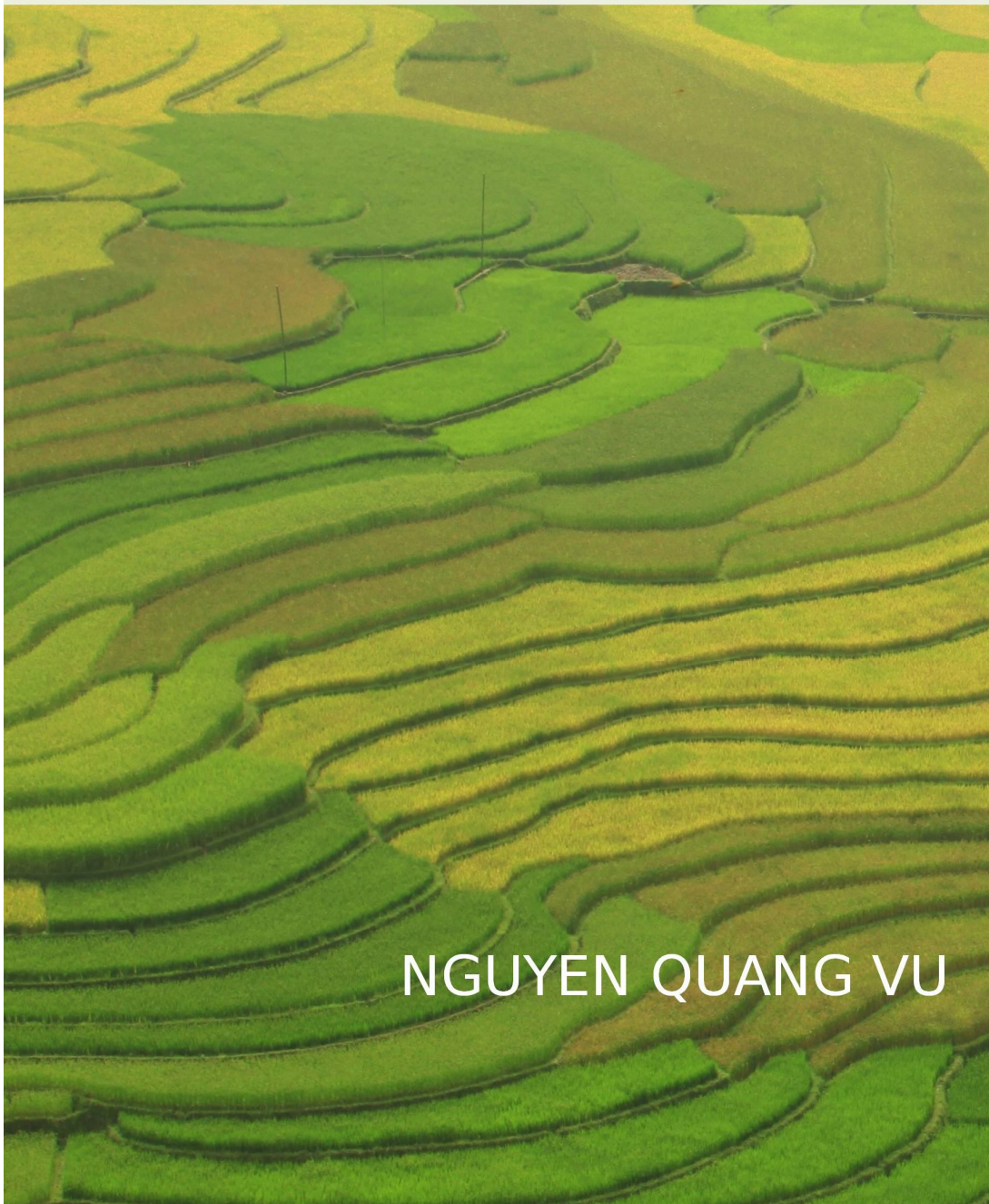


**A BRIEF INTRODUCTION
ON VIETNAM'S LEGAL
FRAMEWORK**



NGUYEN QUANG VU

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Appendix 1: Defined Terms

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BRIEF DESCRIPTION

This book is intended to provide a quick overview of Vietnam's legal framework for a person, who has no or very limited experience with Vietnamese law. After reading this book, you will have basic knowledge about:

- The organisation structure of the Vietnamese Government including the Communist Party of Vietnam;
- The legislation hierarchy in Vietnam;
- Certain difficulties relating to Vietnamese law;
- Dispute resolution in Vietnam; and
- The ability to select foreign governing law for a contract signed with a Vietnamese party.

The law stated in this book is as of 30 July 2012. As at 30 July 2012, the exchange rate between Vietnamese Dong and U.S Dollars is about US\$ 1 = VND 20,850.

1. VIETNAM – THE COUNTRY

1.1 Overview

Searches with Google should provide more than sufficient general information about Vietnam to a person interested in the country. Therefore, in this book, it is sufficient to note that Vietnam is a medium-size country in South East Asia (total area: about 330,000 km², ranking 65th in the world)¹ with a large population (about 86.9 million people in 2010, ranking 13th in the world)² a long history (more than 2,000 years) and a small economy (GDP of about US\$ 100 billion in 2010, ranking 56th in the world).³

In the author's opinion, among various facts about Vietnam, the most unique one is probably the fact that Vietnam is the only country, where people use chopstick to eat but adopt a Latin-based alphabet to write.⁴

1.2 History

Vietnam is probably most well-known in the world about its successful fights against larger countries to maintain its independence and unity.⁵ Notably, Vietnam has fought many battles against the Chinese since thousands years ago,⁶ three times against the Mongols in the 14th century, against the French and the U.S in the 20th century.

Unfortunately, there is not much material left about other aspects of Vietnam society including laws and regulations. The earliest record of a written law issued by a Vietnamese government, the “Le Dynasty Penal Code” (*Lê Triều Hình Luật*), dates back only to 1483.⁷ The Le Dynasty Penal Code and other codes issued by subsequent dynasty focuses mainly criminal laws and family laws. These codes only cover a limited areas of business law regarding properties and contract law. Western style business laws including commercial law and company law were introduced in 19th century, when Vietnam (or part of it) was under the French and the US's occupation.⁸ These laws however were abolished completely when the Communist party gained control of the whole country in 1975.

¹ http://en.wikipedia.org/wiki/List_of_countries_and_outlying_territories_by_total_area.

² http://en.wikipedia.org/wiki/List_of_countries_by_population;
<http://www.gso.gov.vn/default.aspx?tabid=387&idmid=3&ItemID=11505>.

³ <http://databank.worldbank.org/databank/download/GDP.pdf>;
<https://www.cia.gov/library/publications/the-world-factbook/fields/2195.html#vm>

⁴ Vietnamese characters are based on Latin alphabet and are invented by, among others, a French priest in the 17th century.

⁵ <http://www.vietnamimpressive.com/vietnam/index.html>

⁶ The latest occurred in 1979.

⁷ Presentation on History of The State and Laws of Vietnam by Mr Vo Cong Nhi – The College of Law in Ho Chi Minh City. The presentation is obtained by the author from various internet researches.

Only until 1986, Vietnam began to introduce modern business law to attract foreign investment⁹ and domestic private investment.¹⁰ Since then Vietnam has gradually developed its legal framework to regulate “a market economy with Socialist orientation”.¹¹

1.3 Politics

Vietnam is one of a few countries in the world, where the Communist Party is currently in power.¹² Under Article 4 of the Constitution 1992, the Communist Party of Vietnam (CPV) is “the leading force of the State and the society”. The organisation of the CPV can be summarised in the diagram below:¹³

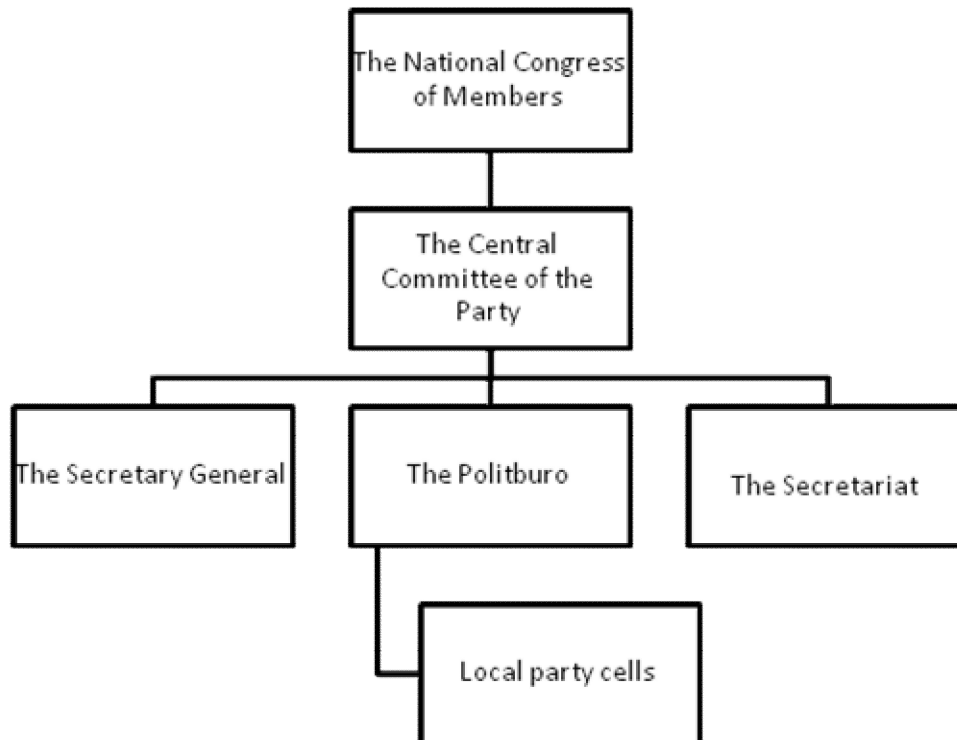


Figure 1: Organisation of the Communist Party of Vietnam.

The highest decision making body of the CPV is the National Congress of Members of the CPV

⁸ <http://thongtinphapluatdansu.wordpress.com/2007/09/17/12423/>

⁹ Law on Foreign Investment of the National Assembly dated 29 December 1987.

¹⁰ Law on Companies of the National Assembly dated 21 December 1990. Law on Private Companies of the National Assembly dated 21 December 1990.

¹¹ Article 15 of the Constitution of Vietnam passed by the National Assembly on 15 April 1992 as amended (**The Constitution 1992**).

¹² Including, among others, China, Cuba and North Korea.

¹³ Article 15 of the Charter of CPV dated 19 January 2011
http://www.cpv.org.vn/cpv/Modules/News/NewsDetail.aspx?co_id=30106&cn_id=443473.

(*Đại hội đại biểu toàn quốc*) (**CPV National Congress**). The CPV National Congress is a large body. For example, the CPV National Congress held in 2011 has 1,400 members representing for 3.6 million party members and 54,000 local part cells.¹⁴ However, the CPV National Congress is not a permanent body and is usually convened only once in every 5 years. To attend the CPV National Congress, a CPV member must be selected through various elections at local meeting levels of the local party cells. One of the most important tasks of the CPV National Meeting is to elect the Central Committee of the Party (*Ban Chấp hành Trung ương*) (**Central Committee**).

The Central Committee elected by the CPV National Congress held in 2011 has 200 members. The Central Committee is also not a permanent body and is only convened once every six months. The Central Committee will elect a handful of members to hold positions in the Politburo (*Bộ Chính Trị*). The Politburo elected in 2011 has 14 members.¹⁵ The Central Committee will also elect the Secretary General (*Tổng Bí Thư*), who is the head of the CPV and therefore is practically the most politically powerful person in Vietnam. The Secretary General cannot hold this position for more than two consecutive terms.¹⁶

The day-to-day operation of the CPV is managed by the Party Secretariat (*Ban Bí Thư*), which is elected by the Central Committee but which must consist of the Secretary General and a number of Politburo members.¹⁷

Given the role of the CPV in Vietnam's politic, an investor doing business in Vietnam when dealing with State officials, Government authorities and State-owned enterprises should take into account of the relative position of such officials, authorities and enterprises in the hierarchy of the CPV. For example, although the Chief Judge of the Supreme Court of Vietnam and the Prime Minister are both elected by the National Assembly, the Chief Judge is only a member of the Central Committee while the Prime Minister is a member of the Politburo. The difference in CPV ranking between the Prime Minister and the Chief Judge is likely to create an impression that the People's Courts are not as politically powerful as the Government.

1.4 Economy

Unlike its politics, Vietnam's economy is intended to be a market economy with multiple economic sectors.¹⁸ In 2010, Vietnam has an annual GDP of about US\$ 100 billion of which:¹⁹

- agriculture sector account for about 21%, industrial sectors account for about 41% and service sectors account for 38%; and
- the State sector accounts for about 34%, the domestic private sector accounts for about 47%

¹⁴ <http://vietnamnet.vn/vn/chinh-tri/3847/11---19-1-2011--dai-hoi-dang-toan-quoc-lan-thu-xi.html>.

¹⁵ <http://vietnamnet.vn/vn/chinh-tri/6750/danh-sach-va-tieu-su-14-uy-vien-bo-chinh-tri-khoa-xi.html>

¹⁶ Article 17 of the Charter of CPV.

¹⁷ Article 17 of the Charter of CPV.

¹⁸ Article 15 of the Constitution.

¹⁹ <http://www.gso.gov.vn/default.aspx?tabid=388&idmid=3&ItemID=11552>

and the foreign-invested sector accounts for 19%.

Vietnam has been a member of the World Trade Organisation since January 2007.²⁰

1.5 The State

General Organisation

The State of Vietnam is currently organised pursuant to the Constitution 1992. The Constitution 1992 provides that Vietnam be divided into provinces and municipalities under direct central administration. There are currently 63 provinces of which there are five municipalities (Hanoi, Ho Chi Minh City, Hai Phong, Da Nang and Can Tho).²¹

The four levels of government administration in terms of geography are the central (*trung ương*), provincial (*tỉnh*) (which includes the provinces and the five directly administered municipalities), district (*huyện*) and communal (*xã*) levels.

The highest ranking organisation of the State is the National Assembly.²² The other principal State institutions at the central level are the President, the Government, the Supreme People's Court and the Supreme People's Procuracy. The principal State institutions at the local level are People's Councils, People's Committees, People's Courts and People's Procuracies. The central organisation of the State of Vietnam can be summarised in the diagram below:

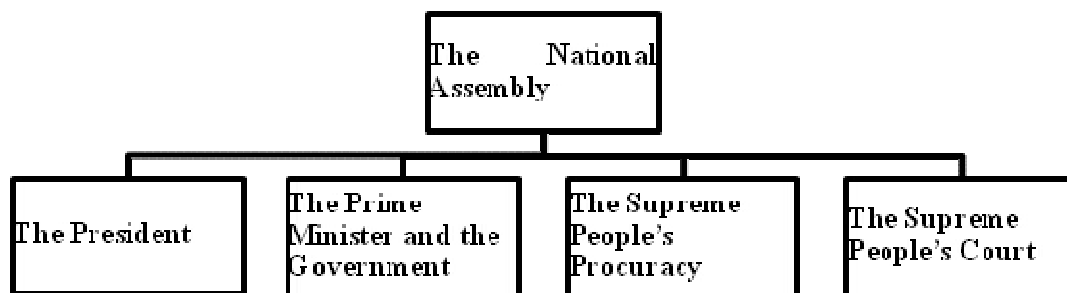


Figure 2 - The central organisation of the State

The National Assembly

The thirteenth National Assembly, elected in 2011, consists of 493 deputies. Under the Constitution 1992, the National Assembly is elected every five years and meets in one-month sessions twice a year.²³ The National Assembly's functions and powers include:²⁴

²⁰ http://www.wto.org/english/thewto_e/acc_e/a1_vietnam_e.htm

²¹ <http://chinhphu.vn/portal/page/portal/chinhphu/cactinhvathanhpho>

²² Article 83 of the Constitution 1992.

²³ Articles 85 and 86 of the Constitution 1992.

²⁴ Article 84 of the Constitution 1992.

- enacting legislation;
- supervising the observance of the Constitution, laws and its own resolutions;
- setting national economic and social development plans;
- deciding national financial and monetary policies;
- deciding national ethnic and religious policies;
- deciding on fundamental external relations policies and ratifying international treaties;
- making decisions to protect national defence and security;
- approving the establishment and elimination of Government ministries; and
- deciding on the establishment or division of provinces.

The National Assembly elects the President and the Vice President, its Chairman and Vice Chairmen and members of the Standing Committee of the National Assembly. The National Assembly also appoints and removes the Prime Minister, the Chief Judge of the Supreme People's Court and the Procurator-General of the Supreme People's Procuracy upon the nomination of the President and appoints and removes Deputy Prime Ministers, Government ministers and other Government members upon the nomination of the Prime Minister.²⁵

When the National Assembly is not in session, its Standing Committee exercises certain of its powers and functions, including the enactment of ordinances, which must not be inconsistent with laws made by the National Assembly. The Standing Committee is also responsible for calling general elections of the National Assembly, convening National Assembly sessions, interpreting the Constitution, laws and ordinances and supervising local People's Councils. Standing Committee decisions and actions may be overruled by the full National Assembly. The term of the Standing Committee is concurrent with that of the National Assembly.²⁶

The President

The President is the head of the State.²⁷ But as discussed in section "Politics" above, the President is not the most politically powerful officer unless he/she is also the Secretary General of the CPV.

The President's main responsibilities are:²⁸

- to promulgate laws and ordinances adopted by the National Assembly and its Standing Committee;
- to nominate the Vice President, the Prime Minister, the President of the Supreme People's Court and the Procurator-General of the Supreme People's Procuracy;
- to appoint and remove Deputy Prime Ministers and members of the Government in

²⁵ Article 84.7 of the Constitution 1992.

²⁶ Articles 90 and 91 of the Constitution 1992.

²⁷ Article 101 of the Constitution 1992.

²⁸ Article 103 of the Constitution 1992.

accordance with the decisions of the National Assembly; and

- to proclaim states of war pursuant to resolutions of the National Assembly or its Standing Committee.

The Government

The Government is the executive agency of the National Assembly and the highest administrative body of Vietnam. The Government is accountable to and reports to the National Assembly.²⁹ The Government consists of the Prime Minister, Deputy Prime Ministers, heads of ministries and heads of ministerial level agencies, including the State Bank.³⁰ The term of the Government is concurrent with the term of the National Assembly. Government ministers other than the Prime Minister need not be members of the National Assembly.³¹

The Government's functions and powers include:³²

- exercising leadership over the work of ministries, ministerial bodies and People's Committees;
- enacting administrative rules and regulations in accordance with the Constitution, laws and ordinances;
- drawing up and implementing the State budget;
- implementing social, ethnic and religious policies;
- entering into international treaties; and
- directing all other matters of Government administration, including those relating to economic affairs, education, sciences, culture, civil affairs, public security, foreign affairs and national defence.

The table below sets out the main responsibilities of key members and ministries of the Government:

Members of the Government	Main responsibilities
The Prime Minister	Overall responsibility for the Government and the execution of the executive and administrative functions of the Government.
Ministry of Finance	Tax; capital market; customs; State budget; State-owned enterprises; and insurance.

²⁹ Article 109 of the Constitution 1992.

³⁰ Article 110 of the Constitution 1992.

³¹ Article 113 of the Constitution 1992.

³² Article 112 of the Constitution 1992.

Members of the Government	Main responsibilities
Ministry of Industry and Trade	Import-distribution; certain industries and services, energy including oil and gas; consumption goods including beer and beverage, tobaccos; representative offices of foreign traders; and competition.
Ministry of Planning and Investment	Companies; State investment and procurement; and foreign direct investment.
State Bank of Vietnam	Foreign exchange control; banking services; foreign loans; and monetary policies.
Ministry of Construction	Real estate; and construction.
Ministry of Transportation	Transportation by road, rail, air and sea; and logistics services;
Ministry of Natural Resources and Environment	Environment protection; mining; and land
Ministry of Health	Hospitals; pharmaceutical products; and cosmetics.
Ministry of Labour, War invalids and Social Affairs	Labour; and employment related services
Ministry of Communication and Information	Telecommunication; internet; postal services; publication; and advertisement.

The People's Courts

The People's Courts are the judicial bodies responsible for the administration of justice for civil, criminal, administrative, economic and labour cases.³³ The Supreme People's Court is the highest judicial body in Vietnam and supervises the administration of justice by the local People's Courts and military courts.³⁴ The Supreme People's Court also considers appeals from verdicts and decisions by provincial and military courts. The Chief Judge of the Supreme People's Court reports to the National Assembly and, when the National Assembly is not in session, to the Standing Committee and the President.³⁵

The People's Procuracies

The People's Procuracies are responsible for the exercise of prosecutorial power and the supervision of judicial activities.³⁶ The Supreme People's Procuracy directs the work of the

³³ Article 1 of the Law on Organisation of the People's Court of the National Assembly dated 2 April 2002.

³⁴ Article 134 of the Constitution 1992.

³⁵ Article 135 of the Constitution 1992.

³⁶ Article 137 of the Constitution 1992.

People’s Procuracies at the local level.³⁷ The Procurator-General reports to the National Assembly and, when the National Assembly is not in session, to the Standing Committee and the President.³⁸ The People’s Procuracies are empowered to protest against judgments or decisions of the People’s Courts, which are contrary to law and bring such protest to higher courts. The People’s Procuracies may also cancel decisions of public investigative agencies in criminal matters if they believe such decisions are illegal.

2. VIETNAM – THE LEGAL FRAMEWORK

2.1 Hierarchy of legislation

According to Article 1 of the Law on Legal Instruments 2008,³⁹ the law of Vietnam consists of the following main legal instruments, which can be issued by various authorities:

Issuing authorities	Instruments dated from 1 January 2009
The National Assembly	Constitution; Laws and Resolutions
The Standing Committee of the National Assembly	Ordinance; and Resolutions
The President	Order; and Decision
The Government	Decrees
The Prime Minister	Decisions
The Supreme Court	Resolutions
The Chief Judge of the Supreme Court	Circulars
The Procurator-General	Circulars
Ministries or ministerial level entities	Circulars
The General State Auditor	Decisions
Local People’s Committees	Decisions, and Directives
Local People’s Council	Resolutions

In addition to the above legal instruments, more than one issuing authorities can together issue a “joint” legal instrument. Legal instruments issued before 1 January 2009 may be issued in a different form under the old Law on Legal Instruments. Nowadays, Vietnamese copies of legal instruments in Vietnam are regularly published on the Official Gazette of the Government and widely available on the internet (e.g. luatvietnam.com.vn; legal.khaitri.vn). English copies of

³⁷ Article 138 of the Constitution 1992.

³⁸ Article 139 of the Constitution 1992.

³⁹ Law on Promulgation of Legal Instruments of the National Assembly dated 3 June 2008 (**Law on Legal Instruments 2008**)

certain important legal instruments are also available for a fee on certain websites (the most reliable one being www.vietnamlaws.com).

In general, legal instruments issued by higher authorities will have higher validity. Legal instruments issued by central authorities will be applicable nationwide while legal instruments issued by local authorities will be applicable within the specific localities only.

Usually, the “legal framework” covering a specific area of law includes:

- a Law issued by the National Assembly setting out the general principles of such area;
- one or more Decrees issued by the Government, which further clarify and implement the Law issued by the National Assembly; and
- one or more Circulars issued by the relevant Ministries in charge of the area in question, which provide more detailed implementation of the Decrees issued by the Government.

In practice, the drafting of all of the above legal instruments is controlled by the relevant Ministry in charge of the relevant area. For example, the Ministry of Finance will control the drafting of all legislations regarding capital market such as the Law on Securities, the implementing Decrees and Circulars. In addition, usually the Law issued by the National Assembly can only be expected to be fully implemented in practice after the relevant Ministries issue the detailed implementing Circulars. Therefore, there is usually substantial delay between the time a Law of the National Assembly is issued and the time such Law is fully implemented in practice.

2.2 Court precedents

The courts in Vietnam do not have express power to interpret the law and a lower court is not bound by preceding judgments of higher courts. Under the Law on Legal Instruments 2008, only the Standing Committee of the National Assembly is expressly authorised to interpret Laws and Ordinances.⁴⁰

A court judgment is not considered as a legal instrument (see the table at 2.1 above). The Supreme Court is however authorised to issue “hearing guidance” often in form of a resolution to clarify the law and to ensure consistency in the implementation of the laws by the courts, and lower courts are bound by such guidance.⁴¹

Under Article 5 of the Law on Organisation of People’s Court, when settling a dispute, the court will act independently and only comply with laws. Therefore, theoretically, a judgment of the court must follow the laws, which are contained in various “legislative instruments” listed at section 2.1 above.

In practice, most of the legal instruments in Vietnam are actually drafted, issued and implemented by the Government and its ministries. Accordingly, the Government and the relevant ministries have substantial power to interpret and implement the law rather than the

⁴⁰ Article 85 of the Law on Legal Instruments 2008.

⁴¹ Article 19 of the Law on Organisation of the People’s Courts.

courts. The courts in Vietnam tend to depend on the Government and its ministries' view or interpretation of a law to decide on a dispute.

In terms of accessibility, although court hearings in Vietnam are required to be open to public, there is no published database of court judgements open for public inspection.⁴² Therefore, it is usually difficult for the public including lawyers to have access to and to review judgements passed by the courts. Effective litigation search in Vietnam is therefore practically impossible.

2.3 International treaties

Vietnam is a party to various international treaties. Accordingly, international treaties sometimes play an important role in determining the rights and obligations of a foreign investor. However, when studying an international treaty, one should note the following:

- an international treaty can only be directly applied in Vietnam if the provisions of the relevant treaty are specific and clear enough and the Vietnamese Government decides to apply those provisions directly.⁴³ Accordingly, until there is a specific law issued to implement an international treaty, Vietnamese authorities may decide not to apply an international treaty on the basis that such provisions are *not* specific and clear enough; and
- in case the provisions of an international treaty and the provisions of a domestic law are “different” on the same issue, the international treaty will prevail.⁴⁴ It is not clear what constitutes a difference between an international treaty and a domestic law.

Usually, an international treaty is intended to provide for the minimum rights and benefits that Vietnam needs to provide to a foreign investor. Therefore, Vietnam should be free to issue a law, which contains better or broader rights and benefits. However, in some cases where domestic laws contain better and broader rights and benefits, the authority may still refuse to apply the domestic laws on the ground that they are “different” from the provisions of the relevant international treaty.

For example, under the Enterprise Law,⁴⁵ resolutions of the General Meeting of Shareholders of a joint stock company will be passed when they are approved by a number of votes representing at least 65% of all the votes of attending shareholders or at least 75% of all the votes of attending shareholders in respect of more serious corporate matters. In its commitments to the WTO (**WTO Commitments**),⁴⁶ Vietnam undertakes that:

⁴² To the author's knowledge, only a few court judgments have been published in certain law commentary books and website (e.g. <http://vibonline.com.vn/Banan/default.aspx>).

⁴³ Article 6.3 of the Law on International Treaties of the National Assembly dated 14 June 2005 (**Law on International Treaties 2005**).

⁴⁴ Article 6.1 of the Law on International Treaties 2005.

⁴⁵ Article 104 of the Enterprise Law of the National Assembly dated 29 November 2005 (**Enterprise Law**).

⁴⁶ The commitments of Vietnam to the WTO are contained in WTO document number

“... notwithstanding the requirements in the 2005 Enterprise Law, investors establishing a commercial presence as a joint venture under the commitments in Viet Nam's Schedule of Specific Commitments would have the right to establish, through the enterprise's charter, all the types of decisions that had to be submitted to the Members' Council or Shareholders' Meeting for approval; the quorum rules, if any, that governed voting procedures; and the precise percentages of voting majorities necessary to make all decisions, including a simple majority of 51 per cent. ... Viet Nam would give legal effect to these provisions of such enterprises' charters.”

To implement the above commitment, the National Assembly issued Resolution 71/2006.⁴⁷ Resolution 71/2006 provides that: “[A] shareholding company is entitled to provide in its charter ... the number of members [of the company] required for holding a shareholder meeting [and] ... the majority vote necessary (including 51% majority) in order to pass decisions ... of the shareholder meeting”. While the WTO Commitments only refer to joint venture companies, Resolution 71/2006 appears to refer to all shareholding or limited liabilities companies and thereby expand the scope of application of the WTO Commitments.

However, the Working Group Implementing the Enterprise Law and the Investment Law (**Working Group**) took the view that because Resolution 71/2006 is “different” from the WTO Commitments (presumably by expanding the scope of the WTO Commitments), the WTO Commitments should prevail Resolution 71/2006 and should be applied instead of Resolution 71/2006.⁴⁸ According to the Working Group, as the WTO Commitments only refer to joint venture companies, the provisions of Resolution 71 are intended to apply only to (1) joint venture companies, which operate in the service sectors committed by Vietnam in the WTO Commitments but not to domestic companies and (2) joint venture companies established before 11 January 2007⁴⁹ and choose to amend their charters before 1 July 2008.

In the author's view, the fact that Resolution 71 expands and therefore is different from the scope of the WTO Commitments should not be considered as a violation of the WTO Commitments. Indeed, Article 3.2 of Decree 108/2006⁵⁰ provides that in the case where a law of Vietnam being issued after Vietnam became a member of any international treaty contains provisions, which are more favourable than such international treaty, investors will be entitled to choose the application of the international treaty or the law of Vietnam. This provision should allow a foreign investor to choose to apply Resolution 71 rather than the WTO Commitments

WT/ACC/VNM/48 dated 27 October 2006.

⁴⁷ Resolution 71 of the National Assembly dated 29 November 2006 approving Vietnam's accession to the WTO (**Resolution 71/2006**).

⁴⁸ The view is stated in Official Letter 771 of the Working Group dated 26 December 2007 (**OC 771**). However, OC 771 is not a legal instrument and should not have the force of law.

⁴⁹ The date on which Vietnam officially joins the WTO.

⁵⁰ Decree 108 of the Government dated 22 September 2006 implementing the Investment Law (**Decree 108/2006**).

when determining the necessary voting thresholds of the General Meeting of Shareholders of a shareholding company.

The situation relating to Resolution 71 and many other similar legislations would have been clearer if Article 6.1 of the Law on International Treaties 2005 uses the word “contrary” instead of “different”.

2.4 Official Letters

Official letters (*công văn*) are regarded as administrative documents (*văn bản hành chính*) as opposed to a legal instrument and are intended to contain correspondences from various authorities.⁵¹ However, in practice, in official letters addressed to other authorities or companies, many authorities express their views and interpretations of a legal provision. In many cases, Government authorities even give instruction on how certain issues should be addressed if there is no law regarding such issue or the law is not clear.

Accordingly, although official letters are not legal instruments and do not have the force of law, in practice, official letters provide useful interpretive aid and guidance for lawyers and practitioners in Vietnam. The downside of relying on official letters is that they are not always publicly available and the view or interpretation contained in an official letter can be changed in the future or conflict with other official letters or legal instruments. An official letter issued by one authority may not bind another authority if the other authority is not under control of the issuing authority.

2.5 Certain rules of interpretation

Although a large number of authorities can issue legal instruments in Vietnam, the Law on Legal Instruments 2008 contains only a few rules of interpretation as follows:⁵²

- A legal instrument is applicable to events or actions, which occur when the legal instrument is effective;
- In case two legal instruments are “different” on the same issue, then the legal instrument issued by a higher issuing authority will prevail; and
- In case two legal instruments issued by the same authority are “different” on the same issue then the more recent legal instrument will prevail.

There is serious deficiency in how a legal instrument should be interpreted in Vietnam. For example, it is difficult to determine whether a “difference” exists between two legal instruments. For example, the Labour Code of the National Assembly provides that an employee with an indefinite employment contract must give a 45 “days” prior notice when he/she resigns.⁵³ However, Circular 21 of the Ministry of Labour, War, Invalids and Social

⁵¹ Article 4.2 of Decree 110 of the Government dated 8 April 2004 on documentation works (**Decree 110/2004**).

⁵² Article 83 of the Law on Legal Instruments 2008.

⁵³ Article 37.3 of the Labour Code of the National Assembly dated 23 June 1994 (as amended) (**Labour**

Affairs (**MOLISA**) requires the employee to give 45 “business days” prior notice when he/she resigns.⁵⁴ One can challenge the validity of Circular 21 by arguing that there is a difference between the Labour Code 1994 issued by the National Assembly and Circular 21 issued by the MOLISA and that the National Assembly is a higher issuing authority. On the other hand, as the MOLISA is empowered to issue implementing regulation and clarify the law of the National Assembly, one can counter-argue that in Circular 21 the MOLISA only “further clarifies” what “days” in the Labour Code means in the relevant context.

In addition, Vietnamese law is not clear when a law or decree is issued to repeal an existing law or decree then whether or not the implementing legal instruments of the repealed law or decree will continue to be effective after the new law or decree is issued. Under Article 78.4 of the Law on Legal Instruments 1996,⁵⁵ implementing regulations of a repealed legal instrument will also be repealed unless otherwise permitted. Unfortunately, the Law on Legal Instruments 2008 does not contain the same provision.

In practice, Government authorities still tend to apply implementing legal instruments of a repealed legal instrument until a new implementing legal instrument on the same issue is issued. However, there is nothing at law to prevent a Government authority from choosing not to apply implementing legal instruments of a repealed legal instrument on the basis that such implementing legal instruments is “different” from the new law.

The risk of adverse or unpredictable interpretation is high when there is a significant time lag between the issuance of new law and the issuance of its implementing legal instruments. For example, Decree 160/2006⁵⁶ on foreign exchange was issued to replace Decree 63/1998⁵⁷ in 2006. However, it has been nearly 6 years and the State Bank of Vietnam has not issued all necessary implementing circulars for Decree 160/2006. During this 6-year period, it is not always clear whether the circulars implementing Decree 63/1998 are still effective and if so, how they are implemented or interpreted in light of Decree 160/2006.

Finally, Vietnamese law is not clear on how to deal with the situation when there are two conflicting legal provisions issued by two different authorities who are at the same level. To address this situation, some laws contain a provision that in case there is a conflict between such laws and other “special” (*đặc thù*) laws then “special” laws will prevail.⁵⁸ However, this gives rise to two other problems:

Code 1994).

⁵⁴ Clause III.1(B) of Circular 21 of MOLISA dated 22 September 2003 on employment contracts (**Circular 21/2003**).

⁵⁵ The Law on Legal Instruments of the National Assembly dated 12 November 1996 (**Law on Legal Instruments 1996**) which is repealed by the Law on Legal Instruments 2008.

⁵⁶ Decree 160 of the Government dated 28 December 2006 on foreign exchange (**Decree 160/2006**).

⁵⁷ Decree 63 of the Government dated 17 August 1998 on foreign exchange (**Decree 63/1998**).

⁵⁸ See for example, Article 3.2 of the Enterprise Law or Article 4.2 of the Commercial Law.

- Except in case of Enterprise Law,⁵⁹ it is usually not clear which laws are considered as “special laws”; and
- It is not clear whether an implementing regulation of a special law which is issued by a lower authority will prevail the “general” law issued by a higher authority.

2.6 Quality issues

Vietnamese law is evolving fast. Unfortunately, the law tends to be expanded just in quantity but not quality. There are various reasons for this situation. But in my opinion, the following are probably notable:

- Court judgments in Vietnam are not binding precedents and even are not easily available;
- There are too many authorities which can issue legal instruments and there are limited coordination between the authorities. In particular, a disproportionate number of authorities come from the Government. According to my estimate, about 24 out of 33 authorities who can issue legal instruments at the central level come from the Government. This has resulted in many conflicting regulations;
- The law gives too much discretion to the relevant Government authorities without specifying how such discretion should be exercised. The lack of certainty and guidance allows the authorities to interpret the law in many different ways; and
- The Government appears not to use people who have legal background and proper legal drafting skills to draft laws and regulations. This together with the complexity of Vietnamese grammar has resulted in many unclear provisions. For example, the drafting of the Enterprise Law is done and coordinated by officials from the Central Institute For Economic Management which is mainly tasked with economic policy studies.⁶⁰

Accordingly, for a business lawyer in Vietnam, practicing Vietnamese law becomes increasingly challenging as various unclear laws become overlapping and conflicting with each other. For example, a listed joint stock commercial bank will be subject to, among other things, the Law on Credit Institutions 2010,⁶¹ the Enterprise Law 2005 and the Securities Law 2006. Each of these laws has a separate definition of “related person”. As such, a lawyer would likely to find a hard time to determine who is a “related person” of a shareholder or director in a listed joint stock commercial bank.

Facing with legal uncertainty, one would either (i) make an educated guess (by following the common practice or otherwise) and be prepared for the risk or (ii) approach the relevant authority to obtain a specific ruling on a specific situation. Normally, (i) is the usual approach because to do (ii) would take substantial time and resources.

⁵⁹ For example, Article 3.3 of Decree 102 of the Government dated 1 October 2010 implementing the Enterprise Law (**Decree 102/2010**).

⁶⁰ <http://www.ciem.org.vn/home/en/home/InfoList.jsp?area=1&cat=5>

⁶¹ Law on Credit Institutions of the National Assembly dated 16 June 2010 (**Law on Credit Institutions**)

2.7 Dispute resolution

Vietnamese courts

The People's Courts are the default dispute resolution forum in Vietnam unless the parties to a dispute agree to settle their dispute through arbitration as permitted by law.⁶² The People's courts at provincial level hear cases where a party or the asset relating to the dispute resides or is located outside of Vietnam.⁶³

The procedures to settle a commercial dispute through Vietnamese courts usually include a first instance hearing by the court of first instance⁶⁴ and, if there is an appeal, an appeal hearing by a relevant appeal court.⁶⁵ In many cases, the parties are also required to go through an amicable settlement process administered by the courts before the courts hold the first instance hearing.⁶⁶ A judgment of an appeal court or an unappealed judgment of the first instance court is considered final and binding. However, such judgment may still be challenged through a judicial review (*giám đốc thẩm*) or re-hearing (*tái thẩm*) at the request of various authorities.

In practice, dispute resolution through the courts of Vietnam can be highly unpredictable and unsatisfactory for the following reasons, among other things:

- a dispute by the courts may have to through more than two hearings in order to reach a final verdict as there are various authorities, who can order a judicial review or re-hearing of the case;
- In practice, in Vietnam, enforcement of contractual rights often occurs through informal contacts or pressures. If such informal measures fail, then the parties tend to refer disputes to the administrative system and government bodies for support and help. The Government and its ministries have substantial power in making, interpreting and enforcing the law;
- The courts have very limited power to interpret law and have to rely on legislation issued and interpreted by executive bodies (e.g. the Government and its Ministries). It is reported that when considering a contract, Vietnamese courts tend to try to find grounds to declare such contracts invalid rather than to find the commercial intent of the parties and enforce such intent,⁶⁷ and
- Even if one obtained a favourable judgment from the court, the enforceability of such

2010).

⁶² Articles 25 – 32 of the Civil Procedures Code of the National Assembly dated 15 June 2004, as amended (**Civil Procedures Code**).

⁶³ Article 33.3 of the Civil Procedures Code.

⁶⁴ Part 2 of the Civil Procedures Code.

⁶⁵ Part 3 of the Civil Procedures Code.

⁶⁶ Chapter 13 of the Civil Procedures Code.

⁶⁷ <http://luathoc5c.net/viewtopic.php?p=3086>; “Claiming invalid contracts to avoid responsibilities” published on the Investment and Securities Magazine on 2 July 2012.

judgment in practice would be uncertain. As a matter of practice, a judgment creditor would have to rely on the judgment enforcement agency, which may have broad discretion on how to enforce the judgment.

Vietnamese arbitration

Under the Law on Commercial Arbitration,⁶⁸ Vietnamese arbitration may hear disputes arising from “commercial activities” or arising between two or more parties of which at least one party is conducting commercial activities.⁶⁹ “Commercial activities” is defined to mean activities which have profit making purpose including sale of goods, provision of services, investment, trade promotion and other activities with profit making purpose.⁷⁰

An arbitration proceeding under the Law on Commercial Arbitration is more straightforward than a court proceeding under Civil Procedures Code. In particular, under an arbitration proceeding, there is only one level of hearing and the arbitration award is final and binding.⁷¹ Unless there is a request to revoke an arbitration award issued by a Vietnamese arbitration, an arbitration award rendered under the Law on Commercial Arbitration can be enforced directly.⁷²

Foreign courts

Under the Civil Procedures Code, Vietnamese courts have “exclusive jurisdiction” over the following disputes with “foreign elements”, among other things:⁷³

- Disputes relating to rights over immovable properties located in Vietnam;
- Disputes relating to transportation contracts where the transporter has its head-office or branch office located in Vietnam; and
- Dispute relating to a “legal fact” (*su kiện pháp lý*), if such legal fact occurs in Vietnam.

Under Article 405.2 of the Civil Proceedings Code, a dispute under the Civil Procedures Code will be considered as having “foreign elements” if (1) a party thereto is a foreign party, or (2) all the parties thereto are Vietnamese parties but (i) the grounds for entering into, amending or terminating the underlying relation of such dispute are subject to a foreign law and/or arise in a foreign country; or (ii) the underlying relation of such dispute relates to an asset located in a foreign country.

There is no guidance on the scope of Vietnamese courts’ exclusive jurisdiction. However, presumably, a dispute with foreign element, which is not subject to the exclusive jurisdiction of

⁶⁸ Law on Commercial Arbitration of the National Assembly dated 17 June 2010.

⁶⁹ Article 2 of the Law on Commercial Arbitration.

⁷⁰ Article 3.1 of the Commercial Law of the National Assembly dated 14 June 2005 (**Commercial Law**).

⁷¹ Article 61 of the Law on Commercial Arbitration.

⁷² Article 66.1 of the Law on Commercial Arbitration.

⁷³ Article 411 of the Civil Procedures Code.

Vietnamese court may be referred to a foreign court for dispute resolution.

Under the Civil Procedures Code,⁷⁴ foreign court judgments may be enforced in Vietnam if the judgment has been recognised by an authorised Vietnamese court. A Vietnamese court will only recognise judgments rendered by the court of a country with which Vietnam has signed a bilateral treaty on reciprocal enforcement, or which is a member of an international convention on reciprocal enforcement signed by Vietnam, or which grants reciprocal treatment to Vietnam in terms of enforcement of court judgments. Vietnam has signed bilateral treaties on the reciprocal enforcement of foreign court judgments with a very limited number of countries (mostly former communist countries). Vietnam is not a member of any international convention on reciprocal enforcement of foreign court judgments. Therefore, a judgment rendered by a foreign court in a developed country is unlikely to be directly enforceable in Vietnam. That being said, it is reported that at least one court judgement issued by a Korean court has been recognised for enforcement in Vietnam in 2007.⁷⁵

Foreign arbitration

Vietnam officially acceded to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards (**1958 New York Convention**) on 28 July 1995. Accordingly, by virtue of the 1958 New York Convention,⁷⁶ if the parties to a dispute reside in countries, which are members of the 1958 New York Convention, then the parties should be able to refer their disputes to a foreign arbitration. In addition, Article 12.3 of the Investment Law⁷⁷ provides that any dispute to which one disputing party is a foreign investor or a foreign invested company, or any dispute between foreign investors could be submitted to, among others, a foreign arbitration or an international arbitration. Outside the context of the 1958 New York Convention and Article 12.3 of the Investment Law, there is no express provision under Vietnamese law, which generally allows disputes with a Vietnamese party or relating to assets in Vietnam to be submitted to foreign arbitration.

To be enforced in Vietnam, a foreign arbitral award⁷⁸ must first be recognised and held enforceable by a Vietnamese court.⁷⁹ Under the Civil Procedures Code, a foreign arbitral award must be recognised and enforced by a Vietnamese court where the award was rendered in or by an arbitration panel of a country that is a party to a relevant international treaty of which Vietnam is a participant or a signatory.⁸⁰ One such treaty to which Vietnam is a party is the

⁷⁴ Article 343.4 of the Civil Procedures Code.

⁷⁵ <http://vibonline.com.vn/Banan/196/Cong-nhan-ban-an-dan-su-cua-Toa-an-Han-Quoc-cho-thi-hanh-tai-Viet-Nam.aspx>

⁷⁶ Article II.1 of the 1958 New York Convention.

⁷⁷ Law on Investment of the National Assembly dated 29 November 2005 (**Investment Law**).

⁷⁸ Article 342.2 of the Civil Procedures Code.

⁷⁹ Article 343.4 of the Civil Procedures Code.

⁸⁰ Article 343.2 of the Civil Procedures Code.

1958 New York Convention. Vietnamese courts will therefore enforce a foreign arbitral award made in or by arbitrators of a country that is a signatory to the 1958 New York Convention. In addition, where Vietnam is not a signatory or participant to a relevant international treaty, Vietnamese courts will recognise and enforce a foreign arbitral award on the basis of reciprocity.⁸¹ Once the court has determined that the arbitral award is recognised and enforceable, and assuming there is no appeal, the award is enforced in the same manner as the judgment of a domestic court.⁸²

Under the Civil Procedures Code, an application for recognition and enforcement of a foreign arbitral award may be rejected by a Vietnamese court on several grounds. In particular, a Vietnamese court may reject an application for recognition and enforcement of a foreign arbitral award if it decides that the dispute should not be resolved by way of arbitration under Vietnamese law or that the recognition and enforcement of the award is contrary to “fundamental principles of Vietnamese law”. The “fundamental principles of the law of Vietnam” are not clearly delineated under Vietnamese law except for a limited set of fundamental principles of the Civil Code,⁸³ which is considered by many practitioners as a fundamental law governing civil and commercial transactions in Vietnam.

2.8 Choice of foreign governing law

Under the Commercial Law, the parties to a commercial transaction with a “foreign element” may agree to apply foreign law if such foreign law is not contrary “to the fundamental principles of the law of Vietnam”.⁸⁴ Article 758 of the Civil Code defines a civil relation involving “foreign elements” to be a civil relation in which a least one of the participating parties is a foreign body, organisation or individual, or a Vietnamese residing overseas, or the civil relation is between participating parties being Vietnamese citizens or organizations but the basis for the establishment, alteration or termination of such relation was the law of a foreign country, or such basis arose in a foreign country, or the assets involved in the relation are located in a foreign country.

There are however two further qualifications to the ability of the parties to a commercial transaction to select foreign governing law:

- There is no clarification as to what constitutes the fundamental principles of the law of Vietnam. As such, a Vietnamese court may decide, in its discretion, whether the application of foreign law to any contract would be contrary to the fundamental principles of Vietnamese law; and
- Under the Civil Code, (1) contracts entered into and performed entirely in Vietnam or (2) contracts relating to immovable assets in Vietnam must “comply with” (*tuân theo*) the law

⁸¹ Article 343.3 of the Civil Procedures Code.

⁸² Article 346.2 of the Civil Procedures Code.

⁸³ Civil Code of the National Assembly dated 14 June 2005 (**Civil Code**).

⁸⁴ Article 5.2 of the Commercial Law.

of Vietnam.⁸⁵ Vietnamese law does not make clear what contracts are considered as related to immovable assets in Vietnam. For example, while a house sale and purchase contract can arguably be considered as being related to immovable assets in Vietnam, it is not clear if a construction contract to build a house can also be considered as such. In addition, if the words “comply with” are interpreted to mean “governed by” (*áp dụng*) then Vietnamese law may still govern contracts entered into and performed entirely in Vietnam even if the parties to the contract agree to select a foreign governing law.

3. CONCLUDING REMARKS

In this book, I have tried to provide a broad portrait of the legal framework for business activities in Vietnam. The good news is that Vietnam does have a legal framework which tries to imitate the legal framework of a modern market economy. The bad news however is that there are many flaws and uncertainties in such legal framework and in the way it is implemented. As such, the recommendation by the author in this book is to avoid having Vietnamese governing law and/or dispute resolutions in Vietnam wherever it is possible and practicable to do so. If that is not possible, then one should (1) try to settle with Vietnamese governing law and Vietnamese arbitration, (2) carefully study the law including all possible interpretations and (3) hope for the best.

⁸⁵ Article 769 of the Civil Code.

APPENDIX 1: DEFINED TERMS

- **1958 New York Convention:** The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards.
- **Central Committee:** The Central Committee of the Party (*Ban Chấp hành Trung ương*).
- **Civil Code:** Civil Code of the National Assembly dated 14 June 2005.
- **Civil Procedures Code:** the Civil Procedures Code of the National Assembly dated 15 June 2004, as amended.
- **Commercial Law:** The Commercial Law of the National Assembly dated 14 June 2005.
- **Constitution 1992:** The Constitution of Vietnam passed by the National Assembly on 15 April 1992, as amended).
- **CPV:** The Communist Party of Vietnam.
- **CPV National Congress:** The National Congress of Members of the CPV.
- **Decree 160/2006:** Decree 160 of the Government dated 28 December 2006 on foreign exchange.
- **Decree 102/2010:** Decree 102 of the Government dated 1 October 2010 implementing the Enterprise Law.
- **Decree 108/2006:** Decree 108 of the Government dated 22 September 2006 implementing the Investment Law.
- **Decree 110/2004:** Decree 110 of the Government dated 8 April 2004 on documentation works.
- **Decree 63/1998:** Decree 63 of the Government dated 17 August 1998 on foreign exchange.
- **Enterprise Law:** The Enterprise Law of the National Assembly dated 29 November 2005.
- **Investment Law:** Law on Investment of the National Assembly dated 29 November 2005.
- **Law on Commercial Arbitration:** Law on Commercial Arbitration of the National Assembly dated 17 June 2010
- **Law on Credit Institutions 2010:** Law on Credit Institutions of the National Assembly dated 16 June 2010.
- **Law on Legal Instruments 2008:** Law on Promulgation of Legal Instruments of the National Assembly dated 3 June 2008.
- **Law on International Treaties 2005:** The Law on International Treaties of the National Assembly dated 14 June 2005.

- **Law on Legal Instruments 1996:** Law on Legal Instruments of the National Assembly dated 12 November 1996.
- **MOLISA:** Ministry of Labour, War, Invalids and Social Affairs.
- **Resolution 71/2006:** Resolution 71 of the National Assembly dated 29 November 2006 approving Vietnam's accession to the WTO.
- **Working Group:** The Working Group Implementing the Enterprise Law and the Investment Law.
- **WTO Commitments:** The commitments of Vietnam to the World Trade Organisation.