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Foreign-invested M&A matures

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As the foreign investment market in Vietnam has matured, so has conventional M&A activity, especially in relation to foreign invested enterprises (FIEs).

Since the early nineties, when foreign direct investment began in earnest, foreign companies have gained the necessary experience of how to do business in Vietnam. The accessibility of local authorities has greatly improved and the foreign investment regulations themselves have become more flexible and sophisticated. This means that many foreign companies now have the confidence to undertake trade and investment without the need for local partners in Vietnam. This has resulted in a large number of buyouts of domestic partners of joint ventures by foreign parties. There has also been some secondary buyout activity, but this has been driven mainly by global acquisitions involving Vietnamese subsidiaries.

The Ministry of Planning and Investment stated that, for 2002, new foreign direct investment projects that arose by virtue of M&A accounted for 15% of the total projects in Vietnam. Statistics for 2003 are not yet available but it is estimated that the ratio will exceed 25% as more investors consolidate their existing investments.

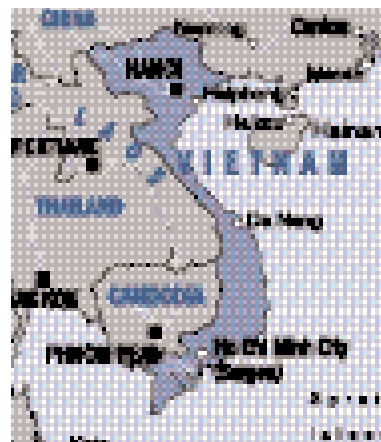
While the market for the sale and purchase of interests in FIEs has been developing for some time, the government has recently also formally launched a so-called equitization process, whereby foreign companies can purchase shares in state-owned enterprises (SOEs) and other domestic enterprises. This will create greater opportunities for foreign companies looking to acquire targets in Vietnamese industry.

Foreign investment regulation

From a regulatory point of view, the merger or acquisition of FIEs is primarily governed by the Law on Foreign Investment of Vietnam (as amended). The acquisition of an interest in an SOE or other domestic enterprise, however, is governed by the recent Regulations on Capital Contribution and Share Purchase by Foreign Investors in Vietnamese Enterprises and its implementing guidelines.

M&A activity in relation to FIEs was only given legislative recognition at the end of 1999. The relevant amendment to the Law on Foreign Investment established the formal procedures by which foreign investors can change a joint venture into a wholly foreign-owned enterprise (WFOEs), as well as for other types of restructuring such as a merger between FIEs, the consolidation of two (or more) FIEs or the transfer of an equity interest in an FIE.

Over the last five years the government has also substantially reduced the industry sectors that are restricted to 100% foreign ownership. Most sectors are now open to



foreign investment. The areas that still are not permitted to have 100% foreign ownership are the exploitation and processing of oil and gas; the exploitation of rare and precious minerals; air, rail and sea transport; mass transit; the construction of harbours and airports; provision of maritime and aviation services; forestation; tour operating businesses; the production of industrial explosives and specialist consulting services. In many cases these can only be carried out by way of joint venture or under a business cooperation contract.

The reorganization of FIEs

Definitions

According to Decree 27 of 2003, which implements certain amendments to the Law on Foreign Investment, the reorganization of an FIE requires the approval of the original licensing body. The original licensing body means the prime minister, the Ministry of Planning and Investment, the People's Committee or the Management Board of the industrial/special zone, depending on the amount of registered capital or sector of investment.

A reorganization is defined to include the merger, consolidation or equity transfer of, or in relation to, an FIE. This generally covers most FIE and M&A activity. A merger is defined as the transfer of the entire capital (cash and assets) of one or more FIEs into another FIE, while consolidation is defined as the consolidation of the entire capital (cash and assets) of two or more FIEs to form a new FIE.

Merger or consolidation

Before the reorganization of an FIE can proceed, an application must be submitted to the original licensing body enclosing documents such as the joint venture contract, the new charter, the contract on merger or consolidation, a report on the enterprise's operations and financial status (before the reorganization) and a business plan that sets out the production and business objectives, the labour employment plan, the settlement of outstanding liabilities and the timing of the reorganization. After the reorganization and the issue of the new investment licence, the new enterprise will legally assume all of the rights and obligations of the former (constituent) enterprises, unless otherwise agreed and approved by the licensing body.

Importantly, a rejected application by the licensing body must clearly justify in writing the reasons for the rejection (although the avenues open to appeal any decision are, in practice, limited).

Transfer of equity interest

A transfer of an equity interest in a joint venture or a WFOE must also be submitted to the original licensing body. The application must include the transfer contract, the resolution of the managing board of the joint venture (or sole shareholder of a WFOE), any amendments to the joint venture contract and/or the enterprise's charter, a report on the enterprise's operations and evidence of the legal status and financial standing of the assignee. While this has become more akin to a registration process, technically the licensing body still has the discretion not to accept a submission.

Under the Law on Foreign Investment (and generally the FIE's charter), a party to a joint venture has the right to assign its interest in the joint venture to a third party provided that a pre-emptive right of purchase is offered to the other parties to the joint venture. Where an assignment is ultimately made to a third party, the conditions of the assignment may not be more favourable than those offered to the joint-venture parties.

Equitization of SOEs

The Guidelines for the Implementation of the Regulations on Capital Contribution and Share Purchase by Foreign Investors in Vietnamese Enterprises (Circular 73) was issued on July 31 2003. It is part of a programme to attract more foreign investment directly into existing state-owned companies by way of equitization. Circular 73 states that: (i) SOEs approved for equitization; and (ii) shareholding companies, liability limited companies, partnerships and cooperatives engaged in production and/or trading in sectors specified by the Ministry of Planning and Investment, may obtain capital contributions from and/or sell shares to foreign investors.

Circular 73 sets out detailed provisions on how to conduct the purchase of shares, the form that capital contributions may take, and how to price the shares sold to foreign investors. This Circular follows the release by the government in 2001 of the SOE Reform Plan, under which more than 1,800 SOEs were identified for equitization, liquidation or to be otherwise restructured.

According to Decree 64 of 2002, foreign companies may only hold up to a 30% interest of an equitized SOE or domestic company. If more than 30% is acquired then the target would need to be officially converted into an FIE.

Listed companies have also been more exposed to foreign investment under Decision No 146 of 2003. Foreign individuals and organizations are now permitted to hold up to 30% of the listed shares of public companies in Vietnam (an increase from 20% under Decision 139 of 1999).

More needed

Despite the clearer regulation in this area, many industry players are calling for more detailed guidelines on M&A activity in Vietnam and a removal of the case-by-case approval process by the relevant government authorities. Reform in land, taxation and employment laws to supplement the general principles are also seen as important.

Forward planning and careful structuring of acquisitions in Vietnam by foreign investors, to allow for easy disposal or expansion is important. The offshore special purpose vehicle for Vietnamese investments is still a means by which an exit can be made more easily, at least until further changes in the Law on Foreign Investment removing the need for government approvals for M&A are enacted.

Banking and project finance

Recommended firms

Freehills

Freshfields Bruckhaus Deringer

White & Case

YKVN

Baker & McKenzie

Johnson Stokes & Master

Phillips Fox

Deacons

Flécheux Ngo & Associés

Gide Loyrette Nouel

Helen Yeo & Partners

Lovells/Saigon Law Office

Lucy Wayne & Associates

Russin & Vecchi

Vietbid Law Firm

Vilaf-Hong Duc

Corporate and commercial

Recommended firms

Freehills

Freshfields Bruckhaus Deringer

Baker & McKenzie

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Lucy Wayne & Associates

Phillips Fox

Deacons

Gide Loyrette Nouel

Lovells/Saigon Law Office

Russin & Vecchi

Thang & Associates

Vilaf-Hong Duc

White & Case

YKVN

Flécheux Ngo & Associés

Vietbid Law Firm

Vision & Associates

Baker & McKenzie

Baker & McKenzie established a formal presence in Hanoi and Ho Chi Minh City in 1993 and the two offices have now grown to a size of about 30 staff. The office is headed by the eminent Fred Burke, described by one peer as “the best-known lawyer in Vietnam.” In November 2003 the Vietnamese Ministry of Justice presented an award to Burke for his contributions to international cooperation in the field of law. The award was the first of its kind to be presented to a foreign lawyer in Vietnam.

Six associates work with Burke on banking and finance transactions. With a roster of international, regional and local clients that includes JP Morgan Chase, ING Bank, the Japan Bank for International Cooperation and the State Bank of Vietnam, it is unsurprising that the practice is a solid member of the top tier. Among the year’s stand-out deals, in January 2004 the team advised Vimas on the \$15 million financing of the Sheraton Hotel in Hanoi, and the following month acted for Siemens on the \$412 million Phu My 3 financing. At the time of writing, Burke is working on two matters: in the first, advising JP Morgan on its merger with Bank One, and in the second – on the regulatory side –

assisting the State Bank of Vietnam on amendments to the Law on Credit Institutions.

Baker & McKenzie has also been extremely active on the corporate and commercial side. Burke advised Ho Tram Resort on the \$275 million establishment of a joint venture for the development of the Bao Trang Vien holiday resort, and also led teams that worked on the sale of a stake in the joint venture relating to the Presidential Place real estate project (worth \$6 million) and on the acquisition of a stake in Paul Maitland International, advising Paul Maitland International. Meanwhile, Nguyen Oanh advised on setting up another joint venture, this time relating to the \$23 million Hoan Cau real estate residential condominium.

Key contact partner

Fred Burke

Leading lawyer

Fred Burke

Freehills

Australian firm Freehills has built a strong presence in Vietnam. Mark Fraser, the managing partner of the firm's Ho Chi Minh City office and head of the Vietnamese banking and finance practice, joined the firm in early 2002 from Freshfields, where he had established an operational presence for the firm in Ho Chi Minh City and was managing lawyer of that office for more than five years. Freehills' Vietnamese presence is based in two cities; Tim Reinold runs things from the Hanoi office alongside Fraser's Ho Chi Minh City operation.

The International Finance Corporation (IFC) is a big client of the firm in Vietnam, and the relationship has delivered a good flow of work over the year. Freehills advised the IFC on the acquisition by Groupe Des Sociétés de Bourbon of the IFC loan provided to Sucrierie de Bourbon, a sugar mill project; the financing of a 100% foreign-owned hospital project in Ho Chi Minh City; and the restructuring of senior and subordinated loans provided to Morning Star Cement by the IFC, a consortium of Thai banks and Nissho Iwai. This last deal involved rescheduling the loans and changes to the offshore escrow account arrangements, the financial support arrangements from sponsors, changes to the off-take arrangements, and an innovative new security package that was the first of its kind under Vietnamese law.

The firm also advised Telstra in relation to its business cooperation contract with Vietnam Posts & Telecommunications, the state-owned telecommunications monopoly, acted for BHP Petroleum on the Dai Hung oil-field development and on the transfer of interests in production sharing contracts, advised on the acquisition by Visy Industries of all of the capital in a 100% foreign-owned enterprise owned by Southcorp, worked on financing the establishment of Vietnam's first international university in Ho Chi Minh City by the IFC and the Asian Development Bank, and represented SembCorp in its acquisition of a

one-third interest in the Phu My 3 build-operate-transfer power plant project.

Key contact partners

Mark Fraser

Tim Reinold

Freshfields Bruckhaus Deringer

Numbers in Freshfields' Vietnam offices have been boosted recently by the hire of two new associates. Nora Vacariu joined the firm in September 2003 from her previous in-house role, and Lam Quynh Anh moved over from the Freshfields' London office in November 2003. Tony Foster heads up the firm's operations from the Hanoi office, a role he has fulfilled since 1994.

One partner and four associates handle banking work from the firm's two offices in Hanoi and Ho Chi Minh City. Stand-out banking deals have included advising Nghe An Tate & Lyle Sugar Company on two loan facilities (worth \$32 million) to refinance a long-term offshore syndicated loan provided by the International Financial Corporation (IFC) and Export Finance and Insurance Corporation, acting for ConocoPhillips and Cuu Long Joint Operating Company on the \$160 million financing of an FPSO vessel, and advising the Asian Development Bank and the IFC on restructuring a \$100 million loan to the Nghi Son Cement Plant.

Debt capital markets work in Vietnam has been fairly quiet, although Freshfields did pick up a prominent role acting for the Vietnamese government in respect of its inaugural issuance of US dollar-denominated global bonds. The firm has, however, been more active on the equity side, advising the Vedan Enterprise Corporation in relation to a listing on the Hong Kong Stock Exchange, acting for Vietnam Enterprise Investments on the listing of \$50 million-worth of new C shares on the Irish stock exchange, and representing BdN Investment on the establishment of PXP Vietnam Fund Limited and the listing of \$25 million on the Irish stock exchange. The last two deals both took place in January 2004.

The firm also has a visible project finance practice that advised, among others, Fortis Bank, Mizuho Financial Group and the Asian Development Bank on the \$300 million financing of the Phu My 3 build-operate-transfer power project, Suez Lyonnaise des Eaux on the \$130 million Thu Duc water treatment build-operate-transfer project, and Mitsui & Co on the Omon-2 combined cycle power project.

General corporate work handled by the firm over the past 12 months has included advising the Beta Vietnam Fund on the sale of its equity interest in Saigon Water Park, and acting for Hatay Brewery in respect of the conversion of a \$200 million joint venture into a wholly foreign-owned company through the buyout of a local partner. The M&A practice has advised Hewlett Packard on the on the Vietnamese aspects of its worldwide merger with Compaq Computer

Corporation, acted for both Crédit Lyonnais and Crédit Agricole Indosuez on the Vietnam aspects of the acquisition of share interests in Crédit Lyonnais by Crédit Agricole Indosuez, and represented Pepsi International Beverages Company in connection with an acquisition in Vietnam.

Lastly, Freshfields has a reputable private equity practice in Vietnam, which has worked on, among other matters, the \$2 million sale of equity to the IFC (advising Dragon Capital), Mekong Capital's purchase of \$15 million-worth of shares in various companies, and Prudential Vietnam Assurance Private's \$15 million investment in the Rose Garden joint-venture company.

Key contact partner

Tony Foster

Leading lawyer

Tony Foster

Johnson Stokes & Master

Johnson Stokes & Master's (JSM) reputation in Vietnam is based to a large extent on that of its Hanoi partner, Suong Dao Nguyen, who peers describe as "a genuine expert" in matters of commercial, corporate and financial law. However, it would be wrong to call JSM's Vietnamese operation a one-woman band – Nguyen is supported by both foreign-trained and local Vietnamese lawyers, and the firm has a solid reputation in the country (as indeed it has across the whole region) for providing solid advice and enjoying a steady flow of work.

On the banking side, JSM prepared documentation for, and advised on, issues relating to a syndicated facility for the expansion of a cement plant in northern Vietnam, and the refinancing of a property company and a foreign hotel venture in Ho Chi Minh City, including all related security aspects. It also advised on the Vietnamese aspects of the Crédit Lyonnais and Crédit Agricole Indosuez merger.

Capital markets work included assisting a number of banks in Vietnam in relation to the use of Isda products in line with the new regulatory regime and the status of this documentation in Vietnam, and advising a state-owned bank in obtaining a representative office licence in New York.

In the mergers and acquisitions sector, JSM's lawyers advised on an acquisition by a Filipino company of a \$35 million food production business in southern Vietnam, a deal that involved a detailed due diligence exercise, preparing both the sale and purchase documentation and handling the Vietnam licensing aspects of the transaction, and acted for a Hong Kong property developer on the acquisition of its joint venture partners' interest.

Meanwhile, general corporate work has included advising on a number of transactions in connection with the provision of oil field services, fabrication of offshore facilities and the charter of FPSO/FSO systems, acting on a number of property development projects (including a \$130 million property project to develop an sports city complex in

HCMC and a \$35 million resort in Da Nang), working on behalf of a number of investors in establishing foreign-invested projects in Vietnam in the shipping and clothing sectors, and representing a Filipino company on its expansion projects in Vietnam.

Key contact partner

Suong Dao Nguyen

Leading lawyer

Suong Dao Nguyen

Lovells/Saigon Law Office

Lovells' continued investment into its Vietnamese presence is paying off, and the firm has won roles on a number of high-end deals. The firm has been in Ho Chi Minh City for 10 years now, and is boosting its presence there by ensuring that some of its best Asian lawyers – including partners James Harris, Michael Hancock, Henry Wheare and Gabriela Kennedy – spend more time on the ground in the Ho Chi Minh City office. The practice has been further bolstered by the arrival of two new lawyers – Stephen Hayward, a partner in Lovells' Hong Kong office moved to join Saigon Law Office, and Paul Brittain, a six-year associate, joined the firm from Baker & McKenzie.

Lovells' well-established alliance with Saigon Law Office also benefits the firm enormously, not least because managing partner Nguyen Dang Trung is the president of the Ho Chi Minh City Bar Association and a well-known figure in the Vietnamese business world.

The firm's corporate practice has been busy over the past year. Among the stand-out deals, partner John Mollard advised on the Vietnamese aspects of the merger between Nissho Iwai Corporation and Nichimen Corporation to form the new Sojitz Corporation, as well as on the Vietnamese aspects of restructuring Inter Public Group's operations. The practice has also acted on Mitsubishi Corporation's real estate development joint venture in Ho Chi Minh City, as well as in relation to a global compliance project.

Meanwhile, on the banking and finance side, the firm has been active in the structured finance sector, and has handled a number of trade financings (for example, for Stemcor) and warehousing financings wishing to obtain security for off-shore finance (such as Control Union). Lovells' projects work over the past year includes continued work on one of the outstanding water treatment plants in Ho Chi Minh City, and advice to the developer in relation to the construction and management of the new Park Hyatt Hotel in Ho Chi Minh City.

At the time of writing the firm is acting for a large Japanese corporation in connection with a feasibility review for an oil and petrochemicals refinery project in Vietnam. Richard Jadot, the former head of Clifford Chance's Ho Chi Minh City office, is focusing on French banks and clients that are active in Vietnam.

Key contacts

James Harris
John Mollard
Nguyen Dang Trung

Lucy Wayne & Associates

Lucy Wayne & Associates comprises one partner (name partner Lucy Wayne) and 18 associates working out of offices in Ho Chi Minh City and Hanoi. Numbers were boosted in December 2003 by the hire of new associate Jason Donovan, and other recent arrivals include Konrad Hull, who joined the firm from Simmons & Simmons' Hong Kong office.

The firm handles the full range of corporate and commercial work, in March 2003 advising Far East Medical Vietnam on the development and opening of a \$40 million international standard hospital in Ho Chi Minh City. At the time of writing the firm is advising Technip Italy in connection with the \$440 million development of the Ca Mau fertilizer plant. Other clients that have benefited from Lucy Wayne's advice in recent times include Avon Cosmetics, TotalFinaElf, Nissho Iwai and Avaya.

Key contact partner

Lucy Wayne

Phillips Fox

Australian firm Phillips Fox is one of the region's largest, with 10 offices across Australia, New Zealand and Vietnam – where it has offices in both Hanoi and Ho Chi Minh City. The firm is fortunate to boast two of Vietnam's most respected lawyers – Bill Magennis, who runs the Hanoi office, and Nigel Russell, partner-in-charge of the Ho Chi Minh City office. Russell is an experienced adviser on foreign investment in Asia, and particularly on matters of Vietnamese corporate and commercial law, while peers and clients praise Magennis for his "excellent approach to transactions" and his "superb legal knowledge". Magennis' practice is a broad one, covering corporate law and banking work, commercial litigation, professional negligence, construction law and aviation.

Phillips Fox's main client is British Petroleum, which it advised on the Nam Con Son pipeline project. Other clients the firm has advised in recent times include Fuji Bank, Philip Morris, Colgate-Palmolive, Citibank, and Nippon Telegraph and Telecommunications.

Key contact partners

Bill Magennis
Nigel Russell

Leading lawyers

Bill Magennis
Nigel Russell

White & Case

White & Case opened its first Vietnamese representative office in Hanoi in 1994 – the first Wall Street firm to establish a presence in Vietnam. These days the firm's main office in Vietnam is in Ho Chi Minh City, managed by Minh Dang from the firm's Singapore office. The firm shares offices with YKVN, White & Case's Vietnamese consulting affiliate, in both Ho Chi Minh City and Hanoi.

The finance practices of both White & Case and YKVN have had excellent years, and jump to the first tier of firms in this area due to a high volume of deals, and roles on many of the landmark transactions. In what was probably the deal of the year, White & Case advised Vietnam Airlines in the \$477 million financing of four Boeing 777-200 aircraft being purchased from the maker with credit guarantees from the Export-Import Bank of the US. The financing, which closed in September 2003, is the first US-Eximbank transaction in Vietnam and the first aircraft purchase undertaken by Vietnam Airlines as part of its fleet expansion programme. The deal also marks a new era of trade after a comprehensive bilateral trade agreement between Vietnam and the US entered into force in December 2001.

White & Case also advised Sampoerna, an Indonesian tobacco concern, on the restructuring of an existing joint venture in connection with the sale of a majority stake to Vinataba, the Vietnamese state-owned tobacco monopoly. This was a tricky deal because it involved the transfer of the equity interest in an existing joint venture from one Vietnamese party to Vinataba, the state-owned tobacco company, and the restructuring and recapitalization of the existing joint venture. The firm also had a role acting for the Vietnam Association of Seafood Exporters and Producers and 11 major seafood producers in US antidumping proceedings initiated by the Catfish Farmers of America against the export of Vietnamese frozen fish fillets. This was the first big trade controversy between Vietnam and the US since the ratification of their bilateral trade agreement.

Key contact partner

Minh Dang

Leading lawyers

Minh Dang
Edward Sim

YKVN

Winner of *IFLR's* Vietnam law firm of the year award, YKVN is the affiliate office of White & Case in Vietnam. It was founded in 1999 by three lawyers who had met as trainee lawyers at White & Case's offices in Vietnam. The firm has now expanded to 15 lawyers, including three partners (managing partner Truong Nhat Quang, partner-in-charge of the Hanoi office Diep Hoai Nam, and his counterpart in the Ho Chi Minh City office, Le Cong Dinh) one of-counsel and 11 associates.

YKVN has a substantial practice advising Vietnamese banks and corporations – its clients in the banking and finance sector include Vietnam Airlines, Vietcombank, Southern Steel Corporation and seafood exporters Agifish and Cataco). In the latter part of 2003 the firm advised Vietnam Airlines on the \$477 million financing of four Boeing 777-200 aircraft being purchased from the maker with credit guarantees from the Export-Import Bank of the United States. This was the first US-Eximbank transaction to take place in Vietnam, as well as the first aircraft purchase undertaken by Vietnam Airlines as part of its fleet expansion programme.

Still in the area of aircraft financing, YKVN acted for Vietnam Airlines again in connection with the guaranteed lease financing of three Airbus A321-200 aircraft by Coface, Euler Hermes and ECGD. ABN AMRO lead managed this transaction, which was the first aircraft financing in Vietnam involving these export credit agencies.

In another landmark deal, the firm acted as Vietnamese counsel to Southern Steel Corporation on the EPC construction of a steel plant and associated facilities in the Phu My complex – the first EPC contract in the steel industry, which was financed entirely by domestic banks. Among the year's other finance deals, in August the firm advised the lender, Vietcombank, in relation financing the construction of the Sheraton Hanoi Hotel and Towers, in November it acted for Indovina Bank on financing the ongoing expansion of the Fortuna Hotel in Hanoi, and the following month it was busy representing Vietcombank again, this time on financing the ongoing expansion of the Hanoi French Hospital. And the work continued in 2004; January saw the firm working for Malaysian Eximbank on financing the development and construction of a knitted-garment manufacturing plant in Binh Duong province, and advising Vietcombank as facility agent and security agent, Chinfon Commercial Bank and Woori Bank in relation to refinancing the offshore project debt of Nghe An Tate & Lyle, a Vietnamese subsidiary of UK sugar company Tate & Lyle. This is the first example of a syndicate of Vietnamese and foreign banks agented by a Vietnamese bank.

YKVN's corporate practice, while solid, is not in the same league as its stellar finance practice, but it still wins roles on some high-profile deals. In June 2003 it advised the Vinasa Investment Corporation, a subsidiary of Sampoerna, on the \$2 million restructuring of a tobacco joint venture in Vietnam. And at time of writing, the corporate department is acting for the Vietnam Association of Seafood Exporters and Producers and 11 large seafood producers in US antidumping proceedings initiated by the Catfish Farmers of America against the export of Vietnamese frozen fish fillets.

Key contact partner

Truong Nhat Quang