Hogan Lovells

Around Asia Pacific – Vietnam

Contents

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The big picture

"Around Asia Pacific" is Hogan Lovells' new periodic overview of the private equity landscape in Asia-Pacific and supplements our "Around Europe" series which focuses on the European private equity industry. Following our inaugural Asia-Pacific edition looking at Greater China (including Hong Kong), in this edition we turn our attention to Vietnam. Future editions in the series will look at other private equity markets in the Asia-Pacific region.

Private equity in Vietnam lags behind more developed neighbouring markets. Recent years have seen relatively modest investment activity (less than US$100 million in overall deal value per year) led primarily by middle-market and local managers, with occasional spikes in value (e.g. in 2011 and 2013) when global firms decided to play. Buyouts remain rare as growth capital and minority acquisitions are the norm.

We highlight some recent Vietnam private equity deals that demonstrate the breadth of opportunities that exist in the market. We also look briefly at some planned equitisations (privatisations) of state-owned companies, as Vietnam's continuing reform of its state-owned enterprises could present opportunities for interested private equity buyers.

Economic conditions in Vietnam remain favourable: Vietnam's 5.9 per cent GDP growth ranked second in the world in 2014; inflation (just over 4.0 per cent) was at a 13-year low; and Vietnam-focused funds (both onshore and offshore) continue to raise capital from foreign investors seeking emerging markets returns. A young population and growing middle class make Vietnam an attractive market for private equity investors, particularly in the retail, consumer goods and food and beverage sectors.

A number of recent legal developments will be of interest to private equity investors, particularly long-awaited amendments to Vietnam's property laws (effective from 1 July 2015) that are expected to open opportunities and increase liquidity in the country's real estate market. We will also touch on the new Law on Enterprises and Law on Investment (also effective from 1 July 2015) and recent Decree 60 (softening the cap on foreign ownership of public companies) to the extent they may be relevant to the activities of foreign private equity investors.

The deals

Standard Chartered Private Equity enters the market

Standard Chartered Private Equity ("**SCPE**") entered the Vietnam market with back-to-back investments in September/October 2014, picking up significant minority stakes in a local restaurant chain operator and Vietnam's largest distributor of plant protection chemicals and rice seeds. SCPE tested the waters with a US$35 million investment in Golden Gate Group, a leading restaurant chain operator with over 80 restaurants nationwide, then made a bigger splash two weeks later with the acquisition of an approximate 36% stake in An Giang Plant Protection Joint Stock Company ("**AGPPS**"), a market leader in Vietnam's agriculture sector, for a reported US$90 million.

Both SCPE investments were notable not only in heralding the arrival of a new player in the market, but also because they represented successful exits for earlier stage private equity investors. The Golden Gate investment allowed existing backer Mekong Capital, a Vietnamese private equity firm, to make a full exit with a reported net multiple of 9.1x, while the purchase of the AGPPS stake from VinaCapital's Vietnam Opportunity Fund is among the largest PE exits via a secondary sale in Vietnam to date.

Warburg Pincus invests in Vincom Retail

2013 saw another first-time Vietnam investment when a consortium led by an affiliate of Warburg Pincus agreed to invest US$200 million in a strategic partnership with Vietnam's largest private sector real estate operator, Vingroup. In addition to the purchase of a 20% equity stake in Vingroup subsidiary Vincom Retail, Warburg Pincus agreed to participate in a future capital-raising of up to US$25 million and was granted an opportunity to invest an additional US$100 million to explore future retail property-related opportunities. Vingroup subsequently announced at the end of June 2015 that the Warburg Pincus consortium had taken advantage of that opportunity and completed a follow-on investment of approximately US$100 million, bringing its total investment in Vincom Retail to US$300 million.

Vincom Retail is Vietnam's largest owner and operator of shopping malls, with assets valued at more than US$1.1 billion. The investment by the consortium, which in addition to Warburg Pincus also includes Credit Suisse and Dragon Capital, represents the largest initial investment, and one of the largest overall investments, by a global private equity firm in a Vietnamese company.

KKR doubles down on Masan Consumer … and wins

KKR also bet big on Vietnam in 2013, more than doubling its stake in Masan Consumer to US$359 million. KKR first invested in Masan Consumer in 2011, when it purchased a 10% stake for US$159 million in what was at the time the largest private equity deal in Vietnam. It was subsequently reported in July of this year that KKR sold half of its holding – almost 42.6 million shares – to an undisclosed buyer for a 100 per cent return. That pot was further sweetened by the reported US$50 million dividend payment KKR received from Masan Consumer last year.

Masan Consumer, one of Vietnam's leading producers of fish sauce, instant noodles and instant coffee, is the private food and beverage unit of Ho Chi Minh City-listed Masan Group, one of Vietnam's largest private sector business groups with a market value of US$3.6 billion and interests ranging from mining to banking. Other investors in Masan Group companies include TPG Capital, PENM Partners (formerly BankInvest), Dragon Capital, Goldman Sachs, Mount Kellett Capital Management and the IFC.

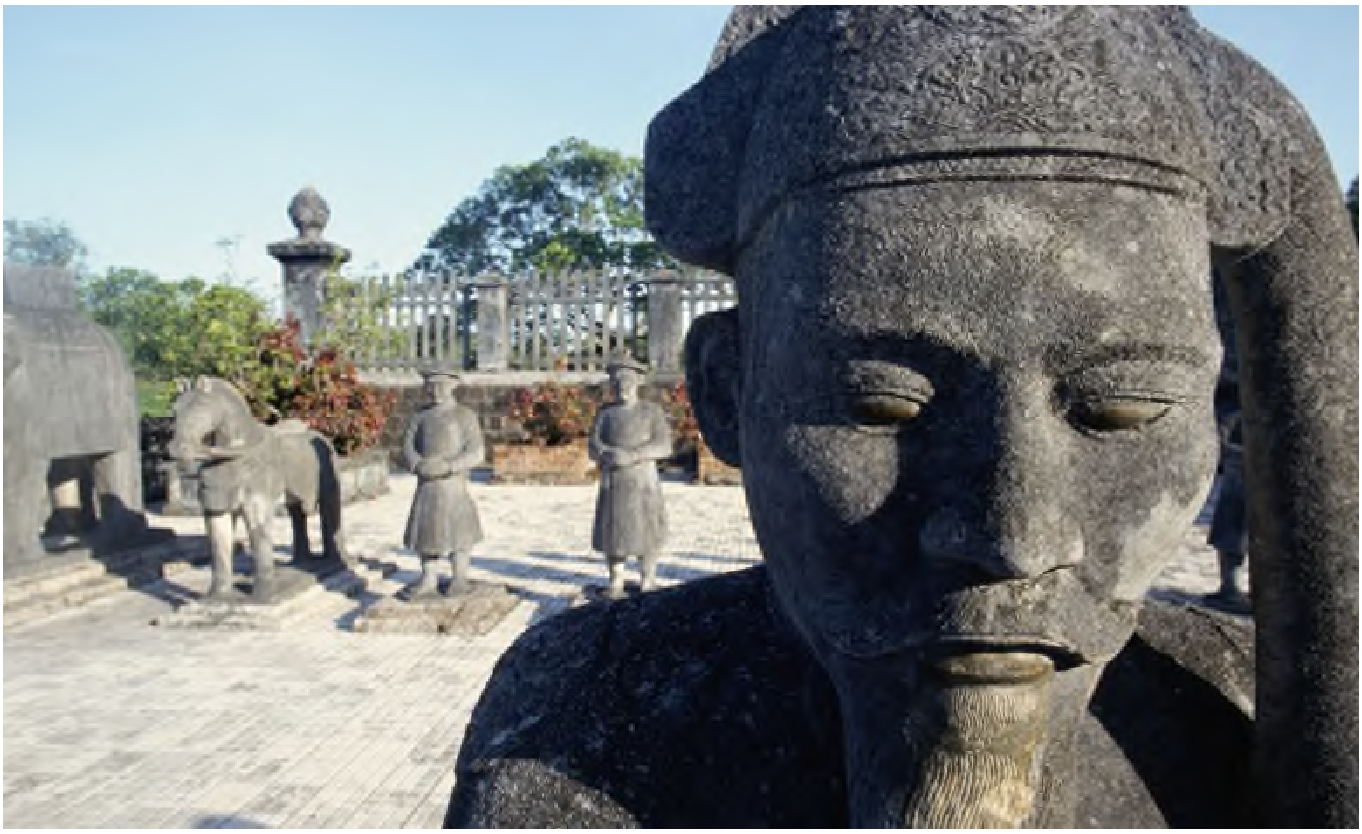
LGM increases stake in Phu Nhuan Jewelry

In April 2015, LGM Investment Ltd increased its stake in Vietnamese precious stone and metal trader Phu Nhuan Jewelry to 5.19% by purchasing an additional 160,000 PNJ shares from Dragon Capital. PNJ posted a 49% growth in gross profit in 2014 despite an 8% decrease in local demand for gold. PNJ is aiming to increase its net profit by 20% this year while expanding its retail network by adding 17 new stores to total 35 outlets. In addition to LGM and Dragon Capital, local private equity firms VinaCapital and Mekong Capital also hold interests in PNJ.

Gaw Capital Partners acquires real estate portfolio from Indochina Land

In June of this year, Gaw Capital Partners, a Hong Kong-based real estate private equity firm, announced its acquisition of an existing portfolio of real estate projects in Hanoi, Ho Chi Minh City and Danang from an affiliate of Indochina Land. The portfolio, which includes Indochina Plaza in Hanoi and the Hyatt Regency Danang, was purchased for US$106 million via a specially created fund. Ho Chi Minh City-based NP Capital is the local joint venture partner in the fund. It was reported that Indochina Land will be retained by the fund for a transition period in order to facilitate some project development and operation work.

Gaw Capital Partners has previously invested in a mixed-use development project, Empire City, in Ho Chi Minh City, but the Indochina Land transaction represents the first time Gaw Capital Partners' fund management services will be deployed in the Vietnam market. The transaction is also notable for involving multiple asset classes in cities spanning the length of the country.



Market commentary and analysis

A growing economy and loosening restrictions are creating investment opportunities

UBS has referred to Vietnam as "potentially one of the most exciting markets in Asia", while Goldman Sachs includes it as one of the "N-11 economies" (the next eleven economies to grow the fastest after the BRICS countries). With recent and predicted near-term annual GDP growth holding between 6-7% a year, Vietnam's economy is set to surpass the economies of more developed countries such as Singapore, Ireland and Norway by 2050.

At the same time, the Vietnamese Government continues to take steps to restructure the economy following the downturn from the end of 2007 and, in the process, create opportunities for private investment - both foreign and domestic. In addition to the recent legal changes discussed later in this publication, the Government is in the middle of an aggressive plan to partially privatise (equitise) hundreds of state-owned enterprises ("**SOEs**") by the end of this year (including those discussed later in this note). Doubts have been expressed as to the capacity of the Vietnamese domestic market to absorb all of the shares to be offered, so the engagement of strategic investors, especially foreign strategic investors, will be vital to the ultimate success of the Government's equitisation plan both in terms of financing and the attraction of technical know-how and experience to the various sectors.

Private equity is playing a small but growing role, especially in consumer-driven sectors

Although private equity in Vietnam remains modest in comparison to the Asia-Pacific region as a whole (where new investments alone have risen above US$80 billion), there are currently more than 300,000 small- and medium-sized enterprises (in additional to the minority stakes available in equitising SOEs) in Vietnam that could be prime targets for foreign private equity investors seeking emerging market returns and prepared to deal with the attendant challenges.

According to a recent report by consulting group Grant Thornton, private equity investment, attracted to Vietnam's young population and burgeoning middle class, has been a significant driver of the country's recent economic growth. Grant Thornton reports that the investors it surveyed are generally optimistic about Vietnam's economy and see education, real estate, food & beverage and retail as the most attractive sectors for private equity investment.

But headwinds remain

Despite a visible increase in investor enthusiasm and the general market optimism reported by Grant Thornton and others, private equity investment in Vietnam is nonetheless being held back by a number of institutional and commercial issues that will be familiar to emerging/frontier market investors.

The economy, although continuing to grow at a reasonable rate, still faces challenges from the slow reform of the public sector and inadequate existing infrastructure. Corruption and government red tape persist and regulatory procedures can be time-consuming and uncertain. The banking sector is still struggling with the high rate of non-performing loans and debt financing can be difficult to obtain. Economic and legal policies are unclear, inconsistent and constantly in flux.

On the commercial side, divergent value expectations between buyers and sellers make cutting a deal difficult – a problem that is exacerbated by the relative lack of transparency during the due diligence process and post-closing. Foreign ownership and other restrictions that force investors to take minority positions also hamper the ability of foreign buyers to implement best business and corporate governance practices and to meaningfully influence or exercise control over ongoing operations.

Looking ahead…where do we go from here?

Money will continue to flow in

Government efforts to ensure political and macroeconomic stability, along with recent changes in law (discussed below) that have loosened restrictions on foreign ownership and operation of Vietnamese businesses and assets, are expected to help Vietnam attract a greater share of ASEAN-targeted foreign direct investment. Rapid growth and falling inflation – real GDP is expected to grow in excess of 6% annually over the coming years while headline inflation was just 1% year-on-year in May 2015 – continue to make Vietnam an attractive market for both local and foreign investors.

Private equity firms both within and outside of Vietnam continue to raise funds for further investment in the country. In the first half of this year, Japanese private equity firm Dream Incubator announced plans to launch a US$100 million DIAIF Fund II to deeper penetrate the Indian and Southeast Asian market, with 60% of the fund's cash earmarked for Vietnam. Closer to home, Ho Chi Minh City-based Mekong Capital announced at the beginning of June that it had raised US$87.4 million in committed capital for its fourth Vietnam fund, Mekong Enterprise Fund III. The fund has a target of US$150 million and will invest solely within Vietnam. Meanwhile, PENM Partners (formerly known as BankInvest) successfully raised its fourth Vietnam fund with US$120 million signed up for the first closing in June and a second closing within the next 12 months expected to add an additional US$60 million.

Focused on a handful of sectors

As consumer spending, driven by a young population and growing middle class, continues to accelerate across Southeast Asia and especially Vietnam, we expect sectors such as retail, food & beverage, TMT (telecommunications, media and technology), education, healthcare, hospitality and leisure to continue to attract significant investment capital in the year ahead. Recent changes in property ownership

laws (discussed below) are also driving increased activity in Vietnam's real estate sector.

Local private equity firm Mekong Capital has stated that its Mekong Enterprise Fund III will target only consumer-driven businesses including retail, restaurants, fast moving consumer goods and pharmaceuticals, and consumer services sectors such as education and healthcare. The fund may also consider investments in consumer-oriented online businesses, particularly those that combine online and offline retail. Dream Incubator's DIAIF Fund II will focus on investments in wholesale, retail, restaurant chains, food products, fast moving consumer goods and peripheral medical products and services, thus following in the footsteps of Dream Incubator's initial Dream Incubator Asian Industrial Fund which invested US$50 million in companies targeting Vietnam's growing domestic demand in sectors such as consumer goods, healthcare and retail. Building on the success of its previous three Vietnam funds, PENM has said its latest fund will look at Vietnamese growth companies operating in the food and beverage, fast moving consumer goods, personal and healthcare products, construction materials, mining and agriculture industries.

According to the Vietnam General Statistics Office, foreign investors contributed US$111.4 million to Vietnam's real estate sector in the first two months of this year. VietCapital Securities Company sees foreign investment as one of the primary drivers of Vietnam's real estate development for 2015, while international property advisory company CBRE forecasts that real estate investment value in the Asia-Pacific region generally this year will increase 5% year on year.

Providing exit opportunities to current investors

The Vietnamese market is expected to see an uptick in deals this year as the recovering economy and increased investment flows provide exit opportunities for current investors. The absence of viable IPO options suggests a wider use of trade sales or secondary buyouts, particularly as foreign firms' interest in entering Vietnam allows domestic shops to exit existing portfolios (many of which are nearing maturity) and return capital to investors. Examples of local private equity firms exiting investments through secondary market sales to foreign investors include last year's sales by VinaCapital's Vietnam Opportunity Fund of its stake in An Giang Plant Protection Joint Stock Company and Mekong Capital's exit from Golden Gate Group, both to Standard Chartered Private Equity.

Privatising SOEs

After announcing plans to equitise (privatise) 432 SOEs in 2014 and 2015, the Vietnamese Government has continued to press ahead despite a slow start to the process and concerns among analysts as to whether the goal is achievable (as of the date of this publication, almost 290 of the initial target list are yet to be equitised). Recognising that previous attempts at equitisation failed to attract foreign interest in large part because the small stakes on offer did not allow private shareholders to have an influence on corporate governance, recent reports indicate that the Government plans to offer larger stakes in future equitisations. Although taking a position in an SOE will not be an attractive option to every private equity investor, some may be of interest to those investors who can overcome (or more likely learn to live with) the potential challenges of having the Government as a partner. According to published reports, upcoming opportunities to participate in initial or ongoing equitisations include:

- **Bank for Investment and Development of Vietnam ("BIDV")**

  According to reports after the BIDV Annual Shareholders' Meeting in April, BIDV is in the process of discussing strategic holdings with six to seven potential investors from Asia, Europe and America. The board of directors disclosed that they are planning to select two investors among these. The identity of potential investors has not yet been disclosed, but it appears that BIDV intends to sell a stake of between 15%-20% to a long-term foreign investor engaged in the banking business and another 10% to an overseas financial investor via private placement. The sale is expected to be completed in 2016. Vietnam's government will retain a 65% stake.

- **Vietnam Airlines**

  After raising US$51 million through an IPO sale of 3.47% of its shares in November 2014, on 12 March 2015, Vietnam Airlines' General Meeting of Shareholders adopted a plan for offering additional shares to strategic investors. Fewer than three potential investors will be chosen, including an airline corporation as a strategic partner and/or financial investor. 282,036,800 ordinary shares (accounting for 20% of charter capital) will be offered by way of private placement. Vietnam Airlines expects to raise around VND 6,289 billion (US$292 million) from the offer.

- **Airports Corporation of Vietnam**

  According to the equitisation plan submitted by Airports Corporation of Vietnam ("**ACV**") to the Prime Minister in April 2015, the Government will continue to own 75% of ACV's charter capital while 20% will be sold to strategic investors and 3.47% will be offered to the public with an opening price of VND 11,100 (US$0.50) per share. More recent reports state that ACV plans to offer 77.8 million shares (equivalent to a 35% stake) at an IPO auction, part of which will be sold to an institutional strategic partner. French airfield operator Aeroports de Paris has expressed interest in taking a 30% stake and is reported to have made an offer to the Ministry of Transport to buy shares in ACV and become its strategic shareholder.

- **Saigon Beer-Alcohol-Beverage Joint Stock Corporation ("Sabeco")**

  The State, through the Ministry of Industry and Trade, is planning to sell a 53% stake in Sabeco to strategic investors and the public in 2015, decreasing its shareholding from 89% to 36%. The sale will reportedly be conducted by way of public auction with a starting price of VND 70,003 per share. Nine investors are reported to have submitted bids to buy holdings in Sabeco, including Thai Beverage Group, which has expressed a desire to buy 40% of the shares in Sabeco for US$1 billion. Other interested investors include Singha Corp, Asahi Breweries, Heineken and SAB Miller, although Sabeco's chairman has previously expressed a preference for domestic investors in the auction.

- **Seaports equitisation**

  Under the equitisation plan for seaports, the State will continue to hold a 51% stake in certain material ports and may completely divest from others. The Ministry of Transport recently proposed to the Prime Minister to sell a block of 80% of the shares in Quang Ninh Port to T&T Group, and is making similar proposals for the sale of shares in Saigon Port, Hai Phong Port and Vinamotor to private investors.

- **Mobifone Telecommunications Corporation**

  Mobifone Corporation, a wholly state-owned limited company under the management of the Ministry of Information and Communication, is expected to complete its equitisation by the end of this year. According to the Deputy Information and Communications Minister, foreign investors will be able to own a maximum stake of 49% in the company post-equitisation. It is also reported that a strategic investor will be offered a 25% stake in Mobifone and that it may be seeking to separately spin off and equitise its Internet Protocol television business. Norway's Telenor ASA, Sweden's Comviq and Malaysia's Axiata Group Berhad have all expressed interest in Mobifone's upcoming IPO.

Doing deals in Vietnam: key issues and considerations

Foreign ownership restrictions

Despite the relaxation of existing caps on foreign ownership in connection with Vietnam's accession to the World Trade Organization ("**WTO**") in 2007 and more recently pursuant to Decree 60/2015/ND-CP dated 26 June 2015 ("**Decree 60**", discussed below), foreign shareholdings in Vietnamese companies are still subject to restrictions under a complex web of foreign ownership caps set out in international treaties and domestic regulations. In addition to caps on the aggregate participation of foreign investors (which include domestic entities having 51% or more equity capital held by foreign parties) in Vietnamese public companies generally, foreign investment in many businesses is also constrained by sector-specific laws regulating activities of companies operating in certain industries. For example, Vietnam's WTO commitments permit foreign ownership limitations in sectors such as entertainment, maritime transport and advertising, while Vietnamese domestic legislation restricts aggregate foreign shareholdings in Vietnamese banks and telecommunications companies. If a company engages in several business sectors with differing foreign ownership limits, the lowest limit applicable to the relevant business sector(s) will apply to that company as a whole. Note also that individual companies may have foreign ownership restrictions included in their charter documents.

Foreign ownership restrictions applicable to public companies have greater impact than might typically be expected, because under Vietnamese law "public companies" include not only companies listed on the Ho Chi Minh City and Hanoi stock exchanges, but also companies that have conducted an IPO or companies with more than 100 shareholders and charter capital of VND 10 billion (approximately US$460,000) or more. The concept of a "public company" in Vietnam is therefore much broader than listed equity.

Foreign shareholdings in public companies are currently limited to 49% in the aggregate, although from 1 September 2015 this cap will be lifted in a number of business sectors in accordance with Decree 60, which we discuss further below. The 49% foreign ownership cap has historically proved to be a real and practical hurdle to foreign investment not only in the major "blue chips" on the Vietnamese stock markets, where the "room" for foreign investment has been used up, but also on mid-market acquisitions of unlisted joint stock companies with a large shareholder base.

Private ownership limits in equitised SOEs

Additional limits on private ownership (both foreign and domestic) apply in the case of equitising SOEs operating in certain strategic industries. The maximum permissible percentage of shares held by private investors in an equitised SOE is determined by the industry in which it operates and must be set out in its equitisation plan in accordance with the Government's policy from time to time. The current private investment room in equitising SOEs was promulgated by the Prime Minister under Decision 37/2014/QD-TTg dated 18 June 2014 and ranges from 0% in the case of highly sensitive sectors (such as those affecting National Defense and Security or economic and social development) to 49% in industries such as urban lighting and water drainage, environmental sanitation and international sea and railway transportation. In practice, the Prime Minister may grant derogation from this rule in certain sectors. Under current regulations, strategic investor(s) and other investors must collectively hold at least 25% of the initial charter capital of the SOE post-equitisation (or lower in certain circumstances but not less than 20%) while 50% must be held by the other investors. In practice, the 50% rule can be waived by Prime Minister's decision, but this requirement does not allow an investor, including a strategic investor, to buy a majority equity stake in an equitising SOE.

Government approvals

Because local licensing authorities often interpret and apply the law arbitrarily and inconsistently, the process for obtaining regulatory and other approvals in Vietnam, including any amendments to a company's business and/or investment license that may be required in connection with an acquisition or foreign investment transaction, can be onerous, time-consuming and unpredictable. This is especially so for companies operating in business sectors that are "conditional" (e.g. entertainment or telecommunications) or deemed to be "sensitive" (e.g. electronic gaming or distribution).

Generally speaking, foreign investment into Vietnam requires approval from the local licensing authority – typically the provincial People's Committee where the target company is established or the relevant industrial zone management authority for projects located in an industrial zone. There are additional sector-specific rules, however, and transactions in regulated sectors such as banking, financial services and insurance often require approval from the relevant Ministries. For example, under Vietnamese banking regulations, written approval of the Governor of the State Bank of Vietnam must be obtained prior to the purchase and sale of the shareholding of a shareholder owning 5% or more of the voting shares of a bank, as well as prior to the subscription by a foreign investor of 5% or more of the shares in a Vietnamese bank.

Although in principle the authorities may not prohibit or reject a transaction if all legal requirements have been satisfied, in practice the approval process still depends to a large extent on the discretion of the authorities. Requests for additional documentation and information while considering an acquisition of shares are the norm, and it is not unusual for the authorities to require an investor to consult with additional agencies (e.g. tax or customs authorities) even where such agencies do not have a formal role in the approval process. For example, although under Vietnam's WTO commitments retail activities have been fully open to foreign investment since January 2009, in practice prior approval of the Ministry of Industry and Trade is still required by the local licensing authorities before granting a licence to engage in the retail business. That said, Vietnamese authorities do commonly grant approvals with limitations imposed (e.g. limited operational duration or business scope) rather than rejecting applications outright.

Vietnam's merger control rules are neither well-developed nor tested, but are robust enough to require at least a preliminary analysis to determine whether an acquisition or business combination transaction meets the relevant thresholds. The Law on Competition No.27/2004/QH11 requires written approval of the Vietnam Competition Authority ("**VCA**") for any economic concentration between companies with a combined market share (calculated primarily on the basis of revenue) in the relevant market in Vietnam of 30% or more, and prohibits transactions that will result in a combined market share of 50% or more unless exempted by the Prime Minister or the Minister of Industry and Trade. Violations of the merger control regulations may result in a penalty of up to 10 per cent of the turnover of the participating parties, and other remedies, including divestiture or separation of a merged company, may also be imposed.

If the 30% filing threshold is triggered, the merger or other business combination transaction will need to be notified to the VCA and the transaction may not be

implemented until the authority has issued its approval. The duration of review can range from one to six months from the date the VCA accepts the parties' submission. Note that acceptance, not submission, starts the clock running.

Lack of transparency

A recurring issue for foreign investors in Vietnam is the lack of transparency both during the buyer's pre-acquisition due diligence process and in business activities generally. Sellers and target companies can be reluctant to make available to a buyer and its representatives information that is commercially sensitive or potentially embarrassing (i.e. that may present certain historical business practices or events in a less than flattering light). There is an instinct and culture to "sweep things under the rug".

Publicly available information is limited compared to other jurisdictions. General corporate registration information is available from the national business registration portal, but the database is incomplete, not necessarily up-to-date and at present covers only wholly domestic companies (i.e. those with no foreign ownership). Information on public target companies may also be found on the websites of the State Securities Commission or relevant (i.e. Hanoi or Ho Chi Minh City) stock exchange, but the level of detail will generally be less than what foreign investors are accustomed to seeing from publicly listed companies in more developed jurisdictions.

Post-acquisition (particularly in the case of minority investments), foreign investors may face challenges in ensuring access to timely, accurate and complete information regarding the target company and its operations. Board representation is customarily negotiated as part of an investment, but language barriers and vastly different corporate cultures and business practices mean foreign investors often find themselves on the outside looking in. For this reason (among others), significant private equity investment in Vietnam has largely gravitated toward a handful of reputable and well-managed companies.

Corruption

Corruption is endemic and remains a persistent problem for foreign investors in Vietnam. Despite the introduction of stricter anti-corruption laws, Transparency International ranked Vietnam 119th out of 174 countries evaluated in their 2014 Corruption Perception Index. Companies report that informal payments to Government officials are a common aspect of doing business in Vietnam, and requests for bribes are often made in exchange for information or preference in competitive sectors. Tax, customs and land use administrations are generally regarded as the most corrupt, fuelled by opaque procedures and significant discretion available to individual officials. Progress in combating corruption is difficult to ascertain because data on the number of prosecutions made under anti-corruption laws is generally unavailable to the public.

Both the United States Foreign Corrupt Practices Act ("**FCPA**") and the United Kingdom Bribery Act ("**UKBA**"), as well as similar laws in other jurisdictions, recognize the concept of successor liability in some form, meaning foreign investors (including private equity investors) are well-advised to pick their partners carefully and pay close attention to their pre-purchase due diligence. Mitigation measures are available if non-compliant conduct is identified in the early stages of the transaction, so buyers should prioritise FCPA and UKBA due diligence (and compliance due diligence generally) to get in front of issues before they become a problem.

Key legal developments

Several new laws will be of interest to private equity investors looking at opportunities in Vietnam. Long-awaited revisions to the laws governing enterprises, investment, real estate business and residential housing enacted by the National Assembly in November last year and effective from 1 July 2015 have the potential to streamline the regulatory process in a number of sectors and increase opportunities for private equity investment.

Law on Enterprises

The new Law on Enterprises No. 68/2014/QH13 introduces changes designed to simplify the process for establishing an enterprise. A company's business lines are no longer stated in its enterprise registration certificate (thereby eliminating the need to amend the certificate with every change in business activity), and enterprises of any corporate form may now enter into a merger (previously only entities with the same corporate form were permitted to merge). The application dossier to incorporate entities in conditional business sectors is also simplified by removing the requirement to prove relevant professional qualifications and contribution of legal capital at the registration stage. Governance rules and shareholder quorum and voting requirements have also been loosened in the case of joint stock companies, and both joint stock companies and limited liability companies may now have more than one legal representative with power to bind the company, provided at least one legal representative is resident in Vietnam.

Of particular importance for private equity investors, the new Law on Enterprises re-affirms certain fundamental minority shareholder protections such as the right to nominate candidates for election to the board of directors and to convene a shareholder meeting to challenge board decisions allegedly taken outside the scope of its delegated authority. In particular, a shareholder or group of shareholders holding 10% or more (or such smaller amount provided in the company's charter) of the total ordinary shares of a company for a consecutive period of six months or more shall have the right:

i. to nominate for election to the board between one (for shareholders holding from 10% to less than 20% of the outstanding shares) and eight (for shareholders holding from 80% to less than 90% of the outstanding shares) candidates out of a maximum of eleven board seats; and

ii. to request the convening of a shareholder meeting if the board of directors violates the rights of shareholders or makes a decision falling outside its delegated authority, or where the term of the board has expired for more than six months without a new board being elected. The board of directors must convene an extraordinary meeting of shareholders within 30 days from the date of receipt of the request or the power to convene will fall to the supervisory board. If the supervisory board fails to convene a meeting within the subsequent 30 day period, the power to convene then falls to the requesting shareholder(s).

On the other hand, the time permitted for members of a limited liability company to contribute their initial charter capital has been shortened from 3 years to 90 days to bring it in line with the time period for joint stock companies, and foreign investors must now open a capital account at a bank in Vietnam in order to purchase or sell shares, assign or receive a capital contribution and receive dividends or other distributions of profits.

The new law also clarifies that only entities with 100% capital owned by the State will be considered SOEs, thereby freeing partly state-owned companies from burdensome regulations governing the affairs of SOEs.

Law on Investment

In an attempt by the Government to create a more transparent investment environment, the new Law on Investment No. 67/2014/QH13 reduces the number of conditional and prohibited business activities, expands the range of projects that are entitled to investment incentives, and streamlines and shortens the licensing application process. The law provides for the first time a comprehensive list of 267 "conditional" business activities requiring sub-licenses or satisfaction of certain conditions by both foreign and domestic investors – a marked improvement over the previous 386 conditional activities set out across a number of legal instruments. The list of activities in which investment is prohibited is similarly reduced from twelve to six, with only illicit activities such as prostitution, drugs, certain types of chemicals and minerals, certain specimens of wild flora and fauna, human trafficking and asexual reproduction remaining entirely closed to investment. On the other hand, the new law also re-asserts the Government's right to require "in-principle" approval from the Prime Minister, National Assembly or provincial People's Committees for projects in "sensitive" sectors, which is likely to remain a burdensome and time-consuming process.

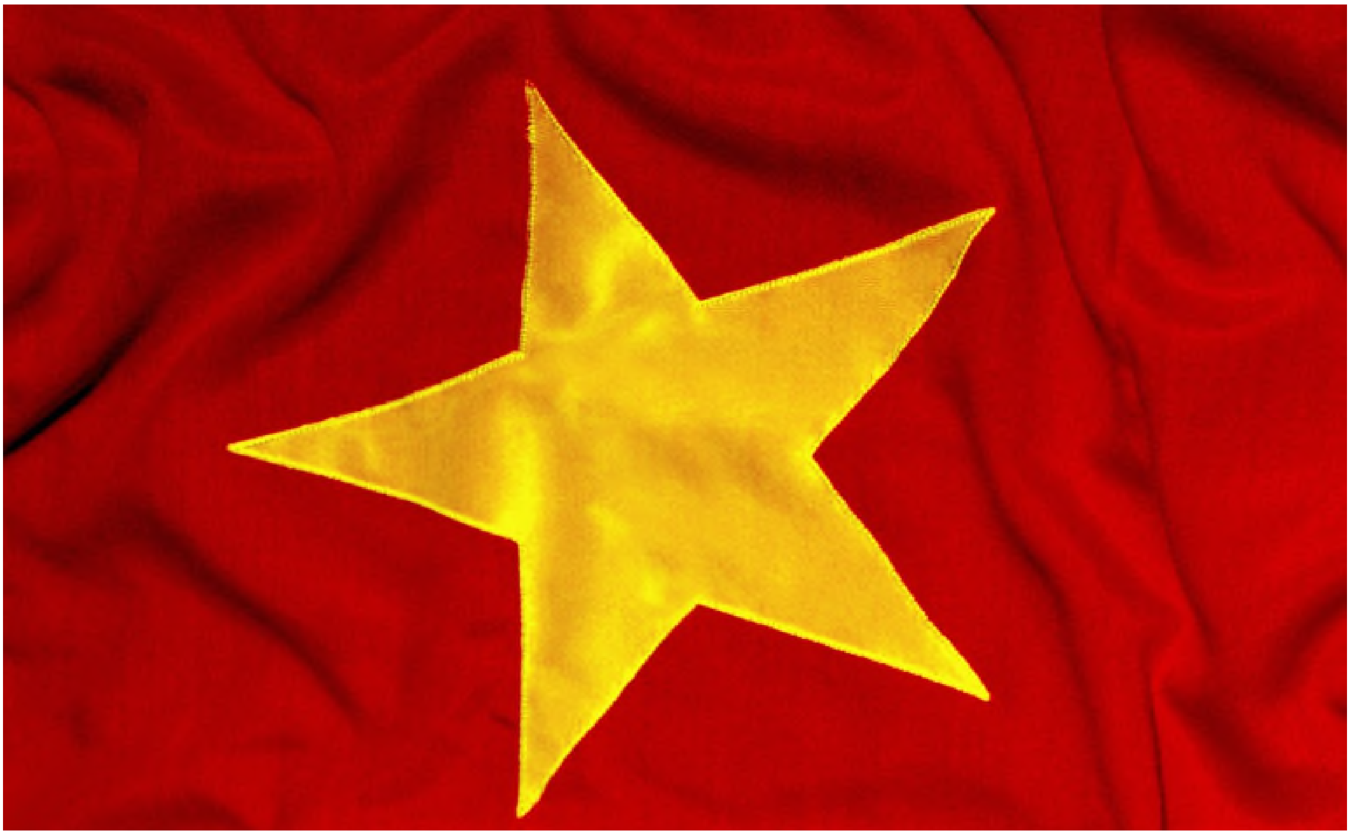
The new law retains the distinction (and disparate treatment) between foreign and domestic investors, but also adds clarity around who will be treated as a "foreign investor" under Vietnamese law. Foreign (i.e. non-Vietnamese) individuals, companies incorporated outside of Vietnam and companies incorporated within Vietnam but with 51% or more charter capital held by foreign individuals or companies are considered "foreign investors" and are subject to additional conditions and procedures when establishing or investing in an economic organization. Foreign investors (including domestic enterprises with 51% or more foreign-owned capital) who acquire 51% or more of the shares or other equity of a Vietnamese company, or who acquire shares or other equity in a company operating in one or more conditional business sectors, must carry out additional registration formalities with the local Department of Planning and Investment where the target company is located prior to completion of the proposed acquisition. Acquisitions of less than 51% of the shares or other equity of a company not operating in a conditional business sector are not subject to any prior registration formalities.

Law on Real Estate Business and Law on Residential Housing

Following on the heels of the new Law on Land that took effect from 1 July 2014, in November 2014 the National Assembly passed new laws governing real estate business (Law on Real Estate Business No. 66/2014/QH13) and residential housing (Law on Residential Housing No. 65/2014/QH13), both of which came into effect on 1 July 2015. The new laws alter the legal framework for foreign investment in real estate and, while not all amendments are favourable to foreign investors, the new laws do better serve the needs of the changing real estate market in Vietnam and, in places, give foreign investors and individuals greater opportunities to access the Vietnamese real estate market.

Foreign v domestic investors

Foreign investors may conduct real estate business in Vietnam by incorporating a company in Vietnam, i.e. a foreign invested enterprise ("**FIE**"). The Law on Real



Estate Business maintains the distinction between foreign and domestic investors but, unlike the Law on Investment, provides neither a definition nor clarity as to what constitutes an FIE for purposes of conducting real estate activities. The legal framework set out in the law in relation to foreign investors would therefore appear to apply to any FIE, irrespective of the actual foreign ownership and whether it is majority or minority foreign owned. In another break from the Law on Investment, there are no concessions expressly given to an FIE with minority foreign ownership and, accordingly, it would seem the provisions in the Law on Real Estate Business relating to FIEs apply not only to true foreign investors but also to Vietnamese incorporated companies with any amount of foreign ownership.

Permitted real estate business activities of an FIE

The Law on Real Estate Business sets out the legal framework for 'real estate business' which includes activities such as the transfer, lease and development of property. While there has always been a distinction between what real estate business is permitted for Vietnamese companies and individuals and what is permitted for FIEs (the basic premise being that a foreign investor is required to engage in real estate business activities solely through investing in the development of property in Vietnam rather than through purchasing or leasing completed buildings), the Law on Real Estate Business removes some of the differences and now permits FIEs to take a lease of constructed premises for the purpose of sub-letting. While the ability of FIEs to purchase fully constructed premises is still restricted, the Law on Real Estate Business does now permit an FIE to purchase constructed premises for the purpose of using them as the FIE's head office or place of business.

Pre-sales of residential property

The Law on Real Estate Business has also introduced new measures governing pre-sales of residential property before construction has been completed. Although aimed at boosting investor confidence in the real estate market (particularly in response to widespread publicity about previous instances of developer default), these measures may constrain the ability of developers to enter into pre-sale agreements with purchasers. A developer may now pre-sell or lease residential property only after obtaining a bank guarantee from an authorised bank to secure the developer's obligation to refund any advance payments if construction of the property is not completed. While certainly a welcome development for purchasers, the availability and cover of the required guarantee remains to be determined and will not come without additional cost to developers (which, it is anticipated, will in many cases be passed on to purchasers).

The new law also reduces the purchase price ratio that may be collected by FIE developers prior to completion of construction. A developer who is an FIE may now collect only up to 50% of the purchase price before the property is handed-over to the purchaser, which compares unfavourably with both the position under the old law and the position for domestic developers under the new law (up to 70% prior to handover in both cases).

Transfer of the whole or part of a real estate project

Subject to the approval of the Prime Minister or local People’s Committee (depending on the size of the project), an FIE is now permitted to purchase the whole or part of an existing residential development project from local developers in order to complete the development and sell or lease the completed residential units. The project being transferred must satisfy certain conditions, including all necessary planning approvals and licences having been obtained from local authorities. Although the old law permitted the transfer of an entire (not part) residential project, the transfer process was not clearly defined and was, in practice, little used. It is hoped that the new transfer provisions will open a new route for FIEs to obtain land and licensed development projects.

Foreign ownership of residential housing

One of the more widely discussed changes is the right under the new Law on Residential Housing for foreign individuals to buy and own residential property in Vietnam. While previously the right to buy a limited range of residential property did exist for a limited category of foreign individuals, it was in practice difficult to evidence that they fulfilled all the requisite criteria and few foreign individuals successfully exercised the right to buy.

Under the new Law on Residential Housing, foreign individuals who are permitted to enter Vietnam may purchase and own houses (including condominiums/apartments, villas and townhouses) in residential development projects for a 50-year term, extendable subject to government approval. However, foreign individuals can only purchase and own up to 30% of the apartments or condominiums in a single building, or up to 250 villas or townhouses within any ward (the lowest, most local, administrative unit), in aggregate. A foreign individual who purchases residential property in Vietnam will have the same general rights as a Vietnamese purchaser, including the right to sub-lease the property.

Although further clarification is needed regarding questions such as what visa a foreign individual will require in order to be classified as 'permitted to enter Vietnam' and how the aggregate foreign ownership limits will be managed, it is hoped this new right to buy will help to stimulate the residential real estate sector by significantly expanding the pool of potential purchasers.

Residential property sale and purchase agreement

A contract between a developer and purchaser for the sale and purchase of residential property must comply with the standard form of contract prescribed by law or it will not be recognised by law and may not be used to obtain a housing ownership certificate after construction is complete. Developers must register their standard form of housing contract with the relevant authority, which is likely to constrain the ability of both developers and purchasers to enter into bespoke contracts, even where both parties desire to do so.

Decree 60 regarding foreign ownership limits on Vietnamese public companies

Decree 60, issued at the end of June and effective from 1 September, contains long-awaited provisions that could allow for majority and above control of Vietnamese public companies by foreign investors. Foreign shareholdings in such companies are currently limited at 49% in the aggregate. The effects of Decree 60 will not be as wide-ranging as they might otherwise have been, as foreign investment in many sectors will continue to be constrained by caps on foreign ownership set out in international treaties (such as the WTO) or domestic regulations. However, there are now at least in theory some sectors and business lines in which the level of permitted foreign ownership is not limited.

The most relevant aspects of Decree 60 are as follows:

- For public companies operating in sectors and/or business lines subject to foreign ownership limitation in international treaties, the maximum ratio of foreign ownership will remain as set out in such treaties. This effectively means that the Government is re-affirming the current administrative approach of applying the minimum commitments under international treaties as maximum foreign ownership thresholds. Sectors falling into this category include entertainment and electronic gaming, telecoms and logistics.

- For public companies operating in sectors and/or business lines subject to specific foreign ownership limitations in the Law on Investment or relevant sector-specific laws, the maximum ratio of foreign ownership shall remain as set out in those laws. Thus, foreign investment in sectors such as banking, facilities or non-facilities based telecommunications and logistics, where foreign ownership is capped under domestic regulations, will continue to be constrained by those caps.

  Decree 60 also provides that public companies operating in sectors and/or business lines subject to conditions applicable to foreign investors but where no specific ratio on foreign ownership limitation has yet been issued will remain subject to a 49% foreign ownership cap as under current law.

- For public companies operating across a number of sectors with differing limits on permitted foreign ownership, the lowest permitted ratio for any of the relevant sectors will apply to the company and its activities as a whole.

- For public companies operating in sectors and/or business lines other than the above, the maximum ratio of permitted foreign ownership is not limited, unless otherwise provided in the charter of the relevant company.

The key uncertainty lies around the sectors that are "*subject to conditions applicable to foreign investors but where no specific ratio on foreign ownership limitation has been issued*" and, in particular, how this phrase will be interpreted by the authorities. Recent Ministerial declarations on this subject have been somewhat vague, although indications are that certain Ministries will issue further conditions for foreign investment in specific sectors that would trigger the application of the 49% cap on foreign investment in that sector. Nonetheless, Decree 60 seems to be a (small) step in the right direction, and it is hoped that this development, together with the other recent changes in law discussed above, will act as a catalyst for more foreign investment in both the private and state-owned sectors in Vietnam.

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