MAYER • BROWN
JSM

Legal Update
Corporate & Securities
Mergers & Acquisitions
Vietnam
8 February 2012

Vietnam Mergers & Acquisitions (M&A)

Overview

Following the promulgation by the National Assembly of Vietnam of both Law No. 59/2005/QH-11 on Investment ("**Investment Law**") and Law No. 60/2005/QH-11 on Enterprises ("**Enterprise Law**") on 29 November 2005 laying down the foundation for a new Vietnamese investment regime, the legal framework for an effective M&A sector in Vietnam has been evolving at a promising pace. Currently, subject to some limitations, foreign investors in Vietnam are allowed to freely acquire stakes in Vietnamese enterprises. Specific restrictions on such acquisitions are provided in both the Schedule of Commitments of Vietnam to the World Trade Organisation and domestic legislation.

Recently, the Vietnamese Government has considered amending legislation related to the M&A sector in order to strengthen the legal framework for foreign investors. There have also been ongoing discussions regarding the revision of such legislation to provide greater clarity in terms of M&A practices in Vietnam. The infancy and the evolving nature of the M&A sector in Vietnam understandably has led to varying interpretations of the legislation over the years. Legal reforms are therefore necessary to resolve these issues. In this context, this position paper addresses some issues relating to the current M&A legal framework in Vietnam as well as recommendations to resolve such issues.

Mayer Brown JSM Vietnam was asked by the European Chamber of Commerce in Vietnam (EuroCham) to submit this position paper addressing some issues relating to the current M&A legal framework in Vietnam as well as recommendations to resolve such issues. This position paper is part of the "White Book of Trade/Investment Issues & Recommendations" submitted by EuroCham to the Vietnamese Government and summarizing the key issues affecting the business climate for European businesses in Vietnam.

Specific Issues

1. National Business Registration Database

Currently, there is no system of public searches in Vietnam for licensed enterprises. From a purchaser's perspective, legal due diligence for M&A transactions is difficult and drawn-out, with certain risks having to be managed, as much reliance is placed on the documents provided by a target company. The Investment Law provides that a national business registration database must be developed. Under Article 72 of Decree 108, it is the duty of the Ministry of Planning and Investment ("**MPI**") to organise and build such national information system. Furthermore, Chapter II of Decree 43 provides the framework for a national business registration database and requires the MPI to administer such database. Some local People's Committees, such as those in Hanoi and Ho Chi Minh City, have begun to provide relevant information on their websites regarding enterprises established within their respective jurisdictions. However, the national database contemplated by law has yet to materialise.

Recommendation: Progress should be made to set up and implement a functioning national business registration database as required by the Investment Law. Updates on the national business registration database should be made on a regular basis to keep information current.

2. Foreign or Domestic Licensing Procedures

Although the investment regime in Vietnam has sought to erase the distinctions between foreign and domestic investors by providing a single law for investment and a single law governing companies, some distinctions still exist with respect to licensing

procedures. On the one hand, foreign investors investing in Vietnam for the first time to set up enterprises whether in the form of wholly foreign-owned enterprises or joint venture enterprises (regardless of foreign equity ownership) will require the issuance of an "investment certificate" which concurrently serves as both the licensing of its investment project and its "business registration certificate." On the other hand, except for large scale or conditional investment projects, domestic investors will only require the issuance of a "business registration certificate." In other words, there exist both foreign investment and domestic investment licensing procedures.

In an M&A transaction, it is not clear under the legislation whether a foreign investor purchasing a stake in a domestic-invested enterprise (i.e., those issued with "business registration certificates") will be required to undergo foreign investment licensing procedures. This lack of clarity is brought about by the legal distinction between an enterprise with foreign equity up to 49% and an enterprise with foreign equity over 49%. Both Decree No. 102/2010/ND/CP dated 1 October 2010 of the Government Providing Detailed Guidelines for the Implementation of a Number of Articles of the Enterprise Law ("**Decree 102**") and the draft decree intended to replace Decree No. 108/2006/ND/CP dated 22 September 2006 of the Government Providing Detailed Guidelines for the Implementation of a Number of Articles of the Investment Law ("**Decree 108**") state that investment conditions applicable to a domestic-invested enterprise will apply to an enterprise where foreign equity is not more than 49%. Where foreign equity is more than 49% in an enterprise, investment conditions applicable to foreign investors will apply. Also, under Decree 102, this distinction applies in a situation where an existing enterprise established in Vietnam makes an additional investment in Vietnam. In this regard, if an existing foreign-invested (under 49%) company wishes to make an additional investment in Vietnam, the domestic licensing procedures apply. If foreign ownership is greater than 49%, the foreign investment licensing procedures will apply.

Due to this distinction regarding foreign equity ownership, it is generally understood that where an M&A transaction relates only to acquisition of 49% or less of a stake in a domestic-invested enterprise, this will entail only amending of the "business registration certificate" and complying with domestic investment licensing procedures. However, this interpretation may not be applicable to conditional investment sectors, such as trading and distribution and those falling under the WTO Schedule, which may require the issuance of an "investment certificate" in addition to or to replace the "business registration certificate" regardless of the foreign equity percentage.

Under Decree 108 and Decree 102, foreign investors investing in Vietnam for the first time must have an investment project and must conduct investment procedures in order to be issued with an "investment certificate" in accordance with the Investment Law and this "investment certificate" concurrently serves as the "business registration certificate" (i.e., there is no separate "business registration certificate"). This has been interpreted to apply to acquisitions by foreign investors of 100% Vietnamese-invested enterprises.

Accordingly, the practice has been that the relevant authorities would issue an amended "business registration certificate" with the name of the foreign investor and with a condition that the investors are required to carry out the procedures for the issuance of an "investment certificate" to register an investment project. This is an unusual situation because the target company in relation to the acquisition already exists and undertakes its business even without an investment project; hence, even after the amended "business registration certificate" is issued, not many target companies comply with the condition to obtain the "investment certificate".

Until such time that the investors will require an amendment of the "business registration certificate" the non-issuance of the "investment certificate" would not be an issue. At the time of the amendment of the "business registration certificate", the relevant authorities will request for a copy of an "investment certificate" based on the condition set out in the

"business registration certificate". The relevant authorities will not amend the "business registration certificate" until such time that an "investment certificate" is submitted.

Varying interpretations also result from the decentralisation of investment licensing procedures under the investment regime. At present, local People's Committees and management boards of specialised zones (e.g., industrial zones and export processing zones) have authority to license most investments. Investments in certain sectors require that the Prime Minister must issue an investment approval. Currently, the relevant authorities at the ministerial level do not have any authority to license an investment but opinions of such ministries are sought from time to time by the licensing authorities in accordance with Decree 108. Ministry-level opinions have considerable impact and can determine whether a licence to set up an enterprise in Vietnam may be obtained.

Recommendation: The current Investment Law and Enterprise Law and implementing legislation for both laws need to be further revised to provide for consistent rules and requirements. Aligning these laws and clarifying the licensing requirements will better level the playing field between foreign and domestic companies operating in Vietnam. Ministry-level authorities may need to take a greater role in clarifying regulations and ensuring that local authorities under their supervision exercise their authority in a fair and consistent manner. Various interpretations should not exist between different local authorities.

3. Amendment of Investment Certificate in a Limited Liability Company ("LLC")

In an acquisition of a multi-member LLC, Article 42.2 of Decree No. 43/2010/ND/CP dated 15 April 2010 of the Government on Enterprise Registration ("**Decree 43**") provides that an application file for assignment of ownership interests must be accompanied with "documents evidencing the completion of the assignment". This application file is submitted in order to amend the investment certificate of an LLC and is regarded as an approval (as opposed to registration or notification) process.

The lack of clarity as to what "documents evidencing the completion of the assignment" are required has led to varying interpretations. There have been instances where proof that the seller has received full payment of the consideration from the purchaser was required. However, in M&A transactions, it is usually a condition for payment of consideration that the amended investment certificate of an LLC first be issued. This practice avoids a situation where consideration is paid before the investment certificate is issued to an LLC. While this may be dealt with under an escrow arrangement, it may be problematic for some foreign investors engaging in a transaction without such arrangements.

Recommendation: Amend Decree 43 to clarify the requirements for assignment completion. Such amendment should consider the practical issue in respect of payment. The requirements should seek to avoid the situation where a purchaser is procedurally required to pay consideration prior to the issuance of an amended investment certificate approving such deal.

4. Law No. 27/2004/QH11 dated 3 December 2004 of the National Assembly on Competition ("Competition Law")

The Competition Law took effect on 1 July 2005. Under Article 18 of the Competition Law, a transaction is prohibited if an "economic concentration" would be formed in which companies involved in such transaction would have a combined "market share" of more than 50% in the relevant market. An M&A deal is considered an "economic concentration".

If parties to an "economic concentration" have a combined "market share" of between 30% to 50% of the "relevant market", they are required to notify the Vietnam Competition Administration Department ("**VCAD**") 30 days before the proposed "economic concentration". The proposed "economic concentration" can only be carried out after written confirmation has been received from VCAD stating that the economic concentration is not prohibited.

Concepts such as "relevant market" and "market share" are defined in the Competition Law. However, the basis for calculating the "market share" of a potential target company in relation to an "economic concentration" is not clear under the Competition Law. Questions thus remain regarding the basis of the calculation.

Recommendation: Clarity should be provided through amendments to the Competition Law to provide an objective means for calculating the "relevant market share" in order to better protect against the risk of "economic concentration" limitations.

5. Enforcement of Contractual Arrangements

Under the Civil Code of Vietnam, parties to a contract may agree on provisions which are not contrary to the laws of Vietnam and Vietnamese social ethics. On this basis, foreign investors interested in making an acquisition in Vietnam often enter into share purchase agreements with exit mechanisms (e.g., put and call options) drafted into the agreements. The laws neither provide nor prohibit these stipulations on put and call options except that these will be legally subject to the right of first refusal granted to other members of an LLC or the shareholders of a joint stock company. The laws are also silent in many respects on exit mechanisms that are usually found in international agreements of this type.

Regarding the enforceability of exit mechanisms in instances when the laws are silent, it remains unclear whether these exit mechanisms may be enforced or relied upon in Vietnam. In many cases, especially with LLCs, a change in members or shareholders must be registered (deemed as an approval) with the local People's Committees. Any exit mechanism is therefore likely subject to approval.

Whether the courts will allow the enforcement of any such exit mechanisms in case of dispute is also dependent upon the attendant circumstances of each case. The doctrine of binding precedents does not apply in Vietnam and each case is decided based on the set of facts and the applicable laws.

Recommendation: Amend either the Civil Code or the Commercial Law to specifically accommodate exit mechanisms in M&A transactions. Efforts should be made to familiarise judges and lawmakers as regards international business/M&A concepts.

6. Grant of Amended Land Use Right ("LUR") Certificates of Acquired Companies

In the case of a transfer of business from one entity to another where LUR is involved, there have been instances when the Departments of Natural Resources and the Environment ("**DNRE**") in some localities have not issued amended LUR certificates to new investors despite approval of the amended investment certificates. Under the land laws, agreements relating to LUR are required to be notarised, but under the Investment Law, an agreement which transfers only the business from one entity to another is not required to be notarised. Due to the application of both the land laws and the Investment Laws, there is a lack of clarity whether notarisation of the business transfer agreement is required.

This leaves open the question as to whether a separate agreement on the transfer of the LUR, in case of a transfer of business from one entity to another, is necessary. We understand DNRE refused to enforce an acquired company's LUR post acquisition without evidence of a transfer of LUR from the former owner to the new owner of the acquired company. When a company is acquired, there may be some legal necessities for converting the nature of the LUR depending on the new owner of the company. However, whether there is a need to have a separate transaction with regard to the assets of the company, including the LUR, should be made clearer under the laws.

Recommendation: Relevant laws, such as the Law on Real Estate Business and Investment Law, should be amended to clarify whether in case of transfer of the business from one entity to another in which LUR is also transferred, a separate agreement is necessary. The relevant laws should be amended to be consistent in respect of notarisation requirements for business transfer agreements especially when a

LUR is transferred with such business.

7. Valuation of Consideration for Tax Purposes

Under the personal and corporate income tax circulars, where the consideration for a transfer of capital or shares is not consistent with the market price, the relevant tax authority has the right to fix such consideration based on documents obtained from an investigation or based on comparables prices in other similar transfer contracts. The Ministry of Finance issued Circular No. 131/2010/TT-BTC dated 6 September 2010 Guiding Implementation of Regulations on Capital Contribution and Share Purchase by Foreign Investors in Vietnamese Enterprises (“**Circular 131**”). Under Circular 131, capital transfer price or the shares sale price to a foreign investor must be the price as decided by the management body of the offering company but the price cannot be less than the market price at the time of sale or, if there is no market price, the book value of the capital contribution portion or shares at the time the management body approves the transfer.

In the past, there has been difficulty in some instances in determining the market price. Parties to an M&A deal have therefore relied on setting the consideration based on the par value of the shares plus some premium, or based on the net asset value, or other methods. Circular 131 apparently is meant to address this situation by allowing the parties to use the book value. However, this runs counter to the language of the personal and corporate income tax circulars. The effect of Circular 131 has yet to be tested. It is however foreseen that varying interpretations will apply.

Recommendation: The tax circulars regarding valuation of consideration should be made consistent to avoid confusion and various interpretations as to such valuation. Terms such as “book value”, “market value”, and “similar contracts” should also be clearly defined so that the relevant tax authorities will not loosely define such terms to the detriment of the parties to an M&A transaction.

8. Vietnamese Accounting System (“VAS”)

The Ministry of Finance has issued a roadmap to implement the commitments with the International Federation of Accountants regarding the application of International Financial Reporting Standards (“**IFRS**”) in Vietnam. A number of IFRS principles have been adopted into the VAS but it has been estimated that it will be in the year 2020 that the IFRS will be fully integrated in the VAS. The common problems under the VAS are (i) the difficulty in re-evaluation of fixed assets due to the lack of an official system of valuation and (ii) the lack of compliance with the accounting requirements in respect of depreciation rate.

These common problems create difficulty for assessment of the real financial standing of the target company. Inadequate record-keeping and inadequate accounting practices in Vietnam therefore continue to pose obstacles to M&A deals.

Recommendation: The Ministry of Finance must consider accelerating adoption of the IFRS principles into the VAS.

9. Private Placement of Securities

Prior to the introduction of Decree No. 01/2011/ND-CP (“**Decree 01**”), which was effective on 25 February 2010, Vietnamese law did not regulate private placement of shares by joint stock companies. With the issuance of Decree 01, in order for a joint stock company to privately place shares, it will need to comply with certain requirements set out in Decree 01 which include (i) preparing a detailed offering plan, (ii) lodging the application file with the relevant State body not less than 20 days prior to the proposed date of private placement, (iii) suspending the transfer of the privately placed shares for at least one year after completion of the offer tranche and (iv) conducting private placements of shares or convertible bonds at least six months apart. However, Decree 01 has been subject to a lot of debates and controversies because certain provisions there are unclear or contradictory with other existing legislation and it fails to address whether private joint stock companies are subject to the requirements for private placements set out in Decree 01. As a result, from 15 November 2010, the licensing bodies in Hanoi and Ho Chi Minh City had temporarily

suspended business registration of merger and acquisition by way of private placement. Such suspension was not removed until after the introduction of Law No. 62/2010/QH12 ("**Law 62**") which amends the Law on Securities and became effective on 1 July 2011. Law 62 clarifies that only public companies will need to satisfy the conditions for private placement of securities set out in the amended Law on Securities and non-public companies can still conduct their private placements of securities in accordance with the Law on Enterprises and other relevant laws.

10. New guidance on Profit Remittance

The Ministry of Finance issued Circular No. 186/2010/TT-BTC ("**Circular 186**") on 18 November 2010 which replaces Circular No. 124/2004/TT-BTC dated 23 December 2004 ("**Circular 124**"). Circular 186 provides guidance of the remittance of profits (in cash or in kind) abroad earned by foreign organisations and individuals from their direct investment in Vietnam under the Investment Law. Circular 186 only allows the foreign investors to remit their profits abroad on an annual basis or upon termination of their investment activities in Vietnam instead of on a quarterly or half-yearly basis as previously permitted under Circular 124. However, Circular 186 has simplified the remittance procedures. Foreign investors will no longer need to obtain the tax authority's certification on remittance as previously required under Circular 24, instead it will just need to submit audited financial statements and corporate income tax finalisation declaration of the Vietnamese entity for the relevant year and a notification of profit remittance to the local tax office prior to the offshore remittance. Foreign investors should note that Circular 186 strictly prohibits any remittance of profits if the Vietnamese entity still bears accumulative losses after carrying forward the losses from the previous year in accordance with the law on corporate income tax.

11. Investment Capital Account

The Prime Minister issued Decision No. 88/2009/QD-TTg on 28 June 2009 ("**Decision 88**") and the Ministry of Finance issued Circular No. 131/2010/TT-BTC on 6 September 2010 ("**Circular 131**"), both regulate capital contribution and purchase of shareholding by foreign investors in Vietnamese enterprises. Under Decision 88 and Circular 131, a foreign institutional investor must open an investment capital account, and a foreign individual investor must open a private account, at a commercial bank in Vietnam and all activities of share purchase and sale, transfer of capital contribution, receipt and use of distributed dividends and profits, remittance of money abroad and other activities relevant to investment in Vietnamese enterprises must all be conducted through such capital account.

12. Restrictions of foreign holdings under Decree 59

The Government issued Decree No. 59/2011/ND-CP on 18 July 2011 ("**Decree 59**") on the equitisation of State-owned enterprises ("**SOEs**") to shareholding companies which came into force on 5 September 2011 and replaces Decree No. 109/2007/ND-CP ("**Decree 109**"). Decree 59 stipulates that strategic investors in the enterprise must hold their stake for at least five years instead of three years as previously regulated under Decree 109 and the maximum number of strategic investors is three. Domestic and foreign investors are eligible to buy shares in an SOE as an investor or a strategic investor. While a domestic investor can buy an unlimited number of shares in the enterprise offered to the public, a foreign investor may only buy a limited number of shares in the enterprise pursuant to an approved equitsation plan and the laws and regulations applicable to the relevant industry. For instance, foreign investors may not own more than 49% of the charter capital of a publicly listed company in Vietnam and 30% (in aggregate) of the charter capital of a commercial joint stock bank.

Recommendation: To attract more foreign investment, the Government may consider increasing the foreign shareholding ratios and removing the restrictions imposed on the foreign investors in an equitisation of SOE step-by-step.

Contact Us

For inquiries related to this Legal Update, please contact the following persons or your usual contacts with our firm.

Dao Nguyen
Partner
T: +84 8 3822 8860 x128
dao.nguyen@mayerbrownjsm.com

Mayer Brown JSM is part of Mayer Brown, a global legal services organisation advising clients across the Americas, Asia and Europe. Our presence in the world's leading markets enables us to offer clients access to local market knowledge combined with global reach.

We are noted for our commitment to client service and our ability to assist clients with their most complex and demanding legal and business challenges worldwide. We serve many of the world's largest companies, including a significant proportion of the Fortune 100, FTSE 100, DAX and Hang Seng Index companies and more than half of the world's largest banks. We provide legal services in areas such as banking and finance; corporate and securities; litigation and dispute resolution; antitrust and competition; employment and benefits; environmental; financial services regulatory & enforcement; government and global trade; intellectual property; real estate; tax; restructuring, bankruptcy and insolvency; and wealth management.

OFFICE LOCATIONS
AMERICAS: Charlotte, Chicago, Houston, Los Angeles, New York, Palo Alto, Washington DC
ASIA: Bangkok, Beijing, Guangzhou, Hanoi, Ho Chi Minh City, Hong Kong, Shanghai, Singapore
EUROPE: Brussels, Düsseldorf, Frankfurt, London, Paris
TAUIL& CHEQUER ADVOGADOS in association with Mayer Brown LLP: São Paulo, Rio de Janeiro
ALLIANCE LAW FIRM: Spain (Ramón & Cajal)

Please visit www.mayerbrownjsm.com for comprehensive contact information for all Mayer Brown offices.

This publication provides information and comments on legal issues and developments of interest to our clients and friends. The foregoing is intended to provide a general guide to the subject matter and is not intended to provide legal advice or a substitute for specific advice concerning individual situations. Readers should seek legal advice before taking any action with respect to the matters discussed herein. Please also read the Mayer Brown JSM legal publications Disclaimer.

Mayer Brown is a global legal services provider comprising legal practices that are separate entities (the "Mayer Brown Practices"). The Mayer Brown Practices are: Mayer Brown LLP and Mayer Brown Europe – Brussels LLP, both limited liability partnerships established in Illinois USA; Mayer Brown International LLP, a limited liability partnership incorporated in England and Wales (authorized and regulated by the Solicitors Regulation Authority and registered in England and Wales number OC 303359); Mayer Brown, a SELAS established in France; Mayer Brown JSM, a Hong Kong partnership and its associated entities in Asia; and Tauil & Chequer Advogados, a Brazilian law partnership with which Mayer Brown is associated. "Mayer Brown" and the Mayer Brown logo are the trademarks of the Mayer Brown Practices in their respective jurisdictions.

© 2012. The Mayer Brown Practices. All rights reserved.

1201