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Cross-Border **M&A**  
Activities In Vietnam:

**A Glance In  
Hospitality Sector**

# Introduction

Thanks to a qualified and reasonable human resource, a high urbanization rate as well as a strategic location in the center of Southeast Asia, Vietnam is becoming well-known as a manufacturing hub, growing consumer market and access to a vast marketplace. All these attributes make investing in Vietnam interesting.

Correspondingly, the Vietnamese M&A market has grown at an impressive rate in terms of both the numbers of transactions and the deal value, especially in the hospitality sector.

By our experience and evaluation in the progress of advisory for the clients who are the tourism real estate development and operating companies in Vietnam, one of the trends and also is the preferred choice of many current investors and especially foreign investors, they would choose the investment options through M&A implementation in many different ways and methods to carry out investment activities in tourism real estate project in Vietnam.

This handbook will summarize some brief information and legal framework related to a M&A deal in the hospitality sector.

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1

# Background of M&A in Vietnam



## 1.1. The whole picture of M&A activities in Vietnam

Thanks to a good and reasonable human resource, a high urbanization rate as well as a strategic location in the center of Southeast Asia, Vietnam is becoming well-known as a manufacturing hub, growing consumer market and access to a vast marketplace. All these attributes make investing in Vietnam interesting. Correspondingly, the Vietnamese M&A market has grown at an impressive rate in terms of both the numbers of transactions and the deal value.



Figure 9 M&A Activities in Vietnam during 2013-2018 (Capital IQ 2018)

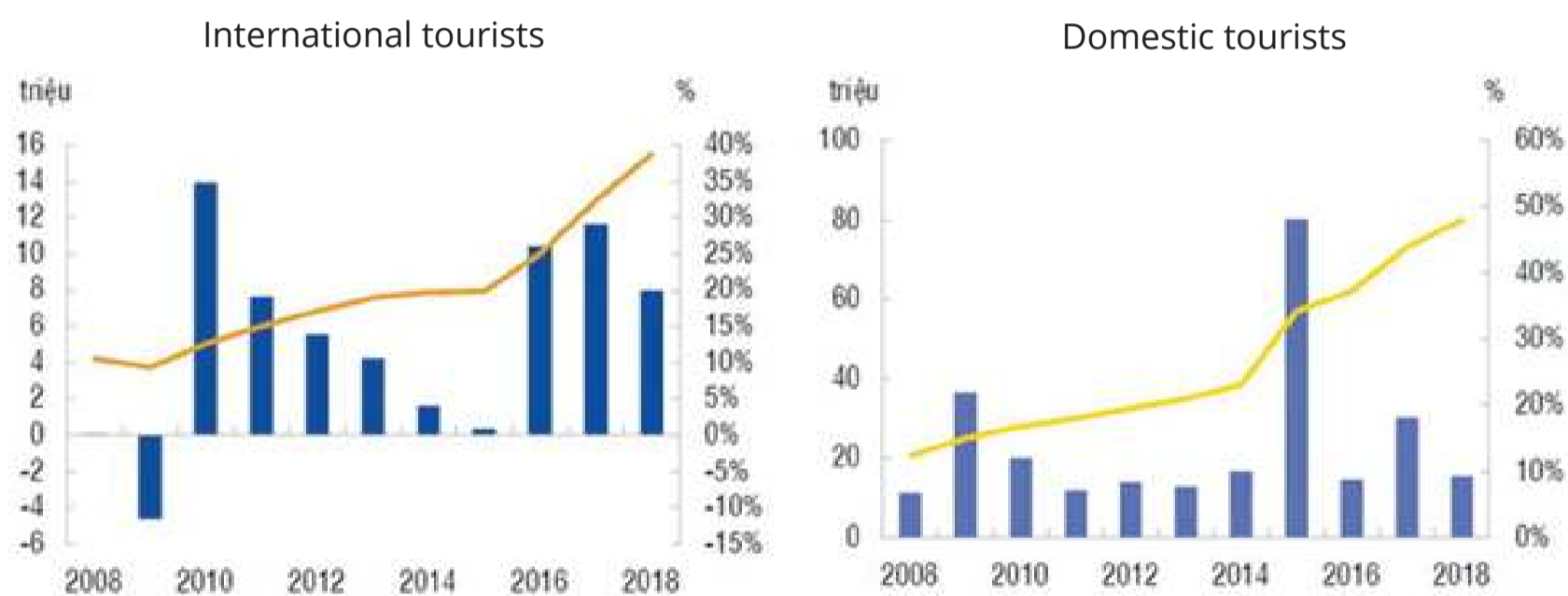
However, among the countries in Southeast Asia, the total M&A deal value in Vietnam still stood at a low level, below the average value of M&A transactions at Malaysia, Philippe and Thailand. Especially Singapore took the top spot with a total M&A deal value of USD89.0 billion, far exceeding other countries in the region.

Size of M&A Deals in Vietnam during 2013-2018		
Deal Size	Number of Deals	Percentage
>500 USD-Mio	9	1%
100-500 USD-Mio	33	5%
20-100 USD-Mio	136	23%
<20 USD-Mio	425	70%

In the overall M&A market, foreign investors are more dominant than domestic investors. Particularly, overseas buyers take up 77% of the total M&A value in the Vietnamese market. Admittedly, the nature of M&A activities is using the money to acquire shares of the other company, then building a strong and reliable brand and applying technology to develop new products. Thereby, Vietnamese investors could not bring much new value into the M&A chain owing to their limitations on capital, technology, and professional management.

## 1.2. What are investors looking for in hospitality sectors?

Vietnam is currently under the period of hard-pressure in both fields throughout the decade: the number of domestic and international tourists. This number of international tourists visit Vietnam developed up to four times within just a decade. From 4.2 million in 2008 to 15.5 million in 2018.



The Blue: Development

The yellow: The number of tourists

By the published report by General Statistics Office in Vietnam, the estimated number of tourists from the beginning of the year to the end of July 2019 had reached 9.8 million international tourists to Vietnam, a 7.9% increase over the same period in 2018, the number of domestic tourists had reached 52.4 million tourists, including 26.9 million stayed tourists. The total revenue from tourists had reached 401 trillion VND, an 8.67% increase over the same period in 2018. The Vietnam National Administration of Tourism stated that within the end months of 2019, tourism of Vietnam keeps promoting and developing in both international and domestic tourists; it determines to receive 17.5 – 18 million international tourists, 85 domestic tourists, total revenue from tourism estimated to reach 700,000 billion VND.

An assessment of the World Economic Forum's tourism competitiveness (WEF) which evaluates and ranks the countries based on various institutional and infrastructure factors related to tourism. Considering the total stats of 2017, Vietnam had ranked 67th globally. Though we reached the average scores and stats of other countries in the region, this is not the highest result in the region (which means "top rank" in the region) in any content about competitiveness. However, since 2015 (the previous evaluation of the stats), Vietnam had made strongest general improvements in competitiveness which compare to other countries in the region, by the improvement swift developed as the readiness of IT and Communications, international openness, public security and safety, port and ground infrastructure.

Estimating Vietnam's tourism market shall continue to strongly develop because of some basic reasons: (1) the number of domestic tourist would continue to increase due to the rapidly development of middle class in Vietnam, the Vietnamese increasingly have interest and habit to travel and have abilities to make better payment for the tourism and related services; (2) the number of international tourists come to Vietnam still has many opportunities to increase because the ratio between international tourists and Vietnam population is still relatively low to compare to other countries in the region and currently, Vietnam is still a new and interesting destination for number of countries where the number of tourists comes to Vietnam modestly; (3) the policies to encourage and promote the development of the tourism services and infrastructures for the tourism industry are highly concerned by the State, currently, the tourism industry is considered as one of the key economic factors of Vietnam.

Therefore, as mentioned analysis, the potential of the tourism industry in Vietnam is huge with many opportunities to develop which is a great opportunity to develop the real estate market and the services for tourism needs.

The growth of tourists would lead to the need for accommodation, making opportunities for villas, hotels, and the needs of services, shopping, and entertainment to develop. At present, compared with other strong developed tourism countries such as Thailand, Malaysia, Singapore... the number of accommodation establishments and entertainment services in Vietnam is still limited. On the other hand, the supply of real estate for tourism in Vietnam just only satisfied a small part of the tourist accommodation needs. The tourism real estate prices in Vietnam are at a low level to compare with the same potential countries. Therefore, tourism real estate still has a lot of room for development. This is also consistent with the trend of investment in tourism real estate targeting to Vietnam's growing middle class.

In the medium term, with 20 million international tourists come to Vietnam yearly would take an average from 5 – 7 days for every time visit, domestic tourists with the number of 85 million would spend 3 – 4 days for their vacation, Vietnam tourism needs more tourism real estate including a well-invested and well-constructed tourism real estate system to create an ecosystem, a population and integrate tourism, entertainment, resort, shopping.

Although the tourism real estate in Vietnam had already had many major projects including hotel projects in municipalities such as Hanoi, Ho Chi Minh City... to the population projects which integrated tourism, entertainment is relatively methodically invested in Phu Quoc, Nha Trang, Da Nang, Hoi An... from both domestic and international real estate developers, however, to compare with the needs and the potential scale of the market, there are still many opportunities for development. Besides, the current legal framework for tourism real estate types, especially the condotel type is still ambiguities that cause difficulties for development units and state agencies when approving to implement the project. The development and preparation of a legal framework for tourism real estate types are being completed and implemented by the Government and the National Assembly and would soon be issued to overcome the current shortcomings and difficulties.

The characteristics of tourism real estate investment projects are more difficult and more challenging than other types of real estate investment, particularly tourism real estate projects such as condotels that it is not finished selling real estate to the Buyer, the more important thing is how to operate effectively. Therefore, right from the design stage of the real estate, it has to be carefully calculated to not only attract the Buyers but also bring impressive experiences for the tourists in the future. With the development trend of the tourism real estate, it is necessary not only to meet the needs of accommodation, dining, and sightseeing but also creating new experiences such as new recreational and sports activities that may attract customers.

Because the tourism real estate market would have many opportunities for development in the coming time with the increase in quality and the number of projects investment of the companies which is operating under this business and more domestic and international companies would invest aggressively into this business.

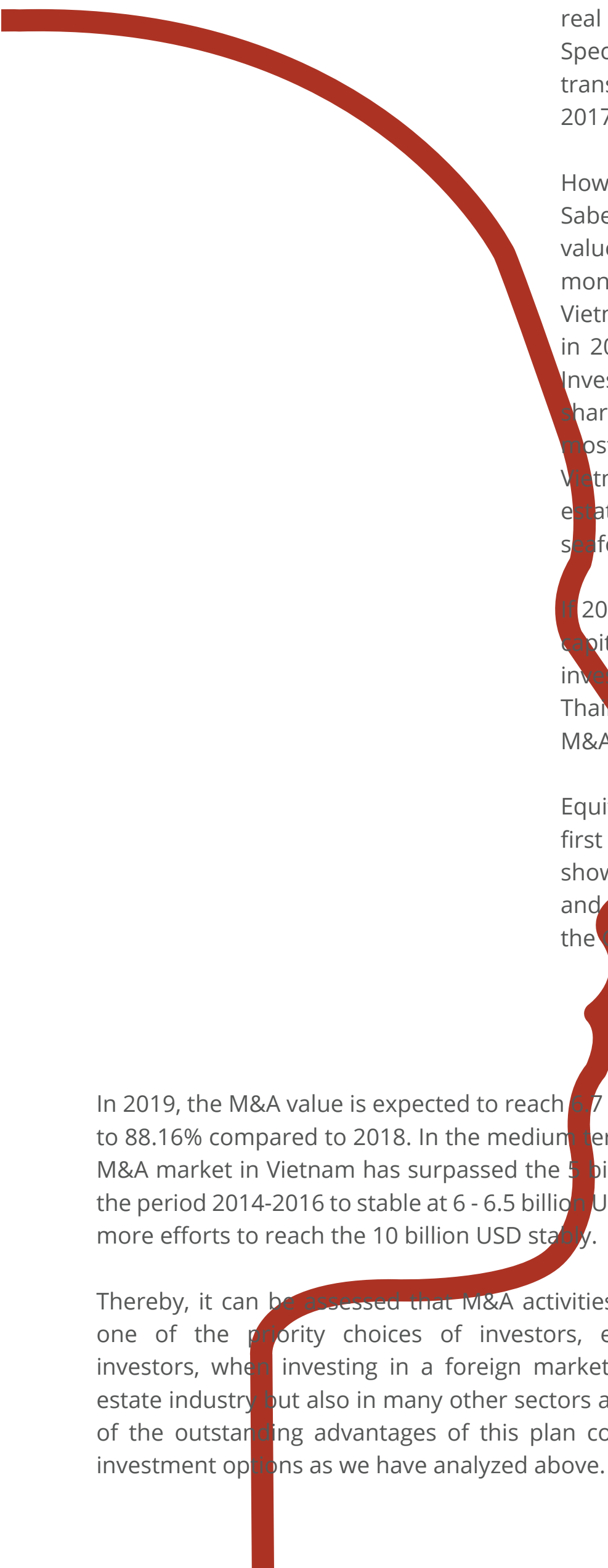
To implement and invest in tourism real estate, the domestic and international investors would have 03 basic options: **(1) Invest and develop a brand new project, (2) Conduct trade and receive a project from the companies (M&A), including the projects which are operating and the projects which under constructed and not yet operating;**

The option should an investor choose would depend on the evaluation of subjective and objective factors of the investor, basically including: **(1) The financial abilities of the investor; (2) The experience of the investor in operation and business; (3) The level of knowledge and understanding of the legal system and project implementation progress in Vietnam; (4) The desire for time market participants.**

By our experience and evaluation in the progress of advisory for the clients who are the tourism real estate development and operating companies in Vietnam, one of the trends and also is the preferred choice of many current investors and especially foreign investors, they would choose the investment options through M&A implementation in many different ways and methods to carry out investment activities in tourism real estate project in Vietnam.

The reason that could be stated to explain this idea is that investing in a manner that will gain some outstanding advantages is: **(1) Shorten the time to participate in the market of the foreign investors; (2) The investors first time invest into the tourism real estate market in Vietnam, especially foreign investors, will often not be knowledgeable about laws and regulations; (3) It is possible to calculate business results and investment more easily than invest into a new project based on appraisal and evaluation; evaluation of business results of enterprises and projects implemented; (4) The combination of a strong financial background and experience professional business management will make a great supplement and improvement to the company's business and post-transaction projects and partly help domestic businesses to divest and gain a financial resource. The main benefits and profits from this transaction are to serve many other purposes of domestic enterprises.**





Considering the overview of the M&A market and the M&A value of M&A deals in Vietnam to assess the M&A trend in the field of real estate in general and tourism real estate in particular. Specifically, in 2018 had recorded a total value of M&A transactions of 7.64 billion USD, equaling 74.9% compared to 2017.

However, excluding the contribution of the recorded deal from Sabeco, the mutant factor of M&A activities in Vietnam in 2017, the value of M&A in 2018 in Vietnam increased by 41.4%. In the first 6 months of 2019, the total value of M&A deals announced in Vietnam was only 1.9 billion VND (equal to 53% of the same period in 2018, 3.55 billion USD). According to statistics of the Foreign Investment Agency, the value of foreign investors buying domestic shares in the first 6 months of 2019 reached 2.64 billion USD. The most vibrant sectors for 2018-2019 focused on exploiting Vietnam's 96 million markets including consumer goods and real estate. Notable deals also focus on consumer finance, retail, seafood, logistics, education ...

If 2017 is the year of Thailand, then 2018 marks the prosperity of capital flows from Korea with large investment deals. Foreign investors, especially investors from Singapore, Hong Kong, Thailand, South Korea, and Japan, still play an important role in M&A activities in Vietnam.

Equitization process and divestment in the period of 2018 and the first 6 months of 2019, despite certain efforts and results, have shown signs of slowing down. It is necessary to remove barriers and take drastic measures to meet the goals and expectations of the Government and investors.

In 2019, the M&A value is expected to reach 6.7 billion USD, equal to 88.16% compared to 2018. In the medium term, the size of the M&A market in Vietnam has surpassed the 5 billion USD mark of the period 2014-2016 to stable at 6 - 6.5 billion USD, but it requires more efforts to reach the 10 billion USD stably.

Thereby, it can be assessed that M&A activities are a trend and one of the priority choices of investors, especially foreign investors, when investing in a foreign market not only in real estate industry but also in many other sectors and fields because of the outstanding advantages of this plan compared to other investment options as we have analyzed above.

According to some figures that Jones Lang Lasalle Company (JLL) has just released a report forecasting the M&A volume of tourism real estate, specifically hotel and hotel properties in The Asia Pacific would be expected to increase by 25-30% annually with a value of more than 11 billion USD in 2019, showing that the demand to make investments through the form of M&A transactions is still the trend of choice in many markets in the world, not only typical in Vietnam market.

Mr. Adam Bury, JLL's Senior Director of Hotel Consulting, stated that although the economic environment is quite cautious and depends heavily on the political situation, bond interest rates tend to decrease, however, the performance benchmark investment into the hotel in the Asia Pacific is quite attractive thanks to the booming tourism demand.

The demand for investment in the hotel real estate segment this year has been received by investment funds, real estate development companies, and domestic investors. This makes 2019 the third highest trading year in the past decade. Until now, only 2017 and 2015 have surpassed 11 billion USD.

In Vietnam, one of the new up-rising markets of the Asia Pacific region, the evolution of hotel M&A activities recorded a lot of progress in the last 10 months of 2019. The most successful transaction on the market in 2019 was recorded as a transaction related to Ho Tram Grand Strip resort which was transferred to the Warburg Pincus investment fund (USA).



Next, Berjaya Group (Malaysia) successfully transferred 75% capital of T.P.C Nghi Tam Village LTD. which owns Intercontinental Hotel worth over 53.4 million USD to Hanoi Hotel Tourism Development Limited Liability Company. Most recently, a five-star hotel transaction in Nha Trang city, Khanh Hoa province, also completed the consultation and negotiation round.

In the first 9 months of 2019, the Asia Pacific hotel investment market had recorded an investment of 7.8 billion USD in the hotel real estate market in the region. In Japan with a series of major events such as the Rugby World Cup 2019, the Tokyo 2020 Olympic Games, and the 2025 International Exhibition Conference, the country has so far reached nearly 3 billion USD in transaction value as recorded.

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These sporting and economic events will boost accommodation demand and investors are looking to take advantage of this wave to exploit opportunities. Japan is the market with the leading hotel performance in the region and is forecast to reach a record 4 billion USD in transaction value this year. In China, due to the declining demand for office space and the retail market, investors have paid attention to the hotel segment, where transaction efficiency has shown signs of recovery. In some other countries in the region, such as Singapore, have seen landmark transactions this year. In September, OUE Company agreed to sell the Oakwood Premier OUE Singapore apartment building to a Hong Kong Joint Venture for 209 million USD. Most recently, the deal for the purchase of Andaz Singapore hotel worth 344 million USD was completed, this is the largest hotel property transaction ever in the history of this lion island.

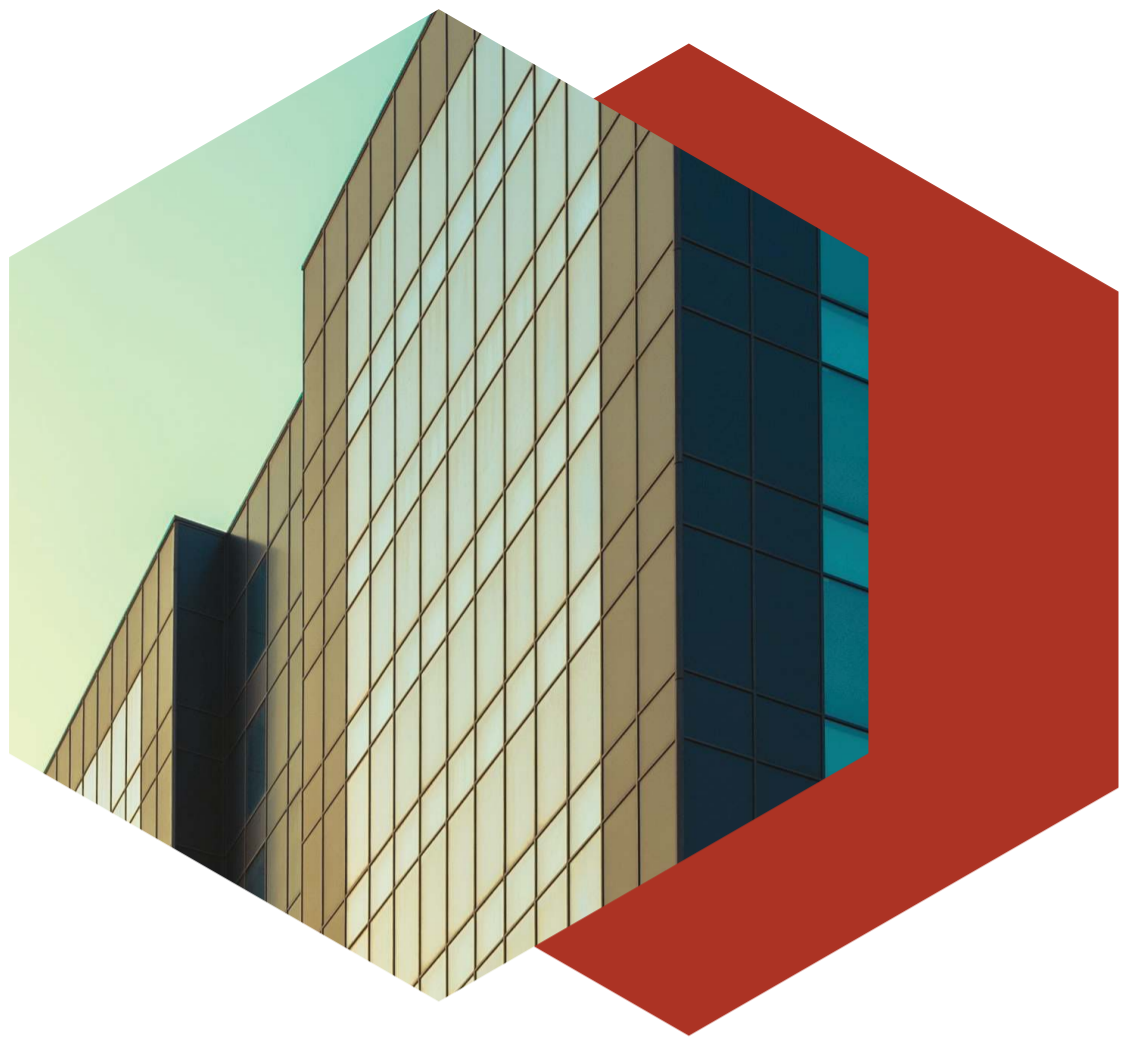
JLL predicts that the hotel asset market has been put into operation and is a bright spot to attract foreign direct investment (FDI) inflows throughout the Asia Pacific region and may continue to rise and express the future. The booming of the tourism industry in these young, emerging markets have been a positive factor driving the strongest hotel market growth in the past decade. According to the published statistics of prestigious real estate consulting firms such as JLL, CBRE, Savill, most M&A transactions in Vietnam for nearly a decade have been related to real estate projects. In general and tourism real estate, in particular, has a strong participation of the Buyers, transfer Receivers are foreign investors although, in reality, the selling price of hotel properties in Vietnam is higher than the estimated investment capital of most foreign investors, especially countries with low corporate loan interest rates (2-4%) such as Japan, Korea, Hong Kong, and Singapore. Domestic investors often act as Sellers and Transferors in transactions.

Domestic investors are mostly interested in developing brand new hotel and resort projects from vacant land funds, while foreign investors pay attention to hotel assets being operated with available cash flow. The ratio of profit recorded after recent sales in Vietnam is about 7-8%. This rate is currently lower than the cost of borrowing in Vietnam, which is also the reason most domestic investors are focusing on developing hotel properties from vacant land funds, with a desire to collect. gain a higher return than investing in existing assets.

The recent years are showing a changing trend, the demand for hotel investment by domestic investors is also growing in recent years. They are willing to pursue high-value deals, focusing on real estate in special locations as Buyers in the transaction, bringing fierce competition with investors foreign. Stemming from many reasons such as We can point out the advantages of implementing M&A compared to investing in developing a new project such as: (1) Vietnam's economy is strongly developing leading to the formation of domestic companies with strong financial potential and management capability not inferior to foreign enterprises, (2) Characteristics of real estate investment activities in general and tourism and hotel real estate in particular, the location is always a key and core factor determining the success of the project, but now most of the beautiful and prime locations in the municipalities, big cities or tourist cities all have owners so choosing the M&A strategy to have real estate access and business in these positions is always a preferred strategy, (3) The scarcity of real estate in "golden position" locations is not only crucial to the success of the business. The project also guarantees the added value of the investment in real estate projects.

Therefore, we predict that M&A activities in the field of real estate in general and tourism real estate, in particular, will continue to grow strongly in both quantity and value and become more and more competitive with the participation of both foreign investors and domestic investors. With the increase in transaction value and the complexity of the transaction, the M&A transaction requires a lot of support from many supporters to ensure success and support for the parties in the transaction. The important roles of supporting agencies include (1) Law firms, (2) Accounting, auditing, financial and tax consulting firms, (3) Brokerage units (4) Consulting and support companies in the management and operation of real estate projects, (5) Other consulting and evaluation units depending on the characteristics of each project type.

Therefore, we have consulted with many investors both in Vietnam and abroad regarding investment and business activities in Vietnam. Apolat Legal Law Firm has represented and participated in legal support in many M&A transactions with both experiences to support clients as a consultant and support for the Buyer as well as Seller in various transactions in real estate in general and tourism real estate in particular.



2

# **M&A deals: an overview of legal basics and implementation process**

## 2.1. Key legislations

- Schedule of Specific Commitments on trade in goods and services of Vietnam to the World Trade Organization (“WTO Commitments”)
- Law on Personal Income Tax No. 04/2007/QH12 passed by the National Assembly of the Socialist Republic of Vietnam on November 21st, 2007, amended and supplemented in 2012 (“Law on Personal Income Tax”) and instructional documents
- Law on Enterprises No. 68/2014/QH13 passed by the National Assembly of the Socialist Republic of Vietnam on November 26th, 2014 (“Law on Enterprise”) and instructional documents
- Law on Real Estate Business No. 66/2014/QH13 passed by the National Assembly of the Socialist Republic of Vietnam on November 25th, 2014 (“Law on REB”) and instructional documents
- Law on Competition No. 23/2018/QH14 passed by the National Assembly of the Socialist Republic of Vietnam on June 16th, 2018 (“Competition Law”) and instructional documents
- Law on tax administration No. 38/2019/QH14 passed by the National Assembly of the Socialist Republic of Vietnam on June 13th, 2019 (“Law on tax administration”) and instructional documents
- Circular No. 111/2013/TT-BTC dated August 15th, 2013 of Ministry of Finance guiding on the implementation of the law on personal income tax, the law on the amendments to the law on personal income tax, and the government's Decree No. 65/2013/ND-CP elaborating a number of articles of the Law on personal income tax and the law on the amendments to the Law on personal income tax (“Circular 111/2013/TT-BTC”)
- Circular No. 06/2019/TT-NHNN dated June 26th, 2019 of the State bank guiding on the foreign exchange management for the foreign direct investment in Vietnam (“Circular 06/2019/TT-NHNN”)
- Civil Code No. 91/2015/QH13 passed by the National Assembly of the Socialist Republic of Vietnam on November 24th, 2015 (“Civil Code”) and instructional documents
- Law on Land No. 45/2013/QH13 passed by the National Assembly of the Socialist Republic of Vietnam on November 29th, 2013 (“Law on Land”) and instructional documents
- Law on Investment No. 67/2014/QH13 passed by the National Assembly of the Socialist Republic of Vietnam on November 26th, 2014 (“Law on Investment”) and instructional documents
- Law on Tourism No. 09/2017/QH14 passed by the National Assembly of the Socialist Republic of Vietnam on June 19th, 2017 (“Law on Tourism”) and instructional documents
- Law on amendments to some articles of the law on insurance business and law on intellectual property No. 42/2019/QH14 passed by the National Assembly of the Socialist Republic of Vietnam on June 14th, 2019 (“Law on Amendments of IB and IP Law”) and instructional documents
- Ordinance on foreign exchange control 28/2005/PL-UBT-VQH11 promulgated Standing Committee of National Assembly on December 13rd, 2005 (“Ordinance on Foreign Exchange Control”)
- Circular No. 151/2014/TT-BTC dated October 10th, 2014 of Ministry of Finance on providing guidance on Decree no. 91/2014/ND-CP dated October 1, 2014 of the Government on amendments to decrees on taxation (“Circular 151/2014/TT-BTC”)
- Circular No. 92/2015/TT-BTC dated June 15th, 2015 of Ministry of Finance guiding on the implementation of VAT and personal income tax incurred by residents doing business, amendments to some articles on personal income tax of the Law no. 71/2014/QH13 on the amendments to tax laws and the government's Decree No. 12/2015/ND-CP dated February 12th, 2015 on guidelines on the Law on the amendments to tax laws and decrees on tax (“Circular 92/2015/TT-BTC”)

## 2.2. Common implementation process

In the M&A world, there are a lot of processes and underlying activities. It involves economic transactions, market information, policy, law, and other factors as well. In essence, the full process can be broken down into five main steps as shown in Table 1:

Table 1 Key steps of a typical buy-side process:

	<b>Opportunity Analysis</b>	<b>Indicative Valuation</b>	<b>Due Diligence</b>	<b>Negotiations</b>	<b>Closing</b>
<b>Time Frame</b>	2-3 months	1 month	2 months	1 month	3 months
<b>M&amp;A</b>	Identify potential targets	Preliminary value analysis  Drafting of indicative offer letter	Manage due Diligence  Management Presentation  Markup on Share Purchase Agreement (SPA)  Update value Analysis  Drafting of firm offer letter	Manage confirmatory due diligence  Negotiations	Monitor the completion of condition precedents
<b>Legal</b>	Regulatory analysis		Legal due diligence Prepare SPA and finalize other legal documentation		Support in fulfilling all closing conditions
<b>Tax</b>	Initial comments on tax implication at proposed deal structuring		Tax due diligence  Optimize tax structuring		
<b>Strategy</b>	Market research		Commercial due diligence		



3

# Typical deal structures



Under the current laws of Vietnam, there are different approaches to carry out a M&A deal. It is depended on parties to determine the form of deal to maximize the benefits and minimize the risk of the transaction. In this context, the seller and buyer may consider the two following popular deal structures:

(i) The first structure: The seller transfers the entire charter capital/share in the target company to the buyer (the Share Deals)

(ii) The second structure: the seller transfers the acquired assets and relevant assets to the buyer (the Asset Deals)

The following sections will respectively analyses some key points of each above-mentioned deal structures.

## 3.1. Share deals

In a share deal, the acquirer buys shares of the target company. The advantage of share deal is an automatic consequence of buying the shares, the acquirer economically also acquires all the contracts that the target has concluded, the permits granted to the target (exceptions can apply), and all of the target's assets. Conversely, the disadvantage is all open and hidden liabilities of the target are economically transferred to the acquirer.

In Vietnam, a share deal is commonly tax-advantageous for the seller in comparison to an asset deal as the capital gain resulting from a transfer of shares is often privileged for income tax purposes.

### 3.1.1. Purchasing share or contributed charter capital

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

- Purchasing capital contribution portions or the right to contribute capital from existing members in liability limited companies (LLCs);
- Contributing new capital into LLCs;
- Purchasing existing shares from shareholders of joint-stock companies (JSCs); and
- Subscribing for new shares in JSCs.

### 3.1.2. Right to investment in Vietnam under the form of capital/share acquisition from local companies

In principle, a foreign investor is permitted to contribute capital to or take the transfer of charter capital in companies in Vietnam but is subject to 02 remarkable points below:

(i) In addition to the conditional business sectors applicable for both local and foreign investors, the foreign investor is also required to satisfy conditions of the investment sectors in accordance with the schedule for implementation of international undertakings in international treaties of which the Socialist Republic of Vietnam is a member; and

(ii) The ratio of capital contribution by foreign investors in a number of sectors, industries, and trades shall be regulated by the Government.

In light of the above, the possibility of the acquisition of capital contribution of Vietnamese companies' owner/shareholders by the buyer and the possible maximum ratio of acquired capital in such case is subject to the restriction, if any, of the WTO Commitments and the law of Vietnam towards the current business lines of the target company.

### **3.1.3. Procedure to transfer contributed charter capital or share in the target company from sellers (equity members/shareholders) to buyer**

Files for registration of capital contribution, purchase of shares or portion of capital contribution shall comprise: Written application for capital contribution, purchase of shares or portion of capital contribution including the following items:

- Information about the company organization to which the foreign investor intends to make the capital contribution or purchase shares or portion of capital contribution; the ratio of the charter capital to be owned by the foreign investor after making the capital contribution, purchasing shares or portion of capital contribution to the company;
- Copy of the people's identify card, ID card or passport in the case of investors being an individual;
- Copy of the incorporation certificate or other equivalent document certifying the legal status in the case of investors being a company.

After the foreign investor has been granted written approval by the Investment Management Office in Vietnam with regard to the capital contribution of the foreign investor in Vietnam, the foreign investor may perform the procedure to register for changes in the company's ownership. Files for register the changes in the company's ownership include:

- A notification of changes of enterprise registration information bearing the signatures of the old owner or his/her legal representative and the new owner or his/her legal representative;
- A legitimate copy of anyone in the personal identification of the transferee in case the transferee is an individual, or legitimate copy of certificate of Enterprise registration or an equivalent document if the transferee is an organization;
- A list of authorized representatives, a legitimate copy of anyone in the personal authentication of the authorized representative and the authorization letter of the owner to the authorized person;
- A legitimate copy of the revised charter of the company;
- A capital transfer contract or documents proving completion of the capital transfer;
- A written approval for capital contribution, purchase of shares, stakes by foreign investors given by Department of Planning and Investment of the province in the case mentioned in Clause 1 Article 26 of the Investment Law on Investment in Vietnam.

Therefore, in order to contribute capital into a company incorporated in Vietnam, foreign investors must perform application for registration for capital contribution, purchase of shares or a portion contributed capital, after the Investment Management Office in Vietnam has approved such application, the said foreign investor may perform the procedure to change the content of the enterprise registration or registration for change in ownership of the company.

### 3.1.4. Transfer of ownership

In a share deal, the acquirer buys shares of the target company. As a result, the acquirer economically also acquires all the contracts that the target has concluded, the permits granted to the target (exceptions can apply) and all of the target's assets.

In a share deal, there are more complicated because ownership is transferred only upon the issuance of a new, or the amendment of an existing ERC and/or IRC. In the ERC, the foreign acquirer is registered as a new equity member or shareholder of the target company. A previously local company becomes a foreign-invested company.

The investment procedure can be lengthy and complicated, besides there is ultimately no guarantee that an ERC will be issued. In the case of LLCs, the amendment process of ERC has to be completed even if the foreign investor only acquires a minority charter capital. In the case of JSCs, there is no need to change the ERC since the shareholder's names are not indicated in the ERC and the Law on Enterprise no longer requires the procedure to notify the changes in shareholders.

### 3.1.5. Some concerns in a share deal

Since there will be the transfer of ownership of the whole target company, the share deals may lead to some concerns:

- Risk of unpaid taxes: It is common in Vietnam that many local companies use two accounting books, one for tax purposes, one for internal information purposes. The investment certificate (in case of a foreign-invested target company) shows tax incentives incompatible with the law (might happen if the target company is located in an industrial zone and the industrial zone is anxious to attract investors). It is clear that these findings indicate unpaid taxes.

#### Relevant regulations:

Article 200 of The Penal Code 2015: Tax evasion

5. Punishments incurred by a corporate legal entity that commits any of the offences specified in this Article:

- a) Any corporate legal entity that commits an offence specified in Clause 1 of this Article despite the fact that it has incurred an administrative penalty or has an unspent conviction for the same offence shall be liable to a fine of from VND 300,000,000 to VND 1,000,000,000;
- b) A corporate legal entity that commits this offence in any of the circumstances specified in Clause 2 of this Article shall be liable to fine of from VND 1,000,000,000 to VND 3,000,000,000;
- c) A corporate legal entity that commits this offence in any of the circumstances specified in Clause 3 of this Article shall be liable to a fine of from VND 3,000,000,000 to VND 10,000,000,000 or has its operation suspended for 06 - 36 months;
- d) A corporate legal entity that commits this offence in any of the circumstances specified in Article 79 hereof shall be permanently shut down;
- dd) The violating corporate legal entity might also be liable to a fine of from VND 50,000,000 to VND 200,000,000 , be banned from operating in certain fields or raising capital for 01 - 03 years.

- Unpaid social security, health insurance, and unemployment insurance contributions: This is a problem in a share deal, not in an asset deal, because these liabilities are not passed to the acquirer of assets.

- Assets are mortgaged: In a share deal, the fact that assets of the target company are mortgaged means that the target company is burdened with the risk to lose the respective assets if the security holder realizes the mortgage. In an asset deal, the security holder may be able to prevent the transfer of ownership of the assets to the buyer.

For this reason, in most cases, the buyer will conduct due diligence over the target company that will be discussed in the following section of this Handbook.

### **3.1.6. Due diligence**

Due diligence is an exercise of digging deep and ensuring that the deal actually worth for the acquisition. Due diligence helps to discover positive, negative findings to protect the buyers from unexpected facts. That is the reason why this has become an essential source of data for the team to do the valuation and planning.

A due diligence will help the buyer to review whether there are risks in the target that would justify a reduction of the purchase price, or are severe that it would be better not to buy the target. The scope of the due diligence depends on the business of the company (e.g. one would probably review whether there are environmental risks in a target whose business is the tanning of leather whereas one would probably not do such a review in case of a target whose business is the development of the software).

For a large proportion of transactions, the buyers investigate different elements of the target companies such as legal and tax obligations, financial data, and the commercial aspect. This highlights the buyers' awareness of the importance of target thorough scrutiny. The investigation is called due diligence process:

- Financial due diligence: the review of historical and future financial figures of the target company such as the robustness of historical earnings, the quality of net debt, the analysis of budgets, and future projections.

- Tax due diligence: the investigation of both the history and future of tax obligation and the exposure of the target company in the context of direct and indirect taxes.

- Legal due diligence: the review of the legal situation of the target company in the areas of the company law, contracts, labor laws, intellectual property, and permits.

- Commercial due diligence: the study of markets in which the target company is operating and the market position in which the company finds itself.

It is usually very difficult to obtain information about Vietnamese companies unless the owner agrees to provide them.

Information, regarding the financial statements, is publicly available only for joint-stock companies (any individual or organization can request this information from the competent business registration office for a fee). However, transparency standards are not comparable to other jurisdictions. In most M&A cases, documents and information provided by the owner in the course of due diligence are the only source to obtain knowledge about the target's legal, tax, and financial background.

### **3.1.7. Internal approvals**

In a share deal, the consent of the remaining equity members or shareholders (if any) is required if capital/shares of (i) limited liability company or (ii) joint-stock company within the first three years after its establishment are bought.

Every member of multi-member limited liability company are entitled to transfer part or all of his/her stake to another person as follows:

a) Offer the stakes to other members in proportion to their stakes in the company under the same conditions;

b) Only transfer the stake under the same conditions applied to other members prescribed in the above paragraph to persons other than members if the members do not buy or do not buy completely within 30 days from the offering date.

In terms of JSCs, within 03 years from the issuance date of the Certificate of Business registration, founding shareholders may transfer their shares to other founding shareholders; they may transfer their ordinary shares to people other than founding shareholders if approved by the General Meeting of Shareholders. In this case, the transferring shareholders do not have the right to vote on the transfer of such shares.

### **3.1.8. Purchase agreement**

In light of the general lack of information that can be unearthed in a due diligence, the share purchase agreement should ideally contain a lot of reps and warranties and remedies for breaches of such reps and warranties, but it is of course not always easy to persuade the seller to agree to them as the seller may not always be convinced that it is necessary to conduct a due diligence and have reps and warranties in addition.

Usually, the charter (articles of association) of the target company will be changed after the acquisition. If there are still old shareholders left in the target company, it is an international standard to include requests and put options or tag-along and drag-along clauses in the articles of association. These clauses are often very long and complicated. Vietnamese shareholders may not always be familiar with these concepts.

### **3.1.9. Payment**

It is not possible to go through the investment procedure in advance to be on the safe side when acquiring the shares; rather, proceedings can only be commenced after the share purchase agreement has been concluded. When applying for the registration of the change of ownership of the shares, the applicant must, amongst others, provide proof that the “assignment has been completed” which is generally understood to mean proof that the purchase price has been paid. This contradicts the demands of the buyer whose interest it is to pay only after having received title to the shares. In practice, this issue can usually be solved by the establishment of an escrow account, which the buyer pays the purchase price. This may entail quite lengthy negotiations with the seller (who usually wants to receive the money immediately and may not see the need for an escrow account). It is necessary to involve the bank in these discussions ultimately, the bank has to agree to<sup>101</sup> the conditions upon which the amount in the escrow account is released to the seller or returned to the buyer.

If the seller is a foreigner and the buyer a Vietnamese, it can be a lengthy and complicated task for the buyer to transfer the purchase price out of the country to the seller.

Payments for transfer of shares/stakes, and receipt of dividends of foreign investors must be made through their capital accounts opened at banks in Vietnam, except for payment with assets.

### **3.1.10. Tax liability**

#### **Tax liability of the sellers**

- **Corporate sellers/transferrors**

For local corporate sellers, any gain derived from the transfer of capital/securities in another Vietnamese entity is regarded as ‘other income’ and is accordingly subject to corporate income tax (CIT) at the current standard rate of 20 percent.

The tax treatment on capital gains earned by a foreign seller is different depending on the corporate form of the target. In particular, the transfer of contributed capital in a Vietnamese LLC is subject to CIT at 20 percent on the gain, whereas the transfer of securities (bonds or shares of JSCs) is subject to CIT on a deemed basis at 0.1 per cent of the sale price.

All goods and services used for production, business, and consumption in Vietnam are subject to VAT at 10%, 5%, and 0%, except for some goods and services being entitled to VAT exemption. An enterprise is required to pay VAT if it sells goods or provides services in Vietnam. The common rate of VAT is 10%. However, under the Law on VAT, income from the capital assignment is exempted from VAT. Notwithstanding, the seller still needs to issue the VAT invoice for the payment of the capital assignment from the buyer.

- **Individual sellers/transferrors**

The current personal income tax (PIT) regulation has different tax implications on capital gains based on the tax residency status of individual investors as well as the corporate form of the target.

Accordingly, a Vietnamese or a foreign seller who is considered a tax resident in Vietnam will be liable to 20 percent PIT on the gains from transferring contributed capital in a LLC or to a flat deemed PIT rate of 0.1 percent on the sales proceeds from the transfer of securities

However, an individual investor who is a non-tax resident in Vietnam and earns income from the transfer of capital/securities in a Vietnamese LLC/JSC is subject to PIT at a rate of 0.1 percent on the sales proceeds.

- **Tax determination**

The aforesaid taxable gains are determined as the excess of the transfer price minus the purchase price of transferred capital/securities, minus the deductible transfer expenses. The transfer price of an LLC or a public non-listed company is the total actual value earned by the sellers under the Capital Transfer Agreement (CTA). In the event, the transfer price is not stated in the CTA or when the tax authority has grounds to determine that the transfer price does not equal the market price, they may re-evaluate the transfer price based on the arm's length principle for tax purposes.

The value of the transferred capital includes the value of capital contributed for the enterprise establishment, the capital from additional contributions, the capital contribution sourced from an acquisition transaction, and the capital contribution sourced from retained earnings used for capital increments at the time of capital transfer.

Deductible transfer costs are the reasonable expenses actually incurred and directly related to the capital transfer, and supported by legitimate invoices/documents, e.g. expenses to carry out the legal procedures, negotiate and sign off the CTA, etc.

### **Tax liability of the buyers**

At the time of receiving transferred capital/securities, no tax is imposed on the buyer or the transferees. However, upon making an investment decision, foreign buyers often start to think of their future exit strategy. Upon their future disposal of shares, from a tax perspective, foreign buyers will wish to achieve tax efficiency. Thus, they may consider investing through an offshore holding company established in a jurisdiction where tax treaty protection may be applicable and where there is possible tax exemption, as then the future disposal occurs outside of Vietnam.

Another viable option is investing through an intermediary, e.g. a securities company or fund manager in case the tax payable amount calculated at 20 percent CIT on net capital gain is higher than the tax payable amount calculated at the deemed rate of 0.1 percent of the total selling price.

### **Tax treaty protection**

Foreign investors earning gains from share sales can seek tax protection under Avoidance of Double Taxation Agreements (DTA) that Vietnam signed with approximately 75 countries. Tax treaty claims are not automatically granted to beneficiaries unless conditions for tax exemption/reduction are satisfied. An application dossier is required and is subject to the final approval/assessment from the tax authority.

## 3.2. Asset deals



In addition to share purchase structure, many M&A deals over hotels are carried out in the form of assets deals. This structure may be more advantageous in terms of potential liability issues and, in some cases, the ability to rebase the asset value for tax depreciation purposes. In an asset deal, the buyer acquires all or selected assets of the Target Company and assumes all, a portion, or none of the liabilities of the Target Company in accordance with the asset purchase agreement.

There are several situations and reasons why a transaction may be structured as an asset deal. For example, this kind of deal can be chosen by parties where the buyer is acquiring only a project, division or a product line from an established company with multiple projects, divisions and product lines that are not separately run, an asset deal is a practical way to achieve and close the deal. Since the buyer only acquires the selected projects or divisions of the Target Company, the advantage is that the buyer is not, in principle and unlike in a share purchase deal, responsible for liabilities of the Target Company as they are not attached to the object of the acquisition.

Unlike in the share purchase deals, in an asset purchase, the assets of the target company rather than the shares in that are subject of the deal. The seller (the owner, equity members, or shareholders of the Target Company) does not possess the properties but the Target Company itself. Besides, it is believed that an asset deal is tax-advantageous for the buyer as the buyer can depreciate the purchase price over the (remaining) useful life of the acquired assets provided that the seller has issued proper invoices.

### 3.2.1. Kind of assets that could be transferred

For the purpose of an asset deal, types of assets that the Target Company may transfer to the buyer include, without any limitation:

- The real estate properties;
- Facilities and equipment;
- Intellectual properties;
- Debts, Debt claims;
- Contractual rights and obligations;
- Other related assets.



### **3.2.2. Internal consents and primary conditions**

Importantly, foreign investors are required to establish (if they have not had) a Vietnamese entity to own assets in Vietnam as the consequence of asset transfer. For existing Vietnamese entities, the investment registration certificate or business license may need to be amended to allow for the expanded activities following the purchase of assets.

Regarding the seller, Vietnamese laws require equity member or shareholder approval of a sale of “all or substantially all” of the assets of the Target Company. According, the sale of assets amounting to 50% or more of the total assets of a company must have the approval of the members’ council (in a limited liability company with more than two members), of the owner (a single-member limited liability company), or of the general meeting of shareholders (a joint stock-company).

### **3.2.3. Valuation and Purchase price**

An important step in the process is to determine the value associated with the firm and to come up with a new suitable price for the deal. Usually, it is far more challenging to evaluate a private firm compared to an open public firm. On the occasion, general public organizations are obliged to generate standard audited reports to the public and to introduce financial data based on accounting standards. Private companies usually do not follow such regulations strictly.

Under the laws of Vietnam, it is commonly regulated that the valuation of assets for transaction purposes is a matter of mutual agreement between the seller and the buyer. Nonetheless, using commercially justifiable valuations is statutorily required. The competent state bodies may look to market value and are entitled to reevaluate the monetary value of assets based on the market values and thereby taxes payable on gains from the deal if they believe that the purchase price does not reflect commercial realities.

Currently, Vietnamese law accepts all common valuation methods known internationally, including (a variation or combination) the following approaches:

- Discounted cash flow analysis: In this method, future incoming and outgoing cash flows are estimated and discounted to their present value. The sum of the discounted cash flows is the net present value of the company.
- Comparison with similar companies: This method will consider the purchase price in similar transactions of a company of similar size and in a similar business line as the Target Company to determine an appropriate purchase price for the transaction in question. However, it is often difficult to find comparable transactions in Vietnam due to the lack of deal’s information.
- Asset-based methods: These approaches are usually used to determine the price of an asset deal. This only evaluates the assets of a company without taking into consideration the profit- or loss-making potential attached to them. Asset-based methods usually yield comparatively low values.

If the transaction is structured as an asset deal and the value of the business was determined by the methods of discounted cash flow method, or by using the purchase price of recent (share deal) transactions as comparisons, the purchase price usually has to be increased to reflect that, unlike in a share deal, old liabilities of the business are not transferred to the buyer.

The transfer of assets is commonly subject to VAT (at a default rate of 10 percent), except for intellectual property transfer, debt claim, .... Additionally, if the seller of asset is a company, the seller is also subject to CIT at 20 percent on the gain from the asset transfer.

#### **3.2.4. Purchase agreement**

It is very recommendable to itemize the purchased assets and allocate the corresponding portion of the purchase price to them in order to avoid problems with registration of ownership, notarization and certification, at least with regard to assets such as factory buildings, land use rights, ships, cars, etc. where the transfer of ownership requires registration.

It may often be a good option to conclude separate purchase agreements for each of these assets. The allocation of a reasonable portion of the purchase price to each asset is also a condition for the acquirer to depreciate the purchase price over time for corporate income tax purposes.

#### **3.2.5. Payment and transfer of ownership**

Payment and transfer of ownership are less complicated in an asset deal, at least if the foreign acquirer has already obtained an investment certificate and set up a subsidiary which buys the assets. Ownership of an asset is transferred at the point of time when the asset is delivered unless the parties have agreed to a different point of time.

For the assets where registration of ownership is required (such as land use rights, factories, houses, construction works, ships, cars, etc.), ownership is transferred upon completion of the registration procedure.

#### **3.2.6. Transfer the contractual obligations and rights**

If the buyer would like to take over contracts concluded by the Target Company, it is required that the transfer needs the consent of the other parties to the contracts except otherwise agreed in the contracts. The transfer of a contract in an asset deal also comprises the transfer of all claims and obligations related to such the contract since the required consent of the other contractual party usually also covers such claims and obligations.

#### **3.2.7. General tax issues in asset deals**

Income from the transfer of most assets in Vietnam is subject to Personal Income Tax or Corporate Income Tax. Income from the transfer of assets (except for the transfer of real estate) comprises monetary or non-monetary receivables from assignment or liquidation of assets. The taxable income from the transfer of assets is fixed as the amount receivable deducted by the residual value of the underlying asset at the time the transfer/liquidation arises. The CIT rate is 20% of the taxable income.

The transfer of most assets in Vietnam is subject to VAT. Current law imposes VAT on goods and services at three rates: 0 percent, 5 percent, and 10 percent. The standard VAT rate is 10 percent. The seller is required to issue VAT invoices for the sale of the asset, and VAT must be added to the sales price and indicated in the invoice issued. Sellers in a transaction of transfer of assets between dependent cost accounting entities are not required to declare and pay VAT.

The transfer of land use rights in Vietnam is currently not subject to value-added tax (VAT). The transfer of property or assets attached to land is subject to 10% VAT except in the case where state-owned residential houses are sold by the state to existing tenants. The transfer of social houses is subject to 5% VAT only. The payer of VAT is the buyer.

The buyer of assets must pay registration tax for certain assets including:

- Land and housing: 0.5%
- Ships and boats: 1%
- Motorcycles: 1-5%
- Automobiles: 2% except for automobiles less than ten seats which are 10% for the first registration and 2% thereafter.

For the purpose of the transaction, the seller may reduce tax implication based on depreciation with the rate depended on kind of transferred assets.

Under Vietnamese rules, an asset is considered to be a fixed asset for tax depreciation purposes where all the following conditions are met:

- There is a high degree of certainty that a future profit will be obtained from utilizing the assets.
- The useful life of such asset is at least 1 year.
- The value of such asset is at least 30,000,000 Vietnamese dong (VND) (approximately 1,400 US dollars - USD).

The depreciation timeframe for intangible assets is from 2 to 20 years. Like goodwill, patents and know-how are not considered as intangible fixed assets for tax purposes and may only be amortized over 3 years.

If the seller of shares is a foreign company and the purchaser a Vietnamese, the Vietnamese purchaser has to withhold Vietnamese corporate income tax on the capital gain from the purchase price (Circular 123/2012/TT-BTC dated 27 July 2012). If both the seller and the purchaser of shares are foreign companies, the target company is responsible to pay Vietnamese corporate income tax on the capital gain on behalf of the foreign seller.

If shares in a foreign holding company are sold, the foreign seller is not liable to Vietnamese corporate income tax on the capital gain (and, by extension, the Vietnamese subsidiary is not liable to pay corporate income tax on behalf of the foreign seller) if the following conditions are met (Official Letter 2268/ TCT-CS dated 28 June 2012):

- The shares are transferred outside of Vietnam between two non-Vietnamese entities;
- The shareholding of the (direct) foreign parent company of the Vietnamese subsidiary is unchanged;

- 
- The investment certificate of the Vietnamese subsidiary remains unchanged.

If the seller is a foreigner, there may be a double taxation agreement preventing Vietnam from taxing the seller's capital gain in a share deal. Relief is available in the shape of (i) exemption or (ii) refund. Exemption means that the capital gain is not taxed in Vietnam at all. Refund means that the seller has to pay Vietnamese (corporate or personal) income tax on the capital gain, but gets a refund later (in Vietnamese dong). Obviously, the exemption is preferable. However, this requires an application for exemption to be filed with the Vietnamese tax authorities 15 days prior to the date the seller declare the capital gain in Vietnam; the application dossier includes, amongst others, a tax residence certificate issued in the jurisdiction of the seller which must have gone through a potentially time-consuming legalization procedure.

### **3.2.8. Some notes concerning tax in the transfer of intellectual properties**

Stipulated in clause 21 of Article 4 of Circular No.219/2013/TT-BTC, intellectual property right transfers according to the Law on Intellectual property is not subject to VAT. If a contract of intellectual property right transfer is associated with a transfer of machinery/equipment, only the value of intellectual property right is not subject to VAT. If such value cannot be separated, VAT shall be imposed on the total value of the transferred intellectual property right and machinery/equipment.

Described in Article 16 of 2007 Personal income tax Law, revised and amended in 2014, a taxable income from copyright is an income in excess of VND 10 million earned by a taxpayer when assigning an intellectual property object under a contract, without depends on the number of payment or the number of receipts. This transfer is entitled to the tax rate of 5% as stipulated in Article 30 of this Law.

If intellectual property rights transfers are organizations, they shall pay this tax when they want to transfer intellectual property.

Regard to fulfillment of tax liability of foreign, income from copyright means any income paid for the right to use, transfer of intellectual property rights and technology transfer, software copyright (including payments for the right to use, transfer of copyright, transfer of industrial property rights, transfer of technologies and software copyright.

Point a Clause 2 of Article 13 of this Circular, company income tax rate applied to income from copyright is 10%.



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# The transfer of some core assets in M&A deals in hospitality sector

## 4.1. Land ownership

In Vietnam, the ownership structures of land use rights are often very unclear and complicated. Under the laws of Vietnam, all land is owned by the people and administered by the State. However, a Vietnamese individual or a company can obtain or be transferred a land use right from the State or others. If the user is Vietnamese, this land use right can take the shape of either (i) a land allocation which can be close to ownership or (ii) a lease. A foreigner can only lease land from the State (with very few exceptions). The lease term is usually equal to the duration of the investment project of the foreigner (max. 50 years, 70 years in exceptional cases). Unlike the land ownership, buildings, factories, or construction works attached to the land, can be owned by individuals or foreign invested enterprises in Vietnam.

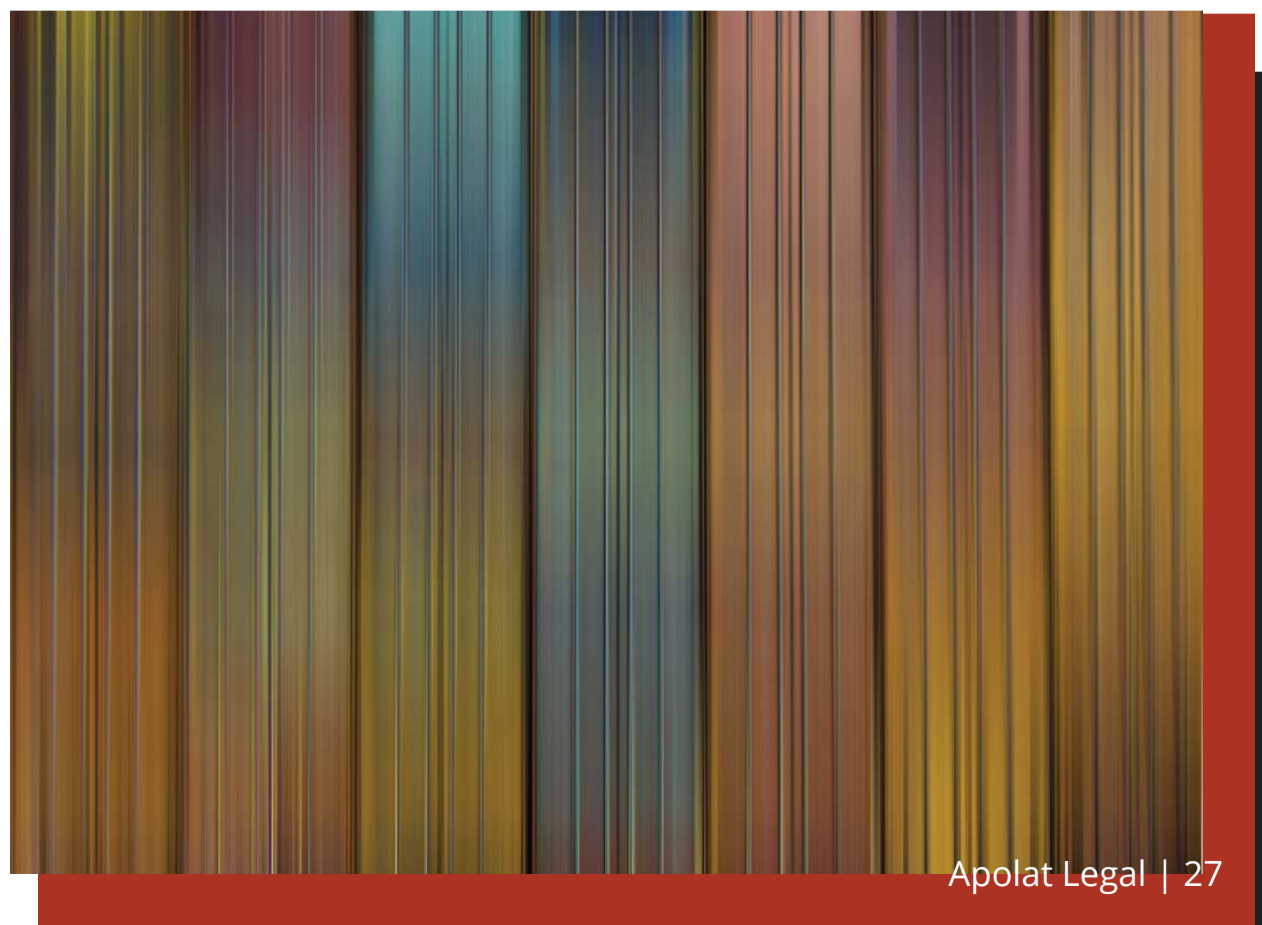
Vietnamese laws dictate that land users are not allowed to transfer land which is allocated by the State without land use levy, land which is leased by the State with annual rental payment.

Organizations that are allocated land with land use levy or leased land with full one-off payment for the entire lease period by the State may transfer land use rights and land-attached assets under their ownership.

In accordance with the land laws, land users may exercise the rights to transfer when meeting the following conditions:

- Having the certificate, except for some special cases;
- The land is dispute-free;
- The land use rights are not distrained to secure judgment enforcement;
- Within the land use term.

Land use rights and ownership of assets located on land are evidenced by a 'Certificate of Land Use Right, House Ownership and Other Assets attached to Land', commonly referred to as a Land Use Rights Certificate (LURC).



## **4.2. Land leased from the State**

Land can be leased from the State by both domestic and foreign-invested enterprises and by Vietnamese individuals. Land can be leased for agriculture, production, and business purposes. This includes infrastructure construction, manufacturing facilities, hotels and resorts, mining and residential housing for lease.

-- Lease tenor: Maximum lease terms are prescribed for different types of leases. Leases to domestic and foreign-invested entities may be for a maximum 50-year period (although, in certain cases – such as projects of national importance – a 70-year term is permitted). The term however must not exceed the duration of the relevant investment project. Extensions are possible, but not guaranteed, and the extended term must not exceed the original term.

-- Rights of lessee: All lessees of land from the State must pay land rental. Domestic enterprises and foreign-invested enterprises may pay rental either annually or in a lump sum upon commencement of the lease. Land users paying rental annually may not mortgage or contribute their land use rights (although they may mortgage or contribute any assets on the land). By contrast, a land user who pays the full land rental up front (where the costs are akin to purchasing the land use rights) may transfer, sublease, mortgage, or contribute their land use rights in much the same way as a party to whom land has been allocated.

## **4.3. Indirect acquisition of LUR by acquiring shares of an existing company**

A foreign investor may indirectly acquire LURs by buying shares of an existing company that has already obtained LURs.

Foreign investors are not allowed to invest in companies that engage in the following business activities: (i) buying houses or construction works for sale, lease or hire-purchase, (ii) leasing houses or construction works for sublease, (iii) receiving an assignment of a LUR to invest in infrastructure works to assign or lease out, (iv) leasing a LUR for land with infrastructure in order to sublease it. That means<sup>112</sup> a foreign investor neither buys shares of, nor contributes capital to a Vietnamese entity engaging in these activities.

## **4.4. Contribution of land use rights as capital**

Some land users are able to use their land use rights as capital to invest in enterprises. A common example of this is where the Vietnamese party to a joint venture contributes their rights as capital to the joint venture company.

-- Generally, in order to contribute land use rights, the Vietnamese party must have been allocated or leased the land use rights and have paid all land use fees or land rental in full.

-- Once contributed, the joint venture enterprise has the same rights as the land users who were allocated or leased land by the State with full payment of land use fees or land rental. They may assign, lease, donate, mortgage or even contribute those land use rights.

#### **4.5. Transferring assets attached to land leased by State with annual rental payment**

Under the law on land, for assets attached to land leased by State with annual rental payment may be transferred to the buyer when some certain conditions are met. Also, the buyer needs to meet some certain conditions to receive the transfer of assets attached to leased land and continue to be leased land for determining land use purpose for the remaining use term as specific price by the State, namely:

- (i) Having financial capacity to implement investment projects;
- (ii) Having business lines relevant to investment projects;
- (iii) Not violating the land law when being allocated or leased land from the State to implement the previous projects.

#### **4.6. Transfer of employment relationships**

With regard to an asset deal, Art. 31 Labor Code provides that where “an enterprise...transfers ownership of... the assets of the enterprise, the succeeding employer shall be responsible to continue performance of the labor contract of the employee”. It is, however, possible to terminate employment contracts of staff not needed. This involves the setting up of a plan for labor usage (requires trade union participation and notification to the labor management authorities) and payment of compensation.



## **4.7. Transfer of intellectual properties**

Pursuant to Vietnamese laws, as for industrial property rights granted on the basis of a decision of the competent State authorities to grant a protection title such as an invention, industrial design, layout design, mark or geographical indication, an industrial property rights transfer agreement shall only come into force when it has been registered with the competent State authorities.

Intellectual property is intangible assets. Currently, there are no regulations determining the value of this property. In addition, though intellectual property laws have explained how to determine the transfer of a trademark does not cause confusion as to properties or origins of goods or services bearing such trademark, these provisions are unclear, and applying the provisions causes lots of problems. Basically, the value for intellectual property is determined by the agreement of parties.

Some important subjects of intellectual properties that may be transferred include:

### **(i) The assignment of the registered trademarks**

An assignment of a trademark must be established in the form of a written contract and an industrial property right assignment contract shall be valid upon its registration with the State administrative body for industrial property rights.

Restrictions on the assignment of the rights to trademarks:

- Industrial property rights owners may only assign their rights within the scope of protection.
- The assignment of the rights to trademarks must not cause confusion as to properties or origins of goods or services bearing such trademarks.
- Rights to marks may only be assigned to organizations or individuals who satisfy conditions for persons having the right to register such trademarks.

### **(ii) The assignment of the rights to tradenames**

An assignment of a tradename must also be established in the form of a written contract and this contract is not compelled to register, because industrial property rights to a trade name shall be established on the basis of lawful use.

Rights to trade names may only be assigned together with the transfer of the entire business establishment and business activities under such trade name.

### **(iii) The assignment of the rights to trade secrets**

An assignment of the rights to trade secrets must be established in the form of a written contract and this contract is not compelled to register, because industrial property rights to a trade secret shall be established on the basis of lawful acquirement of the trade secret and maintaining confidentiality.

**5**

## Comparison of....

**Asset**

**Share purchases**

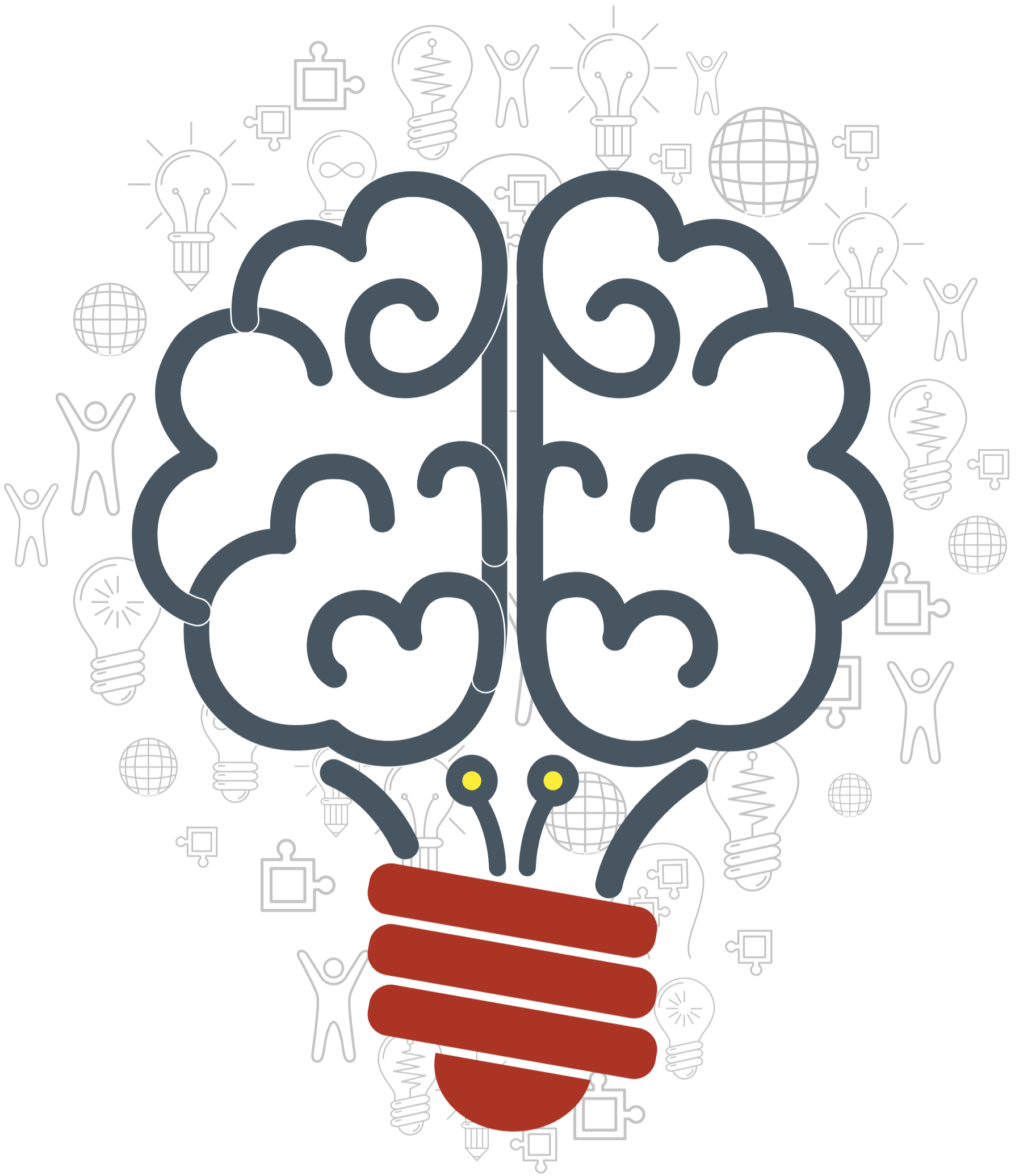
Share purchases lead to ownership of part or all of the target company, which can preserve the licensing benefits of that target entity but can also lead to the potential inheritance of the past tax liabilities. Another key factor in determining whether to use an asset or share deal in Vietnam is that the purchase of asset is subject to VAT, and the purchase of shares is not.

However, in asset deals, the buyer needs to change the licenses and apply for new approvals regarding the business acquired. Permits are not automatically transferred from the target company to the acquirer in an asset deal. Furthermore, the transfer of certain assets (e.g. land use rights) requires special proceedings.

	<b>Share deal</b>	<b>Asset deal</b>
<b>Advantages</b>	<p>Purchaser may benefit not only from tax losses but also from CIT incentives of the target company.</p> <p>Share purchases are not subject to VAT.</p>	<p>The full purchase price can be depreciated or amortized for tax purposes (including acquired goodwill).</p> <p>No previous liabilities of the company are inherited.</p>
<b>Disadvantages</b>	<p>Purchaser is fully responsible for all past/inherent liabilities, including current tax and debts as well as any liabilities arising in the future as a result of past activities of the company.</p>	<p>A foreign investor must have an entity in Vietnam for purchasing of assets.</p> <p>Possible need to renegotiate supply, employment and technology agreements, etc.</p> <p>Benefits of any tax incentives and tax losses incurred by the target company remain with the seller (but maybe lost altogether).</p>

In terms of the taxation, the following tax rates apply according to Vietnamese tax law:

	<b>Corporate income tax on capital gain</b>	<b>Personal income tax on capital gain</b>	<b>VAT on purchase price</b>	<b>Registration fee on purchase price</b>	<b>Notarization fee</b>
<b>Asset deals</b>	20%	Usually not applicable as a registered private enterprise is taxed as a company	Might not be subject to VAT pursuant to Art. 4.8 lit. c Circular 06/2012/TT-BTC ("sale of an enterprise to another enterprise for the purpose of production or business")	<ul style="list-style-type: none"> <li>› Housing and land: 0.5% of the "market price" fixed by the local People's Committee;</li> <li>› ships, boats, yachts, aircraft: 1%;</li> <li>› motorcycles: 2%;</li> <li>› cars, trailers or semi-trailers: 2%</li> <li>› cars with less than 10 seats: rate set by the local People's Committee (between 10% and 20%)</li> </ul>	Depends on the asset, from min. VND 50,000 to max VND 5.2 million + 0,03% of asset value exceeding VND10 billion › Fee cap: VND10 million/case
<b>Share deals</b>	20%	20% (non-resident: 0.1% of turnover)	Not subject to VAT	No	No



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## Some other relevant matters

## 6.1. Employing foreigners

Vietnam, except in limited exempted cases (eg. board members of shareholding companies). The employer is responsible for obtaining the work permit for the foreign employee, which is tied to one specific position with that specific employer only. If the employee changes position or works for another employer, a new work permit is required. Each work permit has a maximum term of 24 months and can be reissued for subsequent terms at the employer's request.

Under Vietnam's Commitments to the World Trade Organization, if a foreign-invested enterprise routinely transfers expatriate managers in and out of Vietnam, at least 20 percent of the total number of the managers, executive directors, and experts of the enterprise must be Vietnamese citizens. However, each foreign-invested enterprise in Vietnam will be allowed to have at least three foreign managers, executive directors, and experts. The employer is required to have a training plan and specific apprenticeship agreements to train Vietnamese employees to eventually replace foreign employees.

## 6.2. Competition Rules on Economic Concentration

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

According to the Competition Law 2018, before a merger, acquisition (collectively "economic concentration") is carried out, it would first have to be notified to the regulator if the prescribed notification thresholds are crossed. Notification required if the following thresholds are met:

- Either party's total assets in the Vietnam market exceeds VND 1000 billion (approx. USD 43 million);
- Either party's total turnover exceeds VND 1,000 billion (approx. USD 43 million) in the preceding fiscal year;
- The value of the transaction exceeds VND 500 billion (approx. USD 21.5 million)(only applies to economic concentrations in Vietnam); or
- The combined market share of the combining entities in the relevant market is 30% or more.

The Competition Law 2018 also provides limited exemptions for prohibited cases of economic concentration subject to conditions. Applicants for such exemption must submit a comprehensive application dossier to the competition administration authority prior to proceeding with any economic concentration activities.

Under the Law on Competition 2004, many businesses found it challenging to be sure of its notification obligations because of the uncertainties surrounding what the relevant market should be, and the difficulties in obtaining market share information. As a result, many transactions have simply not been notified. A shift to notification based on assets, revenue, and value of the transaction, which are more objective measures, is expected to provide greater certainty to businesses on when the notification thresholds are met.

The Law on Competition 2018 now clearly states that it applies to any acts by foreign individuals or entities which have or may have the effect of restricting competition in Vietnam's markets.



## Merger Review Timelines

Before filing a notification, it is important for parties to consider whether it would be helpful to have a pre-merger consultation with the regulator to clarify whether their transaction would need to be notified or if it would be prohibited. This tends to be an informal process that is not set out in any statutory instruments or governed by fixed timelines, but is an important and cost-free first step to clarifying the merger control obligations. Once parties have submitted a complete notification that has been accepted by the regulator, the statutory timelines start to run.

The Law on Competition 2004 provides for an economic concentration to be cleared within 45 days from notification if the review is not complex. This may be extended by a further 60 days in complex cases. The new Law on Competition 2018 extends the review timelines. Under the new regime, the preliminary review would be completed within 30 days from notification. If a more detailed official appraisal is required, the NCC is given a further 90 days to conduct the review. This can be further extended by 60 days in complex cases. The clock may also be stopped during the process if the NCC requests parties to provide additional information and documents as part of the review.

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