present. If there is no quorum at the first meeting, a second meeting must be held within 15 days. In the second meeting, a quorum is reached if 50% of the Charter Capital is present. If there is still no quorum, a third meeting is held within 10 working days at which there is no necessary minimum attendance to obtain a quorum.

A **resolution is adopted** (after a quorum is reached) if it is approved by the number of votes representing at least 65 percent of the total Contributed Capital amount of the attending Members. However, 75 percent of the votes are needed for decisions relating to the sale of assets valued at 50 or more percent of the total value of assets recorded in the latest financial statement of the company, or a smaller percentage or value as per the Company Charter, the amendment and supplementation to the Company Charter and the reorganization or dissolution of the company.

- **Chairperson of Members' Counsel (MLLC and SLLC):** The Members' Council shall elect a Member to be its Chairperson. While the term of the Chairperson of the Members' Council must not exceed 5 years, the Chairperson may be re-elected for an unlimited number of terms. The Chairperson of the Members' Council may concurrently work as the company's GD. The Chairperson has, amongst others, has the rights and obligations to:
  - Prepare the Members' Council's working programs and plans as well as the agenda and documents for meetings of the Members' Council and for collecting Members' opinions.
  - To convene and preside over meetings of the Members' Council or to organize the collection of opinions of Members.

- To supervise, or to organize the supervision of, the implementation - of resolutions of the Members' Council.
- To sign resolutions of the Members' Council on the Members' Council.
- **Company President (SLLC only):** The Company President of a SLLC shall be appointed by the Company Owner and exercise the rights of the Company Owner, except the rights and obligations of the GD.
- **General Director (MLLC and SLLC):** The Members' Council or the Company President appoints/hires the GD for a term not exceeding 5 years each to manage day-to-day business operations of the company. The Chairperson of the Members' Council, another member of the Members' Council or the Company President may concurrently act as the GD, unless otherwise provided in the Company Charter. The GD's rights and obligations include:
  - To decide on all matters related to the day-to-day business operations of the company.
  - To organize the implementation of decisions of the Members' Council or the Company President.
  - To organize the implementation of business plans and investment plans.
  - To appoint, relieve of duty and remove from office managers and other staff in the company, except those falling within the competence of the Members' Council or the Company President.
  - to sign contracts, except cases falling within the competence of the Members' Council or the Company President.
  - To submit annual financial statements to the Members' Council or the Company President for approval.
  - To make recommendations on the use of profits or handling of losses.
- **Supervisors (only SSLC with institutional ownership):** The Company Owner shall appoint at least one Supervisor for a term not exceeding 5 years. A supervisor has the following rights and obligations: To check the lawfulness, honesty and prudence of the company's organs in managing and running the business of the company; to evaluate financial statements, reports on business situations, reports on assessment of management work and other reports before submitting them to the Company Owner or relevant state agencies, submit evaluation reports to the Company Owner and to examine any documents or papers of the company.

### 3.3 Shareholding Company / Joint Stock Company

#### 3.3.1 Overview:

The shareholding company / joint stock company (“JSC”) is an enterprise in which the Charter Capital is divided into equal portions called shares. Shareholders may be organizations or individuals. The minimum number of shareholders is three, no maximum number applies. Shareholders are liable only with the amounts of capital contributed to the enterprise (or the share price paid). Shareholders may freely assign their shares to other persons, except where there are contractual holding obligations or other specific legal requirements. A JSC must have ordinary shares. In addition to ordinary shares, a JSC may have preference shares. Each share of the same type must entitle its holder to the same rights, obligations and interests. Ordinary shareholders have the following rights:

- To attend and express their opinions at the General Meeting of Shareholders and to exercise their voting right with each ordinary share carrying one vote.
- To receive dividends as decided by the General Meeting of Shareholders.
- To be given priority in purchasing new shares offered for sale in proportion to the number of ordinary shares the shareholder holds.
- To freely transfer their shares to other parties, except where contractual restrictions (shareholders’ agreement) or legal restrictions exist.
- To examine and extract information in the list of shareholders with voting rights and to request modification of incorrect information.
- To examine, extract or copy the Company Charter, the meetings of the General Meeting of Shareholders and the resolutions of the General Meeting of Shareholders.
- Upon dissolution or insolvency of the company, to receive part of the residual assets in proportion to their number of shares.

A shareholder or a group of shareholders holding 10 percent of the total ordinary shares for a consecutive period of at least 6 months or more, or holding a smaller percentage provided in the Company Charter has the right to:

- Nominate candidates to the Board of Directors / Supervisory Board.
- Examine and extract the book of minutes and resolutions of the Board of Directors, mid-year and annual financial statements made according to Vietnamese accounting standards and reports of the Supervisory Board.
- Request convening of a General Meeting of Shareholders in specified cases.



- Request the Supervisory Board to inspect each particular issue related to the management and administration of the company.

### 3.3.2 The JSC's organizational structure:

JSCs may choose between two models:

- General Meeting of Shareholders, Board of Directors, Supervisory Board and GD. A Supervisory Board is not compulsory where the JSC has fewer than 11 shareholders and institutional shareholders own less than 50 percent of the total number of shares.
- General Meeting of Shareholders, Board of Directors and GD. In this case at least 20 percent of the members of the Board of Directors must be independent members and an "Independent Auditing Committee" shall be established within the Board of Directors.

### 3.3.3 The JSC's institutional bodies:

- **The General Meeting of Shareholders ("GMS"):** The GMS includes all shareholders with voting rights and is the highest decision-making body of the JSC. The annual GMS must take place at least once a year. In addition to the annual meeting, the GMS may meet on an extraordinary basis. The venue of a meeting of the GMS must be within the territory of Vietnam. The GMS shall hold the annual meeting within 4 months from the end of the financial year. The annual GMS must at least debate and approve/pass resolutions regarding:
  - The annual financial statements and business plan of the JSC.
  - The report of the Board of Directors on the governance and results of operations and performance of each member of the Board of Directors.
  - The Report of the Supervisory Board on the business results of the company, results of performance of the Board of Directors and GD.
  - The self-evaluation reports on the operation of the Supervisory Board and performance of each member of the Supervisory Board.
  - The dividend amounts payable on each type of share.
- The GMS and other shareholders' meetings need at least 51% of voting shares to be present to reach a quorum. If there is no quorum, within 30 days of the first meeting a second meeting is held. The second meeting requires 33% of voting shares to be present to reach a quorum. If still no quorum is reached, a third meeting will be held within 20 days without a required quorum.

Resolutions shall be adopted if approved by a number of shareholders representing at least 51 percent of the total votes of all attending shareholders, except for resolutions on the following topics that require at least 65 percent: i) Types of shares and total number of shares of each type, ii) Change in business sectors, trades and fields, iii) Change in organizational and management structure of the company, iv) Investment projects or sale of assets equal to or more than 35 percent of the total value of assets recorded in the latest financial statements of the company, or a smaller percentage or value provided by the company charter and v) Reorganization or dissolution of the company.

- **The Board of Directors:** The Board of Directors (“BOD”) is the management body of the company, comprised between 3-11 members. The term of BOD members must not exceed 5 years and the members may be re-elected for an unlimited number of terms. The BOD has the following rights and obligations:
  - To decide on medium term development strategies and plans and annual business plans of the company and to decide on investment plans and investment projects within the competence and limits prescribed by law.
  - To decide on the organizational structure and internal management regulations of the company.
  - To decide on the establishment of subsidiaries, branches and representative offices and the capital contribution to or purchase of shares from other enterprises.
  - To recommend the types of shares and total number of shares of each type which may be offered, to decide on offering new shares or raising funds in other forms, to decide on the selling prices of shares and bonds of the company and to decide on the redemption of shares.
  - To decide on solutions for market expansion, marketing and technology.
  - To approve contracts for purchase, sale, borrowing and lending and other contracts valued at 35 or more percent of the total value of assets.
  - To appoint, remove or dismiss the Chairperson of the BOD.
  - To appoint, remove and sign contracts or terminate contracts with the GD and other key managers of the company and to decide on salaries and other benefits of such managers.
  - To appoint an authorized representative to participate in the Members’ Council or the GMS in another company and decide on the level of remuneration and other benefits of such persons.

- To supervise and direct the GD and other managers.
  - To approve the agenda and contents of documents for the GMS; to convene the GMS or to solicit written opinions for the General Meeting of Shareholders to pass decisions.
  - To submit annual final financial statements to the GMS.
  - To recommend dividends to be paid and the time limit and procedures for payment of dividends or for dealing with losses.
  - To recommend reorganization or dissolution of the company or to request insolvency of the company.
- **The Chairperson of the Board of Directors:** The BOD must elect a member of the BOD as its Chairperson. The Chairperson of the BOD may concurrently be the GD of the company. The Chairperson of the BOD has the following rights and obligations: i) To prepare working plans and programs of the BOD, ii) To prepare agendas, contents and documents for meetings of the BOD, iii) To convene and chair meetings of the BOD, iv) To organize the adoption of resolutions of the BOD, v) To monitor the implementation of resolutions of the Board of Directors and vi) To chair the GMS and meetings of the BOD.
  - **The General Director:** The BOD shall appoint one of its members or hire another person as the GD, who shall manage day-to-day business operations of the company. The term of office of the GD must not exceed 5 years, however the GD may be re-appointed for an unlimited number of terms. Similar to the GD of a LLC, the GD is responsible for the day-to-day business operations of the company and decide on all matters that are not in the competence of the BOD or GMS. The GD's rights and obligations include: i) the implementation of decisions and resolutions of the BOD, ii) the organization and implementation of business plans and investment plans of the company, iii) proposing internal management regulations of the company, iv) appointing and removing managers and staff of the company, and v) deciding on salaries, wages and other benefits for employees of the company.
  - **Supervisory Board:** The Supervisory Board has between 3 and 5 members. The term of office of Supervisors must not exceed 5 years. Supervisors shall elect one of them to be the head of the Supervisory Board on the majority principle. The Supervisory Board must have more than half of its members permanently residing in Vietnam. The head of the Supervisory Board must be a professional accountant or auditor and work on a full-time basis in the

company. A Supervisor must not be a spouse, natural father, adoptive father, natural mother, adoptive mother, natural child, adopted child or sibling of any member of the BOD, the GD or other manager in the company, and must not hold any other managerial position in the company. The Supervisory Board's main task is to supervise the BOD and the GD in the management and administration of the company. Its rights and obligations include:

- To inspect the reasonableness, legality, truthfulness and prudence in the management and administration of business operations, the consistency and appropriateness of accounting and statistical work and preparation of financial statements.
- To appraise the completeness, legality and truthfulness of the company's business reports and annual and biannual financial statements, and reports evaluating management work of the BOD and to submit appraisal reports at the annual GMS.
- To review, inspect and evaluate the effect and efficiency of internal controls and audit, risk management and early warning systems.
- To review accounting books, accounting entries and other documents of the company, and examine management and administration activities of the company when finding it necessary or pursuant to a resolution of the GMS or as requested by a shareholder or a group of shareholders.
- To propose to the BOD or the GMS measures to modify, supplement and improve the organizational structure for the management, supervision and administration of the company's business operations.
- When detecting that a member of the BOD or the GD violates the law, to immediately send a written notice to the BOD and request the violator to stop the violation and take remedial measures.
- To participate in and discuss at the GMS, meetings of the BOD and other meetings of the company and to consult the BOD before submitting reports, conclusions and recommendations to the GMS.

### 3.4 Representative Offices and Branches

#### 3.4.1 Representative Offices:

Representative Offices ("ROs") are the simplest form of "presence" for foreign enterprises in Vietnam. They are not independent legal entities under Vietnamese laws. The practical importance of ROs has steadily decreased over the years, mainly

because ROs are now strictly limited to exercise the function of a liaison office, promote the formulation of co-operative projects of a foreign business entity in Vietnam and conduct market research activities. ROs must not conduct any business- or revenue-generating activities, they are prohibited to enter into commercial contracts in their own name and they are now even prohibited to monitor the implementation of contracts concluded by their foreign headquarters. ROs must also not sublet their office, represent other business entities in Vietnam or do anything which is not specifically permitted under the RO legislation. Therefore, rather than opening a RO, foreign companies will usually operate from outside Vietnam for a while, without any legal presence, and then directly set up a FIE after they have decided that Vietnam is a suitable and profitable market for them.

### 3.4.2 Branches:

Branches are not independent legal entities under Vietnamese laws. For **foreign enterprises** to open a branch in Vietnam it must have operated for at least five years since its legal establishment or valid business registration in the country of origin. In the past, foreign branches have been established primarily where foreign companies were not entitled to establishing an FIE in Vietnam (e.g., in the banking and airline sectors, which now is no longer the case). The practical relevance of foreign branches is therefore low in practice.

For **domestic enterprises**, including FIEs, however, establishing of branches may be more useful. For example, where the FIE would like to operate all over Vietnam, it may set-up branches in different locations in Vietnam and operate them as separate accounting units without having to set-up additional legal entities with their numerous regulatory and administrative requirements.

### 3.4.3 Establishment

Art. 45 LOI provides that when establishing a domestic branch or representative office, the enterprise shall apply for branch/representative office registration to the business registration authority in charge. Such an application shall consist of:

- The notice of establishment of the branch/representative office;
- Copies of the Establishment Decision and minutes of the meeting on the establishment of the enterprise's branch/representative office, legal documents of the head of the branch/representative office.
- Within 03 working days from the receipt of the application, the business registration authority shall consider the validity of the application and decide

whether to issue a Certificate of Branch/Representative Office Registration. The business registration authority shall inform the applicant of necessary supplementation in writing if the application is not satisfactory or inform the applicant and provide explanation if the application is rejected.

- The enterprise shall apply for revision of the Certificate of Branch or Representative Office Registration within 10 days from which a change occurs.

Within 10 days from the decision on the business location, the enterprise shall send a notice of business location establishment to the business registration authority.

### 3.5 Business Cooperation Contracts

According to Art. 27 LOI 2020, a Business Cooperation Contract (“BCC”) is an agreement between one or more foreign investors and one or more Vietnamese partners with the objective of cooperating to operate one or more specific business activities. The BCC does not require the parties to establish a new FIE, however during the execution of a BCC, the parties may reach an agreement on using assets derived from the business cooperation to establish an enterprise in accordance with the regulations of the LOE. The parties to a BCC shall establish a coordinating board to execute the BCC. Functions, tasks and powers of the coordinating board shall be agreed upon by the parties. A BCC must at least contain:

- Names, addresses and authorized representatives of parties to the BCC as well as business or project address.
- Objectives and scope of the BCC.
- Contributions by the parties to the contract, and distribution of business investment results between the parties.
- Schedule and duration of the BCC.
- Rights and obligations of the BCC's parties.
- Provisions on adjustment, transfer and termination of the BCC.
- Responsibilities for breaches of the BCC and method of dispute settlement.

The procedures for issuance of IRCs apply to BCCs signed between a domestic investor and a Foreign Investor, or between Foreign Investors. A Foreign Investor to a BCC may establish an operating office in Vietnam to execute the BCC. The location of the operating office shall be decided by the Foreign Investor depending on the requirements for BCC execution. The operating office has its own seal. The Foreign Investor may open a bank account, hire employees, sign contracts and carry out business activities under the BCC and its “Certificate of Registration.”



### 3.6 Public Private Partnerships

Public-Private Partnership (“PPP”) investments are governed by the Law No. 64/2020/QH14 on Public-Private Partnership Investment (“PPP Law”) which took effect on 1<sup>st</sup> January 2021. The PPP Law provides the rights, obligations and responsibilities of entities, organizations and individuals involved in PPP investments.

#### 3.6.1 Permitted PPP projects and capital requirements:

Under Art. 4 (1) PPP Law, PPP investments are permitted in the following five sectors:

- Transportation;
- Power grids, power plants, except hydropower plants;
- Water resources and irrigation, clean water supply, water drainage and wastewater treatment, waste management and waste disposal.
- Healthcare, education and training.
- Information Technology infrastructure.

Art. 4 (2) PPP Law requires the following minimum investment capital:

- A minimum capital requirement of not less than VND 200 billion applies to PPP projects in the above sectors, except for healthcare, education and training projects. If PPP projects are executed in areas facing socio-economic difficulties or extreme socio-economic difficulties as defined in the LOI, a minimum capital requirement of at least VND 100 billion applies instead.
- A minimum capital requirement of at least VND 100 billion applies to PPP projects in the healthcare, education and training sectors.

#### 3.6.2 Types of PPP contract types and minimum content:

Art. 45 PPP Law provides for these types of standard PPP contracts:

- **Build - Operate - Transfer contract (BOT contract):** Contract under which a PPP project investor or enterprise is assigned the right to build and operate infrastructure works and systems within a predetermined term; upon expiry of such term, the PPP project investor or enterprise transfers these works or systems to the State.
- **Build - Transfer - Operate contract (BTO contract):** Contract under which a PPP project investor or enterprise is assigned the right to build infrastructure works and systems; after the construction is complete, the PPP project investor or enterprise transfers these works or systems to the State and is accorded the right to operate these works or systems within a specified period of time.



- **Build - Own - Operate contract (BOO contract):** Contract under which a PPP project investor or enterprise is assigned the right to build, own and operate infrastructure works and systems within a predetermined term; upon expiry of such term, the PPP project investor or enterprise terminates the contract.
- **Operate - Manage contract (O&M contract):** O&M contract means a contract under which a PPP project investor or enterprise is assigned the right to operate and manage part or the whole of existing infrastructure works and systems within a predetermined term; upon expiry of such term, the PPP project investor or enterprise terminates the contract.
- **Build - Transfer - Lease contract (BTL contract):** BTL contract means the contract under which a PPP project investor or enterprise is assigned the right to build infrastructure works or systems and transfer them after completion; is accorded the right to supply public products and services on the basis of operating and exploiting these works or systems within a predetermined term; the transferee signs a service lease and pays the PPP project investor or enterprise.
- **Build - Lease - Transfer contract (BLT contract):** BLT contract means the contract under which a PPP project investor or enterprise is assigned the right to build infrastructure works or systems and supply public products and services on the basis of operating and exploiting these works or systems within a specified period of time; the transferee-to-be signs a service lease and pays the PPP project investor or enterprise; upon expiry of such term, the PPP project investor or enterprise transfers these works or systems to the State.

Mixed contracts are possible and contain elements of different standard contracts as mentioned above. The Government provides sample contracts (templates) applicable to each of the above contract types, which are the basis on which the parties will negotiate the specific legal, financial and other commercial terms of the contemplated PPP investment. Deviations from the Government templates is possible in theory; however, Art. 47 PPP Law requires that any PPP contract must contain at least the following information and terms:

- Objectives, scale, location and schedule of implementation of a project; time and duration of an infrastructure work or system; the effective date of the contract; contract term;
- Scope of and requirements concerning engineering, technology and quality of the infrastructure work or system, supplied public products or services;

- Total investment; capital structure; financial plan, including the financial arrangement plan; public product and service prices and charges, including methods and formulas for setting or adjusting them; state capital invested in a PPP project and the corresponding form of management and use (if any);
- Conditions for use of land and other natural resources; plans to organize the construction of auxiliary works; requirements for compensation, support and resettlement; assurance of safety and environmental protection; force majeure cases and plans for response to force majeure events;
- Responsibilities for carrying out licensing procedures according to regulations of relevant laws; design; organization of construction; quality inspection, supervision and management at the construction phase; acceptance testing, settlement of investment capital and confirmation of the completion of infrastructure works and systems; provision of main input materials used for production and business activities of the project;
- Responsibilities for the operation and commercial use of infrastructure works and systems so that public products and services are provided in a continuous and stable manner; conditions, order and procedures for transfer of infrastructure works and systems;
- Performance security; rights of ownership, management, and exploitation of assets related to the project; rights and obligations of the PPP project investor or enterprise; the agreement on use of a third-party guarantee service with respect to the obligations of the contract signatory;
- Plans for response to the circumstances substantially changing in accordance with civil law to continue to perform the contract; response, compensation and punitive measures in case one of the contracting parties breaches the contract;
- Responsibilities of parties related to information security; reporting regime; provision of information, related documents and explanation about the contract performance at the request of competent authorities, inspection, examination, auditing, and supervising authorities;
- Principles and conditions for amendment, supplementation and termination of the contract before its expiry; assignment of rights and obligations of the parties; the lender's rights; procedures, rights and obligations of the parties upon contract discharge;
- Investment incentives, guarantees, revenue increase and decrease, assurance of balancing of foreign currencies, types of insurance (if any);
- Laws governing the contract and dispute resolution mechanism.

### **3.6.3 Equity contributions, bid- and performance guarantee:**

According to Art. 77 (1) PPP Law, the investor's equity contribution must be at least 15% of total investment in a PPP-project. In addition, Art. 48 (1)-(3) PPP Law PPP require that the PPP project investor must provide a contract performance security before the effective date of the contract.

Prior to contract conclusion, Art. 33 (1) PPP Law requires a bid guarantee amounting to 0.5-1.5% of total investment in the project. Bid solicitors must return or release bid guarantees to unsuccessfully bidding investors within the time limit specified in the invitation for bid, but not longer than 14 days from the date on which the results of investor selection are approved. With regard to the selected investor, their bid guarantee shall be returned or released after the PPP project enterprise established by the investor has fulfilled their obligations specified in the contract performance security (or performance bond) as prescribed in Art. 48 PPP Law. Bid guarantees shall not be returned if: i) investors withdraw their bids during the validity of these bids; ii) the investor violates the law on bidding to the extent that such violation leads to the bid cancellation, iii) the investor has not conducted or refused to negotiate or finalize the contract within 30 days of receipt of the bid-winning notice from the bid solicitor, or has negotiated and finalized the contract but refused to sign the contract, except in force majeure cases or iv) PPP project enterprises established by investors have failed to fulfil their obligations specified in the contract performance security (or performance bond).

Based on the scale and nature of each project, the value of a contract performance security shall be specified in the invitation for bid at a determined rate of between 1-3% of total investment in the project. The validity period of the contract performance security shall start on the effective date of the contract and end on the date on which the PPP project enterprise completes its contractual obligations during the stage of construction of infrastructure work or system under the contract; In cases where it is necessary to prolong the construction period. The PPP project investor shall be entitled to return or release the contract performance security after discharge of their contractual obligation to build the construction work or infrastructure system.

### **3.6.4 Foreign currency balancing guarantee:**

For significant PPP projects, i.e., those under the investment policy decisions of the National Assembly and the Prime Minister, Art. 81 PPP Law stipulate that PPP investors who have exercised their right to buy foreign currency to meet the needs of current, capital and other transactions, or transfer capital, profits, or other liquidated

investments remitted abroad and who cannot accommodate their legal foreign currency demands, shall be entitled to use up to 30% of VND revenues generated from each project after deduction of VND spending amounts as a guarantee for foreign currency balancing.

### **3.6.5 Sharing of increased and reduced PPP project revenues:**

Art. 82 (1) PPP Law provides that if the actual project revenue is 125% higher than the revenue specified in the financial plan under a PPP project contract, the investor and the PPP project enterprise will share with the State 50% of the difference between the actual revenue and 125% of revenue in the financial plan. The increased revenue may be shared after adjustment in the prices and costs of public products and services or the PPP contract term according to the provisions of Art. 50, 51 and 65 of the PPP Law and must be audited by the State Audit.

If the actual project revenue is 75% lower than the revenue specified in the financial plan under a PPP project contract, the State will share with the investor or PPP project enterprise 50% of the difference between 75% of revenue in the financial plan and the actual revenue. Sharing of reduced revenues may occur if the following requirements are satisfied: i) Projects are developed and executed under BOT, BTO or BOO contracts; ii) Changes in relevant planning, policies and laws result in a reduction in revenue; iii) Measures to adjust prices and charges of public products and services, and PPP contract terms, according to the provisions of Articles 50, 51 and 65 of this Law, have been fully taken, but the minimum revenue requirement of 75% has not been met yet; iv) The reduced revenue has been audited by the State Audit.

### **3.6.6 Dispute resolution:**

According to Art. 97 PPP Law, disputes between investors with at least one foreign investor; disputes between investors or PPP project enterprises and foreign organizations or individuals shall be settled by: i) Vietnamese Arbitration; ii) Vietnamese Court; iii) Overseas Arbitration; iv) International Arbitration or v) Arbitration established under agreements between disputing parties' agreement. As far as a Vietnamese state authority is party to a dispute, only Vietnamese Arbitration or Vietnamese Courts are available. Negotiation and sometimes mediation may be agreed between the parties which precede arbitration or court proceedings. However, Art. 55 PPP Law requires that *“PPP project contract, its annexure and other relevant documents signed between a Vietnamese state authority and a PPP project investor or enterprise shall be governed under Vietnamese legislation. With respect to the matters that are not regulated under Vietnamese law, the parties may reach specific*

*agreements in a PPP contract on condition that such agreements are not in breach of basic rules of Vietnamese law.”* This may be problematic as many project investors may be reluctant to agree to Vietnamese laws because they will be more familiar with common law jurisdictions such as English or Singaporean law, which govern many international PPP projects. In addition, conflicts may also arise for project financing if PPP project documentation is governed by Vietnamese law but the (overseas) financing documents are governed by a different legal system.

### 3.7 Mergers & Acquisitions

#### 3.7.1 Licensing requirements under the LOI (IRC):

Mergers & Acquisitions (M&A) in Vietnam are governed by the LOE, the LOI, and in addition by the general principles of the Vietnamese Civil and Commercial Codes. Certain M&A transactions may in addition be subject to merger control under the Competition Law No. 23/2018/QH14 (LOC), in force since 1<sup>st</sup> July 2019, and its implementing Decree No. 35/2020/ND-CP (Decree) which came into force on 15<sup>th</sup> May 2020. The LOI/LOE acknowledge Foreign Investors’ rights to invest in Vietnamese companies. The acquisition of capital contributions or shares in a Vietnamese LLC or JSC operating in certain conditional sectors, for instance in the banking, financial services and insurance industries, is further regulated by specialized laws complementing the provisions of the LOI/LOE.

Foreign investors must only obtain an IRC according to the licensing procedures in the LOI if their acquisition of (or subscription to) LLC capital contributions or JSC shares:

- Increases the permitted foreign ownership ratio in Vietnamese companies conducting business in certain conditional or restricted business sectors.
- Results in the foreign investor, after closing of the transaction, holding 50% or more of the LLC’s or JSC’s Charter Capital.
- Results in co-owning economic organizations which LURs in island and border or coastal communes, wards and towns or in other areas affecting national defense and security.

The above is regardless of whether the acquisition of LLC capital contributions or JSC shares follows a purchase from an existing investor or by way of capital increase. Based on the above, it is not required to conduct additional investment procedures under the LOI upon transferring contributed capital or shares between Foreign Investors if the ownership percentage of Foreign Investors remains unchanged.

### **3.7.2 Types of M&A transactions:**

#### **Acquisition of shares / capital contributions (“share deal”):**

The share deal is the most common M&A transaction, in which the purchaser acquires from the seller capital contributions in a LLC or shares in a JSC, either by way of acquiring existing capital contribution / shares or by way of subscription to newly issued capital contributions or shares in case of capital increases and (public) offering of shares. Sometimes, the purchaser will also acquire newly-issued shares of a public company by way of subscription or otherwise shares or share options from existing shareholders of a company. The share deal has the advantage that the purchaser acquires from the seller automatically not only all assets but also all licenses and contracts that the target company has obtained or concluded. The share deal also allows Foreign Investors the acquisition of certain types of assets that cannot be sold to them as individual assets in an asset deal, such as e.g., land (LURs), certain real estate and related fixtures). However, a share deal also means that the purchaser automatically acquires the target’s liabilities, which means that the purchaser needs to conduct a thorough due diligence before signing a Share Purchase Agreement (“SPA”) / Share Subscription Agreement (“SSA”) in cases of capital increases.

#### **Acquisition of assets (asset deal):**

Investors may also acquire a Vietnamese target company by way of purchasing the entirety of the target’s assets, but not the target’s liabilities. For above state reasons, this type of M&A transaction is less common in Vietnam than a share deal. There are no licensing requirements with regards to amending the IRC in an asset deal, as the ownership structure remains unchanged. While the purchaser does not automatically acquire the target company’s liabilities, the asset deal is more complicated with regards to transferring the target’s contracts, as every single contract needs the consent of the other contract party. In addition, operational licenses and permits are not automatically transferred to the purchaser and must be newly applied for. One of the advantages of an asset deal is that accounting-wise, the purchaser is able to depreciate the purchase price of the assets over the remaining accounting life of the acquired target assets.

### **3.7.3 M&A transaction procedures:**

#### **Memorandum of Understanding (“MOU”):**

Once the investor has identified an acquisition target, and the company owner is willing to sell, purchaser and seller acquirer will usually sign a “Memorandum of



Understanding” (“MOU”) in which the parties express their willingness to enter into the transaction and lay out the basic terms and timelines of the prospective transaction. While the MOU is only binding if it expressly states so (unusual), it is an important “symbolic” document that provides clarity and documents the commitment and seriousness of the parties to the MOU. Usual contents of the MOU that seller and purchaser will address, include: i) a description of the target and ownership, ii) existing encumbrances, iii) scope and time of the due diligence, iv) purchase price components and determination, v) timelines for signing, executing and closing of the transaction, vi) exclusivity, vii) termination. In most transactions, confidential information will be disclosed by both parties therefore it is common practice that the MOU also includes a confidentiality provision with regards to both the transaction and the information revealed in the due diligence.

#### **Due diligence of target company:**

A thorough due diligence of the target company is essential for the purchaser to identify any hidden liabilities or other legal-, tax or commercial/financial issues with the target company. For private companies, the purchaser’s main source of information will be documents and information provided by the target company’s owners. The scope and depth of the due diligence usually depends on the business of the company and the size of the transaction. Generally, a purchaser in a share deal conducts at least a legal due diligence covering ownership structure, third-party rights, existence and validity of licenses, assessment of contract risks as well as existing and potential liabilities and litigation.

In addition, a financial due diligence is essential in which the accounts and financial data of the target company need to be verified. However, in practice it is often hard to obtain complete and accurate information, as bookkeeping and transparency standards in Vietnamese domestic companies are often below international standards. This is particularly true with regards to accounting information, as keeping different sets of financial data for different recipients is still not uncommon. Additional sources of information include public databases, keyword searches in Vietnamese online media, credit rating agencies and information obtained by customers of the target company.

#### **Share Purchase Agreement / Sale and Purchase Agreement:**

After successful due diligence, seller and purchaser will negotiate, in a share deal, the Share Purchase Agreement and in an asset deal, the Sale and Purchase Agreement relating to the target’s assets (both: “SPA”). In both cases, the SPA is the formal



agreement that sets out the terms and conditions relating to the sale and purchase of shares in or assets of the target company. If the acquisition relates to less than 100% of the target company's capital contributions/shares and therefore old shareholders remain, a Shareholders' Agreement ("SA") will often complement the SPA. The SA regulates the rights and obligations of old and new shareholders amongst each other after closing of the transaction. The new shareholders will often request tag-along and drag-along clauses in the target company's company charter, allowing them to force the old shareholders, under certain conditions, to sell their remaining shares to themselves or third parties. While these clauses are international standard, Vietnamese shareholders are often unfamiliar with them.

The SPA should very clearly set out what is being sold, to whom and for how much, other obligations and liabilities as well as representations and warranties. The latter are particularly important where the due diligence was limited in scope and/or based on incomplete documentation. The purchase price provisions should address not only the composition and calculation of the purchase price, but also how the price will be satisfied, when the price must be paid and whether the price is a fixed sum, or subject to a price adjustment mechanism. A tax covenant / indemnity offers the purchaser protection for any tax liabilities that may not have been revealed by the due diligence. In certain situations, it may be necessary for the completion of the SPA to be conditional on certain matters, such as obtaining tax clearances or regulatory approval. In such cases, a "conditions precedent" or "closing conditions" clause will usually be added into the SPA. This is also true if the purchase price or closing of the transaction depends on certain outcomes of the due diligence that will only be available later. In this context, the SPA will often include a "material adverse change" clause which is generally known and not uncommon in Vietnam. Overall, the completion / closing mechanics can be difficult as the parties will need to agree upon timings, place of completion, the actions and what is to be delivered at completion. The latter normally include the post-completion formalities such as amending the company's IRC/ERC.

### 3.8 Common Formation Mistakes

- **Using a Vietnamese nominee to establish a company:** In order to avoid the delays and complications in getting a company established (specifically to circumvent the IRC procedures), a Vietnamese individual is asked to establish the company as the sole owner (on behalf of the foreigner/foreign entity, and using the foreign money), with the intention that the ownership of the Vietnamese company will subsequently be transferred to the foreigner/foreign

entity. This is problematic, because “nominee-agreements” are invalid and thus unenforceable in Vietnam.

- **Missing the 90-day timeline to pay up the committed Charter Capital:** In Vietnam, the Charter Capital of the FIE must be transferred to the FIE’s DIA within 90 days after the ERC has been issued. The foreign currency amount transferred must match exactly the agreed Charter Capital in VND as mentioned in the company’s ERC. Failure to transfer within 90 days can have significant consequences for the company, including revocation of the ERC.
- **Personal loans to the FIE:** If loans to the FIE are proceeded through private bank accounts rather than the DIA, the loan will not be able to be deposited back into the Foreign Investor’s personal bank account. The Foreign Investor is then stuck with VND cash if the FIE repays. Therefore, investors should always loan funds to the FIE from abroad from their bank account into the FIE’s DIA.
- **Residency requirement for Legal Representative:** Each company in Vietnam requires at least one Legal Representative (“LR”), and at least one LR must reside in Vietnam. This means: If one LR is not permanently residing in Vietnam, a second LR needs to be appointed.
- **Not registering promptly for tax:** Tax registration is important, and it is time sensitive to avoid penalties. Also, if you don’t undertake your tax registration and VAT election promptly, you may not be able to enter the VAT credit system for the first year, denying you the ability to receive refunds or VAT credits to carry forward. For start-up companies, the refunds or credits can be substantial.
- **Undocumented or unregistered loans:** Loans from abroad must go through the DIA which will ensure loans can be repaid back to where they came. Loans from domestic sources can be made into the company’s current bank account. However, loans that are not documented with proper loan agreements are often regarded as revenue by the tax authorities and taxed accordingly. Foreign currency loans with a term of at least 12 months loans that are not registered with the State Bank of Vietnam can potentially result in the loss of the ability to repatriate the loans and the loans becoming taxable revenue to the company.
- **Not appointing a chief accountant:** Except for some cases, every company must have a Chief Accountant. Vietnamese Law treats the Chief Accountant position in high regard – they are required for opening bank accounts, signing bank withdrawal documents, registering and lodging taxes, and complying with many compliance requirements with authorities.

### 4.1 Corporate Income Tax

#### 4.1.1 Calculation of corporate income tax payable:

Corporate income tax (“CIT”) applies to the Foreign Investor’s taxable income, defined as **total revenue within one tax period plus other relevant income (including income received from outside of Vietnam) minus deductible expenses and losses carried forward**. CIT payable then equals the taxable income multiplied by the applicable CIT rate. The standard CIT rate is 20%, except for companies operating in the oil- and gas as well as the mining sector which are subject to CIT rates ranging from 32% to 50%. Taxpayers may carry forward their full tax losses consecutively for up to five years. Losses arising from incentivised activities can be offset against profits from non-incentivised activities, and vice versa. However, a carry back of losses is not permitted. Vietnam does not recognize offsetting losses against profits on a group level but allows offsetting only within the specific legal entity even if they are 100% subsidiaries or related companies (i.e., no group consolidation or group loss relief).

Deductible expenses include all expenses required for revenue generation, which are evidenced by proper documentation (including e.g., bank transfer vouchers where the invoice value is VND 20 million or above) and not specifically identified as being non-deductible. Non-deductible expenses include, amongst others:

- Depreciation of fixed assets in violation of applicable regulations.
- Employee remuneration which is not paid, or not stated in the employment contract, collective labour agreement or the company policies.
- Staff welfare exceeding a cap of one month’s average salary, including non-compulsory medical and accident insurance.
- Contributions to voluntary pension funds and life insurance for employees exceeding VND 3 million per month per person.
- Research and development reserves in violation of applicable regulations.
- Severance payments exceeding the legal maximum under the labour law.
- Overhead expenses allocated to a permanent establishment in Vietnam by the foreign company’s head office which exceed the permitted amount under a prescribed revenue-based allocation formula.
- Loan interest proportionally to any charter capital not yet contributed.
- Loan interest from non-economic and non-credit organisations exceeding 1.5 times the interest rate set by the State Bank of Vietnam.

- Interest payments exceeding 30% of EBITDA.
- Provisions for stock devaluation, bad debts, financial investment losses, product warranties or construction work in violation of applicable regulations.
- Unrealised foreign exchange losses due to the year-end revaluation of foreign currency items other than accounts payable.
- Donations except for certain donations for education, health care, natural disaster or building charitable homes for the poor or for scientific research.
- Administrative penalties, fines, late payment interest.
- Service fees paid to related parties that do not meet certain conditions.

For certain businesses such as insurance companies, securities trading and lotteries, the Ministry of Finance provides specific guidance on deductible expenses.

#### **4.1.2 CIT Administration:**

The default tax year is the calendar year. Companies are required to notify the tax authorities in case they deviate from the calendar year. Companies are required to make quarterly provisional CIT payments based on estimates. The provisional CIT payments in the first three quarters of a tax year must not account for less than 75% of the final CIT liability for the year. Any shortfall is subject to late payment interest of up to 11% p.a., counting from the payment deadline for quarter three provisional CIT. Companies must submit their final CIT returns and pay the outstanding CIT amount annually not later than the last day of the third month after the fiscal year end.

#### **4.1.3 Capital Gains Tax:**

Profits resulting from the sale of capital contributions or shares in a Vietnamese company are generally subject to 20% CIT. Although no separate tax type, this is often referred to as “capital assignment (profit) tax” or “capital gains tax”. The taxable gain is the **sales proceeds and purchase cost (or the initial nominal value of the charter capital or shares contributed) minus applicable transfer expenses**. Where the seller is a foreign entity, a Vietnamese purchaser is required to withhold the capital gains tax from the payment to the seller on behalf of the Vietnamese tax authorities. Where the purchaser is also a foreign entity, the Vietnamese entity which is transferred can ultimately be held responsible for the tax payment.

Tax declaration and payment is required within 10 calendar days from the date the parties sign the SPA, or, if official approvals are required, within 10 calendar days from such approval. Vietnamese tax authorities may adjust the purchase price for capital gains tax purposes where they believe that the purchase price is not at arm's length

or where the purchase price is deemed too low and “hiding” another transaction. Whether not only the transfer of a Vietnamese entity, but also the transfer of an overseas parent (direct or indirect) of a Vietnamese company is subject to capital gains tax is disputed, with Vietnamese tax authorities often taking a broad approach to taxation. Capital gains of a local entity from the transfer of securities are taxed at 20%, except for capital gains resulting from the transfer of public companies or publicly listed securities by a foreign entity are taxed at 0.1% of the total sales proceeds.

#### **4.1.4 Transfer Pricing Rules:**

##### **Related party definition and threshold:**

Related party transactions (between both foreign and Vietnamese, including FIEs) may be subject to Vietnamese transfer pricing (“TP”) rules which are governed by Decree 132/2020/ND-CP (“Decree 132”), effective since 20<sup>th</sup> December 2020. Related party transactions covered by Decree 132 include: *“purchase, sale, bartering, renting, leasing out, borrowing, lending, transfer or disposal of commodities, provision of services; financial borrowing, lending, financial services, financial guarantee and other financial instruments; purchase, sale, bartering, renting, leasing out, borrowing, lending, transfer or disposition of tangible assets, intangible assets and agreement on purchase, sale and sharing of resources such as assets, capital, labour and sharing of costs between related parties.”*

Parties are related if, amongst others, i) a party is directly or indirectly involved in the management, control of, contribution of capital to, or investment in, the other party or ii) parties are directly or indirectly affected by the management, control of, contribution of capital, or investment, from the other party. Amongst others, the following ownership thresholds and control requirements apply:

- An enterprise participates directly or indirectly in at least 25% of the other enterprise’s equity;
- Each of the two enterprises has at least 25% of its equity held, whether directly or indirectly, by a third party;
- An enterprise is the shareholder having the greatest ownership interest in the other enterprise, or participates directly or indirectly in at least 10% of total share capital of the other enterprise;
- An enterprise guarantees or offers another enterprise a loan under any form to the extent that the loan amount equals at least 25% of equity of the borrowing enterprise and makes up for more than 50% of total medium- and long-term debts of the borrowing enterprise.

### **TP methods and determination of comparables:**

These include cost-plus, resale-price, profit-split and comparable profits methods. Intercompany agreements using cost-plus should define as precisely as possible the services and pricing to avoid confusion with regards to the service provider's independent position. In this regard, Decree 132 sets the acceptable arm's length range from the 35<sup>th</sup> to the 75<sup>th</sup> percentile, with the median value at the 50<sup>th</sup> percentile.

When determining comparable prices, taxpayers must determine comparables in the following order: (i) the taxpayer's internal comparables, (ii) comparables in the same country/market, and (iii) comparables in regional countries with similar industrial and economic standards and stage of development. Decree 132 gives the tax authorities the power to use their internal databases for TP assessment in case they find the comparables used by the taxpayer insufficient or in violation of Decree 132. Complementing this, Decree 132 also requires that TP analysis follows the "substance-over-form" rule according to which the tax authorities must determine tax liability by analysing the substance of a related party transaction rather than simply looking at its form. The tax authorities have become increasingly more sophisticated with challenging comparables used by taxpayers and are also performing increasing numbers of TP audits in case they suspect that the taxpayer had submitted incomplete or inaccurate TP documentation.

### **Deductible loan interest:**

Under Decree 132, the total loan interest cost arising after deducting deposit interests and lending interests within a specific taxable period which is deducted during the process of determination of income subject to the corporate income tax is capped at 30% of the net profit generated from business activities within the taxable period plus loan interest costs arising after deducting deposit interests and lending interests arising within the taxable period plus depreciation/amortization expenses arising within that period of a taxpayer (EBITDA). The portion of loan interest cost which is non-deductible may be carried forward to the next taxable period for the determination of total loan interest cost deductible if total loan interest cost deductible in the next taxable period is lower than the amount prescribed in point a of this clause. The loan interest costs may be carried forward for a maximum consecutive period of five years. Excluded from the cap are i) loans of taxpayers that are credit institutions or insurance companies, ii) ODA loans and concessional loans of the Government which are granted to enterprises in the on-lending form; iii) loans intended for implementing certain national target and welfare programs.



### **TP documentation:**

As far as an intercompany agreement constitutes a related party transaction, certain documentation requirements must be met. These include an annual declaration of related party transactions and TP methodology used, and a taxpayer confirmation of the arm's length value of their transactions (or otherwise the making of voluntary adjustments). Decree 132 requires that the TP method applied does not result in a decrease of tax liabilities to the state budget.

Taxpayers with related party transactions must prepare and maintain a comprehensive TP documentation, containing a master file, a local file and country-by-country report. Decree 132 contains a TP declaration form which requires disclosure of detailed information, including segmentation of profit and loss by related party and third-party transactions. The TP declaration forms must be submitted together with the annual CIT return. Under Decree 132, a taxpayer is exempt from preparing transfer pricing documentation if one of the following conditions is met:

- Revenue below VND 50 billion and total value of related party transactions below VND 30 billion in a tax period.
- Conclusion of an Advance Pricing Agreement (APA) and submission of annual APA report(s).
- Revenue below VND 200 billion and achieving at least the following ratios of earnings before interest and tax to revenue from the following businesses: distribution (5%), manufacturing (10%), processing (15%).
- Taxpayers with only domestic related party transactions, their related parties having the same tax rate and none of the parties enjoy tax incentives.

## **4.2 Foreign Contractor Tax**

### **4.2.1 Scope:**

Foreign Contractor Tax ("FCT") applies to foreign companies and individuals without a legal presence in Vietnam which earn income sourced from Vietnam on the basis of agreements with Vietnamese parties (including FIEs). In such cases, FCT is levied on payments received by the foreign contractor from Vietnam, except for the pure supply of goods (i.e., where the responsibility, cost and risk relating to the goods passes at or before the border of Vietnam and there are no associated services performed in Vietnam), services performed and consumed outside Vietnam and various other services performed completely outside of Vietnam.

However, certain distribution arrangements where foreign entities are directly or indirectly involved in the distribution of goods or provision of services in Vietnam are still subject to FCT, for example where the foreign entity retains ownership of the goods, bears distribution, advertising or marketing costs, is responsible for the quality of goods or services, determines prices or authorizes Vietnamese entities to carry out on its behalf (part of the) distribution of goods or provision of services in Vietnam.

#### 4.2.2 FCT Rates:

The following FCWT rates apply:

Service / Industry	Deemed VAT	Deemed CIT
Supply of goods in Vietnam where seller's responsibility exceeds pure supply of goods to border and passing of full risk to buyer at border.	Exempt	1%
Services not exclusively performed and consumed outside of Vietnam	5%	5%
Services together with supply of machinery and equipment	3%	2%
Construction, installation without supply of materials, machinery or equipment.	5%	2%
Construction, installation with supply of materials, machinery or equipment.	3%	2%
Leasing of machinery and equipment	5%	5%
Restaurant, hotel and casino management services	5%	10%
Logistics and transportation services	3%	2%
Interest	Exempt	5%
Royalties	Exempt	10%
Transfer of securities	Exempt	0,1%
Insurance	Exempt	5%
Financial Derivatives	Exempt	2%

A withholding tax of 5% CIT applies to interest paid on loans from foreign entities. Offshore loans provided by certain government or semi-government institutions may be exempted from FCT under applicable double taxation or inter-governmental

agreements. Interest paid on bonds (except for tax exempt bonds) and certificates of deposit issued to foreign entities is subject to 5% withholding tax.

A 10% royalty withholding tax applies in the case of payments made to a foreign party for transfers of industrial property rights. However, if the transfer of patents, technical know-how or technology processes is used as part of the capital contribution of a Foreign Investor, no FCWT applies.

With regards to transactions in which Vietnamese individuals purchase goods or services from overseas suppliers conducting e-commerce and digital-based business activities, banks and payment intermediary service companies are required i) to withhold and pay tax on behalf of the e-commerce foreign contractors on a monthly basis (if such contractors do not register to pay tax in Vietnam and ii) to keep records of overseas remittances and provide this information monthly to the tax authorities if the Vietnamese individual customers use a payment forms for which withholding is not possible, specifically credit cards.

FCT payable may be affected by double taxation agreements (“DTAs”), of which Vietnam has signed over 80 with a number of others at various stages of negotiation.

#### 4.2.3 FCT payment methods:

Foreign contractors can choose one of the following three methods for tax payment:

- **Deduction Method:** Foreign contractors can apply for the deduction method if they (i) have a permanent establishment in Vietnam or are a tax resident in Vietnam, ii) the duration of the project in Vietnam is 182 days or more, and (iii) they adopt the Vietnamese Accounting System (“VAS”) and obtain both a tax registration and a tax code. The Vietnamese customer is required to notify the tax office that the foreign contractor will pay tax under the deduction method within 20 working days from the date of signing the contract. If the foreign contractor carries out multiple projects in Vietnam and qualifies for application of the deduction method for one project, the contractor is required to apply the deduction method for its other projects as well. The foreign contractor will pay CIT at 20% on its net profits.
- **Direct Method:** For the direct (non-deduction) method foreign contractors, VAT and CIT will be withheld by the Vietnamese customer at various rates that are specified according to the nature of the activities performed. The VAT withheld by the Vietnamese customer is generally an allowable input credit in its VAT return. Separate requirements for FCT declarations under this method are

provided for foreign contractors providing goods and services for exploration, development and production of oil and gas.

- **Hybrid Method:** Allows foreign contractors to register / pay VAT based on the deduction method but pay CIT under the direct method. Foreign contractors wishing to apply the hybrid method must: i) Have a PE or be tax resident in Vietnam, ii) operate in Vietnam under a contract with a term of more than 182 days, and iii) maintain accounting records in accordance with the VAS.

## 4.3 Value Added Tax

### 4.3.1 VAT Scope:

Value added tax (“VAT”) applies to goods and services used for production, trading and consumption in Vietnam. Vietnamese companies must charge VAT on the value of goods or services supplied in Vietnam. VAT also applies on the duty paid value of imported goods. The importer must pay VAT to customs authorities at the same time they pay import duties. For imported services, VAT is applied via the FCT mechanism.

VAT payable is calculated as the output VAT charged to customers less the input VAT on purchases of goods and services. All organizations and individuals producing or trading goods and services in Vietnam must register for VAT. In certain cases, branches of an enterprise must register separately and declare VAT on their own activities. Taxpayers must file VAT returns on a monthly basis by the 20<sup>th</sup> day of the subsequent month, or on a quarterly basis by the 30<sup>th</sup> day of the subsequent quarter (for companies with prior year annual revenue of VND 50 billion or less).

No output VAT is charged but input VAT may be credited – amongst others - in case of: i) compensation, bonuses and subsidies (except those provided in exchange for certain services), ii) transfer of emission rights and certain other financial revenues, iii) certain services rendered by foreign companies which do not have a permanent establishment in Vietnam and if the services are rendered outside of Vietnam (including repairs to means of transport, machinery or equipment, advertising, marketing, promotion of investment and trade), iv) overseas brokerage activities for the sale of goods and services overseas, v) transfer of investment projects, vi) capital contributions in kind, vii) commissions from the sale of exempt goods/services and vii) goods exported and then re-imported to Vietnam due to sales returns by overseas.

VAT exemptions include: i) some agricultural products, ii) goods/services provided by individuals having an annual revenue of VND 100 million or below, iii) transfer of land use rights, iv) financial derivatives and credit services (including credit card issuance,

finance leasing and factoring), v) various securities activities including fund management, vi) capital assignment, foreign currency trading and debt factoring, vii) certain insurance services, viii) medical services, care services for the elderly and disabled, ix) printing and publishing of newspapers, magazines and certain types of books, x) passenger transport by public buses, xi) transfer of technology, software and software services except exported software which is entitled to 0% rate and xii) imports of machinery, equipment and materials which cannot be produced in Vietnam for direct use in scientific research and technology development activities.

#### 4.3.2 VAT Rates:

0%	Applies to certain exported goods and services sold to overseas or non-tariff areas and consumed outside of Vietnam or in non-tariff areas, certain goods processed for export, goods sold to duty free shops, certain exported services, construction and installation carried out for export processing enterprises, aviation, marine and international transportation services. Application of the 0% rate requires complete and proper documentation, such as contracts, evidence of non-cash payment and customs documents. Not applied to some services such as, e.g., advertising-, training-, entertainment-, hotel- and tourism services provided in Vietnam to foreign customers and services relating to trade and distribution of goods.
5%	Applies to the provision of essential goods and services, including, amongst others, clean water, certain educational and teaching materials, books and certain publications, certain unprocessed food, medicine and medical equipment, certain rubber products, sugar, husbandry feed, various agricultural products and services, certain technical and scientific services as well as certain cultural-, artistic- and sport related products and services.
10%	Applies to all other goods, services and activities not specified as VAT non-subjected, VAT exempted or subject to VAT rates of 0% or 5%.

#### 4.3.3 VAT Invoices (“Red Invoices”):

For input VAT to be creditable, taxpayers must always obtain a proper VAT invoice. Companies can use pre-printed invoices, self-printed invoices or electronic invoices (“E-Invoices”). All VAT invoices must contain certain mandatory items and be registered with or notified to the local tax authorities before they can be used. For exported goods, commercial invoices are used instead of domestic tax invoices. E-invoices will be compulsory from 1<sup>st</sup> July 2022.

Certain “high tax risk companies” are required to use E-Invoices with a verification code continuously for 12 months. High tax risk companies are defined as those which have charter capital of less than 15 billion VND and have certain features, for example: i) Sales of goods or provision of services to related parties, or ii) non-compliance with certain tax declaration requirements, or iii) change of business location more than 2 times within 12 months without any notification or any tax declaration at the new location, or iv) companies subject to penalties for breach of invoice regulations in the last year. The “high tax risk company” status will then be reassessed after 12 months for possible approval for using e-invoices without verification code.

Industries where companies are allowed to use E-invoices without a verification code of the tax authorities will be determined based on the economic sectors as regulated such as electricity, petrol, telecommunication, transportation, credit institution, insurance, e-commerce, supermarkets, etc or other companies which satisfy certain conditions. Companies using e-invoices without verification code must transfer e-invoice data to the tax authorities, either directly or via an authorized e-invoicing service provider.

#### **4.3.4 VAT Refunds:**

VAT refunds are only granted in certain cases, including:

- Exporters having excess input VAT credits over 300 million VND. The refunds are provided on a monthly or quarterly basis, in line with the VAT declaration period of the taxpayer. The amount of input VAT relating to export sales (meeting the criteria for VAT refunds) that can be refunded to a taxpayer must not exceed 10% of its export revenue. VAT refunds are available to companies which import goods and then export them without further processing subject to various conditions.
- New projects of companies adopting VAT deduction method which are in the pre-operation investment phase and have accumulated VAT credits over VND 300 million VND. Exceptions include conditional investment projects which do not satisfy the regulated investment conditions, or investment projects of companies whose charter capital has not yet been contributed as regulated.
- Certain ODA projects, diplomatic exemption, foreigners buying goods in Vietnam for consumption overseas.

In other cases where a taxpayer’s input VAT for a period exceeds its output VAT, it will have to carry the excess forward to offset future output VAT.



#### 4.4 Special Sales Tax

The Special Sales Tax (“SST”) applies to i) the provision of certain services and ii) certain imported goods (except for various types of petrol) at both the import and selling stages. The taxable price of imported goods upon importation is the dutiable price plus import duties. Taxpayers producing SST subjected goods with SST subjected raw materials are entitled to claim a credit for the SST paid on raw materials imported or purchased from domestic manufacturers. Where taxpayers pay SST at both the import and selling stages, the SST paid at importation is creditable against SST paid at the selling stage.

The following SST Rates apply:

Products/ services	SST rate (%)
Cigar/Cigarettes	75
Spirit/Wine with ABV $\geq 20^\circ$	65
Spirit/Wine with ABV $< 20^\circ$	35
Beer	65
Automobiles less than 24 seats	10 – 150
Motorcycle of cylinder capacity above 125%	20
Airplanes, boats	30
Petrol	7 – 10
Airconditioners (not more than 90,000BTU)	10
Playing Cards	40
Votive Paper	70
Discotheques	40
Massage, karaoke	30
Casinos, jackpot games,	35
Entertainment with betting	30
Golf	20
Lottery	15

#### 4.5 Import Duties

Most goods imported into Vietnam are subject to import duty which is calculated by multiplying the goods’ dutiable value with the applicable import duty rate. The dutiable value of imported goods is typically based on the transaction value (i.e., the price paid

or payable for the imported goods, and where appropriate, adjusted for certain dutiable or non-dutiable elements). Import duty rates are classified into three categories: ordinary rates, preferential rates, and special preferential rates.

- Preferential rates are applicable to imported goods from countries that have most-favoured-nation (MFN) status with Vietnam. The MFN rates are in line with Vietnam's World Trade Organization (WTO) commitments and are applicable to goods imported from other WTO member countries.
- Special preferential rates are applicable to imported goods from countries that have a special preferential agreement or a free trade agreement with Vietnam.

To be eligible for preferential rates or special preferential rates, the imported goods must have a certificate of origin. If goods are sourced from non-preferential treatment/non-favoured countries, the ordinary rate is charged at MFN rate plus 50% surcharge. Import VAT is added in addition at a rate of usually 10%. In addition to import duty and import VAT, SST, environment protection tax, anti-dumping tax, safeguard tax and anti-subsidy tax may be applied to a number of imported goods. The customs authorities perform regular customs audits which usually focus on matters such as e.g., accurate HS code classification and goods valuation, compliance with requirements for duty exemptions and origin of goods.

Import duty exemptions include:

- Machinery & equipment, specialised means of transportation and construction materials (which cannot be produced in Vietnam) comprising the fixed assets of encouraged investment projects.
- Machinery, equipment, specialised means of transportation, materials (which cannot be produced in Vietnam), office equipment imported for use in oil and gas activities.
- Materials, supplies and components imported for the production of exported goods and materials, supplies, components imported for processing of exports.
- Goods manufactured, processed, recycled, assembled in a free trade zone without using imported raw materials or components when imported into the domestic market.
- Materials, supplies and components which cannot be domestically produced and which are imported for the production of certain encouraged projects.
- Goods temporarily imported or exported for the purpose of warranty, repair, and replacement.

A refund of import duties is only possible for:

- Goods for which import duties have been paid but which are not actually physically imported;
- Imported goods that are not used and which must be re-exported;
- Imported materials that were imported for the production of goods for the domestic market but are later used for the processing of goods for export under processing contracts with foreign parties.

## 4.6 Personal Income Tax

### 4.6.1 Tax Residency:

Tax residents are subject to Personal Income Tax (“PIT”) on their worldwide taxable income, wherever it is paid or received. Tax residents in Vietnam are individuals:

- residing in Vietnam for 183 days or more in either the calendar year or the period of 12 consecutive months from the date of first arrival, or
- having a permanent residence in Vietnam (including a registered residence which is recorded on the temporary residence card in case of foreigners, or
- having a leased house in Vietnam with a term of 183 days or more in a tax year and unable to prove tax residence in another country.

Individuals not meeting the conditions for being tax resident are considered tax non-residents. Tax non-residents are subject to PIT at a flat tax rate of 20% on their Vietnam related employment income, and at various other rates on their non-employment income. However, Double Taxation Agreements (DTAs) may apply.

**The following PIT Rates apply:**

Monthly Taxable Income in VND	PIT Rate
0 – 5,000,000	5%
5,000,001 – 10,000,000	10%
10,000,001 – 18,000,000	15%
18,000,001 – 32,000,000	20%
32,000,001 – 52,000,000	25%
52,000,001 – 80,000,000	30%
80,000,001 +	35%

#### 4.6.2 Employment Income:

All “Employment Income” is subject to PIT. It includes all cash remuneration and benefits-in-kind, such as salaries, allowances, bonuses, housing- and other fringe benefits of employment paid for by the employer, including shares and other forms of company participation provided to employees. Shares and share purchase options awarded to employees are treated as employment income (bonuses) and taxed when the shares are sold or the options are exercised. In such case, the taxable income equals the value of the shares recorded in the accounting books of the employer or the market value of the shares. Employment Income does not include:

- Payments for business trips, mobile phone charges and stationery.
- Office clothes (subject to a cap if the office clothes are provided in cash).
- Payment for overtime (however the overtime premium only).
- Certain other collective benefits in kind such as membership fees, entertainment, healthcare, transportation to and from work, mid-shift meals.
- One-off relocation allowance to Vietnam for expatriates and from Vietnam for Vietnamese working overseas.
- School- and kindergarten fees up to high school in Vietnam/overseas for children of expatriates/Vietnamese working overseas
- Annual return trip airfare for expatriates and Vietnamese working overseas.
- Allowances / benefits for wedding, funeral (subject to a cap).

Tax-deductible items include:

- Contributions to certain approved charities.
- Contributions to mandatory social, health and unemployment insurance schemes and contributions to local voluntary pension schemes (subject to cap).
- A personal allowance of VND 11 million per month and a dependent allowance of VND 4.4 million per month per dependent. The dependent allowance is not automatically granted, and the taxpayer needs to register qualifying dependents and provide supporting documents to the tax authority (usually passports).

#### 4.6.3 Non-employment income:

- **Business income (including rental income):** Any income derived from production and business activities as well as income from independent practice. Various flat rates apply, ranging between 0.5% - 5%, based on the type of business income. Business losses cannot be offset against employment income if an individual has income from both business and employment.

- **Capital investment income:** Any income earned from investing in shares, making capital contributions and lending money. Types of income from capital investment include dividends and profit shares of any kind, interest on capital deposits, bonds, securities, loan interest and similar types of income. Income from capital investment is generally taxed at a flat rate of 5% (e.g., dividends and interest income, except for bank interest).
- **Real estate income:** Income from the sale and transfer of real estate is taxed at 2% of the sales (for both residents and non-residents).
- **Income from royalties:** Any income derived from the assignment or transfer of the right to use intellectual property rights or objects including literary, artistic and scientific works, copyrights, inventions, industrial designs, trademarks, technical know-how and similar items in excess of VND 10 million (determined each time the royalties are paid) is taxed at 5%.
- **Income from franchising:** Any income exceeding VND 10 million, derived by an individual from a franchising contract under which the franchisor authorizes the franchisee to purchase / sell goods or provide services in accordance with conditions imposed by the franchisor is taxed at 5%.  
  
**Income from winnings or prizes:** Income from winnings or prizes in cash or in kind in excess of VND 10 million from lotteries, betting, casinos, promotional prizes and similar items is taxed at a flat rate of 10%.
- **Income from inheritances or gifts:** Income from the receipt of inheritances or gifts in excess of VND 10 million, including securities, contributed capital, real property and other assets required to be registered is taxed at a flat rate of 10%.

#### 4.6.4 Non-taxable income:

- Interest earned on deposits with banks and on life insurance policies.
- Compensation paid under life/ non-life insurance policies.
- Retirement pensions paid under the Social Insurance law (or the foreign equivalent).
- Income from transfer of properties between various direct family members.
- Inheritances/ gifts between various direct family members.
- Monthly retirement pensions paid under voluntary insurance schemes.
- Income of Vietnamese vessel crew members working for foreign shipping companies or Vietnam international transportation companies.
- Income from winnings at casinos.

#### 4.6.5 PIT Administration:

The PIT year is the calendar year. However, where in the calendar year of first arrival an individual is present in Vietnam for less than 183 days, his/her first tax year is the 12-month period from the date of arrival. Subsequently, the tax year is the calendar year. All individuals with taxable income must obtain a tax code and submit their tax registration file to their employer who will subsequently submit this to the local tax office. Those who have other items of taxable income are required to submit their tax registration file to the district tax office of the locality where they reside. Regarding tax declarations, the following applies:

- **Employment income:** For employment income, tax has to be declared and paid provisionally on a monthly basis by the 20th day of the following month or on a quarterly basis by the 30th day following the reporting quarter. The amounts paid are reconciled to the total tax liability at the year-end. An annual final tax return must be submitted and any additional tax must be paid within 90 days of the year end. Expatriate employees are also required to carry out a PIT finalization on termination of their Vietnamese assignments. Tax refunds due to excess tax payments are only available to those who have a tax code.
- **Non-employment income:** The individual is required to declare and pay PIT in relation to each type of taxable non-employment income. The PIT regulations require income to be declared and tax paid on a receipt basis (except rental income which can be declared and tax can be paid on an annual basis). For non-employment income, PIT must be declared and paid in relation to each type of taxable non-employment income. If an individual has both business and employment income, only business income must be reported in that declaration.
- **Overseas income:** A resident individual receiving employment income paid from overseas must also file tax declarations in Vietnam. Other types of income (capital investment, capital transfer, transfer of real property, royalties, franchising, winnings, inheritances and gifts) must be declared within ten 10 days after the date the income arises or is received. PIT paid in a foreign country on the foreign income is generally creditable under applicable DTAs.



### 5.1 Employment Types & Contents

The Vietnamese Labour Code No. 45/2019/QH14, effective since 1<sup>st</sup> January 2020 (“VLC”) and its implementing Decree No. 145/2020/ND-CP, effective since 1<sup>st</sup> January 2021 (“Decree 145”), govern employment matters in Vietnam. The VLC defines an employment contract as any *“agreement between an employee and an employer on a paid job, salary, working conditions, and the rights and obligations of each party in the labour relations.”*, regardless of whether the document is called “employment contract” or not. Before recruiting an employee, an employer must conclude an employment contract in writing, except for employment for less than one month.

#### 5.1.1 Indefinite and fixed-term employment contracts:

Art. 20 VLC distinguishes two types of employment contracts:

- **Indefinite-term employment contracts** and
- **Fixed-term (definite-term) employment contracts** with a duration of up to 36 months. If an employee keeps working upon expiry of a fixed-term employment contract, within 30 days from the expiration date, the employer may either conclude a new employment contract or finalize the employee’s leaving the company. Until such time, the parties’ rights, obligations and interests specified in the old employment contract shall remain effective. If a new employment contract is not concluded after the 30-day period, the existing fixed-term employment contract shall become an indefinite employment contract. In practice, it is therefore essential that the employer does not passively tolerate the employee’s continuous working after expiration but notifies the employee about either conclusion of a new employment contract or the fact that no additional employment contract will be concluded.

Employers can, after the first fixed-term employment contract expires, only enter into **one (1)** more fixed-term employment contract, and the third employment contract must then always be indefinite.

However, employers often argue that this rule does not apply to foreign employees, as the duration of their work permit is limited to two (2) years and Art. 34 (12) VLC in addition stipulates that employment contracts are (automatically) terminated in case the foreign employee’s work permit expires. On the other hand, however, work permits can be extended before they expire, and if work permits are not extended, employment agreements may also contain an extraordinary termination right for such case. Therefore, one could also well argue that the rule of having only up to two (2)

definite-term contracts applies to both Vietnamese and foreign employees. If an employer, despite the above, still wants to enter into more than two (2) fixed-term contracts, it is therefore recommended that the employment contract then contains at least a “severability clause” stating that: *“If a provision of this employment contract is held to be illegal, invalid or unenforceable, in whole or in part, the Employer and Employee intend that the legality, validity and enforceability of the remainder of this Contract remains unaffected.”*

#### **5.1.2 Probation contract / probation period:**

Under Art. 24 VLC, the parties may either include the probation time in the employment contract or enter into a separate probation contract (except for employment contracts with a duration of less than one month). For higher-qualified jobs (especially in foreign-invested enterprises) separate probation contracts are the exception and the probationary period will be included in the employment contract. Art. 25 VLC provides that the probationary period shall not exceed:

<b>180 calendar days</b>	For the position of enterprise executives under the Law on Enterprises, such as (general) directors and other company executives.
<b>60 calendar days</b>	For positions that require a junior college degree or above.
<b>30 calendar days</b>	For positions requiring a secondary vocational certificate, professional secondary school and positions for technicians and skilled employees.
<b>Six (6) working days</b>	For all other jobs.

During the probationary period, either party has the right to terminate the probation- or employment contract without prior notice and compensation obligation. The probationary salary shall not be lower than 85% of the offered salary. Upon the expiry of the probationary period, the employer shall inform the employee of the probation result. If the result is satisfactory, the employer shall keep implementing the already concluded employment contract or conclude the employment contract. (i.e., replacing the separate probation contract). If the result is not satisfactory, the employer may terminate the employment- or probation contract with immediate effect.

#### **5.1.3 Minimum and recommended contents:**

Under Art. 21 VLD, both indefinite- and fixed-term employment contracts must include at least the following contents:

- The employer's name, address and full name and position of the person who concludes the contract on the employer's side.
- The employee's full name, date of birth, gender, residence, identity card number or passport number.
- The job title and place of work.
- The duration of the employment contract.
- The salary including the form and (monthly) due date of salary payments, including allowances and other additional payments (bonuses).
- The schedule for salary raises and promotions.
- Working hours and rest periods.
- Personal protective equipment for the employee (if applicable).
- Social insurance, health insurance and unemployment insurance.
- Basic training and advanced training, occupational skill development.

If the job is directly related to any of the employer's business secrets or technological know-how, the employer has the right to request signing of a separate confidentiality agreement, covering scope of confidentiality and consequences of violation by the employee, including contract penalties and damages.

In addition to the above minimum provisions, employers should always include in their standard employment contracts additional provisions for their protection, including for example provisions on confidentiality, non-competition (i.e., working for or advising the employer's competitors, prohibition of multiple employments with other employers (even if non-competing), non-poaching, rules on conflict of interest and anti-corruption, ideally supported by a local "Code of Conduct" (CoC) that covers all major compliance topics in one document.

#### **5.1.4 Overtime work:**

According to Art. 105 VLC, working hours must not exceed eight hours per day or 48 hours per week. Overtime work is the duration of any work performed beyond the agreed working hours. An employer has the right to request an employee to work overtime when all of the following conditions are met:

- The employee agrees to work overtime.
- The total normal working hours plus overtime working hours shall not exceed 12 hours in 01 day, and 40 hours in one (1) month.
- The total overtime working hours do not exceed 200 hours in one (1) year.

Beyond the above, an employer may request an employee to work overtime for up to 300 hours in one (1) year in the following fields, works, jobs and cases:

- Manufacturing, processing of textiles, garments, footwear, electric (products), processing of agricultural, forestry, aquaculture products, salt production.
- Generation and supply of electricity, telecommunications, refinery operation; water supply and drainage.
- Works that require highly skilled workers that are not available on the labour market at the time.
- Urgent works that cannot be delayed due to seasonal reasons or availability of materials or products, bad weather, natural disasters, fire, hostility, shortage of power or raw materials, or technical issue of the production line.

Employees who work overtime will be paid based on their salary as follows:

- On normal days: at least 150%.
- On weekly days off: at least 200%
- During public holidays, paid leave, at least 300%, not including the daily salary during the public holidays or paid leave for employees receiving daily salaries.

An employee who works at night will be paid an additional amount of at least 30% of the normal salary. An employee who works overtime at night will be paid, in addition to the above, an amount of at least 20% of the day work salary of a normal day, weekend or public holiday.

While many employers would like to fully exclude in the employment contract the employee's right to overtime compensation, this is not generally permitted. However, an overtime clause in the employment contract may specify the requirements for overtime compensation, for example as follows:

*"The Employee is expected to fulfil his / her tasks under this Labour Contract in his / her regular working time, and overtime should therefore generally not be required. Overtime requested by the Employee in writing can only be compensated if i) the Employer approves in writing the Employee's written overtime request before the overtime occurs and ii) the Employee has worked the full number of hours per week in accordance with this Employment Contract. Overtime requests and approvals must be made monthly, within five (5) working days after the end of each calendar month. If the Employer approves the Employee's written overtime request in writing, overtime shall generally be compensated in the form of equivalent time off. Overtime compensation not claimed within three (3) months after the Employer's approval shall be forfeited."*

### 5.1.5 Leave entitlements:

An employee working for at least 12 months is entitled to annual leave of 12 days in addition to public holidays and at least one weekly day off. The annual leave of an employee shall increase by at least one day for every five years of employment with the same employer. An employee who has been working for an employer for less than 12 months will have a number of paid leave days proportional to the number of working months. An employee who, due to employment termination or job loss, has not taken or not entirely taken up his/her annual leave shall be paid in compensation for the untaken leave days. In addition, an employee is entitled to take a fully paid personal leave in the following circumstances: i) Marriage: three days, ii) Marriage of his/her biological or adopted child: one day, iii) Death of his/her biological or adoptive parent; death of his/her spouse's biological or adoptive parent; death of spouse, biological or adopted child: three days. An employee is further entitled to take one day of unpaid leave and must inform the employer in the case of the death of his/her grandparent or biological sibling; marriage of his/her parent or natural sibling. Employee and employer may also agree on additional unpaid leave.

## 5.2 Employment Termination

### 5.2.1 Case groups:

Art. 34 VLC stipulates the following cases of termination of an employment contract:

1. The employment contract expires.
2. The tasks stated in the employment contract have been completed.
3. Both parties agree to terminate the employment contract.
4. The employee is sentenced to imprisonment without being eligible for suspension or release, in case of capital punishment or the employee is prohibited from performing the work stated in the employment contract by an effective verdict or judgment of the court.
5. The foreign employee working in Vietnam is expelled by an effective verdict or judgment of the court or a decision of a competent authority.
6. The employee dies; is declared by the court as a legally incapacitated person, missing or dead.
7. The employer that is a natural person dies; is declared by the court as a legally incapacitated person, missing or dead. The employer that is not a natural person ceases to operate.
8. The employee is dismissed for disciplinary reasons.

9. The employee unilaterally terminates the employment contract.
10. The employer unilaterally terminates the employment contract.
11. The employer allows the employee to resign according to Art. 43 VLC.
12. The work permit of a foreign employee expires according to Art. 156 VLC.
13. The employee fails to perform his/her tasks during the probationary period under the employment contract or gives up the probation.

### **5.2.2 Unilateral termination by employee:**

#### **Termination without cause:**

Employees have the right to unilaterally terminate their employment contract, provided they notify the employer in advance:

- at least 45 days in case of an indefinite-term employment contract.
- at least 30 days in case of a fixed-term employment contract of 12-36 months.
- at least three working days in case of a fixed term of contract under 12 months.

#### **Immediate termination with cause:**

Employees have the right to unilaterally terminate their employment contract without prior notice if they are:

- a. not assigned to the work or workplace or not provided with the working conditions as agreed in the employment contract.
- b. not paid adequately or on schedule.
- c. maltreated, assaulted, physically or verbally insulted by the employer in a manner that affects the employee's health, dignity or honour or forced to work against their will.
- d. sexually harassed in the workplace.
- e. pregnant and have to stop working in accordance with Art. 138 VLC.
- f. reaching the retirement age unless otherwise agreed by the parties, or
- g. they find that the employer fails to provide truthful information in accordance with Art. 16 VLC in a manner affecting employment contract performance.

### **5.2.3 Unilateral termination by the employer:**

Under Art. 36 VLC, an employer has the right to unilaterally terminate an employment contract in one of the following circumstances:

- a. The employee repeatedly fails to perform his/her work according to the criteria for assessment of employees' fulfilment of duties established by the employer. The criteria for assessment of employees' fulfilment of duties shall be



established by the employer with consideration taken of opinions offered by the representative organization of employees (if any).

- b. The employee is sick or has an accident and remains unable to work after having received treatment for a period of 12 consecutive months in the case of an indefinite-term employment contract, for 06 consecutive months in the case of an employment contract with a fixed term of 12 – 36 months, or more than half the duration of the contract in case of an employment contract with a fixed term of less than 12 months. Upon recovery, the employer may consider concluding another employment contract with the employee.
- c. In the event of a natural disaster, fire, major epidemic, hostility, relocation or downsizing requested by a competent authority, the employer has to lay off employees after all possibilities have been exhausted.
- d. The employee is not present at the workplace after the time limit specified in Art. 31 VLC.
- e. The employee reaches the retirement age specified in Art. 169 VLC.
- f. The employee quits his/her fails to go to work without acceptable excuses for at least five consecutive working days.
- g. The employee fails to provide truthful information during the conclusion of the employment contract in accordance with Art. 16 VLC in a manner that affects the recruitment.

When unilaterally terminating the employment contract in any of the cases specified in above points a, b, c, e and g, the employer shall inform the employer in advance:

- at least 45 days in case of an indefinite-term employment contract.
- at least 30 days in case of fixed-term employment between 12 – 36 months.
- at least three working days in case of fixed-term employment of less than 12 months and in the cases stipulated in point b above.

When unilaterally terminating the employment contract in points d and f above, the employer is not required to inform the employee in advance. Employers are prohibited from unilaterally terminating an employment contract if the employee:

- is suffering from an illness or work accident, occupational disease and is being treated or nursed under the decision of a competent health institution, except for the cases stipulated in Art. 36 (1b) VLC.
- is on annual, personal or any other type of leave permitted by the employer.
- is pregnant, on maternal leave or raising a child under 12 months of age.

#### 5.2.4 Consequences of illegal unilateral termination:

**By employee:** The employee who illegally unilaterally terminates his/her employment contract shall: i) not receive the severance allowance, ii) pay the employer a compensation that is worth his/her half a month's salary plus an amount equal to his/her salary for the remaining notice period from the termination date, and iii) reimburse the employer with training costs.

**By employer:** The employer that illegally unilaterally terminates an employment contract with an employee shall reinstate the employee in accordance with the original employment contract, and pay the salary, social insurance, health insurance and unemployment insurance premiums for the period during which the employee was not allowed to work, plus at least two months' salary specified in the employment contract. After the reinstatement, the employee must return the severance allowance or redundancy allowance (if any) to the employer. Where there is no longer a vacancy for the position or work as agreed in the employment contract and the employee still wishes to work, the employer shall negotiate revisions to the employment contract. In case the employee does not wish to return to work, the employer shall pay an additional severance allowance in accordance with above principles. Where the employer does not wish to reinstate the employee and the employee agrees, both parties shall negotiate, beyond the severance payment, an additional compensation which shall be at least an additional two months' salary under the employment contract in order to terminate the employment contract.

#### 5.2.5 Termination for economic reasons:

Art. 42 VLC allows employers to unilaterally terminate employees in case of "changes in structure, technology or changes due to economic reasons." Changes in structure and technology include i) changes in the company's organizational structure or personnel rearrangement, ii) changes in processes, technology, equipment associated with the employer's business lines and changes in products or product structure. Changes due to economic reasons include economic crisis or economic depression and changes in law and state policies upon restructuring of the economy or implementation of international commitments. In addition, Art. 43 VLC allows employers to terminate employees in cases of restructuring such as e.g., full or partial division, consolidation, conversion, merger or sale of the enterprise.

Employers who want to terminate employees for economic reasons or due to restructuring must first implement a "labour utilization plan" if the change affects the employment of a large number of employees. In case of new vacancies, priority shall be given to retraining the existing employees. If the employer is unable to create

alternative employment and is forced to terminating employees, the employer is obliged to pay redundancy allowances to the affected employees.

#### **5.2.6 Severance and redundancy payments:**

In case an employment contract is terminated as prescribed in above 6.2.1 No. 1, 2, 3, 4, 6, 7, 9 and 10, the employee has worked for the employer on a regular basis for at least 12 months, the employer shall pay the employee a severance allowance amounting to **half a month's salary for each year of work**, except for the cases in which the employee is entitled to receive retirement benefits as prescribed by social insurance laws.

In case an employment contract is terminated for economic reasons or due to restructuring, and the employee has worked on a regular basis for the employer for at least 12 months, the employer shall pay a redundancy allowance amounting to **one month's salary for each year of work**, with the total redundancy allowance being at least two month's salaries. The qualified period of work as the basis for calculation of severance or redundancy allowance shall be the total period during which the employee actually worked for the employer minus the period over which the employee participated in the unemployment insurance in accordance with unemployment insurance laws and the period for which severance allowance or redundancy allowance has been paid by the employer.

The salary as the basis for calculation of both severance and redundancy allowance shall be the average salary of the last six months under the employment contract before the termination.

### **5.3 Internal Labour Regulations & Labour Discipline**

#### **5.3.1 Minimum content of ILRs:**

According to Art. 118 VLC, every employer with at least 10 employees must have Internal Labour Regulations ("ILRs") and register these at their local Department of Labour, Invalids and Social Affairs ("DOLISA"). The ILRs must include the following:

- Working hours and rest periods.
- Order at the workplace.
- Occupational safety and health.
- Actions against sexual harassment in the workplace.
- Protection of employer's assets, business secrets and intellectual property.
- Cases in which reassignment of employees are permitted.
- Violations against the ILRs and disciplinary measures.

- Material responsibility for damages.
- The persons(s) having the competence to take disciplinary measures.

Once issued, the employees must be notified of the ILRs by displaying them at the workplace and/or in the company's Intranet.

### **5.3.2 Types of labour discipline:**

The employee's violation of the ILRs authorizes the employer, under the requirements laid out in the ILRs, to i) reprimand the employee, ii) defer a due salary raise for up to 6 months, iii) demote the employee or iv) dismiss the employee.

Art. 125 VLC allows an employer to dismiss an employee in the following cases:

- The employee commits an act of theft, embezzlement, gambling, deliberate infliction of injuries or uses drug at the workplace.
- The employee discloses technological or business secrets or infringes the intellectual property rights of the employer.
- The employee commits acts which are seriously detrimental or are posing a seriously detrimental threat to the assets or interests of the employer.
- The employee commits sexual harassment in the workplace.
- The employee repeats a violation which was priorly disciplined by deferment of salary raise or demotion and has not been absolved. A repeated violation means a violation which was disciplined and is repeated before it is absolved in accordance with Art. 126 VLC (according to which an employee who is disciplined by reprimand, deferment of salary raise or demotion will have the previous violation absolved after three months, six months or three years respectively from the day on which the disciplinary measure is imposed if he/she does not commit any other violation against the ILRs).
- The employee fails to go to work for a total period of five days in 30 days, or for a total period of 20 days in 365 days from the first day he/she fails to go to work without acceptable excuses. Justified reasons include natural disasters, fires, the employee or his/her family member suffers from illness with a certification by a competent health facility; and other reasons as stipulated in the ILRs.

When imposing disciplinary measures in the workplace, employers must not:

- Harm the employee's health, life, honour or dignity.
- Apply monetary fines or deducting amounts from the employee's salary.
- Impose a disciplinary measure against an employee for a violation which is not stipulated in the ILRs, the employee's employment contract or the VLC.

### 5.3.3 Work suspension:

An employer has the right to suspend an employee if an alleged violation of the employment contract, the ILRs or the VLC is of a complicated nature and where the continued presence of the employee at the workplace is deemed to cause difficulties for the investigation. However, an employee can only be suspended from work after consultation with the representative organization of the employees. The suspension shall not exceed 15 days, or 90 days in special circumstances. During the suspension, the employee shall receive an advance of 50% of his/her salary. Upon the expiry of the work suspension, the employer shall reinstate the employee. Where the employee is disciplined, he/she shall not be required to return the advanced salary. If the employee is not disciplined, he/she is entitled to full salary for the suspension period.

### 5.3.4 Procedural requirements:

Disciplinary measures against an employee require the following:

- The employer is able to prove the employee's fault.
- A representative organization of employees to which the employee is a member participates in the procedure.
- The employee is physically present and has the right to defend him/herself, request a lawyer or the representative organization of employees to defend him/her; if the employee is under 15 years of age, his/her parent or a legal representative must be present.
- The disciplinary process is recorded in writing.

In practice, dismissal of employees is not easy: It requires the Employer to evidence the employee's fault, for example by providing written statements of witnesses, and a prior written warning letter to the employee stating exactly when he / she has committed each violation of the ILRs (with signature/stamp of the employer, to be acknowledged by the employee). Warning emails are insufficient and it is therefore recommended to have two (2) warning letters, with the first warning letter setting a deadline for the employee to correct his/her wrong behaviour or actions.

It is prohibited to impose more than one disciplinary measure for one violation of the ILRs. Where an employee commits multiple violations of the ILRs, he/she shall be subjected to the heaviest disciplinary measure for the most serious violation. In addition, no disciplinary measure shall be taken against an employee if the employee:

- is taking leave on account of illness or convalescence or on other types of leave with the employer's consent.
- is being held under temporary custody or detention.

- is waiting for verification and conclusion of the competent agency for violations.
- is pregnant, on maternal leave or raising a child under 12 months.
- commits a violation of the ILRs while suffering from the mental illness or another disease which causes the loss of consciousness or the loss of his/her behavioural control.

The time limit for taking disciplinary measures against a violation is six months from the date of the occurrence of the violation. For violations directly relating to finance, assets and disclosure of technological or business secrets the time limit is 12 months.

### **5.3.5 Individual labour dispute settlement:**

Art. 187 VLC stipulate the competence to settle individual labour disputes as follows:

#### **Settlement by labour mediators:**

Individual labour disputes shall generally be settled through mediation by labour mediators before being brought to the Labour Arbitration Council (“LAC”) or the Court, except for the following labour disputes for which mediation is not mandatory (amongst others): Disputes over dismissal and unilateral termination of employment contracts, disputes over damages and/or allowances upon termination of employment contracts, disputes over social-, health or unemployment insurance. The time limit to request a labour mediator to settle an individual labour dispute is six (6) months from the date on which a party discovers the act of infringement of their lawful rights and interests.

#### **Settlement by Labour Arbitration Council:**

The parties may, by consensus, request the LAC to settle a dispute if mediation is not mandatory. Within 30 working days from establishment of the arbitral tribunal, it shall issue a decision on the settlement of the labour dispute. In case an arbitral tribunal is not established by the deadline, a decision on the settlement of the labour dispute is not issued by the deadline or a disputing party fails to comply with the decision of the arbitral tribunal, the parties are entitled to bring the case to People’s Court. The time limit to request the LAC to settle an individual labour dispute is nine (9) months from the date on which a party discovers the violation of their rights, interests or applicable laws.

#### **Settlement by the People’s Court:**

The parties are generally entitled to request the People’s Court to settle the case if mediation is not mandatory and/or arbitration is not agreed on. The time limit to bring an individual labour dispute to the People’s Court is one (1) year from the day on which a party discovers the violation of their rights, interests or applicable laws.



## 5.4 Labour Outsourcing

Labour outsourcing means that an employee enters into an employment contract with an outsourcing agency, which subsequently outsources its employee to work for a client enterprise. Labour outsourcing is a conditional business, requires a labour outsourcing license, is permitted for up to 12 months and only for certain types of work as follows:

- The employment is necessary for the sharp increase in labour demand over a limited period of time.
- The outsourced employee is meant to replace another employee who is taking maternal leave, has an occupational accident or occupational disease or has to fulfil his/her citizen's duties.
- The work requires highly skilled workers.

The client enterprise may not employ an outsourced employee in the following cases:

- The outsourced employee is meant to replace another employee during a strike or settlement of labour disputes;
- There is no agreement with the outsourcing agency on responsibility for compensation for the outsourced employee's occupational accidents and diseases;
- The outsourced employee is meant to replace another employee who is dismissed due to changes in organizational structure, technology, economic reasons, full division, partial division, consolidation or merger of the enterprise.

The client enterprise must not outsource an outsourced employee to another employer; must not employ an employee outsourced by an agency that does not have a valid labour outsourcing license. The outsourcing agency and the client enterprise must conclude a written labour outsourcing contract with the following major contents:

- The work location, the vacancy to be filled by the outsourced employee, detailed description of the work, and detailed requirements for the outsourced employee;
- The labour outsourcing duration; the starting date of the outsourcing period;
- Working hours, rest periods, occupational safety and health at the workplace;
- Compensation responsibility in case of occupational accidents and diseases;
- Obligations of each party to the outsourced employee.

The labour outsourcing contract shall not include any agreement on the rights and benefits of employee which are less favourable than those stipulated in the concluded employment contract between the employee and the outsourcing agency.

### **Rights and obligations of the outsourcing agency:**

- Provide an outsourced employee who meets the requirements of the client enterprise and the employment contract signed with the employee;
- Inform the outsourced employee of the content of the outsourcing contract;
- Provide the client enterprise with the curriculum vitae of the outsourced employee, and his/her requirements.
- Pay the outsourced employee a salary that is not lower than that of a directly hired employee of the client enterprise who has equal qualifications and performs the same or equal work;
- Keep records of the number of outsourced employees, the client enterprise, submit periodic reports to the provincial labour authority.
- Take disciplinary measures against the outsourced employee if the client enterprise returns the employee for violations against labour regulations.

### **Rights and obligations of the client enterprise:**

- Inform and guide the outsourced employee about its ILRs and other regulations.
- Not to discriminate between the outsourced employee and its directly hired employees in respect of the working conditions.
- Reach an agreement with the outsourced employee on night work and overtime work in accordance with the VLC.
- The client enterprise may negotiate with the outsourced employee and the outsourcing agency on official employment of the outsourced employee while the employment contract between the outsourced employee and the outsourcing agency is still unexpired.
- Return the outsourced employee who does not meet the agreed conditions or violates the work regulations to the outsourcing enterprise.
- Provide evidence of violations against work regulations by the outsourced employee to the outsourcing agency for disciplinary measures.

### **Rights and obligations of the outsourced employee:**

- Perform the work in accordance with the employment contract with the outsourcing agency;
- Obey ILRs, management, administration and supervision by client enterprise;
- Receive a salary which is not lower than that of a directly hired employee of the client enterprise with equal qualifications and performing the same or equal job;
- File a complaint with the outsourcing enterprise in case the client enterprise violates agreements in the labour outsourcing contract.

- Negotiate termination of the employment contract with the outsourcing agency in order to conclude an employment contract with the client enterprise.

## 5.5 Social Security Obligations

While social insurance (“SI”) and health insurance (“HI”) contributions are mandatory for both foreign and Vietnamese employees, unemployment insurance (“UI”) contributions are mandatory for Vietnamese employees only. Statutory employer contributions do not constitute a taxable benefit to the employee; however, the employee’s contributions are PIT deductible. SI/HI/UI contributions are based on the employees’ monthly gross income (salary, allowances and other regular payments).

### Health- and social insurance contributions:

Both Vietnamese and foreigners employed in Vietnam for three (3) months or more are subject to compulsory HI contributions. In addition, since January 2022, both Vietnamese and foreigners employed in Vietnam for 12 months or more are also subject to compulsory social insurance contributions, in which employers are obliged to contribute from the employee’s gross salary 3% to the “sickness and maternity fund”, 0.5% to the “occupational accidents and occupational diseases fund” and 14% to the “retirement and death fund” (total 17.5%). The employee contributes 8% only to the retirement and death fund. The maximum monthly salary that is subject to SI/HI contributions is capped at 29,800,000 VND, being 20 times the **minimum basic wage** (applicable to public sector employees, currently VND 1,490,000 VND per month).

### Unemployment insurance contributions:

Unemployment insurance compensates Vietnamese employees for job loss or termination. Employer and employee will each contribute to the UI 1% of the employee’s gross salary, up to 20 times the **minimum regional salary** (which applies to non-public sector employees). The government distinguishes, depending on the cost of living, four zones as follows:

<b>Zone 1:</b> VND 4,420,000 (approximately USD 193) - Hanoi and Ho Chi Minh City urban areas and certain neighbouring industrial areas in Binh Duong and Dong Nai.
<b>Zone 2:</b> VND 3,920,000 (approximately USD 172) - Hanoi and Ho Chi Minh City rural areas and other major urban areas such as Can Tho, Danang and Hai Phong
<b>Zone 3:</b> VND 3,430,000 (approximately USD 150) - Provincial cities and the districts of Bac Ninh, Bac Giang and Hai Duong
<b>Zone 4:</b> VND 3,070,000 (approximately USD 134) - Rest of the country

**In summary, the following contribution requirements apply:**

<b>Contribution:</b>	<b>Employer:</b>	<b>Employee:</b>
Social Insurance (SI)	Sickness and maternity fund: 3% Occupational disease and accident fund: 0.5% Retirement and death fund: 14%	8%
Health insurance (HI)	3%	1.5%
Unemployment insurance (UI)	1%	1%
<b>Total</b>	<b>21.5%</b>	<b>10.5%</b>

#### **Statutory retirement benefits:**

Vietnamese and foreign employees who have paid social insurance for a period of time as prescribed by social insurance laws shall receive a retirement pension when he/she reaches the retirement age. The retirement ages of employees in normal working conditions shall be gradually increased to 62 for males by 2028 and 60 for females in 2035. Since 2021, the retirement ages of employees are 60 years and three months for males and 55 years and four months for females, and it annually increases by three / four months for males/ females.

## **5.6 Local Employment of Foreigners**

The local employment of foreigners in Vietnam is governed by the VLC and Decree No. 152/2020/ND-CP on “*Foreign workers working in Vietnam and Recruitment and Management of Vietnamese workers working for foreign employers in Vietnam*” (Decree 152) effective since 1<sup>st</sup> January 2021. According to Art. 152 VLC, foreigners should only be employed in Vietnam to hold highly qualified positions of e.g., managers, executives, specialists and technical workers/engineers and if professional requirements for those cannot be met by Vietnamese employees. Prior to hiring foreign employees, employers must therefore file an annual report of demand on their use of foreign employees to the local DOLISA for approval by the People’s Committee, and an application for a work permit cannot be processed until obtaining this approval.

### **5.6.1 Work permit requirement and exemptions:**

Art. 153 VLC stipulates that unless an exemption applies, all foreign nationals who want to work in Vietnam must obtain a work permit. Employing foreign nationals or

foreigners working in without a valid work permit constitutes a violation of Vietnamese law and is subject to penalties and sanctions for employer and foreign employee (who may even be deported or forced to leave Vietnam). Art. 154 VLC and Art. 7 of Decree 152 detail that a foreigner working in Vietnam is exempt from a work permit if he/she

- is the owner or capital contributor of a limited liability company with a capital contribution value of at least 3 billion VND.
- is the Chairperson or a member of the Board of Directors of a joint-stock company with a capital contribution value of at least 3 billion VND.
- is an intra-company transferee within 11 sectors in the schedule of commitments in services between Vietnam and WTO, including: business services, communication services, construction services, distribution services, educational services, environmental services, financial services, health services, tourism services, recreational and cultural services, and transport services.
- is the manager of a representative office, project or the person in charge of the operation of an international organization or a foreign non-governmental organization in Vietnam.
- enters Vietnam for a period of less than 3 months to do marketing of a service.
- enters Vietnam for a period of less than 3 months to resolve complicated technical or technological issue which (i) affects or threatens to affect business operation and (ii) cannot be resolved by Vietnamese experts or any other foreign experts currently in Vietnam.
- is a foreign lawyer who has been granted a lawyer's practising certificate in Vietnam in accordance with the Law on Lawyers.
- is granted a communication and journalism practicing certificate in Vietnam by the Ministry of Foreign Affairs as per the law.
- is one of the cases specified in an international treaty to which the Socialist Republic of Vietnam is a signatory applies.
- enters Vietnam to provide professional and engineering consulting services or perform other tasks intended for research, formulation, appraisal, supervision, evaluation, management and execution of programs and projects using official development assistance (ODA) in accordance with regulations or agreement in international treaties on ODA signed between the competent authorities of Vietnam and foreign countries.
- is sent by a foreign competent authority or organization to Vietnam to teach and study at an international school under management of a foreign diplomatic

mission or the United Nations; or of a facility established under an agreement to which Vietnam is a signatory.

- is a volunteer as specified in Art. 3 of Decree 152.
- enters Vietnam to hold the position of a manager, executive, expert or technical worker for a period of work of less than 30 days and up to 3 times a year.
- enters Vietnam to implement an international agreement to which a central or provincial authority is a signatory as per the law.
- is a student studying at a foreign school or training institution which has a probation agreement with an agency, organization or enterprise in Vietnam; or a probationer or apprentice on a Vietnam sea-going ship.
- is a relative of a member of foreign representative body in Vietnam as specified in Art. 2 of Decree 152.
- obtains an official passport to work for a regulatory agency, political organization, or socio-political organization.
- takes charge of establishing a commercial presence.
- is certified by the Ministry of Education and Training as a foreign worker entering Vietnam for teaching and research purpose.

Despite being exempted by law from the work permit requirement, foreigners falling under one of the above exemptions still need a “*certification of exemption from work permit*” which is granted by the DOLISA of the province where the foreign worker is expected to work. The employer shall request the DOLISA to certify that such foreign worker is eligible for exemption from a work permit at least 10 working days before he/she starts to work. The validity period of a certification of exemption from work permit is up to 2 years. If a certification of exemption from work permit is re-issued, the corresponding validity period is up to 2 years.

### **5.6.2 Work application procedure and validity:**

If a work permit must be obtained, the application process is supposed to only take 15 working days but may take longer in practice. Therefore, companies planning to employ a non-exempted employee in Vietnam must apply for the work permit 15 working days prior to the foreign employee’s intended contract start date. To apply for a work permit, the foreign employee must provide the employer before submission of the application at the DOLISA, with at least the following documents:

- Legalized copy of their passport,



- “Fitness to work certificate” issued by a foreign or Vietnamese competent health facility issued within 12 months before the submission date of the application or the certificate as specified in regulations of the Minister of Health.
- Legalized police (clearance) certificate or a document certifying that the foreign worker is not serving a sentence, has a criminal record expunged or is not facing a criminal prosecution issued by a foreign or Vietnamese authority issued within 6 months before the submission date of the application.
- Proof as a manager, executive or expert (such as university degree or evidence of relevant experience, curriculum vitae).
- Two colour photos (4cm x 6cm size, white background, front view, bare head, no colour glasses), taken within 6 months before application.
- An acceptance of demand for foreign workers unless it is not required.

After initial approval, a work permit is valid for a maximum of two (2) years and can be extended in a procedure similar to obtaining the original work permit. A work permit is or becomes invalid if:

- the employment contract is terminated and/or the contents of the employment contract are inconsistent with the contents of the work permit granted.
- The work performed does not conform with the contents of the work permit.
- The contract on which the work permit was granted expires or is terminated.
- The foreign party issues a written notice which terminates the outsourcing of the foreign employee to Vietnam.
- The Vietnamese party or foreign organization that hires the foreign employee ceases its operation.
- The work permit is revoked.

## 5.7 Practical Tips

### 5.7.1 Tips for expat assignments to Vietnam:

In case of expatriate employees (“Expats”) transferred by their overseas employer to Vietnam, the local Vietnamese employment contract will often not be the only relevant legal document with regards to the Expat’s employment in Vietnam (from the foreign company’s point of view). Rather, an assignment contract and / or an overseas employment contract (active or “dormant”) will often complement the local Vietnamese employment. As the Vietnamese local employment contract, assignment contract and the applicable law may conflict, the following should be considered:

- **Conclude a local employment contract:** In some cases, employers will try to not even conclude a local Vietnamese employment contract for the assignment time to Vietnam but comply with their Vietnamese legal obligations by providing to the authorities a translation of the overseas assignment contract only. While this is legally possible, it may create uncertainties for both the Expat and the Employer for example with regards to minimum Vietnamese legal requirements. It is therefore recommended to conclude for every assignment to Vietnam a Vietnamese local employment contract to supplement the Expat's overseas and/or assignment contract to Vietnam.
- **Return clauses or reinstatement guarantee:** If the employer wishes to cancel the overseas employment contract and replace it **only** with a local Vietnamese employment contract, the Expat should consider requesting at least a "return clause" or "reinstatement guarantee" in addition to the local employment contract. More favourable for the Expat is an assignment contract according to which the overseas contract is not cancelled but set as "dormant" for the duration of the assignment and then automatically "revives" once the assignment is completed.
- **Consider "dual" termination protection:** With regards to employment termination, the best-case for the Expat (and worst-case for the employer) is where two valid employment contracts exist: A local Vietnamese employment contract and in addition, a (dormant) overseas employment contract with an assignment component or assignment contract that connects both contracts. In such case, to fire the employee, employers must subsequently terminate first the local Vietnamese employment contract and then the ("revived") overseas employment contract, thereby doubling their efforts and risks.
- **Consider local social insurance contributions:** As Expats will be subject to mandatory Vietnamese social security and PIT obligations for the time of their assignment, the assignment contract should address precisely who will pay the ongoing overseas social security obligations during the time of the assignment. The same is true for the Expat's accumulation of overseas pension benefits and contributions to respective mandatory or voluntary pension funds overseas. With regards to the Expat's potentially additional PIT burden resulting from the assignment to Vietnam, the assignment contract may either include a "net-salary clause" or a "tax- equalization" clause stating that the employer must burden or neutralize any PIT disadvantages resulting from the assignment.

- **Accumulation of severance payments in subsequent expats postings:** With regards to severance payments in the event of termination of the Expat's employment during the assignment abroad, some employers try to limit their severance obligations to the time of the assignment according to local Vietnamese law and ignore the Expat's overall employment time with the global employer. Therefore, a "severance clause" in the (active or dormant) overseas contract should clearly address the Expat's entry date to the company headquarters / company group and stipulate clearly that severance entitlements apply for the entire time period from the entry date to the termination date (regardless of where the employment was terminated). In addition, it should be stipulated which severance amount and calculation should apply under which applicable law (e.g., headquarters or assignment location or combined).
- **Check relocation clauses carefully:** Employers usually aim at a high degree of flexibility with regards to Expat relocation and phrase relocation- / transfer clauses broadly. Expats should therefore carefully look at the wording of such clauses to avoid the uncertainty to be transferred at any time to any location. At least, some objective criteria should be established according to which the employer may relocate the employee (such as e.g., comparability of new location in terms of both job requirements and environment).
- **Agree on applicable law for all employment contracts:** With regards to the applicable law, some employers like to exclude in the assignment contract or even the local employment contract the application of Vietnamese labour laws even though Vietnamese law is territorially applicable. It should be clearly defined here that the employer does not have such "cherry-picking" right. Rather, in cases of conflict between Vietnamese and overseas laws, the more favourable law for the Expat should apply.

#### 5.7.2 Do's and Don'ts for local employment in Vietnam:

- **Don't rely on CV information alone:** Next to CVs, you also ask for copies of candidate's academic records (such as, e.g., university degrees, English tests etc.). In addition, candidates should provide reference letters and reference contacts to allow you to call former employers directly. While reference letters are generally phrased too well-meaning, only a direct call with (former) employer(s) may generate more candid statements about the candidate's actual skills in reality.

- **Use recruiters for pre-selection:** The pre-selection process saves you time and may include initial interviews and certain tests to validate the candidate's skills, qualifications and experience. Also, recruiters can pre-select based on the candidate's salary expectation and check the candidate's motives. However, while the use of recruiters is useful, employers should not limit their pre-selection to just 2-3 "final" candidates but ask for at least 10-15 CVs to get a better picture of who may be available in the market.
- **Don't hire "friends and family":** It is generally recommended to dismiss recommendations of "friends and family" by existing company staff to avoid conflict of interest at the workplace in principle. If, exceptionally, such recommendations are considered, a careful and thorough background screening of such candidates should be conducted.
- **Understand local salary standards:** Employers should have a salary range for their positions, based on competitive market rates. If candidates ask for less than market standard despite formally meeting qualifications, they may not be seriously interested in the job and have other motives instead (for example, setting-up or already running their own side business)
- **Don't enter into indefinite employment contracts:** Employers should always enter into a fixed-term employment contract (usually 12-24 months for the first employment) rather than signing an indefinite contract right away. Employers may enter into up to two fixed-term employment contracts and the third contract must generally be an indefinite-term contract. For foreign employees, however, this rule is disputed and if more than two fixed-term contracts are made, a severability clause should be included in the contract according to which both parties agree with the additional fixed-term contract(s).
- **Include a probation time in the employment contract:** A probation time should be agreed with all candidates. The probation time can be up to 180 days for executive positions. This gives you sufficient time to assess the candidate "on the job" and terminate the employment either during probation or when the employment contract ends.
- **Make professional employment contracts:** Employers should make sure the employment contract contains at least the legal minimum requirements and is made in Vietnamese language. In addition, include employer-protective clauses to the employment contract such as specifically provisions on confidentiality, non-competition, non-poaching, rules on conflict of interest and anti-corruption.

- **Include job description and targets in employment contracts:** Clearly agree on the standards for the employee's expected performance to make it easier for the company to terminate the employee for non-performance. If no job description and no key performance indicators and performance requirements are agreed upon in writing (by annexing both to the employment contract), Vietnamese courts will generally argue that employees are not obliged to deliver specific results but only offer their work as specified in the employment contract. (no results- or success guarantee).
- **Have Internal Labour Regulations (ILRs) registered with the DOLISA:** In addition to job description and performance targets, the ILRs allow you to define in great detail the requirements for sanctioning an employee's violation of company rules and other misconduct. The ILRs will make it easier for you to terminate an employee who violates laws, regulations and internal rules. For Vietnamese companies with at least 10 employees, they are mandatory in any case and may therefore also be considered before the threshold is reached.
- **Limit signing authority of executives:** If you hire General Directors or other executives, make sure that their signing authority for business and financial transactions is limited or controlled. This is particularly true if those executives are appointed as Legal Representatives of your company at the same time. With regards to bank transactions, clearly register with the bank the individuals allowed to transact, alone or together, up to which amounts.

### 6.1 IPR Types

Intellectual property rights (“IPRs”) are governed by Vietnam’s Law on Intellectual Property No. 50/2005/QH11, first enacted in 2005, then amended in 2009 and further supplemented in 2019 (“IP Law”). Vietnam’s legal framework for the protection of IPRs is relatively comprehensive, covering most aspects of IPR protection in accordance with international standards. The IP Law regulates copyrights and related rights, industrial property rights and rights to plant varieties; and the protection of such rights, with the subject matter of each of those rights being:

- **Industrial property rights** comprise inventions, industrial designs, designs of semi-conducting closed circuits, trade secrets, marks, trade names and geographical indications.
- **Copyrights** comprise literary, artistic and scientific works; the subject matter of copyright related rights shall comprise performances, audio and visual fixation, broadcasts and satellite signals carrying coded programmes.
- **Rights to plant varieties** comprises plant varieties and reproductive materials.

Vietnam is a member to numerous international conventions regulating IPRs, amongst others: the Agreement on Trade-Related Aspects of International Property Rights (“TRIPS”), the Berne Convention, the Paris Convention for the Protection of Industrial Property, the Madrid Agreement concerning the International Registration of Marks, the Rome Convention for the Protection of Performers, the Producers of Phonograms and Broadcasting Organizations, the Patent Cooperation Treaty and the International Convention for the Protection of New Varieties of Plants. Since December 30<sup>th</sup> December 2019, European companies and designers are also able to use the Hague System to protect their industrial designs in Vietnam.

IPRs can be either registered or unregistered:

- **Unregistered IPRs** automatically give their owner legal title to their creation, such as e.g., copyrights, unregistered design rights, confidential information and trade secrets.
- **For other IPRs**, registration with the competent authorities is required to establish legal title over the IPR. If no registration occurs, third parties are generally free to register and use your creations. This includes patents, trademarks (except for well-established trademarks) and industrial designs.

For Foreign Investors, the following IPRs are practically most important:



IPR Type	Description	Protection Duration
Trademark	Marks used to distinguish goods or services of different organisations and individuals. They may take the form of words, images or any combination.	10 years from the date of application, renewable for successive 10-year periods without limitation.
Patent	A technological solution presenting worldwide novelty, an inventive step applicable in socio-economic fields.	20 / 10 years from the date of application for invention / utility solutions patents.
Industrial Design Patent	The outward appearance of a product embodied in three-dimensional configuration, lines, colours or a combination of such elements.	5 years from the date of application, renewable twice for 5 years each, up to a maximum of 15 years.
Trade Secrets	Information obtained illegally from business / investment activities, which has not priorly been disclosed.	Recognized but only if both violation and specific damages can be evidenced.
Copyright	Rights of an organisation or individual to works which such organisation or individual created or owns. "Works" means a creation of the mind in the literary, artistic or scientific sectors, expressed in any mode or form.	50 years after author's death. 75 years for films, photos, literary works, works of applied art and anonymous works.

## 6.2 IPR Registration

All registrations of IPRs must be made at the National Office of Intellectual Property Rights ("NOIP"), which is a subsidiary organisation of the Ministry of Science and Technology. The NOIP's preliminary examination of applications must be completed within three months after receipt. After this, there will be a further evaluation lasting for at least nine months. In practice, IPR registration can take up to 18 months.

### 6.3.1 Trademarks:

Trademarks can be protected by the IP Law if they are distinctive, visible signs in form of letters, words, drawings or images including holograms, or a combination of these, represented in one or more colours. A trademark is distinctive if it consists of one or more easily noticeable and memorable elements or a combination thereof. Three-dimensional signs (shapes) can be registered as trademarks, but trademarks based on sound and smell are not recognized.

Trademark protection lasts for 10 years from the approval date of the NOIP and can be extended for consecutive 10-year periods for an unlimited number of times. The IP-Law provides a number of circumstances under which a trademark is not eligible for protection, such as in case it is identical or confusingly similar to another trademark already registered or used for identical or similar goods or services in Vietnam.

IPRs are territorial in nature, which means that registrations in one country's jurisdiction are not automatically enforceable in others, and therefore registrations in multiple countries may be necessary. In practice, Foreign Investors often do not register their trademarks locally in Vietnam, because they believe to having already automatically obtained international trademark protection under the Madrid Agreement / WIPO system. However, Vietnam operates under a "first-to-file" system, meaning that the first person to file an IPR application at the NOIP for the territory of Vietnam will own that trademark once approved by the NOIP, regardless of whether or not an international registration under the Madrid Agreement already exists. The NOIP therefore disregards registration under the Madrid Agreement by allowing local registrations even where international protection has already been granted.

Because of the NOIP's above practical approach, it is essential to always register trademarks locally in Vietnam (either by trademark extension over WIPO or by initial trademark application in Vietnam), even if automatic protection under the Madrid Agreement should in theory be sufficient. Otherwise, any third party can register the trademark in Vietnam and then become for the territory of Vietnam the (illegal) owner of that trademark, despite Vietnam being a signatory to the Madrid Agreement. In these (not so uncommon) cases of "bad-faith" registrations, the real trademark owner is then blackmailed into buying back their own trademarks at an inflated price.

### **6.3.2 Patents:**

A patent is an exclusive right granted for an invention. A patent requires i) inventiveness, meaning a new technical solution or improvement to a product or process, ii) novelty, meaning it has not been published or disclosed to the public before, and iii) industrial applicability, meaning that it can be developed into mass manufacturing. Once the patent is granted, invention patents last 20 years without possibility for extension. Utility solution patents last 10 years without possibility for extension. The registration process for both often takes up to 20 months.

To obtain a patent for the territory of Vietnam, an application must be filed with the NOIP. As with trademarks, Vietnam operates under a "first-to-file" system, meaning that the first person to file a patent in Vietnam will own the IPR for Vietnam once the

application is granted, regardless of whether another party was the inventor or the first user of the patented creation. With Vietnam being a party to the Paris Convention, applicants are entitled to a right of priority if the same filing has been made within the last 12 months in any other country being party to the convention. This is useful for patent owners because after first filing in their home country, they then have 12 months to decide which other countries they want to register in, before having to commence international filings.

### **6.3.3 Industrial designs:**

An industrial design patent means a specific appearance of a product embodied by three-dimensional configurations, lines, colours, or a combination of these elements. Industrial design patents cover products with a distinctive shape, pattern or colour, which still maintain novelty and industrial applicability. In order for an industrial design patent to be granted, the design must be new, creative and have an industrial application. An industrial design patent is considered “new” if it differs substantially from industrial designs that are already disclosed to the public inside or outside Vietnam. An industrial design is deemed “creative” if it cannot easily be created by a person with average knowledge in the relevant field. Like patents, an industrial design is considered capable of industrial application if it can be used as a model for mass manufacture of products. However, these cases shall not be protected as industrial design patents: i) if the appearance of a product is dictated by the technical features of the product, ii) the appearance of a civil or an industrial construction work, iii) the shape of a product if it is invisible during product use. Industrial design patents last 5 years, with the option to extend twice for consecutive 5-year periods (15-year maximum protection). Registration may take up to 18 months.

### **6.3.4 Trade secrets:**

Trade secrets include information obtained from financial or intellectual investment activities, which have not been disclosed and are applicable in business. Information qualifies as a trade secret if the information i) has not been made to the public and is therefore not common knowledge, ii) gives its owner a business advantage and iii) remains secret because the owner takes necessary measures to protect the confidentiality of the information. Examples for trade secrets include new products or business models, special techniques, customer and supplier lists, technical know-how etc. Trade secrets do not include personal secrets, state management secrets and other confidential information which is not relevant to business. In practice, trade secrets are protected upon creation and cannot be registered with the NOIP. However, despite being unregistered rights, trade secrets are increasingly being recognized in

Vietnam. They can, at least in theory, be enforced provided their owner can evidence that they are non-public, have commercial value, and sufficient measures have been taken to protect their confidentiality. Those measures include, amongst others, restricting employees' and third parties' access to trade secrets, marking documents with trade secrets as confidential and protecting trade secrets by confidentiality and non-disclosure agreements with employees and third parties wherever possible.

### 6.3.5 Copyrights:

Vietnamese IP Law protects literary, artistic and scientific works (including performances, audio and visual fixation, broadcasts and satellite signals carrying coded programmes) such as e.g. literary works, scientific works, textbooks, teaching materials, lectures and speeches, press articles, musicals, films and photos, art works, drawings, sketches, plans, maps and architectural works, computer programs and data collections. Protection duration is 75 years from publication 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. In Vietnam, copyrights are automatically protected under the Berne Convention which extends protection to all treaty countries. However, copyright registration is still advisable to obtain copyright certificates which serve as documentary evidence in case IPR enforcement becomes necessary. Registrations are filed at the National Copyright Office, which is a subsidiary organisation of the Ministry of Culture, Sport and Tourism, and/or the responsible Department of Culture which is responsible in some cases.

## 6.3 IPR Enforcement

Qualification levels of court officials, judges, customs authorities and other IPR enforcement agencies are still relatively low. Specifically, IPR enforcement agencies outside the big cities often lack both experience and training to render fair decisions and judgements in line with Vietnamese law. Moreover, victims to IPR violations must provide documentary evidence proving the IPR infringement(s) and the actual damages suffered as a consequence of such infringement.

**Administrative Actions:** Administrative action is the most common route when dealing with IPR infringements. As administrative agencies still lack the expertise to resolve complex disputes, expert opinions must often be obtained to facilitate the resolution of the case. Depending on the value and nature of the case, different governmental bodies may be involved, such as the e.g., the police, customs market control force and competition authority. Those bodies are able to issue on the IPR infringer different penalties and sanctions such as “cease- and desist” orders, fines up

to VND 500 million, confiscation and/or destruction of infringing goods as well as means for producing the infringing goods, suspension of infringer's business license, removal of infringing elements from a product, withdrawal of domain name and/or company's name containing infringing elements, recall of infringing goods already on the market and in some cases the recovery of illegal profit. A request to apply administrative measures against IPR infringers should be filed with the relevant enforcement authority and include with the application: i) documentary evidence of ownership of the infringed IPRs, ii) other evidence such as e.g., samples or photographs or the counterfeit/infringed goods, iii) proof of damages caused by the infringement (if possible) and iv) an expert opinion (if available). Upon submission of those documents, the enforcement agency in charge will then examine the request within one month from its filing date. If the request and its documentation are complete, the competent authority will then raid and seize infringing goods without prior notice to the infringer. If an infringement is found, the relevant authority will also impose sanctions and penalties upon the infringer.

**Civil Litigation:** For IPR holders to claim - beyond administrative sanctions and fines - additional civil damages, they must commence civil litigation against the infringer. Damages are based on lost sales or the infringer's profits, however if the actual damages cannot be determined, the maximum amount the court can award in such cases is VND 500 million. By taking civil action, IPR holders may also request provisional measures (preliminary injunctions) and claim remedies available under law, especially claims for damages. To initiate a lawsuit, the IPR holder has to file a petition to the court within two years from the date of infringement discovery.

**Criminal Prosecution:** While IPR infringements may constitute a crime, pressing criminal charges against IPR infringers can be a challenging task, because court-proof evidence must be provided to the court and such evidence is often difficult to obtain. Also, a criminal conviction will not recover any civil damages or losses. Penalties for IPR infringements include monetary fines of up to VND 1 billion and imprisonment of up to three years, provided that the infringement is i) intentional, and ii) on a 'commercial scale'.

## 6.4 IPR Licensing Agreements

Licensing of industrial property rights is generally permitted but must be made by written contract ("Licensing Agreement"). The following licensing restrictions exist:

- The right to use geographical indications or trade names is not licensable.

- The right to use collective marks must not be licensed to organizations or individuals other than members of the owners of such collective marks.
- The licensee must not enter into a sub-licence contract with a third party unless it is so permitted by the licensor.
- Trademark licensees are obliged to indicate on goods and goods packages that such goods have been manufactured under mark licence contracts.

The IP Law recognizes the following types of Licensing Agreements:

- **Exclusive Licensing Agreement** means an agreement under which, within the licensing scope and term, the licensee shall have the exclusive right to use the licensed industrial property object while the licensor may neither enter into any industrial property object licence contract with any third party nor, without permission from the licensee, use such industrial property object.
- **Non-exclusive Licensing Agreement** means an agreement under which, within the licensing scope and term, the licensor shall still have the right to use the industrial property object and to enter into a non-exclusive industrial property object licence contract with others.
- **Sub-licence Licensing Agreement** means an agreement under which the licensor is a licensee of the right to use such industrial property object pursuant to another contract.

Licensing Agreements must contain at least the following principal contents: i) Full names and addresses of the licensor and of the licensee, ii) Agreement type and term, licensing price and grounds for licensing, iii) Licensing scope, limitations on rights use and territorial limitations and iv) Licensor and licensee rights and obligations.

A Licensing Agreement must not include provisions which “unreasonably restrict the right of the licensee”, which are considered automatically invalid. These include:

- Prohibiting the licensee from improving the industrial property object other than marks;
- Compelling the licensee to transfer free of charge to the licensor improvements of the industrial property object made by the licensee or the right of industrial property registration or industrial property rights to such improvements;
- Directly or indirectly restricting the licensee from exporting goods produced or services provided under the industrial property object licence contract to the territories where the licensor neither holds the respective industrial property right nor has the exclusive right to import such goods;



- Compelling the licensee to buy all or a certain percentage of raw materials, components or equipment from the licensor or a third party designated by the licensor not for the purpose of ensuring the quality of goods produced or services provided by the licensee;
- Prohibiting the licensee from complaining about or initiating lawsuits with regard to the validity of the industrial property rights or the licensor's right to license.

## 6.5 Practical Tips

- **Register your IPR locally in Vietnam:** Register your IPRs locally in Vietnam even if you have already registered in another Madrid Agreement country.
- **Avoid sharing or disclosing IPRs with business- or JV partners:** Never disclose or assign your IPRs to business- or JV-partners, unless necessary and only after having carried out a comprehensive risk assessment.
- **Include IPR protection clauses in your employment contracts:** Always include in your employment contracts effective IPR protection clauses and educate your employees on the importance of IPR protection, specifically through compliance trainings and assigning one staff to IPR protection.
- **Have IPR protection procedures and mechanisms in place:** Have sound physical protection and destruction methods for documents, drawings, tooling, samples, machinery etc. to avoid leakages of IPRs to third parties and/or competitors. Restrict IPR information to selected staff.
- **Check market competitors:** Make sure that your genuine products are not re-sold under a different brand name. Only use reliable distribution partners and have clear and detailed distribution agreements in place.
- **Use experience of established companies:** Where possible, talk to other businesses already doing similar business in Vietnam about their experiences with protecting their IPRs in Vietnam. Talk in addition with experts and advisors such as lawyers and IP agents who can advise you on various courses of action to protect your IPRs and/or defend your IPRs.
- **Pre-check your IPRs before entering Vietnam:** Check with your attorney whether someone has already registered your trademark in Vietnam, and if so, what course of action is recommended.
- **Collect all evidence to protect your rights:** Regarding enforcement, collect all evidence, specifically quotations, contracts with the infringing party and all email contains infringing information and all other documentary evidence.



Viet Diligence Legal (VDL) is a fully Vietnam-licensed law firm offering comprehensive, cost-effective and practice-oriented legal advice in Vietnam. By truly understanding your entrepreneurial and commercial objectives, VDL delivers quality and added value through hands-on legal solutions that help you achieving your business objectives in Vietnam. Since its establishment in 2014, VDL combines local expertise in Vietnam with the international experience of its teams in Hanoi and Ho Chi Minh City. Our areas of expertise include Foreign Direct Investment (FDI), corporate- and commercial law including M&A, employment- and tax law as well as local litigation and arbitration.

Dr. Dühn has been admitted as a German lawyer (Rechtsanwalt) since 2001 and as a foreign registered lawyer Vietnam since 2007. Dr. Dühn focuses his practice on international trade and commercial matters, complex international contract negotiations, corporate restructurings as well as in employment-related settlements and dispute resolution. Dr. Dühn's experience covers numerous sectors and industries, such as e.g., sales and distribution, manufacturing, real estate as well as IT and business process outsourcing (BPO). His clients include mostly internationally operating SMEs as well as private entrepreneurs.

Prior to establishing Viet Diligence Legal, Dr. Dühn has gained relevant industry experience as the regional Chief Compliance Officer Asia-Pacific at MAN Truck & Bus based in Bangkok / Thailand and Senior Legal Counsel for the German chipmaker Infineon Technologies. Dr. Dühn studied law with a focus on business and competition law at the Friedrich-Schiller University Jena and completed his PhD in 2003 at the University of Osnabrück. In 2005, Dr. Dühn also received a Master of Laws Degree (LL.M.) in Securities and Financial Regulation from the Georgetown University Law Center, Washington D.C.

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