

VIETNAM

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SUCCESSFUL STRATEGIES FOR DOING BUSINESS IN ASIA





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SUCCESSFUL STRATEGIES FOR DOING BUSINESS IN ASIA

PREPARED BY MERITAS LAWYERS IN ASIA

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SUCCESSFUL STRATEGIES FOR DOING BUSINESS IN ASIA

This is the fourth revised edition of Successful Strategies for Doing Business in Asia, which was first published in 2006. Prepared by lawyers from 13 leading Meritas member law firms in the Asia region, this book targets foreign investors and business people looking to pursue investment opportunities throughout Asia. Each chapter contains general information and guidelines and offers practical insights as opposed to specific legal advice.

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The following currency notations are used throughout this book.

RMB	Chinese Renminbi	PHP	Philippine Peso
HKD	Hong Kong Dollar	SGD	Singapore Dollar
INR	Indian Rupee	TWD	New Taiwan Dollar
IDR	Indonesian Rupiah	THB	Thai Baht
JPY	Japanese Yen	USD	United States Dollar
KRW	Korean Won	VND	Vietnamese Đông
MYR	Malaysian Ringgit		

Please be aware that the information on legal, tax and other matters contained in this book is merely descriptive and therefore not exhaustive. As a result of frequent changes in legislation and regulations from country to country, the situations as described throughout this book do not remain the same. Meritas cannot and does not guarantee the accuracy or the completeness of information provided, nor the application and execution of laws as stated. Please do not rely solely on these materials without consulting with qualified legal advisors who are familiar with your particular areas of interest and geographic locations.

In 2008, the world experienced its worst financial crisis in 70 years. Today, while many countries and economic regions are still suffering, Asia continues to be a bright spot. Home to 3.8 billion people, Asia is playing a major role in driving the global economy back to healthier times. At first, China rebounded quickly, though this momentum has slowed somewhat recently. India exhibits signs of long-term growth potential, as do Singapore, Malaysia and others in Asia, but serious challenges remain.

For over 30 years I have worked on behalf of multinational companies in their pursuit of investment and business opportunities throughout Asia. What I have learned is that countries in the Asian region can appear similar and at the same time be remarkably different. While local legal systems and government regulations will vary, every country has universal opportunities and challenges that foreign investors will face. This book is designed to provide both practical and timely insights into the 12 most frequently-asked questions that potential investors in Asia should consider:

1. What role will the government play in approving and regulating opportunities for foreign direct investment?
 2. Is it possible for foreign investors to conduct business without involving a local partner? What corporate structure is most commonly used and best for foreign investors?
 3. How does the government regulate commercial joint ventures composed of foreign investors and local companies or individuals?
 4. What specific laws will influence the commercial relationship between local agents/distributors and foreign companies?
 5. In what manner does the government regulate merger and acquisition activities by foreign investors? Are there any specific areas or industries that are heavily restricted or completely prohibited to foreign investors?
 6. How do local labor statutes regulate the treatment of employees and expatriate workers?
 7. What role do local banks and government agencies play in regulating the treatment and conversion of local currency, repatriation of funds overseas, letters of credit, and other basic financial transactions?
 8. What types of taxes, duties and levies should a foreign investor expect to encounter in negotiating an inbound investment?
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9. Do comprehensive intellectual property laws exist, and do they provide the same levels of protection for foreign investors as local companies? Will local courts and tribunals enforce IP laws uniformly, regardless of the nationality of the parties?
10. If a commercial dispute arises, given the choice between local courts or an international arbitration venue, which would offer a more beneficial forum for fair dispute resolution for foreign investors?
11. What recommendations can you offer for how best to negotiate and conduct business in your country?
12. What practical advice can you share with investors who decide to do business in your country?

Thirteen Asian law firms within the Meritas alliance have generously contributed to this book. These firms are comprised of leading local lawyers who possess broad practical experience in advising international clients on how best to conduct business in their respective countries. Each law firm was presented with these “Twelve Questions” and invited to write a chapter providing an overview of the laws in their jurisdiction along with timely insights and advice. In a concise manner, this book hopes to provide readers with a clear understanding of the similarities and differences, strengths and weaknesses of countries in the Asian region.

One final thought: For those who are waiting for Asia to become more predictable or financially stable before pursuing business or investment opportunities, do not wait too long. Most successful multinationals are already actively conducting business throughout Asia. Those who delay will find themselves missing out on one of the greatest economic expansions in history. There are risks, certainly, but also great rewards for the savvy – and educated – investor.

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The Law on Enterprises (LoE 2014) was passed by the National Assembly on 26 November 2014. It took effect on 1 July 2015, and replaced the Law on Enterprises 2005. Together with the Investment Law 2014, also effective 1 July 2015, the LoE 2014 introduces a new legal framework to establish, organize and operate companies in Vietnam.

I. WHAT ROLE WILL THE GOVERNMENT OF VIETNAM PLAY IN APPROVING AND REGULATING FOREIGN DIRECT INVESTMENT?

The Ministry of Planning and Investment (MPI) is the central administrative body that oversees all investment activities, including foreign investment. The MPI is responsible for drafting legislation, developing policies, providing guidance and consultation, and coordinating with other authorities. The MPI is also the contact point for foreign invested enterprises (FIEs) should problems or questions arise.

However, it is important to understand that the Department of Planning and Investment (DPI) under provincial/city People's Committees directly administer foreign investment activities and issue investment registration certificates (IRCs) for almost every type of foreign investment within their province/city. An IRC is required for every foreign-invested investment project. Some projects, especially those that are termed "conditional," important projects or projects that are very large, require in-principle approval sometimes by the National Assembly, sometimes by the Prime Minister, or more often by the provincial/city People's Committees prior to the issuance of the IRC.

The Prime Minister establishes management boards to administer FIEs that are located in an industrial zone, high-tech zones, economic zones, or export processing zones (generally IZ). An FIE in an IZ is subject to the IZ's rules on import/export, environment, labor, etc., in addition to the general rules of the government and the MPI. An IZ management board is authorized to issue an IRC for a project within its administrative area.

After the IRC is issued, the foreign investor will apply for and obtain an Enterprise Registration Certificate (ERC) from the DPI. The IRC records the investment project that the foreign investor is permitted to conduct in Vietnam. Meanwhile, the ERC permits the foreign investor to establish and operate the company. The foreign investor can conduct business only after obtaining both the IRC and the ERC.

Other more specialized ministries may also be involved in foreign investment. For example, in high-tech projects, the Ministry of Science and Technology has an administrative role. It develops industry-specific policies for foreign investment and assures that the application of foreign investment regulations is in harmony with the industry's own rules.

2. IS IT POSSIBLE FOR FOREIGN INVESTORS TO CONDUCT BUSINESS IN VIETNAM WITHOUT A LOCAL PARTNER? WHAT CORPORATE STRUCTURE IS MOST COMMONLY USED AND BEST FOR FOREIGN INVESTORS?

In general, foreign investors and domestic investors are treated equally in the choice of direct investment forms and in the percentage of ownership. Conditions on certain forms of investment apply to every investor. However, there are some conditions that are imposed only on foreign investors. For example, in certain fields and industries a cap is placed on the percentage of foreign shareholding. Investment conditions are relaxed or changed. Currently, the cap on foreign capital contribution is as follows:

- In a public company (including a listed company): 49%
- In commercial services, the cap is determined in accordance with Vietnam's international undertakings. For example, under Vietnam's WTO commitments:
 - ▶ In telecommunications services, the cap is 49% for facilities based, 50% for Internet access services, 70% for certain virtual private networks and value-added services, and 65% for other non-facilities-based telecommunications services
 - ▶ In container handling services (except services provided at airports) the cap is 50%.
- The cap may be different in specialized regulations, such as the legislation on civil aviation, the legislation on publications and the press, etc.

In fields and industries that are not subject to any cap (which is in most fields and industries), foreign investors can conduct business without a local

partner. The available corporate structures for a wholly foreign owned enterprise are as follows:

- For a single investor, sole proprietorship or a one-member limited liability company;
- For two or more investors, two to 50 member limited liability company, partnership, or joint stock company.

The limited liability company is the corporate structure most commonly used by foreign investors.

3. HOW DOES THE VIETNAMESE GOVERNMENT REGULATE COMMERCIAL JOINT VENTURES COMPOSED OF FOREIGN INVESTORS AND LOCAL COMPANIES OR INDIVIDUALS?

Foreign investors are entitled to enter into joint venture contracts (JVC) with local firms. Parties to a JVC include:

- Foreign party, comprised of all foreign founding investors/shareholders, and
- Vietnamese party, comprised of all Vietnamese founding investors/shareholders.

The JVC must address the corporate form, business lines, charter capital, schedule to implement the project, term of the project, investment location, rights and obligations of the parties, rules of financial management, etc.

A joint venture is licensed for a specific project and term. The maximum term of a project is generally 50 years, with minor exceptions. A joint venture enterprise may concurrently carry out a number of separate projects.

In a few fields and industries such as banking, securities, and tourism, the Vietnamese party to a joint venture must itself be licensed to engage in the proposed business. In some fields and industries (e.g., maritime transport services, logistics, etc.), both the foreign investors and local investors (to a joint venture) must be separately licensed to carry out the proposed business.

The LoE 2014 provides detailed rules on the governance of each corporate form.

4. WHAT SPECIFIC LAWS WILL INFLUENCE THE COMMERCIAL RELATIONSHIP BETWEEN LOCAL AGENTS/DISTRIBUTORS AND FOREIGN COMPANIES?

All civil transactions, including trading and business activities, are generally governed by the Amended Civil Code (ACC). The relationship between a local agent and a foreign company is mainly governed by the Amended Commercial Law (ACL) and its implementing regulations.

There are no specific regulations that govern the relationship between a local distributor and a foreign company.

Generally, “distribution” and “trading” by an FIE are permitted, except for a list of specific products which are restricted to foreign investors (e.g., tobacco, pharmaceutical products, books, rice, etc.). The process to obtain a distribution license does not always go smoothly, because the government’s concern is that foreign companies will only set up distribution companies in Vietnam rather than develop or invest in manufacturing activities which bring more economic and social benefit to the country.

5. IN WHAT MANNER DOES THE VIETNAMESE GOVERNMENT REGULATE PROPOSED MERGER AND ACQUISITION ACTIVITIES BY FOREIGN INVESTORS? ARE THERE ANY SPECIFIC AREAS OR INDUSTRIES THAT ARE HEAVILY RESTRICTED OR COMPLETELY PROHIBITED TO FOREIGN INVESTORS?

Foreign investors’ acquisition of shares in a domestic company is regulated by Decision 88/2009/QD-TTg of the Prime Minister, dated 18 June 2009.

Generally, except for industries that are subject to foreign ownership caps as noted in Question 2, and for those state-owned enterprises in which the government wants control, as mentioned below, a foreign investor may acquire up to 100% of a domestic company.

Decision 37/2014/QD-TTg of the Prime Minister, dated 18 June 2014, identifies certain state-owned enterprises (SOE) in which the state will retain a majority interest. These include existing SOEs in the following sectors:

- Fulfillment of national defense and security tasks as regulated by the government
- Manufacturing and supplying industrial explosive materials
- Manufacturing and supplying toxic chemicals

- Transmitting, dispatching the national power system, multi-purpose hydropower and nuclear power particularly important to the economy and society associated with national defense and security
- Managing, operating the infrastructure system of the national and urban railway; controlling the national and urban railway transportation
- Managing, operating airports playing an important role in national defense and security; flight assurance services
- Assurance of maritime safety
- Providing public postal services
- Lottery business
- Publishing (excluding printing and publishing)
- Printing currency
- Map measurement serving national defense and security
- Managing, operating irrigation systems, inter-provincial and inter-district agricultural hydraulic engineering and stone revetments
- Planting and protecting watershed forest, protection forest, and specialized forest
- Credit extension that serves economic and social development
- Member enterprises that play an important role in business operations and strategy development holding business and technological secrets, and of which 100% of capital must be held by state-owned corporations to perform their tasks and discharge the main business lines

Generally, an SOE is equitized by way of a fairly regulated and structured auction process. The concept of a “strategic” foreign investor plays a role in an SOE. Selection of a foreign strategic investor is generally done on a competitive basis.

An acquisition involving a foreign buyer must be registered and approved by the licensing authorities. First, the target company needs to apply and amend its corporate registration certificate to reflect the new shareholding structure. After that, the foreign investor may apply for an IC. If the business scope of the target company is conditional/restricted as to foreign investors, the licensing procedure is another barrier for the foreign investor to overcome before an IC can be issued. In practice, the local licensing authorities may consult with several relevant ministries and/or authorities.

The acquisition of shares in the banking and insurance sectors is subject to the approval of the State Bank of Vietnam (SBV) and the Ministry of Finance. There are certain conditions that a foreign investor must meet in order to obtain the SBV's approval.

- **Credit Institutions** (including banks and finance companies).

The following transactions must be approved by the SBV:

- ▶ A foreign investor's acquisition of shares issued by a domestic bank
- ▶ Transfer of at least 5% of the voting shares of a domestic bank (essential holding)
- ▶ Transfer of shares of a domestic bank that results in a shareholder losing an essential holding or in a shareholder acquiring an essential holding
- ▶ Acquisition or transfer of at least 5% of voting shares of a financial company

- **Insurance Companies**

An acquisition or transfer of 10% or more of the charter capital of an insurance company must be approved by the Ministry of Finance.

6. HOW DO LOCAL LABOR STATUTES REGULATE THE TREATMENT OF EMPLOYEES AND EXPATRIATE WORKERS?

The Labor Code sets forth rules for the employment of both Vietnamese and expatriate employees who are working in Vietnam. In general, working conditions under the law and rights and obligations under a labor contract are the same for both Vietnamese and expatriate employees. There is an unresolved issue concerning whether Vietnamese labor rules apply to an expatriate who is working in Vietnam but is employed by a foreign company located offshore.

There are several distinctions between the employment of an expatriate and the employment of a Vietnamese citizen.

WORK PERMITS FOR EXPATRIATE EMPLOYEES

With limited exceptions, most expatriates who work in Vietnam are required to have a work permit. An expatriate is exempt from the work permit requirement in the following circumstances:

- S/he is a contributing member or owner of a limited liability company in Vietnam
- S/he is a member of a board of directors of a joint stock company in Vietnam

- S/he is either a head of a representative office or a project office of an international organization or nongovernmental organization in Vietnam (On a related note, a chief representative of a foreign trader's representative office is not included in this category and is required to obtain a work permit)
- S/he enters into and stays in Vietnam for a period less than three consecutive months in order to offer services
- S/he enters into and stays in Vietnam for less than three consecutive months to handle an emergency situation or is involved in a complicated technical or technological issue that affects production/business activities and cannot be adequately addressed within Vietnam
- S/he is a foreign lawyer having a certificate issued by the Ministry of Justice to practice law in Vietnam
- S/he is a foreign pupil/student who is studying in Vietnam (the employer must give seven days advance notice to the provincial labor authorities in such situations)
- S/he is seconded to Vietnam as permitted under Vietnam's WTO commitments
- S/he provides expert and technical consultancy services or undertakes other tasks with respect to research, formulation, evaluation, monitoring and assessment, management and implementation of a program or project using official development aid (ODA)
- S/he obtains a media license issued by the Ministry of Foreign Affairs
- S/he is appointed by a competent authority in a foreign country to teach at an international school which is managed by a foreign diplomatic office or an international organization in Vietnam
- S/he is a volunteer working in Vietnam on a voluntary basis and without entitlement to a salary in order to implement an international treaty to which Vietnam is a signatory
- S/he is a consultant, teacher or researcher at a university or vocational college and has a master degree or higher (or similar qualification), and works in Vietnam for a period not exceeding 30 days
- S/he is exempt from obtaining a work permit pursuant to international agreements to which Vietnam is a signatory

Vietnam made a commitment with respect to employee immigration in the tourism industry in 2009 – the ASEAN Mutual Recognition Arrangement on Tourism Professionals (MRA-TP). The MRA-TP takes effect in ASEAN in 2015. Under the MRA-TP, Vietnamese may work in ASEAN member countries and vice versa. It is likely that a significant number of tourism industry employees will enter Vietnam to work. Other industries may follow.

In order for an expatriate to be issued a work permit, an employer must prepare a plan to recruit expatriates for each job for which Vietnamese do not qualify, and file such plan 30 calendar days or more prior to the proposed recruitment. The plan must be filed and approved by the Chairman of the provincial People's Committee.

To receive a work permit, an expatriate employee is required to present a health certificate, police record, certificates of professional expertise, and education certificate, among other documents.

The maximum duration of a work permit is two years, and the work permit is no longer extendable. Once a work permit expires, a new dossier for a new work permit must be made.

COMPULSORY SOCIAL AND UNEMPLOYMENT INSURANCE FOR VIETNAMESE EMPLOYEES

Social insurance is compulsory for any Vietnamese employee who works pursuant to a labor contract of indefinite term or a term of three months or more. Both the employer and the employee are required to contribute to the state social security fund. Contributions are based on the employee's gross monthly salary, which is capped at 20 times the basic minimum salary. Currently, the employer contributes 18% and the employee contributes 8% of the employee's salary.

Unemployment insurance applies to a Vietnamese employee who has a labor contract either of indefinite term or a term of three months or more. The employer and the employees each contribute 1% of the employee's gross monthly salary calculated up to the salary cap mentioned above. Contributions are based on the employee's gross monthly salary and are also capped at 20 times the regional minimum salary.

Expatriate employees are not subject to compulsory social and unemployment insurance. However, both expatriate and Vietnamese employees are subject to mandatory health insurance coverage if they work under a labor contract of indefinite term or a term of three months or more. Contributions are based on the employee's gross monthly salary

and are also capped at 20 times the basic minimum salary. The employee contributes 1.5% while the employer contributes 3% of the employee's salary.

7. WHAT ROLE DO LOCAL BANKS AND GOVERNMENT AGENCIES PLAY IN REGULATING THE TREATMENT AND CONVERSION OF LOCAL CURRENCY, REPATRIATION OF FUNDS OVERSEAS, LETTERS OF CREDIT, AND OTHER BASIC FINANCIAL TRANSACTIONS?

Foreign investors and individuals can transfer capital or foreign currencies into Vietnam via foreign currency accounts opened at licensed credit institutions. There are generally no restrictions.

After fulfilling their tax obligations, foreign investors, whether individuals or entities, can transfer profits, royalties, principal and interest on foreign loans, capital and investment liquidation direct investment accounts.

Generally, access to foreign exchange is not difficult. Foreign investors have the right to purchase foreign currency. Foreign employees who have foreign currencies may make bank transfers or carry foreign currencies abroad. If foreign employees have lawful income in Vietnamese dong, they are entitled to convert Vietnamese dong into foreign currencies in order to transfer or carry them abroad. Proof of payment of tax may be required.

In the case of an indirect investment offshore, such as purchase of foreign shares, both Vietnamese and foreign investors must meet conditions set by the SBV. The SBV approves such indirect investment only case-by-case.

8. WHAT TYPES OF TAXES, DUTIES, AND LEVIES SHOULD A FOREIGN INVESTOR EXPECT TO ENCOUNTER IN NEGOTIATING AN INBOUND INVESTMENT IN VIETNAM?

The main taxes that may affect a foreign-invested enterprise are:

- Corporate income tax (CIT)
- Value added tax (VAT)
- Personal income tax (PIT)
- Import/export duties
- Foreign contractor tax (FCT)
- Special consumption tax (SCT)

We do not analyze each of them in detail. Briefly, Vietnam will gradually reduce import duties according to its international commitments and agreements. Vietnam applies the same VAT and CIT rates to both local and foreign entities.

CIT

The common CIT rate for foreign invested enterprises and local enterprises is 22%. This rate will fall to 20% on 1 January 2016. If a project meets specific conditions and criteria as set out in the Law on CIT and in the Investment Law, an investor may enjoy a lower tax rate (10%, 15%, 17% or 20%). Subject to location, sectors and industries, the maximum period to enjoy the preferential CIT rate will vary.

The CIT rate applicable to exploration and exploitation activities of oil, gas and other rare natural resources ranges from 32% to 50%.

Tax holidays. Subject to the nature, location and scale of a project, an enterprise may be entitled to a full tax holiday ranging from two years to four years commencing from the first year it has taxable income or from the date on which it receives a certificate of high-tech enterprise or a certificate of agricultural enterprise with high-tech application.

Tax reduction. A further 50% tax reduction applies to certain projects. The period of reduction can be from four years to nine years commencing from the year in which the full tax holiday ceases.

VAT

There are three rates: 0%, 5% and 10%. In most cases, the rate is 10%. The 0% rate applies to exported products and services.

PIT

For tax purposes, a Vietnamese tax resident is a person who:

- Stays in Vietnam for 183 days or more in a calendar year or within a period of 12 consecutive months or has lease contract(s) with an aggregate term of 183 days or more within a tax assessable year; or
- Has registered his/her residential address in Vietnam; or
- Has a temporary residence card.

A Vietnamese tax resident must pay income tax on his/her worldwide income. The tax brackets are progressive and the top bracket, which applies to monthly income over VND80 million (USD1.00=VND21,500), is 35%.

If a person is not a Vietnamese tax resident as defined above, his/her income is taxed on the basis of gross income generated in Vietnam at the following flat rates:

RATE	INCOME FROM
1%	Trading in goods
5%	Services
2%	Manufacturing, construction, transportation and other businesses
5%	Royalty, franchising fees (except contractual income less than VND10 million)
20%	Salaries, remuneration generated from Vietnam (regardless of place of payment/receipt)
5%	Capital investments (dividends/interest)
10%	Inheritance
0.1%	Sale of securities/transfer of interest in an entity
2%	Sale of real estate

IMPORT/EXPORT TARIFF

Vietnam applies both an *ad valorem* and a specific rate system. Depending on each kind of goods as identified in the HS code, the preferred tariff rate and the specific tax amount may vary. Import duties are subject to frequent change. In addition to the preferred tariff, Vietnam also accords a better tariff to certain goods that originate from a country that has a trade agreement with Vietnam (e.g., ASEAN Free Trade Agreement, China-ASEAN Agreement, Bilateral Trade Agreement with the U.S., etc.).

Under WTO, Vietnam committed to revise its duty rates. Generally speaking, Vietnam committed to reduce import duties within a phase-out period and has generally completed the phase-out.

Export duties are charged only on a few items, basically natural resources such as minerals, forest products, and scrap metal. Rates range from 0% to 45%. The price used for computation of export duties is the FOB price, i.e., the contract selling price of goods at the port of departure excluding freight and insurance costs.

FCT

The FCT applies to a foreign entity or individual (foreign contractor) that does business in or receives income from Vietnam on the basis of an agreement between the foreign contractor and a Vietnamese party or

between the foreign contractor and a foreign subcontractor. The FCT liability is also imposed on:

- A foreign contractor that sells goods into Vietnam under the Intecoterm delivery clause (with a few exceptions); and
- A foreign contractor that receives compensation in excess of its actual damages.

The rules on calculation of taxes for a foreign contractor that is an entity are vastly different from the rules applicable to a foreign individual contractor. Briefly, VAT and CIT apply to an entity foreign contractor. VAT and personal income tax rules applicable to a foreigner as discussed above also apply to a foreign individual contractor. An entity foreign contractor can pay tax in one of three methods (declaration method, direct method, or the hybrid method).

If an entity foreign contractor fails to meet conditions to apply the declaration or the hybrid methods, it must apply the direct method. In such case, the Vietnamese party must withhold the FCT before paying the entity foreign contractor. Depending on the nature of the transaction and services, each component of the FCT—VAT and CIT—may vary. However, generally, the combined rate is about 10%.

SCT

There are 11 goods (e.g., cigarettes, beer, alcohol, automobiles, airplanes, yachts, etc.) and six services (dancing halls, karaoke bars and massage parlors, casinos and gaming with prizes, betting businesses, golf businesses, and lottery businesses) that are subject to SCT. The SCT rates range from 10% to 70%. With effect from 1 January 2016, the SCT rates imposed on certain goods (e.g., cigarettes, beer and alcohol) will be increased. The highest rate will be 75%.

9. DO COMPREHENSIVE INTELLECTUAL PROPERTY LAWS EXIST IN VIETNAM AND DO THEY PROVIDE THE SAME LEVELS OF PROTECTION FOR FOREIGN INVESTORS AS LOCAL COMPANIES? WILL LOCAL COURTS AND TRIBUNALS ENFORCE IP LAWS UNIFORMLY, REGARDLESS OF THE NATIONALITY OF THE PARTIES?

Vietnamese law on the registration of intellectual property rights (IPRs) conforms to international norms.

The IPRs recognized in Vietnam are as follows:

- Copyright of literary, artistic, and scientific works; copyright-related rights of performances, audio and visual fixation, broadcasts and encrypted program-carrying satellite signals;
- Industrial property rights comprised of inventions, industrial designs, layout designs of integrated circuits, trade secrets, trademarks, trade names, and geographical indications;
- Plant varieties and plant reproductive materials.

DOMESTIC LAWS AND INTERNATIONAL AGREEMENTS

Vietnam has a number of comprehensive and modern laws on the administration and regulation of IPRs. Vietnam is a member of most international conventions and treaties, including the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).

ENFORCEMENT OF IPRs IN VIETNAM

When the intellectual property rights of an entity are infringed, the entity can follow either administrative or judicial procedures in enforcing its rights. However, Vietnam's protection of IPRs may not satisfy the expectations of manufacturers and IPR holders. Enforcement often needs to be conducted promptly; however, delays frequently occur due to time-consuming procedures and the lack of human resources of enforcement bodies. Those factors make the effort to stop counterfeiting, especially against small counterfeiters, ineffective.

One matter that remains unresolved is the lack of a mechanism to recognize well-known (or famous) marks in Vietnam. When an application for registration of a mark by the owner of a well-known trademark is rejected because it has already been applied for or registered, the owner may attempt to have its trademark recognized by filing a complaint with

the National Office of Industrial Property (NOIP). The complaint must be accompanied by required documents and other evidence. If the complaint is successful, the owner's mark will be recognized as well-known. In such cases, the prior application or registration will be rejected or cancelled. However, there is no certificate granted to the owner to certify that its mark is a well-known mark, which leaves the mark open to future challenge.

While there is no legal difference in enforcement of IPRs on behalf of foreign or domestic holders, far more foreign than domestic IPR holders seek enforcement. Regardless of the IPR holder's nationality, enforcement is weak. However, greater numbers of domestic IPR holders are seeking to enforce their rights. Monetary fines have recently increased, but are still not adequate to prevent initial and recurring violations.

10. IF A COMMERCIAL DISPUTE ARISES, GIVEN THE CHOICE BETWEEN LOCAL COURTS OR AN INTERNATIONAL ARBITRATION VENUE, WHICH WOULD OFFER A MORE BENEFICIAL FORUM FOR FAIR DISPUTE RESOLUTION FOR FOREIGN INVESTORS?

A dispute involving a foreign investor or an FIE can be settled by any one of the following methods:

- Vietnamese courts
- Foreign or international arbitration
- An arbitration panel selected by the parties

Of note, only a Vietnamese court can settle a dispute involving real estate.

It is difficult to recommend a specific forum to resolve disputes for all types of commercial transactions. No forum is particularly or obviously superior to another. The advantages and disadvantages of a particular dispute resolution forum will vary depending on the nature of the transaction and the parties. The following matters relating to Vietnamese commercial arbitration are subject to the court's jurisdiction:

- Appointment or change of arbitrators
- Application, change, or cancellation of injunctive relief
- Cancellation of an arbitral award
- A claim against an arbitral award based on the validity or enforceability of the arbitration agreement, or the authority of the arbitration tribunal
- Admissibility of evidence

- Invitation of witnesses
- Registration of an arbitral award
- Other civil matters as stipulated by laws

There are grounds to believe that arbitration offers foreign investors a better forum for dispute resolution. Arbitration can take place in Vietnam or abroad. Arbitration procedures are more simple and straightforward than litigation. The parties have a hand in selecting the arbitrators. The arbitral award is final and binding. The parties are entitled to select the applicable law, settlement procedures, language of arbitration, place of arbitration, etc. In addition, after a recognition process by a competent court, the arbitral award can be enforced. This means that an arbitral award can be enforced in the same way as a judgment of a court.

Judicial dispute resolution is more conventional, but it is not without problems. A judgment issued by a foreign court—except for courts in a few former Soviet-bloc countries—cannot easily be enforced. If the court is domestic, it may not be impartial, especially if one party is state-owned.

Whether an arbitral award or a court judgment, there is a low rate of enforcement in Vietnam. Enforcement is a large hurdle to overcome.

II. WHAT RECOMMENDATIONS CAN YOU OFFER FOR HOW BEST TO NEGOTIATE AND CONDUCT BUSINESS IN VIETNAM?

It is difficult to provide general “one-size-fits-all” advice, as each business situation is unique. However, the following suggestions may be helpful.

- Research and learn the local market, its legal framework, tax system, and local partners. These are preliminary and necessary steps in developing a good and feasible business plan.
- Cooperation with a local partner is an option for foreign investors to gain access to the market, especially where the proposed business is conditional or is restricted to 100% foreign ownership.
- Participating in social events helps develop social connections. In Vietnam, trust is essential. Commercial deals are often done after a social relationship has been established.
- Being patient is a factor in successful negotiations. The negotiation will be long and take numerous turns if it involves a state-owned enterprise. Alternative proposals, based on realistic and mutually beneficial solutions, should be explored.

12. WHAT PRACTICAL ADVICE CAN YOU SHARE WITH INVESTORS WHO DECIDE TO DO BUSINESS IN VIETNAM?

Impatience is a factor in many unsuccessful deals. Foreign investors should take the time to find a compatible partner and to understand the market and environment. This process can be time-consuming but worthwhile in the long run. It may be desirable to set up a representative office in the country for purposes of facilitating initiatives, arranging logistics, promoting relationships with local partners and potential customers, and establishing connections with relevant governmental authorities.

The selection of a consultant or consulting firm is also important. For matters involving governmental agencies, it may be desirable to hire a consulting firm that has experience with those particular ministries. For technical matters, there are several international firms that provide technical assistance concerning the licensing process and other matters. Engaging a firm that has commercial expertise, experience in dealing with government agencies, technical knowledge, and deep insight into the industry should help investors in the longer term.

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Russin & Vecchi has a long history in Vietnam. From 1967 to 1975, it was the only foreign law firm in Vietnam. At that time, the firm represented multinational banks, petroleum, construction, and manufacturing companies. Today, many of those companies have returned to Vietnam, and are again represented by the firm.

The firm reopened its office in Ho Chi Minh City in January 1993 to provide legal advice on foreign investment and commercial matters. The Hanoi office was opened in April 1994 to provide similar services, and to meet the particular needs of clients whose activities are regulated by the Vietnamese government.

Russin & Vecchi brings a deep knowledge of Vietnamese law, practice and culture. Russin & Vecchi's objective is to provide its clients with practical advice and solutions.

Legal Services: Much of the firm's work is performed for foreign companies as they begin or expand their operations in Vietnam. These areas include merger and acquisition, foreign direct investment in manufacturing, power and other sectors; business operations; banking; agency and distribution; representative offices and branches; intellectual property; franchising; tax planning; hotels, resorts and property development and complex M&A.

Attorneys: The firm's offices are staffed by Vietnamese law graduates trained in local law, and by expatriate attorneys familiar with international legal standards and practice. The staff is multilingual and able to communicate in English and Vietnamese.

Integration with other Russin & Vecchi offices: The Vietnam offices work with other Russin & Vecchi offices in Asia, Washington, D.C., New York and elsewhere. Each office is a separate professional entity, and attorneys in other offices provide legal services upon specific arrangements, and in order to meet a client's needs. In such cases, the firm is able to utilize the expertise available in other offices in order to address each client's needs. This results in efficient utilization of the firm's lawyers, and keeps rates competitive, thus reducing costs.

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