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# 1 Introduction

Over the past five years, Vietnam economy has consistently been of the fastest growing in the world. GDP was 8.5% in 2007 and 6.2% in 2008.

Vietnam has been a favoured location for manufacturers of products such as clothing, footwear and electronics in recent years. Foreign companies were quick to recognise Vietnam's advantages in the form of low cost, political stability, sound policies and good transportation networks. By the end of August 2007, Vietnam had 150 industrial zones attracting foreign manufacturers mainly from Singapore, Taiwan, Korea, Japan and China.

While economic growth is to be admired, high inflation and a weak stock market in 2008 has caused concerns amongst investors. In October 2008 the Vietnamese government announced that fighting inflation is its highest priority and they will continue to pursue tighter financial and fiscal policy, delay or postpone unnecessary investment projects, tighten control on loans for real estate development and stocks and promote exports. Even in this period of worldwide economic recession, the growth is predicted to be 5% in 2009.

There is a saying that in every crisis, there are opportunities. The tightening of liquidity and falling prices in Vietnam present significant opportunities to foreign investors. With its accession to the World Trade Organisation, competitive manufacturing base, growing domestic market, large work force and lower labour cost compared to its neighbours, Vietnam will continue to be attractive to foreign investors who have a longer term view.

This client paper is intended to provide an overview of the legal framework and regulatory procedures that are relevant to foreign investors considering doing business in Vietnam. It is an introductory guide only and not intended to provide legal advice. If you would like any further information about particular legal issues please contact a member of our Vietnam team.

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# 2 Legal System

## Recent Reforms and Developments

The legal system in Vietnam is socialist in nature. However Vietnam is quite different from other socialist countries as it also adopts characteristics of other countries with civil legal systems. The law in Vietnam is sourced from legislation (Codes and Laws) enacted by the National Assembly, and Ordinances issued by the Standing Committee of the Standing Assembly, where the former is not in session.

Vietnam has undergone many significant and positive changes in their political, diplomatic and economic relations with other countries. This is reflected in, for instance, Vietnam's improved relations with the United States and its entry as a full member of ASEAN.

In recent years, Vietnam has promulgated over 90 legal documents associated with foreign direct investment activities and has executed agreements with 28 countries that promote investment. This demonstrates Vietnam's clear determination to create a better, more attractive regulatory framework for foreign direct investment activities. Some major international developments enhancing Vietnam's global economic competitiveness, besides those already mentioned, include the

suspension of the US economic embargo (February 1994); execution of the Bilateral Trade agreement with the US (December 2001); and entry into the WTO (January 2007).

Vietnam's accession to the WTO provides by far the most concrete evidence (if any was needed) of Vietnam's gradual integration into the global economy and its growing competitiveness with neighbouring countries. Vietnam's commitments to reduce tariffs under the GATT regime, its determination to liberalise markets for foreign investments and its devotion to WTO standards in areas such as the rule of law, intellectual property protection and international commercial relations, illustrate clearly that Vietnam's legal and investment environments are slowly but surely maturing.

### **New laws and regulations to boost foreign investment**

All newly established foreign invested and domestic invested enterprises are now governed by the Enterprise Law and Investment Law. These laws aim to promote equal treatment of foreign and domestic companies. Moreover, these new laws allow foreign investors to:

- establish branch and representative offices in the country
- establish legal entities (i.e. limited liability company, shareholding company, partnership, or sole proprietorship) either as a fully foreign invested entity or as a joint venture with domestic players
- invest through use of the contractual forms, such as Business Cooperation Contracts ("**BCC**"), Build-Operate-Transfer ("**BOT**"), Build-Transfer-Operate ("**BTO**"), Build-Transfer ("**BT**") and Build-Own-Operate ("**BOO**") arrangements.

Previously, the legal system in Vietnam has been criticised for its incompleteness and inconsistencies. In order to overcome this problem and to create a more attractive playing field for foreign investors, the Vietnamese government has promulgated many new laws and at the same time, amended existing laws to bring them in line with international standards. As a result of these efforts, new laws and regulations relating to intellectual property, tax, foreign exchange, securities, arbitration, employment, construction, environmental protection, land and real estate, banking, insurance and bankruptcy have been enacted. These are discussed in more detail in the later sections of this paper.

Laws and regulations made at lower levels must not conflict with those made at higher levels, and generally only serve to implement central-level enactments. Regulations, rules or directives are, however, occasionally enacted or issued at the provincial level in the first instance on a "trial" basis and, after sufficient experience has been gained, enacted on a national basis.

In spite of the uniformity attributable to centralization, there is a great deal of variation in local practice and interpretation where central policy is silent or unclear. Accordingly, legal analysis should always be tailored to conditions in the relevant domestic target location(s).

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### 3 Setting up a Business in Vietnam

The original Law of Foreign Investment in Vietnam was replaced by the Unified Law on Enterprises ("**Enterprises Law**") and Common Law on Investment ("**Investment Law**") which were passed in 2005 and became effective on 1 July 2006, to govern foreign investments in Vietnam. These new laws, like their predecessors, allow foreigners to invest in most sectors of the economy, particularly in sectors of export-oriented products, agricultural activities, new materials, high technology, research and development, environment protection amongst others.

Under the Enterprises Law and Investment Law, foreign investors are entitled to select one of the following modes of investment:

- (i) Business cooperation contract ("**BCC**");
- (ii) Limited liability company ("**LLC**"), with one or more members;
- (iii) Joint stock company ("**JSC**");
- (iv) Partnership; and
- (v) infrastructure contracts such as, Build-Operate-Transfer ("**BOT**") contracts.

Different considerations, such as those relating to governance regime, financing possibilities and relevant disclosure requirements, apply when selecting the appropriate form of investment in Vietnam. Further, different operational aspects of the entity would present themselves, depending on the commercial vehicle chosen, namely either as a joint stock company or limited liability company.

Details concerning each vehicle are described in the schedule below:

Vehicle	Description
<b>BCC</b>	<ul style="list-style-type: none"> <li>• Partnership signed by two or more parties with the aim of conducting one or more business operation(s) in Vietnam.</li> </ul>
	<ul style="list-style-type: none"> <li>• Mutual allocation or responsibilities and sharing of profits.</li> </ul>
	<ul style="list-style-type: none"> <li>• Not a separate legal entity – contractual rights and obligations of the parties are shared.</li> </ul>
	<ul style="list-style-type: none"> <li>• A Cooperation Board (with equal representation by the parties), may be set up if needed, to coordinate daily operation of the BCC.</li> </ul>
<b>LLC with one or more members</b>	<ul style="list-style-type: none"> <li>• A LLC with a single investor (i.e. member) or pursuant to a joint venture contract signed by one or more investors (either local or foreign investors).</li> </ul>
	<ul style="list-style-type: none"> <li>• A LLC is not permitted to issue shares and the number of investors must be within the range of 2 to 50.</li> </ul>
	<ul style="list-style-type: none"> <li>• A LLC obtains its legal entity status, effective from the date of its business registration certificate.</li> </ul>

Vehicle	Description
	<ul style="list-style-type: none"> <li>A 100% foreign owned enterprise with more than one investor, and foreign invested joint venture enterprises, may establish a LLC with more than one member (i.e. a multi-member LLC ("MMLLC")).</li> </ul>
	<ul style="list-style-type: none"> <li>A MMLLC is managed by a Members' Council and the Chairman of the Members' Council or the General Director is the legal representative of the company.</li> </ul>
	<ul style="list-style-type: none"> <li>In a one member LLC ("OMLLC"), there is a single investor, such as a 100% foreign owned enterprise with only one parent company.</li> </ul>
	<ul style="list-style-type: none"> <li>The General Director of an OMLLC represents the company (he/ she must permanently reside in Vietnam and must authorise another to act on his/ her behalf if he/ she travels abroad for 30 days or more).</li> </ul>
	<ul style="list-style-type: none"> <li>In an OMLLC, a Members' Council may be established to coordinate the operations. Although this may also be done by the Board of Directors.</li> </ul>
<b>JSC</b>	<ul style="list-style-type: none"> <li>Company established by at least three investors (local or foreign) and may incorporate both entities and individuals.</li> </ul>
	<ul style="list-style-type: none"> <li>Legal entity that must have ordinary shares and may have preference shares. A JSC can issue shares to the public.</li> </ul>
	<ul style="list-style-type: none"> <li>The highest decision making body is its General Meeting of shareholders. A JSC is managed by a Board of Management and a general director.</li> </ul>
	<ul style="list-style-type: none"> <li>The Chairman of the Board of Management or the General Director is the legal representative of the JSC and must permanently reside in Vietnam and must appoint another person to act if he/ she is abroad for 30 days or more.</li> </ul>
	<ul style="list-style-type: none"> <li>Establishment of an Inspection Committee is required, when there are more than 11 individual shareholders, where one shareholder possesses more than 50% of the total share capital.</li> </ul>
<b>Partnership</b>	<ul style="list-style-type: none"> <li>An enterprise with no less than 2 individual partners as joint owners of the company (with unlimited liability) and in addition, if relevant, one or more limited liability partners.</li> </ul>
	<ul style="list-style-type: none"> <li>Limited liability partners are not allowed to participate in daily management or to carry out business activities on behalf of the partnership.</li> </ul>
	<ul style="list-style-type: none"> <li>Partnerships are regarded as a separate legal entity in Vietnam.</li> </ul>
	<ul style="list-style-type: none"> <li>Business of the partnership is managed by the Partners' Council.</li> </ul>
<b>BOT contracts</b>	<ul style="list-style-type: none"> <li>These are popular investment vehicles for foreign investors. Please refer to the later section on Infrastructure for information on BOT arrangements.</li> </ul>

In addition to the vehicles mentioned above, foreign investors may wish to establish representative and branch offices in Vietnam.

### **Representative offices**

Representative offices ("RO") are not separate legal entities under the law of Vietnam. Typically, an RO's activities are restricted to business promotion, identification of and accelerating trade opportunities and supervision of the execution of contracts signed between its parent and local partners (although the RO may sign on behalf of their parent). Further, ROs are not permitted to generate profit from operations in Vietnam, make or receive payments directly or purchase local goods directly for export or distribute imported products on behalf of their head office. However, ROs are permitted to lease office space, employ staff and execute contracts as long as this falls within the boundaries of their permitted activities. The license of a RO has a term of five years, although it may be extended.

Despite these limitations, ROs are the most popular vehicle chosen by foreign investors to establish a presence in the country. To establish a RO, the foreign company must apply for a license issued by the Provincial Trade Department, and complete post licensing procedures including notice of operations and obtaining a seal. No taxes are applicable to RO's operations, besides personal income tax payable by their staff.

### **Branch Office**

Foreign banks, auditing firms, law firms and foreign economic organisations can establish branch offices ("BO") in Vietnam. Unlike ROs, BOs are permitted to conduct business activities, execute contracts, and perform all other commercial activities for which they are licensed. The Ministry of Trade is the body with the function to grant, amend or withdraw licenses for BOs.

A BO is permitted to trade products and carry out trading related activities according to the laws of Vietnam. Typically, they are permitted to: lease office space; recruit staff; execute contracts and carry out trading activities in Vietnam in accordance with their license; open bank accounts; remit profits abroad; and have a company stamp in their own name. BOs are subject to taxes.

### **Registration and Approval Requirements**

An Investment Certificate ("IC"), which also serves as the business registration certificate, must be obtained by a foreign investor for its Vietnam projects. The IC sets out the scope of the permitted business activities, total share capital and the license for the investment project. A foreign invested enterprise may operate as a multi-purpose investment vehicle and carry out more than one investment project.

Typically, a foreign invested project with investment capital below VND 300 billion (not a 'conditional' investment project) is only required to undergo registration procedures to receive an IC, whereas a project with investment capital above that amount (i.e. 'conditional' investment project) would be subject to an additional evaluation process.

Certain important national projects (e.g. airports, seaports) and infrastructure projects with investment capital over VND 1.5 trillion are approved by the Prime Minister's office. If less than VND 1.5 trillion, the provincial level's People Committees or, where investment is carried out within industrial zones, the Board of Management of the relevant special trade area, have authority to grant an IC for the project.

### **Incentive to invest in Vietnamese Projects**

In seeking to attract foreign investment, in particular industries and geographical areas, the Vietnamese Government has introduced various investment incentives, such as tax concessions and cuts on land use fees, to encourage investments projects in Vietnam.

Typically, investment incentives are provided to sectors associated with:

- (i) Manufacture of new materials, high tech or bio-tech products, and information technology;
- (ii) Agricultural and environmental protection and development through use of advanced technology;
- (iii) Breeding, growing, rearing and processing of agricultural, forestry and aquaculture products;
- (iv) Labour intensive industries;
- (v) Large scale infrastructure projects;
- (vi) Development and educational training of the Vietnamese public;
- (vii) Development of the local ethnic crafts and culture; and
- (viii) Investment projects located in remote or underdeveloped areas (as determined by the Vietnamese Government).

Further, investment incentives are also available, depending on the nature and scope of the project. Examples of such incentives include - temporary business income tax reduction (or exemption) for the first profit making year; preferential business income tax rate of 10 to 20%; right to open off-shore bank accounts for borrowing and debt servicing; ability to convert the Vietnamese currency earnings to repay loans and to distribute profits to foreign investors; free or reduced land rental; cuts on import duties on specific products (e.g. equipment, machinery, fuel and raw materials); loss transfer; and depreciation on immovable assets.

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## **4 Special Trade Zones**

Foreign Investors in Vietnam may benefit from several special trade and customs areas. The three main areas are export processing zones, industrial zones and high tech zones. These zones are established by a decision of the Government or the Prime Minister, and are governed by Decree 29/2008/ND-CP (the "EZ Decree") which took effect on 10 April 2008. Enterprises within them may be licensed for a term of 50 years, or longer, subject to conditions.

Enterprises operating in the zones must be limited liability companies under Vietnamese law and subject to Vietnamese foreign investment legislation.

### **1.1 Export Processing Zones**

Export Processing Zones ("EPZ") cater for enterprises involved in the manufacturing or processing of export goods and the supply of export related services, and are managed by the Board of Management of the company which established the EPZ. Export processing enterprises can also be established in Industrial Zones or High Tech Zones.

According to the EZ Decree, investors with investment projects in EPZs are entitled to incentive policies applicable to areas included in the list of areas with specially difficult socio-economic conditions and other incentive policies, such as tax reduction and lower corporate income tax, in accordance with the law.

Additionally, both Vietnamese and Foreign employees are given a 50% reduction in personal income tax if they are working in an EPZ, and the cost of building, maintaining or renting apartments and infrastructure buildings in order to serve employees working in the EPZ is deductible from the income tax of enterprises.

## 1.2 Industrial Zones

Industrial Zones ("IZ") focus on enterprises specialising in the production of industrial goods and the supply of industrial manufacturing services.

The establishment and management of an IZ follows the same process as used for an EPZ. IZs are open to companies engaged in:

- Construction, manufacturing, processing or assembly of industrial products;
- Development of, and trading in, patents, technical know-how and technological process;
- Scientific technological research, and
- Provision of services to support industrial production.

Both foreign invested and domestic enterprises may operate in IZs, with both being eligible for the same incentives as enterprises operating within EPZs.

## 1.3 High-Tech Zones

High-Tech Zones ("HTZ") are created to develop high-tech technology within Vietnam, both through research and development and technology transfer. As such, they are reserved only for high tech enterprises. Enterprises operating within these zones are eligible for the same incentives as IZs and EPZs.

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# 5 Business-Related Laws

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

## Enterprise Law

The Enterprise Law sets the framework for Vietnam's corporate law and designates the types of corporate vehicles (limited liability enterprises, joint stock enterprises, partnerships and private enterprises) investors may establish to carry out their investment projects. Foreign investors are no longer restricted to establishing limited liability enterprises. As a continued effort to attract foreign direct investment into Vietnam, decree 139/2007/ND-CP was issued to provide specific guidelines on the establishment, management, operation, restructuring and liquidation of enterprises operating in Vietnam to prevent arbitrary interference by several ministries and local authorities. There are restrictions remaining in a number of business sectors but they will be phased out in accordance with Vietnam's WTO market opening roadmap.

By the deadline of 30 June 2008, only a few of the 6,000 or so foreign-invested enterprises have re-registered their business under the new enterprise law to enjoy better incentives in line with the country's WTO commitments. Enterprises failing to re-register have to comply with the business scope and duration of operation certified in its investment license issued under the old laws.

### **The Investment Law**

The Investment Law replaces the 1996 Foreign Investment Law and the Law on Promotion of Domestic Investment and serves as a roadmap for the conditions and procedures for investment in Vietnam. It regulates how an investment in Vietnam may be approved, the rights and obligations of investors, the protection of the investors' legal rights and investment incentives. In particular, an investment certificate is issued to an investor who invests "directly" in Vietnam, and licenced investment may not be nationalized.

The State also encourages foreign investment in areas with difficult socio-economic conditions by establishing IZ, EPZ and HTZ.

According to Decree No.90/2007/ND-CP, foreign business entities without a physical presence in Vietnam, upon application for a certificate for the right to export and import, are now permitted to engage in import and export activities under certain conditions.

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## **6 Vietnam Civil Code and Commercial Law**

### **Civil Code**

The areas covered by the 2005 Civil Code and its implementing regulations are wide ranging and govern not only civil relations but also certain trade, business and labour relations. The Code covers principles of ownership and protection of property rights, measures of security that may be taken over property, principles of performance of civil contracts, transfer, exchange, mortgage and inheritance of land use rights, intellectual property rights and technology transfer.

### **The Commercial Law**

The 2005 Commercial Law has a wide scope governing all profit-making activities, including transactions involving the sale or purchase of goods and other related activities and those relating to the commercial provision of services, investment, trade promotion and other commercial activities. The concept of goods is extended to cover all types of movable assets, including future assets and all assets attached to land. The concept of commercial services has been extended to include all services that are not prohibited by law.

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## **7 Accounting and Auditing**

### **Accounting**

According to the Law on Accounting and its implementing legislation, subject to application for an exemption, all foreign invested enterprises must use the Vietnamese accounting system and Vietnamese language in their bookkeeping. This causes some concern among foreign investors as the Vietnamese system does not always adopt commonly accepted international principles of accounting. Foreign invested enterprises must also employ a Vietnam-qualified chief accountant for their accounting function.

### **Auditing**

Under Decree 105 on Accounting, enterprises such as foreign invested enterprises, listed companies, banks and certain other financial institutions, insurance companies and state-owned enterprises are required to undergo an annual audit of their accounts.

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## 8 Dispute Resolution

Vietnam's court system remains underdeveloped and it can be cumbersome and time-consuming to obtain a court ruling in Vietnam. The court hierarchy of Vietnam has three tiers, namely the Supreme Court, Provincial Courts, and District Courts. Most members of the judiciary are also members of the Communist Party and will seek its advice on sensitive matters. In practice, therefore, resolution of disputes by mediation and negotiation is the preferred approach.

Disputes may be referred to arbitration if a local court is not desirable and it is important to ensure that a proper arbitration agreement is included in the contract. Foreign investors in Vietnam often prefer to arbitrate in either Hong Kong or Singapore for the reason of their close proximity, developed legal systems and availability of skilled arbitrators and legal professionals.

Vietnam has been a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards since 28 July 1995. The Civil Procedure Code sets out the procedures for the recognition and the enforcement of foreign arbitral awards. In practice, however, it remains time-consuming to have foreign arbitral awards enforced in Vietnam.

Contractual parties may also choose to hear disputes within Vietnam's arbitral body, the Vietnam International Arbitration Centre or the newly established Pacific International Arbitration Centre. The new Law on Commercial Arbitration (Law No. 54/2010/QH12) which came into effect on 1 January 2011, aims at improving the current system in a number of areas including allowing foreign arbitrators to hear cases in Vietnam. This not only provides local enterprises with a choice of international arbitrators but also encourages foreign companies to arbitrate in Vietnam. On the other hand, if parties wish to place the arbitration outside Vietnam, according to the old Ordinance on Commercial Arbitration, they can only do so when a party to the contract is either a 'foreign investor' or an 'enterprise with foreign owned capital'. Having a local subsidiary of a foreign company was not enough to have the arbitration situated outside Viet Nam. The new Law has abolished this rigid condition and parties are now free to select the conduct of their dispute resolution either inside or outside the territory of Vietnam. With disputes involving "foreign element" the parties are free to select the language to be used in arbitration proceedings and tribunals will now be able to apply foreign laws selected by the parties without having to first consider whether it contravenes the basic principles of Vietnamese law. More importantly, parties can request arbitration tribunal to order an interim relief instead of having to apply to the court.

Despite these developments, the new law does not allow for re-arbitration of disputes, except where explicitly agreed by the parties. This means that if an award is set aside due to a procedural irregularity, the arbitration clause will have been exhausted and the parties will be forced to litigate. Furthermore, the uncertainty in the recognition and enforcement of a foreign award in Vietnam remains since an award rendered by foreign arbitration either inside or outside Vietnam is considered "foreign arbitral award" and the Vietnamese courts retain the power to refuse to enforce an award if it is contrary to the basic principles of Vietnamese law.

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## 9 Bankruptcy

In the era of State Planning where all industrial assets were owned by the State, there was no concept of bankruptcy or liquidation of enterprises. The legal framework for bankruptcy in Vietnam was generally considered to be deficient before the 2004 Bankruptcy Law (No. 21/2004/QH11) and 2005 Resolution (No. 03/2005/ND-HDTP) on the implementation of the Bankruptcy Law (collectively referred to as the "**Bankruptcy Law**") came into effect.

Under the Bankruptcy Law, the Economic Courts of provinces or cities may declare any enterprise

established under Vietnamese law (whether state-owned, domestic or foreign invested) insolvent and distribute the enterprise's assets (or the proceeds from their sale) among the creditors upon receiving a bankruptcy petition filed by a creditor, union or labour representative, or the company owner. There is no individual bankruptcy.

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## 10 Repatriation of Capital

In the event of voluntary (and solvent) liquidation of a foreign invested enterprise, the foreign investor is entitled to repatriate their invested capital only after all other outstanding payments (such as to the State, employees, and other creditors) have been made. It is now possible, depending on the type of business entity under which the business is established and operated in Vietnam, to reduce the invested capital during the operational term of the investment project under the Enterprise Law.

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## 11 Infrastructure

### 1.1 BOT Contracts

The BOT Decree states that the Government will ensure that the Ministry of Planning and Investment publishes a list of approved projects for investment from time to time. The Vietnamese Government has identified a large number of construction projects to be completed over the coming years, and lists of these projects are regularly published. Some projects on this list are dependent on financing by international institutions such as the World Bank or the Asian Development Bank.

It is possible for projects not on this list to be approved on a case by case basis. A foreign investor may directly approach the relevant authorities to obtain their approval for a BOT project.

Where a project is approved as a BOT, the investors will construct and operate/manage the project for a fixed duration before it is transferred back to the Government. To facilitate construction and management, the parties to the BOT may agree to establish a co-ordination board (similar to a management board) to oversee the implementation and management of the agreement. The functions, tasks and powers of such a body may be determined by the parties to the BOT contract.

### 1.2 BTO and BT Investment Contracts

A BTO usually involves an investor constructing the project, and then transferring it to the Government upon completion. The Government then allows the investor to operate the project for a certain period so as to allow the investor to recover its investment with an agreed return on equity.

A BT project also involves the immediate transfer to the Government of the project upon completion, but does not include a right to operate the project. The investor may instead be awarded another project by the Government to allow it to recoup its investment costs and make a return on the equity that it has invested.

### 1.3 BOO Investment Contracts

A BOO is a contractual method of investment that is permitted for projects in the power sector under which an investor funds a public infrastructure project, and is in turn allowed to own and operate the project for the duration of the investment certificate (usually 50 years, but exceptionally 70 years).

Despite improvements in the regulatory environment for infrastructure projects, investors still need to be aware of the obstacles in this sector, (for example, those in relation to potential lenders' securities) before they invest.

#### **1.4 Infrastructure Sectors**

There are no restrictions on which infrastructure sectors are open to foreign investment. While the need for investment is obvious in the power and ports sectors, the BOT Decree specifically encourages investment in infrastructure facilities including roads, bridges, tunnels and relevant public utilities, railways, air, river and sea ports, ferry landings, water and waste plants, power plants and transmission, and other infrastructure facilities as decided by the Prime Minister.

#### **1.5 Award of Projects**

Under the new BOT Decree, the preferred method for selecting an investor for a BOT contract is international or domestic tender. However, direct appointment of investors is still permitted in certain circumstances, including where a project is proposed directly by an investor or where there is only one investor who satisfies the pre-qualification requirements. The Prime Minister may also decide to directly appoint an investor to enter directly into contract negotiations.

BOTs are negotiated with an Authorised State Body ("**ASB**"). An ASB may be a ministry, or ministry-level agency, or a provincial People's Committee, depending on the size of the project. In the case of projects with foreign invested capital, the parties may agree in the contract to the application of foreign laws, as long as the application of such an agreement does not conflict with the basic principles of Vietnamese Law.

The BOT Decree attempts to streamline the sometimes cumbersome Vietnamese bureaucratic process by requiring ASBs to establish an "inter-branch working group". This group is to bring together the relevant Government bodies and independent advisers to consider the criteria for selection of investors, support the negotiation of contracts and resolve implementation issues.

#### **1.6 Tendering Laws**

The bidding provisions under Vietnam's tendering regulations govern the participation of both foreign and domestic investors in tenders for infrastructure projects. Preference is often given to applicants who intend to employ local employees or use local materials, as well as to applicants who plan to introduce advanced technology.

The recent overhaul of Vietnam's tendering laws, including the adoption of the Tendering Law in 2005 and the passing of Decree 58-2008-ND-CP (the "**Tendering Decree**") in 2008 have both improved Vietnam's legal framework for bidders. The Tendering Decree includes provisions to ensure the competitiveness of the tendering process, and a process to implement these. It also provides a series of conditions that must be met to ensure that the party preparing the tendering invitation and the tendering parties are independent. However, despite the Tendering Decree setting out specific fines for the breach of tendering laws, recourse for unsuccessful bidders remains a problem, and it is difficult to challenge the results of a tendering process.

#### **1.7 Decree 48/2010 ND-CP ("Decree 48')**

Decree 48 which came into effect on 1 July 2010 contains several important changes and additions to existing statutory provisions governing the Vietnamese construction industry. Since Vietnam does not have its own set of contract law and the provisions in the Law on Construction are general, Decree 48 aims at improving the quality and enforceability of construction contracts in general and clarifying "hot issues" such as price adjustment, suspension, termination of contract in particular. It governs all types of contracts, including for consulting services, construction services, EPC, and turnkey contracts. Some of the changes and amendments brought about were quite remarkable such as contractor's new statutory rights & privileges as well as new statutory duties, strict notice

and substantiation of claims.

Decree 48 applies to organisations and persons involved in construction contracts governing projects where not less than 30% of the capital invested in that project is regarded as state capital and ODA project is included in this category.

Decree 48 introduced important changes and additional statutory provisions in a number of key areas such as new party rights, privileges, duties and obligations ; material price inflation ; adjustment of schedule ; payment ; construction insurance ; notification and substantiation of claims ; time limit for commencement of arbitration ; suspension and termination ; and bilingual construction contracts.

In several respects, unfortunately, Decree 48 does not exhibit the clarity and uniformity of legislative drafting required of Vietnamese statutory instruments and numerous questions arise as to its intended operation and the status of prior statutory instruments.

### **1.8 Investment Licences and the Investment Vehicle**

An Investment Licence is required for foreign investment in a project of any nature in Vietnam. The BOT Decree distinguishes between an investor (the company or individual investing capital in the project) and a project enterprise (the vehicle set up by the investor to manage the project).

The investor enters into contract negotiations for the BOT and, in the first instance, signs the project contract. This means that before the project enterprise is established, the obligations under the BOT remain exclusively with the investor. This exposes the investor to risks that it would ordinarily seek to confine to the project company.

The BOT Decree does contemplate that a project enterprise may "assume" the rights and obligations of an investor under a BOT agreement with respect to the implementation of a project. The project enterprise may enter into a written takeover agreement with the investor and the ASB, which would then constitute an integral part of the project contract. In practice, however, it would be preferable for an investor to seek that BOT obligations under the BOT contract simply be imposed directly on the project enterprise.

If a project enterprise is established, this vehicle itself must obtain an Investment Certificate. Under the Investment Law, foreign invested enterprises may operate in a variety of forms including:

- Limited Liability Companies;
- Joint Stock Companies;
- Private Companies, and
- Partnerships.

While the BOT Decree is silent on whether all of these forms may be used for BOT Projects, experience suggests that joint ventures with a local partner are looked upon approvingly by the Vietnamese authorities.

### **1.9 Capital Requirements and Construction Security**

Investors may raise funds themselves or may seek State contributions. However, under the BOT Decree, Vietnamese SOEs can only contribute up to 49% of the investor's capital. The BOT Decree also requires investors to contribute a minimum equity to the project, inversely proportional to the total amount, as follows:

- Not less than 30% equity where total investment capital is below VND 75 billion;
- Not less than 20% equity where total investment capital is between VND 75 billion and below VND 1,500 billion, and

- Not Less than 10% equity where total investment capital is VND 1,500 billion or more.

The investment capital should be contributed in line with a schedule agreed in the project contract, but need not be contributed in full on the commencement of the project. The BOT Decree may also require some investors to offer security to guarantee construction works.

#### **1.10 Incentives for Investment**

There are various incentives for investors undertaking a BOT project, including exemption from applicable land use fees or land rent, import duties on goods imported to implement the project, and taxes relating to technology transfer and royalties, as well as significantly reduced corporate income tax and tax holidays. Additional incentives may be negotiated.

#### **1.11 Lenders Security and Step-In Rights**

According to Vietnamese law, foreign lenders cannot take out security over land use rights or structures on the land constructed by a project company unless they have a foreign bank branch in Vietnam.

Lenders can negotiate step-in rights if the project company fails. According to the BOT Decree, such rights must be pre-approved by the relevant ASB counterparty, and are subject to the lender agreeing to comply with all the respective obligations of the project enterprise or the investor as stipulated in the project contract. In practice, however, it is difficult to secure ASB approval to cover all circumstances where a lender may wish to exercise its step-in rights.

#### **1.12 PPP law**

Following (and borrowing in part from) the BOT Decree of November 2009, the Prime Minister signed Decision No. 71/2010/QĐ-TTg dated 9 November 2010 which issued detailed regulations covering the piloting of investment in the form of public private partnerships (the "Regulations") in Vietnam. The Regulations became effective on 15 January 2011 and will continue to be implemented for between 3 and 5 years following which time it is intended that they will be replaced by a Decree on the form of PPP investment in Vietnam.

Investors will need to note first that the Regulations do not set up any distinct investment regime for PPP projects and their investment will still need to comply with all applicable investment regulations (including any limitations on foreign ownership). As with the BOT Decree, it remains to be seen whether effective and thorough implementing regulations are forthcoming to flesh out the detail of the principles in the Regulations. Such detail will be of great interest to foreign investors and funders in determining whether to make investment. Second, a risk remains that the definitive Decree on PPPs might, at worst, contain provisions contrary to the Regulations thus in theory potentially invalidating projects awarded under the Regulations absent an express "grandfathering" provision.

The Regulations set out a requirement that private sector investments have a senior debt-to-equity ratio of 70:30. This is very prescriptive and obviously represents a much higher equity proportion than that seen in emerging market PPP projects and also when compared to European ratios. The Regulations also permit the Government to inject a state participation portion into a project. That state contribution can be in the form of one or a blend of: direct state capital (i.e. budgeted investment capital; official development assistance; Government bonds; state-guaranteed credit facilities; state development investment credit; development investment capital of state enterprises and other capital sources); investment incentives (including various tax treatments); and relevant financial policies. In practice, the most likely state participation would be the injection of existing real estate or assets. The Regulations cap the state participation portion (unless the Prime Minister decides otherwise) to a maximum of 30% of the total investment level (under the BOT Decree, the 'total state capital' must not exceed 49% of the 'total investment value').

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## 12 Land and Real Estate

Land legislation remains fragmented and complex in Vietnam. Ownership and use of land are mostly governed by the Land Law 2004 and its implementing regulations. However, there are Decrees that relate to land in terms of implementing the particular Law, each issued by different agencies in their own area of responsibility. On the broadest level of laws, the Civil Code also covers issues relating to land. As a result, uncertainty remains regarding certain crucial issues concerning land transactions and registrations of land ownership rights.

### Land Use Rights and Land Use Right Certificates

In Vietnam, land belongs to the State and private ownership of land is not permitted. However, under the Land Law, the State allocates or leases out land to individuals, organizations and businesses through the granting of so-called land use rights ("LUR") and the issuance of LUR Certificates ("LURC"). LURC is the form of registration of tenure of land conferring various rights upon the land user but falling short of the freehold title to land. The term or duration of the LUR for foreign investors is usually 50 years but may be 70 years in certain circumstances. Under a new Decree 84/2007/ND-CP, foreign developers of residential land may obtain a land lease for 70 years which may be renewed without limit and additional rent. Only Vietnamese enterprises and individuals may be granted an LURC in perpetuity.

Foreign invested enterprises in Vietnam may obtain LUR by way of

- (i) entering into a joint venture company with a domestic company in respect of which the Vietnamese partner contributes land use right or
- (ii) entering into a land lease directly with certain permitted lessors, including the Government or
- (iii) entering into a lease directly with Vietnamese organisations holding LURs. At present the process of obtaining LUR is time-consuming.

### Joint Venture Company to Develop a Real Estate Project

In order to be able to make contribution to a JVC in the form of LUR, the domestic partner should obtain the LUR through an "allocation" of land from the Government and the allocation fees should be paid in full in advance. However, under the Land Law, a Vietnamese party who "leases" land from the Government may contribute it to the venture if the lease was obtained before 1 July 2004 and the land rentals have been prepaid for the majority of the term and the remaining unpaid term is less than five years. After the JVC is incorporated and issuance of its investment certificate, the LURC will be issued to and in the name of the foreign invested JVC.

The Law on Real Estate Business and its implementing Decree (153/2007/ND-CP) laid the much needed groundwork for regulations in the field of real estate business activities. The amount of legal capital required for an entity to engage in real estate business is set at six billion Vietnamese dong (currently equivalent to around USD353,000).

### Land Lease

Foreign invested enterprises may consider leasing the land directly from the Government or sub-leasing land from an infrastructure developer. Besides, the Land Law now allows foreign invested enterprises to lease land from:

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

Lease applications involving private lessors may be assessed more cautiously.

### **Lease Term**

The lease term must not exceed 50 years or, in special circumstances, 70 years and extensions may be allowed by the Government provided that the use of land is consistent with the approved land plan and is in conformity with the land regulations during its land use period. The grant of an extension of the LUR is subject to government discretion, but it is unclear what would happen to the assets owned by a land user in the event the lease term is not extended.

### **Lease Payment and Rights Enjoyed**

Investors who make a "one-off payment", subject to certain close gap conditions, have the right to transfer their LUR, sub-lease the land, contribute their LUR to a JVC and may mortgage their LUR as security. Investors making annual lease payments may not transfer, sub-lease or mortgage their LUR to third parties.

### **Lease of Commercial Property**

Foreign investors may consider leasing an office in a commercial building and no approval is required for an office lease, although an office lease of more than six months' duration needs to be notarised.

### **Notarisation of land contracts**

Essentially, all documents related to land must be notarised. This can delay and increase the complexity of some land transactions since notarisation can be a time-consuming process.

### **Withdrawal of Land from Foreign Investors**

The Government is empowered under the Land Law to reclaim land leased or allocated to parties (including foreign investors) and the parties are entitled to a refund of the capital invested in the land. The Government is so empowered when one of the following circumstances arise:

- the land is used inefficiently or for incorrect purposes, or the land user intentionally damages the land
- the land user intentionally fails to discharge financial obligations to the Government
- the land has not been used for 12 consecutive months from the date of handover of land, or
- the land use project schedule has been delayed for more than 24 months against the progress originally committed to by the investor under the project documentation.

### **Mortgages**

Under Vietnamese law, LUR may only be mortgaged to Vietnamese financial institutions, including foreign bank branch offices in Vietnam but not offshore lenders. It is uncertain whether an onshore security agent is able to take a mortgage over LURs for and on behalf of offshore finance parties.

To be eligible to mortgage its LURs, a foreign invested lessee is required to pay all land rental in advance or where the lease was entered into before 1 July 2004, the land rentals have been prepaid for the majority of the term and the remaining unpaid term is less than five years.

In practice, there are limits to the value of the entitlement to mortgage LURs due to the absence of reliable enforcement procedures.

### **The Way Forward**

After Vietnam became a member of the World Trade Organization in 2007, the Government has submitted to the National Assembly a program for revision of the 2003 Land Law to better suit the process of international economic integration. As Vietnam is undergoing a period of accelerated national industrialization and modernization, land issues will continue to be the subject of debate and review.

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## 13 Intellectual Property

Vietnam is a member of World Intellectual Property Organisation (WIPO) and a member of the following International intellectual property treaties:

- Paris Convention on Industrial Property Protection
- Patent Corporation Treaty (PCT) – since March 1993
- Madrid Agreement on International Trade Mark Registration
- Berne Convention on literary and art works protection – since June 2004

The IP Law in Vietnam, which was passed in 2005 and came into force on 1 July 2006, has been updated regularly. Since Vietnam's accession to membership of WTO in January 2007, the implementation of the TRIPs agreement (the agreement on Trade-Related Aspects of Intellectual Property Rights) and the protection of IP rights in Vietnam are the main focus.

### Patents and Trade Marks

Vietnam adopts the "first-to-file" principle in relation to patents and trade marks. Priority is given to the first filed application when there are two or more applications for similar patents or trade marks. Notwithstanding that, if an application is filed first in a convention country then subsequently filed in Vietnam within the priority period, the applicant will be able to claim priority in Vietnam by virtue of the Paris Convention. The IP Law allows two or more individuals or entities to file a patent or trade mark application in their joint name. Trade mark registrations are valid for 10 years and can be renewed while registered patents are valid for 20 years.

Vietnam does recognize the concepts of associated mark, collective mark and well-known mark. It is possible to register collective mark, 3-D mark and certification trade mark.

### Copyrights

The works covered by copyright include literary, dramatic, musical works, sound recording, artistic works, architectural works, computer programs, films, broadcasts, cable programs, works of folk culture and typographical arrangements.

Rights over a work include personal rights and property rights. There are 3 types: (i) rights of an author; (ii) rights of an owner; and (iii) rights of an author who is also the owner of a work and therefore holds full personal and property rights over a work.

The IP Law draws distinction between the owner of a copyright and the author of the work which may or may not be the same person or entities.

### Enforcement

The IP Law provides a variety of enforcement options to IP rights owners. Depending on the severity of the infringement, infringers are subject to informal actions, administrative measures, civil proceedings or criminal prosecutions.

The quickest enforcement solution which immediately puts a stop to infringement is administrative procedure. Upon receipt of requests from rights owners, the State enforcement authorities will ask the legal representative of rights owners to issue initial warnings to infringers. If infringement continues the authorities will conduct administrative actions, which may include seizure, total destruction, removal of infringing elements or suspension of Customs clearance and monetary fines.

Civil proceedings are a more powerful and thorough solution and have a lasting impact on the infringement. The court can order infringers to stop the infringement, issue a public apology, perform certain civil obligations and pay damages. At the request of the rights owner and subject to payment of a bond which is equivalent to 20% of the value of the goods, the Court may apply some

provisional measures such as immediate seizure, inventory checks and urgent sealing of infringed goods to prevent them from being destroyed.

If the infringement justifies a criminal prosecution, the infringer will be brought to Court in accordance with the Criminal Code.

### **Domain names**

Registration, possession or use of a domain name that is identical or confusingly similar to a protected trade mark, trade name or geographical indication is considered an act of unfair competition. It is noted that the dispute resolution policy under the Vietnam Law of Technology and Information only applies to Vietnamese country code top domain names (.vn and .com.vn). Therefore, it is advisable that domain name owner register both their trade mark and their Vietnamese country code top domain names to maximize the protection.

The Regulation on Internet Resources Management and Use (Decision 27/2005/QĐ-BCVT dated 11 August 2005) set out the rules and procedure governing the registration and maintenance of domain names.

### **Technology Transfer and Licensing Contracts**

The Vietnamese government and the Ministry of Science & Technology have made efforts to encourage the transfer of advanced technologies into Vietnam. All technology transfer agreements with foreign licensors are required to be registered with the Ministry of Science & Technology and royalties payable are subject to some limitations.

A technology transfer contract can be in hand-written or electronic form and other forms permitted by law. Parties are free to choose the language of the contract but if the main transactions take place in Vietnam, the contract should be prepared in both Vietnamese and the relevant foreign language. In theory, parties are also free to agree on royalties, the duration of technology transfer and the law governing the agreement, as long as the terms and conditions are not contrary to Vietnamese laws.

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## **14 Employment**

In Vietnam, the Labour Code and its implementing regulations serves as the principal legal base for all labour-related matters. It applies to both employees and employers, including foreign organizations employing local and foreign staff who work regularly in Vietnam.

Foreign invested enterprises are required to sign employment contracts with employees. Internal labour regulations are compulsory for enterprises having more than 10 employees. Labour contracts must have clauses relating to job specification, salary, place of work, labour safety and hygiene and provisions on social and health insurance.

By statute, the normal working hours of each employee must not exceed 8 hours a day or 48 hours a week. Special working hours are applied to female, child, disabled and older employees. Overtime is strictly regulated by the laws of Vietnam and subject to certain restrictive exceptions, should not exceed four hours a day or 200 hours per year.

17% social and health insurance contributions by employers (15% for social insurance and 2% for medical insurance) are mandatory for all Vietnamese employees employed with a term of three months or more.

From the year 2010 onwards, every two years, the employer and employee are required to pay an additional 1% social insurance. In addition, from 1 January 2009 on, the employer and the employee are required to contribute 1% of the salary to the Unemployment Insurance Fund. There is a cap for both of these contributions.

Wages of Vietnamese employees of foreign invested enterprises operating in Vietnam may not be lower than the minimum wage stipulated by the law. From 1 January 2009, for unskilled employees working under normal conditions, the minimum wage level, which is regularly adjusted, varies depending on the geographical location of employment, as follows:

Minimum wage per month	Working Area
VND1,200,000 (about US\$70)	Hanoi and Ho Chi Minh City
VND950,000 to VND1,080,000 (about US\$60- to US\$65 )	Hai Phong; Vung Tau , Thu Dau Mot Town, Ha Long in Quang Ninh Province; Bien Hoa, Long Khanh Town and suburban districts of Nhon Trach, Long Thanh, Vinh Cuu and Trang Bom in Dong Nai Province, suburban districts of Thuan An, Di An, Ben Cat and Tan Uyen in Binh Duong Province and rural districts of Hanoi and Ho Chi Minh City
VND920,000 (about US\$55)	The rest of the country

Employees with vocational training should receive a salary of at least 7% higher than the above minimum salary rate.

In the event of a labour dispute, the employer and employees are required to try to settle the dispute by negotiation before referring it to a labour reconciliation council. Failing resolution, the dispute will then be referred to the District People's Court. For collective labour disputes, the dispute is first referred to the Labour Arbitration Council, failing which to the People's Court during which time the employees are entitled to strike.

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## 15 Immigration, Visas and Work Permits

Various entry/exit visas are available and renewable for 1) foreigners considering investments in Vietnam; 2) foreigners implementing investment projects in Vietnam, as well as their families and staff. Temporary resident cards are available for longer term foreign employees.

Foreigners working in foreign enterprises in Vietnam must, subject to certain exceptions, obtain a work permit (valid up for three years). Foreign employees may be employed for jobs for which qualified Vietnamese are not available and training programmes must be established for Vietnamese for future replacement. A work permit may be renewed only if the Vietnamese employees have not fully been trained to replace the foreign employees.

Five groups of foreign employees are exempt from necessary work permits:

- foreigners entering Vietnam to work for less than three months and to resolve emergency situations for which no person in Vietnam is qualified
- members of Board of Management
- chiefs of representative or branch offices in Vietnam
- foreign lawyers certified to practice in Vietnam and
- foreign employees sent by a foreign company or organization to perform contracts (other than labour contracts) signed with Vietnam partners.

Decree No. 34/2008/ND-CP dated 25 March 2008 removes the 3% cap on foreigners to local employees ratio in an enterprise to better comply with Vietnam's WTO commitment. Therefore, employers can now hire an unlimited number of foreign employees if such employees meet the criteria as set out by the Decree.

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## 16 Taxation

Corporate Income tax, Value Added tax, Personal Income tax and Social and Health Insurance contribution are the principal taxes applied to foreign invested enterprises in Vietnam.

### Corporate Income Tax (CIT)

The new Decree 14-2008-QH12 issued on 3 June 2008 which is effective from 1 January 2009 replaces the old tax regulation 09-2003-QH11. Under the new law taxable income includes all revenue earned from doing business in goods and services and income from capital transfers and real property transfers are now also included.

The new CIT tax rate is reduced from 28% to 25%, applicable to all establishments and enterprises. For companies engaging in researching, exploring & exploiting petroleum and gas and other rare and precious natural resources the standard tax rate is within the range of 32% - 50% (28% - 50% previously).

Enterprises are permitted to deduct up to 10% of their total operational expenses on advertisement and marketing.

The Ministry of Finance issues guidelines to clarify the preferential CIT rates for different types of investments. Investment in underdeveloped areas and in priority industries will enjoy larger preferential CIT rates for longer periods.

### Value Added Tax (VAT)

The new Decree 13-2008-QH12 issued on 3 June 2008 which is effective from 1 January 2009 replaces the old VAT tax regulation.

Enterprises are required to pay VAT on behalf of the consumers and the VAT payable is the amount of output VAT charged by a business minus input VAT incurred by the enterprise. The three tax rates of 0%, 5% and 10% are imposed depending on the nature of the goods and services provided by enterprises.

In respect of the tax rate of 10%, the new law expands items such as specialized machinery, equipment or means of transportation which form part of a technological process or construction materials, geological surveys, exploration, formulation of maps to the list of "taxable objects".

As regards the tax rate of 5%, items such as film production, importation & distribution of films are added to the list.

Assignment of capital and derivative financial services, however, belong to the "non-taxable objects" list.

### Personal Income Tax (PIT)

Resident individuals with taxable income arising within or outside the territory of Vietnam and non-resident individuals with taxable income arising within the territory of Vietnam are subject to PIT.

Resident individuals are defined as those who are physically present in Vietnam for an aggregate of 183 days or more during a 12-month period counting from the first day of arrival or in a year in subsequent years; or has a residential location in Vietnam at which permanent residence has been registered; or has a leased residence in Vietnam the term of which lease is for 90 days or more within the tax year.

The new law sets out a new mechanism for calculation of PIT and most individual incomes are subject to PIT other than certain high incomes as stipulated in the old law.

Taxable income comprises of incomes generated from business, salaries / wages, capital investments, capital transfers, real property transfers, winning of monetary prizes, royalties, franchises, inheritance or receipt of a gift of securities or property or other assets for which ownership or use rights must be registered.

The maximum PIT rate for resident individuals is 35%. The income bands and tax rates are as follows:

Tax Bracket	Portion of Annual Assessable Income (million VND)	Portion of Monthly Assessable Income (million VND)	Tax Rate (%)
1	Up to 60	Up to 5	5
2	Over 60 to 120	Over 5 to 10	10
3	Over 120 to 216	Over 10 to 18	15
4	Over 216 to 384	Over 18 to 32	20
5	Over 384 to 624	Over 32 to 52	25
6	Over 624 to 960	Over 52 to 80	30
7	Over 960	Over 80	35

The tax rates applied to non-resident individuals is up to 20% depending on the types of taxable income.

Employers are required to withhold and pay provisional PIT for their employees to the tax authorities on a monthly basis. Contributions to the Social Insurance Fund and the Health Insurance Fund are mandatory to Employers and Vietnamese employees.

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