

Lovells

## Doing Business in Vietnam



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This note is written as a general guide only. It should not be relied upon as a substitute for specific legal advice.

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# Doing Business in Vietnam

## INTRODUCTION

The last several years have seen the Vietnamese economy enjoy sustained, strong growth with historic highs in foreign direct investment, including in financial institutions, and also in domestic investment, including very significant infrastructure programmes. Highs have also been reached in Vietnam's international trade – albeit from a low base.

The positive expectations of foreign investors were both stimulated and buttressed by Vietnam's accession to membership in the WTO in January 2007. Significant recent legal and regulatory reforms mean there are now relatively liberal foreign investment, foreign exchange and licensing laws and a more pro business environment in this one party Communist State. Steps have been taken to open Vietnam's capital markets and to move forward the programme of 'equitisation' of State-owned companies. Vietnam's fundamentals are also supported by its demographics, with a young, reasonably well educated population looking to enjoy the advantages of the shift to a market economy.

The rapid legal, economic and social changes certainly bring their own difficulties and have not resolved all uncertainties nor removed inconsistent interpretation or regulatory bottle-necks in the path of foreign investment. Vietnam's capital markets are at an early stage. It is yet to be seen if Vietnam will really push through the equitisation programme. Nor has rapid infrastructure development yet cured problem areas, for example in power and transport, for those establishing a business in Vietnam or dealing with Vietnam.

The other side of these challenges represents existing and substantial opportunities for both the Vietnamese and for foreign investors.

This client note is intended to provide an overview of the legal framework and regulatory procedures most likely to be relevant to foreign investors considering establishing a business in Vietnam. It also identifies some problem and risk areas to be considered in foreign investor's preliminary planning. It is a general introductory guide only and not intended to provide legal advice. The laws and regulations referred are those current at December 2008. However, it is expected that laws and regulations will continue to evolve quickly.

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Ho Chi Minh City

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# Vietnam's legal system

## BACKGROUND TO REFORM

In 1986, prompted in part by the collapse of the Soviet Union, the Vietnamese government instituted the 'Doi Moi' ('Open Door') reform programme, intended to revitalise the Vietnamese economy by reorienting the State planned economy towards a market economy, with a gradual opening of the country to foreign investment. The foreign investment law ("**Law on Foreign Investment**") was introduced in 1987.

The Vietnamese Government has continued on the path toward creating a "socialist-oriented market-based" economy. State subsidies have been cut, price controls have been lifted, private enterprise has been permitted, State enterprises are gradually being equitised, and foreign investment policies have been adopted to attract foreign capital. The international community has been supportive of Vietnam's continued reforms and economic successes. Vietnam is being increasingly integrated into 'normal' global trade relations.

Key international developments influencing Vietnam's economic development include:

- the lifting of the US economic embargo in February 1994
- joining of ASEAN in July 1995
- concluding a Bilateral Trade Agreement with the US that took effect from December 2001 and
- entry in the WTO with effect from 11 January 2007.

Vietnam's recent accession to the WTO is the most important of these milestones. Vietnam's commitments to reduce and phase out tariffs under the GATT regime, further open its markets to foreign

investment and adhere to WTO standards in the areas of rule of law, intellectual property protection and international commercial relations have marked a significant step in integrating Vietnam into the global economy. This has been received by many foreign investors as an indicator that Vietnam's legal and investment environments are maturing.

## NEW INVESTMENT REGIME

The principal legislation for foreign investment in Vietnam is now the Enterprise Law ("**Enterprise Law**") and the Investment Law ("**Investment Law**"), both of which took effect on 1 July 2006. This unified set of legislation is applicable to all newly-established foreign invested and domestic-invested enterprises and, in principle, provides for equal treatment in most sectors of the economy. This legislation paved the way for Vietnam's membership in the WTO. Vietnam became the 150th member of WTO on 11 January 2007.

The Enterprise Law and Investment Law replace the old Foreign Investment Law, which has been in effect, although with substantial amendments, since 1987. The past experience and practices of Vietnamese licensing and local authorities' under the Foreign Investment Law necessarily inform their approach to the new laws so established practices and procedures may still be followed, although in some cases inconsistent with the words and scope of the new legislation, thereby causing some confusion and frustration.

The new investment regime provides that foreign investors are entitled to:

- establish a physical presence through branches and

representative offices of overseas organisations

- establish private limited liability company, shareholding company, partnership, or sole proprietorship, as a legal entity in Vietnam, either with 100% foreign invested capital or as a joint venture with domestic investors
- invest through one of several contractual forms which include Business Cooperation Contracts, Build-Operate-Transfer, Build-Transfer-Operate, Build-Transfer, and Build-Own-Operate arrangements
- invest in the business development of, purchase shares in, contribute capital to, or otherwise merge with and acquire an existing business entity in Vietnam, including a local domestic entity.

New laws and regulations have also recently come into force concerning intellectual property, tax, foreign exchange, securities, arbitration, labour, construction, environmental protection, the system of land use rights and land registration, banking, insurance and bankruptcy.

These areas are discussed further within this note.

Several of these laws await the issuance of implementing regulations, as well as interpretation and application in practice. It is sometimes difficult to predict how local authorities will interpret and apply new laws. However, together these laws provide a new and improved legal regime for foreign investment.

Patience and flexibility are required in order to successfully navigate through the legal and regulatory framework in Vietnam. In this regard, Government officials have themselves shown openness, flexibility and a willingness to try to accommodate the needs and expectations of foreign businesses.

# Vietnam’s political structure

Vietnam remains a one-party State. At its head is the Vietnamese Communist Party (“VCP”). All major decisions for the State are made by the VCP Central Committee and its *Politburo*. VCP is headed by a General Secretary (currently, Mr. Nong Duc Manh). VCP Congresses are held every four to five years. These party congresses set the basic policy for Vietnam’s economic and political direction. Delegates to each congress are elected or nominated from all levels of the party (district, municipal and provincial). In practice, the party congresses have significant powers. In a number of instances, foreign investors, particularly in more “sensitive” areas of investment have to await the outcome of the VCP Congress before ministerial-level decisions to be made on their proposed investment projects. At times, the granting of licences or approvals in areas such as telecommunications, banking and insurance has effectively been stalled during the period leading up to the next VCP congress.

In a major move towards reform, the 1992 Constitution provided that the VCP was subject to the rule of law and was not permitted to interfere in the day-to-day running of the Government.

The National Assembly, constitutionally Vietnam’s highest legislative authority, is elected by the people in contested elections. At its head is a President with administrative powers.

Also, within the National Assembly, a cabinet style body constitutes the “Government”. The Government is headed by the Prime Minister.

### INSTITUTIONS OF STATE

Under the 1992 Constitution, the main governmental institutions in Vietnam are:

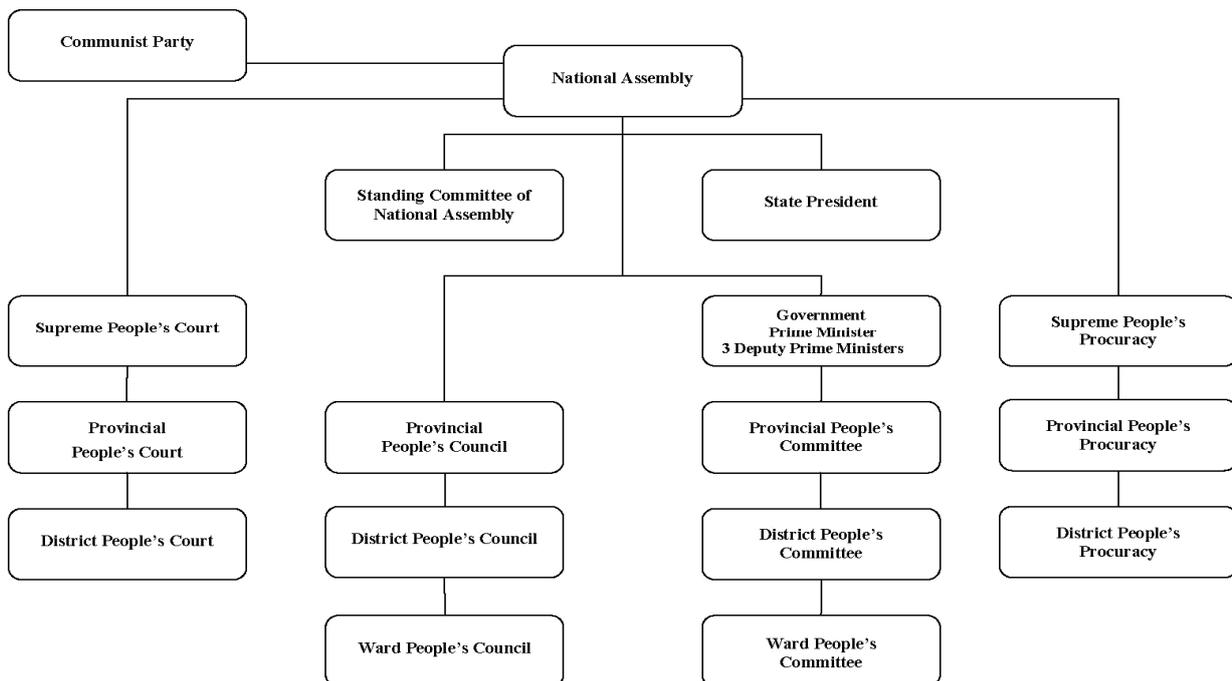
- the National Assembly, headed by the President
- the Government, Prime Minister, Ministries and ministry-equivalent State bodies
- the People’s Courts (Supreme and Local)
- the People’s Procuracy (Supreme and Local)
- the People’s Councils and People’s Committees in 64 provinces and cities and
- the Communist Party of Vietnam, headed by the General Secretary of the Communist Party.

See Figure 1.

### NATIONAL ASSEMBLY AND THE GOVERNMENT

Vietnam’s legislative, executive and judiciary functions partially overlap and are under the overall coordination of the National

FIGURE 1 – THE INSTITUTIONS OF VIETNAM



Assembly. The National Assembly has supreme power and appoints the President, Prime Minister, Chief Justice of the People's Supreme Court, and Chief of the People's Procuracy.

The National Assembly is the only institution that has both constituent and legislative powers. The members of the National Assembly hold office for a term of five years and meet twice a year. The Standing Committee of the National Assembly is in session for the remainder of the year. In addition to other powers, the Standing Committee issues ordinances and presents draft laws to the National Assembly.

The President is Vietnam's Head of State and acts on a variety of domestic and foreign matters. The President is elected by the National Assembly and his term of office matches that of the National Assembly.

The Government is a cabinet-style body comprised of the Prime Minister, three Deputy Prime Ministers, Ministers and heads of other ministry-level State bodies. The Prime Minister is accountable to the National Assembly and the President.

**THE MINISTRIES AND MINISTRY-LEVEL AGENCIES**

The Ministry of Planning and Investment ("MPI") is the most significant Ministry for foreign investors. The MPI oversees the implementation of the Investment Law and has the role of guiding local authorities in connection with the licensing of larger scale foreign investment projects. The MPI also monitors foreign investment activities and serves as the coordinating body for investment projects that require the approval of more than one ministry or ministry-level agency. In practice, local

authorities may seek the MPI's guidance on new investment regulations, specific investment projects and the application of the Investment Law and other laws to a particular situation.

Under the Investment Law, the authority to issue investment certificates and to evaluate projects is now, in most cases, delegated to local authorities, including the provincial Departments of Planning and Investment, the management boards of industrial and export-processing zones and associated district-level bodies.

With respect to important projects having national significance, the National Assembly decides relevant policies and provides regulations regarding, the licensing criteria for these projects. The Prime Minister may approve such projects and other selected investment projects of special importance.

Other Ministries may be more directly involved with the MPI in the foreign investment approval process depending on the sector. For example:

- the Ministry of Science and Technology considers the suitability of any technology to be applied in projects and any matters related to the development of high-tech zones
- the State Bank of Vietnam considers applications for licences in the banking and financial sectors and exercises credit and foreign exchange control in respect of investment activities
- the Ministry of Finance determines policies on investment support and investment incentives, in particular tax incentives, and receives applications from foreign-invested insurance providers

- the State Securities Commission, under the Ministry of Finance, considers applications for licences in the securities sector (such as securities companies and fund management companies) and supervises Vietnam's Stock Exchange and Securities Trading Centre
- the Ministry of Trade and Industry (recently created by merger of the Ministry of Trade and Ministry of Industry) considers applications for import/export licences and domestic distribution rights and co-ordinates input from relevant ministries and others concerning large industrial and infrastructure projects, such as projects in the power sector
- the Ministry of Natural Resources and Environment guides the implementation of regulations on land management (including regulations on land-use rights), site clearance and compensation, and manages natural resources and the environment in relation to investment activities and
- the Ministry of Construction provides guidelines for implementing regulations on construction.

**CONSTITUTIONAL PROTECTION OF FOREIGN INVESTMENT**

The 1992 Constitution (as amended in 2001) enshrines certain principles and provides certain guarantees for foreign investors. Specifically, the Constitution provides that:

- private sector entities may engage in business and production and may establish enterprises without restriction as to size and scope (Constitution, Article 21)

- all business enterprises are equal before the law. The legal ownership of capital and assets are protected by the State. Enterprises in all economic sectors are permitted to enter into joint ventures or cooperate with local or foreign individuals and organisations (Constitution, Article 22)
- the lawful assets of individuals and organisations will not be nationalised. However, the State may purchase or requisition assets for compensation, when necessary, if it is in the national interest. (Constitution, Article 23)
- the State encourages foreign organisations and individuals to invest funds and transfer technology to Vietnam in accordance with Vietnamese law and international law and practice. Business enterprises with foreign invested capital may not be nationalised (Constitution, Article 25)
- citizens enjoy freedom to engage in enterprise in accordance with the law (Constitution, Article 57) and the law recognises the right of ownership of lawful income, savings, housing, chattels, means of production, funds and other assets of enterprises or other economic organisations. The State protects the citizen's right of lawful ownership and inheritance (Constitution, Article 58).

A number of the above guarantees and principles are subject to more specific guidance (and in practice, restrictions) under Vietnamese law.

# Establishing a business in Vietnam

## REPRESENTATIVE AND BRANCH OFFICES

The Commercial Law and its implementing legislation permit foreign businesses and others to establish representative offices and – in some cases – branches in Vietnam. Foreign businesses intending to operate a representative or branch office in certain sectors such as banking, finance, legal services, culture, education, and tourism should note that the establishment and operation of these entities is regulated by specific legislation and not the Commercial Law and its general provisions on representative offices and branches.

### REPRESENTATIVE OFFICE (“RO”)

Representative offices are one of the most popular vehicles for foreign companies to establish a business presence in Vietnam. The main function of an RO is to seek business opportunities for the parent company and to supervise the performance of contracts that the parent company has entered into in Vietnam.

ROs are *not* permitted to generate profits from operations in Vietnam, execute contracts in their own name, make or receive payments directly, purchase local goods directly for export, or distribute imported products on behalf of their head offices. ROs may, however, lease office space in Vietnam, employ Vietnamese and foreign staff and enter into contracts in connection with their permitted operations.

Generally, ROs of foreign trading or service companies are allowed to operate for a five year term (which may be extended).

## BRANCH OFFICE

Branch offices of foreign companies have the right to conduct business activities for their own account, execute contracts in their own name, and carry out all other commercial activities for which they are licensed. Of note, the right to conduct commercial activities in respect of restricted goods and services will only be available as scheduled in Vietnam’s international undertakings.

The Ministry of Trade is authorised to grant, amend or withdraw licences for branch offices that intend to engage in trading activities and most other services.

## PERMITTED INVESTMENT VEHICLES UNDER THE ENTERPRISE LAW

Legal entities permitted under the Enterprise Law include limited liability enterprises, joint stock companies, partnerships and private enterprises. Foreign invested enterprises are primarily established as limited liability companies or joint stock companies (a joint stock company could not be established under the former Law on Foreign Investment).

Foreign invested enterprises with a single investor may only be established as a limited liability company. A joint stock company must have at least three shareholders. Different considerations should be taken into account in selecting the entity to be established, as the governance regime, the financing options, disclosure requirements and other operational aspects of the entities differ depending on whether the investment is carried out by a limited liability company or a joint stock company.

## LIMITED LIABILITY COMPANY

The Enterprise Law provides for two types of limited liability companies, namely, a one-member limited liability company and a multi-member limited liability company.

### Multi-member Limited Liability Company (“MMLLC”)

An MMLLC is a company in which an investor (referred to as “member”) is liable for the debts and other commercial obligations of the company up to the amount of capital that the member has undertaken to contribute to the company. Members of an MMLLC may be organisations or individuals.

An MMLLC must have at least two members and not more than 50. The company attains its legal entity status from the date of issuance of its business registration certificate (which is issued in the form of an investment certificate to foreign investors). 100% foreign-owned enterprises with more than one foreign investor, as well as foreign invested joint venture enterprises, may be established as an MMLLC.

An MMLLC is managed by a members’ council which includes all of the members (who may be individuals or representatives of corporate members), a chairman of the members’ council and a general director. A limited liability company with eleven members or more must have an inspection committee. The chairman of the members’ council or the general director is the legal representative of the company.

### One-member Limited Liability Company (“OMLLC”)

An OMLLC is a limited liability company with a single investor,

such as a 100% foreign-owned enterprise with only one parent company.

An OMLLC is represented by its general director. However, the investor may also establish a members' council (provided that an additional representative of the investor is appointed) and/or a board of directors to govern the operations of the OMLLC.

Each OMLLC is required to appoint from one to three supervisors. The supervisor has a role that is similar to that of an audit committee, although the supervisor's reports are submitted directly to the members.

The legal representative of the company must permanently reside in Vietnam. If he or she is absent from Vietnam for more than 30 days, another person must be authorised to act on his or her behalf in accordance with the provisions of the company's charter.

### **JOINT STOCK COMPANY ("JSC")**

A JSC (or shareholding company) is a company whose charter capital is divided into shares and shareholders are liable for the debts and other property obligations of the company up to the amount of capital they have contributed or are liable to contribute to the company.

Shareholders may be corporate entities or individuals. The minimum number of shareholders is three and there is no restriction on the maximum number of shareholders. A JSC may issue securities to the public to raise capital in accordance with Vietnam's securities laws.

A JSC obtains legal entity status from the date of issuance of its business registration certificate is issued. Foreign investors may establish a JSC, provided that the

number of foreign and/or domestic investors in the company is at least three.

The investment certificate of a foreign invested JSC also functions as its business registration certificate.

The highest decision-making body of a JSC is its general meeting of shareholders. A JSC is managed by a board of management and a general director. JSCs with more than 11 individual shareholders or one shareholder, who owns more than 50% of the total number of shares, are required to have an inspection committee.

The chairman of the board of management or the general director – as determined by the company's charter – is the legal representative of the company. The legal representative must permanently reside in Vietnam. If he or she is absent from Vietnam for more than 30 days, another person must be authorised to act on his or her behalf.

A JSC must issue ordinary shares and may also issue preferred shares which may include:

- voting preferred shares (that are non-transferable)
- dividend preferred shares
- redeemable preferred shares and
- other preferred shares as specified in the company's charter.

### **PARTNERSHIP**

A partnership is an enterprise where no fewer than two individual partners (both of whom must be general partners) who are joint owners of the company and who carry out business under a common name. General partners of a

partnership have unlimited liability for the obligations of the partnership.

A partnership under Vietnamese law is a separate legal entity (despite the general partners' unlimited liability) and obtains its status from the date its business registration certificate is issued.

In addition to having at least two general partners, a partnership may have one or more limited partners. Limited partners are liable for the debts of the partnership only to the extent of the amount of capital they have committed to contribute to the partnership.

The overall management of the partnership is carried out by the partners' council which includes all partners, including limited partners. However, limited partners are not permitted to participate in the day-to-day management of the partnership or carry out business activities in the name of the partnership.

### **ISSUANCE OF AN INVESTMENT CERTIFICATE**

A foreign investor investing in Vietnam is required to obtain an investment certificate for its investment project. The investment certificate also serves as the business registration certificate of the enterprise. The investment certificate sets out the total invested capital as well as charter capital of the enterprise and investment project, as well as the scope of activities for which the enterprise and the investment project are licensed. A foreign invested enterprise may only carry out the activities for which it is licensed in Vietnam.

Under the Enterprise Law and the Investment Law, a foreign invested enterprise may be licensed to carry

out more than one investment project and may hence operate as a multi-purpose investment vehicle.

#### Registration and evaluation procedures for the issuance of an investment certificate

Whether a foreign invested project is subject only to registration procedures or is also required to be 'evaluated' depends on the amount of its invested capital and the nature of the investment project. Foreign invested projects with investment capital below VND 300 billion (about US\$ 18.5 million) and which are not on the list of so-called 'conditional' investment projects are only required to undergo registration procedures to receive an investment certificate. Projects with investment capital of VND 300 billion (about US\$18.5 million) or more and projects categorised as 'conditional' are subject to evaluation procedures, regardless of whether they are to be carried out by domestic or foreign investors.

#### Encouraged and specially-encouraged investment projects

The Vietnamese Government specifically encourages foreign investment in a number of sectors as well as in certain geographic areas. Investment incentives, typically in the form of tax holidays, exemption from land-use fees and other incentives, may be available to varying degrees for encouraged and specially encouraged investment projects. Generally, investment projects in the following sectors are eligible for incentives:

- manufacturing new materials; energy production; manufacturing high-tech products; bio-technology; information technology; mechanical manufacturing

- breeding, rearing, growing and processing agricultural, forestry and aquaculture products; salt production; breeding and growing new plant and animal varieties
- use of high-technology and advanced technology; environmental protection; research, development and creation of high-technology
- labour-intensive industries
- construction and development of infrastructure facilities and important large scale industrial projects
- professional development, education, training, health, sports, physical education and Vietnamese culture
- development of traditional crafts and industries and
- other manufacturing and service sectors as determined from time to time.

In addition, investment projects located in certain disadvantaged geographical locations, primarily in remote or under-developed areas, as determined by the Government from time to time, are entitled to investment incentives.

#### INVESTMENT INCENTIVES

For investment projects on the list of encouraged and specially encouraged investment projects, a range of investment preferences and incentives may be available. Depending on the nature of the project, these can include:

- temporary corporate income tax exemption and temporary corporate income tax reduction from the first profit making year
- a preferential corporate income tax rate of 10 to 20%

- the right, subject to approval, to open off-shore bank accounts for borrowing and debt service
- the right to convert Vietnamese currency earnings into foreign currency to repay loans and pay the foreign investor's share of profits
- free or reduced land rent
- exemption from import duties on a number of products including but not limited to equipment and machinery, specialised means of transport, components, spare parts, fuel, and raw materials
- loss carry forward
- depreciation of immovable assets.

#### Approval authorities

Certain important national projects (such as the construction and operation of airports, national sea ports and other projects) and certain other infrastructure projects with investment capital of VND1.5 trillion (about US\$92.5 million) or more must be approved by the Prime Minister's office. If the investment capital is less than VND1.5 trillion (about US\$92.5 million), the provincial-level People's Committees are authorised to grant an investment certificate for the project. If the investment is in an industrial zone, export processing zone or high-tech zone, the zone's Board of Management has the authority to grant an investment certificate.

#### CONTRACTUAL FORMS OF INVESTMENT

##### Build-Operate-Transfer contracts in Vietnam

For infrastructure projects, the Build-Operate-Transfer ("BOT") structure is the primary investment form for foreign investors in Vietnam. The

BOT form of investment is discussed in more detail below.

#### Other contractual forms of investment – Business Cooperation Contract

A business cooperation contract is defined as a contractual relationship between two or more companies which does not establish a separate legal entity. The parties to a business cooperation contract are licensed to operate and implement a specific project in Vietnam.

The main disadvantage of a business cooperation contract is that the parties have unlimited liability for the debts of their commercial activities of the parties. To reduce such exposure, a foreign party could consider setting up an offshore investment vehicle which then enters into a business cooperation contract with the local party(ies).

## Special trade zones

### INDUSTRIAL ZONES (“IZ”)

IZs came into legal existence on 1 January 1995. IZs focus on attracting enterprises specialising in the production of industrial goods and the provision of industrial manufacturing support services.

An IZ must conform to the Master Plan for the development of IZs (“Master Plan”) which is formulated by the Ministry of Planning and Investment and approved by the Prime Minister. A proposed IZ must be in accord with the Master Plan and at least 60% of the total industrial area of an established IZ in the province or city must be leased to investors. Once established an IZ is managed by the Management Committee of the IZ, an agency under the provincial People’s Committee.

The activities that may be carried out in an IZ include:

- construction and operation of infrastructure facilities
- production, processing, manufacturing and assembly of industrial products for export and/or sale in to the domestic market
- development of, and trading in, patents, technical know-how and technological processes
- scientific and technological research and
- provision of industrial support services.

Both Vietnamese and foreign invested enterprises are permitted to operate within IZs. Such enterprises are called IZ enterprises. Foreign invested enterprises within IZs can receive preferential tax treatment

At the beginning of 2008, there were more than 148 IZs in Vietnam.

### EXPORT PROCESSING ZONES (“EPZ”)

EPZs focus on attracting enterprises that are classified as “export processing enterprises” and which specialise in manufacturing or processing goods for export or the supply of export related services. An export processing enterprise may also be established in an IZ or High Tech Zone (see below).

Like IZs, an EPZ must conform to an approved Master Plan and must lease at least 60% of its total industrial area in the province or city to investors.

In the past, these enterprises received preferential tax treatment. However, pursuant to the terms of Vietnam’s accession to the WTO, Vietnam is prohibited from providing export or export-related subsidies to investors. Whilst tax incentives continue to be available for export-processing enterprises that are located in an EPZ or an IZ, Vietnam may be required to phase out these incentives in accordance with its WTO commitments.

The first EPZ to be set up in Vietnam was the Tan Thuan EPZ in Ho Chi Minh City in 1991.

### HIGH-TECH ZONES (“HTZ”)

HTZs came into existence in 1997. The purpose of an HTZ is to develop high tech industries, attract and disseminate modern foreign technology and generally increase technology standards in Vietnam. HTZs are reserved for high tech enterprises.

The establishment of an HTZ requires approval of the Government or Prime Minister. Once approved, an HTZ is managed by a Management Committee in the same way as an IZ and EPZ.

The first HTZ in Vietnam was established in Hoa Lac in Ha Tay province near Hanoi. The second HTZ, Saigon Hi-Tech Park near Ho Chi Minh City recently began licensing foreign invested enterprises.

## Mergers and acquisitions and equitisation

### MERGERS AND ACQUISITIONS

The Vietnamese Government has recently issued detailed guidelines for implementing a number of articles of the Enterprise Law (Decree 139 dated 5 September 2007). Decree 139 clarifies that foreign investors may acquire shares or an equity interest in Vietnamese enterprises subject to the specific restrictions:

- foreign investors may currently only acquire in aggregate up to 49% of the issued shares of listed Vietnamese companies
- a single foreign investor may only acquire up to 15% of the issued shares of a joint stock commercial bank in Vietnam (up to 20% with the approval of the Prime Minister); the total foreign shareholding may not exceed 30% of the issued shares of the bank and
- as regards Vietnamese enterprises operating in a number of restricted service sectors, foreign investors may only acquire shares or an equity interest in accordance with Vietnam's international commitments, in particular, the terms of Vietnam's accession to the WTO.

Vietnam's WTO schedule permits restrictions to continue in the areas of distribution, media, certain logistics services, industrial maintenance services and several other service sectors. The specific foreign ownership limit in these sectors corresponds with Vietnam's market opening commitments as agreed in its bilateral and international undertakings (for example, currently 49% foreign ownership of distribution services is permitted, 49% to 51% for logistics services). Most of these restrictions will be phased-out over a period of time in accordance with Vietnam's

commitments under international treaties. In particular, the government is now drafting a decision allowing foreign investors to acquire shares or an equity interest in unlisted enterprises without limitation, except in specifically restricted areas. A single foreign investor has acquired a 30% share of Pacific Airlines, the second largest airline in Vietnam.

### EQUITISATION

Vietnam's privatisation process (or "equitisation" as the privatisation process is called) commenced in the late 1980s shortly after Vietnam adopted its "Doi Moi" programme of economic renovation. A relatively large number of state-owned enterprises were equitised after 1989 but these equitised enterprises were relatively insignificant, consisting of small and medium-sized enterprises or subsidiaries of the large State-owned corporations and conglomerates. Since 2005, Vietnam has been actively pursuing equitisation of the country's "crown jewel" enterprises, and is currently testing the market for private participation in a number of the largest state-owned commercial banks, insurance companies and state corporations. Foreign investors have now acquired stakes in Bao Viet and Bao Minh, Vietnam's largest insurance companies.

The regulatory framework for the equitisation of Vietnam's State-owned enterprises has recently been amended significantly. On 26 June 2007, the Government of Vietnam issued Decree No. 109/2007/ND-CP regarding the conversion of state-owned enterprises with 100% state-owned capital into joint stock companies. Decree 109 sets out a number of provisions regarding the equitisation of Vietnam's State-owned enterprise sector permitting, amongst others, foreign investors to assume the role

of 'strategic investor' in an equitised company.

Seventy one of the major state-owned corporations are currently undergoing equitisation or are expected to be equitised in the near future including, amongst others: Mekong Housing Bank, Vietnam Airlines, Vinatex, Saigontourist, Vietnam Steel Corporation and other major State-owned enterprises. These developments provide opportunities for investment funds, private equity investors, and others.

## Business-related laws

### ENTERPRISE LAW AND THE INVESTMENT LAW

The Enterprise Law and the Investment Law took effect on 1 July 2006. These laws provide a level playing field for all newly established foreign invested and domestic enterprises in Vietnam.

#### Enterprise Law

The Enterprise Law provides the framework for Vietnam's corporate law. The Enterprise Law contains provisions for the establishment, management organisation, governance and operation of limited liability enterprises, joint stock enterprises, partnerships and private enterprises in all economic sectors. Foreign investors are no longer limited to establishing limited liability enterprises, and are generally entitled to equal treatment with domestic investors in establishing an enterprise in Vietnam.

However, foreign investors are still subject to the market opening roadmap associated with Vietnam's WTO accession schedule (and other bilateral investment agreements) in a number of business sectors. For example, foreign investors may not currently establish an enterprise with 100% foreign-owned capital in the distribution sector (restricted until January 2009), provide statutory non-life insurance services, or act as a securities company in Vietnam. These restrictions will be phased out in accordance with Vietnam's WTO roadmap.

Foreign invested enterprises licensed under the old Foreign Investment Law were able to re-register their operations under the Enterprise Law until 30 June 2008. Whilst there was no legal requirement for these enterprises to re-register, foreign invested

enterprises that chose not to re-register face certain restrictions regarding expansion of their scope of activities and their licensed term in the future.

#### The Investment Law

Replacing the 1996 Foreign Investment Law (as amended in 2000), and the Law on Promotion of Domestic Investment, the Investment Law provides the legal framework for investment projects to be carried out by enterprises under the Enterprise Law or pursuant to specific types of contracts (such as BOT contracts). The Investment Law also regulates, among other matters, the licensing of investment projects, investment activities, the rights and obligations of investors, the protection of the investors' legal rights and investment incentives.

Under the Investment Law, an investment certificate is issued to an investor to implement an investment project. Under the Investment Law, an investor may also be licensed to carry out multiple investment projects through only one enterprise in Vietnam. The Investment Law requires the State to create favourable conditions for investors to invest and engage in lawful business activities in Vietnam. According to the Investment Law, licensed investments may not be nationalised and certain investment incentives and support policies apply to investors in certain sectors or geographical areas.

The State also encourages foreign investment in areas with difficult socio-economic conditions by establishing IZs, EPZs, HTZs and economic zones.

### VIETNAM'S CIVIL CODE AND COMMERCIAL LAW

#### Civil Code

In June 2005, the National Assembly passed the Civil Code which replaced the 1995 Civil Code. The new Civil Code took effect on 1 January 2006.

As a basic law, the Civil Code governs not only civil relations but also certain trade, business and labour relations.

The Civil Code covers a wide range of subjects, including, general guidance on protection of personal freedoms, statutes of limitation, principles of ownership and protection of property rights; civil liability, the taking of security interests (e.g. pledges, mortgages, guarantees and other forms of security), performance of civil contracts, the transfer, exchange, mortgage and inheritance of land use rights, intellectual property rights and technology transfer. Most of these matters are addressed in more detail in specific legislation and implementing regulations applicable to certain areas of the law. This legislation may prevail over the general provisions of the Civil Code.

#### The Commercial Law

A new Commercial law also took effect on 1 January 2006.

The Commercial Law governs a wide range of commercial activities, including transactions involving the sale and purchase of goods and related activities and activities relating to the commercial provision of services, investment, trade promotion and other commercial activities. The concept of goods is extended to cover all types of movable assets, including future assets and all assets attached to land. The concept of commercial services has been extended to include all services that are not prohibited by law.

## ACCOUNTING AND AUDITING

### Accounting

According to the Law on Accounting and related implementing legislation, all foreign invested enterprises must use the Vietnamese accounting system and accounts must be kept in the Vietnamese language. This is presently the cause of some concern to foreign investors given the present state of the Vietnamese accounting industry and the fact that this system is unfamiliar and does not always conform to commonly accepted international accounting principles. If there are legitimate reasons for an enterprise to apply common foreign accounting practices and account in foreign currency, an exemption may be obtained from the Ministry of Finance. Also, a foreign language may be used for accounting purposes in addition to the Vietnamese language. All foreign invested enterprises are required to employ a Vietnam-qualified chief accountant to maintain their books of account.

### Auditing

According to Decree 105 on Accounting, the following enterprises, amongst others, are required to undergo an annual audit of their accounts:

- foreign invested enterprises
- listed companies
- banks and certain other financial institutions
- insurance companies and
- state-owned enterprises.

## DISPUTE RESOLUTION

Vietnam's court system remains underdeveloped and it can be cumbersome and time-consuming to

initiate a court action and obtain a court ruling in Vietnam. The law encourages the resolution of disputes by mediation and negotiation. Given the questions surrounding both the domestic court system and the enforcement of arbitral awards in Vietnam, this is often the preferred approach in practice as well.

Foreign investors and foreign invested enterprises may agree to refer disputes with their Vietnamese counterparts to arbitration or the local courts in Vietnam. In this connection, it is important to ensure that contracts provide for suitable arbitration procedures. Due to their proximity and developed legal systems, foreign investors in Vietnam often prefer to arbitrate disputes in either Hong Kong or Singapore.

In September 1995, the Vietnamese Government became a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. In December 2001, a Vietnamese court enforced the award of a foreign arbitral body against a Vietnamese company for the first time. Procedures for the recognition and enforcement of foreign arbitral awards have been clarified by the Civil Procedure Code of 2005. However, to date, only a limited number of foreign arbitral awards have been submitted for enforcement in Vietnam. In practice, it remains time-consuming to have foreign arbitral awards enforced in Vietnam.

Parties to a contract may also refer disputes to a Vietnamese arbitration tribunal, such as the Vietnam International Arbitration Centre. In the past, decisions of the Vietnam International Arbitration Centre could prove difficult to enforce due to the lack of a legislative enforcement mechanism. However, since 2003 the Ordinance on

Commercial Arbitration has provided for arbitral awards to be enforced by the Judgment Enforcement Bureau under the Ministry of Justice. This has helped make domestic arbitration a more viable alternative for foreign investors.

## SECURED TRANSACTIONS AND SECURITY ISSUES

Relevant provisions of the Civil Code, Decree 163/2006/ND-CP dated 29 December 2006 and the BOT regulations generally provide the basis on which lenders, including foreign lenders, may take security in connection with loans to foreign invested enterprises in Vietnam.

This legislation allows both current and future assets to be used as security. Future assets include movable and immovable property and assets purchased with loan capital. Assets include manufacturing plant, equipment, machinery, raw materials, Vietnamese and foreign currency, insurance proceeds, contributions to the charter capital of enterprises, buildings and immoveable property. In the case of BOT companies, land use rights may also be mortgaged with any bank that has a legal presence in Vietnam (including foreign bank branches).

An issue that has been the subject of speculation for some time is whether or not legislation will be introduced that allows foreign lenders (without a foreign bank branch in Vietnam) to take mortgages in land use rights of foreign invested enterprises in Vietnam.

## BANKRUPTCY

Under the previous system of centralised State planning, when all industrial assets were owned by the

State, no concept of bankruptcy or liquidation of State-owned enterprises existed. Accordingly, no bankruptcy or insolvency laws were necessary. The move towards a market economy has necessitated the adoption of a bankruptcy law, if only to deal with the insolvency of many inefficient and uncompetitive State-owned enterprises.

Prior to October 2004, the legal framework for bankruptcy in Vietnam was generally considered to be inadequate and remained largely untested. Pursuant to Vietnam's ongoing legal reform, the former bankruptcy law was replaced by Bankruptcy Law No. 21/2004/QH11 which took effect on 15 October 2004 and Resolution No. 03/2005/ND-HDTP of the Judges' Council of the Supreme People's Court guiding the implementation of the Bankruptcy Law (the foregoing collectively referred to as the "Bankruptcy Law").

Under the Bankruptcy Law, any enterprise established under Vietnamese law (whether State-owned, domestic or foreign invested) may be declared insolvent. An application for a declaration of bankruptcy may be filed by a creditor, union or labour representative, or by the company owner. Jurisdiction lies with the Economic Courts of the province or city where the company's head office is located. If a conciliation or reorganisation plan cannot be agreed upon, or if the plan fails, then the judge will declare the company insolvent and order the assets (or the proceeds from their sale) distributed among the company's creditors. The People's Court of Provinces or Cities directly under the Central Government (i.e. Hanoi, Danang, and Ho Chi Minh City) will receive and dispose of bankruptcy petitions.

## REPATRIATION OF CAPITAL

In the event of a voluntary liquidation of a solvent foreign invested enterprise, the foreign investor is entitled to repatriate its invested capital only after all of its obligations (such as to the State, employees, and other creditors) have been satisfied.

During the term of operation of an investment project, repatriation of capital depends on whether foreign investors are entitled to reduce or withdraw capital. Whilst this was not possible under the former Foreign Investment Law, the possibility to reduce invested capital under the Enterprise Law depends on the type of business entity that is established and operated in Vietnam.

According Article 42 of the Enterprise Law, members of MMLLCs and shareholders of a JSC may, under certain circumstances, request the MMLLC or JSC to buy back their capital contribution or shares. Owners of OMLLCs however are not permitted to withdraw contributed capital from the company in any form.

## Land and real estate

Ownership and use of land are governed by the Land Law, which took effect on 1 July 2004, and related implementing regulations. Reflecting the sensitivities surrounding land ownership in Vietnam, the Land Law is not entirely clear on several issues regarding land ownership and the use of land. Whilst a number of aspects of the Land Law have been clarified in the implementing legislation, uncertainty remains regarding a number of crucial issues pertaining to land transactions and the certification and registration of land-ownership rights and the rights to own buildings and structures situated on the land.

### LAND USE RIGHTS AND LAND USE RIGHT CERTIFICATES

The State is the owner of all land in Vietnam and private ownership of land is not permitted. However, the local Departments of Natural Resources and the Environment may allocate or lease land to individuals, organisations and businesses through the granting of so-called land use rights ("LUR") and the issuance of LUR Certificates ("LURC"). In principle, a LURC does not pass land ownership from the State to the holder as it is merely a certificate of title to the rights to use the land. The term of a LURC issued to foreign invested enterprises is normally limited to a maximum of 50 years, although in certain circumstances, the term may be for as long as 70 years. Only Vietnamese enterprises and individuals may be granted a LURC in perpetuity, such title being similar to complete land ownership.

Foreign invested enterprises in Vietnam may obtain LUR by way of (i) contribution to capital in the form of LUR by the local party to a joint venture company or (ii) entering into a land lease directly with certain permitted lessors, including the

Government. In a recent development, foreign invested enterprises may also enter into a lease directly with Vietnamese organisations holding LURs. However, in practice, this is still rare. Only domestic enterprises may be allocated land directly from the local land authorities.

In practice, this situation gives Vietnamese companies an advantage in obtaining land use rights.

### JOINT VENTURE COMPANY TO DEVELOP A REAL ESTATE PROJECT

To secure land in desirable locations foreign investors often opt to enter into a joint venture in which the local party contributes its share of capital in the form of the value of certain LURs. The domestic party should obtain the LUR through an 'allocation' of land from the Government by way of an administrative decision and the allocation fees should be paid in full.

However, under Article 111.1(d) of the Land Law, a Vietnamese party who 'leases' land from the Government may nevertheless make its capital contribution to a JVC in the form of LUR if the following two conditions are met:

- the Vietnamese Party leased the relevant land before the effective date of the new Land Law, i.e. 1 July 2004 and
- the land rent has been prepaid in full for the whole lease term or for the majority of the term if the unpaid portion of the term is less than five years.

After the JVC is incorporated and its investment certificate has been issued by the licensing authority, the LURC will be issued to and in the name of the foreign invested JVC.

### LAND LEASE

Instead of obtaining the LURs through a contribution of capital to a joint venture company, foreign invested enterprises may consider leasing land directly from the Government.

Foreign invested enterprises in Vietnam may also sub-lease land from an infrastructure developer. In addition to these conventional lessors, Article 93.3 of the Land Law now allows foreign invested enterprises to lease land from:

- Vietnamese economic organisations, including State-owned companies, private joint stock companies and limited liability companies or
- an existing foreign invested enterprise that leases land from the Government and develops infrastructure facilities on the land, provided that this existing foreign invested enterprise has paid land rent for the whole land lease term.

Although the Land Law allows foreign invested enterprises to lease land from private lessors (such as private joint stock or limited liability companies), the authorities have been willing to consider this on a case-by-case basis only.

### LEASE TERM

The lease term must be consistent with the duration of the approved project provided that it must not exceed 50 years or, in special circumstances, 70 years. The Government may approve an extension of the lease term upon its expiration if:

- the lessee has complied with the land regulations during its land use period and

- the use of land is consistent with the approved land plan.

Foreign invested enterprises wishing to extend the term of their land lease must get approval for their supplemental projects under Decree 181. The extension of the LUR is subject to the Government's discretion. It is not clear what would happen to the assets owned by a land user in the event the lease term is not extended.

#### **LEASE PAYMENT AND RIGHTS ENJOYED**

The rights of foreign invested enterprises in respect of LURs may vary depending on the way lease payments are made. Under certain conditions, investors who make a "one-time payment" may have the right to transfer their LUR and assets attached thereto, sub-lease the land and attached assets, contribute their LUR and attached assets to a JVC and may use their LUR as security for loans from Vietnamese financial institutions (including branches of foreign banks in Vietnam). Those making annual lease payments may sell or assign their assets, but may not mortgage, sub-lease or transfer their LUR to third parties.

#### **LEASE OF COMMERCIAL PROPERTY**

Rather than lease a parcel of land, foreign investors may consider leasing office space in a commercial office building. The office lease is not subject to any approval by Vietnamese authorities although an office lease with a term of more than six months must be notarised.

#### **NOTARISATION OF LAND CONTRACTS**

All documents related to land must be notarised. This might delay and increase the complexity of some land transactions because

notarisation in Vietnam can be a time-consuming process.

#### **WITHDRAWAL OF LAND FROM FOREIGN INVESTORS**

Under the Land Law, the Government has the power to reclaim land leased or allocated to parties, including foreign investors. Land might be withdrawn from foreign investors if:

- the land is used in an inefficient way or for any improper purpose
- the land user intentionally destroys the land
- the land user intentionally fails to meet its financial obligations to the Government
- the land has not been used for 12 consecutive months from the date of handover of the land or
- the land use schedule for the project has been delayed for more than 24 months beyond the date to which the investor originally committed in the project documentation.

If the Government reclaims property for any of the reasons stated above, the land user is entitled to a refund, in an amount determined by a Valuation Council, of the capital invested on the land, including land use fees, land rent, and assets.

#### **MORTGAGES**

Vietnamese law permits mortgages over LUR, but only to Vietnamese financial institutions, including foreign bank branches in Vietnam. The laws are silent on the taking of security interests in land or LURs by offshore entities. Therefore, at present LURs cannot be mortgaged to offshore financial institutions.

Vietnamese law is not clear on whether an onshore agent of an

offshore lender is able to take a mortgage over LURs for and on behalf of the offshore lender.

To be eligible to give a mortgage over LURs, a foreign invested lessee is required to pay land rent in advance for the full term of the land lease. A mortgage over LURs is also permitted if the lease was entered into before 1 July 2004 and the land rent has been prepaid in full for the full lease term or for the majority of the term if the remaining unpaid portion of the term is less than five years.

In practice, there are limits to the value of a mortgage as security due to the absence of reliable mortgage enforcement procedures.

#### **FOREIGNERS AND RESIDENTIAL HOUSING**

The inability of foreigners to purchase and own residential housing in Vietnam has been debated for some time. A resolution implementing a pilot project permitting foreign individuals and organisations to purchase and own residential housing was finally passed on 3 June 2008. The pilot project will take effect on 1 January 2009 and last for five years.

Under the resolution, five categories of foreign individuals and organisations will be eligible to purchase and own residential apartments (foreigners will still not be permitted to own residential houses) on the condition that individuals reside and have the right to remain in Vietnam for at least one year and that organisations have an investment certificate. There are certain restrictions on the number of apartments that can be owned, the ownership period and the date of resale of the apartment(s). Foreigners who have purchased residential apartment(s) under the pilot project shall, after the pilot

## Infrastructure

project expires, be permitted to continue to own such apartment(s) for the duration of their ownership certificate(s).

Vietnam is keenly aware of the need for investment in infrastructure to sustain the high rates of economic growth the country has experienced since the introduction of economic reforms. To date, the State budget and overseas development assistance have been the principal sources of funds for infrastructure development. Despite preferential Government policies for privately-funded infrastructure projects in Vietnam, relatively few foreign invested infrastructure projects have been implemented to date.

### **BOT, BTO AND BT CONTRACTS**

Where private participation in infrastructure has occurred, the majority of contracts have followed the build-operate-transfer, build-transfer-operate or build-transfer (collectively "BOT") model. Decree 78/2007/ND-CP (the BOT Decree) provides regulations concerning investments in infrastructure facilities based on the BOT model.

The BOT Decree provides that the Government will issue a list of approved projects (published by the MPI from time to time) for which BOT investments are invited. The Vietnamese Government has identified a large number of construction projects that it wishes to complete in the coming years, and lists of projects seeking foreign investment are published regularly. Some projects are dependent on financing from international institutions such as the World Bank and Asian Development Bank.

It is possible for projects not on such published lists to be approved on an ad hoc basis and a foreign investor may therefore directly approach the

relevant authorities to obtain approval for a BOT project.

If a project is approved as a BOT project, investors are responsible for the construction and operation/management of the project for the fixed term of the BOT contract, following which the investors are required to transfer the project to the Vietnamese Government without compensation.

The parties to a BOT contract may agree to establish a coordination board (similar to a board of management) for the implementation and management of the BOT project. The functions, tasks and powers of the coordination board may be determined by the parties to the BOT contract. A foreign party to the BOT contract may lease office space in Vietnam to implement the performance of the BOT contract.

### **BTO AND BT INVESTMENT CONTRACTS**

In a typical BTO project, the foreign investor constructs the project and transfers it to the Government upon completion. The Government then allows the investor to operate the project for a fixed period of time so that the investor can recover its investment plus an agreed rate of return on investment.

A BT project also entails the immediate transfer of the facility to the Government upon completion but does not include the right to operate it. Instead, the investor may be awarded another project to allow it to recover its investment and receive a return on its investment.

### **BOO INVESTMENT CONTRACTS**

A BOO is a contractual form of investment that is specifically permitted in the power sector. A private investor funds construction of a public infrastructure project then is allowed to own and operate the facility at its own risk for the term of the investment certificate (normally 50 years and in exceptional cases 70 years).

Although the BOT Decree seeks to improve the regulatory environment for infrastructure investment, investors should be aware of certain issues before committing resources to a BOT investment, including restrictions on the ability of certain lenders to take security in project assets.

### **INFRASTRUCTURE SECTORS**

In recent years, power shortages have underscored the need for investment in power generation. The port sector is also attracting an increasing amount of interest from private investors. However, Vietnam's need for investment extends well beyond these sectors.

There are no restrictions on the infrastructure sectors open to a foreign investor. Under the BOT Decree, the Government expressly 'encourages' investment in infrastructure facilities including roads, rail, air and sea ports, water and waste treatment plants, power plants and power transmission facilities.

### **AWARD OF PROJECTS**

The Government has historically tended to award BOT contracts on a negotiated basis, rather than through competitive tendering. Under the BOT Decree, the 'preferred' method of selecting an

investor for a BOT contract is international or domestic tender. However, the direct appointment of an investor is still permitted in certain circumstances, including where a project is proposed directly by a particular investor or where there is only one investor who satisfies the requirements for pre-qualification. Of note, the Prime Minister may also decide to appoint an investor to enter directly into contract negotiations. Transparency has not historically characterised the process of investor selection.

A BOT contract is negotiated and executed by an authorised State body (“ASB”). An ASB may, depending on the size and sector of the project, be a ministry or ministry-level agency (such as the Ministry of Trade and Industry) or a provincial People’s Committee.

The cumbersome nature of Vietnamese bureaucracy has prevented many projects from achieving a successful close. The BOT Decree does seek to improve this record by requiring an ASB to establish an “inter-branch working group” which brings together relevant government bodies and independent advisers to consider the criteria for selecting investors, support the negotiation of contracts and resolve implementation issues. It remains to be seen whether this will tangibly reduce red tape.

## TENDERING LAWS

Detailed bidding provisions govern the participation of foreign and Vietnamese contractors in the projects tendering process in Vietnam. Preference is often given to those applicants who intend to employ local employees or utilise local materials in addition to applicants who anticipate introducing advanced technology. Whilst the recent overhaul of Vietnam’s tendering regulations

and, in particular, the adoption of the Law on Tendering in 2005 (effective from 1 April 2006) have helped to improve the legal framework for tenders, recourse for bidders who feel they have been treated unfairly remains problematic and it is difficult in practice to challenge the result of the tender process.

## INVESTMENT CERTIFICATES AND THE INVESTMENT VEHICLE

An investment certificate is required to implement a foreign investment project of any nature in Vietnam, including BOTs and other infrastructure projects.

The BOT Decree distinguishes between an investor (the company or individual investing capital in the project) and a project enterprise (the vehicle set up by the investor to manage the project).

It is the investor who is appointed to enter into contract negotiations for a BOT project and, in the first instance, it is the investor who must sign the BOT contract. Therefore, prior to the establishment of the project enterprise, the obligations under the BOT contract remain exclusively with the investor.

An investor will ordinarily want to establish a project enterprise. This vehicle must itself obtain an investment certificate. Under the Investment Law, foreign invested enterprises may operate in a number of different forms, including a limited liability company, a joint stock company, a private company or a partnership. The BOT Decree is silent as to whether each of these legal entities may be used for BOT projects. However, experience suggests that joint ventures with a local partner are regarded positively by Vietnamese authorities.

As a signatory to the BOT contract, an investor can potentially expose itself to risks that it would ordinarily want borne by the project enterprise. The BOT Decree does contemplate that a project enterprise can “assume” the rights and obligations of the investor with respect to “implementation” of a project. In practice, it is better for an investor to limit its risk by negotiating the BOT contract to expressly provide that the obligations are imposed directly on the project enterprise.

## CAPITAL REQUIREMENTS AND CONSTRUCTION SECURITY

Investors may raise funds themselves for a BOT project or the project may be supported by capital contributions from the State. Under the BOT Decree, capital contributions by SOEs cannot total more than 49% of the total capital.

The BOT Decree requires investors to provide a minimum proportion of equity to the project enterprise. The proportion of equity lower the higher the project amount, as follows:

- not less than 30% equity if the total investment capital is below VND75 billion (about US\$4.6 million)
- not less than 20% equity where the total investment capital is between VND75 billion Dong and below VND1,500 billion (from about US\$4.6 million to 92.6 million) and
- not less than 10% equity where the total investment capital is VND1,500 billion or more (exceeding about US\$92.6 million).

Investors should note that the investment capital must be contributed in accordance with the schedule stipulated in the project contract, though it need not

necessarily be contributed in full upon commencement of the project. The BOT Decree also requires investors to offer security performance bonds to guarantee construction of the project.

### **INVESTMENT INCENTIVES**

There are various incentives available to investors who undertake a BOT project. These include exemptions from applicable land use fees or land rent, exemption from duties on goods imported to implement the project, as well as significantly reduced corporate income tax rates and tax holidays. It may be possible for investors to negotiate additional incentives for a particular project.

### **LENDER'S SECURITY AND STEP-IN RIGHTS**

Under Vietnamese law, a foreign lender cannot take security interests in land use rights or structures built on the land unless the lender has established a foreign bank branch in Vietnam. Whilst there are examples of lending syndicates (comprised of local and foreign banks) taking security in project assets, the enforcement of such security remains untested. A number of BOT projects have failed to go forward because of this restriction.

Lenders can negotiate step-in rights in cases where the project company defaults in a BOT context, a lender's step in rights must be pre-approved by the relevant ASB counterparty. However, in practice, it may be difficult for lenders to obtain sufficiently broad consent to cover all of the circumstances in which a lender might wish to step into a distressed project.

## Intellectual property

Vietnam's intellectual property laws have evolved steadily since the Doi Moi policy of "renovation" was introduced in late 1986, and the adoption of legislation aimed at stimulating the domestic economy and attracting foreign investment. As Vietnam's commercial relations with foreign countries developed, Vietnam continued to improve its legal framework for protecting intellectual property rights. This process was accelerated in the early 2000s when Vietnam entered into negotiations to join the World Trade Organization ("WTO"). On 1 January 2006, the amended *Civil Code of Vietnam* ("Civil Code") and amended *Commercial Law* ("Commercial Law") both took effect. This legislation was followed by a new and comprehensive *Law on Intellectual Property* ("IP Law"), which took effect on 1 July 2006. The Civil Code, Commercial Law and IP Law and related implementing legislation provide a more comprehensive and detailed legal framework for the establishment and protection of intellectual property rights, including patents, marks, trade names, geographical indications, trade secrets, copyrights and "related rights", as well as plant varieties. The current legal framework also contains prohibitions against various forms of unfair competition.

It should also be noted that the new Law on Technology Transfer, which took effect on 1 July 2007, has eased previous rules governing the transfer of technology and know-how to Vietnamese entities and, in most cases, eliminated the requirement that that such contracts must be approved in advance.

### INTERNATIONAL TREATIES AND CONVENTIONS

Vietnam has long been a party to such international treaties and conventions as the *Paris Convention for the Protection of Industrial Property* (since 1949), the *Madrid Agreement Concerning the International Registration of Marks* (since 1949), the *Convention Establishing the World Intellectual Property Organization* (Stockholm Agreement) (since 1976) and the *Patent Cooperation Treaty* (since 1993).

More recently, Vietnam joined the *Berne Convention for the Protection of Literary and Artistic Works* (2004), the *Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms* (2005); the *Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite* (Brussels Convention) (2006); the *Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks* (Madrid Protocol) (2006); the *International Convention for the Protection of New Varieties of Plants* (UPOV) (2006); and the *Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations* (2007).

On 11 January 2007, Vietnam became the 150<sup>th</sup> member of the World Trade Organization (WTO). According to the terms of its accession to the WTO, Vietnam agreed to immediately comply with the terms of the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPs). Vietnam's domestic intellectual property legislation reflects the country's obligations under the foregoing international treaties and conventions.

In addition, Vietnam has entered into bilateral agreements relating to the

protection of intellectual property rights, including the *Agreement Between the Government of the United States of America and the Government of the Socialist Republic of Vietnam on the Establishment of Copyright Relations* (1998), a bilateral treaty for the protection of intellectual property rights with Switzerland (1999), as well as the *Agreement Between the United States of America and the Socialist Republic of Vietnam on Trade Relations*, which took effect on 10 December 2001.

Vietnam is not a party to the *Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks* ("Nice Agreement"). However, Vietnam follows the international system of classifying goods and services prescribed in the Nice Agreement.

### PATENTS

Vietnamese law provides for the registration and protection of three types of patents, namely, "inventions", "utility solutions" and "industrial designs." An invention patent is valid from the date a title of protection is granted until 20 years after the filing date. A utility solution is valid from the grant date until 10 years after the filing date. An industrial design is valid from the grant date and may be renewed for two consecutive 5 year terms.

### LAYOUT DESIGNS OF INTEGRATED CIRCUITS

Layout designs of semi-conductor integrated circuits are protectable in Vietnam and a certificate of registration for the same is valid for 10 years after the filing date, for 10 years after the date the layout design was first used commercially, or fifteen years after the date the layout design was created.

## TRADE MARKS

Provided they are deemed distinctive and are otherwise registrable, trade marks and service marks are protected in Vietnam, as are certification marks and collective marks.

Upon the issuance of a title of protection (i.e. "registration"), a mark is protected from the grant date until 10 years after the filing date and may be renewed indefinitely for consecutive 10 year terms.

Marks are subject to cancellation for non-use if they have not been used for a continuous period of 5 years without justification, unless use of the mark has been commenced or resumed at least 3 months before a request for termination of the registration for non use.

### Oppositions Proceedings

At any time from the date an application for registration of a mark or other industrial property right is published in the Official Gazette up to (but not including) the date a decision is issued granting registration to the mark or industrial property right, any third party may oppose the same by filing a written opposition with the National Office of Industrial Property.

### Cancellation Proceedings

A cancellation action may be filed against any registered trade mark or other industrial property right that did not meet the conditions for registration at the time the mark or industrial property right was registered, has not been used for the specified period of time, or on other prescribed grounds.

## GEOGRAPHICAL INDICATIONS

A geographical indication is protectable in Vietnam if the product

bearing the same comes from the location that corresponds to the geographical indication and the reputation, quality or characteristics of the product is principally attributable to the geographical conditions of that location.

Geographical indications" are protectable indefinitely from the date a title of protection is granted.

## TRADE NAMES

A trade name that is capable of distinguishing the business in connection with which it is used (i.e. that is not confusingly similar to another party's mark or geographical indication which was protected before the date of first use of the trade name) is protected from the date it is first used in Vietnam.

## TRADE DRESS

Though "trade dress" is not specifically defined or expressly protected in any provision of Vietnamese law, Article 130 of the IP Law provides a possible basis for parties to prevent others from imitating the distinctive "get up," "look and feel" or configuration of their products.

## TRADE SECRETS

A trade secret is protectable as such if it satisfies the criteria for protection, namely, that the trade secret is not commonly known or easily ascertainable, it gives its holder a commercial advantage over others, and the owner takes such steps as are necessary to keep the trade secret confidential and not easily accessible.

## PLANT VARIETIES

Plant varieties are protected for a period of 25 years from the date a title of protection is granted in the case of timber trees and vines, and 20 years for other varieties of plants.

## ESTABLISHMENT OF INTELLECTUAL PROPERTY RIGHTS

To obtain protection for patents (invention patents, utility solution patents and industrial design patents), layout designs of semi-conductor integrated circuits, marks, geographical indications and plant varieties, an application must be filed with the State administrative body responsible for the intellectual property right in question. In the case of patents, layouts, marks and geographical indications, an application must be filed with the National Office of Intellectual Property ("NOIP") under the Ministry of Science and Technology.

Applications for protection of plant varieties are submitted to the Office for the Protection of New Plant Varieties under the Ministry of Agriculture and Rural Development.

Subject to Vietnam's obligations under applicable treaties, including its obligation to honour priority dates and protect well known marks, Vietnam follows the "first to file" principle in connection with granting titles of protection to patents, layout designs of semi-conductor integrated circuits, marks, geographical indications.

Foreign individuals and entities must retain a local Vietnamese agent to submit an application for protection of intellectual property rights and provide the Vietnamese agent with a power of attorney.

## COPYRIGHT

Under Vietnamese law, copyright subsists in original works of authorship from the moment of their creation, including literary, artistic and scientific works, including textbooks, lectures and speeches, works of the press, musical, theatrical and cinematographic works, works of applied art, photographic works, architectural works, maps, sketches and similar drawings, works of folklore and folk art, as well as computer programs. Derivative works may also be protected if this would not prejudice the copyright in the pre-existing work used to create the derivative work.

Pursuant to Vietnam's obligations under international treaties and conventions and corresponding provisions of the IP Law, protection is also provided to "related rights", including rights in *performances* of musical, choreographic, theatrical, literary and other artistic works, sound and video recordings, as well as broadcasts and satellite signals carrying coded programs.

Registration of copyright is not required for a work to be protected in Vietnam. However, registration relieves the registrant of the burden of proving copyright or a "related right" in some cases. Applications for registration of copyrights are submitted to the National Copyright Office under the Ministry of Culture, Sports and Tourism.

#### "Moral Rights" and "Economic Rights"

Under Vietnamese law, copyright consists of "moral rights" and "economic rights."

Moral rights include the right of an author to assign a title to his/her work, to have their real names associated with the work or have their real names or pseudonyms acknowledged when their works are published or used, to publish or authorise others to publish their works, and to protect the

integrity of the work by prohibiting others from modifying their works.

Economic rights, meanwhile, include the right to make a derivative work, to display their work in public, to reproduce the work, to distribute or import the original or copies of the work, to transmit the work to the public by electronic means, and to license the original or a copy of a cinematographic work or computer program.

An author owns the moral rights and economic rights in a work, unless the author has been assigned the task of creating the work by an organisation to which the author belongs, or the author enters into a contract with an organisation or individual pursuant to which the author creates the work. In cases which correspond to the "work for hire" concept in other legal systems, the "economic rights" in a work belong to the assigning organisation or individual, as the case may be, but the moral rights associated with the work (except for the right to publish or authorise others to publish the work) are retained by the author and may not be assigned. Vietnamese law also recognises moral rights of directors, screenwriters, playwrights, composers, cameramen and others in respect of cinematographic and dramatic works. Persons who finance or materially support the production of a cinematographic or dramatic work own the economic rights associated with the work, but must pay a royalty or other compensation to directors, screenwriters, composers and others with moral rights to the work in question. In addition, performers have certain "moral rights" in their performances and may also have economic rights to the extent they have invested in the performance.

Moral rights (except for the moral right to publish or authorise others to publish the work) are protected definitely indefinitely.

Economic rights in copyrighted works (and the moral right to publish or authorise others to publish the work) are protected for the life of the author plus fifty (50) years, except for cinematographic, photographic, stage and other specified works which are protected for fifty (50) year from the date of first publication. The IP Law also provides specific terms of protection for owners of "related rights" such as performers, producers of audio and visual fixations and broadcasting organisations.

The IP Law lists the specific acts that constitute copyright infringement, as well as the specific acts that constitute infringement of "related rights." At the same time, the IP Law contains provisions relating to "fair use" (i.e., instances in which a work may be used without having to seek permission or pay royalties) of literary, artistic and scientific works, as well as works that are the subject of "related rights."

#### Assignment of Copyright and Related Rights

Contracts for the assignment of copyright or "related rights" must be in writing and include certain mandatory provisions and comply in other respects with relevant provisions of the Civil Code. As noted above, the "moral rights" of authors referred to above (except for the right to publish or authorise others to publish) may not be assigned, neither may the "moral rights" of performers be assigned. The "moral rights" of performers including the right to have their name acknowledged while performing, or in connection with the distribution of an audio or visual recording, or broadcast of the performance, as well as the right to prevent others from modifying editing or corrupting the work in any way that is contrary to the honour and reputation of the performer.

Given the specific rights associated with copyrighted works and "related

rights”, which can vary depending on the type of work involved and other circumstances, it is important that foreign parties and others involved in business matters involving such rights to seek the advice of counsel before entering into any transaction in relation thereto.

## DOMAIN NAMES

The key piece of legislation governing domain name issues in Vietnam is *Decision No. 27/2005/QĐ-BBCVT of the Ministry of Posts and Telematics Providing Regulations on the Management and Use of the Internet* (“Decision No. 27”), which was issued on 11 August 2005 and took effect on 5 September 2005.

Under Decision No. 27, domain names such as <.com.vn>, <.biz.vn>, <.net.vn>, <.org.vn> <.info.vn>, etc. may be registered on a first-to-file basis. A foreign individual or organisation desiring to register a domain name having a Vietnam country code top level domain name (“ccTLD”) need not reside or have an office in Vietnam, but must do so through one of the domain name registration agents recognised by the Vietnam Internet Network Information Center (“VNNIC”) under the Ministry of Posts and Telematics.

Under previous regulations, if VNNIC thought that registration of a domain name might give rise to a dispute, it was required to post the domain name on VNNIC’s website for three days in order to give third parties an opportunity to oppose registration of the domain name. Under Decision No. 27, VNNIC need no longer do this. Rather, Decision No. 27 imposes an affirmative duty on a prospective registrant to ensure that the domain name it intends to register and use does not infringe the rights of any other party.

Under Decision No. 27, an owner of intellectual property rights who

believes a domain name registration infringes the owner’s rights, must file a formal challenge to the registration within 90 days of learning of the registration. VNNIC then has 45 days within which to issue its decision on the owner’s challenge to registration of the domain name in question. An adverse decision can be appealed by filing another challenge with the Ministry of Posts and Telematics.<sup>1</sup>

Alternatively, the owner may file a lawsuit in Vietnamese court under the IP Law’s “anti-cyberquatting provisions.” Under the IP Law, it is an act of unfair competition to register, possess or use a domain name that is identical or confusingly similar to a protected trade mark (including a well known mark), trade name or geographical indication.

## ENFORCEMENT OF IPR

In cases of counterfeiting or other infringement of intellectual property rights (“IPR”), the IPR owner may pursue relief through administrative or civil proceedings. In certain serious cases, the infringer may be criminally prosecuted and subjected to fines, imprisonment and even the death penalty, depending on the severity of the infringement. Border measures are also available to victims of infringement.

In the case of administrative enforcement, the IPR owner typically enlists the assistance of the Market Management Bureau (“MMB”) and/or the Economic Police in the locale(s) where the infringing activity is taking place. The infringer shall be compelled to cease the infringing acts

and shall receive a warning or monetary fine at least equal to the value of the infringing goods, but no more than five times the value of the infringing goods. Counterfeit goods may also be confiscated, together with the raw materials, equipment and means used to produce them. In addition, counterfeit goods may be ordered destroyed, distributed through no-commercial channels, or transported or re-exported out of Vietnam after the infringing elements of the goods have been removed. As noted above, the IPR owner may also request the assistance of Vietnamese customs by providing information necessary for Vietnamese customs to identify and seize the infringing goods.

An IPR owner may also seek relief by filing a civil action in Vietnamese court pursuant to the Civil Proceedings Code, which was adopted on 15 June 2004. The Vietnamese court may order the defendant to cease and desist from its infringing activity, issue a public apology, perform specified civil obligations and compensate the IPR owner for economic and psychological damage. Upon showing that there is a risk of irreparable damage to the IPR owner or that suspected infringing goods or evidence may be destroyed or lost, the IPR owner may seek preliminary or provisional relief in the form of, amongst others, seizure or sealing of the infringing goods. In the event such relief is granted, the IPR owner must post security in an amount 20% of the value of the goods seized or detained, or at least VND 20 million (about US\$1,200). The IPR owner will be required to compensate the defendant in the event the goods are found to be not infringing.

## TECHNOLOGY TRANSFER

In addition to provisions in the Civil Code and Commercial Law on technology transfer, Vietnam adopted

<sup>1</sup> It should be noted that this procedure only applies to Vietnam ccTLDs and it is unclear whether the ICANN Uniform Domain Name Dispute Resolution Policy (“UDNDRP”) could be applied to such disputes, though the UDNDRP has been successfully used to force the transfer of a non-country code top level domain from a Vietnamese party to a foreign party.

a new *Law on Technology Transfer*, which took effect on 1 July 2007.

In an effort to promote the development, use and dissemination of advanced technology throughout Vietnam for the socio-economic development of the country, the *Law on Technology Transfer* and related legislation has substantially eased previous rules governing the transfer (by assignment, license or contribution to capital) of technology, know-how and proprietary rights by foreign parties to Vietnamese parties, while at the same time allowing the parties to a technology transfer contract much greater freedom to determine the terms of their agreement, including the form and amount of payment for such technology transfer.

Technology subject to transfer includes technical know-how, technical information, such as technological plans, processes, solutions, formulae, specifications, drawings and computer programs, as well as methods for optimizing production and renovating technology. Technology to be transferred may be embodied or bundled with proprietary rights such as patents, trade marks, or trade secrets, whether or not such rights are protected in Vietnam.

Transfers of technology are encouraged if, for example, they create new and highly competitive products, new industries or services, save energy or raw materials or protect human health. Transfers of technology are restricted if directed at the protection of the national interest, human health, Vietnamese cultural values or protection of living organisms, natural resources or the environment. Transfers of technology are prohibited if they are inconsistent with laws on occupational safety, protection of human health or the environment, or if the technology transferred creates products that harm Vietnam's socio-economic

development, national defence, security or safety, or if the technology is a State secret.

The *Law on Technology Transfer* permits technology to be transferred in the form of:

- a stand alone technology transfer contract;
- in connection with an investment project (e.g. as part of a party's contribution to capital, provided this is documented in writing,
- as part of a franchising agreement,
- as part of a contract transferring/licensing industrial property rights, or
- a contract for the sale of machinery with which a transfer of technology is associated.

A technology transfer contract must be in writing, which can include a telegram, telex, facsimile, message or other form authorised by law.

The law expressly distinguishes between transfers of ownership of technology and transfers of the right to use technology.

A contract for the transfer of restricted technology shall be effective only if first approved by the competent State body.

Vietnamese law previously restricted the amount of consideration a foreign party could receive for the transfer or license of technology, know-how and/or industrial property rights. The *Law on Technology*, at least in theory, provides the parties greater freedom in this regard. Payment may be made by one or a combination of the following: (i) a lump sum payment or instalment payment in money or goods, (ii) transfer of technology as a contribution to capital, or (iii) another method of payment as agreed by the parties.

A technology transfer contract must be registered with the "competent State body" in cases provided by law.

A Vietnamese and foreign party may agree to apply foreign law or international commercial practice to the technology transfer contract (provided this is not contrary to fundamental principles of Vietnamese law), and even provide for disputes to be resolved by a foreign arbitrator or court.

## FRANCHISING

A common way to commercially exploit a trade mark and related intellectual property rights and know-how is through franchising. Though a number of global and regional franchise businesses entered the Vietnamese market, the legal framework for doing this has been sketchy at best.

However, with the adoption of the Commercial Law and related implementing legislation, the franchise form of doing business now has a specific legal basis. General provisions of the Commercial Law on franchising have been supplemented by *Decree No. 35-2006-ND-CP Implementing in Detail the Commercial Law With Respect of Franchising Activities* ("Decree 35"), which provides more specific legal provision governing franchising.

While providing the franchisor and franchisee a significant degree of freedom to contract, the legal framework for franchising in Vietnam, like in other countries, recognises the need for a certain amount of regulatory oversight of the franchising business. In this regard, Decree 35, among other things:

- Requires the franchisor to have operated its franchise system for a least one year before granting a franchise in Vietnam, and if the franchisor's principal or primary is a Vietnamese business entity, this

franchisee must operate the franchise for at least one year before sub-franchising the franchise system;

- Requires that the franchise system be registered with the Ministry of Trade;
- Requires the franchisor to provide the prospective franchisee with a disclosure document at least fifteen days before the parties enter a franchise contract. (The Ministry of Trade has issued regulations regarding information that must be contained in the disclosure document and information that may be disclosed voluntarily.)

In addition to the foregoing, the Commercial Law and Decree 35, impose an affirmative obligation on franchisors to provide the franchisee with initial training and ongoing technical support, to design and layout the outlet at which the goods and/or services of the franchisee are sold (at the franchisee's expense), guarantee the intellectual property rights associated with the franchise, and treat all franchisees equally. A violation of any of the obligations provides the franchisee with a right to unilaterally terminate the franchise contract. The franchisor is also required to immediately notify all of its franchisees of important changes to the franchise system. If the franchisor has a primary franchisee, the franchisor is required to discharge other obligations in respect of such primary franchisee.

Franchisors must also be aware of the provisions of Decree 35 dealing with assignments of franchises. For example, if a franchisee provides a written request to assign the franchise, the franchisor must provide a written response within fifteen days approving or refusing assignment of the franchise and provide one of the reasons stipulated in Decree 35.

The Commercial Law also specifies the obligations of franchisees, which include, among other things, the obligation to pay royalties and other sums payable under the franchise agreement, to keep confidential business know-how received during the franchise agreement, even after the contract has expired or is terminated, to operate the franchise according to the franchisor's system and not to sub-franchise without the franchisor's consent.

While franchising is another way to do business in Vietnam, and a number of well known franchisors have granted franchises in Vietnam, a prospective franchisor must take care that they comply with the legal framework governing franchising in Vietnam.

## Banking and capital markets

### BANKING

Foreign banks, both banking and non-banking credit institutions, are entitled to operate in Vietnam in any of the following forms:

- representative office
- branch of a foreign commercial bank
- commercial joint venture bank with foreign capital contribution currently not exceeding 50% of the chartered capital (higher rates permitted with the approval of the Prime Minister)
- joint venture finance leasing company
- 100% foreign invested finance leasing company
- joint venture finance company
- 100% foreign invested finance company and
- 100% foreign-owned banks.

There is a list of legal capital requirements that the foreign banks must meet.

Foreign finance companies may establish a representative office, joint venture finance company, 100% foreign invested finance company, joint venture finance leasing company or 100% foreign invested finance leasing company.

Foreign finance lease companies are permitted to have a presence in Vietnam in the forms of a representative office, joint venture finance company and 100% foreign invested finance leasing company.

There are now two foreign banks that have obtained approval in principle to establish a subsidiary in Vietnam.

### CAPITAL MARKETS

Vietnam's capital markets are still in a relatively nascent stage. To date, two securities trading centres have been established in Ho Chi Minh City (in 2000) and Hanoi (in 2005). In August 2007, the Ho Chi Minh City Securities Trading Centre was renamed the Ho Chi Minh City Stock Exchange. The Ho Chi Minh City Stock Exchange is to be developed into the country's primary stock exchange.

Under the new Law on Securities (No. 70/2006/QH11 dated 29 June 2006 which took effect on 1 January 2007), in order to offer securities to the public, an enterprise must meet certain conditions regarding its charter capital, financial standing and its intentions to use the capital raised. To offer shares to the public (a concept that is different from "listing" in Vietnam), enterprises must have charter capital of at least VND10 billion (about US\$620,000) at the time of registration. If fund certificates are offered to the public, the total value of fund registered certificates must be at least VND50 billion (about US\$3.1 billion).

Foreign organisations and individuals may obtain a securities trading code to sell and purchase securities in Vietnam's securities market and may hold:

- a maximum of 49% of the total shares listed or registered for trading by any one organisation which has been listed or has registered for trading at a Securities Trading Centre
- a maximum of 49% of the total investment fund certificates which have been listed or registered for trading of a securities investment fund
- an unlimited percentage of bonds issued by any issuing organisation.

Specific limitations apply to joint stock commercial banks which have been listed or have registered for trading in a Securities Trading Centre.

Foreign securities service suppliers are permitted to establish representative offices and may enter into joint ventures with Vietnamese partners, but the foreign capital contribution may not exceed 49% of the charter capital of the joint venture.

# Employment

The relationship between an employee and an employer in Vietnam is governed by the Labour Code and its implementing regulations. This legislation is fairly detailed and employers in Vietnam, including foreign invested enterprises, need to be familiar with these regulations and related procedures.

Foreign invested enterprises are required to sign employment contracts with their employees, and adopt internal labour regulations if their work force consists of at least ten employees. Labour contracts must include at least the following terms and conditions: a job description, place of work, working hours, salary and/or wages, term of the labour contract, and provisions on social and health insurance. The trade union may require that a collective labour agreement be negotiated with the employer. A company must register with the local or industry trade union within six months of commencing operations.

## WORKING HOURS AND WAGES

Normal working hours for an employee are eight hours per day or 48 hours per week (based on a six-day work week). A number of Government agencies and socio-political organisations have adopted a 40 hour working week, and foreign invested enterprises are being encouraged to follow this example.

The employer and employee(s) may agree on overtime but overtime work should not exceed four hours a day or 200 hours per year, except in certain special cases. However, the conditions for this are relatively onerous and require an agreement between the relevant State authority, typically the representative of the Vietnam Confederation of Labour, and the employer’s representatives.

Non-wage labour costs are relatively high compared to the rest of the Asia region and employees must contribute 17% to a social and health insurance contributions by employers are mandatory for all Vietnamese employees employed under labour contracts with a term of three months or longer.

Currently, the social insurance contribution is 20% of which the employer must contribute 15% and the employee must contribute 5% of their base salary to the Social Insurance Fund. Under the new social insurance regulations, from 2010 on, the contributions will gradually increase by 1% for each two year period. Under the new Law on Social Insurance, the maximum salary on which the contributions (and benefits) are based will be capped at 20 times the minimum salary payable by domestic enterprises (currently VND 540,000). Employers are further required to contribute 2% of an employee’s base salary to the Health Insurance Fund. Employees contribute an additional 1% from their salary. Foreign employees are not subject to these obligations.

In addition, from 1 January 2009 onward, the employer and the employee are required to contribute 1% of the employee’s salary (subject to the above cap) to the Unemployment Insurance Fund.

Vietnamese law provides a minimum level of salary and wages for Vietnamese employees depending on the geographical place of employment. For unskilled employees working for foreign invested enterprises under normal conditions, the minimum wage level varies as follows:

Min. Wage / Month	Work location
VND 870,000 or about US\$55	Hanoi and Ho Chi Minh City (Urban districts)
VND 790,000 or about US\$50	Hai Phong, Bien Hoa, Vung Tau, Thu Dau Mot town and suburban districts of Thuan An, Di An, Ben Cat and Tan Uyen in Binh Duong Province and rural districts of Hanoi and Ho Chi Minh City
VND 710,000 or about US\$45	The rest of the country

The Ministry of Labour, Invalids and Social Affairs revises the monthly minimum wage from time to time based on inflation indices and the country’s economic development.

As for employees who have obtained vocational training, the minimum salary is at least 7% above the statutory minimum wage for unskilled employees referred to above.

## LABOUR DISPUTES

In the event of a labour dispute, the employer and employees are required to try to settle the dispute through conciliation. If this fails, a dispute may be referred to a labour reconciliation council for negotiations. If this approach fails, the dispute will then be referred to the People’s Court in the case of individual labour disputes. For collective labour disputes, the dispute may be referred to the Labour Arbitration Council. Again, if

the dispute cannot be resolved in this manner, the parties may refer the dispute to the People's Court. In the meantime, the employees are entitled to strike.

Recently adopted regulations provide for compensation to be paid to the employer for losses caused by an illegal strike. However, it remains to be seen how this will affect the labour environment in Vietnam.

## IMMIGRATION AND VISAS

Six-month multiple entry/exit visas are available to foreigners wishing to consider investment possibilities in Vietnam. Such visas are renewable for further six-month periods.

Foreigners implementing investment projects in Vietnam, together with their families and domestic staff, generally may obtain multiple entry/exit visas, the length of which is determined by the type of business in which the foreign national is engaged. These visas may be renewed as required. Temporary resident cards are available for longer term foreign employees.

## WORK PERMITS

In accordance with the Labour Code and other relevant laws, expatriates working regularly in foreign invested enterprises in Vietnam must, subject to certain exceptions, obtain a work permit. Foreign employees may be employed for jobs for which qualified Vietnamese employees are not available but enterprises employing foreign workers are required to implement training programmes to transfer requisite skills to Vietnamese.

A work permit is valid for up to three years and may be renewed provided the employer can show that there

are no Vietnamese nationals available with the skills to fill the position at the end of the initial period.

The employer may, however, be required to demonstrate that a training programme has been implemented to enable a Vietnamese employee to learn and eventually take over the job held by the foreign expatriate.

A new Decree 34/2008/ND-CP on foreigners working in Vietnam took effect on 13 April 2008 changing the group of foreigners required to obtain work permits. Now members of the members council of a limited liability company and general director/deputy general directors are exempt from the work permit requirement only if they are owners of the enterprise or fall within one of the below exemptions listed below.

Decree 34 does not clearly specify how persons exempt under the previous decree must act following these changes; however, it appears that such persons will have until October 2008 to obtain their work permit. If they do not, they may risk being deported from Vietnam.

The following groups are now exempt from the work permit requirement:

- foreign employees entering Vietnam to work for less than three months
- members (owners) of a limited liability company
- board members of a JSC
- foreigners entering Vietnam to offer services
- foreigners entering Vietnam for less than three months to resolve emergency situations
- foreign lawyers certified to practice in Vietnam.

Nevertheless, employers are required to submit details concerning the employment of such exempt individuals to the local Department of Labour prior to employing them and submit documentation such as a standard CV, health certificate, criminal record and certificate of education to the Department of Labour within 30 days of commencement of employment.

## FOREIGN EMPLOYEE LIMITS

Previously, Decree No. 105/2003/ND-CP dated 17 September 2003 limited the number of foreign employees to 3% of the organisation's employees.

Decree 34 abolished this limitation. However, Decree 34 provides a new restriction; foreign enterprises transferring foreign employees to Vietnam must employ Vietnamese in at least 20% of the positions as managers, executive directors and experts.

# Taxation

The principal taxes, applicable to foreign invested enterprises, are the Corporate Income Tax, Value-Added Tax, Personal Income Tax and Social and Health Insurance contributions. Other taxes and similar expenditures that may affect foreign invested enterprises and foreign investors include land rent, import and export tariffs, special sales taxes (excise taxes), natural resource tax (payable in respect of mining and petroleum projects), foreign contractor withholding and other withholding taxes, as well as capital assignment profits tax. In May 2008, the National Assembly passed new laws on corporate income tax, personal income tax and value added tax which will take effect on 1 January 2009.

## CORPORATE INCOME TAX

Foreign investors are subject to tax based on the form of legal presence in Vietnam. In principle, all foreign invested enterprises that are established as a legal entity in Vietnam and branches established in Vietnam are subject to Corporate Income Tax ("CIT") at the standard rate of 28% of their taxable income. Net profits from BCC, BTO and similar arrangements are also subject to CIT in Vietnam. The standard CIT rate will be reduced to 25% as of 1 January 2009.

Tax incentives are available for encouraged projects and specially encouraged projects (see discussion above) and lower tax rates of 20%, 15% and 10% may apply to enterprises assigned special tax treatment for a certain period. Enterprises may also be eligible for a tax holiday and a 50% reduction of CIT. Under the new law on corporate income tax, the preferential tax rates will be 20% and 10 %.

The Ministry of Finance issues guidelines to clarify tax concessions and the period of time for which they will be available for different types of investments.

Generally, investments in underdeveloped areas and in priority industries will enjoy larger concessions for longer periods.

Enterprises may carry forward losses for a period of up to five years, provided that they have been registered with the tax authorities. Effective 1 January 2009, losses incurred in connection with the transfer of real property can only be deducted from income realised from such activities.

Provisional CIT is payable in quarterly instalments during the year. The CIT obligation of the enterprise is finalised and paid at the end of the tax year.

Representative offices currently do not pay CIT as they are not permitted to generate profits in Vietnam. However, the RO's Chief Representative, and its Vietnamese and expatriate employees are required to pay Personal Income Tax and ROs are required to obtain a tax code and pay personal income tax on behalf of their employees.

## VALUE ADDED TAX

Although Value Added Tax ("VAT") is levied on direct consumption of goods and services, enterprises are required to pay VAT on behalf of their customers. Provisional VAT returns are required to be filed monthly. The VAT payable is the difference between the output VAT charged by a business and any input VAT incurred by the enterprise. The standard VAT rate currently stands at 10%, although 0% VAT and 5% VAT apply to certain products and services. Other goods and services are exempt from VAT (such as

certain medical services, training, credit services and others). Providers of tax exempt goods and services may not recover any input VAT paid by them. The provisional VAT returns are reconciled with the total VAT debt for any tax year by the end of the year.

## PERSONAL INCOME TAX

Foreign individual investors, expatriate employees working in Vietnam and Vietnamese employees are subject to Personal Income Tax ("PIT").

### Resident foreigners

Any foreigner who is physically present in Vietnam for an aggregate of 183 days or more during a one-year period from the date of his/her arrival or, in a year in subsequent years, is treated as a resident for tax purposes, and is subject to PIT on their worldwide income.

The maximum Personal Income Tax rate for resident foreigners is 40%. The current income bands and corresponding tax rates for resident foreigners are as follows:

Average monthly income (VND)	Tax rate (%)
To 8,000,000	0
Over 8,000,000 to 20,000,000	10
Over 20,000,000 to 50,000,000	20
Over 50,000,000 to 80,000,000	30
Over 80,000,000	40

The above rates also apply to Vietnamese employees working overseas.

**Non-resident foreigners**

Non-resident foreigners are subject to 25% income tax on their income earned in Vietnam.

Starting in 1996, the Vietnamese tax authorities tightened their procedures for collecting foreigners' PIT, and normally request a clear declaration of that portion of income that is earned in Vietnam and that portion of income that is earned outside Vietnam. Consulting tax treaties is therefore important in tax planning. To date, Vietnam has signed double taxation avoidance treaties with over 45 countries, including Australia, China, France, Italy, Japan, Singapore and the UK.

**Vietnamese employees working in Vietnam**

The maximum PIT rate for Vietnamese employees working in Vietnam is also 40%. The current income bands and tax rates for Vietnamese working in Vietnam are as follows:

Average monthly income (VND)	Tax rate (%)
To 5,000,000	0
Over 5,000,000 to 15,000,000	10
Over 15,000,000 to 25,000,000	20
Over 25,000,000 to 40,000,000	30
Over 40,000,000	40

Employers are required to withhold and pay provisional PIT for their

employees on a monthly basis. PIT is finalised at the end of a tax year. Employers and Vietnamese employees are also required to make contributions to the Social Insurance Fund and the Health Insurance Fund. Please refer to the Section on Employment above for more details on these matters.

The new Law on Personal Income Tax, which takes effect 1 January 2009, introduces some changes to the current PIT system. Individuals will be taxed on ten types of personal income, including income from employment, business, capital investments and transfer of capital. 14 specific types of income are exempt from tax, such as gain on transfers of residential houses, provided the transferor owns only one residential house, and interest on money deposits. The highest marginal PIT rate for income from employment and business will be 35%. For other types of personal income the rates will vary between 01%-25%. The tax rate for income from employment for non-resident foreigners will be a flat rate of 20%.

**OTHER TAXES**

A range of other taxes and other payments may apply to foreign investors and foreign invested enterprises in Vietnam, including withholding taxes on royalties from technology transfer and intellectual property licences, as well as withholding on interest, import tariffs, land rent, and so forth.

**PROFITS REMITTANCE TAX**

Vietnam's profits remittance tax regulations were abolished by the Government in 2004 in accordance with Circular 26/2004/TT-BTC dated 31 March 2004. This means that foreign investors do not have to pay tax when they transfer dividends from investments in Vietnam overseas,

provided that CIT has been paid on the enterprise's profits.

## Lovells

Lovells' network of Asian offices encompasses the major Asian financial and business centres. Lovells works with its offices in Europe and the United States and with leading firms in other jurisdictions to provide an integrated service to clients doing business throughout the Asia Pacific region and worldwide.

With offices in Ho Chi Minh City, Hanoi, Dubai, Singapore, Shanghai, Beijing, Hong Kong and Tokyo, and a professional legal staff of over 170, including 23 resident partners, Lovells has a substantial presence in Asia and provides specialist capability in a comprehensive range of corporate business law services.

Lovells operates internationally but local know-how and insight is the touchstone of the service provided in each of our Asian offices. Lovells lawyers come from a diverse mixture of cultures, nationalities and backgrounds.

Lovells is an energetic and growing firm in Asia, committed to providing a client and market driven service. Lovells' clients' needs determine how we organise the range of specialist services we provide. Lovells aims to work in partnership with clients and we regard their success as a measure of our own. Lovells continues to build on its roots in the Asia region and to constantly develop and refine our services, in anticipation of future market trends and legal developments.

### LOVELLS IN VIETNAM

Lovells' Ho Chi Minh City office has considerable experience in assisting clients with foreign investment and other business interests in Vietnam. Lovells was the first international law firm to open a representative office in Ho Chi Minh City, the country's economic hub, in 1994,

and the first firm to obtain branch status in Ho Chi Minh City in 1996. The Vietnam practice is conducted from there, with the support of Lovells' other Asian offices where necessary. Lovells' Hanoi office is scheduled to open in October 2008.

Lovells offers clients the experience of international lawyers with extensive knowledge of Vietnamese laws and considerable practical experience with transactions concerning Vietnam, including negotiating with Vietnamese parties, both private and governmental.

Lovells has helped clients in a wide range of matters such as oil and gas, real estate and construction, M&A and related transactions, intellectual property including trade mark and patent registration and enforcement, telecoms, technology transfer, banking, capital markets and insurance and foreign investment advice relating to all foreign investment forms. Lovells has also worked with the Government of Vietnam on benchmark documentation for a high profile water BOT project in Ho Chi Minh City.

From Lovells' offices in Ho Chi Minh City and Hanoi, we can assist clients throughout Vietnam and can also conduct work on matters relating to Cambodia and Laos, such as establishing foreign invested companies and protecting intellectual property rights in those countries.

## Glossary of terms

BCC:	Business Cooperation Contracts
BOO:	Build-Own-Operate
BOT:	Build-Operate-Transfer
BT:	Build-Transfer
BTO:	Build-Transfer-Operate
EPZ:	Export Processing Zone
HTZ:	High Tech Zone
IP:	Intellectual Property
IPR:	Intellectual Property Right(s)
IZ:	Industrial Zone
JSC:	Joint Stock Company (Shareholding Company)
MMLLC:	Multi-member Limited Liability Company
MPI:	Ministry of Planning and Investment
NOIP:	National Office of Intellectual Property
OMLLC:	One Member Limited Liability Company
VCP:	Vietnamese Communist Party
WTO:	World Trade Organisation

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