

Fraser's Vietnam Mergers and Acquisitions Guide

May 2022

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Fraser's Law Company (and its predecessor firm) has been collectively advising clients on Vietnam-related transactions for 30 years. We are a full-service commercial law firm practising in Vietnam.

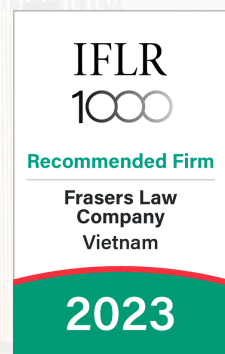
Our firm delivers clarity, understanding, and insight, founded on our commitment to excellence and innovation. We have an integrated team of international and local lawyers, allowing us to advise on Vietnamese law matters to an international standard. We are the trusted advisor of choice by leading international and Vietnamese companies in relation to their business and investments in Vietnam, and we are regarded as the premier independent legal practice in Vietnam. We have consistently been recognised as being in the top tier of law firms in Vietnam by leading independent guides to law firms such as The Legal 500, Chambers & Partners, and Asialaw.

Core Practice Areas

- Banking and Finance
- Capital Markets
- Competition and Antitrust
- Corporate and Commercial
- Corporate Fraud
- Data Protection and Privacy
- Dispute Resolution
- Employment
- Environmental, Social and Governance (ESG)
- Insurance
- Intellectual Property
- International Trade
- Investigations
- Mergers and Acquisitions
- Project Finance
- Projects and Energy
- Real Estate
- Regulatory Compliance
- Restructuring and Insolvency
- Tax
- Technology, Media and Telecommunications (TMT)

Key Industry Sectors

- Banking and Finance
- Capital Markets and Securities
- Education
- Energy
- Equitisations
- FMCG
- Healthcare and Pharmaceuticals
- Insurance
- Investment Funds
- Manufacturing and Heavy Industries
- Projects and Infrastructure
- Real Estate and Construction
- Retail
- Technology, Media and Telecommunications (TMT)
- Transportation and Logistics
- Travel, Hospitality and Tourism



"Fraser's Law is unique in Vietnam as they bring a very strong international approach to the local area. They apply this international know-how to the needs of multinational clients within Vietnam and ensure that local requirements are understood and met."
Client Commentary, The Legal 500 Asia Pacific

TABLE OF CONTENTS

CHAPTER 1:	INTRODUCTION	6
CHAPTER 2:	THE KEY LAWS	10
CHAPTER 3:	TYPES OF VIETNAM TARGETS.....	13
CHAPTER 4:	BUYER CHARACTERISATION.....	18
CHAPTER 5:	TARGET SECTORS	21
CHAPTER 6:	FOREIGN OWNERSHIP RESTRICTIONS	24
CHAPTER 7:	KEY STATE APPROVALS	27
CHAPTER 8:	FOREIGN EXCHANGE CONTROL	34
CHAPTER 9:	TAXATION	41
CHAPTER 10:	STRUCTURING	44
CHAPTER 11:	INTRA-VIETNAM EQUITY CAPITAL RAISINGS	49
CHAPTER 12:	GOVERNING LAW, DISPUTE RESOLUTION, AND LANGUAGE ..	52
CHAPTER 13:	CONDUCTING LEGAL DUE DILIGENCE IN VIETNAM	55
CHAPTER 14:	OTHER JURISDICTION-SPECIFIC FACTORS	58
CHAPTER 15:	PUBLIC COMPANY-SPECIFIC FACTORS	60
CHAPTER 16:	CONCLUSION	63
SCHEDULE 1:	GLOSSARY OF DEFINED TERMS	65
SCHEDULE 2:	IMPORTANT LEGAL NOTICES	70

1

Introduction

- 1.1 Vietnam enjoys a vibrant and ever-expanding mergers and acquisitions (“M&A”) market, in relation to public as well as private target companies domiciled in Vietnam. Commencing with the Vietnamese Government’s “open door” policy in the mid-1980s, Vietnam’s economy and corporate landscape have steadily modernised and liberalised since that time and continue to do so.
- 1.2 Vietnam’s economy has been one of the world’s stand-out success stories since international economic integration began in earnest during the 1990s. The remarkable GDP growth rates which Vietnam has experienced, particularly since the turn of the millennium (averaging higher than 6% per annum) show no signs of abating (or, more accurately, were showing no signs of abating prior to the emergence of the COVID-19 pandemic crisis during 2020). The key economic fundamentals of a large (more than 95,000,000) and young (median age 30.8 years) population, together with political stability and a cultural drive for prosperity and development, have formed the basis for sustained growth rates which have been on average significantly ahead of most economies worldwide during recent decades. Even the COVID-19 crisis, whilst certainly having adverse effects on Vietnam’s economic landscape, has not caused Vietnam’s GDP to cease growing nor dampened the enthusiasm of foreign investors in relation to Vietnam.
- 1.3 Vietnam’s strong and sustained economic growth has occurred in parallel with the development and liberalisation of the legal and regulatory framework which underpins foreign direct and indirect investment in and in relation to Vietnam. From modest and highly restrictive beginnings, the legal and regulatory framework in Vietnam has steadily developed, improved, and liberalised, up to a point where investors (both foreign and domestic) now enjoy a comparatively clear and consistent legal and regulatory platform upon which to implement direct and indirect investment activities in and in relation to Vietnam.
- 1.4 Of particular note are two key events which have occurred during the first two decades of the new millennium, the first being Vietnam’s accession to the WTO in January 2007, and the second being the remarkable and progressive improvement of the key laws which underpin investment transactions in Vietnam (those being the laws relating to enterprises, investment, and securities). WTO accession in 2007 committed Vietnam to one of the developing world’s most progressive and open market access liberalisation programmes. The increases in foreign investment activity and economic growth which have followed have been impressive. In addition, since the turn of the millennium there have been three iterations of each of the Law on Enterprises (corporate law), the Law on Investment, and the Law on Securities, with the most recent of these having come into force and effect on 1 January 2021. Each iteration of these key laws has been a material improvement on its predecessor and has demonstrated the genuine commitment of the Vietnamese Government to fostering both foreign and domestic investment in Vietnam. These welcome legislative developments have been coupled with significant reforms and improvements in bureaucratic procedures and processing times, resulting not only in the law itself becoming comparatively more clear, consistent, and effective, but also in the application of the law by State authorities becoming comparatively more efficient, timely, and transparent.
- 1.5 Opportunities for foreign investors in the M&A market in Vietnam continue to become increasingly available, across the full spectrum of industry sectors and in relation to

public as well as private target companies. The Vietnamese Government appears to be committed to continuing to foster a vibrant M&A market in Vietnam, and continues to deliver on its promises to implement meaningful and effective legal, regulatory, administrative, and bureaucratic reforms, to the benefit of investors both foreign and domestic.

- 1.6** This Frasers Vietnam Mergers and Acquisitions Guide (the “**Vietnam M&A Guide**”) deals with transactions involving private companies as well as transactions involving listed and unlisted public companies. Please note, however, that this Vietnam M&A Guide does not purport to focus primarily on public capital markets transactions and thus covers transactions involving private target companies in somewhat greater detail. In addition, it should be noted that this Vietnam M&A Guide is prepared primarily from a legal and practical perspective and thus does not focus on financial, accounting, or commercial matters. Taxation matters are mentioned briefly in this Vietnam M&A Guide, but only from a high level and only from the perspective of the key taxes arising in connection with M&A transactions involving Vietnam-domiciled targets (“**Vietnam Targets**”).
- 1.7** In Vietnam, there is a hierarchical structure of law-making and laws, under which the highest form of laws (aside from the Constitution) are made by the National Assembly of Vietnam and referred to as “Laws”. Another key type of superior legislation is “Ordinances”, which are made by the Standing Committee of the National Assembly.
- 1.8** In most cases, Laws and Ordinances have implementing and guiding legislation and quasi-legislation issued underneath them by various subordinate law-making bodies and officers, such as:
- (i) implementing decrees (issued by the Government of Vietnam), which set out implementing and guiding provisions, to enhance detail for the application of Laws or Ordinances (in addition to setting out the terms of decisions being within the designated decision-making power of the Government) (“**Decrees**”);
 - (ii) implementing circulars (issued by central Government Ministries), which set out implementing and guiding provisions, to enhance detail for the application of Decrees (in addition to setting out the terms of decisions being within the designated decision-making power of central Government Ministries) (“**Circulars**”); and
 - (iii) official decisions (issued by provincial or municipal People’s Committees or their Departments), which set out implementing and guiding provisions, to enhance detail for the application of Circulars (in addition to setting out the terms of decisions being within the designated decision-making power of provincial or municipal People’s Committees or their Departments) (“**Official Decisions**”).
- 1.9** In this Vietnam M&A Guide, any references to “...laws...” should be read and understood as being references to “...Laws or Ordinances and all of their implementing legislation, of all kinds and at all levels...”. For example, where there is a reference in this Vietnam M&A Guide to “... the Law on Enterprises...”, this should be read and understood as being a reference to “... the Law on Enterprises and all of its

implementing legislation, of all kinds and at all levels...”.

- 1.10** The types of M&A transactions that occur in Vietnam are broadly similar to those which occur in many jurisdictions worldwide and include equity-based transactions as well as asset-based transactions. This Vietnam M&A Guide primarily focuses on the following types of M&A transactions, due to their prevalence in the Vietnam M&A market:
- (i) sale and purchase transactions in respect of shares or contributed charter capital in Vietnam Targets (“**Intra-Vietnam Capital Transfers**”); and
 - (ii) asset (or project) sale and purchase transactions involving the assets of Vietnam Targets (“**Intra-Vietnam Asset Transfers**”).
- 1.11** Other types of M&A transactions such as merger, consolidation, separation, and division transactions, whilst they certainly do occur in Vietnam, are comparatively less popular in the context of the Vietnam M&A market and thus are dealt with only briefly in this Vietnam M&A Guide.
- 1.12** This Vietnam M&A Guide also deals briefly (but not in any significant degree of detail) with:
- (i) sale and purchase transactions in respect of shares in companies which are domiciled outside of Vietnam (“**Extra-Vietnam Capital Transfers**”) and which hold subsidiaries or other equity interests in Vietnam-domiciled companies (in circumstances where the holding of such Vietnam-based subsidiaries or other equity interests is the primary or a major purpose of such foreign-domiciled companies) (“**Foreign Holding Companies**”);
 - (ii) equity capital raising transactions such as share subscription and issuance transactions and charter capital contribution transactions involving Vietnam Targets (“**Intra-Vietnam Equity Capital Raisings**”); and
 - (iii) foreign direct investment activities such as the establishment by Foreign Investors of new subsidiaries in Vietnam and the entry by Foreign Investors into new, incorporated joint ventures with domestic partners in Vietnam (“**Foreign Direct Investment Activities**”).
- 1.13** Annexed to this Vietnam M&A Guide at Schedule 1 is a glossary of capitalised and defined words and expressions. Wherever any such capitalised words or expressions are used in this Vietnam M&A Guide, those capitalised words or expressions have the meanings ascribed to them in Schedule 1 to this Vietnam M&A Guide.
- 1.14** Annexed to this Vietnam M&A Guide at Schedule 2 is a series of important legal notices, subject to which this Vietnam M&A Guide has been published. Readers should ensure that they read and digest these important legal notices before reading the main body of this Vietnam M&A Guide.

2

The key laws

2.1 M&A transactions implemented in Vietnam relating to Vietnam Targets (“**Vietnam M&A Transactions**”) are regulated by three key bodies of legislation, namely:

- (i) the Law on Enterprises (being the key body of law regulating the establishment, governance, management, operation, re-organisation, and dissolution of companies and other forms of enterprises in Vietnam);
- (ii) the Law on Investment (being the key body of law regulating many forms of direct and indirect investment activities in Vietnam, encompassing both domestic investment and foreign investment activities); and
- (iii) the Law on Securities (being the key body of law regulating the public securities markets in Vietnam and which, in numerous key respects, prevails over the Law on Enterprises and Law on Investment in relation to listed and unlisted public companies in Vietnam, as well as in relation to securities investment funds, funds management companies, and other types of securities industry participants).

2.2 In addition, in most cases, the implementation of M&A transactions in Vietnam also necessitates careful consideration of a number of other key bodies of legislation, including, for example:

- (i) the Schedule of Specific Commitments in Services to the World Trade Organization given by Vietnam in the context of its accession to the World Trade Organization, dated 27 October 2006 (the “**WTO Commitments**”), which sets out crucially important market access principles giving rise to the key legal framework for matters such as allowable forms of foreign investment and foreign ownership percentages;
- (ii) the Law on Competition (being the key body of competition or anti-trust law in Vietnam);
- (iii) the Ordinance on Foreign Exchange (being the key body of law regulating the movement of foreign currency into and out of Vietnam and the deployment of foreign currency within Vietnam); and
- (iv) the Civil Code (being the key body of law setting out, amongst many other matters, the fundamental principles of contract law in Vietnam).

2.3 Specific industry sectors in Vietnam are also often subject to certain industry-specific bodies of law which are of crucial importance in relation to any M&A transactions conducted within that sector. Key examples include:

- (i) in relation to the banking sector, the Law on Credit Institutions;
- (ii) in relation to the real estate and property development sectors, the Law on Real Estate Business, the Law on Residential Housing, and the Law on Land; and
- (iii) in relation to the pharmaceutical sector, the Law on Pharmacy.

- 2.4** Naturally, each and every M&A transaction must be considered carefully and on its own specific merits. Vietnam law is complex, and there are many different State authorities at different levels (including central, provincial, municipal and local government levels) with the power to issue binding legislative or quasi-legislative instruments.
- 2.5** Whilst the bodies of law summarised briefly in Sections 2.1 and 2.2 above will in many cases be the key bodies of law requiring careful consideration in connection with any Vietnam M&A Transaction, investors should never embark upon any Vietnam M&A Transaction without first having taken appropriate professional advice as to the existence and impact of any sector-specific legislation which applies to the relevant target sector(s), in addition to the key framework laws summarised in Sections 2.1 and 2.2 above.
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3

Types of Vietnam Targets

3.1 All Vietnam-domiciled companies take one of three corporate forms, namely those summarised in Sections 3.2 to 3.4 below.

3.2 Limited liability company with one member

A limited liability company with one member (an “**LLC1**”) is the most simple and straightforward form of Vietnam-domiciled company, being a corporate form in relation to which the company:

- (i) can have only a single corporate or individual equity owner (“**Member**”);
- (ii) does not have its equity capital (referred to in Vietnam as “**Charter Capital**”) divided into shares (and thus is unable to issue shares of any class);
- (iii) has a comparatively simple and straightforward governance, management, and operational structure (for example, it is possible to structure an LLC1 such that key decision-making power is divided as appropriate between two key bodies, namely, in respect of an LLC1 with a sole corporate member, a President or Member’s Council (which comprises three to seven authorised representatives of the corporate member) and a General Director or Director (CEO), or, in respect of an LLC1 with a sole individual member, a President and a General Director or Director (CEO); and
- (iv) cannot become listed or registered for trading on any stock exchange in Vietnam (without first having been converted into a Joint Stock Company).

3.3 Limited liability company with two or more members

A limited liability company with two or more members (an “**LLC2**”) is a comparatively simple and straightforward form of Vietnam-domiciled company, being a corporate form in relation to which the company:

- (i) must have a minimum of two and may have up to 50 Members;
- (ii) does not have its Charter Capital divided into shares (and thus is unable to issue shares of any class);
- (iii) is controlled under an ownership and voting structure in which the proportion of the value of the registered and contributed (paid-up) Charter Capital actually contributed (paid-up) by each respective Member is the sole determining factor in respect of both equity ownership and voting power;
- (iv) has a comparatively simple and straightforward governance, management, and operational structure (for example, there is no separate owners’ body (such as a general meeting of shareholders) and separate governance body (such as a board of directors), but rather a single owners’ governance and management body known as the “**Members’ Council**”, which is the ultimate decision-making body of the LLC2 and is comprised of all of the Members or their appointed “authorised representatives”, with voting power apportioned purely on the basis of percentage of equity ownership); and
- (v) cannot become listed or registered for trading on any stock exchange in Vietnam (without first having been converted into a Joint Stock Company).

3.4 Joint stock company (or “shareholding company”)

A joint stock company (also referred to as a “shareholding company”) (a “**JSC**”) is a comparatively more sophisticated form of Vietnam-domiciled company, in which the

Company:

- (i) must have at least three equity owners (“**Shareholders**”);
- (ii) has its Charter Capital divided into shares (and thus issues shares to its Shareholders and is able to issue various different classes of shares);
- (iii) is able to issue other types of securities, in addition to shares;
- (iv) is governed by a separate general meeting of shareholders (consisting of all of the holders of voting shares or their appointed “authorised representatives”) and a separate board of directors (being elected by the general meeting of shareholders and referred to in Vietnam as the “**Board of Management**”); and
- (v) subject to satisfying the criteria for qualification as a public company (as specified in the Law on Securities), is capable of having its securities listed or registered for trading on one of the stock exchanges operating in Vietnam (a “**Vietnam Stock Exchange**”) (being, as at the date of publication, the Ho Chi Minh City Stock Exchange (the “**HOSE**”) and the Hanoi Stock Exchange (the “**HNX**”)) or the Unlisted Public Company Market (as at the date of publication administered by the HNX) (the “**UPCoM**”) – noting that the current Law on Securities appears to contemplate the establishment of a single stock exchange in Vietnam, to be named the “Stock Exchange of Vietnam” (the “**SEV**”), although as at the date of this publication it remains unclear as to precisely what form the SEV will take and whether or not the HOSE and/or the HNX will continue to operate as separate stock exchanges underneath it.

3.5 In relation to JSCs, there are three separate and distinct types of JSCs, each of which has key distinguishing features, as summarised in Sections 3.6 to 3.9 below. Please note, however, that the descriptive terms adopted in Sections 3.6 to 3.9 below to describe the three key categories of JSCs are not terms specified in the applicable laws of Vietnam, but rather have been adopted in this Vietnam M&A Guide for the sake of convenience and ease of reference.

3.6 Private JSCs

Private JSCs (“**Private JSCs**”) are JSCs which:

- (i) do not satisfy the criteria for public companies as specified in the Law on Securities;
- (ii) are not registered with the State Securities Commission (the “**SSC**”) as being public companies; and
- (iii) do not have their securities listed or registered for trading on any Vietnam Stock Exchange.

3.7 Listed JSCs

Listed JSCs (“**Listed JSCs**”) are JSCs which:

- (i) satisfy the criteria for public companies, as set out in the Law on Securities;
- (ii) are registered with the SSC as being public companies; and
- (iii) have their securities listed for trading on a Vietnam Stock Exchange.

3.8 Unlisted Public JSCs

Unlisted public JSCs (“**Unlisted Public JSCs**”) are JSCs which:

- (i) satisfy the criteria for public companies, as set out in the Law on Securities;
- (ii) are registered with the SSC as being public companies;
- (iii) do not have their securities listed for trading on any Vietnam Stock Exchange; and
- (iv) are required by law to have their securities registered for trading on the UPCoM.

3.9 A key threshold question in conducting any assessment of any proposed Vietnam M&A Transaction is whether the Vietnam Target takes the corporate form of an LLC1, an LLC2, a Private JSC, a Listed JSC, or an Unlisted Public JSC. The category of corporate form into which the Vietnam Target falls will invariably have a significant impact upon numerous key aspects of any proposed Vietnam M&A Transaction (including, for example, key structural and procedural considerations).

3.10 In relation to any Vietnam M&A Transaction in which the Vietnam Target is an LLC1, an LLC2, or a Private JSC (a **“Private Company”**):

- (i) the Law on Enterprises and the Law on Investment, in conjunction with any relevant sector-specific laws, will invariably be of paramount importance;
- (ii) the key State authorities which will be likely to be involved in the Vietnam M&A Transaction, in approval and/or registration capacities, will be:
 - (a) in many cases, the relevant provincial or municipal Department of Planning and Investment (the **“DPI”**) (the key corporate licensing authority), in addition to any sector-specific State authorities having direct responsibility for regulating the relevant target sector(s); or
 - (b) in relation to Private Companies established within one of the numerous special economic zones located throughout Vietnam (such as industrial zones, high-tech zones, or import/export zones), the relevant provincial or municipal economic zones authority, in addition to any sector-specific State authorities having direct responsibility for regulating the relevant target sector(s), and
- (iii) the Law on Securities, the SSC, and the Vietnam Securities Depository (the **“VSD”**) (which pursuant to the Law on Securities is eventually to be superseded by the Vietnam Securities Depository and Clearing Corporation (the **“VSDCC”**)) will have no relevance in relation to the Vietnam M&A Transaction.

In the balance of this Vietnam M&A Guide, we use the term **“Corporate Licensing Authority”** to describe the key corporate licensing authority in the context of any Private Company, being the DPI or the relevant provincial or municipal economic zones authority, as described in Item (ii) of this Section 3.10 above.

3.11 In relation to any Vietnam M&A Transaction in which the Vietnam Target is a Listed JSC or an Unlisted Public JSC (a **“Public Company”**):

- (i) the Law on Securities, in conjunction with any relevant sector-specific laws, will invariably be of paramount importance;
- (ii) the Law on Enterprises and the Law on Investment will normally be of some relevance, but the Law on Securities will normally apply in precedence in most material respects;

- (iii) the key State authorities which will be likely to be involved in the Vietnam M&A Transaction, in approval and/or registration capacities, will invariably be the SSC (being the key regulating authority of the public securities market in Vietnam) and the VSD or (following its establishment and commencement of operations) the VSDCC (being the State regulatory body or State-owned entity responsible for the deposit, registration, transfer, and clearance of securities of Public Companies), in addition to any sector-specific State authorities having direct responsibility for regulating the relevant sector; and
 - (iv) the Corporate Licensing Authority will normally have no material relevance in relation to the transaction, except to the extent that the Vietnam Target (being a Public Company) has subsidiaries which are Private Companies.
-

4

Buyer characterisation

- 4.1 Please note that the observations set out in this Chapter 4 apply primarily to Intra-Vietnam Capital Transfers and Intra-Vietnam Equity Capital Raisings, as opposed to other types of Vietnam M&A Transactions. The basic principles set out in this Chapter 4 will, however, often have some degree of relevance (and in some cases a major impact) on other types of Vietnam M&A Transactions not being Intra-Vietnam Capital Transfers and Intra-Vietnam Equity Capital Raisings.
- 4.2 Before commencing any Vietnam M&A Transaction, a key threshold question which must always be answered is whether or not the person or entity that will acquire, or subscribe for or contribute, the relevant shares (in the case of Vietnam Targets being JSCs) or Charter Capital (in the case of Vietnam Targets being LLC1s or LLC2s) is to be categorised as a “foreign investor” or a “domestic investor”.
- 4.3 Vietnam law distinguishes in many important respects between:
- (i) on the one hand, “foreign investors” (or investors being deemed by law to constitute “foreign investors”) (“**Foreign Investors**”); and
 - (ii) on the other hand, “domestic investors” (or investors being deemed by law to constitute “domestic investors”) (“**Domestic Investors**”),
- and these characterisations will often have a major impact on key aspects of a Vietnam M&A Transaction.
- 4.4 Similarly, the administrative and bureaucratic processes applicable to (on the one hand) Foreign Investors and (on the other hand) Domestic Investors can in many cases be materially different. Although the distinctions are less stark than they were, for example, 20 years ago, they nevertheless remain of crucial importance and must always be considered at the outset of any Vietnam M&A Transaction.
- 4.5 Individuals being citizens of Vietnam are clearly categorised as Domestic Investors, whereas citizens of any foreign countries are clearly categorised as being Foreign Investors. The sole exception to this proposition is citizens of foreign countries who are of Vietnamese origin (“overseas Vietnamese”, or “*Việt Kiều*”), in relation to whom Vietnamese law in some limited cases affords Domestic Investor status.
- 4.6 Vietnam-domiciled companies which are wholly owned by Domestic Investors are themselves clearly deemed to constitute Domestic Investors, when engaging in equity investment activities within Vietnam. Conversely, foreign-domiciled companies in all cases clearly constitute Foreign Investors.
- 4.7 Vietnam-domiciled companies which are 50% or less owned by Foreign Investors and/or companies deemed by law to constitute Foreign Investors are deemed by law to constitute Domestic Investors (“**Deemed Domestic Investors**”) when implementing equity investment activities in Vietnam. Conversely, Vietnam-domiciled companies which are more than 50% owned by Foreign Investors and/or including companies deemed by law to constitute Foreign Investors are deemed by law to constitute Foreign Investors (“**Deemed Foreign Investors**”), when implementing equity investment activities in Vietnam. In the balance of this Vietnam M&A Guide, the terms “Foreign Investors” and “Domestic Investors” are used to include Deemed Foreign Investors and Deemed Domestic Investors, respectively. The 50% threshold for determining Deemed Foreign Investors is a change that has occurred under the current Law on Enterprises

(2020), which came into force on 1 January 2021. Under the predecessor Law on Enterprises (2015), the percentage threshold for determining Deemed Foreign Investors was 51%.

- 4.8** Although the laws of Vietnam as they relate to Deemed Domestic Investors do open up exciting and advantageous investment structuring possibilities for foreign-domiciled companies and foreign individuals, caution does need to be exercised from the perspective of obtaining necessary approvals from State licensing authorities, who can sometimes be resistant to granting approvals in relation to investment structures which they perceive to be unduly creative.
-

5

Target sectors

- 5.1 From a foreign investment perspective, it is of paramount importance to understand that, in Vietnam, the allowable forms of foreign investment and allowable foreign ownership percentages are dictated on an industry sector-by-industry sector basis.
- 5.2 Each and every Vietnam-domiciled company must register with one or more relevant State authorities a “scope of permitted business activities”, which sets out each of the lines of business in relation to which that company carries out revenue-generating business activities (the “**Scope of Permitted Business Activities**”).
- 5.3 Vietnam-domiciled companies are permitted to generate revenue from engaging in lines of business specifically registered in their Scope of Permitted Business Activities, but are not permitted to generate revenue from engaging in any unregistered business activities. Certain irregular and ad hoc business activities may qualify as an exception to this rule, such as irregular and ad hoc real estate leasing activities or intra-group shareholder lending activities.
- 5.4 When assessing any potential Vietnam M&A Transaction, the Scope of Permitted Business Activities of the Vietnam Target must be analysed on a sector-by-sector basis, with each and every registered line of business being considered on its own separate and distinct merits, from a foreign investment and ownership restrictions perspective.
- 5.5 Where there are different foreign investment rules and/or ownership restrictions applying to different lines of business within a Vietnam Target’s Scope of Permitted Business Activities, it is the most restrictive of such rules and restrictions which will apply to determine the foreign investment rules and ownership restrictions for the entire Vietnam Target.
- 5.6 Take, for example, a proposed acquisition by a Foreign Investor involving a Vietnam Target having two registered lines of business within its Scope of Permitted Business Activities, where one of those lines of business is open for 100% foreign ownership (for example, wholesale distribution (trading) of non-alcoholic beverages) and the other is prohibited from foreign ownership altogether (for example, wholesale distribution (trading) of cigarettes). In this scenario, the line of business being prohibited from foreign ownership altogether must be deleted from the Scope of Permitted Business Activities before the acquisition can proceed.
- 5.7 It is also important to note that, in addition to sector-specific restrictions on foreign equity ownership, Vietnam law imposes specific conditions on and/or procedures applicable to foreign investment, also on a sector-by-sector basis.
- 5.8 Careful sector-by-sector analysis is therefore always of paramount importance for any Foreign Investor (including any Deemed Foreign Investor) in assessing any potential Vietnam M&A Transaction, particularly in respect of Vietnam Targets which are wholly owned by Domestic Investors (such wholly-domestic companies often having been established with and continuing to have extensive Scopes of Permitted Business Activities).
- 5.9 A sector-by-sector analysis of the kind outlined above must always be conducted by Foreign Investors (including Deemed Foreign Investors) in relation to any proposed equity investment activity in Vietnam, not only in the context of Vietnam M&A

Transactions (including Intra-Vietnam Equity Capital Raisings), but also in the context of Foreign Direct Investment Activities.

6

Foreign ownership restrictions

- 6.1** Although Vietnam’s foreign investment laws have become highly liberalised in recent years (in comparison with many other Asia-Pacific jurisdictions and other developing jurisdictions worldwide), there are still significant restrictions which apply in some cases in relation to foreign equity ownership.
- 6.2** In relation to foreign ownership restrictions, different rules apply to foreign ownership of:
- (i) Private Companies; and
 - (ii) Public Companies.
- 6.3** In relation to Private Companies, in many cases the key rules and restrictions relating to forms of foreign investment and allowable foreign ownership percentages are to be found in:
- (i) commitments of Vietnam on market access under international treaties such as the WTO Commitments; and/or
 - (ii) applicable sector-specific legislation.
- 6.4** Unlike the situation which prevailed in Vietnam prior to 1 January 2021 (when the current Law on Enterprises and Law on Investment came into force), it is now relatively clear that, in the case of Private Companies operating in a particular industry sector, where there are no specific foreign ownership restrictions set out in the international treaties to which Vietnam is a contracting member or any sector-specific legislation in relation to that particular industry sector, as a matter of technical Vietnam law, Foreign Investors are permitted to own up to 100% of the equity in Vietnam-domiciled companies operating in that particular industry sector. It is, however, important to note that:
- (i) in practical terms, Vietnamese Corporate Licensing Authorities can and often do exercise discretion in determining whether or not to grant necessary State approvals for M&A transactions involving industry sectors which are not specifically set out in the international treaties to which Vietnam is a contracting member or otherwise specifically legislated as being open for a specified percentage of foreign equity ownership; and
 - (ii) in relation to industry sectors which are specified in the international treaties as being “unbound”, the Vietnamese Government remains free to introduce domestic legislation under which restrictions on foreign market access are imposed.
- 6.5** In relation to Private Companies, there are many key industry sectors in which 100% foreign ownership of Vietnam-domiciled companies is clearly permitted.
- 6.6** In the case of Public Companies, the Law on Securities authorises the Government to regulate the foreign ownership ratio and procedures applicable to foreign investment in Public Companies. The foreign ownership rules as they apply to Public Companies may be broadly summarised as follows:

- (i) Where any international treaty to which Vietnam is a contracting member imposes any foreign ownership ratio cap or allowable foreign ownership ratio, the specified ratio will apply and will be treated as being a cap (even if it is not expressed as being such).
 - (ii) Where any sector-specific legislation imposes any specific restrictions on foreign ownership in that sector (for example, in the banking sector), then those sector-specific restrictions will apply, in accordance with their terms, to Public Companies operating in that sector (and/or whose registered Scope of Permitted Business Activities includes any line of business falling within that sector).
 - (iii) Where any Vietnam law imposes any specific conditions on foreign investment in any particular sector (and the relevant sector constitutes a “conditional sector”), even if the applicable sector-specific legislation is silent on foreign ownership restrictions, then foreign ownership of any Public Company operating in that particular sector (and/or whose registered Scope of Permitted Business Activities includes any line of business falling within that sector) will be limited to 50% of the contributed charter capital of the relevant Public Company.
 - (iv) Where any Public Company does not operate in and does not have any registered lines of business which are subject to sector-specific foreign ownership caps or which constitute “conditional sectors”, it is possible for those Public Companies to increase their allowable foreign ownership percentage to up to 100%, subject to compliance with certain administrative procedures and (in practical terms) the support of the SSC.
 - (v) As is the case with Private Companies, in relation to Public Companies it is always the registered line of business within the Scope of Permitted Business Activities which gives rise to the most restrictive foreign ownership rules which will dictate the foreign ownership cap in respect of the entire Public Company.
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7

Key State
approvals

- 7.1 In many cases, Vietnam M&A Transactions will require some form of State approval. The specific approvals required will vary depending on the particular characteristics of each particular Vietnam M&A Transaction.

Acquisition Approvals

- 7.2 Where the Vietnam Target is a Private Company and the buyer or subscriber is a Foreign Investor, in many cases the key State approval which is required will be an “acquisition approval” (also known as an “M&A approval”), being a statutory approval, specified by the Law on Investment, which is necessary to obtain before any acquisition of or subscription for any direct equity stake (being shares, in the case of a JSC, or contributed charter capital, in the case of an LLC1 or LLC2) (“**Capital Share**”) in any Private Company may be lawfully implemented by any Foreign Investor (including any Deemed Foreign Investor) (an “**Acquisition Approval**”).
- 7.3 The application dossier which is required (in most cases involving Vietnam Targets being Private Companies) to be filed with the relevant Corporate Licensing Authority, seeking the issuance of an Acquisition Approval, is relatively straightforward and has a statutory approval time of 15 days (calculated as from the time of the Corporate Licensing Authority issuing an official receipt in respect of the application dossier). Compared with the State approval or consent processes that in most cases applied before the introduction of Acquisition Approvals (which occurred in July 2015), the process of applying for and obtaining Acquisition Approvals is comparatively clear, straightforward, and efficient.
- 7.4 A significant change was introduced under the current Law on Investment 2020 (which entered into force on 1 January 2021), in that it is now relatively clear (on the basis of the express provisions of the Law on Investment) that only Vietnam M&A Transactions falling within the following categories require Foreign Investors to obtain an Acquisition Approval (the “**Legislated Acquisition Approval Categories**”):
- (i) the Vietnam Target has within its Scope of Permitted Business Activities any sectors being subject to conditions applicable to foreign investors and the proposed Vietnam M&A Transaction will increase the overall foreign ownership ratio of the Vietnam Target’s contributed charter capital in any percentage;
 - (ii) the proposed Vietnam M&A Transaction will result in the overall foreign ownership ratio of the Vietnam Target’s contributed charter capital increasing from $\leq 50\%$ to $>50\%$;
 - (iii) the proposed Vietnam M&A Transaction will result in any increase in the overall foreign ownership ratio of the Vietnam Target, in circumstances where the overall foreign ownership ratio is already $>50\%$; or
 - (iv) the Vietnam Target holds any land use rights certificate in relation to any land located on an island or in any coastal or border commune, ward, or town or in any other area which affects national defence or security (the “**Sensitive Land Rule**”).

- 7.5 Although any Vietnam M&A Transaction not falling within any of the Legislated Acquisition Approval Categories may technically be implemented by any Foreign Investor without needing to apply for any Acquisition Approval, in practice the Corporate Licensing Authorities tend to take an exceedingly strict view in relation to the Sensitive Land Rule (and in the Legislated Acquisition Approval Categories generally) and thus it is invariably prudent to consult with the relevant Corporate Licensing Authority before implementing any Vietnam M&A Transaction which in theory requires no Acquisition Approval. In practice, many Corporate Licensing Authorities appear to consider that the holding by any Vietnam Target of any land use rights certificate is sufficient to trigger the application of the Sensitive Land Rule.

ERC and IRC amendments

- 7.6 It is now clear that Foreign Investors (including Deemed Foreign Investors) do not need to:

- (i) apply for registered foreign investment projects (evidenced by the issuance of Investment Registration Certificates (“**IRCs**”)) before acquiring Capital Shares in Private Companies; or
- (ii) amend any existing IRC of the Vietnam Target (where the Vietnam Target already holds an IRC),

as a condition precedent to the implementation of any Vietnam M&A Transaction.

- 7.7 Foreign Investors (including Deemed Foreign Investors) should be aware that, in addition to obtaining an Acquisition Approval as a condition precedent to completion of any acquisition of or subscription for any Capital Share in any Private Company (where an Acquisition Approval is required), there will often be additional State approval and/or registration steps which need to be attended to as a consequence of completion. Examples include those set out immediately below.

- (i) In relation to any LLC1 or LLC2, the Enterprise Registration Certificate (“**ERC**”) will always need to be amended in order to register the name(s), particulars, and Charter Capital ownership details of any incoming Members.
- (ii) It will often be necessary to amend the ERC and/or IRC of a Private Company in order to register other types of changes arising from any acquisition of or subscription for any Capital Share in that Private Company, such as changes to the Legal Representative(s) of the Private Company, changes to the registered representative(s) of the Members or Shareholders of the Private Company, changes in the Charter Capital of the Private Company, or other key investment project or corporate particulars.

- 7.8 The matter of whether ERC and/or IRC changes of the kind set out in Items (i) and (ii) of Section 7.7 above need to be attended to as conditions precedent or post-completion covenants in relation to Intra-Vietnam Capital Transfers or Intra-Vietnam Equity Capital Raisings is generally and in theory a matter for negotiation between the seller and the buyer or the subscriber and issuer (as applicable).

Post-completion registration requirements

- 7.9 In any event, Vietnam law requires the relevant Corporate Licensing Authority to be

notified formally of various post-completion matters, whether or not any corresponding changes to the relevant ERC and/or IRC are required. Such post-completion notification obligations relate to matters such as:

- (i) changes to the names, particulars, or equity holdings of any Foreign Investors; or
- (ii) changes to the names or particulars of the key office-bearers of the Vietnam Target, including, as applicable, the authorised representatives of any organisational Members or Shareholders being Foreign Investors, and/or the Legal Representative.

Public companies

7.10 In relation to Listed JSCs, where shares are acquired by way of “on-market” transactions (that is, Intra-Vietnam Capital Transfers implemented via the relevant Vietnam Stock Exchange, in which the seller is unknown and no written sale and purchase agreement is directly entered into between the seller and the buyer), as a general proposition no specific State approvals or consents are required, except in certain cases such as:

- (i) where a merger control notification or other approval requirement arises under the Law on Competition (in this regard, please refer to Sections 7.16 to 7.21 below); or
- (ii) where the relevant acquisition will:
 - (a) increase the buyer’s total holding (whether direct or indirect) of voting shares (aggregated with the buyer’s related persons) to $\geq 25\%$ of issued voting shares; or
 - (b) where the buyer, directly or indirectly (and aggregated with its related persons) already holds $\geq 25\%$ of issued voting shares and the acquisition will result in the buyer, directly or indirectly (and aggregated with its related persons) increasing its voting stake in the Target Company to or above certain thresholds, being $\geq 35\%$, $\geq 45\%$, $\geq 55\%$, $\geq 65\%$, or $\geq 75\%$ – in which case such acquisition must be implemented by way of a mandatory public offer process (in this regard, please refer to Chapter 15 below).

Trading band waivers

7.11 It is possible for buyers to enter into direct agreements with sellers to acquire shares in Listed JSCs, as opposed to simply purchasing such shares “on market” from anonymous sellers via the relevant Vietnam Stock Exchange. Such “off-market” or “direct agreement” acquisitions are, however, subject to “trading band” restrictions, pursuant to which, if the purchase price to be paid falls outside of the allowable “trading band”, specific SSC approval must be obtained in order for the transaction to be implemented.

7.12 In the case of the HOSE, the allowable “trading band” is plus or minus 7% above or below the closing price of the target shares on the HOSE on the immediately preceding trading day. In the case of the HNX, the allowable “trading band” is plus or minus 10%

above or below the closing price of the relevant shares on the HNX on the immediately preceding trading day.

- 7.13** Where any “off market” or “direct agreement” sale and purchase transaction in respect of shares in a Listed JSC is to be implemented at a purchase price falling within the allowable “trading band”, then no SSC approval is required and the seller’s and the buyer’s respective securities brokers must implement the transaction as a “put through” transaction, using the normal electronic securities transfer and clearance systems administered by the VSD (and eventually by the VSDCC).
- 7.14** Where any “off market” or “direct agreement” sale and purchase transaction in respect of shares in a Listed JSC is to be implemented at a purchase price falling outside of the allowable “trading band”:
- (i) specific SSC approval is required; and
 - (ii) subject to SSC approval being obtained, the seller’s and the buyer’s respective securities brokers may implement the transaction outside of the normal electronic transfer and clearance systems administered by the VSD (and eventually by the VSDCC, albeit that the VSD (or VSDCC) must still be involved in the transaction, from the perspective of registering the transfer of the relevant shares in the VSD’s (or VSDCC’s) electronic share registry system).
- 7.15** The key rules and procedures which apply in the context of Unlisted Public Companies are essentially a variation on the rules and procedures summarised above in relation to Listed JSCs (being similar, but not identical). In case of the UPCoM, the allowable “trading band” is plus or minus 15% above or below the closing price of the target shares on the UPCoM on the immediately preceding trading day.

Merger control notification requirements

- 7.16** From a Law on Competition perspective, until 1 July 2019 (when the current Law on Competition passed by the National Assembly of Vietnam on June 2018 came into force), any Vietnam M&A Transaction which, if consummated, would give rise to any “economic concentration” in which the parties to the “economic concentration” together enjoy a “combined market share” in any “relevant market” of $\geq 50\%$ of the “relevant market”, the former Law on Competition prohibited the consummation of that Vietnam M&A Transaction. This rule applied equally to Private Companies and Public Companies.
- 7.17** Until 1 July 2019, where the consummation of any Vietnam M&A Transaction would have given rise to any “economic concentration” in which the parties to the “economic concentration” together enjoyed “combined market share” in any “relevant market” being $\geq 30\%$ but $< 50\%$ of the “relevant market”, the former Law on Competition required a formal notification to the Vietnam Competition and Consumer Authority (the “VCA”) to be made and for the transaction not to be consummated in the absence of official clearance from the VCA. This rule applied equally to Private Companies and Public Companies.
- 7.18** Under the changes which came into force on 1 July 2019 in relation to the applicable

merger control rules and procedures in Vietnam, merger control notification obligations and absolute prohibitions are no longer determined solely by reference to specific percentages of “combined market share” within “relevant markets”, but also by reference to other specified factors. From an absolute prohibition perspective, an “economic concentration” is now prohibited if it will “...cause or possibly cause substantial effects in restraint of competition in any Vietnam market...”.

7.19 Under the current Law on Competition and its implementing legislation:

- (i) any “economic concentration” transaction which triggers any of the threshold tests outlined in Section 7.20 below (the “**Notification Threshold Tests**”) must be notified to the Vietnamese competition authorities;
- (ii) “economic concentrations” (“**Economic Concentrations**”) include (but are not limited to) any:
 - (a) joint venture formation which gives rise to the establishment of any new corporate joint venture entity; and
 - (b) acquisition transactions giving rise to the acquirer holding a majority equity stake or otherwise being in a position to control the decision-making of the Target Company in relation to key corporate and business matters,
- (iii) there is little express differentiation between Economic Concentration transactions which are implemented wholly within Vietnam, wholly outside of Vietnam, or partly inside and partly outside of Vietnam, meaning that all Economic Concentration transactions are potentially subject to regulation under the Law on Competition, regardless of jurisdiction;
- (iv) the Law on Competition contains no express exemptions for intra-group corporate reorganisation or similar transactions, meaning that any Economic Concentration forming part of any intra-group corporate reorganisation or similar transaction is potentially subject to regulation under the Law on Competition; and
- (v) the National Competition Council (the “**NCC**”) is specified as being the key competition regulatory authority in Vietnam, however, as at the date of this publication, the NCC has not yet been established and the Ministry of Industry and Trade (the “**MOIT**”), together with the legacy VCA, acts as the key competition regulatory authority in Vietnam.

7.20 The following are the Notification Threshold Tests:

- (i) In relation to total asset value in Vietnam: Any one or more of the parties to the Economic Concentration transaction (the “**EC Transaction Parties**”) and/or the corporate group of which it forms part has VND3,000 billion (approximately USD130 million) or more.
- (ii) In relation to revenue generated in Vietnam (during the most recent financial

year preceding the Economic Concentration): One or more of the EC Transaction Parties and/or the corporate group of which it forms part generates VND3,000 billion (approximately USD130 million) or more.

- (iii) In relation to the transaction value of the Economic Concentration transaction: VND1,000 billion (approximately USD43 million) or more (noting that this Notification Threshold Test only applies in the relation to Economic Concentration transactions which occur inside Vietnam).
- (iv) In relation to the combined market shares of the EC Transaction Parties (during the most recent financial year preceding the Economic Concentration transaction): 20% or more of any relevant market within Vietnam).

7.21 The Notification Threshold Tests must be applied in relation to any Economic Concentration transaction which occurs wholly inside Vietnam, wholly outside Vietnam, or partly inside and partly outside Vietnam, provided that:

- (i) any one or more of the EC Transaction Participants or its affiliates has any presence in any relevant market in Vietnam; and
- (ii) the Notification Threshold Test referred to in Item (iii) of Section 7.20 above applies only in relation to Economic Concentration transactions which occur inside Vietnam.

7.22 Please note that the applicable Notification Threshold Tests are different in connection with Vietnam Targets that operate in the banking, insurance, or securities sectors.

Conclusion

7.23 Each and every Vietnam M&A Transaction must be considered on its own unique merits, in order to determine what are the specific State approvals or consents which it will be necessary to obtain in order for the proposed transaction to be consummated lawfully.

8

Foreign exchange control

- 8.1 Vietnam’s foreign exchange control regulations are strict and will invariably impact upon any Vietnam M&A Transaction involving any seller and/or buyer being a Foreign Investor.
- 8.2 Before embarking upon any Vietnam M&A Transaction, it is crucial to determine whether the proposed Vietnam M&A Transaction is correctly to be categorised as being a “direct investment” transaction or an “indirect investment” transaction. The answer to this key question will determine the applicable rules for the flow of funds in relation to the relevant Vietnam M&A Transaction.
- 8.3 The tests for what is a “direct investment” transaction and what is an “indirect investment” transaction are now relatively (although not entirely) clear, due to regulations having been issued by the State Bank of Vietnam (the “**SBV**”) in September 2019. The introduction of this relative clarity was welcome and much needed, as the question of what Vietnam M&A Transactions fell within the “direct investment” or “indirect investment” regulatory regimes had been vexed and highly problematic for many years.
- 8.4 In practice, different banks (being, in practical terms, the “gatekeepers” of foreign currency inflows and outflows into and out of Vietnam) often form and apply different interpretations of what is a “direct investment” transaction and what is an “indirect investment” transaction (although the degree of discretionary decision-making scope wielded by the banks has narrowed significantly since September 2019). For this reason, during the very early stages of assessing any potential Vietnam M&A Transaction, Foreign Investors should (in addition to conducting due diligence and structuring analysis) always consult with their Vietnam bankers (and the bankers of the Vietnam Target) to obtain their guidance as to whether the proposed transaction is to be characterised as a “direct investment” or an “indirect investment” transaction. It is highly inadvisable not to leave this crucial foreign exchange control analysis until late in the transaction process, given that material transaction delays and obstacles can and often do arise from it.
- 8.5 Although the applicable regulations are not entirely clear and are open to varying interpretations, there are basic principles which are clear and which are crucial to understand, as summarised in Sections 8.6 to 8.19 below.
- 8.6 All acquisitions of shares in Public Companies are clearly “indirect investment” transactions. In order for any such “indirect investment” acquisition of shares in a Public Company to be implemented, any Foreign Investor must:
- (i) apply to the VSD or the VSDCC (via one of its depository members) for and be issued with a “securities trading code”;
 - (ii) open a statutory “indirect investment capital account” (an “**IICA**”) with a “depository bank” in Vietnam (being a bank which is duly certified by the SSC and registered as a “depository member” of the VSD or the VSDCC) and which is also licensed by the SBV to engage in foreign exchange trading activities (a “**Depository Bank**”); and
 - (iii) open a “securities depository account” with a Depository Bank and a “securities trading account” with a duly licensed Vietnam securities broker – noting that:

- (a) it is not mandatory to open a “securities trading account” with a Vietnam securities broker; and
- (b) any “securities trading account” opened with a Vietnam securities broker will in any event need to have an underlying “securities depository account” held with a Depository Bank.

8.7 An IICA is a special type of VND-denominated bank account through which all funds must be routed in connection with a Foreign Investor’s “indirect investment” activities in Vietnam, including purchase prices for securities, the proceeds of sales of securities, and the proceeds of any dividends paid to the Foreign Investor on securities held by the Foreign Investor as a result of any “indirect investment” in any Vietnam Target. In the context of Vietnam Targets being Public Companies, all flows of funds into and out of Vietnam, in connection with any share purchase, share sale, dividend receipt, or other capital transactions must be routed through an IICA (held by the Foreign Investor in its own name with a Depository Bank, and denominated in VND).

8.8 Normally, all of the requirements summarised in Section 8.6 above will be attended to on behalf of the Foreign Investor by its selected Depository Bank and/or securities broker in Vietnam. Engagement of a duly licensed:

- (i) Depository Bank in Vietnam is an essential prerequisite to participation by any Foreign Investor in any Vietnam M&A Transactions involving Vietnam Targets being Public Companies; and
- (ii) securities broker in Vietnam is in most cases regarded as being a desirable and helpful step in connection with any Vietnam M&A Transactions involving Vietnam Targets being Public Companies.

8.9 All Vietnam M&A Transactions involving securities in Public Companies must be implemented using the compulsory codes and accounts outlined in Section 8.6 above, failing which the purchase of foreign currency using the VND proceeds of dividend payments and securities divestment transactions – and the repatriation of that foreign currency – will generally be impossible.

8.10 On the other hand, many Vietnam M&A Transactions involving Private Companies will clearly constitute “direct investment” transactions. Under the key SBV regulations which came into force in early September 2019 (the “**September 2019 SBV Regulations**”), investment by way of acquisition of or subscription for Capital Shares in the following categories of Private Companies are expressly characterised as being “direct investment” transactions:

- (i) Private Companies which are newly established pursuant to IRCs, with one or more Foreign Investors as member(s) or shareholder(s), regardless of the percentage of equity capital held by the Foreign Investor(s);
- (ii) Private Companies which do not fall within the category outlined in Item (i) of this Section 8.10 above, but which have $\geq 51\%$ of their equity capital held by one or more Foreign Investors, including:

- (a) Private Companies in which one or more Foreign Investors have contributed equity capital (in the sense of subscribing for Capital Shares or equivalent) or acquired paid-up equity capital;
 - (b) Private Companies established as a result of any demerger, division, merger, or consolidation transactions involving one or more Foreign Investors; and
 - (c) Private Companies newly established pursuant to specialised sector laws (for example, financial institutions, insurance companies, securities companies, law firms, and others) with one or more Foreign Investors as member(s) or shareholder(s) and
- (iii) project companies established by one or more Foreign Investors to implement public-private partnership (PPP) projects in accordance with the Law on Investment.

8.11 In relation to “direct investment” Vietnam M&A Transactions between buyer being a non-resident of Vietnam and seller being a resident of Vietnam (whether natural persons or other types of legal entities), under the September 2019 SBV Regulations it is necessary (assuming that the buyer wishes to fund its purchase from foreign currency held in a bank account outside of Vietnam) for:

- (i) the purchase price to be paid in consideration of the target Capital Share to be transferred out of the buyer’s foreign currency bank account held outside of Vietnam, converted into Vietnamese Dong, and deposited into the VND-denominated “direct investment capital account” held by the Vietnam Target in its own name with a bank in Vietnam (a “**DICA**”); and
- (ii) after any necessary amendments to the ERC and/or IRC of the Target Company (where applicable) have been attended to (in addition to any other necessary enterprise registration amendments) and any necessary “tax clearances” have been obtained, the Vietnam Target must then transfer the purchase price (or the residual balance thereof) to the seller.

8.12 The September 2019 SBV Regulations specify that where the seller and the buyer in a Vietnam M&A Transaction are both Foreign Investors and are not residents of Vietnam, the purchase price payable for the target Capital Share, in a “direct investment” scenario, is not required to be paid via the DICA of the Vietnam Target. This, arguably, opens up the possibility of direct payment of a purchase price, in foreign currency, between buyers and sellers where both parties are non-residents of Vietnam. This is a significant change from the prevailing situation prior to September 2019 (in which the purchase price was required to be routed through a DICA held by the Vietnam Target in Vietnam, and only disbursed to the seller outside of Vietnam after any necessary amendments to the ERC and/or IRC of the Target Company (where applicable) had been attended to (in addition to any other necessary enterprise registration amendments) and any necessary “tax clearances” had been obtained).

8.13 The significant legal development outlined in Section 8.12 above is in many respects warmly welcomed by the Foreign Investor and legal communities in Vietnam, as it may be regarded as materially increasing convenience for Foreign Investors involved in Vietnam M&A Transactions and materially reducing the time and complexity of implementing payments for Capital Shares in “direct investment” transactions in respect of which the buyer and the seller are both Foreign Investors and not residents

of Vietnam. On the other hand, direct payment in foreign currency outside of Vietnam (in other words, payment of purchase prices not routed through the DICA of the Vietnam Target) may be regarded as giving rise to a number of material risk exposures for Foreign Investor buyers, including potential:

- (i) defects in title, if the equity capital contributions underlying the target Capital Shares have not been duly and properly implemented in strict accordance with applicable Vietnamese law and/or cannot be verified with conclusive documentary evidence;
- (ii) exposure to liability for Capital Transfer Tax arising from the Vietnam M&A Transaction, which the seller may have failed to declare and pay in strict accordance with applicable Vietnamese law; and/or
- (iii) potential difficulties in relation to future repatriation of dividend receipts or the proceeds of divestment transactions, in the event of relevant banks in Vietnam determining that the buyer has insufficient conclusive evidence of having implemented a valid and lawful “direct” capital investment into Vietnam.

8.14 The September 2019 SBV Regulations, whilst increasing convenience, speed, and simplicity in respect of Vietnam M&A Transactions, will also necessitate a higher degree of care for buyers:

- (i) when conducting due diligence in relation to underlying equity contribution transactions;
- (ii) in securing contractual protections in relation to the seller’s Capital Transfer Tax obligations; and
- (iii) in ensuring that documentary evidence is available to prove (to the satisfaction of relevant banks in Vietnam) that the underlying equity contributions have in fact been duly and properly implemented in strict accordance with applicable Vietnamese law, and to prove that the purchase price has in fact been paid and received in accordance with the provisions of the applicable sale and purchase agreement.

8.15 As a practical matter, in a “direct investment” scenario, the Vietnam bank of the Vietnam Target, with which the Vietnam Target holds its DICA, should be consulted with and requested to provide its opinion as to whether or not it considers that the purchase price should be paid directly and outside of Vietnam, or via the DICA. As a practical matter, if the DICA-providing bank is of the view that the September 2019 SBV Regulations should be applied in accordance with their terms, then it will not be possible for the purchase price to be routed through the DICA in any event. In all cases, buyers should conduct very careful and detailed due diligence as to whether or not the equity capital contributions underlying the target Capital Share have been duly and properly implemented in accordance with the applicable Laws of Vietnam, having regard to risk factors such as those outlined above in Section 8.13.

8.16 As a general proposition, Vietnam M&A Transactions:

- (i) in which the Vietnam Target is a Private Company;
- (ii) in which the buyer is a Foreign Investor; and
- (iii) which do not fall within any of the transaction categories outlined in Section 8.10 above,

will normally be treated as being “indirect investment” transactions, having regard to the provisions of the September 2019 SBV Regulations.

8.17 In relation to “indirect investment” transactions of the kind outlined in Section 8.16 above, where the seller is a Domestic Investor and a resident of Vietnam:

- (i) the Foreign Investor will need to open an IICA in its own name, with a bank in Vietnam;
- (ii) the purchase price to be paid in consideration of the target Capital Share will need to be converted into VND and deposited into the IICA, in VND;
- (iii) the bank will then release the purchase price to the seller (transferred in VND); and
- (iv) the timing and logistics for the declaration and payment by the seller of any Capital Transfer Tax and/or the application for any amendments to any applicable ERC and/or IRC that may be necessary, will normally be a matter for negotiation between the parties and will not directly concern the bank providing the IICA.

8.18 In relation to “indirect investment” transactions of the kind outlined in Section 8.16 above, where both the buyer and the seller are Foreign Investors and non-residents of Vietnam, the September 2019 SBV Regulations are unclear. In relation to these types of “indirect investment” transactions, the conservative and prudent approach is for the buyer to open an IICA and for the purchase price to be routed through the buyer’s IICA and paid into the seller’s IICA before then being repatriated to the seller (although there is one view which holds that direct payments in foreign currency outside of Vietnam are sufficiently low-risk as to be acceptable in relation to these types of “indirect investment” transactions).

8.19 It is of paramount importance that Foreign Investors considering Vietnam M&A Transactions liaise with the relevant banks early in the transaction process, with a view to determining whether the proposed Vietnam M&A Transaction will proceed on an “indirect investment” or a “direct investment” basis, and what are the bank’s prevailing interpretations and policies that will impact directly on the flow of funds in respect of the relevant Vietnam M&A Transaction. The relevant banks include (in each case, where applicable) the bankers within Vietnam of each of the buyer, the seller, and the Vietnam Target. Once a consensus amongst the parties and their bankers has been achieved as to the “direct investment” or “indirect investment” status of the transaction and the prevailing interpretations and policies of the bank have been identified, the parties can then prepare the definitive transaction documents to reflect the necessary transaction funds flow process arising from this key preliminary investigation exercise.

8.20 Other key foreign currency control rules relating to investment activities in Vietnam, which all participants in Vietnam M&A Transactions should bear in mind, include those set out in the following Items (i) to (v):

- (i) In relation to any type of commercial transaction which is to be entered into and/or primarily performed in Vietnam (including any sale and purchase of any Capital Share not being the sale and purchase of any Capital Share between Foreign Investors all of whom are non-residents of Vietnam), the transaction consideration:
 - (a) must be denominated and documented in pure VND terms only; and

- (b) must not be expressed in foreign currency equivalent terms (and the transaction documentation must not contain any foreign currency equivalent amounts nor currency conversion principles.
 - (ii) Entry into contracts which contravene the rules referred to in Item (i) immediately above gives rise to enforceability risks, difficulty in achieving registration with State authorities, and potential administrative penalties.
 - (iii) Foreign currency which is transferred into Vietnam other than in strict compliance with the applicable foreign exchange regulations, will normally be extremely difficult, if not impossible, to transfer back out of Vietnam. Although it is relatively easy to transfer foreign currency into Vietnam, the same does not apply to transfers of foreign currency out of Vietnam. Remittances of foreign currency out of Vietnam can only be implemented upon a clear and valid “legal basis”, with clear and definitive supporting documentation in most cases being required. If the compulsory rules applying to “direct investment” and “indirect investment” transactions are not followed when implementing Vietnam M&A Transactions, Foreign Investors will invariably have difficulty in repatriating the proceeds of dividend distributions and capital divestment transactions.
 - (iv) Strict rules also apply in relation to loan funding in Vietnam, where the lender is foreign-domiciled. For example, any loans made by foreign-domiciled lenders, where the loan has a term of at least 12 months, must be registered with the SBV (and the same applies to foreign loans having a term of less than 12 months but which are not repaid in full within that initial term). Another example is that there is no express procedure under Vietnam foreign currency control law for foreign-domiciled lenders to provide loans to borrowers in Vietnam being Vietnamese individual citizens. Loan funding transferred into Vietnam other than in strict compliance with the express provisions of Vietnam currency control laws gives rise to material enforcement and funds repatriation risks.
 - (v) Foreign-domiciled investors should always seek legal advice from appropriately qualified and experienced professionals in Vietnam before transferring foreign currency into Vietnam, so as to ensure strict compliance with Vietnam foreign currency control legislation and thus avoiding repatriation difficulties in the future.
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9

Taxation

- 9.1** The key taxation issue relating to Vietnam M&A Transactions is that of “capital transfer tax”, which is imposed upon all transfers of Capital Shares in Vietnam-domiciled companies (“**Capital Transfer Tax**”). Capital Transfer Tax is not of itself a separate and distinct tax, but rather is a subset of corporate income tax (in the case of companies) or personal income tax (in the case of individuals).
- 9.2** It is also crucial to note that Vietnam law imposes Capital Transfer Tax on many Extra-Vietnam Capital Transfers, even where there is no change in the registered ownership of any Capital Share of the relevant target subsidiaries or investee entities within Vietnam. Where Vietnam law deems that the proceeds of any Extra-Vietnam Equity Transfer constitute “...income primarily derived from business activities conducted within Vietnam...regardless of the location of the business premises...” (“**Taxable Indirect Transfers**”), Vietnam law regulates Capital Transfer Tax applicable to sellers being companies and non-residents but remains silent as to individuals, whether or not resident in Vietnam. Accordingly, sellers being companies and non-residents in Taxable Indirect Transfers are subject to Capital Transfer Tax at the rate of 20% of the capital gain realised on the transfer.
- 9.3** In the case of transfers of shares in Public Companies, Capital Transfer Tax is imposed at the rate of 0.1% of the total transfer consideration, with the generation or otherwise of capital gains being irrelevant. This applies to sellers being companies or individuals, whether or not resident in Vietnam.
- 9.4** In the case of transfers of Capital Shares in Private JSCs, Capital Transfer Tax is imposed at the rate of:
- (i) 20% of the capital gain, in respect of sellers being companies (whether or not resident in Vietnam) on the transfers; and
 - (ii) 0.1% of the total transfer consideration, in respect of sellers being individuals (whether or not resident in Vietnam).
- 9.5** In the case of transfers of Capital Shares in LLC1s and LLC2s, Capital Transfer Tax is imposed at the rate of:
- (i) 20% of the capital gain, in respect of sellers being companies (whether or not resident in Vietnam) and sellers being individuals and residents in Vietnam; and
 - (ii) 0.1% of the total transfer consideration, in respect of sellers being individuals and non-residents of Vietnam.
- 9.6** Dividends distributed to Members or Shareholders being companies are not treated as being taxable income in Vietnam at all, provided that such dividends are declared and paid by the relevant Vietnam-domiciled company on a fully after-tax basis. No withholding tax is applicable in relation to Members or Shareholders being companies who receive dividends distributed by any Vietnam-domiciled company.
- 9.7** In the case of individuals, personal income tax is payable at the rate of 5% on dividends declared and paid by Vietnam-domiciled companies, including where such dividends are declared and paid on a fully after-tax basis. This 5% personal income tax is paid on

a withholding basis by individuals not being resident in Vietnam.

- 9.8** In relation to interest income on loans, foreign-domiciled lenders are subject to Vietnam withholding tax at a rate of 5%.
- 9.9** This Vietnam M&A Guide does not purport to set out a comprehensive summary of Vietnam taxation, but merely sets out a brief and high-level summary of the key taxation issues which normally arise in the context of Vietnam M&A Transactions.
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10

Structuring

- 10.1** There are many and varied structuring options available to Foreign Investors wishing to acquire interests in Vietnam-domiciled companies.
- 10.2** Structures involving Foreign Holding Companies are often used by Foreign Investors and have numerous advantages, including in particular the comparative ease of implementing transfers of shares in the capital of such Foreign Holding Companies (as compared with the relatively process-heavy and State approval-dependent nature of many transfers of Capital Shares in Vietnam Targets).
- 10.3** It is, however, important for Foreign Investors to appreciate that the use of Foreign Holding Companies is not always as straightforward as it may first appear, and there are numerous pitfalls which often catch Foreign Investors by surprise, for example those set out in the following Items (i) to (v):
- (i) Vietnam Corporate Licensing Authorities will often purport to refuse approvals for acquisitions or capital injections by Foreign Investors in Vietnam Targets that operate in industry sectors which are specified in the WTO Commitments, where the proposed buyer, subscriber, or contributor is domiciled in a jurisdiction not itself being a member of the WTO.
 - (ii) Capital Transfer Tax in Vietnam is often payable on the transfer of shares in the capital of Foreign Holding Companies, even where the seller, the buyer, and the Foreign Holding Company are all domiciled outside of Vietnam and non-residents of Vietnam for tax purposes.
 - (iii) Even where the transfer of shares in Foreign Holding Companies does not give rise to any changes of registered Capital Share ownership in Vietnam, it will often be necessary to register changes to key investment project or enterprise registration details relating to the relevant Vietnam-domiciled subsidiary, as a result of the offshore change of ownership. Examples may include the necessity to register changes to the Foreign Holding Company's registered legal and/or authorised representative in the applicable IRC, or changes to the registered Legal Representative of the Vietnam-domiciled subsidiary in the applicable ERC.
 - (iv) In the context of Taxable Indirect Transfers, if the seller defaults on its obligations to pay Capital Transfer Tax in Vietnam, the Vietnam tax authorities will often endeavour to recover such Capital Transfer Tax from the relevant Vietnam-domiciled subsidiary, and are often (in practical terms) successful in so doing. It is therefore crucial for buyers to protect themselves contractually against post-completion exposure arising from seller defaults on Capital Transfer Tax obligations.
 - (v) Foreign Investors into Vietnam are often required to file with Vietnam Corporate Licensing Authorities consular legalised copies of their audited financial statements for the two most recently-ended financial years, in the course of applying for necessary State approvals. Foreign Holding Companies which are unable to satisfy this requirement sometimes encounter difficulty in obtaining necessary State approvals in Vietnam. It is therefore in some respects advantageous for Foreign Investors to use Foreign Holding Companies which are companies of genuine substance and are able to produce audited financial statements for the two most recently-ended financial years and which show a healthy and profitable financial status on the other hand, we note that, in most

cases, in relation to Foreign Investor entities which are unable to satisfy this requirement (such as newly-incorporated special-purpose vehicle entities), the Corporate Licensing Authority will normally be satisfied by the production of a consular legalised copy of a bank statement showing that the proposed Foreign Investor entity holds a cash balance being at least sufficient to fund the proposed capital investment into Vietnam).

- 10.4** Intra-Vietnam Asset Transfers are possible to implement in Vietnam, but should be approached with caution.
- 10.5** Intra-Vietnam Asset Transfers will in most cases require the buyer entity to be domiciled in Vietnam. In this regard, Foreign Investors must be aware of the fact that they cannot simply establish a special-purpose vehicle, or holding company, in Vietnam. Foreign Investors wishing to establish subsidiaries in Vietnam must firstly obtain approval to implement a registered “investment project with foreign capital”, as evidenced by the issuance of an IRC. In addition, Vietnam law does not recognise the concept of a pure holding company and (as a general proposition) any Vietnam-domiciled subsidiary (not being any of the specific types of securities investment companies or funds recognised by and licensed under the Law on Securities) must always be registered with a Scope of Permitted Business Activities containing lines of business via which it will generate revenue not being dividend revenue.
- 10.6** Once a subsidiary of a Foreign Investor is established in Vietnam in order to implement an approved “investment project with foreign capital”, it is then (as a general proposition) necessary for that subsidiary to implement the approved investment project and to generate actual revenue from so doing. In most cases, therefore, Intra-Vietnam Asset Transfers will normally only be desirable as an adjunct to an existing registered “investment project with foreign capital”, as opposed to a means of initial entry into the Vietnam market.
- 10.7** Intra-Vietnam Asset Transfers are also often difficult and time-consuming to implement in practice, for a number of reasons including the fact that State approvals and licences are generally not transferable in Vietnam. When implementing an Intra-Vietnam Asset Transfer, it is usually necessary for the transferee entity to apply afresh for the issuance of the various State approvals and consents forming part of the acquired assets, which in many cases will outweigh the benefits of implementing an Intra-Vietnam Asset Transfer as opposed to a Capital Share acquisition (subject of course to the status of the Vietnam Target from the perspective of actual and/or contingent liabilities).
- 10.8** In addition, Intra-Vietnam Asset Transfers are subject to the imposition of value-added tax (VAT), at the rate of 10% or 5% (depending on the type of assets) on the transfer consideration.
- 10.9** Selection of the appropriate corporate form (whether an LLC1, LLC2, Private JSC, or Public JSC) is a key factor in any Vietnam structuring analysis. It will often be desirable (and is usually possible) to convert the corporate form of the Vietnam Target from one corporate form to another, as a condition precedent to completion of a Vietnam M&A Transaction.
- 10.10** De-listing and/or “privatisation” of Vietnam Targets being Public Companies can often

be an advantageous pre-completion structuring initiative, but parties need to be aware that these processes are time-consuming and not straightforward. For example, it may be relatively easy to reduce the number of shareholders of a Public Company below the minimum of 100 (which is a condition under the Law on Securities for a company to qualify as a Public Company). On the other hand, deregistration as a Public Company requires an application to be lodged with the SSC, and there is an official waiting period of 12 months before deregistration will be approved. Therefore, any pre-completion structuring benefits of “privatisation” of a Public Company cannot be exploited for a period of at least 12 months as from commencement of the “privatisation” process.

- 10.11** Of great significance from a structuring perspective is the fact that Vietnam law deems Vietnam-domiciled companies which are no more than 50% foreign owned to be Deemed Domestic Investors, when engaging in equity investment activities in Vietnam. Thus, initial entry into the Vietnam market by way of a joint venture with a Domestic Investor partner, in which the Domestic Investor partner holds at least 50% of the equity capital, can open up exciting possibilities for further market expansion as a result of such joint venture entity being deemed to constitute a Deemed Domestic Investor.
- 10.12** The Law on Enterprises also expressly recognises other specific types of Vietnam M&A Transactions and structuring devices, including those summarised in Sections 10.13 to 10.17 below.
- 10.13 Mergers:** Being transactions in which one or more companies merge into an existing and remaining company, by way of the transfer of all assets, rights, obligations, and interests of the merging company(ies) to the remaining company, with the merging company(ies) ceasing to exist upon the completion of such asset transfer(s).
- 10.14 Consolidations:** Being transactions in which two or more companies are consolidated into a single new company, with the companies having been so consolidated ceasing to exist.
- 10.15 Separations:** Being transactions in which part of the assets and/or rights and/or obligations of a company are separated from that company in order to form one or more new companies, with the company from which such assets and/or rights and/or obligations were separated continuing to exist.
- 10.16 Divisions:** Being transactions in which companies split their Shareholders or Members and assets to establish two or more new companies, involving:
- (i) proportional parts of the equity capital of the company (together with proportional parts of the assets of the company) being distributed to a number of new companies corresponding to the number of Shareholders or Members;
 - (ii) all of the Capital Shares of one or more Members or Shareholders (together with proportionally corresponding assets) being transferred to one or more new companies; or
 - (iii) a combination of (i) and (ii) described immediately above.
- 10.17** Mergers, consolidations, separations, and divisions are often overlooked by parties

when structuring Vietnam M&A Transactions, but can often serve as useful structuring tools, particularly in the context of a jurisdiction in which standard asset transfer transactions can be difficult to implement in practice, and especially when there are licences attached to a particular investment or project that need to be separated when there is a divestment of such investment or project that might have been held in a company holding numerous other investments or projects.

- 10.18** As is the case in most jurisdictions, each and every Vietnam M&A Transaction must have its structuring aspects carefully considered on its own unique merits.

11

Intra-Vietnam Equity Capital Raisings

- 11.1** Intra-Vietnam Equity Capital Raisings are often an advantageous method for investors to obtain Capital Shares in Vietnam Targets, whether as an adjunct or an alternative to Intra-Vietnam Capital Transfers.
- 11.2** In the case of any Target Company being an LLC1, any contribution to the Charter Capital of that LLC1 by any incoming, new Member will necessitate the conversion of the corporate form of that LLC1 into that of an LLC2 or a JSC.
- 11.3** In the case of any Target Company being an LLC2, existing Members are entitled to pre-emptive rights in relation to any proposed new contributions to the Charter Capital of such LLC2. Dilutive contributions to the Charter Capital by any incoming new Members are only possible with the s approval of the existing Members.
- 11.4** In the case of Private JSCs, the existing Shareholders (within any particular class of shares) are entitled to pre-emptive rights on any issuance of new shares of the relevant class. Dilutive issuances of new shares may only be implemented by Private JSCs by way of private placement plans, subject to:
- (i) supermajority resolutions of the General Meeting of Shareholders; and
 - (ii) waiver by the existing Shareholders of the relevant class of their pre-emptive rights.
- 11.5** In addition, the implementation of an Intra-Vietnam Equity Capital Raising in the context of a Private JSC will normally require an Acquisition Approval to be obtained in relation to each Foreign Investor wishing to participate.
- 11.6** In the case of Public Companies, the Law on Enterprises and the Law on Securities do not contain any express provisions recognising pre-emptive rights in favour of existing Shareholders in relation to dilutive private placement share issuance transactions. Public Companies may therefore implement dilutive private placement share issuances subject to:
- (i) approval of the General Meeting of Shareholders by way of special resolution (which will normally require a 65% supermajority); and
 - (ii) approval by the SSC of a Private Placement Plan being compliant with the applicable regulations.
- 11.7** In the case of JSCs (whether Private JSCs or Public Companies), equity capital can be raised by the issuance of numerous different types and classes of shares and other securities, including, for example, dividend preference shares, redeemable preference shares, redeemable convertible preference shares, other classes of preference shares, convertible bonds, convertible loans, and other types of convertible instruments.
- 11.8** Although Vietnam law affords to JSCs a significant degree of flexibility as to the types of shares and other convertible or equity-tied securities they can issue, investors must always take great care to ensure that they only invest in securities of a kind which are consistent with applicable law, can actually be readily converted in practical terms, and are capable of due and proper enforcement if necessary.

- 11.9** Please note that equitisations of State Owned Enterprises and IPOs are outside of the scope of this Vietnam M&A Guide.
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12

Governing law,
dispute resolution,
and language

- 12.1** Vietnam law expressly recognises the right of parties to select foreign governing law, in relation to any contracts having a “foreign element”. Therefore, in theory, Capital Share sale and purchase agreements or other definitive M&A documents relating to Vietnam Targets may be governed by foreign law, provided that at least one of the sellers or the buyer is a Foreign Investor.
- 12.2** In reality, however, where the Vietnam M&A Transaction involves the transfer or issuance of Capital Shares in a Vietnam Target, in most cases Vietnam law will either be the necessary or the desirable choice of governing law. All Vietnam M&A Transactions must in any event be implemented in accordance with Vietnam law. Further, in the event of any inconsistency between Vietnam law and any foreign governing law, Vietnam law will generally prevail in practice.
- 12.3** In relation to transactions conducted outside of Vietnam (for example, Extra-Vietnam Capital Transfers), foreign governing law will obviously be appropriate in most cases, but will not relieve the seller from liability for Capital Transfer Tax or the need to procure amendments to ERCs and/or IRCs (where necessary in order to register any relevant changes in registered enterprise registration or investment project particulars).
- 12.4** In relation to some kinds of contracts in Vietnam, dispute resolution through the courts of Vietnam is compulsory (for example, contracts relating to transfers or other transactions involving land). In the context of Vietnam M&A Transactions, however, parties generally enjoy flexibility to determine their preferred dispute resolution forum.
- 12.5** Where one or more of the parties to a Vietnam M&A Transaction is a Foreign Investor, foreign arbitration is often the preferred (and is a valid) method of dispute resolution, with the Singapore International Arbitration Centre (the “SIAC”) being a particularly popular choice.
- 12.6** Vietnam has ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and thus arbitral awards obtained from tribunals within fellow member jurisdictions are capable of recognition and enforcement in Vietnam. Foreign Investors must, however, bear in mind the fact that foreign arbitral awards are (under Vietnam’s regulatory framework) capable of recognition and enforcement in Vietnam only to the extent that they are “...not inconsistent with the basic principles of Vietnam law...”. In practice, this means that foreign arbitral awards must be considered by the Vietnamese courts before enforcement will be permitted, which in many cases may involve (in practical terms) a de facto retrial of the merits of the award.
- 12.7** Arbitration in Vietnam is another option and while it is still developing in sophistication, it is nevertheless worthy of serious consideration by parties to Vietnam M&A Transactions, given that, unlike in the case of foreign arbitration:
- (i) arbitral awards obtained from Vietnam arbitration are capable of being agreed between the parties to be final and binding (that is, they are not subject to additional substantive reconsideration for the purposes of recognition and enforcement); and
 - (ii) it is possible to obtain interim relief (for example, injunctions) from Vietnamese courts in connection with Vietnam arbitration proceedings, which is in many cases not possible to do in connection with foreign arbitration proceedings.

- 12.8** Foreign Investors usually prefer to avoid litigation through the courts of Vietnam for the resolution of disputes in connection with Vietnam M&A Transactions, for a various reasons.
- 12.9** From a language perspective, in most cases the use of Vietnamese language in drafting and executing M&A definitive transaction documents is not technically compulsory. In practice, however, it is invariably necessary (in practical terms) to use Vietnamese language or bi-lingual definitive transaction documents, due to the following facts:
- (i) in order to be capable of being filed with any State authority or court in Vietnam, the original of a definitive transaction document must be prepared and executed in at least the Vietnamese language (with bi-lingual documents being acceptable);
 - (ii) where no Vietnamese language original of a document is available, that document must always be translated into Vietnamese and the Vietnamese translation must be notarised, before that document is capable of being filed with any State authority or court;
 - (iii) a Vietnamese counterparty may require a Vietnamese language original from a commercial perspective; and
 - (iv) as a result of the facts outlined in Items (i) to (iii) immediately above, it is invariably desirable and prudent to enter into all definitive M&A transaction documents relating to Vietnam Targets in at least the Vietnamese language and in most cases in the Vietnamese language in addition to the most appropriate foreign language.
- 12.10** It is possible to provide in definitive M&A documents for the foreign language version to prevail in the event of any inconsistency. In reality, however, Vietnamese State authorities and courts will in practice usually have regard to the Vietnamese language version only. It is therefore always of paramount importance to ensure that the Vietnamese and foreign language versions of any definitive transaction documents are consistent with one another in legal meaning and effect and have been formally settled and signed off by fully-qualified Vietnamese lawyers.
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13

Conducting legal due diligence in Vietnam

- 13.1** Vietnamese sellers and Vietnam Targets have in recent years become increasingly accustomed to the process of due diligence and the importance placed by buyers (particularly Foreign Investors) on the conduct of due diligence reviews. Historically, Vietnamese sellers and Vietnam Targets were generally resistant to the concept of opening up their records to enable the conduct of due diligence reviews, but this resistance has gradually dissipated as foreign investment in Vietnam has increased.
- 13.2** Public Companies in Vietnam do, however, in many cases continue to be resistant to the conduct of due diligence reviews by potential buyers or subscribers, on the basis that the information on the public record should suffice. Given, however, that the standards of compliance by Public Companies with their public disclosure obligations in many cases leaves much to be desired, Foreign Investors often consider it to be necessary to conduct due diligence over and above the information available on the public record. When conducting due diligence on Public Companies in Vietnam, investors must always ensure that the due diligence process is managed in such a way as to avoid contraventions of the Vietnam law prohibitions against insider trading.
- 13.3** Vietnamese sellers and Vietnam Targets may be unfamiliar with the due diligence process and will often not be in a position to allocate adequate resources to facilitate the process. Foreign Investors need to be prepared to cope with situations of this kind and to be patient when conducting due diligence reviews. Often, Vietnamese sellers and Vietnam Targets will be reluctant to incur expenses in engaging professional advisors to assist them in managing the due diligence process, but Foreign Investors should take a strong stance in requiring the involvement of professional advisors on the seller and/or Vietnam Target side, which will invariably give rise to a far more effective and efficient due diligence process.
- 13.4** Vietnamese sellers and Vietnam Targets will often refuse to facilitate online data rooms or to provide buyers or their advisors with electronic or hard copies of documents. Unfortunately, the provision of physical data rooms (with no copies of any documents permitted to be taken) remains a common occurrence in Vietnam, although to a decreasing extent as sophistication develops. Open and transparent Q&A processes and management interviews can also in many cases be difficult to implement in Vietnam. Often key management personnel may not have a sufficient command of any foreign language to enable the conduct of management interviews in any foreign language. Foreign Investors need to be prepared to handle these cumbersome due diligence conditions when assessing potential Vietnam M&A Transactions.
- 13.5** Having facilitated due diligence investigations, Vietnamese sellers will often then be resistant to providing representations and warranties in definitive transaction documents, on the presumption that the due diligence conducted should provide the buyer with sufficient comfort as to whether or not to proceed with the proposed transaction and sufficient clarity as to the risks involved. Historically, the expectation of Vietnamese sellers was generally that Capital Shares should be sold on an “as is” basis, subject only to the express provisions of Vietnam law in relation to liability. Although the general levels of understanding and sophistication in Vietnam are steadily increasing, it is often difficult to convince Vietnamese sellers as to why representations, warranties, and specific indemnities are fair and reasonable for inclusion in definitive transaction documents.

- 13.6** As a general proposition, it is prudent when conducting legal due diligence in relation to Vietnam Targets to allocate generous timetables for the collation of requested information and documents and for the completion of legal due diligence and the negotiation of definitive transaction documents. It is also generally prudent to ensure that information request lists are presented in clear, succinct, focussed, and user-friendly form, and are presented in the Vietnamese language as well as in any relevant foreign language. Overly broad or complex information request lists often prove to be counter-productive, in the context of potential Vietnam M&A Transactions.
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14

Other jurisdiction-
specific factors

- 14.1** In Vietnam, sellers frequently require an up-front deposit against the purchase price, and will insist on the deposit being paid before the commencement of any due diligence investigations by the buyer. Such deposit requests generally vary from 5% to 20% of purchase price. Although Vietnamese sellers are becoming increasingly accustomed to the use of escrow agents or joint bank accounts for the holding of deposits, it is still commonplace for Foreign Investors to encounter staunch resistance to the use of escrow services or joint bank accounts. This strong cultural preference for deposits is tied to the strong cultural resistance to due diligence which is a feature of the Vietnam M&A landscape (that is, Vietnamese sellers and Vietnam Targets often prefer to be very certain that the proposed investor is serious, before opening the books, and deposits are perceived as being the only genuine form of evidence that the buyer is serious).
- 14.2** Vietnamese sellers often continue to expect that Capital Shares will be sold on an “as is” basis and that they will not be exposed to liability for claims post-completion. Although the degree of understanding and acceptance of contractual protections in favour of the buyer is steadily increasing in parallel with the development of the Vietnam M&A market, Foreign Investors looking at potential Vietnam M&A Transactions should generally be prepared to encounter staunch resistance to robust contractual protections in Vietnam.
- 14.3** Vietnamese sellers, Vietnam Targets, and State authorities are generally resistant to lengthy or complicated definitive transaction documents. For this reason (in addition to the cumbersome nature of negotiating lengthy and complex legal documents in two languages), simple, clear, and succinct definitive transaction documents are generally preferable in connection with Vietnam M&A Transactions.
- 14.4** Unfortunately, Vietnam is not a member of the Apostille Convention. Accordingly, in connection with any necessary State approvals or consents in Vietnam, it is usually necessary for Foreign Investors to file with the relevant State authorities a number of supporting and/or identification documents, which must be “consular legalised” through (at least) a notary public, a relevant foreign affairs ministry (or equivalent), and the Vietnam embassy or consulate in the Foreign Investor’s home jurisdiction. Such “consular legalised” documents must then be translated into Vietnamese (with the translations notarised or validly certified in Vietnam), before those documents are capable of being filed with the relevant State authority in Vietnam. This process is invariably cumbersome and time-consuming, and Foreign Investors must always be sure to allocate sufficient time to accommodate such processes in any transaction timetable.
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15

Public company-
specific factors

- 15.1** In addition to the various specific features relating to Vietnam M&A Transactions involving Public Companies in Vietnam (as outlined above in the preceding sections of this Vietnam M&A Guide) there are numerous other key points which buyers of or subscribers for shares in Public Companies need to bear in mind.
- 15.2** Any person or entity who (together with their related persons or entities, on an aggregated basis) acquires shares in a Public Company which take the aggregate holdings of that person or entity (together with their related persons or entities) up to at least 5% of issued voting share capital, must disclose to that Public Company, the SSC, and the relevant stock exchange (or securities trading centre) the fact of having become a “major shareholder”, within five business days of having reached that threshold. Any major shareholder who disposes of shares in a Public Company and ceases to be a major shareholder (as a result of their shareholding reducing to less than 5% of issued voting share capital) must disclose to that Public Company, the SSC and the relevant stock exchange the fact of having ceased to be a “major shareholder”.
- 15.3** Having become a “major shareholder”, (at least 5% of voting shares, aggregated with all related persons or entities), any future acquisitions or divestments taking that “major shareholder” (together with all related persons or entities) above or below any 1% increment must also be disclosed within five business days of completion.
- 15.4** Where a person is considered an “insider” of a Public Company, any acquisition or disposal by that person of any shares in that Public Company must be disclosed three days before the trade is implemented. “Insiders” include the Chairman, members of the Board of Management, Legal Representative, General Director (or Director), Deputy General Director (or Deputy Director), Finance Director, Chief Accountant, Inspectors, and equivalent managerial positions elected by the General Meeting of Shareholders or appointed by the Board of Management.
- 15.5** Any acquisition of shares in a Public Company which, once completed, will take the total shareholding stake of the acquiring shareholder (together with all related persons or entities) up to at least 25% of issued voting share capital, must be implemented by way of a statutory “mandatory public offer to acquire” process (“MPO”) unless the General Meeting of Shareholders of that Public Company resolves to grant an exemption. The MPO process is time-consuming and cumbersome and requires specific SSC approval.
- 15.6** Similarly, once any shareholder (together with all related persons or entities) holds at least 25% of issued voting share capital in a Public Company, any future acquisition which results in the ratio of issued voting shares held by that shareholder (aggregated with all related persons and entities) increasing to certain thresholds, being $\geq 35\%$, $\geq 45\%$, $\geq 55\%$, $\geq 65\%$, or $\geq 75\%$ of total issued voting shares must be implemented by way of an MPO, unless the General Meeting of Shareholders of that Public Company resolves to grant an exemption. After implementing an MPO, if the buyer (aggregated with all related persons or entities) holds at least 80% of the issued voting shares, during the 30 days following the conclusion of the MPO, the buyer must continue to buy any shares in the relevant Public Company which any of its shareholders wish to tender (upon terms being consistent with those of the MPO), unless the MPO was offered in relation to the entirety of the issued shares of the relevant Public Company.

- 15.7** In Vietnam, there are no compulsory acquisition provisions under which any shareholder may be compelled to sell any shares against the will of that shareholder (whether or not following the completion of any MPO).
- 15.8** Investors examining potential Vietnam M&A Transactions involving Public Companies must always be aware of the prohibitions against insider trading and implement any valuation or due diligence processes carefully and so as to avoid any contravention of the insider trading rules.
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- 16.1** Vietnam, having one of the most rapidly and successfully developing economies and M&A markets in the world, presents huge opportunities both for market access and capital gains, whether by way of investment in Public Companies, Private Companies, or by way of Intra-Vietnam Asset Transfer transactions.
- 16.2** Although the opportunities are huge, investing in Vietnam is not without legal and jurisdictional risk, and it is crucial that all investors (whether Domestic Investors or Foreign Investors) are properly advised by experienced Vietnam M&A counsel before embarking upon any Vietnam M&A Transaction.
- 16.3** This Vietnam M&A Guide is prepared and published by Frasers Law Company subject to and on the basis of the important legal notices set out in Schedule 2 to this Vietnam M&A Guide.
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SCHEDULE 1

Glossary of defined terms

When used anywhere in this Vietnam M&A Guide, the capitalised words or expressions which are defined in this Schedule 1 shall have the meanings ascribed to them in the table set out below in this Schedule 1.

Defined Term	Definition
“Acquisition Approval”	Has the meaning ascribed to that term in Section 7.2 of this Vietnam M&A Guide.
“Board of Management”	Has the meaning ascribed to that term in Item (iv) of Section 3.4 of this Vietnam M&A Guide.
“Capital Share”	Has the meaning ascribed to that term in Section 7.2 of this Vietnam M&A Guide.
“Capital Transfer Tax”	Has the meaning ascribed to that term in Section 9.1 of this Vietnam M&A Guide.
“Charter Capital”	Has the meaning ascribed to that term in Item (ii) of Section 3.2 of this Vietnam M&A Guide.
“Circulars”	Has the meaning ascribed to that term in Item (ii) of Section 1.8 of this Vietnam M&A Guide.
“Corporate Licensing Authority”	Has the meaning ascribed to that term in Section 3.10 of this Vietnam M&A Guide.
“Decrees”	Has the meaning ascribed to that term in Item (i) of Section 1.8 of this Vietnam M&A Guide.
“Deemed Domestic Investors”	Has the meaning ascribed to that term in Section 4.7 of this Vietnam M&A Guide.
“Deemed Foreign Investors”	Has the meaning ascribed to that term in Section 4.7 of this Vietnam M&A Guide.
“Depository Bank”	Has the meaning ascribed to that term in Item (ii) of Section 8.6 of this Vietnam M&A Guide.
“DICA”	Has the meaning ascribed to that term in Item (i) of Section 8.11 of this Vietnam M&A Guide.
“Domestic Investors”	Has the meaning ascribed to that term in Item (ii) of Section 4.3 of this Vietnam M&A Guide.
“DPI”	Has the meaning ascribed to that term in Sub-Item (ii)(a) of Section 3.10 of this Vietnam M&A Guide.
“EC Transaction Parties”	Has the meaning ascribed to that term in Item (i) of Section 7.20 of this Vietnam M&A Guide.
“Economic Concentration”	Has the meaning ascribed to that term in Item (ii) of Section 7.19 of this Vietnam M&A Guide.
“ERC”	Has the meaning ascribed to that term in Item (i) of Section 7.7 of this Vietnam M&A Guide.
“Extra-Vietnam Capital	Has the meaning ascribed to that term in Item (i) of Section

Defined Term	Definition
Transfers”	1.12 of this Vietnam M&A Guide.
“Foreign Direct Investment Activities”	Has the meaning ascribed to that term in Item (i) of Section 1.12 of this Vietnam M&A Guide.
“Foreign Holding Companies”	Has the meaning ascribed to that term in Section 1.12 of this Vietnam M&A Guide.
“Foreign Investors”	Has the meaning ascribed to that term in Item (i) of Section 4.3 of this Vietnam M&A Guide.
“HNX”	Has the meaning ascribed to that term in Item (v) of Section 3.4 of this Vietnam M&A Guide.
“HOSE”	Has the meaning ascribed to that term in Item (v) of Section 3.4 of this Vietnam M&A Guide.
“ICA”	Has the meaning ascribed to that term in Item (ii) of Section 8.6 of this Vietnam M&A Guide.
“Intra-Vietnam Asset Transfers”	Has the meaning ascribed to that term in Item (ii) of Section 1.10 of this Vietnam M&A Guide.
“Intra-Vietnam Capital Transfers”	Has the meaning ascribed to that term in Item (i) of Section 1.10 of this Vietnam M&A Guide.
“Intra-Vietnam Equity Capital Raisings”	Has the meaning ascribed to that term in Item (i) of Section 1.12 of this Vietnam M&A Guide.
“IRC”	Has the meaning ascribed to that term in Item (i) of Section 7.6 of this Vietnam M&A Guide.
“JSC”	Has the meaning ascribed to that term in Section 3.4 of this Vietnam M&A Guide.
“Laws”	Has the meaning ascribed to that term in Section 1.7 of this Vietnam M&A Guide and, for the purposes of this Vietnam M&A Guide, includes all legislative instruments having force and effect in Vietnam from time to time, including Laws, Ordinances, Decrees, Circulars, and Official Decisions.
“Legislated Acquisition Approval Categories”	Has the meaning ascribed to that term in Section 7.4 of this Vietnam M&A Guide.
“Listed JSC”	Has the meaning ascribed to that term in Section 3.7 of this Vietnam M&A Guide.
“LLC1”	Has the meaning ascribed to that term in Section 3.2 of this Vietnam M&A Guide.
“LLC2”	Has the meaning ascribed to that term in Section 3.3 of this Vietnam M&A Guide.
“M&A”	Has the meaning ascribed to that term in Section 1.1 of this Vietnam M&A Guide.
“Member”	Has the meaning ascribed to that term in Item (i) of Section 3.2 of this Vietnam M&A Guide.

Defined Term	Definition
“Members’ Council”	Has the meaning ascribed to that term in Item (iv) of Section 3.3 of this Vietnam M&A Guide.
“MOIT”	Has the meaning ascribed to that term in Item (v) of Section 7.19 of this Vietnam M&A Guide.
“MPO”	Has the meaning ascribed to that term in Section 15.5 of this Vietnam M&A Guide.
“NCC”	Has the meaning ascribed to that term in Item (v) of Section 7.19 of this Vietnam M&A Guide.
“Notification Threshold Tests”	Has the meaning ascribed to that term in Item (i) of Section 7.19 of this Vietnam M&A Guide.
“Official Decisions”	Has the meaning ascribed to that term in Item (iii) of Section 1.8 of this Vietnam M&A Guide.
“Ordinances”	Has the meaning ascribed to that term in Section 1.7 of this Vietnam M&A Guide.
“Private Company”	Has the meaning ascribed to that term in Section 3.10 of this Vietnam M&A Guide.
“Private JSC”	Has the meaning ascribed to that term in Section 3.6 of this Vietnam M&A Guide.
“Public Company”	Has the meaning ascribed to that term in Section 3.11 of this Vietnam M&A Guide.
“SBV”	Has the meaning ascribed to that term in Section 8.3 of this Vietnam M&A Guide.
“Scope of Permitted Business Activities”	Has the meaning ascribed to that term in Section 5.2 of this Vietnam M&A Guide.
“Sensitive Land Rule”	Has the meaning ascribed to that term in Item (iv) of Section 7.4 of this Vietnam M&A Guide.
“September 2019 SBV Regulations”	Has the meaning ascribed to that term in Section 8.10 of this Vietnam M&A Guide.
“SEV”	Has the meaning ascribed to that term in Item (v) of Section 3.4 of this Vietnam M&A Guide.
“Shareholders”	Has the meaning ascribed to that term in Item (i) of Section 3.4 of this Vietnam M&A Guide.
“SIAC”	Has the meaning ascribed to that term in Section 12.5 of this Vietnam M&A Guide.
“SSC”	Has the meaning ascribed to that term in Item (ii) of Section 3.6 of this Vietnam M&A Guide.
“Taxable Indirect Transfers”	Has the meaning ascribed to that term in Section 9.2 of this Vietnam M&A Guide.
“Unlisted Public JSC”	Has the meaning ascribed to that term in Section 3.8 of this

Defined Term	Definition
	Vietnam M&A Guide.
“UPCoM”	Has the meaning ascribed to that term in Item (v) of Section 3.4 of this Vietnam M&A Guide.
“VCA”	Has the meaning ascribed to that term in Section 7.17 of this Vietnam M&A Guide.
“VIAC”	Has the meaning ascribed to that term in Section 12.7 of this Vietnam M&A Guide.
“Vietnam M&A Guide”	Has the meaning ascribed to that term in Section 1.6 of this Frasers Vietnam Mergers and Acquisition Guide
“Vietnam M&A Transactions”	Has the meaning ascribed to that term in Section 2.1 of this Vietnam M&A Guide.
“Vietnam Stock Exchange”	Has the meaning ascribed to that term in Item (v) of Section 3.4 of this Vietnam M&A Guide.
“Vietnam Targets”	Has the meaning ascribed to that term in Section 1.6 of this Vietnam M&A Guide.
“VSD”	Has the meaning ascribed to that term in Item (iii) of Section 3.10 of this Vietnam M&A Guide.
“VSDCC”	Has the meaning ascribed to that term in Item (iii) of Section 3.10 of this Vietnam M&A Guide.
“WTO Commitments”	Has the meaning ascribed to that term in Item (i) of Section 2.2 of this Vietnam M&A Guide.

SCHEDULE 2

Important Legal Notices

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