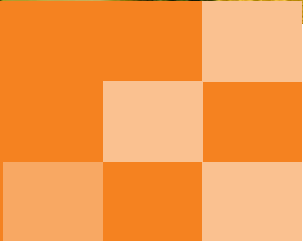




**Forms of Doing Business
in Vietnam 2017**



Baker & McKenzie (Vietnam) Ltd. is a member of Baker & McKenzie International, a Swiss Verein with member law firms around the world. In accordance with the common terminology used in professional service organizations, reference to a “partner” means a person who is a partner, or equivalent, in such a law firm. Similarly, reference to an “office” means an office of any such law firm.

© Baker & McKenzie (Vietnam) Ltd. 2017
All rights reserved.

DISCLAIMER

This publication is copyrighted. Apart from any fair dealing for the purposes of private study or research permitted under applicable copyright legislation, no part may be reproduced or transmitted by any process or means without prior written permission.

The material in this publication is of the nature of general comment only. It is not offered as advice on any particular matter and should not be taken as such. The firm and the contributing authors expressly disclaim all liability to any person in respect of anything and in respect of the consequences of anything done or omitted to be done wholly or partly in reliance upon the whole or any part of the contents of this publication. No client or other reader should act or refrain from acting on the basis of any matter contained in it without taking specific professional advice on the particular facts and circumstances in issue.

This may qualify as “Attorney Advertising” requiring notice in some jurisdictions. Prior results do not guarantee a similar outcome.



Table of Contents

I. Investment Under The Investment Law 2014 and The Enterprise Law 2014.....	3
II. The Forms of Investment	4
A. The Forms of Investment	4
A.1 The LLC (Multiple Member LLC and Single Member LLC)	4
A.2 The Joint Stock Company	9
A.3 Partnership Company	13
A.4 Business Cooperation Contract	13
A.5 Public – Private Partnership (“PPP”).....	14
A.6 Term and Termination under the Investment Law 2014 and the Enterprise Law 2014	17
B. Investing in Domestic Vietnamese Enterprises – Limitations on Foreign Ownership.....	18
B.1 Purchasing Shares or Charter Capital	18
B.2 Merger, Consolidation, Division and Separation	19
B.3 Acquisition of Assets	21
B.4 Competition Rules on Economic Concentration.....	21
B.5 Foreign Ownership Limitations.....	22
III. The Approval Process for Foreign Investors	24
A. Investment Registration Certificate (IRC)	24
B. Enterprise Registration Certificate (ERC)	25
C. Post-Establishment Formalities	25
D. Conditional Investment Sectors for Foreign Investors	25
E. Taxation of Foreign Businesses	26
F. Enterprise Income Tax	26
G. Transfer Pricing.....	27
H. Tax Incentives	28
I. Value Added Tax	30
J. Special Consumption Tax.....	31

K. Foreign Contractor Tax.....	32
L. Personal Income Tax.....	34
M. Double Taxation Treaties.....	37
IV. Other Forms of Doing Business in Vietnam	38
A. Representative Offices.....	38
B. Branch Offices	38
C. Franchising	39
D. Technology Transfer.....	41
List of Conditional Investment Sectors	44



List of Acronyms

AFTA	ASEAN Free Trade Area
ASEAN	Association of South East Asian Nations
BCC	Business Cooperation Contract (under the LFI and Investment Law)
BOM	Board of Members
BOO	Build-Own-Operate
BOT	Build-Operate-Transfer
ERC	Enterprise Registration Certificate
BT	Build-Transfer
BTO	Build-Transfer-Operate
CEO	Chief Executive Officer
CEPT	Common Effective Preferential Treatment
DOIT	Department of Industry and Trade
EIT	Enterprise Income tax
FIC	Foreign Invested Company
GSM	General Shareholders Meeting
JSC	Joint Stock Company
LFI	Law on Foreign Investment in Vietnam
LLC	Limited Liability Company
MFN	Most Favored Nation
MOF	Ministry of Finance
PC	Partnership Company
PIT	Personal Income Tax
PSC	Production Sharing Contract
PPP	Public – Private Partnership
RO	Representative Office
SBRA	State Business Registration Authority
SIRA	State Investment Registration Authority
VAT	Value Added Tax
WTO	World Trade Organization

Introduction

Since Vietnam first opened its doors to foreign direct investment in the late 1980s, the primary way to establish a long-term corporate presence in Vietnam had been to set up a foreign invested company (“**FIC**”) under the *Law on Foreign Investment in Vietnam of 1996* (“**LFI**”) and its predecessor the 1987 *Law on Foreign Investment*.

Since 1 July 2006, the *Enterprise Law 2005* and the *Investment Law 2005* superseded the *LFI* to be the main legislative frameworks governing matters relating to foreign investment in Vietnam, reflecting Vietnam’s desire to attract foreign investment to the country.

Nearly 10 years after the adoption of the above-mentioned two legislations, on 26 November 2014, the National Assembly passed a new Investment Law 2014 and Enterprise Law 2014, replacing Enterprise Law 2005 and Investment Law 2005 as from 1 July 2015. These new laws adopt a more pro-investor approach, aiming to reduce administrative bureaucracy and better facilitate foreign investment into Vietnam.

This publication outlines the corporate vehicles that are available to foreign investors and traders for conducting business operations in Vietnam under the *Investment Law 2014 and Enterprise Law 2014*, and alternative means for establishing a business presence in Vietnam.



I. Investment Under The Investment Law 2014 and The Enterprise Law 2014

Per the *Investment Law 2014*, foreign investors or enterprises with certain amount of foreign ownership undertaking a project are required to complete investment registration formalities before the relevant provincial level State Investment Registration Authority (“**SIRA**”), which will issue them investment registration certificates (“**IRC**”).

Per the *Enterprise Law 2014*, every enterprise must receive an enterprise registration certificate (“**ERC**”) prior to beginning operations, which will be issued by the provincial level State Business Registration Authority (“**SBRA**”). The ERC sets out the corporate details of such enterprise, including its amount of charter capital. The specific scope of business activities that an enterprise is permitted to undertake in Vietnam will be recorded on the National Enterprise Registration Information Gateway for public research.

The *Investment Law 2014 and Enterprise Law 2014* stipulate that an FIC established before the *Investment Law 2014 and the Enterprise Law 2014* has the option to:

- (1) continue its operation in accordance with its current investment license or investment certificate without re-registration; or
- (2) request the SIRA to convert its current investment license or investment certificate into the IRC.

II. The Forms of Investment

A. The Forms of Investment

Foreign investment projects in Vietnam can take the form of any of the following investment vehicles:

1. The Limited Liability Company (“**LLC**”);
2. The Joint Stock Company (“**JSC**”);
3. The Partnership Company (“**PC**”);
4. The Business Cooperation Contract (“**BCC**”); and
5. Public – Private Partnership (“**PPP**”) projects.

Strictly speaking, the PPP project may be implemented by a project enterprise set up under the form of an LLC or JSC, albeit with certain distinguishing legal characteristics, rather than as a separate form of foreign investment.

A.1 The LLC (Multiple Member LLC and Single Member LLC)

An LLC may take the form of either an LLC with two or more members (“**Multiple Member LLC**”) or an LLC with one member (“**Single Member LLC**”). An LLC has its own charter and the Board of Members (“**BOM**”) which is akin to a GSM of a JSC, and has the right to establish dependent units such as branches or ROs domestically or abroad.

An LLC has the status of a recognized legal entity and a member of an LLC is responsible for the debts and liabilities of the enterprise to the extent of the amount of capital that the member has contributed or committed to contribute to the enterprise. An LLC does not issue shares.



i. Multiple Member LLC

A Multiple Member LLC is an enterprise that has more than one but no more than fifty members, which may be organizations, individuals, or a combination of both.

b. *Rights of a Member*

A member of a Multiple Member LLC has the right, among other things, to:

- attend meetings of the BOM;
- cast votes in a number that is proportionate to its capital contribution;
- be distributed shares and profits proportional to its capital contribution; and
- be given priority in contributing additional capital.

Subject to the right of first refusal (i.e., members wishing to transfer all or part of their capital must first offer to sell such portion of capital to all other members proportionately), a member can transfer, dispose of or ask the company to buy back its capital contribution portion in accordance with the *Enterprise Law 2014* or as stipulated in the company charter.

c. *Management and Control*

The BOM is the highest decision making body of a Multiple Member LLC, and its members are appointed in proportion to their respective capital contribution portions. A Multiple Member LLC having 11 members or more must also establish a Control Committee. A Multiple Member LLC having less than 11 members may also establish a Control Committee as appropriate for its management requirements.

d. *Meetings*

The chairperson of the BOM, or a member or group of members, that own more than 10% or more of the charter capital can call a meeting

of the BOM.¹ In the event that the company has one member owning more than 90% of the charter capital and its charter does not stipulate another smaller proportion, the minority members acting jointly will automatically have the right to call a meeting.

A quorum is established when members representing at least 65% of the charter capital are present.² If the first meeting fails to have the necessary members to constitute a quorum, a second meeting may be convened within the 15 days following the first meeting and the second meeting must have members representing at least 50% of the charter capital.³ If the second meeting does not meet the quorum, a third meeting may be held within 10 working days, at which time the meeting is conducted irrespective of attendance.

The company charter stipulates the frequency of BOM meetings, but the BOM must meet at least once a year.

e. Voting

Resolutions can be adopted by means of voting at a meeting, seeking written opinions (i.e., written resolutions in lieu of a meeting), or by other methods as provided in the company charter (e.g., by electronic means, such as video conferencing).

Resolutions will be adopted at meetings when such resolution is approved by a number of votes representing at least 65% of the total contributed capital of the members attending the meeting.⁴

Approval from a number of votes representing at least 75% of the total contributed capital of the members attending the meeting must be obtained for a resolution on:

- A sale of assets/property with a value equal to or greater than 50% of the total value of assets (as stated in the company's

1 Or as stipulated in the company charter

2 Or as stipulated in the company charter

3 Or as stipulated in the company charter

4 Or as stipulated in the company charter



latest financial report or a smaller proportion stipulated in the company's charter);

- A resolution on an amendment and supplement to the company's charter; or
- A resolution on the company's reorganization or dissolution.

A resolution adopted by means of seeking written opinions, must be approved by a number of members representing at least 65% of the charter capital.

f. Managerial Personnel

A Multiple Member LLC must have one director or general director⁵ of the company appointed by the BOM, who may or may not be a member of the company. The general director is responsible for the day-to-day operation of the company and is often the legal representative of the company, although the charter may provide otherwise.

vii. Single Member LLC

A Single Member LLC is owned by one organization or individual member (“**Company Owner**”) who is liable for the debts and other liabilities of the company to the extent of the amount of the charter capital of the company. A Single Member LLC has the same legal status as a Multiple Member LLC, but the Company Owner has more autonomy with regards to decisions made about the company. The Company Owner may either appoint a representative to be the president or may create a BOM comprising of three (3) to seven (7) appointed representatives, which will implement the Company Owner's rights and obligations on its behalf.

Meetings of the BOM (if the company has one) must have at least two-thirds of the representatives present; and each representative

⁵ The General Director or Director under Vietnamese law is equivalent to a CEO or a General Manager.

has a vote of equal validity⁶. A resolution of the BOM is adopted when it is approved by more than a half of the number of attending representatives. An amendment or supplement to the company charter, company reorganization and a transfer of all or part of the charter capital of the company must have the approval of at least three-quarters of the number of representatives attending the relevant meeting.

Similar to a Multiple Member LLC, a Single Member LLC must have a director or general director appointed by the president or the BOM, who is responsible for the day-to-day operation of the company and is often the legal representative of the company, although the charter may provide otherwise.

A Single Member LLC must have controllers and the Company Owner can decide the number of controllers who are responsible for supervising the performance of the BOM (or the President) and the director (or general director), and carrying out other tasks assigned by the Company Owner.

A Single Member LLC may reduce its charter capital in any of the following two cases:

- Where the company returns a part of the contributed capital in the company's charter capital to the Company Owner, provided that the company has been in business operation continuously for more than two (2) years as from the date of registration of the enterprise and the company can ensure that the company's debts and other asset obligations can still be paid fully after the return has been made to the Company Owner; or
- Where the Company Owner has not paid fully and in a timely manner the company's charter capital.

A Single Member LLC may increase its charter capital by way of additional investment from the Company Owner or by obtaining capital contributions from other persons. In the event that part of the charter capital is contributed by or transferred to another organization

⁶ Or as stipulated otherwise under the company charter.



or individual, the company must register to convert into a Multiple Member LLC or a JSC within 10 days from the date of completion of the transfer.

A.2 The Joint Stock Company

A JSC is an enterprise whose charter capital is divided into shares held by three or more organizations or individuals. Shareholders are responsible for the debts and liabilities of the enterprise to the extent of the amount of their contributed capital. A JSC has the right to issue securities in order to raise capital and it may list on the Securities Exchange.

The JSC must have common shares and may have preferred shares and/or issue bonds. A common shareholder has the right, among other things:

- to attend the General Shareholders Meeting (“GSM”);
- to vote in a number that corresponds to his/her/its amount of shares;
- to receive dividends, to transfer his/her/its shares; and
- to be given priority in buying new shares offered for sale corresponding to his/her/its amount of common shares.

A JSC has the right to select its organizational, managerial and operational structure in accordance with one of the two following methods (except where securities laws provides otherwise):

- GSM, the Board of Management, Control Committee and the (General) Director. Where a JSC has fewer than 11 shareholders, and the shareholders being organizations holding less than 50% of the total company shares, there is no requirement for a Control Committee.
- GSM, Board of Management and (General) Director. In this case, at least 20% of the members of the Board of Management must

be independent and an Internal Auditing Committee must be established directly under the Board of Management.

a. *General Shareholders Meeting*

A GSM consists of all shareholders having the right to vote and is the highest decision-making body of a JSC. Its main powers include, among other things:

- adopting the company's development orientation;
- deciding on the types/classes of shares and the total number of shares in each type/class authorized to be offered for sale; and deciding on the annual dividend rate for each type/class of shares;
- elect, relieve duty of and discharge, the members of the Board of Management and members of the Control Committee;
- deciding on an investment or a sale of assets/property, with a value equal to or greater than 35% of the total value of assets stated in the most recent financial statements of the company, if the company's charter does not stipulate a different proportion or value;
- deciding on the amendment and/or supplement to the company's charter;
- adopting annual financial statements;
- deciding on a buy-back of more than 10% of the total number of shares in each type/class that have been sold;
- reviewing and handling violations committed by the Board of Management and/or Control Committee which cause damage to the company and the company's shareholders;
- deciding on a company reorganization or dissolution; and
- other rights and duties under the provisions of the *Enterprise Law 2014* and the company charter.



The GSM may meet annually or extraordinarily, at least once a year. The annual meeting must be held within four months from the ending date of the financial year. The meeting venue for the GSM must be within the territory of Vietnam. In the event that a GSM is held concurrently in several different venues, the meeting venue of the GSM is determined to be the venue where the chair attends the meeting.

The quorum of the meeting is at least 51% of the total number of voting shares. If the first meeting fails to meet this quorum, the quorum for the second meeting is at least 33% of the total number of voting shares. If the second meeting fails to meet this quorum, the third meeting will be held irrespective of the quorum.

Resolutions of the GSM are adopted at a meeting when they are approved by a number of shareholders representing at least 51% (or more as may be provided in the company's charter) of the total number of voting shares of all shareholders attending the meeting. A percentage of at least 65% (or more as may be provide in the company's charter) will be required for the resolutions relating to the following issues:

- Decision on the types/classes of shares and the total number of shares in each type/class authorized to be offered for sale;
- Change in the scope of business of the company;
- Change in the company's management structure;
- The company's re-organization or dissolution;
- An investment or sale of assets/property with value equal to or greater than 35% of the total value of assets stated in the most recent financial statements of the company (unless the company's charter stipulates a different proportion); and
- Other matters stipulated under the company charter.

As an exception, cumulative voting can be used for the election of members to the Board of Management and the Control Committee.

A resolution of the GSM will be adopted by way of written opinion if it is approved by at least 51% (or more as may be provided in the company's charter) of the total number of voting ballots.

b. Board of Management

The Board of Management is the managing body of a JSC consisting of not less than 3 members and not more than 11 members (specific number of members will be provided by the company charter). BOM members are elected by the GSM by way of cumulative vote for a term of up to 5 years and can be re-elected.

Generally speaking, the Board of Management has the full authority to, in the name of the company, make decisions, exercise the company's rights and perform the company's obligations that do not fall under the authority of the GSM.

The Board of Management may meet periodically or extraordinarily. The Chairperson will convene a periodical meeting at any time necessary, though the Board of Management must meet at least once every quarter. A meeting of the Board of Management may be conducted when there are three-quarters or more of the total number of its members attending the meeting.

A resolution of the Board of Management may be adopted if approved by the majority of the members attending the meeting; in the event of even votes, the Chairperson has the casting vote.

c. Director/General Director

The Director/General Director is appointed by the Board of Management for a term of up to 5 years and can be re-appointed. The Director/General Director is responsible for the day-to-day operation of the company.

d. Control Committee

A Control Committee is required for a JSC having 11 or more shareholders who are individuals, or having shareholders being



organizations owning 50% or more of the total number of shares of the company.

The Control Committee consists of 3 to 5 members if the company charter does not provide otherwise, and more than half of its members must regularly reside in Vietnam. The Chief Controller must be a professional accountant or auditor and must work full time at the company, except where otherwise stated in the company charter.

The Control Committee members are appointed by GSM by way of cumulative vote for a term of up to 5 years and can be re-elected. In general, the Control Committee is responsible for supervising the performance of the Board of Management and the Director/General Director, and carrying out other tasks assigned by the GSM.

A.3 Partnership Company

A PC is a form of enterprise set up by at least two partners and has a status of a legal person - a PC is akin to a limited liability partnership in other jurisdictions. A PC must have two general partners and may also have limited partners (literally, “capital contributing members”). General partners are liable for all obligations of the PC with their own property, while limited partners are only liable to the extent of their capital contribution. To date, PCs have not been a common vehicle for foreign investment in Vietnam.

A.4 Business Cooperation Contract

A BCC is a contractual relationship akin to a partnership which does not create a new legal entity but which is licensed to engage in business activities in respect of a specific project in Vietnam. BCCs are most commonly used in the oil industry, where production sharing contracts have traditionally been structured as BCCs, and in telecommunications and advertising projects. This is changing as LLCs and JSCs are being allowed into these fields.

A.5 Public – Private Partnership (“PPP”)

Investment under the form of PPP is defined as a form of investment conducted on the basis of a contract (“**PPP Project Contract**”) between an authorized State agency (“**ASA**”) and the investor and/or project enterprise in order to implement, manage and operate an infrastructure project or to provide public services.

A PPP Project Contract can take one of the following forms:

- build - operate - transfer (“**BOT**”), which is defined as a contract entered into by an ASA and an investor for the construction of an infrastructure facility, upon completion of which the investor shall have the right to commercially operate such facility for a fixed term; upon the expiry of such term, the investor shall transfer (hand-over) the facility to the ASA;
- build - transfer - operate (“**BTO**”), which is defined as a contract entered into by an ASA and an investor for the construction of an infrastructure facility, upon completion of which the investor shall transfer such facility to the ASA and have the right to commercially operate the facility for a fixed term;
- build - transfer (“**BT**”) contract, which is defined as a contract entered into by an ASA and an investor for the construction of an infrastructure facility; the investor shall transfer such facility to the ASA and shall be paid by way of reserved land in order to implement other projects;
- build - own - operate (“**BOO**”) contract, which is defined as a contract entered into by an ASA and an investor for the construction of an infrastructure facility, upon completion of which the investor shall own and have the right to commercially operate the facility for a fixed term;
- build - transfer - lease (“**BTL**”) contract, which is defined as a contract entered into by an ASA and an investor for the construction of an infrastructure facility, upon completion of which the investor shall transfer such facility to the ASA and



have the right to provide services on the basis of operating and exploiting the facility for a fixed term; and the ASA shall lease such services and shall make payment to the investor;

- build - lease - transfer (“**BLT**”) contract, which is defined as a contract entered into by an ASA and an investor for the construction of an infrastructure facility, upon completion of which the investor shall have the right to provide services on the basis of operating and exploiting such facility for a fixed term; the ASA shall lease such services and shall make payment to the investor; upon the expiry of the term for provision of such services, the investor shall transfer the facility to the ASA;
- operate - manage (“**O&M**”) contract, which is defined as a contract entered into by an ASA and an investor to commercially operate a facility partly or entirely for a fixed term; and
- any other similar forms of contract to be approved by the Prime Minister.

The PPP investment form is encouraged and eligible for a number of investment projects in construction, renovation, operation, business activities, management of infrastructure facilities, provision of equipment or public services in the following sectors:

- Transport infrastructure facilities and related services;
- Lighting systems; water supply systems; drainage systems; waste and wastewater collection and treatment systems; social housing, resettlement housing, cemeteries;
- Power plants, electricity transmission lines;
- Infrastructure facilities in healthcare, education, vocational training, culture, sports and other related services; office buildings of state agencies;
- Commercial infrastructure facilities, science and technology, hydro-meteorological facilities, economic zones, industrial zones,

high technology zones, information technology focused zones and information technology applications;

- Agricultural and rural infrastructure facilities and development services for connecting production with processing, as well as the actual sale of agricultural products; and
- Other investment sectors as decided by the Prime Minister.

Procedures for investment in a PPP project may involve the following steps:

- **Project proposal:** The Government must arrange formulation of project proposals and announce the project and a list of projects on the national bidding network. The law also allows for investors to propose implementation of PPP projects outside the projects and lists of projects approved and announced by the Government.
- **Feasibility study report:** The Government shall arrange formulation of the feasibility study report for a project in order to provide the basis for tender invitation documents for investor selection and for negotiation of the PPP project contract. For investor-proposed projects, the investor can be assigned to formulate the feasibility study report.
- **The selection of investors for PPP projects:** International open bidding is compulsory for PPP projects, except in limited cases where national open bidding or direct appointment are permissible.
- **Project contracts:** After completing negotiation of the project contracts (e.g., BOT contract, government guarantee, etc.), the Government and the investor will sign an investment agreement (which contains draft project contracts) to confirm the draft of the project contracts, and will officially sign the project contracts after an IRC has been issued.



- Establishment of the project enterprise: Upon issuance of an IRC, the investor must establish an enterprise to implement the PPP project, except for PPP projects implemented under a BT contract or small scale projects.

A.6 Term and Termination under the Investment Law 2014 and the Enterprise Law 2014

An enterprise may terminate in the following cases:

- The operational duration stated in the charter expires and there is no decision to extend;
- As decided by the BOM or the Company Owner or the GSM;
- The enterprise does not have the required minimum number of members or shareholders for a period of six consecutive months; or
- The ERC is revoked.

In the event that an enterprise terminates of its own volition, it will only be allowed to do so once it has discharged all debts and property obligations.

An investment projects terminate in the following circumstances:

- The duration of the project expires;
- Conditions for termination of operations (as stipulated in the relevant contract, enterprise charter, etc.) have been met;
- The investor decides to terminate the project operations; or
- The investment project falls into cases provided under the *Enterprise Law 2014* and the investor is incapable of remedying the conditions for ceasing the activities;
- Where the land for the investor to implement the project is revoked by the State or where the investor is not permitted to continue to use the place of investment and fails to complete

the formalities for changing the place of investment within the regulated period of time;

- Where the activities of the investment project have ceased and the SIRA cannot contact the investor or the investor's legal representative upon the expiry of a period of 12 months from the date of cessation of the activities;
- The investor fails to implement or is incapable of implementing the project in accordance with the schedule registered with the SIRA after a period of 2 months has lapsed and the investor does not fall into the category eligible for lengthening the schedule for implementing the investment project; and
- Under a decision or judgment of a court or arbitral body.

B. Investing in Domestic Vietnamese Enterprises – Limitations on Foreign Ownership

B.1 Purchasing Shares or Charter Capital

In general, foreign investors may invest in Vietnamese enterprises by way of taking any of the following ways:

- Purchasing capital contribution portions or the right to contribute capital from existing members in LLCs;
- Contributing new capital into LLCs;
- Purchasing existing shares from shareholders of JSCs; and
- Subscribing for new shares in JSCs.

The *Investment Law 2014* does not distinguish between the purchase of shares or charter capital as a direct or indirect form of investment. Acquisitions of shares or charter capital only trigger the obligation to register the acquisition with the SIRA in two cases - i.e., the purchase of shares or equity by a foreign investor into:



- an enterprise operating in business sectors where foreign investors are subject to conditions; or
- a target enterprise results in that foreign investor owning 51% or more charter capital of the targeted enterprise.

The target Single Member LLC or Multiple Member LLC will need to subsequently register for the issuance/amendment of its ERC, unlike in a case where the target enterprise is a JSC where no further ERC amendment is required.

B.2 Merger, Consolidation, Division and Separation

The *Enterprise Law 2014* defines merger, consolidation, division, and separation as follows:

- Enterprise merger is a process whereby one or a number of enterprises transfers all of its assets, legal rights, liabilities and benefits for the purpose of merging with another enterprise.
- Enterprise consolidation is a process whereby two or more enterprises combine all of their assets, legal rights, liabilities and benefits for the purpose of consolidating among themselves so as to become a new enterprise.
- Enterprise division is the process whereby an LLC or a JSC may split up its members/shareholders and assets to establish two or more new enterprises in the following cases:
 - a portion of capital/shares of members/shareholders, along with the respective assets, is divided between the new enterprises by the ownership ratio in the original enterprise and in correspondence with the assets transferred to the new enterprises;
 - all the portion of capital/shares of one or more members/shareholders, along with the respective assets, is transferred to the new enterprises, or
 - both of the above.

- Enterprise separation is the process whereby an LLC or a JSC splits off, where a part of the assets/property, rights and obligations of an existing enterprise (i.e., the separating enterprise) are transferred to establish one or more new enterprises (i.e., the separated enterprises).

These forms of enterprise restructuring take effect upon the approval of the relevant SBRA. After enterprise reorganization, various rights and obligations will cease to exist, while the parties involved would assume others.

Other notable points include:

- After a merger is completed, the target enterprise will cease to exist and the surviving enterprise will assume the legal rights and interests of the target enterprise. Additionally, the surviving enterprise will be liable for unpaid debts, labor contracts, property obligations and other liabilities of the target enterprise.
- With respect to an enterprise consolidation, the consolidating enterprises will cease to exist upon completion of consolidation and the consolidated enterprise will assume the legal rights and interests, and is liable for the unpaid debts, labor contracts and other liabilities of the consolidating enterprises.
- With respect to an enterprise division, the original enterprise will disappear and the newly established enterprises will be jointly liable for the unpaid debts, labor contracts and other liabilities of the original enterprise. However, the new enterprises may make agreements with creditors, customers and employees in order for one of them to perform these obligations.
- With respect to an enterprise separation, the separating enterprise and the separated enterprise will be jointly liable for the unpaid debts, labor contracts and other liabilities of the separating enterprise, except where the separating enterprise, the separated enterprise, and the creditors, customers and employees of the separating enterprise agree otherwise.



B.3 Acquisition of Assets

An onshore enterprise could also acquire some or all of the assets of another enterprise. For this purpose, assets of an enterprise which may be acquired may include the following:

- valuable papers;
- bonds, debts and other forms of borrowing;
- contractual rights and comprising intellectual property rights, including trademarks, industrial designs, inventions, trade names, origin or appellations of origin of goods;
- rights with respect to real property, including the right to lease out, assign and mortgage it;
- items of revenue derived from investment activities, including profits and interest on shareholding, dividends, royalties and all types of fees;
- other assets and rights with economic value in accordance with law and international treaties to which Vietnam is a member.

B.4 Competition Rules on Economic Concentration

Under the *Competition Law*,⁷ enterprise mergers, consolidations, acquisitions and joint ventures are considered acts of economic concentration.

Formation of an economic concentration is prohibited if the combined market share of the enterprises participating in the economic concentration represents more than 50 percent of the relevant market, except in some exceptional cases. Where the enterprises participating in an economic concentration have a combined market share ranging from 30-50 percent of the relevant market, the legal representative of

⁷ Law No. 27/2004/QH11 on Competition adopted by the National Assembly on 3 December 2004 (“Competition Law”)

those enterprises must notify the relevant competition administration authority.⁸ These enterprises are only able to proceed with the economic concentration after receiving the approval of the competition administration authority.⁹

The *Competition Law* also provides limited exemptions for prohibited cases of economic concentration subject to conditions.¹⁰ Applicants for such exemption must submit a comprehensive application dossier to the competition administration authority prior to proceeding with any economic concentration activities.¹¹

B.5 Foreign Ownership Limitations

Foreign investors may purchase capital contribution or shares in domestic Vietnamese companies with no limitation, subject to the following restrictions:

- The cap on foreign investment in public companies¹² is 49%¹³. From 1 September 2015, the 49% cap of foreign ownership in Vietnamese public companies has been relaxed in certain cases. If Vietnam committed to allow foreign ownership in certain business lines to be more than 49%, then foreign investors may hold shares in a public company doing business in such business lines up to the ratio allowed by such Vietnam's commitments. For public companies operating in business lines and industries

8 Competition Law, Art. 20.1.

9 Competition Law, Art. 24.

10 Competition Law, Art. 19.

11 Competition Law, Art. 29.

12 A public company is a JSC that (i) has already conducted the public offering of its stocks; or (ii) has its stocks listed at a stock exchange; or (iii) has its stocks owned by at least one hundred investors, excluding professional securities investors; and has a contributed charter capital of VND 10 billion or more.

13 Decision No. 55/2009/QĐ-TTg of the Government dated 15 April 2009 (“**Decision No. 55**”).



to which domestic law provides for a foreign ownership cap, foreign investors may hold shares up to that capped amount;¹⁴

- The cap on foreign investment in enterprises doing business in certain sectors where specialized branch laws provide for foreign ownership must comply with such provisions (e.g, a cumulative 30% limit applies to banks);
- The cap on foreign investment in enterprises doing business in service sectors will be in accordance with Vietnam’s bilateral and multilateral commitments (for example, Vietnam’s WTO Schedule of Commitments, ASEAN Framework Agreement on Services, Vietnam - Japan Economic Partnership Agreement, etc.); and
- The cap on foreign investment in enterprises with 100% State owned capital undergoing equitization or converting their form by other methods will be in accordance with the plans approved by competent authorities.

14 Decree No. 60/2015/ND-CP amending, supplementing several articles of Decree No. 58/2012/ND-CP on providing specific provisions for the implementation of Securities Law (“**Decree No. 60**”).

III. The Approval Process for Foreign Investors

A. Investment Registration Certificate (IRC)

Foreign investors must have an investment project and obtain an IRC, by submitting an application dossier to the SIRA. The competent SIRA for a specific investment project will be determined based on the location where the foreign investor proposes to implement its investment project, which can be:

- the Management Authority of the industrial zone, export processing zone, high technology zone or economic zone, or
- the Foreign Investment Division under the provincial-level Department of Planning and Investment.

The *Investment Law 2014* specifies the types of investment projects subject to special consideration and preliminary approval of the National Assembly, the Prime Minister, or the provincial People's Committee. The lists include large projects which are likely to have a major impact on the environment, or projects which require conversion of the land use purpose, or result in relocation and resettlement of more than 10,000 inhabitants, or fall under special business sectors (e.g., construction of air transportation or seaport, casino operations, cigarette production, oil and gas exploitation, golf course construction, etc.).

- In general, the application dossier is likely to take 2 to 4 months to prepare (including the translation and execution of all documents) and submit. The decision to approve and issue the IRC is discretionary, whilst statutorily provided that such decision should be made within 15 days from the date of submission of the application. If the SIRA refuses to issue such an IRC, it must provide a written explanation of the reasons of the refusal to the foreign investor.



- For investment projects subject to special consideration and preliminary approval, the SIRA will forward the submitted application to the National Assembly/the Prime Minister/the provincial People’s Committee for their in-principle approval prior to issuing the IRC.

B. Enterprise Registration Certificate (ERC)

If a new FIC is being established together with an investment project, upon the issuance of an IRC, the foreign investor will have to apply for an ERC for the establishment of the FIC. Although the laws stipulate that the licensing authority must issue an ERC within 3 working days, in practice, it may take longer.

C. Post-Establishment Formalities

Securing an ERC only marks the beginning of the legal life of an FIC. Once the ERC has been issued, a number of subsequent administrative formalities must be undertaken within specific time limits - e.g., tax registration.

D. Conditional Investment Sectors for Foreign Investors

The *Investment Law 2014* lists out 267 conditional investment sectors, some of which are applicable to foreign investors as investment conditions, and some of which are applicable to all enterprises as business conditions, as provided in Appendix 1.

The specific investment conditions applicable to investments in these sectors are detailed either in specialized laws governing the particular sector or in international commitments, such as Vietnam’s WTO Commitments on Services (“**Vietnam’s WTO Commitments**”). Vietnam has generally interpreted these commitments as setting limitations on foreign investment/participation in the Vietnamese market.

E. Taxation of Foreign Businesses

FICs and foreigners doing business in Vietnam may be subject to a number of taxes, including enterprise income tax (“**EIT**”), value-added tax (“**VAT**”), foreign contractor tax, special consumption tax, and import and export duties.

In general, FICs are subject to the same laws on VAT, EIT and other taxes applied to all business entities and activities in Vietnam. However, the tax liabilities of an FIC, the method of collection, or whether it qualifies for any special tax preferences may vary considerably depending on the form of business. FICs, foreign contractors and branch offices are subject to EIT in Vietnam, and ROs may constitute taxable permanent establishments depending on their activities as defined by law.

Dividends paid by an FIC to its corporate investors are not subject to any tax. However, dividends paid by an FIC to its individual shareholders or individual members of a Multiple Member LLC are subject to withholding of PIT.

F. Enterprise Income Tax

The Enterprise Income Tax Law (“**EIT Law**”) which came into effect on 1 January 2009 was amended in 2014 and 2015.

Since 1 January 2016, the standard EIT rate is 20%¹⁵. However, enterprises having total annual revenue of no more than VND 20 billion may apply the tax rate of 20% from 1 July 2013. This tax treatment is applicable to any transfer of charter capital other than securities in an enterprise by offshore or local institutional investors.

The transfer of securities (shares of public JSCs and investment fund certificates and bonds, etc.) by offshore institutional investors is subject to a 0.1% EIT rate on the total value of securities sold at the time of

¹⁵ Decree No. 218/2013/ND-CP on Detailed Provisions for the Implementation of the Enterprise Income Tax issued by the Government on 26 December 2013 (“**Decree No. 218**”).



transfer.¹⁶ This is the deemed EIT rate regardless of whether the transfer results in a gain.

EIT is one of the most important forms of taxation in Vietnam for foreign investors and is imposed on FICs and branches who derive income from both within and outside of Vietnam.

Foreign companies located abroad but engaging in business activities in Vietnam or deriving income in Vietnam are also subject to EIT. However, foreign companies from countries that have entered into a double-taxation treaty with Vietnam may be eligible for protection from a certain degree of tax exposure if qualifying conditions are met.

Taxable income by definition is the total turnover minus deductible expenditures, plus other income. EIT is assessed on assessable income, which is the taxable income after further deducting tax-exempt income and losses carried forward. Loss can be carried forward for five years after the year that the loss is incurred. Except for restrictions or caps on deductibility of certain specific expenditures, expenditures are generally tax deductible if the expenses incurred actually relate to the company's business operations, and the expenses are supported with sufficient invoices or vouchers with the regulations.

G. Transfer Pricing

In principle, every transaction is required to be made at market price. Additionally, related party transactions are subject to transfer pricing documentation and reporting.

“Market price” is defined as the price of goods and services based on arm's length business agreements between unrelated parties. Vietnamese laws provide five different ways to determine market prices, namely the comparable uncontrolled price method, the resale

¹⁶ Circular No. 100/2004/TT-BTC on Providing Guidelines on Value Added Tax and Enterprise Income Tax on Securities issued by the Ministry of Finance on 20 October 2004 (“**Circular No. 100**”), Part III.2.2, as amended by Circular No. 72/2006/TT-BTC on 10 August 2006 (“**Circular No. 72**”); Circular No. 103/2014/TT-BTC, issued by the Ministry of Finance on 6 August 2014 (“**Circular No. 103**”).

price method, the cost plus method, the profit comparable method, and the profit split method. Taxpayers are permitted to use the most appropriate method based on the conditions of the transaction, information, and data for a comparability analysis.

Prices in related party transactions are determined through comparability analysis, which considers four criteria comprising characteristics of the product, operational function of the business, contract terms of the transaction, and economic conditions of the transaction.

Businesses are required to maintain transfer pricing documentation on a contemporaneous basis and submit a declaration of related party transactions together with the filing of the annual enterprise income tax finalization return to the tax authority. Information and documentation must be provided to the tax authority within 30 days upon receiving the request. The 30-day time frame can be extended for valid reasons for another 30 days. Businesses have the right to request that the tax authority keeps the provided information and documentation confidential.

H. Tax Incentives

Tax incentives are granted to investment projects based on investment sector, location and scale of project.

Investment sectors entitled to tax incentives will be limited to high-tech industries, scientific research and technological development, infrastructure development, software product production, education and training, medical services, sports and cultural activities, and environmental activities. Tax incentives are also granted to enterprises established in industrial zones (except industrial zones located in geographical areas with advantageous socio-economic conditions), economic zones, high-tech zones, geographical areas with difficult socio-economic conditions and geographical areas with especially difficult socio-economic conditions. Unless otherwise eligible for tax incentives granted to large-scale projects, tax incentives typically



include preferential tax rates of 10% or 20% (17% from 1 January 2016), tax exemptions for two or four years, and 50% tax reductions for four, five or nine years.

Since 1 January 2014, under the amended *EIT Law*, tax incentives are granted to large-scale manufacturing projects. Specifically, manufacturing projects (except for production of goods subject to special consumption tax and exploitation of mineral resources) are eligible for a 10% tax rate for 15 years, a four-year tax exemption and a nine-year 50% tax reduction, if one of the following conditions are met:

- Investment capital is at least VND 6 trillion (approximately USD285 million)¹⁷ and the investment capital is contributed within three years from the issuance date of the investment certificate and the annual revenue reaches and maintains at least VND10 trillion (approximately USD475 million) three years after the year starting from when the FIC generates revenue;
- Investment capital is at least VND 6 trillion (approximately USD285 million) and the investment capital is contributed within three years from the issuance date of the investment certificate and the project will have more than 3,000 employees three years after the year starting from when the FIC generates revenue; and
- Investment capital is at least VND 12 trillion (approximately USD570 million) and the investment capital is contributed within five years from the issuance date of the investment certificate and the technology implemented for the project is evaluated in accordance with the Law on High Technology or the Law on Science and Technology.

The *EIT Law* also provides for a research and development tax break. A locally-established enterprise may set aside and contribute up to 10% of the annual assessable income to its research and development fund. Within five years, however, if less than 70% of the fund is used, or the

¹⁷ This is based on the exchange rate of VND21,000 equal to USD1 which is applied to all USD amounts converted from VND amounts in this publication.

fund is not used for the purposes related to research and development, the enterprise must pay the tax on the unused or misused portion of the fund, coupled with any late payment interest or late payment penalty.

No tax incentives are applicable to capital gains, interest income, foreign currency trading, recovered bad debts, income from business activities outside Vietnam, precious mineral resources, oil and gas exploration and exploitation, or electronic games of chance and betting.

I. Value Added Tax

The Value Added Tax Law (“*VAT Law*”) which took effect on 1 January 2009 was amended in 2014 and 2015.

i. Scope of Application and Tax Rates

VAT applies to the supply of goods and services that are deemed to be used “for production, business or other consumption in Vietnam.” A considerable number of goods and services are exempt from VAT. However, it is notable that under the *VAT Law* imported goods, including equipment, machinery, specialized means of transport and construction materials not yet produced locally, are not considered to be tax-exempt supplies, unless they are for scientific research and technological development, or for oil and gas exploration and exploitation activities. Derivative financial transactions are also VAT-exempt.

The *VAT Law* maintains three tax rates of 0%, 5%, and 10%. The standard VAT rate is 10%. Exported goods and services are zero-rated. From 1 January 2014, exported goods or exported services means goods or services consumed outside Vietnam or within tariff-free zones, or provided to customers overseas.

ii. Payment of VAT

Generally, VAT payments are computed and made on a monthly or quarterly basis, based on a credit method which allows the taxpayer to deduct invoiced input VAT incurred from the output VAT charged



to customers during the month. Accordingly, the actual VAT payment consists of net VAT on the value added to the goods or services supplied by the taxpayer. Input VAT incurred for providing VAT-exempt supplies is not creditable. From 1 January 2009, the *VAT Law* requires any payment for each purchase or aggregate purchases from one supplier in one day amounting to VND20 million (approximately USD952) or more to be made via a bank in order to be eligible for credit of input VAT.

The *VAT Law* also provides for an additional method of computing VAT whereby the payable VAT will be assessed directly on the value added during the supply of goods or services. This method applies to foreign contractors that do not have a permanent establishment in Vietnam; or when the business operation in Vietnam, in accordance with contracts, is less than 183 days; or when the foreign contractor does not adopt the Vietnamese Accounting System for the work in Vietnam.

In addition to VAT, certain goods and services are subject to a special consumption tax at the stage of production, importation, or supply of the service. These goods and services range from cigarettes to golf-related businesses and are defined by the *Special Consumption Tax Law*.

J. Special Consumption Tax

Special consumption tax (“SCT”) is imposed on the production or import of taxable goods and the supply of taxable services, including: cigarettes and cigars; spirits and beer; cars with less than 24 seats; motorcycles with a capacity of over 125cc; aircraft and yachts (except those used for transportation or tourism business); gasoline of all kinds; air conditioners with a capacity of 90,000 BTU or less; playing cards and votive paper; and goods and services relating to the operation of dancehalls, massage lounges, karaoke parlors, casinos, electronic prize games, betting entertainment, golf and lotteries. SCT is charged on these goods and services in addition to VAT.

The goods listed above will not be subject to SCT if they are:

- (i) produced for export, including sales to export processing enterprises (except for sales of automobiles with less than 24 seats to export processing enterprises);
- (ii) imported for aid purposes;
- (iii) temporarily imported for re-export during the tax payment grace period;
- (iv) belonging to foreign individuals and organizations that enjoy diplomatic immunity;
- (v) personal belongings within the duty-free limit for immigration purposes;
- (vi) imported for sale at duty free shops;
- (vii) imported into tariff-free zones or purchased and sold between tariff-free zones, except where the goods concerned are automobiles with fewer than 24 seats;
- (viii) aircraft or yachts used for transportation or tourism business and aircraft used for national defense and security;
- (ix) special types of vehicles, such as ambulances and mobile television vans;
- (x) naphtha, condensate, reformat components and other components used as raw materials for production (except used for gasoline production) directly imported by manufacturers; or
- (xi) air conditioners with a capacity of 90,000 BTU or less that are designed for installation in a means of transportation.

K. Foreign Contractor Tax

Offshore entities are considered foreign contractors and are subject to foreign contractor tax comprising of VAT and EIT. Offshore business organizations, with or without a permanent establishment in Vietnam, that conduct business in Vietnam or procure income derived from Vietnam as a result of contracts, agreements, or commitments with



organizations or individuals in Vietnam are categorized as foreign contractors and are subject to foreign contractor tax. Additionally, offshore business organizations with or without a permanent establishment in Vietnam that conduct business in Vietnam or gain income in Vietnam by performing only part of the work are considered to be foreign sub-contractors and are also subject to this tax.

When a foreign contractor is a business individual, he/she will be subject to VAT and personal income tax (“PIT”). The VAT and EIT liabilities of foreign organizational contractors are set forth in accordance with *Circular No. 103*. The sale of goods under Incoterms, by which foreign sellers bear risks on goods up to the territory of Vietnam, will expose the foreign sellers to withholding of EIT of 1% on the sales proceeds.

Under *Circular No. 103*, the sale of goods together with associated services performed in Vietnam, such as installation, trial run, warranty, maintenance, replacement, and other services, continues to be taxable. In addition, *Circular No. 103* specifies that foreign suppliers of goods would be exposed to foreign contractor tax in Vietnam in the following circumstances where the foreign supplier:

- bears risks related to goods within Vietnamese territory;
- retains the title to goods delivered to local distributors;
- bears the cost for distribution, marketing, promotion, or is responsible for the quality of goods or service delivered to local distributors;
- determines the selling price of goods or services to third parties;
- authorizes or hires local organizations to perform a part of the distribution service or other services relating to the sale of goods in Vietnam; or
- authorizes a local organization or individual to negotiate and/or sign contracts on behalf of the foreign supplier.

There are three methods of tax payment and calculation: (1) VAT Payment by Offsetting Input VAT Against Output VAT and EIT Payment Based on Actual Assessable Income; (2) Tax Withholding by the Vietnamese Contracting Party; and (3) Hybrid Method of Tax Calculation and Payment Reintroduced. Methods (1) and (3) require more conditions regarding business establishment and operation as compared to Method (2), which is applied by default.

In addition to the aforementioned taxes, foreign business organizations may be subject to other taxes in Vietnam, depending on their scope of business operations. These commonly include taxation of capital and securities assignments and import and export duties.

L. Personal Income Tax

PIT in Vietnam is governed by *the Law on Personal Income Tax (“Law on PIT”)*, which was implemented on 1 January 2009 and amended in 2013 and 2015. Individual tax payers are classified either as ‘residents’ or ‘non-residents’, and are subject to different rates on this basis.

The tax rates for residents will depend on the source and the level of income, as outlined in the following tables. Notably, the *Law on PIT* does provide for tax exemptions in certain limited cases.

i. Tax Rates for Resident Individuals

Tax rates for resident individuals are determined in accordance with progressive tax rates and/or flat tax rates, depending on the source and the level of income as follows:

Progressive Tax Rates

The progressive tax rates apply to a resident’s income from salaries and wages.



Level	Assessable Income Per Year (VND million dong)	Assessable Income Per Month (VND million dong)	Tax Rate (%)
1	Up to 60	Up to 5	5
2	Over 60 to 120	Over 5 to 10	10
3	Over 120 to 216	Over 10 to 18	15
4	Over 216 to 384	Over 18 to 32	20
5	Over 384 to 624	Over 32 to 52	25
6	Over 624 to 960	Over 52 to 80	30
7	Over 960	Over 80	35

In arriving at the assessable income derived from business income, salaries and wages, it is permitted to deduct the following from the taxable income: statutory insurance contributions, voluntary pension fund contribution, qualified charitable contributions, personal deduction of VND 9 million (approximately USD428) per month for a taxpayer, and a deduction of VND 3.6 million (approximately USD171) per month for each eligible dependent.

Flat Tax Rates

The flat tax rate applies to a resident's business income, and income from capital investment, capital transfer, real estate transfer, prizes won, copyright royalties, commercial franchising, inheritances or gifts.

Assessable Income	Tax Rate (%)
Income from capital investments (e.g., dividend payment or interest earnings)	5
Income from royalties and franchises	5
Income from winnings or prizes	10
Income from inheritance or gifts	10
Capital gains from transfer of charter capital	20
Income from securities transfer	0.1

Business income - gross turnover from (i) goods trading, (ii) provision of services and (iii) production, construction, transportation and other business activities	0.5 - 5
Proceeds from real property transfers	2

Hence, the profit gained by a resident individual upon the transfer of his or her capital contribution, other than securities in a business enterprise, is subject to a 20% PIT rate imposed on each transaction. If the transfer is in the form of a securities transaction (including transfer of shares of a non-public joint stock company), the individual will be subject to 0.1% PIT on the total value of securities sold at the time of transfer.

ii. Tax Rates for Non-Residents

Non-residents are subject to tax on income derived from Vietnam. The assessable income of non-residents is the gross income without any deductions.

Assessable income	Tax rate
Business income being gross turnover from (i) goods trading, (ii) provision of services and (iii) production, construction, transportation and other business activities	1% / 5% / 2% respectively
Salaries and wages	20%
Income from capital investments (e.g., dividend payment or interest earnings)	5%
Proceeds from transfer of capital (including both charter capital and securities)	0.1%
Sales proceeds of immovable property	2%
Income from copyright or franchising	5%
Income from prizes, inheritances or gifts	10%



M. Double Taxation Treaties

Vietnam has entered into a number of agreements on the avoidance of double taxation. There are 66 such agreements now in effect between Vietnam and various countries.

These agreements, however, do not preclude Vietnam from imposing tax on capital gains realized by a foreign investor in certain instances. There are some exceptions to this general rule, mainly with respect to the alienation of aircrafts and ships. Therefore, an investor should consider these agreements when structuring cross-border acquisitions.

The permanent establishment concept was incorporated into the *EIT Law* in 1999. The Government has retained and reinforced this concept through subsequent amendments to the *EIT Law*. As a result, double taxation agreements are becoming increasingly relevant in terms of taxation within Vietnam. In this regard, the MOF has issued a number of circulars that provide detailed guidelines on the application of double taxation agreements in Vietnam. *Circular No. 205/2013/TT-BTC* addressed the issue of beneficial ownership for eligibility of protection under double taxation agreements.

IV. Other Forms of Doing Business in Vietnam

Apart from the forms of business provided under the *Investment Law 2014* and *Enterprise Law 2014*, other means of establishing a commercial presence in Vietnam may include ROs, branch offices, contracted projects and franchising arrangements.

A. Representative Offices

A foreign party interested in having an institutional presence in Vietnam may establish an RO, which does not constitute an independent legal entity and is only allowed to engage in market research, “soft” marketing, liaison with the head office abroad in respect of trade and investment matters and overseeing the implementation of contracts in Vietnam. ROs are prohibited from engaging in direct profit-making activities and receiving any form of revenue.

B. Branch Offices

Branch offices are dependent units of foreign companies licensed to do business directly in Vietnam. Under law, the types of businesses that may open branches are restricted.

Foreign companies that have done business in certain fields for more than five years may set up branches in Vietnam in accordance with Vietnam’s WTO Commitments and other treaties in respect to trading and distribution activities. Vietnam’s WTO Commitments allow foreign companies in some service areas to set up branches in Vietnam, subject to certain phasing (e.g., non-life insurance, securities, computer and related services, management consultant services, construction, and franchising). However, as a matter of practice, the Government has only allowed foreign law firms, tobacco companies, and banks to set up branches in Vietnam.



C. Franchising

Provisions on franchising in Vietnam can be found under the *Commercial Law* and *Decree No. 35*, as amended by *Decree No.118* and *Decree No. 120*,¹⁸ detailing the implementation of the *Commercial Law* specifically in relation to franchising activities. Additionally, *Circular No. 09*¹⁹ provides guidelines on registration procedures regarding franchising activities. Other laws on the subject of technology transfer and to some extent, intellectual property licenses, can also be used as a basis for establishing a franchise.

i. Conditions for being a Franchisor

According to *Decree No. 35*, franchisors must meet certain conditions before establishing franchises in Vietnam. The main criteria are as follows:

- The business system intended for franchise has been in operation for at least one year. In cases where a Vietnamese party is the primary franchisee of a foreign franchisor, such Vietnamese party must have engaged in the relevant franchising activities in Vietnam for at least one year before being granted a sub-franchise;
- A franchise operation must be registered with the relevant State authorities before performing franchise transactions; and
- The provision of products and services under a franchise must not be in violation of the law - i.e., such products and services must not be prohibited by law; in cases where the provision of such products and services is restricted, the franchisors must obtain the necessary license(s) from the competent State authorities.

18 Decree No. 35/2006/ND-CP, date 31 Mar. 2006, amending and supplementing administrative procedures provided in a number of decrees detailing the Commercial Law (“**Decree No. 35**”); amended by Decree No. 118/2011/ND-CP (“**Decree No. 118**”), and Decree No. 120/2011/ND-CP, (“**Decree No. 120**”).

19 Circular No. 09/2006/TT-BTM, dated 25 May 2006, guiding commercial franchising registration (“**Circular No. 09**”).

ii. Registration of Franchise Operation

Parties to a franchise contract do not have to register their contract with State authorities. Instead, franchisors are required to register their franchise operation with the relevant State authorities before entering into franchise contracts. Registration of a franchise operation can be understood as a disclosure procedure by which franchisors submit their plan to enter into franchise contracts to the State authorities, as well as information on their background and franchise system.

According to *Decree No. 35* and *Circular No. 09*, application dossiers for the registration of franchise operations generally include the following:

- An application for the registration of a franchise operation, made according to the form guided by the Ministry of Industry and Trade (“**MOIT**”);
- A written introduction of the franchise operation, made in accordance with the form stipulated by MOIT;
- Written certification of the following:
 - The legal status of the intended franchisor; and
 - Intellectual property right protection titles granted in Vietnam or a foreign country in the case of transferring registered intellectual property rights.
- The franchise descriptions and the verification documents must be consularized in accordance with the law. If the documents referred to in the second and third items directly above are in a foreign language, these documents must be translated into Vietnamese and duly notarized and consularized.

The application dossier to register a franchise operation must be submitted to MOIT if such franchise operation is made from a foreign country into Vietnam, including cases where a franchise is being transferred from non-tariff zones, export-processing zones and other special customs zones into the territory of Vietnam. Franchising



activities within Vietnam and franchising activities from Vietnam to foreign countries no longer need to be registered with the MOIT.

Thus, foreign franchisors must register their planned franchise operation with the MOIT before entering into a franchise contract with a local franchisee. There is also a registration fee, which is set by the MOIT.

Even though franchise contracts are not subject to registration procedures, their contents regarding intellectual property licensing and technology transfer are still subject to registration with the relevant State authorities, under intellectual property and technology transfer laws and regulations.

iii. Taxation of Franchise Fee

Taxation of franchise fees is not clearly provided for in prevailing laws. However, tax on royalties gained from the licensing of intellectual property rights and technology transfers, which involve franchises, are provided for by law. The transferor has the obligation to pay tax on royalties. The applicable tax rate is based on the foreign contractor tax rates as previously discussed and must be withheld by the transferee.

Vietnam is a signatory of bilateral tax treaties with certain countries, and these treaties provide a basis for reducing certain types of royalties.

D. Technology Transfer

The *Law on Technology Transfer* was passed by the National Assembly on 29 November 2006 and took effect on 1 July 2007. This law significantly liberalized technology transfer transactions in Vietnam. In addition to the *Law on Technology Transfer*, laws on intellectual property and to some extent, laws and regulations on franchising, serve as the legal grounds for technology transactions in Vietnam.

i. Types of Technology Transfer

Technology transfer can be performed through the two following forms, i.e., (a) as a whole or (b) as a part of another transaction, as described in detail below:

- (a) To perform a technology transfer independently; or
- (b) To perform a technology transfer as a part of other projects or transactions as follows;
 - Investment projects;
 - Franchises;
 - Licenses or assignments of intellectual property rights; or
 - Sale or purchase of machinery attaching technology transfer.

The *Law on Technology Transfer* requires the transfer of industrial property rights in technology transfer contracts to follow the regulations on intellectual property. However, unregistered or expired intellectual property may also be the subject of technology transfer.

ii. Registration Requirements

The *Law on Technology Transfer* removes most of the requirements for registration and approval that applied to most technology transfers and licenses in the past, and replaces that system with a system under which only “conditional” technologies require appraisal.

Technologies are classified into three types:

- Technologies in which transfers are encouraged, e.g., environmentally-friendly technologies, technologies preventing disasters, diseases, etc. (**“encouraged technologies”**);
- Technologies in which transfers are restricted, including those involving risks to human health, the environment and national security (**“restricted technologies”**); and
- Technologies in which transfers are prohibited (**“prohibited technologies”**).

Among the above, contracts for transfer of restricted technologies are subject to approval procedures. A list of restricted technologies has



been published under *Decree No. 133*. It is noteworthy that the *Law on Technology Transfer* requires not only “approval procedures” but for parties to seek permission from State authorities before signing technology transfer contracts of restricted technologies.

iii. Term of Contracts

The *Law on Technology Transfer* removes all time-limits for technology transfer transactions and allows parties to decide the term of contracts without any limit.

It also allows parties to decide the effective date of technology transfer contracts, except in cases where the transferred technologies fall within the list of restrictions, in which case the effective date of contract is the date the contract is approved by the State authority.

iv. Taxation

The transferor has the obligation to pay tax on the amount of revenue generated from the technology transfer. The applicable tax rate is based on the foreign contractor tax rates as discussed earlier and is withheld by the transferee.

There are, however, numerous tax policies designed to promote technology transfer. For example, income of enterprises derived from technology transfers under the list of encouraged technologies to organizations and individuals located in geographical areas of especially difficult socio-economic conditions is exempt from EIT. Additionally, revenue derived from technology transfers is exempt from VAT.²⁰

²⁰ Decree No. 133/2008/ND-CP, dated 31 December 2008, detailing and guiding the implementation of a number of articles of the law on technology transfer (“**Decree No. 133**”), Art. 32; Amended by Decree No. 103/2011/ND-CP dated 15 Nov. 2011 (“**Decree No. 103**”); Decree No. 218/2013/ND-CP, dated 26 Dec. 2013, detailing and guiding the implementation of the Law on EIT, Art. 4.11; and Circular No. 219/2013/TT-BTC, dated 31 Dec. 2013), providing guidelines for implementation of the VAT Law, the amended VAT Law and Decree No. 209/2013/ND-CP (“**Circular No. 219**”), Art. 4.21.

Appendix 1

List of Conditional Investment Sectors

No.	Business line
1	Seal production
2	Combat gear trading (including repair)
3	Firecracker trading
4	Pawnshop services
5	Massage services
6	Trading of warning devices of emergency vehicles
7	Security services
8	Paint gun services
9	Lawyer's practice
10	Notary's practice
11	Judicial assessment in the fields of finance, banking, construction, antiques, relics, copyrights.
12	Auctioneering services
13	Arbitration services
14	Bailiff's practice
15	Asset liquidator's practice
16	Accounting services
17	Audit services
18	Tax agent services
19	Customs brokerage services
20	Duty-free goods trading
21	Bonded warehouse services
22	Domestic LCL consolidation services



23	Gathering services and customs inspection services inside and outside border checkpoint areas
24	Securities trading
25	Securities registration, depository, offsetting, and liquidation services by Vietnam Securities Depository/ organizations trading in listed securities and other securities.
26	Insurance
27	Reinsurance
28	Insurance brokerage
29	Insurance agency
30	Insurance agency training services
31	Price verification services
32	Consulting services serving company values for equitization
33	Lottery business
34	Electronic games of chance for foreigners
35	Debt collection services
36	Debt trading services
37	Credit rating services
38	Casino business
39	Betting business
40	Voluntary pension fund management services
41	Oil and gas trading
42	Gas trading
43	Commercial assessment services
44	Industrial explosive trading (including destruction thereof)
45	Explosive precursor trading
46	Business operations using industrial explosives and explosive precursor

47	Blasting services
48	Trading in chemicals except banned chemicals according to Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction
49	Inorganic fertilizer trading
50	Alcohol trading
51	Trading in tobacco products, tobacco materials, machinery and equipment serving tobacco industry
52	Commodity exchange operation
53	Electricity generation, transmission, distribution, wholesaling, retailing, import, and consultancy
54	Trading in foods under the management of the Ministry of Industry and Trade
55	Rice export
56	Temporary import for re-export of goods subject to special excise tax
57	Temporary import for re-export of frozen food
58	Temporary import for re-export of goods on the List of used goods
59	Franchising
60	Coal trading
61	Logistics services
62	Mineral trading
63	Industrial precursor trading
64	Goods trading and activities directly related goods trading of foreign investors
65	Electronic commerce activities
66	Petroleum activities



67	Assessment of conformity of pneumatic tools, industrial lifting devices, chemicals, industrial explosives, equipment serving mineral and petroleum extraction; except for equipment and instruments serving extraction at sea
68	Vocational training
69	Association with foreign vocational training institutions and foreign-invested vocational training institutions in vocational training at intermediate and college levels
70	Fire safety and firefighting services
71	Occupational skill assessment services
72	Quality assessment of joint vocational programs with foreign vocational training institutions and foreign-invested vocational training institutions in Vietnam.
73	Occupational safety assessment services with regard to machinery and supplies with strict occupational safety requirements
74	Occupational safety and occupational hygiene training services
75	Employment agency services
76	Overseas employment services
77	Voluntary drug rehabilitation services
78	Conformity declaration and certification services
79	Outsourcing services
80	Road transport services
81	Car warranty and maintenance services
82	Motor vehicle inspection services
83	Driving school services
84	Traffic safety inspector training services
85	Driving test services
86	Traffic safety inspection services

87	Waterway transport services
88	Building, modifying, repairing inland watercraft
89	Provision of training for crewmembers and operators of inland watercraft
90	Ship transport, shipping agency services
91	Multi-level marketing business
92	Ship towing services
93	Importing, dismantling used sea-going ship
94	Sea-going ship building, modification, repair services
95	Sea port operation
96	Air transport business
97	Design, production, maintenance, testing of aircraft, aircraft engines, propellers, and equipment thereof in Vietnam
98	Airport operation
99	Aviation services at airports
100	Air navigation services
101	Flight crew training services
102	Rail transport business
103	Rail infrastructure business
104	Rail transport business
105	Multimodal transport business
106	Transport of dangerous goods using road or waterway vehicles
107	Pipeline transport services
108	Maritime navigation services
109	Real estate trading
110	Provision of training in real estate brokerage, real estate valuation, and operation of real estate exchanges



111	Provision of training in apartment building management and operation
112	Provision of training in construction project management
113	Project management consultancy services
114	Construction survey services
115	Construction design assessment services
116	Construction supervision services
117	Construction services
118	Investment project planning and assessment services
119	Foreign investors' construction
120	Project management consultancy services
121	Construction work conformity assessment and certification services
122	Lighting and greenery system operation services
123	Shared infrastructure operation services
124	Construction planning development services
125	Urban planning development services provided by foreign entities
126	Trading in white asbestos of Serpentine group
127	Postal services
128	Telecommunications services
129	Import of radio transmitters and transceivers
130	Digital signature authentication services
131	Establishment and operation of publishers
132	Printing services
133	Publication release services
134	Social network services
135	Online games business
136	Pay radio/television services

137	News website development services
138	Processing, recycling, repair, refurbishment of used IT products on the list of used IT products banned from import for foreign partners
139	Pay-per-view television services
140	Provision of information and IT services on mobile network or the Internet
141	Trading in mobile phone jammers
142	Provision of information security products and services
143	Operation of higher education institutions
144	Operation of foreign-capitalized educational institutions, ROs of foreign educational institutions in Vietnam, branches of foreign-capitalized educational institutions
145	Operation of continuing education institution
146	Operation of students' education centers
147	Operation of compulsory education institutions
148	Vocational training
149	Operation of specialized schools
150	Operation of preschool education institutions
151	Educational cooperation with foreign partners
152	Extra classes
153	Fishing
154	Trading in fishing instruments
155	Fish trading
156	Trading in aquatic feed
157	Trading in biological preparations, microorganisms, chemicals, environmental remediation agents serving aquaculture
158	Aquatic breed testing services
159	Aquatic feed testing services



160	Breeding, raising, propagating wild animals and plans according to CITES Appendix
161	Breeding, raising, propagating endangered or rare wild animals and plans according to CITES Appendix
162	Breeding, raising normal wild animals
163	Export, import, re-export, transit wild specimens according to CITES Appendix
164	Export, import, re-export bred, raised, propagated specimens according to CITES Appendix
165	Pesticide trading
166	Processing items required to undergo plant quarantine
167	Pesticide testing services
168	Plant protection services
169	Trading in veterinary medicines, biological preparations, vaccines, microorganisms, chemicals serving veterinary medicine
170	Veterinary services
171	Animal surgery, animal testing services
172	Vaccination, diagnosis, prescription, treatment, and healthcare services for animals
173	Trading in veterinary medicines, biological preparations, vaccines, microorganisms, chemicals serving veterinary medicine
174	Concentrated breeding, breed production services; slaughtering; quarantine of animals and products thereof; production of animal-derived materials for animal feed production; preparing, processing, preserving animals and products thereof; trading in animal products; preparing, processing, packaging, preserving animal products
175	Trading in foods under the management of the Ministry of Agriculture and Rural Development

176	Trading, testing organic fertilizers
177	Trading in plant varieties, animal breeds
178	Manufacture of animal feeds
179	Import of animal feeds
180	Exporting, importing rare, endangered terrestrial wild animals and plants according to CITES Appendix
181	Trading in forest plants, animals restricted from trading
182	Trading in ornamental plants, shade trees, ancient trees from Vietnam's natural forests
183	Trading in firewood from timber or from Vietnam's natural forests
184	Trading in sperms, embryos, eggs, and lavas
185	Trading in biological preparations, microorganisms, chemicals, environmental remediation agents serving aquaculture
186	Testing biological preparations, microorganisms, chemicals, environmental remediation agents serving aquaculture
187	Trading in genetically modified food
188	Provision of training in bidding
189	Bidding agency services
190	Project assessment consultancy services
191	Provision of training in project assessment
192	Medical examination and treatment services
193	HIV testing services
194	Tissue bank services
195	Childbirth assistance, sperm preservation, embryo preservation services
196	Medicine trading
197	Medicine testing services



198	Cosmetics production
199	Infectious microorganism testing services
200	Vaccination services
201	Trading in medical and household anti-insect and antibacterial chemicals
202	Opioid replacement therapy services
203	Trading in foods under the management of the Ministry of Health
204	Plastic surgery services
205	Surrogacy services
206	Bioavailability and bioequivalence assessment services
207	Clinical trial of medicines
208	Trading in medical equipment
209	Medical equipment classification
210	Medical equipment testing services
211	Industrial property verification services
212	Radiological work services
213	Atomic energy application ancillary services
214	Export, import, and transport of radioactive materials
215	Technological conformity assessment services
216	Inspection, calibration, testing of measuring instruments and measurement standards
217	Motorcycle helmet trading
218	Technology assessment, valuation, and examination services
219	Intellectual property representation services
220	Film production
221	Antique examination services
222	Monument protection or renovation project planning, execution, supervision services

223	Karaoke, dance club business
224	Travel services
225	Sports business
226	Art performance, fashion show, beauty contest, model contest services
227	Trading in audio and video recordings of art performances
228	Festival organization services
229	Trading in art or photography works
230	Accommodation services
231	Advertising services
232	Trading in relics, antiques, national treasures
233	Museum services
234	Electronic games business (except for electronic casino games for foreigners and online electronic casino games)
235	Export of relics, antiques other than those under the ownership of the state, political organizations, socio-political organizations; import of cultural commodities under the management of the Ministry of Culture, Sports and Tourism
236	Verification of copyright and relevant rights
237	Land survey and assessment services
238	Land planning services
239	IT infrastructure and software infrastructure development services
240	Land database development services
241	Land pricing services
242	Land use right auction services
243	Geodesy and cartography services
244	Underground water drilling services
245	Underground water survey services



246	Water supply, processing, and extraction services
247	Underground water drilling services
248	Mineral exploration services
249	Mineral extraction
250	Harmful waste management services
251	Scrap material import
252	Environmental monitoring services
253	Strategic environment assessment, environmental impact assessment, environmental protection scheme consultancy services
254	Trading in biological preparations
255	Collection, transport, processing of refuse
256	Business operation of commercial banks
257	Business operation of non-bank credit institutions
258	Business operation of cooperatives, people's credit funds, microfinance institutions
259	Provision of payment services
260	Credit information service provision
261	Foreign exchange activities
262	Trading in gold bullion
263	Manufacture of gold bullion, export raw gold and import raw gold for manufacture of gold bullion
264	Manufacture of gold jewelry
265	Import of commodities under the management of the State bank (money vault door)
266	Money printing, molding
267	Trading in military clothing and equipment of the armed forces, military weapons, technologies, devices, vehicles for the military and police; parts, components, supplies, specialized equipment, and technologies for manufacture thereof

BAKER & MCKENZIE (VIETNAM) LTD. OFFICES

www.bakermckenzie.com/vietnam

Ho Chi Minh City

12th Floor, Saigon Tower
29 Le Duan Blvd.
District 1, Ho Chi Minh City
Socialist Republic of Vietnam
Intn'l Tel: +84 28 3829 5585
Fax: +84 28 3829 5618
Email: vninfo@bakermckenzie.com

Hanoi

Unit 1001, 10th floor
Indochina Plaza Hanoi
241 Xuan Thuy Street
Cau Giay District, Hanoi 10000
Socialist Republic of Vietnam
Intn'l Tel: +84 24 3825 1428
Fax: +84 24 3825 1432
Email: vninfo@bakermckenzie.com

BMVN International LLC (in alliance with Baker & McKenzie)

www.bakermckenzie.com/bmvn

Unit 1002, 10th Floor, Indochina Plaza Hanoi
241 Xuan Thuy Street
Dich Vong Hau Ward
Cau Giay District, Hanoi, Vietnam
Direct line: +84 24 3936 9398
Fax: +84 24 3825 1432
Mobile: +849.83.94.68.68
Email: tmh@bmvn.com.vn



Baker McKenzie helps clients overcome the challenges of competing in the global economy.

We solve complex legal problems across borders and practice areas. Our unique culture, developed over 65 years, enables our 13,000 people to understand local markets and navigate multiple jurisdictions, working together as trusted colleagues and friends to instill confidence in our clients.

www.bakermckenzie.com

© 2017 Baker & McKenzie (Vietnam) Ltd. All rights reserved.

Baker & McKenzie (Vietnam) Ltd. is a member of Baker & McKenzie International, a Swiss Verein with member law firms around the world. In accordance with the common terminology used in professional service organizations, reference to a "partner" means a person who is a partner, or equivalent, in such a law firm. Similarly, reference to an "office" means an office of any such law firm.

This may qualify as "Attorney Advertising" requiring notice in some jurisdictions. Prior results don't guarantee a similar outcome.