Global Private M&A Guide - Limited External Content - Vietnam

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*This content was last reviewed around October 2023.*

# Quick reference guide

## Due diligence, pricing and closing

**Typical due diligence issues**

A potential investor may find it challenging to conduct a comprehensive due diligence exercise due to a lack of transparency among domestic enterprises. A target company may invoke state secrecy laws to prevent the disclosure of information if the state has equity in the enterprise. In addition, potential investors may find domestic enterprises' record-keeping and accounting practices lacking compared with international standards, making the task of verifying a target company's compliance status even more challenging. Patience, diplomacy and good communication skills are necessary to obtain the relevant information pertaining to a target company.

Domestic enterprises in Vietnam are also typically unfamiliar with the documents that must be provided or disclosed in a due diligence exercise, or how to properly organize them for the other side. This may occasionally affect the results of a due diligence review, which may cause significant delays in obtaining information from the target.

**Pricing and payment**

The purchase price needs to be decided based on a fair valuation of the transferred assets/equity interests in order to avoid possible questions from the relevant tax authorities.

**Signing/closing**

*Is a deposit required?*

The sell side would typically request a deposit in a share sale or asset sale transaction. However, this remains subject to the negotiation between the parties.

*Is simultaneous signing/closing common?*

Simultaneous signing and closing is not common in Vietnam due to the following reasons:

**Share/equity interest sale**: Certain governmental approvals are required in order to effect the transfer, and approval may be required before being entitled to contribute capital or acquire capital/shares (M&A Approval). The target company may also be required to update its Enterprise Registration Certificate (ERC) or make certain notifications to/receive confirmations from the authorities in order to reflect the buyer's name as one of its owners/shareholders. Merger filing requirements may also be triggered in some cases.

**Asset sale**: Certain common assets (e.g., real properties and vehicles) require registration, and the transfer of these assets would not be effective and completed without satisfaction of these conditions. Merger filing requirements may also be triggered in some cases.

It is possible for the transacting parties to agree on the simultaneous signing and closing, especially in transactions that are undertaken at the offshore level and subject to the laws of that jurisdiction.

## Approvals/registrations

**Foreign investment restrictions**

Vietnam has a mandatory and suspensory foreign investment screening procedure, which means that transactions that meet the relevant criteria need to be notified to the relevant authority and cleared before they can be completed. For further information, see the more detailed section on "Foreign investment restrictions".

**Foreign exchange control**

All transactions and payments within Vietnam must be effected in Vietnamese dong, except in certain cases prescribed by the State Bank of Vietnam.

In the case below, the purchase price for equity transfer must be paid through the direct investment capital account, which is opened in the name of the target company at a licensed bank in Vietnam, before onward payment to the seller's account:

(i) A foreign investor wishes to acquire shares or equity interest from a shareholder or member who resides in Vietnam, or contribute capital into a target company operating in Vietnam that has any of the following:

An existing foreign member or shareholder and has already been required to obtain an IRC

51% of its charter capital is held by foreign investors (FDI Company)

The acquisition of shares or equity interest (from the shareholder or member being a resident in Vietnam), or contribution of capital by the foreign investor results in the target company becoming an FDI Company

In the case below, the foreign buyer/investor itself will have to open an indirect investment capital account for the payment of the acquisition of shares or contributed capital to the seller:

(ii) A foreign investor acquires from a shareholder or member being a resident in Vietnam shares or equity interest in, or contributes capital into, a target company operating in Vietnam, and such target company satisfies either of these conditions:

Is not an FDI Company and will not become an FDI Company after such acquisition or contribution

Has shares listed or registered for trading on the securities trading system

**Antitrust/merger control**

Vietnam's merger control regime requires notification when certain thresholds are met. The pre-acceptance review takes seven working days and a preliminary assessment takes 30 days from confirmation of a complete submission. An official assessment takes up to 90 days with an extension for complicated concentrations. Transactions cannot be implemented without approval from the Vietnam Competition Commission (VCC). For further, see the more detailed section on "Antitrust/merger control".

**Other regulatory or government approvals**

A target company operating in special sectors may trigger special approvals from the industry management authorities. In addition, any entity engaging in a regulated industry must satisfy any relevant business conditions. Business conditions typically include permits, eligibility certificates, practicing licenses and confirmation letters. The Investment Law lists 227 conditional business sectors, which are applicable to all enterprises in Vietnam as business conditions.

## Employment

**Share/equity interest sale**

Where an investor sells its equity in an enterprise and there is no change in the identity of the employer, it could be said that no legal transfer takes place merely by virtue of a change in the ownership of the employer and no consents are required.

**Asset sale**

The acquisition of assets does not automatically transfer the employees. The method for employee transfer in Vietnam is "termination and re-hire."

The law does not require the transferor to obtain the consent of a local labor authority, the employees or any employee representative organization before the sale of an enterprise, nor does it require the transferor to give prior notice to the labor authority. However, if a lay-off is to be conducted before or after the transaction, the employer must comply with any applicable requirements to consult with the employee representatives and notify the authority.

## Tax

**Share/equity interest sale**

The transfer of capital interest and securities is not subject to value added tax (VAT). In addition, no other transfer tax is imposed on an acquisition of capital or securities.

However, sellers will be subject to income tax, at rates that differ depending on whether the sellers are individuals or corporate entities and whether it is an acquisition of securities or capital.

In particular, with respect to a transfer of capital in a limited liability company, individual sellers who are Vietnam tax residents pay personal income tax (PIT) at a rate of 20% on gains while nonresident individual sellers pay PIT at 0.1% on transfer proceeds. For a sale of shares in a joint stock company (JSC), whether public or non-public, individual sellers will be subject to 0.1% PIT on sale proceeds.

Vietnamese corporate sellers are subject to 20% corporate income tax (CIT) on any gains derived from a transfer of capital or securities. Foreign/offshore corporate sellers will pay CIT at a rate of 20% on any gains generated from a transfer of capital of a limited liability company or from a transfer of shares in a non-public JSC, and they will pay CIT at the rate of 0.1% on transfer proceeds for a transfer of shares in a public JSC.

Vietnamese tax authorities have challenged the imposition of income tax on "indirect share transfers" by referring to Decree No. 12/2015/ND-CP (Decree 12) that has been applicable from 2015 onwards. Accordingly, taxable incomes (or gains) derived in Vietnam by a foreign/offshore company (regardless of whether it has a permanent establishment in Vietnam and the location of the business) are any incomes (or gains) derived from certain M&A activities, including a transfer of contributed capital, investment projects, rights to contribute capital or rights to participate in investment projects, etc.

However, Decree 12 and other relevant tax regulations do not specifically address how taxable gains would be calculated and which entity would be liable for tax declaration and payment. This gives rise to uncertainty in implementation.

**Asset sale**

*Registration fee*

It is mandatory to register the ownership or use right of certain types of properties in Vietnam, such as houses and land, ships, boats, automobiles, motorcycles, hunting rifles and sports guns. Registration fees, known in Vietnamese as "lệ phí trước bạ", are imposed on buyers of certain property when they register the ownership of properties.

Registration fees imposed on a change of ownership or right to use land and houses are 0.5% of the property value. Different registration fee rates apply for other items. However, except for motor vehicles with fewer than 10 seats, aircrafts and yachts, registration fees for one asset do not exceed VND 500 million.

*VAT*

A transfer of tangible assets is subject to VAT. The VAT rate may vary depending on the assets, but the standard VAT rate is generally 10%.

*CIT*

Any income derived from an asset sale is regarded as other income and subject to 20% CIT. Net book value of assets transferred (substantiated with supporting documents required under regulations) is the deductible cost base. CIT payables (if any) will be provisionally paid by the company on a quarterly basis. At a financial year-end, a seller will prepare the annual CIT finalization return, which includes income/loss from this asset sale.

**OECD's Two Pillar Solution**

The OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting has put forward a so-called Two-Pillar Solution to address the tax challenges arising from the digitalization of the economy. Pillar Two is intended to introduce a global minimum effective rate of tax of 15% for large businesses in each jurisdiction where they operate and will lead to fundamental changes in the international tax system. It is currently being implemented in a large number of jurisdictions.

Groups will need to consider how the Pillar Two rules could impact on the life cycle of M&A transactions from the pre-acquisition phase (including transaction planning (such as the choice of acquisition structure and financing) and due diligence of the target group), the acquisition phase (such as contractual risk allocation around Pillar Two) to the post-acquisition phase and the impact of Pillar Two on any post-acquisition integration.

## Post-acquisition integration

For information on post-acquisition integration matters, please see our [Post-acquisition Integration Handbook](https://www.bakermckenzie.com/en/insight/publications/resources/post-acquisition-integration-2023).

# Common deal structures

## What are the key private M&A deal structures?

The acquisition of an enterprise can take different forms: (i) the purchase of shares (with respect to the target being a JSC) or charter capital (with respect to the target being an LLC); (ii) the acquisition of assets; or (iii) the reorganization of an enterprise (by way of merger, consolidation, division and separation). A share acquisition is the most common structure in the Vietnamese market, given that certain types of assets (e.g., land use rights, assets attached to lands, and workforce) may not be transferrable or can only be transferred upon satisfaction of certain regulatory approvals.

For the purpose of a business combination, the Enterprise Law contemplates two types of reorganization: (i) merger; and (ii) consolidation of enterprises. All of these forms of enterprise reorganization take effect upon the approval of the relevant licensing authorities. Depending on the specific form of the enterprise reorganization, various rights and obligations cease to exist and others are assumed by the parties involved in the process. In particular:

(i) Merger

Under the Enterprise Law, an enterprise merger is defined as a process whereby one or a number of enterprises transfers all of its assets, legal rights, liabilities and benefits for the purpose of merging with another enterprise.

After a merger has been completed, the target enterprise will cease to exist and the surviving enterprise will assume the legal rights and interests of the target enterprise. Additionally, the surviving enterprise will be liable for unpaid debts, labor contracts, property obligations and other liabilities of the target enterprise.

(ii) Consolidation

An enterprise consolidation is a process whereby two or more enterprises combine all of their assets, legal rights, liabilities and benefits for the purpose of consolidating among themselves so as to become a new enterprise.

In terms of consolidation, the consolidating enterprises will be extinguished upon completion and the new consolidated enterprise will assume the legal rights and interests, and is liable for the unpaid debts, labor contracts and other liabilities of the consolidating enterprises.

A merger is more common than consolidation in practice, although the application depends on the business objectives for the restructuring.

## Which entity is likely to be the target company (on a share sale) or the seller (on an asset sale)?

Under the Enterprise Law, companies in Vietnam are referred to as "enterprises." In Vietnam, the following types of enterprises are most commonly seen in practice:

Single member limited liability company (SMLLC)

Multiple member limited liability company (MMLLC)

JSC

## What are the different types of limited liability companies?

(i) SMLLC

An SMLLC is owned by one organization or individual member (company owner), who is liable for the debts and liabilities of the enterprise to the extent of the amount of the charter capital of the enterprise. An SMLLC has the same legal status as an MMLLC and a JSC, but the company owner has more autonomy concerning decisions made about the enterprise. The company owner may appoint either a representative to be president, or more than one representative to create a board of management (BOM) (comprising three to seven persons), which will implement the company owner's rights and obligations on its behalf.

In addition, there is no statutory term of office for the president. However, the statutory term of office for BOM members cannot exceed five years.

Similar to an MMLLC, an SMLLC must have a director or general director appointed or hired by the president or the BOM, who is responsible for the day-to-day operation of the enterprise and is usually the legal representative of the enterprise, although the charter may provide otherwise. An SMLLC is allowed to have several legal representatives, as long as one of them resides in Vietnam, and must authorize another person if they need to travel abroad. The president or the chairperson of the BOM will be the default legal representative if the charter is silent on that point.

The company owner must appoint controller(s) in a number at its discretion. Controllers bear responsibility for supervising the performance of the BOM (or the president) and the director (or general director), and carrying out other tasks assigned by the company owner. The controllers can have a term of office not exceeding five years.

A company owner must contribute capital in a full and timely manner. An SMLLC can decrease its charter capital in two cases:

When the limited liability company returns part of its contributed charter capital to the limited liability company owner, as long as the limited liability company is continuously operating for more than two years from the date of enterprise registration and the limited liability company ensures that it is able to pay all debts and other liabilities after returning the capital to the company owner

When the company owner fails to contribute the charter capital as committed

An SMLLC may increase its charter capital by way of additional investment from the company owner or by obtaining capital contributions from other persons. In the event that part of the charter capital is contributed by or transferred to another organization or individual, the enterprise must register to convert into an MMLLC or a JSC within 10 days of the date of complete transfer.

The company owner shall contribute the registered charter capital within 90 days from the issuance of the ERC. If the company owner does not fully contribute the registered charter capital, it must register for the decrease in charter capital within 30 days from the deadline of capital contribution and shall be liable for the financial obligations of the SMLLC to the extent of all assets owned by them for failing to contribute prior to the registration of the charter capital decrease. However, the deadline for capital contributions in the form of assets (such as land use rights and equipment) is extended until the completion of the transfer of the ownership of these assets into the legal entity.

(ii) MMLLC

An MMLLC is an enterprise that has more than one but no more than 50 members, which may be organizations, individuals or a combination of both. A member can transfer, dispose of or ask the enterprise to buy back its capital contribution portion in accordance with the Enterprise Law or as stipulated in the enterprise charter.

An MMLLC must have one director or general director of the company appointed by the BOM, who may or may not be a member of the enterprise. The general director is responsible for the day-to-day operation of the enterprise and can be appointed by the BOM as the legal representative of the company. Similar to an SMLLC, an MMLLC can have many legal representatives, as long as one of the legal representatives resides in Vietnam, and must authorize another person if they need to travel abroad. The BOM is the highest decision-making body of an MMLLC, and its members' voting rights are allocated in proportion to their respective capital contribution. An MMLLC with more than 11 members must also establish a control committee.

(iii) JSC

A JSC is an enterprise whose charter capital is divided into shares held by three or more organizations or individuals. Shareholders are responsible for the debts and liabilities of the enterprise to the extent of the amount of their contributed capital. A JSC has the right to issue securities in order to raise capital, and it may list on a stock exchange if it satisfies the stock exchange's requirements. A shareholder can transfer, dispose of or ask the enterprise to buy back its shares in accordance with the Enterprise Law or as stipulated in the enterprise charter.

Similar to an SMLLC and an MMLLC, a JSC can have many legal representatives as long as one of the legal representatives resides in Vietnam, and must authorize another person if they need to travel abroad. In cases where there is only one legal representative, the chairperson of the board of management or the (general) director shall be the legal representative of the JSC.

A JSC must have common shares and may have preferred shares and/or issue bonds.

A JSC has the right to select its organizational, managerial and operational structure in accordance with one of the two following methods (except where securities laws provide otherwise):

General meeting of shareholders (GSM), the board of management, control committee and the (general) director. Where a JSC has fewer than 11 shareholders, and the shareholders are organizations holding less than 50% of the total company shares, there is no requirement for a control committee.

GSM, board of management and (general) director. In this case, at least 20% of the members of the board of management must be independent and an internal auditing committee must be established directly under the board of management.

## Is there a restriction on shareholder numbers?

An SMLLC can only have one owner. An MMLLC must have at least two members and no more than 50 members. A JSC must have at least three shareholders and there is no limitation on the maximum number of shareholders.

If a JSC has a paid-up charter capital of VND 30 billion or more and at least 10% of its voting shares owned by 100 or more investors who are not major shareholders, it must register to become a public JSC.

## What are the key features of a share sale and purchase?

Acquisitions via equity investment may take place through the issuance of new shares/rights to contribute more capital, or through the purchase of existing shares/capital contribution portion. In either case, certain pre-transaction approvals/filings may be triggered, including foreign investment approvals (for further information on these, see the more detailed section on "Foreign investment restrictions"  below) and/or merger filing requirements (for further information on these, see the more detailed section on "Antitrust/merger control" below), depending on the structure of the transaction.

An acquisition of equity is often simpler than an acquisition of assets, as it is generally only necessary to transfer the shares/capital contribution portion in the target company, which is relatively common in Vietnam.

## What are the key features of an asset sale and purchase?

A foreign buyer cannot purchase assets directly from the Vietnamese seller. The buyer will need to set up a NewCo in Vietnam in order to acquire the target company's assets. To set up a NewCo in Vietnam, the foreign buyer needs to have an "investment project" in Vietnam for the NewCo.

The following types of assets are commonly seen in an asset sale and purchase:

Valuable papers.

Bonds, debts and other forms of borrowing.

Contractual rights comprising intellectual property rights, including trademarks, industrial designs, inventions, trade names, and origin or appellations of origin of goods.

Rights with respect to real property, including the right to lease out, assign, mortgage and to provide guarantees.

Items of revenue derived from investment activities, including profits and interest on shareholding, dividends, royalties and all types of fees, and other assets and rights with economic value in accordance with the law and international treaties of which Vietnam is a member.

# Preliminary documents

## Is it customary to prepare a letter of intent or term sheet and, if so, to what extent are they binding on both parties?

A preliminary agreement, such as a memorandum of understanding (MOU) or a letter of intent (LOI), is not a prerequisite to a merger or acquisition in Vietnam, but serves as a useful tool for the parties to reach an initial "meeting of the minds." Due to the potentially different business practices between a domestic Vietnamese enterprise and a potential foreign investor, an MOU or LOI is a means for the parties to flesh out their intentions and assumptions at an early stage.

## Does a term sheet, in this context, customarily include provisions on exclusivity, break fee or confidentiality?

**Exclusivity:** It is common to include exclusivity provisions in a term sheet.

**Break fee:** It depends on the parties' negotiations, but is not common.

**Confidentiality:** It is common to include confidentiality provisions in a term sheet.

## Are exclusivity, break fee and confidentiality provisions supplemented with separately negotiated agreements?

Normally, a term sheet includes fundamental provisions that will be negotiated and detailed by the parties in transactional documents. As such, separately negotiated agreements in relation to exclusivity, break fee(s) and confidentiality provisions are not necessarily required. Having said that, depending on the parties' intention, exclusivity, break fee(s) and confidentiality provisions can be included in the MOU or LOI at the initial stage of the transaction. In some cases, a non-disclosure agreement (NDA) can be separately signed for confidentiality purposes.

## Is there a duty or obligation to negotiate in good faith?

Unless there is a binding agreement between the parties, there is no act-in-good-faith duty or obligation, and there is no provision on recourse or liability under Vietnamese law.

# Agreeing to the acquisition agreement → Purchase price

## Is a purchase price adjustment common?

Yes, purchase price adjustments are becoming more common.

## What type of purchase price adjustment is common (e.g., debt-free, cash-free)?

Frequency/market practice: All types are seen, including working capital adjustment, cash-free debt-free, and NAV adjustments.

## Is there a collar on the purchase price adjustment?

Frequency/market practice: Rarely; collars are not common. They may be required where one of the parties is a public company.

## Who usually prepares the closing balance sheet (where applicable)?

Frequency/market practice: These are usually prepared by the buyer.

## Is the balance sheet audited (where applicable)?

Frequency/market practice: Common for final price determination.

## Is an earn-out common?

Frequency/market practice: Depending on the transaction structure; earn-outs are more common in private equity transactions when the sellers continue to manage the target enterprise after closing. They are less common where the seller is completely exiting. Earn-outs are commonly capped.

## Is a deposit common?

Frequency/market practice: Fairly common, but also subject to negotiation.

## Is an escrow common?

Frequency/market practice: Fairly common.

## Is a break fee common?

Frequency/market practice: Fairly common, but also subject to negotiation.

# Agreeing to the acquisition agreement → Conditions precedent

## Express Material Adverse Event (MAE) closing condition?

Frequency/market practice: Fairly common; this is typically available where there is a long period before execution and completion.

## Is the MAE general or specific?

Frequency/market practice: Both are seen.

## Is the MAE quantified?

Frequency/market practice: Fairly common but subject to negotiation.

# Agreeing to the acquisition agreement → Covenants

## Is a noncompete common?

Frequency/market practice: Fairly common.

## Is it common to use waterfall or blue pencil methods to interpret contractual provisions?

Frequency/market practice: A blue pencil provision is fairly common.

## Are nonsolicitation provisions (of employees) common?

Frequency/market practice: Fairly common (in conjunction with noncompete).

## Are nonsolicitation provisions (of customers) common?

Frequency/market practice: Fairly common (in conjunction with noncompete).

## Are seller restrictions usually imposed on the target business between signing the purchase agreement and closing?

Frequency/market practice: Very common.

## Is there broad access to books, records and management between signing and closing?

Frequency/market practice: Fairly common; generally seen in private deals.

## Is it common to update warranty disclosure or notify of possible breach?

Frequency/market practice: Fairly common but subject to negotiation.

# Agreeing to the acquisition agreement → Representations and warranties

## Materiality in representations — how is it quantified (e.g., by a USD amount)?

Frequency/market practice: Fairly common; it is usually quantified by the amount or percentage of the change.

## How is knowledge qualified (e.g., specific people, actual/constructive knowledge)?

Frequency/market practice: Knowledge qualifiers are growing. They are often limited to actual knowledge and due enquiry of a specified list of members of senior management.

## Is a warranty that there is no materially misleading/omitted information common?

Frequency/market practice: Fairly common; this is always requested by buyers, but is typically one of the most contested warranties.

## Is disclosure of the data room common?

Frequency/market practice: Fairly common but subject to negotiation.

# Agreeing to the acquisition agreement → Repetition of representations and warranties

## Is it common to repeat warranties at closing?

Frequency/market practice: Fairly common; repetition at completion is common.

## Is it common to repeat warranties at all times between signing and closing?

Frequency/market practice: Fairly common.

## Is a bring-down certificate at closing common?

Frequency/market practice: Bring-down certificates are not very common.

## What is the applicable repetition standard, e.g., true in all material respects or Material Adverse Effect?

Frequency/market practice: True and accurate in all material respects is common but there is often a carve-out for fundamental representations, which must be absolutely true.

## Is double materiality common (a materiality qualification in bring-down at closing and in representation(s))?

Frequency/market practice: Rarely; double materiality is usually avoided.

# Agreeing to the acquisition agreement → Limitations on liability

## What is the common cap amount (as a percentage of purchase price)?

Frequency/market practice: Typically 100% of the purchase price for fundamental warranties and in the region of 20% - 30% for other warranties.

## Does the cap (and other liability limitations) apply to the whole agreement or just warranties (or particular terms)?

Frequency/market practice: Both are seen regularly.

## What are the common exceptions to the cap?

Frequency/market practice: Title and authority warranties are the most common exceptions. Due to the unpredictability of the Vietnamese tax system (and tax officials), it is very difficult to have the seller accept an uncapped tax warranty.

## Is a deductible or basket common?

Frequency/market practice: Both are seen regularly.

## Is a de minimis common?

Frequency/market practice: Fairly common.

## How long does seller liability survive?

Frequency/market practice: This differs case by case and subject to negotiation.

## Are there any common carve-outs from limitation on seller liability (e.g., fraud, tax, key warranties)?

Frequency/market practice: fraud are mostly carve-outs from limitation on seller liability.

## Is warranty insurance common?

Frequency/market practice: Rarely.

# Agreeing to the acquisition agreement → Set-offs against claims

## Is a set-off against claims for tax benefits common?

Frequency/market practice: Rarely.

## Is a set-off against claims for insurance proceeds common?

Frequency/market practice: Rarely.

## Is a set-off against claims for third-party recoveries common?

Frequency/market practice: Rarely.

# Agreeing to the acquisition agreement → Damages, knowledge

## Is there an obligation to mitigate damages?

Frequency/market practice: Rarely; this is required by law, but it is not common to incorporate this into the purchase agreement.

## Is there an exclusion of consequential damages?

Frequency/market practice: Fairly common.

## Are provisions that there is no liability if the buyer has knowledge common, or does buyer knowledge have no effect?

Frequency/market practice: Rarely; they are often silent.

# Agreeing to the acquisition agreement → Dispute resolution

## Does local law allow for a choice of governing law?

Yes, if at least one party to the agreement is a foreign investor.

## What is the common governing law?

Frequency/market practice: Vietnamese law is preferred for enforcement in Vietnam.

## Is litigation or arbitration more common? If arbitration, where?

Frequency/market practice: This differs case by case. If arbitration is used, Singapore and Vietnam are more commonly seen.

# Agreeing to the acquisition agreement → Stamp duty and tax

## If stamp duty is payable, is it normally shared?

There is no stamp duty in Vietnam.

## Is a separate tax covenant/indemnity or tax deed common?

Frequency/market practice: It is fairly common to have a tax indemnity, usually included in the purchase agreement.

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