

Preface

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DCT has been advising domestic and international clients on commercial matters throughout Vietnam for over 10 years. DCT has been actively involved in advising clients on investments in Vietnam since 1999.

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TABLE OF CONTENT

TABLE OF CONTENT	ii
INTRODUCTION	vi
1. FORMS OF DOING BUSINESS	1
1.1 What key law governs investments in Vietnam?	1
1.2 What are most common forms of direct investment in Vietnam?	1
1.3 In order to carry out an investment project in Vietnam in WFOE or JV form, must an investor set up a Vietnamese legal entity?.....	2
1.4 What types of Vietnamese legal entities are available?.....	2
1.5 What is the key difference between a LLC and a JSC?	2
1.6 What factors lead a foreign investor to choose a JV or a WFOE?	3
1.7 What is a representative office permitted to do?	3
2. GOVERNMENT APPROVALS	3
2.1 What is the approval process for establishing JVs and WFOEs?	3
2.2 What level of the Vietnamese government must approve a particular project?.....	4
3. BUSINESS SCOPE AND AUTHORITY	4
3.1 What is the significance of a company’s business registration certificate or IC?.....	4
3.2 What is a “legal representative” of a Vietnamese company?	5
3.3 What is the significance of a Vietnamese company’s “business scope”? ..	5
3.4 When do contracts in Vietnam need to be notarised?.....	5
4. CAPITAL STRUCTURE	5
4.1 What is the capital structure of an FIE?	6
4.2 Can the capital contribution of an FIE be reduced, whether by distribution or otherwise?.....	6
4.3 What are the time limits for contributing capital?	6
5. RETAIL AND DISTRIBUTION	6
5.1 Are there any business form limitations for foreign companies in retail and distribution business in Vietnam?.....	6
5.2 What are the requirements to establish a retail outlet?	7

6.	TAXATION	7
6.1	Briefly describe the corporate income tax rates in Vietnam?	7
6.2	What are the Value Added Tax rates?	7
6.3	What are the personal income tax rates?.....	8
7.	RIGHT TO PURCHASE FOREIGN CURRENCY AND REMITTANCE OF PROFITS	8
7.1	Can I purchase foreign currency in Vietnam?	8
7.2	Is it possible to repatriate your investment from Vietnam?.....	9
8.	WTO AND FOREIGN INVESTMENT IN VIETNAM	9
8.1	How does Vietnam’s WTO entry benefit foreign investment in Vietnam? 9	
8.2	Will Vietnam live up to its WTO commitments?	9
9.	IMPORT/EXPORT	10
9.1	Can my company freely import its goods into Vietnam?	10
9.2	What items are prohibited from import?.....	10
10.	LITIGATION IN VIETNAM	10
10.1	What is the structure of the Vietnamese court system?	10
10.2	What are the qualifications of judges in Vietnam?.....	12
10.3	Is the role of judges similar to other civil law jurisdictions in that they take the lead in investigating the case?.....	12
10.4	What is the system for enforcing court judgments?.....	13
10.5	How independent of politics is the Vietnamese court system?.....	13
10.6	Political issues apart, how well do Vietnamese courts work?	13
10.7	Is arbitration in Vietnam preferable to litigation?.....	14
10.8	Is offshore arbitration possible?.....	14
10.9	Are foreign judgments enforceable in Vietnam?	15
11.	REAL ESTATE LAW	15
11.1	Is it possible for foreign companies and FIEs to own land in Vietnam? ..	15
11.2	Can a company or individual own improvements and other assets on land in Vietnam?.....	16
11.3	Are there any limits on the deposits a developer may ask from the purchaser for residential commercial housing?	16
11.4	How is land rental price calculated and when is it payable?	17

11.5	How is land use fee calculated and when it payable?.....	17
11.6	May land be mortgaged and is registration required?.....	18
11.7	What taxes and fees exist relating to real estate?.....	18
12.	INTERNET.....	19
12.1	Who regulates internet related businesses?.....	19
12.2	Does Vietnam have a law relating to electronic commerce?.....	19
12.3	Does Vietnam censor certain types of content that may be placed on the Internet websites?.....	19
13.	LABOR.....	19
13.1	What approvals do expatriate workers need to legally work in Vietnam?.....	19
13.2	What are the key conditions for an employment contract in Vietnam?....	20
13.3	On what grounds may you terminate an employee?.....	21
14.	ENVIRONMENTAL LAW.....	21
14.1	What environmental reports or studies must be submitted for investment projects in Vietnam?.....	21
14.2	What are some of the possible environment related financial obligations an investor may face in Vietnam?.....	22
15.	BANKRUPTCY LAW.....	22
15.1	Who may file bankruptcy in Vietnam?.....	22
15.2	Which court has jurisdiction over a bankruptcy?.....	22
16.	INTELLECTUAL PROPERTY.....	23
16.1	What laws protect intellectual property in Vietnam?.....	23
16.2	Is registration required to protect intellectual property?.....	23
16.3	What is the duration of protection patent, copyright, trademark, industrial design and trade name?.....	23
17.	TECHNOLOGY TRANSFER.....	24
17.1	Who has the right to transfer technology?.....	24
17.2	What kind technology may be transferred?.....	25
17.3	What technology transfers are prohibited?.....	25
17.4	What approvals or procedures should be followed in order to transfer technology in Vietnam?.....	25
18.	GOVERNMENT OF VIETNAM AND CHARTS OF MAJOR STATE AGENCIES.....	26

18.1	Overview of the government of Vietnam	26
18.2	Central Authorities.....	27
18.3	Local Authorities	27
18.4	Government of Vietnam	28

INTRODUCTION

In the past several years culminating in its accession to WTO on 11 January 2007, Vietnam has taken active steps to revamp its entire legal framework for doing business and for investing in Vietnam. The changes are largely favourable to both foreign and local investors.

Some of the significant laws include: the Investment Law, which regulates how an investment in Vietnam may be approved and Law on Enterprises, which sets out the types of corporate vehicles investors may establish to carry out their investment projects. These laws both became valid only over one year ago on 1 July 2006.

In addition to these laws, Vietnam has also issued new laws on contracts (Commercial and Civil Codes), on dispute resolution (Code of Civil Procedure), on intellectual property (Intellectual Property Law), on anti-corruption (Anti-corruption Law), on the stock market (Securities Law) and on foreign exchange (Foreign Exchange Law).

In respect of real estate investments, there is a new Land Law, Housing Law and Law on Real Estate Business (which became valid on 1 January 2007).

These new laws in general create a much more favourable and clearer legal framework for doing business for local and foreign businesses alike and form an excellent backbone for the future development of Vietnam.

These laws contain many “firsts”. For example, the Law on Enterprises abolishes the distinction between a local and a foreign company and between both of these and a State-owned company. All types of companies must now operate by the same corporate governance rules. This should create a level-playing field for doing business, since the failure to comply with these corporate rules will lead to personal liability for directors, officers of a company, regardless of whether the company is foreign-owned, Vietnamese-owned or State-owned. The Investment Law also now applies to both local and foreign investors.

This Guide answers some of the most common questions raised by investors when they consider investing in Vietnam. What follows is no more than a general guide for investors, outlining some of the main issues which should be considered. It is necessarily selective and should not be used as a substitute for formal advice.

1. FORMS OF DOING BUSINESS

1.1 What key law governs investments in Vietnam?

Whether a foreign investor invests “directly” or “indirectly” in Vietnam, the applicable law is the Investment Law, which applies to both local and foreign investors in Vietnam. It is significant in that it contains a significant number of investment guarantees.

“Direct” investment is defined to include the following:

- Establishing companies owned 100% by local or foreign capital (“**WFOE**”)
- Establishing joint ventures between local and foreign investor(s) (“**JV**”)
- Investing pursuant to a contract: business cooperation contract (“**BCC**”), Build-Operate, Build-Transfer-Operate or Build-Operate-Transfer or Build-Transfer Contract
- Investing in developing a business (to expand the size or improve capacity of a project or change to new technologies, increase quality of products or reduce pollution to the environment)
- Purchasing shares of or contributing capital to companies, branches in Vietnam to participate in management
- Investing in a merger or acquisition of a company or branch
- Other forms of direct investment.

“Indirect” investment is defined to include the following:

- Purchasing of shares, bonds and other valuable papers
- Investing through securities investment funds
- Investing through other intermediary financial institutions.

Investing in a real estate project to develop and build the same would be considered as a direct investment.

The Investment Law requires an investor who invests “directly” to obtain approval for a relevant project and approval is given via the issuance of an investment certificate (“**IC**”). In respect of “indirect” investment, the Investment Law states that the investor needs to comply with the Securities Law and other relevant laws.

If a foreign entity does not want to or is not ready to invest in Vietnam but desires a physical presence in Vietnam, it may setup a representative or a branch office. Branches are permitted in some specialised sectors but are otherwise unusual.

1.2 What are most common forms of direct investment in Vietnam?

The most common forms of direct investment by a foreign investor or investors to carry out a project are: to incorporate a WFOE, JV or to enter into a BCC.

A WFOE and JV are both Vietnamese corporate legal entities and therefore in each case a Vietnamese corporate vehicle to carry out investment in these forms must be established under the Law on Enterprises as discussed below.

In a BCC, no legal entity is formed. The parties to such arrangements may agree to share profits and losses or share in the products of the cooperation, in much the same way as a partnership; it is, in effect, a contractual JV.

1.3 In order to carry out an investment project in Vietnam in WFOE or JV form, must an investor set up a Vietnamese legal entity?

Yes, to carry out a business or an investment project in the WFOE or JV form, investors would have to set up a Vietnamese legal entity. This is governed by the Law on Enterprises which is the new company law that sets out the types of corporate vehicles available to investors. It became valid on 1 July 2006.

In respect of foreign investors carrying out a first project in Vietnam, the incorporation of the Vietnamese company takes place simultaneously with the licensing of their first project. This means that a foreign investor cannot incorporate a company without a project. However, subsequent to the first project, they have the option to carry out additional projects using the established corporate vehicle or set up new corporate vehicles.

1.4 What types of Vietnamese legal entities are available?

A foreign investor (just like a local investor) can select the following Vietnamese corporate vehicles to carry out a project:

- (1) A limited liability company (“**LLC**”) which is essentially a private company with a minimum of two shareholders and a maximum of 50;
- (2) A shareholding or joint stock company (“**JSC**”) which is a public company with at least 3 shareholders but no maximum and which can issue shares and list on the Vietnam Securities Trading Centre;
- (3) A one-member LLC which is a LLC with only one shareholder;
- (4) A partnership which are made up of individual partners;
- (5) A private enterprise (akin to a sole proprietor).

1.5 What is the key difference between a LLC and a JSC?

The main key difference is ability to mobilise capital by the sale of shares and securities by the JSC. Furthermore, a company that wishes to list on a public securities exchange in Vietnam or conduct a public offering must be a JSC. In general, shareholders of a JSC have the right to freely assign their shares. In contrast, in a LLC, the assignment of charter capital (equity) is subject to the right

of first refusal of the members. The corporate governance structure of a JSC is more complex than the LLC.

1.6 What factors lead a foreign investor to choose a JV or a WFOE?

The main factor for a foreign investor to choose a JV is either because many business sectors in Vietnam require a JV to establish a commercial presence in Vietnam or because the Vietnamese party has a key asset, local know-how and knowledge, or other factors that make the JV essential. For example, in real estate development projects, the Vietnamese party usually has the land use rights that it may opt to contribute to the JV in exchange for equity.

1.7 What is a representative office permitted to do?

A representative office represents the foreign company in Vietnam, as the name suggests. It is often the first step to establishing a presence in the country. Foreign company that wishes to establish a representative office in Vietnam must first be duly established in accordance with the laws of its home jurisdiction.

Representative offices have limited rights. They are permitted to engage only in business development and other activities and cannot engage in activities that generate profit. The head of the representative office is not permitted to sign economic or commercial contracts with Vietnamese businesses on behalf of the offshore company unless he or she has specific legal authority from the offshore company. Despite the limitations, the representative office may play an important role in facilitating operations and business on behalf of the offshore company.

2. GOVERNMENT APPROVALS

2.1 What is the approval process for establishing JVs and WFOEs?

In respect of foreign direct investment, whether it is in the form of a WFOE or JV or BCC or any other permitted form, an IC must be obtained from the relevant licence issuing body.

To receive an IC a project will either go through: a *registration* or an *evaluation* procedure based on size of project and type of projects:

Registration applies to projects:

- (a) Under 300 million VND (approximately US\$ 18.75 million)
- (b) Not on list of “conditional” sectors.

The time limit for issuance of an IC: 15 business days.

Evaluation applies to:

- (a) Projects over or under 300 million VND
- (b) On the list of “conditional” sectors.

Time limit: 43 business days (or 45 business days in special cases).

“Conditional” is defined to mean investment in sectors impacting:

- national defence and security, social order and safety
- banking and finance
- public health
- culture, information, press and publishing
- entertainment services
- real estate business
- survey, prospecting, exploration and mining of natural resources, environment ecological
- development of education and training
- other sectors as set out by law.

2.2 What level of the Vietnamese government must approve a particular project?

Decree 108/2006/ND-CP dated 22 September 2006 which guides the Investment Law delegates the authority to issue ICs to the local People’s Committees for most types of projects (including real estate) regardless of size except for a limited types of “sensitive” of projects which requires the Prime Minister to approve the investment policies (such as casino projects, production of cigarettes).

However, even in respect of these “sensitive” projects, if the Prime Minister has already approved the investment policies for investing in these sectors, the local People’s Committees are authorised to issue the IC.

This “de-centralisation” of licensing authority is generally seen as favourable step as local People’s Committees are much more familiar with projects in their localities than the central licensing authority (the Ministry of Planning and Investment (“MPI”). Previously, a project over US 10 million in HCMC or Hanoi and over US 5 million in other cities and provinces has to be approved by the MPI. Significant delay resulted as MPI in Hanoi is not familiar with the project and the local requirements and lack sufficient manpower to deal with the applications. This new change, therefore, should significantly reduce any delay in approving projects.

3. BUSINESS SCOPE AND AUTHORITY

3.1 What is the significance of a company’s business registration certificate or IC?

All validly existing private business enterprises in Vietnam must have either a business registration certificate or an IC. Either one or the other is required depending upon set criteria. The IC doubles as a business registration document. Foreign invested enterprises, which include WFOEs and JVs, (“**FIEs**”) always need to obtain an IC. Certificates are usually issued by the local People’s Committee with jurisdiction over the matter. The certificates state the legal name of the company, the nature of the company (LLC or JSC), its permitted scope, its legal representative, legal address and the amount of registered capital. Without a valid certificate, business enterprises cannot legally do business in Vietnam.

3.2 What is a “legal representative” of a Vietnamese company?

The legal representative is the officer who has the primary responsibility and power to act on behalf of the company in its dealing with the outside world, including the State. Pursuant to the Law on Enterprises, either the chairman of the members’ council (in case of a LLC), chairman of the board of management (in case of the JSC) or the general director must be designated the legal representative. Legal representatives have the authority to bind the company in contracts, initiate lawsuits, and are personally liable for the commission or omission of certain acts. For example, in the context of a LLC, the legal representative of the company must notify the business registration body in writing of the progress of capital contribution within fifteen (15) days from the date undertaken for capital contribution, and must bear personal liability for any damage to the company and to other persons due to late notification or inaccurate, untruthful or incomplete notification.

3.3 What is the significance of a Vietnamese company’s “business scope”?

Unlike in most common law countries, the business scope permitted to Vietnamese companies are narrowly defined and mostly codified into a State recognized and published list of business activities called “business lines.” Generally, the permitted business scope must be closely tied to what is considered necessary for particular project. Generally to obtain an IC, the investor needs tangible plans, including a feasibility study, on what precisely the investor will do. Board grants of business scope such as “do any lawful business permitted by law” are not permitted.

3.4 When do contracts in Vietnam need to be notarised?

Generally, all land related documents in Vietnam need to be notarize, include those related to improvement upon land such as buildings and houses. Most other contracts, including civil and commercial contracts, need not be notarized.

4. CAPITAL STRUCTURE

4.1 What is the capital structure of an FIE?

Generally, for FIEs, there is no per se net/worth or capital structure requirement; however, companies must have enough capital resources to successfully realize the business goals set out in their IC. The capital structure is stated in the IC, including the total investment amount. In practice, generally, at least 20% of total investment amount must be contributed as equity (rather than from loans). In the case of a JSC, founding shareholders of JSCs are required to register to subscribe for at least 20% of the number of ordinary shares offered for sale.

4.2 Can the capital contribution of an FIE be reduced, whether by distribution or otherwise?

Yes, but there is a qualified waiting or a “lock-in” period. In a LLC, an investors may reduce their capital contribution if business operations have been carried out for more than two years from the date of business registration; and, at the same time, ensure that debts and other property obligations of the company are able to be paid in full after returning part of the contributed capital to the investors. In the JSC, within three years from the date of issuance of the business registration certificate, the shares of founding shareholders cannot be sold except to other founding shareholders unless the sale to non-founding shareholders is approved by the shareholders.

4.3 What are the time limits for contributing capital?

Under the Law on Investment, investors must contribute their capital contribution in accordance with the schedule stated in their IC application. The Law on Enterprises does not prescribe a set time limit for limited liability companies; however, the founding shareholders of shareholding companies are required to register to subscribe for a combined at least 20% of the number of ordinary shares offered for sale and must pay in full for the shares registered for subscription within 90 days from the date of issuance of the business registration certificate of the company.

5. RETAIL AND DISTRIBUTION

5.1 Are there any business form limitations for foreign companies in retail and distribution business in Vietnam?

Yes, there are limitations on the types of business forms that may engage in retail in distribution in Vietnam. Generally, to establish a commercial presence in Vietnam to do retail and distribution business, foreign companies must establish a JV enterprise in Vietnam with up to 49% foreign ownership. The 49% ownership cap for foreign entities is set by Vietnam’s WTO commitments and will be abolished by 1 January 2008, and by 1 January 2009, there will be no JV requirement. In other words, from 1 January 2008 to 1 January 2009, a JV is still

required but there will be no ownership percentage cap for foreign entities; and, from 1 January 2009, WFOEs may apply to conduct distribution in Vietnam.

The option of opening up a branch office is not advisable right now because there is uncertainty in the law as to whether, as a branch, you may engage in distribution.

5.2 What are the requirements to establish a retail outlet?

Vietnam's WTO commitments on the retail business in Vietnam by foreign investors is limited. Pursuant to the WTO, Vietnam's commitment in wholesale trade and retailing services states: "The establishment of outlets for retail services (beyond the first one) shall be allowed on the basis of an Economic Needs Test (ENT)." In turn, the ENT is explained as: "Applications to establish more than one outlet shall be subject to pre-established publicly available procedures, and approval shall be based on objective criteria. The main criteria of the ENT include the number of existing service suppliers in a particular geographic area, the stability of market and geographic scale." What this means in practice is that the licensing of retail stores, beyond the first one, of FIEs is at the discretion of the Vietnamese authorities.

According to Decree No. 23/2007/ND-CP, any FIE which is licensed to distribute goods in Vietnam is allowed to establish one retail store without any license required. For the second store, it must apply to the provincial People's Committee where its intended second store is located. Before issuing license, the People's Committee must get the approval of the Ministry of Trade ("MOT") of Vietnam.

6. TAXATION

6.1 Briefly describe the corporate income tax rates in Vietnam?

For corporate income tax ("CIT") in Vietnam the uniform rate is 25%. There are special investor incentive rates at 10%, 15%, and 20% available for a period between 10-15 years from date the company begins to operate (and in exceptional cases the 10% rate may be available for entire term of the project if approved by Prime Minister). There are also tax holidays: from 2-9 years depending on where project is located, types of activities & number of employees. Tax holidays can take form of complete tax exemption for a certain period from the date the company makes profits followed by a period when tax is charged at half rate. There are special rates for investments in certain geographical areas such as Phu Quoc.

6.2 What are the Value Added Tax rates?

There are three rates: 0%, 5%, and 10%.

6.3 What are the personal income tax rates (updated from 2010)?

For foreigners:

- If a foreigner is a resident for less than 183 days within a 12-consecutive month period, the tax rate is 25% on Vietnam-related income earned based on the days he/she is in Vietnam.
- If a foreigner is resident for more than 183 days, standard rates apply based upon progressive scales. Tax is on worldwide income.
- Foreigners working in Phu Quoc pays only 50% of ordinary rates.

Foreigners	Income ≈ USD	Tax Rate
1	Up to 500	0%
2	Over 500 - 1,270	10%
3	Over 1,270 - 3,200	20%
4	Over 3,200 – 5,000	30%
5	Over 5,000	40%

For Vietnamese:

Vietnamese	Income ≈ USD	Tax Rate
1	Up to 300	0%
2	Over 300 - 950	10%
3	Over 950 – 1,600	20%
4	Over 1,600 – 2,600	30%
5	Over 2,600	40%

7. RIGHT TO PURCHASE FOREIGN CURRENCY AND REMITTANCE OF PROFITS

7.1 Can I purchase foreign currency in Vietnam?

Yes. The Investment Law specifically allows foreign investors to purchase foreign currency at credit institutions licensed to trade in foreign currency in Vietnam to meet their “vang lai” (non-capital) or “non-capital” transactions and other permitted transactions as set out in the foreign exchange laws (such as repayment of an offshore loan, and remittance of dividends abroad). The law sets out a broad range of permitted transaction. Thus, the banks are in charge of foreign exchange compliance and will guide their customers accordingly. As long as the proper documentations are provided to the bank, remittance offshore is not a problem.

It should be noted that under although all enterprises have the right to convert, there is no guarantee of availability of foreign currency in Vietnam except for important projects in certain fields.

7.2 Is it possible to repatriate your investment from Vietnam?

Yes. The Investment Law provides that a foreign investor after it has met its financial obligations to the State may remit the following from Vietnam:

- (a) profits derived from business activities (profits can be remitted on a quarterly, semi-annual or annual basis);
- (b) payments received from the provision of technology and services and from intellectual property;
- (c) principal of and any interest on offshore loans;
- (d) invested capital and proceeds from the liquidation of investments;
- (e) other sums of money and assets legally owned by the investor.

8. WTO AND FOREIGN INVESTMENT IN VIETNAM

8.1 How does Vietnam’s WTO entry benefit foreign investment in Vietnam?

While the WTO Agreements are not specifically focused on investment terms and conditions, as a condition to entry into the WTO, Vietnam has agreed to open up a number of previously restricted or closed sectors to greater foreign investment, including distribution and retail, architectural and engineering services, construction, banking and education services. The rules are complicated and vary from sector to sector but in general permit, over a span of one to three year period, first minority foreign investment in JVs, followed by majority foreign investment in JVs, and eventually wholly foreign-owned investments.

8.2 Will Vietnam live up to its WTO commitments?

Ultimately this is a political question. The WTO rules are complex and demanding and may developing countries have trouble complying with all of them. However, Vietnam has many good reason to comply. First, non-compliance would subject Vietnam to compulsory dispute resolution pursuant to WTO rules and could result in retaliatory measures by the offended nation. Second, the Vietnamese leaders seemed to genuinely recognize the benefits that WTO membership provide and have legislated law prior to and after WTO accession that have overhauled legal system to make it more transparent, predicable, fair, investor friendly, and in line with greater compliance with its WTO commitments.

9. IMPORT/EXPORT

9.1 Can my company freely import its goods into Vietnam?

Generally, most goods may be imported to Vietnam. Of course there are some goods that are prohibited, subject to permission from the Ministry of Trade, and subject to other regulation. Even without physical presence in Vietnam, a foreign company may import goods into Vietnam. Under a new law, such foreign company may need to obtain a certificate of registration of right of export and import.

9.2 What items are prohibited from import?

The list of good prohibited include: cigars, petroleum, specialised newspapers and magazines, disks and videos, aircraft and rockets, weapons and ammunition, certain types of second hand consumer goods, materials and transport facilities. This list is not exhaustive.

10. LITIGATION IN VIETNAM

10.1 What is the structure of the Vietnamese court system?

The court hierarchy of Vietnam has three tiers namely the Supreme Court, Provincial Courts, and District Courts.

The Supreme Court is composed of one Council of Supreme Court Judges and separate special courts namely the Central Military Court, the Criminal Court, Civil Court, Economic Court, Labor Court, Administrative Court and respective appellate courts. The Supreme Court is empowered to hold supervisory and/or review trials of cases with judgments which have already taken legal effect but have been protested.

The Supreme Court has the power of appellate review of judgments of first-instance in the immediate lower courts, which have not yet taken legal effect but have been appealed or protested.

The Council of Supreme Court Judges is the highest body for trials that apply *supervisory* and *review procedures* (highest body for trying *supervisory* and *review* cases) and the supreme authority on guiding courts on the uniform application of laws.

Under the procedural laws of Vietnam, a *supervisory trial* is a hearing that reviews judgments have been rendered but have been protested for a possible serious violation of laws. A serious violation of laws is defined as (i) conclusions in the judgment do not reflect the objective facts; (ii) a serious violation of procedural laws; and (iii) a serious mistake of law application.

A *review trial* is a hearing of judgments which have been rendered but have been protested based on discovery of new facts that can materially affect the contents of those judgments.

Protest is the procedure (or the right of Procuracy Office or Superior Courts) in which the procuracy office (prosecution office) or the superior court makes an appeal or objection to the judgment of a court. There are two types of protest. First, the Procuracy Office of the same level or higher can protest a judgment by requesting an appellate court hear the case following the appellate procedure. The Procuracy Office may appeal a judgment of a court of first instance to the court of appeal regardless of irregardless the parties' wishes. Second, the Procuracy Office or Superior Court can protest the judgment by requiring competent court hearing the case via *supervisory* or *review* procedure.

A Provincial Court is composed of one Committee of Provincial Court Judges and separate special courts namely the Criminal Court, the Civil Court, the Economic Court, the Labor Court, and the Administrative Court.

A Provincial Court is empowered to hold:

1. First-instance trials of cases according to the provisions of the Code of Civil Procedure which include: (i) transportation agreements via airway or sea way, sales of securities, disputes in investment, banking, insurance, intellectual property, and company; (ii) a concerned party to the dispute is living abroad or the disputed property is located abroad; and (iii) cases that a Provincial Court takes from a District Court where it deems necessary;
2. To conduct appellate trials of cases where the first-instance judgments and/or rulings of lower courts have not yet taken legal effect but have been appealed and/or protested against according to the provisions of the procedural law; and
3. To supervise, review cases where judgments and/or rulings of lower courts have already taken legal effect but been protested against according to the provisions of the procedural law.

The Committee of Provincial Court Judges has the power to hold supervisory and review trials which were already taken legal effect but have been protested.

A District Court has the power to hold first-instance trials.

10.2 What are the qualifications of judges in Vietnam?

According to Article 37 of the 2002 Law on Organization of the People's Courts and Article 5 of the 2002 Ordinance on Judges and Peoples' Assessors, to be appointed as a judge a person must meet the following conditions:

1. be loyal to the Fatherland and the Constitution of the Socialist Republic of Vietnam;
2. have good qualities and virtue;
3. be incorrupt and honest, determined to protect the socialist legality;
4. have a law bachelor degree have been trained in a professional school;
5. have engaged in practical work for a period of time prescribed by law;
6. have the adjudicating capability; and
7. have good health to ensure the fulfillment of assigned tasks.

The required time set out in point 5 above is four years for a District Court.

To become a Provincial Court judge, a person must have been a District Court judge for at least five years or if not yet appointed as a District Court judge, a person must have worked in the legal profession for at least ten years.

To become a Supreme Court judge, he must have been a Provincial Court judge for at least five years or if not yet appointed as a Provincial Court judge, he must have worked in the legal profession for at least fifteen years.

The term of office for every judge is five years. Upon the termination of the term, a Judge Selection Council will review the performance of a judge and decide if he is qualified to reappointment. The components of the Judge Selection Council are different according to the level of a judge, i.e., District or Provincial or Supreme Court judge.

10.3 Is the role of judges similar to other civil law jurisdictions in that they take the lead in investigating the case?

The new Code of Civil Procedure has introduced some features of a more adversarial litigation system, including: burdens of proof and requiring parties to take the initiative in adducing evidence to support their case. Therefore, it has lessened the judge's role as the lead investigator in the case. However, it is at base a civil law system and the rule for the parties' right to discovery is not comprehensive.

10.4 What is the system for enforcing court judgments?

An order to execute a civil judgment would be governed by the Ordinance on Execution of Civil Judgments, No. 13-2004-PL-UBTVQH (“**OECJ**”). Once the judgment is obtained, it is given to the civil judgment-executing bodies who must issue decisions to force the judgment execution. However, the executors must set a time limit of no more than thirty days counting from the date of receiving the judgment execution decision for the judgment debtors to voluntarily execute the judgment, except for cases where it is necessary to prevent the judgment debtors from dispersing or destroying assets or shirking the judgment execution, in which case, the executors will have the right to apply, in time, coercive measures prescribed in Article 37 of the OECJ.

OECJ, Article 37 states:

The executors are entitled to apply the following coercive measures for judgment execution:

1. Deduction of account deposits, deduction of money, recovery of valuable papers of the judgment debtors;
2. Deduction of incomes of the judgment debtors;
3. Blockade of accounts, property of the judgment debtors at banks, credit organizations, State treasuries;
4. Detaining, handling of assets of the judgment debtors, including their assets being held by the third persons;
5. Forced handover of houses, transfer of land use right or handover of objects or other assets;
6. Ban from doing certain jobs or being forced to do certain jobs.

The time frame from filing a lawsuit to obtaining a judgment is approximately 90 days. After the judgment the losing party would have 15 days to appeal. Add to this the 30 days to await voluntary execution, most judgment creditors are likely wait at least 135 days from the date of filing the civil complaint for a decision to force judgment execution. The actual execution of the decision by “executors” may take much more additional time. In practice, there are some legitimate concerns regarding the possible corruption of judicial officers, including executors.

10.5 How independent of politics is the Vietnamese court system?

Independence of the judiciary from politics is not guaranteed under the laws of Vietnam. In practice, most members of the judiciary are members of the Communist Party and will seek the Party’s advice on sensitive matters.

10.6 Political issues apart, how well do Vietnamese courts work?

While the situation is improving, both Vietnamese people and foreign investors are often dissatisfied with the quality of the judgments of Vietnamese courts. The common cause is the lingering perception the judicial system is unprofessional and corrupt. Moreover, since the hearing process may encompass stages of first instance, second instance, appeal, supervision, and review, reaching a final judgment is often quite long and frustrating.

10.7 Is arbitration in Vietnam preferable to litigation?

Because the appeal rules and the lack of independence of the judiciary, arbitration in Vietnam is sometimes preferable. Furthermore, the legislation of the Ordinance on Commercial Arbitration, have greatly improved the terms of commercial arbitration. One benefit of Ordinance on Commercial Arbitration is that, for the disputes that fall into its jurisdiction, an arbitral award arising pursuant to it does not have to be recognized (unlike awards given under the New York Convention on the Enforcement of Arbitral Awards (“**NY Convention**”)) or re-litigated in a Vietnamese court. The award may be brought directly to an enforcement agency for enforcement unless such award is cancelled by a Vietnamese court.

The Ordinance on Commercial Arbitration only applies to disputes arising from commercial activities in accordance with an agreement between the parties. The Ordinance broadly defines “commercial activities” to mean “the performance of one or more commercial acts by a business organization or individual, comprising purchase or sale of goods; provision of services; distribution, commercial representation or agency; bailment; leasing out or leasing; hire-purchase; construction; consulting; engineering; licensing; investment; finance and banking; insurance; exploration and exploitation; transportation of goods and passengers by air, sea, rail or road; and other commercial acts in accordance with law.”

10.8 Is offshore arbitration possible?

Yes, under the Law on Investment the parties may choose offshore arbitration. The Code of Civil Procedure sets for guidelines on the recognition and enforcement of foreign arbitral awards in Vietnam. Vietnam has been a party to the NY Convention since 28 July 1995.

However, any dispute between a foreign investor and State administrative body of Vietnam relating to investment activities in the territory of Vietnam shall be resolved by a Vietnamese arbitration body or court, unless otherwise provided in a contract signed between a representative of a competent State body of Vietnam with the foreign investor or in an international treaty of which the Socialist Republic of Vietnam is a member. Additionally, disputes between the developers and buyers/lessors would likely have to be resolved in Vietnam although the Investment Law allows for offshore arbitration. Pursuant to the Code of Civil Procedure of Vietnam, all disputes relating to immovable assets located in Vietnam fall under the exclusive jurisdiction of a Vietnamese court.

10.9 Are foreign judgments enforceable in Vietnam?

Generally, foreign judgments are not enforceable in Vietnam. Under the current Code of Civil Procedure, Vietnamese Courts will only consider the recognition of judgments issued by Courts in countries that have entered into an agreement in this regard with Vietnam. To date, most of the countries that have entered into a judicial agreement with Vietnam are socialist.

With regard to countries that have not signed a judicial agreement with Vietnam, the recognition of the verdicts issued by the Courts in those countries would be considered for recognition on a reciprocal basis. However, in practice, only few verdicts issued by courts in foreign countries (most of them socialist countries) have been reported to be recognized by the Courts of Vietnam.

For a foreign verdict to be recognized in Vietnam, a letter requesting the recognition of the same must be sent to the Ministry of Justice (“**MOJ**”) in Vietnam. The MOJ will forward the letter, together with any attached documents, to an authorized Court within seven days from the date of receipt of the letter of request for its consideration and action. Four months after the Court has received all the documents, it is required to issue a decision as to whether it will reject the request for recognition and return all the documents to the Ministry of Justice, or will consider the case. Once the judgment has been recognized, enforcement would proceed pursuant to OECJ.

11. REAL ESTATE LAW

11.1 Is it possible for foreign companies and FIEs to own land in Vietnam?

Yes, however, the concept of “ownership” in Vietnam is unique and needs to be explained. Vietnam’s Land Law is similar to that of China. Land belongs to the people and the right to use the land is administered by the State for the people. Ownership is referred to as a “right to use land” (“**LUR**”) and evidence of such right is a land use right certificate (akin to a title deed) (the “**LUR Certificate**”) which sets out the term and the purpose of the land use. LURs can be granted on a “long-term” basis or for a limited term. In general, “long-term use” LURs are only granted for a number of very limited purposes such as for residential, personal use, for households and individuals that have already been granted long-term LURs to use for the family’s production, business purposes, for national security purpose, etc.

While LUR Certificate is similar to a deed in most countries, some differences and uncertainties should be noted. For example, LUR may used only for the specific purpose for which it had been granted. Failure to do so can lead to withdrawal of the LUR. In general, the State is required to provide compensation if it withdraws or reclaims the land. However there is circumstance where no

compensation is required. For example, Government may withdraw land in a number of circumstances including:

- When the term has expired and no extension is given
 - Regarding land and assets on land, no compensation will be paid
- Land for an investment project has not been used for 12 consecutive months or the implementation schedule has been delayed for 24 months compared to that set out in the project documents from the date the land is handed over and no approval is granted for such delay
 - No compensation is payable “in respect of land”
 - Government will issue (but has not yet done so) legislation on compensation for assets on land

Furthermore, the term or duration of the LUR for foreign investors is usually 50 but maybe 70 years (in the case of residential land and in special circumstances) and not in perpetuity. It is worthy of note, however, that pursuant to a new law, Decree 84-2007-ND-CP, foreign developers of residential land may obtain a land lease for 70 years which may be extend without limit, each time for a period of 70 year without any additional land fees paid to the State.

There are four forms of LUR, an *allocation* with or with payment of a Land Use Fee; or, a *lease* with payment annually or lump-sum payment for the whole of the lease term. Previously, foreign individuals and organizations were only entitled to: (1) receive a lease (and could not receive an allocation) from the *State* or (2) were allocated land which was brought-in as capital contribution by a Vietnamese party to a JV with a foreign company. Currently, under Article 24 of Decree 84-2007-ND-CP, the law allows the “assignment of projects using land” from *domestic economic organizations* (e.g. domestic companies) to foreign invested companies in Vietnam a varied number of circumstances, providing foreign investors additional avenues to acquire land in Vietnam.

11.2 Can a company or individual own improvements and other assets on land in Vietnam?

Yes, when foreign developers make assets on land upon which it has LUR, it has ownership interest on the assets; they simply need to register the assets. However with regards to purchasing existing assets on land, the law does not allow a foreign investor to acquire or directly purchase a real estate improvement such as buildings. It does, however, allow a foreign investor to invest in an existing asset to improve it. The extent of the improvement needed to satisfy this requirement is unclear.

11.3 Are there any limits on the deposits a developer may ask from the purchaser for residential commercial housing?

Yes, there are legal limits on deposits you can ask for in real estate projects. Pursuant to the Law on Residential Housing (“LRH”) and the Law on Real Estate Business (“LREB”), deposits and advance payments for commercial *residential* housing:

- (a) Cannot be received unless:
 - 1. “design of residential housing has been approved”;
 - 2. “the construction of the foundation has been completed”;
 - 3. “[developer has] completed construction of infrastructure servicing the real estate in accordance with the approved contents and schedule of the project”; and
- (b) Cannot exceed 70% of the contract price of the residential housing “before delivery of the residential housing to purchasers”

The exact meaning of the quoted text (the actual language used in the law) is uncertain. For example, we are uncertain as to what exactly constitutes “construction of the foundation.” Both the LRH and LREB are new and, presently, there is no guiding legislation expanding on the meaning of the statutory language. There is no escrow requirement for deposits and advance payment.

11.4 How is land rental price calculated and when is it payable?

Land rental payable when land is leased from Government pursuant to a land lease (annually or for entire term) and is 0.5%-2% of land price issued by based on price list issued by the People’s Committee (“PC”) of each city, province on 1 January of each year.

If land prices fluctuate for 60 days, price list issued by the relevant PC will be adjusted. Specifically, if prices decrease by 10% or more compared to those set by PC or if prices increase by 20% or more compared to those set by PC, the price will be adjusted but any upward adjustment may not exceed 20%.

11.5 How is land use fee calculated and when it payable?

Land use fee is based on price list issued by the PC of each city, province on 1 January of each year. In practice, the price is based on market value. It is unclear as to whether improvements made by developers will be included. Land use fees is payable when land is allocated with a payment of a LUF. For foreign-invested developers (which lease land from the Government) of apartments / villas for sale sells to purchasers, payment is due for Apartments: at the latest when “project ends” and for Villas: when villas are sold. These rules are not applicable to a JV scenario because the local JV partner would have paid this when land is contributed to a JV.

11.6 May land be mortgaged and is registration required?

Land may only be mortgaged if rental is paid all in advance. Furthermore, in the case of a FIE land user, land may only be mortgaged to “credit institutions licensed to operate in Vietnam” and not to “offshore” lenders, including shareholders.

Registration is done at Land Use Right Registration Offices. The procedures for registration are fairly clear and LUR Registration Offices have limited time periods to carry out formalities of registration. Enforcement of mortgages is based on contracts. If enforcement cannot be carried out pursuant to the contract, the mortgagee may sell the LUR or request a State body to sell the land by auction or commence proceedings.

11.7 What taxes and fees exist relating to real estate?

The following are a list of the main taxes and fees related to real estate.

- (1) A registration fee is payable to register ownership in a real estate asset which is 1% for land and house of price paid (maximum VND 500,000,000 per asset) (approximately US\$ 31,250).
- (2) Income received from sale of houses/construction works attached on land is subject to Value Added Tax (“VAT”). VAT applicable for sale of houses = [income from sale of houses - land use fee] x VAT rate at 10% (See TT120/2003/TT-BTC).
- (3) LUR Assignment Tax is imposed on the transfer of land use rights from the seller to the buyer: 4% paid on the transfer of residential land by households & individuals.
- (4) Under the tax laws, income earned from LURs assignment and sublease is subject to Corporate Income Tax (“CIT”) with a special method of calculation (See Circular 128/2003/TT-BTC dated 22 December 2003) as follows:
 - Taxable income = [income received from LURs assignment, transfer of land lease right] – [expenses relating to the transfer/assignment].
 - *In which*, income received from LURs assignment, transfer of land lease right means the actual assignment price (excluding income received from sale of houses/construction works attached on land). Expenses of the assignment include: paid land rental, expenses for compensation and site clearance and other fees/charges on granting of the LURs and other related expenses.
 - CIT = [taxable income] X [tax rate at 28%]. After a certain amount of CIT is calculated at 28%, the remaining income (= taxable income - 28% x taxable income) will be subject to standard rates on progressive basis as follows:

<u>Level</u>	<u>Percentage of remaining income and expenses</u>	<u>Tax rate</u>
1	Up to 15%	0%
2	Over 15% to 30%	10%
3	Over 30% to 45%	15%
4	Over 45% to 60%	20%
5	Over 60%	25%

12. INTERNET

12.1 Who regulates internet related businesses?

Internet Service Providers (“**ISPs**”) must be licensed by Directorate General of Post and Telecommunications (“**DGPT**”), and licences once issued will be valid for up to 10 years. An Internet Content Providers (“**ICPs**”), defined as a body, organization or enterprise that provides information on the Internet through an ISP, must be issued a licence by the Ministry of Culture and Information. It seems to be the case that ICPs only need to obtain a one-time permit to post information on the Internet instead of a permit on every occasion. Further, these organisations are subject to governmental control by DGPT, Ministry of Culture and Information and Ministry of Public Security.

12.2 Does Vietnam have a law relating to electronic commerce?

Yes, a recent law has been implemented on e-transactions. The Ministry of Posts and Telecommunications is responsible to the Government for presiding over electronic transaction activities. The law stipulates the legal validity of data messages and electronic signatures, signing and performance of electronic contracts, and security, safety, protection and confidentiality in electronic transactions.

12.3 Does Vietnam censor certain types of content that may be placed on the Internet websites?

Yes, under Vietnamese law an ICP cannot publish content on websites that may oppose the State, cause people to rebel against the State, infringe upon ethics and fine customs of Vietnam, or disclose national secrets. Misuse of the internet can result in fines that range from 50,000 to 70,000,000 Vietnamese Dong.

13. LABOR

13.1 What approvals do expatriate workers need to legally work in Vietnam?

The majority of expatriate employees and overseas Vietnamese wishing to work in Vietnam for three months or more are also obliged to obtain a work permit which will entitle them to be employed in Vietnam in accordance with the term of the labour contract but for not more than 36 months. The work permit may also be extended on one occasion corresponding to the term of the labour contract. Thereafter, the work permit may only be extended for following occasions if upon expiry of the first extended occasion Vietnamese employees have not completely been trained to replace foreign partners and with approval of Chairman of the central-run provincial or municipal People's Committees where employers' headquarters are located. Exempt are members of the Board of Management (in shareholding companies) or Members Council (in limited liability companies), foreigners working for diplomatic or foreigner being chiefs of representative offices or foreigners granted with lawyer practising certificates by Ministry of Justice or the foreign party to a BCC, foreign students studying in Vietnam and those working for State offices.

The total expatriate employees hired by a FIE must not exceed 3% of the enterprise's labour force and in any case, cannot total more than 50 employees. This 3% limit does not apply to the employment of expatriates by foreign contractors, representative offices, and branches. However, the employment of expatriates by these organizations requires approval from the chairman of the provincial People's Committee. Approval is exempted for those employers whose projects has been licenced with a description of the number of foreign employees it is allowed to employ.

13.2 What are the key conditions for an employment contract in Vietnam?

All workers must have a contract of employment that covers a number of specified general issues including the nature of the work, working hours/breaks, salary, location and duration of the contract to name a few. If an employee is called for military service or public service, the contract will be suspended for the duration of that service.

Normally, the contract must be signed directly by the employer and employee, though an authorised signatory may sign on behalf of a group of workers. The contract may take one of three forms:

- (a) a contract for an indefinite term;
- (b) a contract for a defined duration of 12 to 36 months; or
- (c) a seasonal or fixed term contract for less than 12 months.

A contract for a definite term or seasonal contract will be converted automatically into an indefinite term contract if at its expiry the employee continues to work for the employer but the parties fail to re-sign a new contract within 30 days from the date of its expiry. In addition, a definite term contract may only be extended on

one occasion following which the employee in question must either be released or else employed on an indefinite term basis.

13.3 On what grounds may you terminate an employee?

It is difficult for employer to unilaterally terminate employment contracts in Vietnam. Simple notice to terminate, however long, is not by itself permissible, unless, of course, the employee agrees. Otherwise, an employer may only terminate an employee's contract in limited and defined circumstances after notification to the Department of Labour when:

- (a) the employee is dismissed;
- (b) the employee repeatedly fails to perform the work required as per the contract;
- (c) the employee suffers illness or injury and remains unable to work after having received treatment for a period as stipulated by law;
- (d) reasons of force majeure force the employer to scale down production and reduce the number of employees ; or
- (e) the enterprise terminates its operation.

Dismissal is only permitted when the employee has committed one or more of the following acts prescribed by the Labour Code:

- (a) theft;
- (b) embezzlement;
- (c) disclosure of technological and business secrets;
- (d) any act that causes severe losses to the company's assets and interests;
- (e) repeating a breach while on a disciplinary sanction for an earlier breach;
- (f) repeating a breach after being demoted for the earlier breach; or
- (g) absence for 5 working days or more in a month or 20 working days in a year without justifiable reasons.

In all of the above, it appears that notice must be given; 45 days in respect of an indefinite term contract; 30 days for a contract of between 12 months and 36 months, and three days for contracts of a duration of less than 12 months.

14. ENVIRONMENTAL LAW

14.1 What environmental reports or studies must be submitted for investment projects in Vietnam?

Recent laws on the environment have been implemented in Vietnam, which forces investors to be considerate of the environment when entering Vietnam. There are two kinds of documents that anyone wishing to invest in Vietnam may be required to submit: an environmental impact assessment report (the “**EIA Report**”) and environmental protection undertaking (“**EPU**”). An investor,

depending on their investment fields and/or their scope of investment, may have to prepare either one or the other.

The content of the EIA Report must include: specifications of the project, operational technology of the project, measures to minimize the negatives effects on the environment, and undertaking to apply environmental protection measures during construction and operation phases, and opinions of the local People's Committee and the population community where the project is carried out.

The contents of the EPU report must include: the project site; the form and scale of production, trading and services, materials and raw materials used for the project; likely waste to be produced from the project; and undertaking to apply measures to minimize and treat wastes and comply with the laws on the environment. The undertaking must be registered with the local district People's Committee where the project is located before commencement of the project.

14.2 What are some of the possible environment related financial obligations an investor may face in Vietnam?

Investor may face the following environment related financial obligations:

- (a) Environment tax: Any organisations or individuals producing goods that have negative environmental and health consequences are subject to this tax.
- (b) Environmental protection fees: These must be paid by organisations or individuals discharging waste that could be harmful to the environment.
- (c) Natural resource exploitation and restoration funds: An organisation or individual that exploits natural resources must give a deposit to a credit institution operating in Vietnam or to the environment protection fund where the exploiting is taking place.
- (d) Environment protection funds: The State and each of its provinces have financial agencies to protect the environment. These agencies are funded by the government and aim to spend money to protect the environment from further damage.

15. BANKRUPTCY LAW

15.1 Who may file bankruptcy in Vietnam?

The bankruptcy law recognizes liquidation and re-organisation of enterprises, co-operative and alliances of cooperatives established and operating pursuant to the law. There is no individual bankruptcy. Moreover, certain enterprises are subject to special treatment under the bankruptcy law.

15.2 Which court has jurisdiction over a bankruptcy?

There is no separate bankruptcy court. Depending on where the business is registered it will be under the jurisdiction of the District People’s Court, People’s Court of in a province or a city under central authority. The Court of Appeal under the People’s Supreme Court has jurisdiction to review any appeal. The judge has the power to collect evidence, investigate, convene, and chair meetings of the creditors. Real estate is not treated differently than other assets in insolvency proceedings.

16. INTELLECTUAL PROPERTY

16.1 What laws protect intellectual property in Vietnam?

The new Civil Code and the Law on Intellectual Property codify the bulk of the regulations on intellectual property. Vietnam is also a signatory to the Paris Convention, the Madrid Agreement and the Stockholm Convention of 1967, Berne Convention for the Protection of Literary and Artistic Works, and the Geneva Convention for the Protection of Producers of Phonogrammes against Unauthorized Duplication of their Phonogrammes.

Industrial property and copyright are regulated separately. Industrial property is administered principally by Ministry of Science and Technology and copyright by the National Office of Intellectual Property.

16.2 Is registration required to protect intellectual property?

Yes, registration is generally required except for copyright. However, registration of copyright will create prima facie evidence for protection. Generally, for other intellectual property rights, the rights are protected upon registration on a first to file priority basis. Exceptions to the first to file rule are trade secrets and geographic indications and trade names which are entitled to legal protection upon fulfillment of their own conditions for formation and usage.

16.3 What is the duration of protection patent, copyright, trademark, industrial design and trade name?

Type	Brief Legal Description	Duration of Protection
Patent	A technological solution presenting worldwide novelty, an inventive step applicable in socio-economic fields	20 years from the date of application
Copyright	Rights of an organization or individual to works which such organization or individual created or owns – “works” means a creations of the mind in the	Authors’ life plus 50 years except for movies, photographs, plays, applied fine arts works which enjoy only 50 year protection for date

	literary, artistic or scientific sectors, expressed in any mode or form	of first publication
Trademark	Marks used to distinguish goods or services of different organizations and individuals. They may take the form of words, images or any combination presented in one or more colors	10 years from the date of application, renewable for successive 10 year periods without limit
Industrial Design Patent	The outward appearance of a product embodied in three dimensional configuration, lines, colours or a combination of such elements.	5 years from the date of application, renewable for an additional two periods of 5 years – up to a maximum of 15 years
Trade Name	The designation of an organization or individual used in business activities in order to distinguish the business entity bearing such trade name from other business entities in the same business sector and area	As long as its formation and usage

17. TECHNOLOGY TRANSFER

17.1 Who has the right to transfer technology?

The following organizations and individuals have the right to transfer the right to use (by licencing/sub-licencing) or the ownership of technology:

- (a) The owner of the technology;
- (b) Any organization or individual being permitted by the owner of the technology to transfer the use or ownership of the technology.

A technology transfer must be implemented on the basis of a written contract which must include specific terms required by law and the contract generally must be registered with the competent State body.

17.2 What kind technology may be transferred?

The legal objects of technology transfer are: technical know how; technical knowledge about technology in the form of technological plans, technical solutions, formulae, technical parameters, design drawings, technical plans, computer programs, and data information about the transferred technology; solutions for rationalization of production and renovation of technology, licences for special business rights and other objects as provided in the law on technology transfer.

In the case where the technology is an object with protected intellectual property rights, the transfer of such technology must be conducted together with the transfer of intellectual property rights in accordance with the law on intellectual property.

17.3 What technology transfers are prohibited?

The following technologies are not permitted to be transferred:

- (a) The technology does not meet the regulations of the law on occupational safety, occupational hygiene, ensuring the health of people, or on protection of the environment;
- (b) Technology that adversely affect culture, security and social safety;
- (c) Technology which fails to have technical, economic or social efficiency; and
- (d) Technology with serves national security or defence, but the permission of the authorised State body has not been obtained.

17.4 What approvals or procedures should be followed in order to transfer technology in Vietnam?

A technology transfer must be implemented on the basis of a written contract which must include specific terms required by law.

The technology transfer contract subject to registration with the competent State body in the following circumstances:

- (a) the transfer of foreign technology into Vietnam;
- (b) the transfer of Vietnamese technology outside of Vietnam; and
- (c) domestic transfer of technology within Vietnam where the value of the technology transfer contract exceeds VND 500,000,000 (approximately US\$ 31,250)

Registration must take place within 90 days of executing the technology transfer contract. The parties to a technology transfer contract may agree on the price where the transferee does not use State funds and where the transferee use State funds, it must be submitted to the competent State body for approval.

18. GOVERNMENT OF VIETNAM AND CHARTS OF MAJOR STATE AGENCIES

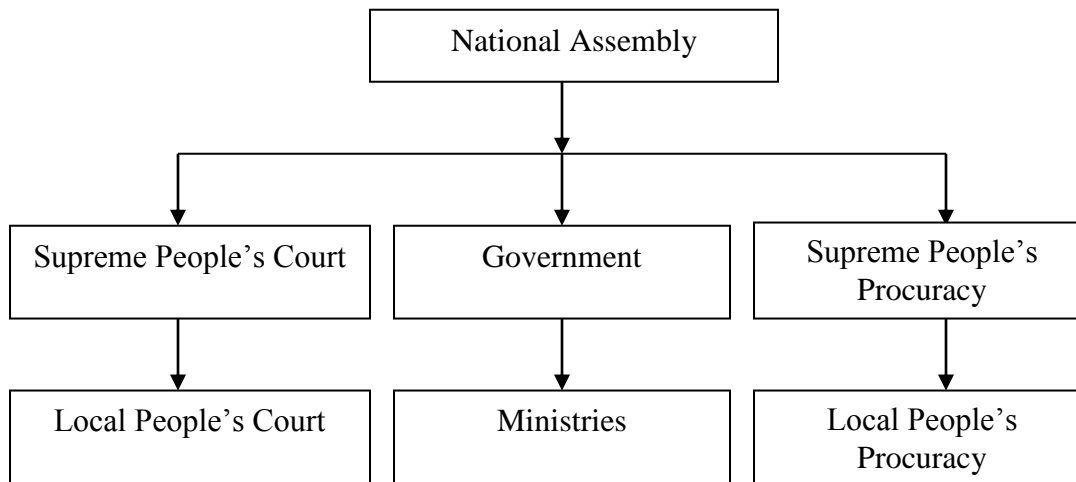
18.1 Overview of the government of Vietnam

The Socialist Republic of Vietnam is a single-party state. Only political organizations affiliated with or endorsed by the Communist Party are permitted to contest elections. The President of Vietnam is the titular head of state and the nominal commander in chief of the military of Vietnam, chairing the Council on National Defense and Security. The Prime Minister of Vietnam is the head of government, presiding over a council of ministers, currently composed of 5 deputy prime ministers and the heads of 22 ministries and commissions.

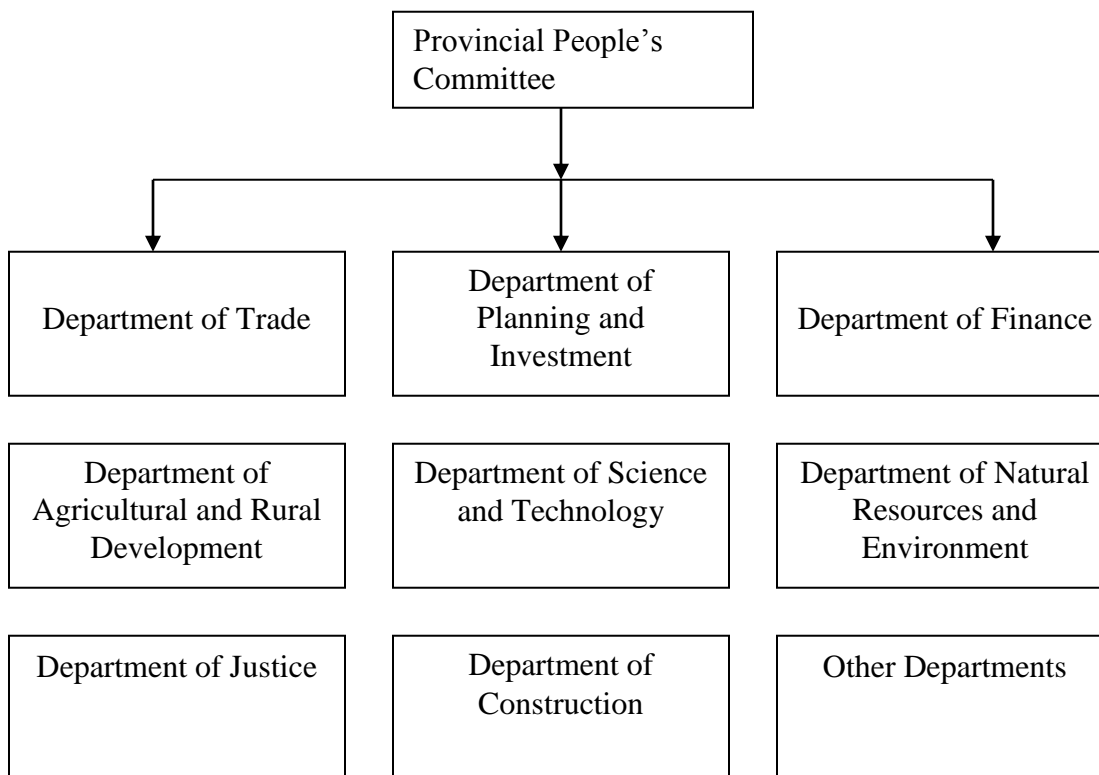
The National Assembly of Vietnam is the unicameral legislature of the government, composed of 498 members. It is superior to both the executive and judicial branches. All members of the council of ministers are derived from the National Assembly. The Supreme People's Court of Vietnam, which is the highest court of appeal in the nation, is also answerable to the National Assembly. The General Secretary of the Communist Party is perhaps one of the most important political leaders in the nation, controlling the party's national organization and state appointments, as well as setting policy.

Below in sections 18.1 through 18.3 are charts showing the general organizational structure of the Socialist Republic of Vietnam.

18.2 Central Authorities



18.3 Local Authorities



18.4 Government of Vietnam

