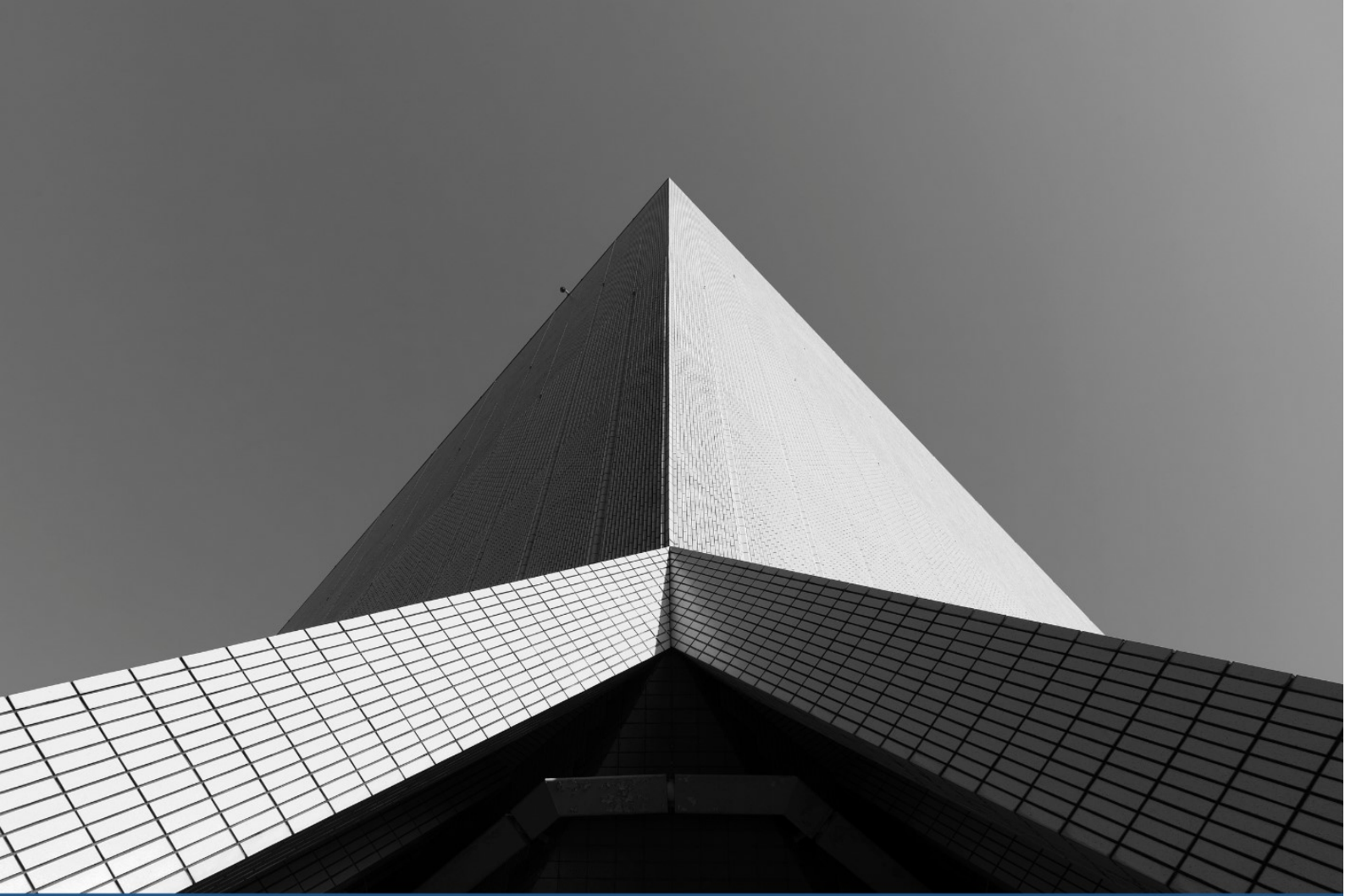


Legal Analysis: Impact of the Commercial Law on Share Sale and Purchase Transactions in Vietnam

October 2023



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1. Introduction

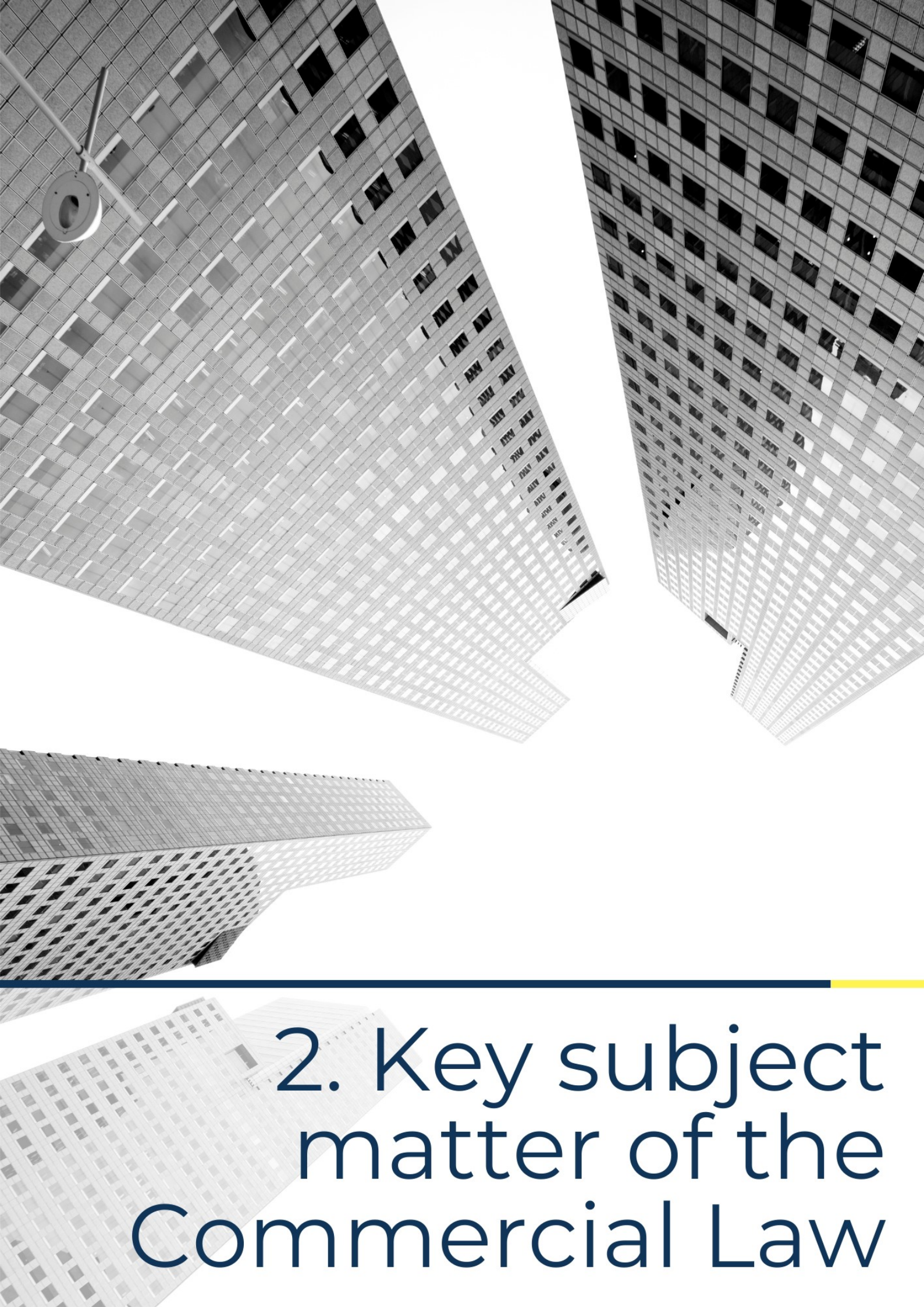
1. Introduction

- 1.1 The Commercial Law¹ is a troublesome beast. Vietnam, like every jurisdiction worldwide, undoubtedly requires clear and robust laws to regulate the conduct of commerce within its sovereign territories. There can be little doubt that when the National Assembly of Vietnam promulgated the Commercial Law, its intention was to provide Vietnam with a legislative platform upon which businesses could engage in commerce and have a relatively clear understanding of their statutory rights and obligations when so doing.

- 1.2 Did the National Assembly, however, intend that the Commercial Law should apply to and regulate:

- (i) sale and purchase transactions in respect of issued and paid-up shares (**JSC Shares**) in the charter capital of Vietnam-domiciled joint stock companies (**JSCs**);
- (ii) subscription and issuance transactions in respect of newly issued JSC Shares;
- (iii) sale and purchase transactions in respect of contributed charter capital (**LLC Charter Capital**) in limited liability companies with one member (**LLC1s**) or limited liability companies with two or more members (**LLC2s** and, together with LLC1s, **LLCs**); and/or
- (iv) charter capital contribution transactions in respect of LLCs, (together, **Share Transactions**)?

- 1.3 On the face of it, the answer would have to be a resounding “no”. To read the Commercial Law from beginning to end gives the reader no inkling that it could have been intended to apply to and regulate Share Transactions. The Commercial Law does not appear to deal with or even mention Share Transactions or any related concepts at all (with one or two possible and arguable exceptions, as outlined below). The Commercial Law appears to be concerned with precisely what one would expect it to be concerned with, namely commerce.



2. Key subject matter of the Commercial Law

2. Key subject matter of the Commercial Law

- 2.1 Key examples of the subject matter of the Commercial Law include the following:
- (i) sale and purchase of goods;
 - (ii) supply and performance of services;
 - (iii) commercial enhancement activities such as marketing and promotion;
 - (iv) commercial brokerage and agency activities;
 - (v) commercial processing activities;
 - (vi) auctioning of goods;
 - (vii) tendering in relation to goods and services;
 - (viii) leasing of goods; and
 - (ix) franchising.
- 2.2 All of the matters listed in Items (i) to (ix) of Paragraph 2.1 immediately above fall squarely within the general concept which is commonly understood as being commerce. From a plain language perspective (whether a plain English language perspective or a plain Vietnamese language perspective), the concept of “commerce” (in Vietnamese, “*thương mại*”) is, in essence, the concept of the buying and selling of goods and services, and related activities.
- 2.3 From a common sense and logical perspective, Share Transactions are an entirely different matter altogether. JSC Shares and LLC Charter Capital (together, **Shares**) are clearly not what is normally understood as being “goods” and are clearly not “services”. Share Transactions are generally considered to constitute corporate matters, not commercial matters. Share Transactions in most jurisdictions worldwide – including in Vietnam – are regulated by separate and distinct legislative regimes which are specifically designed and intended to regulate companies and related matters.

“...the concept of ‘**commerce**’ is, in essence, the concept of the buying and selling of goods and services, and related activities...Shares are clearly not what is normally understood as being ‘goods’ and are clearly not ‘services’.”



3. Share Transactions and the Commercial Law

3. Share Transactions and the Commercial Law

- 3.1 If it is so obvious that the Commercial Law cannot have been intended to apply to and regulate Share Transactions, why are we even bothering to write this article? Nobody ever talks about or thinks about the Commercial Law when negotiating or entering into a Share Transaction in Vietnam, and with good reason. Not only is the Commercial Law on its face not concerned with Share Transactions, but there is an entire body of law in Vietnam whose clear and express purpose is to regulate companies, investment activities, and related matters, including Share Transactions. In addition, the Civil Code² provides in relatively clear and detailed terms for the fundamental basis and all key aspects of the formation and performance of contracts in Vietnam – including in relation to breach, termination, and claims for compensation under contracts in Vietnam. Of what possible relevance, therefore, could the Commercial Law be, in relation to Share Transactions?
- 3.2 The reality is that the Commercial Law seems to have a nasty habit of rearing its head in connection with Share Transactions, in the form of a defensive tool, used by defendants in litigation or arbitration proceedings to try to avoid or minimise liability to which they would otherwise have been exposed on the basis of the express provisions of the relevant contracts. The reason for this is that the Commercial Law contains provisions dealing with “...*remedies in commerce*...”, which are capable of being interpreted and applied so as to cut across and in extreme cases nullify provisions which are commonly used in SPAs worldwide, such as break fee provisions, specific or general indemnity provisions, specific or contingent payment provisions, limitation of liability provisions, and others. In some cases, such use of the Commercial Law as a defensive tool succeeds, causing much frustration and confusion in claimants who had been under the impression that the provisions of the relevant SPA would be upheld and enforced in accordance with their terms.
- 3.3 Let us now briefly examine:
- (i) the laws of Vietnam which clearly and expressly are intended to apply to and regulate Share Transactions in Vietnam; and
 - (ii) why, for so long as it remains unclear as to whether or not the Commercial Law does, should, and/or is intended to apply to and regulate Share Transactions in Vietnam, buyers, sellers, and Vietnam Targets are adversely impacted by an ambiguous and incongruous legislative regime in connection with Share Transactions in Vietnam.
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4. Laws expressly regulating Share Transactions

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4.1 Private Companies

4.1.1 It is clear that the Law on Enterprises³, together with its implementing legislation (together, **the Enterprise Law**) will always play:

- (i) a fundamentally important role in relation to any Share Transaction involving a Vietnam Target which is not a listed or unlisted public company (**a Private Company**); and
- (ii) a role (albeit a comparatively minor role) in relation to any Share Transaction involving a Vietnam Target which is a listed or unlisted public company (**a Public Company**).

4.1.2 The Enterprise Law is the key legislation which governs companies and other forms of enterprises in Vietnam, including to set out the key rules and principles for the issuance, transfer, and ownership of Shares (noting, of course, that in relation to Public Companies, the Law on Securities⁴, together with its implementing legislation (together **the Securities Law**) also sets out key rules and principles in relation to Share Transactions, which apply in precedence to the those set out in the Enterprise Law, insofar as Vietnam Targets being Public Companies are concerned).

4.1.3 It is clear that buyers, sellers, and Vietnam Targets must comply with the Enterprise Law when entering into and implementing any Share Transaction in Vietnam (albeit that the provisions of the Enterprise Law are in practical terms of secondary application only, where the Vietnam Target is a Public Company). Accordingly, it is also clear that any SPA which is governed by Vietnam law:

- (i) must be entered into subject to and upon terms and conditions which are consistent with the provisions of the Enterprise Law; and
- (ii) will be invalid and unenforceable in Vietnam, to the extent that it contains any provisions which are inconsistent with any provisions of the Enterprise Law.

4.2 Public Companies

In relation to any Share Transaction involving Shares in a Public Company, it is clear that the Securities Law will always apply and will be the primary regulating legislation in relation to the relevant Share Transaction. The Securities Law is the key legislation which governs Public Companies in Vietnam, including to set out the key rules and principles for the issuance, transfer, and ownership of Shares in Public Companies. A Share Transaction in relation to Shares in a Public Company can only be implemented in accordance with the rules, principles, and systems set out in the Securities Law. Accordingly, it is also clear that any SPA which is governed by Vietnam law and deals with Shares in a Vietnam Target being a Public Company:

- (i) must be entered into subject to and upon terms and conditions which are consistent with the provisions of the Securities Law; and

“...there is an entire body of law in Vietnam whose clear and express purpose is to regulate companies, investment activities, and related matters, including Share Transactions.”

4. Laws expressly regulating Share Transactions

- (ii) will be invalid and unenforceable in Vietnam, to the extent that it contains any provisions which are inconsistent with any provisions of the Securities Law.

4.3 All Vietnam Targets

4.3.1 Other examples of legislative instruments which are of undoubted relevance and application to any Share Transaction in Vietnam include:

- (i) the Law on Investment⁵, together with its implementing legislation (together, ***the Investment Law***); and
- (ii) the Law on Competition⁶, together with its implementing legislation (together, ***the Competition Law***).

4.3.2 It is clear that Share Transactions constitute a type of “...*investment*...” activity which is expressly covered by and regulated under the Investment Law. SPAs in Vietnam:

- (i) must be entered into subject to and upon terms and conditions which are consistent with the provisions of the Investment Law; and
- (ii) will be invalid and unenforceable in Vietnam, to the extent that they contain any provisions which are inconsistent with any provisions of the Investment Law.

4.3.3 Similarly, a Share Transaction which constitutes a notifiable “...*economic concentration*...” under the Law on Competition cannot be implemented lawfully unless it has been notified to and cleared by the Vietnam Competition Commission.

4.4 Sector-specific laws

In addition, there are numerous sector-specific laws containing provisions which are expressly and undoubtedly intended to apply to and regulate Share Transactions in Vietnam, where the relevant Vietnam Target is licensed to conduct and/or in fact does conduct business activities within that particular sector. Key examples include:

- (i) the Law on Credit Institutions⁷, together with its implementing legislation (together, ***the Credit Institutions Law***), which clearly and expressly applies to and regulates Share Transactions where the Vietnam Target is a “...*credit institution*...” or other type of entity which is expressly subject to the provisions of the Credit Institutions Law; and
- (ii) the Law on Real Estate Business⁸, together with its implementing legislation (together, ***the Real Estate Business Law***), which clearly and expressly applies to and regulates Share Transactions where the Vietnam Target is licensed to and/or in fact does engage in “...*real estate business*...” in Vietnam.



5. Legal Analysis: Application of the Commercial Law

5. Legal Analysis: Application of the Commercial Law

- 5.1 What, then, of the Commercial Law? Upon what grounds could it be argued that the Commercial Law applies to and regulates Share Transactions? If the Commercial Law does apply to and regulate Share Transactions, what impact might this have on buyers, sellers, and/or Target Companies who – quite rightly from a common sense and logical perspective – may not have considered the provisions of the Commercial Law before negotiating and entering into a Share Transaction in Vietnam?
- 5.2 The Commercial Law may be said to be something of an anomaly, in comparison with many other legislative instruments which are currently in force and effect in Vietnam. Initially passed by the National Assembly in 2005, the Commercial Law pre-dates key events such as Vietnam's accession to the WTO and has only undergone one amending event, in 2010, which gave rise to minimal amendments of material significance. The Commercial Law is therefore a legislative instrument which has been in force and effect, in essentially the same form, for nearly 20 years and thus, unlike other key legislation such as the Enterprise Law, Investment Law, Securities Law, and Competition Law, has not been modernised or made more sophisticated in parallel with Vietnam's overall economic and legal development. The Commercial Law may therefore be regarded as being something of a relic from the past, and representative of a bygone era preceding Vietnam's integration into the international business community.
- 5.3 When one reads the Commercial Law, it seems on the face of it to be obvious that it has no relevance to (and could not have been intended to apply to or regulate) Share Transactions. It is, however, necessary to delve a bit deeper into a technical "black letter law" analysis of the express provisions of the Commercial Law and other key legislation such as the Civil Code, to see why and how the Commercial Law does frequently make its presence felt in the context of disputes arising from SPAs governed by the laws of Vietnam.
- 5.4 SPAs which are governed by Vietnam law are undoubtedly "*...civil contracts...*" of the kind which are recognised and regulated by the Civil Code. The Civil Code forms the fundamental basis of contract law (as well as other types of "*...civil relations...*") in Vietnam. All contracts which are governed by Vietnam law must be entered into in a manner being consistent with the provisions of the Civil Code, and any contractual provision which is inconsistent with any provision of the Civil Code will generally be invalid and unenforceable in Vietnam.
- 5.5 Article 4 of the Civil Code establishes a number of relatively clear principles in relation to its applicability to "*...civil relations...*" (which concept undoubtedly includes the concept of contractual relations), namely:
- (i) that the Civil Code is the general law which governs all "*...civil relations...*" in Vietnam;
 - (ii) that any other laws of Vietnam which govern specific sectors or other specific matters (***Other Specific Laws***) must not be inconsistent with any of the basic principles of civil law which are set out in Article 3 of the Civil Code (***the Basic Civil Principles***);
 - (iii) that to the extent that Other Specific Laws are silent in relation to any particular matters which are dealt with in the provisions

5. Legal Analysis: Application of the Commercial Law

of the Civil Code (and/or contain provisions which are inconsistent with any of the Basic Civil Principles), the provisions of the Civil Code will apply; and

- (iv) where there is any inconsistency between any provisions of any international treaty by which Vietnam is bound (**a Relevant International Treaty**) and any provisions the Civil Code, the provisions of the relevant international treaty will apply to the extent of any such inconsistency.

5.6 In addition to the important concepts outlined in Article 4 of the Civil Code, Article 156 of the Law on the Promulgation of Legislative Documents⁹ sets out a number of further principles in relation to the application of legislation in Vietnam, including the following:

- (i) if two or more legislative instruments promulgated by the same State lawmaking authority contain inconsistent provisions in relation to the same subject matter, the legislative instrument having been promulgated later in time will prevail to the extent of any such inconsistency;
- (ii) the application of Vietnam legislation must not obstruct the implementation of any Relevant International Treaty; and
- (iii) where there is any inconsistency between the provisions of any Vietnam legislation and the provisions of any Relevant International Treaty, the provisions of the Relevant International Treaty will prevail to the extent of such inconsistency.

5.7 Share Transactions (assuming that they occur pursuant to legal documents which are governed by Vietnam law) are an excellent demonstrative example of the meaning and effect of Article 4 of the Civil Code and Article 156 of the Law on the Promulgation of Legislative Documents. By way of illustration, assuming a Vietnam Target which is a Private Company (as opposed to a Public Company), it is clear that:

- (i) where the buyer in a Share Transaction is a Foreign Investor¹⁰ and the WTO Commitments¹¹ – or another Relevant International Treaty – specify in favour of all Foreign Investors (or a specified subset of Foreign Investors) certain market access rights, in the form of equity ownership, in relation to the business sector in which the relevant Vietnam Target operates, Vietnam as a State and its governmental bodies are obliged to give effect to those market access commitments by allowing to be made in Vietnam any equity investments which fall within the scope of those market access commitments;
- (ii) the Enterprise Law primarily governs all of the key aspects of the transfer and ownership of Shares and given that its provisions are consistent with the Basic Civil Principles, its provisions will apply in relation to those aspects of the Share Transaction which are covered by its provisions;
- (iii) Share Transactions are clearly a type of “...investment...” activity which is governed by the provisions of the Investment Law and given that there are no provisions of the Investment Law which are inconsistent with the Basic Civil Principles, the relevant Share Transaction must be implemented in accordance with the applicable provisions of the Investment Law (for

5. Legal Analysis: Application of the Commercial Law

example, the specified requirements for Foreign Investors to apply for and obtain “M&A approval” or “acquisition approval” in relation to many types of Share Transactions);

- (iv) the Competition Law governs all of the key aspects of merger control in Vietnam, meaning that where the proposed Share Transaction constitutes an “...*economic concentration*...” for the purposes of the Competition Law and triggers one or more specified notification tests, the Share Transaction must be notified to the Vietnam Competition Council and cleared for implementation, before it may be lawfully implemented; and
- (v) where there is no Other Specific Law which contains mandatorily applicable provisions in relation to claims and liability under the relevant SPA, the provisions of the Civil Code will apply in relation to claims and liability under the SPA.

5.8 The question, therefore, becomes whether or not the Commercial Law constitutes an Other Specific Law in relation to Share Transactions, for the purposes of Article 4 of the Civil Code.

5.9 Article 1 of the Commercial Law specifies the following in relation to the governing scope of the Commercial Law [emphasis added in the form of underlining]:

“Article 1 Governing Scope

1. Commercial activities conducted within the territory of the Socialist Republic of Vietnam.
2. Commercial activities conducted outside the territory of the Socialist Republic of Vietnam in cases where the parties agree to select application of this Law or of foreign law or an international treaty of which the Socialist Republic of Vietnam is a member and which stipulates application of this Law.
3. *Activities not for profit-making purposes of one party to a transaction with a business entity in the territory of the Socialist Republic of Vietnam in cases where application of this Law is selected by the party conducting such activities not for profit-making purposes.”*

5.10 For the purposes of this analysis, therefore, the key question becomes whether or not Share Transactions constitute “...*commercial activities*...” for the purposes of the Commercial Law.

5.11 Article 2 of the Commercial Law specifies the following in relation to the matter of the entities to which the Commercial Law applies [emphasis added in the form of underlining]:

“Article 2 Applicable entities

1. *Business entities* conducting commercial activities as stipulated in Article 1 of this Law.
2. *Other organizations and individuals* conducting acts relating to commerce.”

5.12 Again, therefore, the key questions for the purposes of this analysis are whether or not a seller and/or a buyer of Shares in a Share Transaction can be said to be “...*conducting commercial activities*...” and/or

5. Legal Analysis: Application of the Commercial Law

“...conducting acts relating to commerce...”, when entering into and giving effect to a Share Transaction under an SPA.

- 5.13 Article 3 of the Commercial Law defines the concept of *“...commercial activity...”* as follows [emphasis added in the form of underlining]:

“Commercial activity means activity for profit-making purposes, comprising purchase and sale of goods, provision of services, investment, commercial enhancement, and other activities for profit-making purposes.”

- 5.14 Here, the key questions for the purposes of this analysis are whether or not a Share Transaction may be said to constitute any one or more of the following:

- (i) an *“...activity for profit-making purposes...”*;
- (ii) the *“...purchase and sale of goods...”*;
- (iii) *“...investment...”*; and/or
- (iv) *“...other activities for profit-making purposes...”*.

- 5.15 It appears to be relatively clear (based on the express provisions of the Commercial Law) that in order to constitute a *“...commercial activity...”*, an activity must be engaged in by its participants for the purposes of making profit. In other words, it appears to be relatively clear (based on the express provisions of the Commercial Law) that any activity which is engaged in by its participants for purposes which do not include the generation of profit, cannot constitute *“...commercial activity...”* for the purposes of the Commercial Law.

- 5.16 **Whether or not Share Transactions are for *“...profit-making purposes...”***

5.16.1 Some Share Transactions are undoubtedly entered into for the purposes of generating profit. For example, when an institutional or retail investor acquires shares in a listed Public Company via a stock exchange, in most cases it will be likely that the sole or primary objective of that investor is to generate profit by selling those shares at some time in the future, for a price being higher than the purchase price.

5.16.2 It certainly cannot, however, be said that all Share Transactions are entered into for profit-making purposes.

5.16.3 Although it would be rare and unlikely that a buyer would enter into a Share Transaction with the objective of realising a capital loss, buyers may indeed have such an objective in some cases (for example, if to realise a capital loss on a Share Transaction would give rise to tax advantages).

5.16.4 Many Share Transactions are entered into not for the purposes of generating capital profit on the future divestment of the target Shares, but for other cogent and justifiable reasons, such as:

- (i) to secure strategic alliances with the Vietnam Target and/or its other shareholders;
- (ii) to take control of the Vietnam Target in order to secure changes to its strategic direction and/or business activities; or

5. Legal Analysis: Application of the Commercial Law

“Share Transactions cannot be said to be inherently profit-seeking activities, in and of themselves... and not all profit-seeking activities are commercial activities governed by the Commercial Law.”

- (iii) to implement a corporate restructuring, for any number of reasons (such as tax minimisation or administrative streamlining).

5.16.5 What if a buyer acquires Shares in a profitable Vietnam Target, not with the objective of realising capital gain but with the objective of holding the Shares long-term and thereby securing a reliable dividend yield? Can this be said unequivocally to constitute an activity engaged in for “...*profit-making purposes*...”? Logically and rationally, the answer must be “no”, as dividends distributed by an investee entity do not necessarily (and in many cases will not) give rise to the generation of profit by the buyer on its own account.

5.16.6 What if a buyer enters into a Share Transaction for the purposes of establishing a long-term strategic joint venture with another company, with no thought at all of capital gain? The purposes of the joint venture may or may not include the generation of profit, as there are any number of strategic reasons why companies enter into joint ventures. Even if it is intended that the joint venture entity will be profitable, does this necessarily mean that the purpose of the Share Transaction itself was for the buyer to make profit? Logically and rationally, the answer must be “no”.

5.16.7 The key point here is that Share Transactions:

- (i) cannot be said to be inherently profit-seeking activities, in and of themselves;
- (ii) in many cases can be shown clearly not to constitute profit-seeking activities; and
- (iii) may be strongly argued not to constitute “...*commercial activities*...” for the purposes of the Commercial Law, if they can be shown not to constitute profit-seeking activities.

5.16.8 It is worth noting that not all profit-seeking activities are commercial activities governed by the Commercial Law. By way of illustration, the Supreme Court of Vietnam in its Decision No. 12/2019/QD-GDT dated 24 September 2019 held the following:

- (i) in relation to construction activities engaged in within Vietnam, the Construction Law¹² will always apply;
- (ii) in relation to any construction matters that are not expressly regulated by the provisions of the Construction Law, the Civil Code will apply;
- (iii) although the relevant construction activities carried out by the relevant construction companies were engaged in for the purpose of generating profit, the provisions of the Construction Law and the Civil Code were to be applied in determining the dispute before the Supreme Court, not the provisions of the Commercial Law.

5.16.9 It is reasonable to draw a broad analogy between the Supreme Court decision outlined in Paragraph 5.16.8 above and the matter of Share Transactions. On the face of it, the Supreme Court appears to have concluded that:

5. Legal Analysis: Application of the Commercial Law

- (i) the mere fact of the existence profit-making objectives is insufficient to invoke the application of the Commercial Law;
- (ii) where there are laws (such as the Construction Law) which are clearly more relevant and applicable to certain subject matter (such as construction activities), those laws should be applied as a matter of first precedence; and
- (iii) in relation to general contractual matters not being specifically dealt with in sector-specific laws (such as the Construction Law), it is the Civil Code, not the Commercial Law, that should be applied in construing the provisions of applicable contracts.

It is reasonable to contend that these concepts translate directly and neatly to the concept of Share Transactions and support the proposition that the Commercial Law ought not to be applied in construing SPAs.

5.17 **Whether or not Share Transactions constitute “...investment...” for the purposes of the Commercial Law.**

5.17.1 Assuming that we do have a Share Transaction in relation to which its participants have the generation of profit as at least one of their objectives in entering into the Share Transaction, does that Share Transaction fall within any of the types of “...commercial activities...” which are specifically mentioned in Article 3 of the Commercial Law?

5.17.2 Article 3 of the Commercial Law specifies “...investment...” as being among the types of profit-seeking activities which fall within the definition of “...commercial activity...”. This is a bizarre and anomalous inclusion within Article 3 of the Commercial Law, given that:

- (i) there is no definition of the word “...investment...” set out anywhere in the Commercial Law;
- (ii) the concept of “...investment...” is not referred to anywhere else in any other provision of the Commercial Law; and
- (iii) there are no other provisions of the Commercial Law which contemplate any type of activity which could reasonably be regarded as constituting “...investment...”.

5.17.3 It is reasonable to pose the question: Why on Earth is “...investment...” mentioned in Article 3 of the Commercial Law, when the Commercial Law does not contain any other provisions dealing with any matters constituting or relating to the concept of “...investment...”? Regardless of the answer to this question, the fact remains that in a civil law jurisdiction such as Vietnam, we must analyse and construe legislation strictly on the basis of its express provisions and without succumbing to the temptation to apply a “substance over form” analysis.

5. Legal Analysis: Application of the Commercial Law

5.17.4 In the absence of any definition of the word “...*investment*...” in the Commercial Law, we must look to the Investment Law for guidance as to what this concept should be understood to mean when it is used in the Commercial Law.

5.17.5 At least in circumstances where the relevant Vietnam Target is licensed to engage (and/or in fact does engage) in revenue-generating business activities in Vietnam, it would seem to be relatively clear that many Share Transactions do fall within the following definition of “...*business investment*...”, as set out in Article 3.8 of the Law on Investment [emphasis added in the form of underlining]:

“Business investment means an investor expends investment capital to conduct business activities.”

5.17.6 Similarly, where the relevant Vietnam Target is licensed to engage in (and/or does in fact engage in) revenue-generating business activities in Vietnam, it would seem to be relatively clear that many buyers in Share Transactions do fall within the following definition of “...*investor*...”, as set out in Article 3.18 of the Law on Investment [emphasis added in the form of underlining]:

“Investor means an organisation or individual conducting business investment activities, comprising domestic investors, foreign investors and economic organisations with foreign investment capital.”

5.17.7 On this basis, it is difficult to escape the conclusion that, in many cases (including those in which the relevant Vietnam Target is licensed to engage (and/or in fact does engage) in revenue-generating business activities in Vietnam), Share Transactions:

- (i) may be strongly argued to fall within the concept of “...*investment*...”, for the purposes of the definition of “...*commercial activity*...” set out in Article 3 of the Commercial Law; and
- (ii) accordingly – if engaged in for “...*profit-making purposes*...” – may be argued to be regulated by the provisions of the Commercial Law, to the extent that they are not regulated by more directly relevant Other Relevant Laws of Vietnam (such as the Law on Enterprises and the Law on Investment).

5.18 **Whether or not Share Transactions constitute “...*sale and purchase of goods*...” transactions, for the purposes of the Commercial Law**

5.18.1 Bizarre though this proposition undoubtedly is, it is even possible to argue that Share Transactions constitute “...*purchase and sale of goods*...” transactions, for the purposes of the Commercial Law.

5.18.2 Clearly, Share Transactions do constitute “...*purchase and sale transactions*...”, but can it be seriously contended that Shares constitute “...*goods*...”? On the face of it, it would seem to be verging on preposterous to suggest that Shares might constitute “...*goods*...”, based on the plain language meaning of the word

5. Legal Analysis: Application of the Commercial Law

“Goods comprise:

(a) All types of moveable property, including moveable property to be formed in the future;

(b) Objects attached to land.”

-Article 3,
Commercial Law

(whether in English or in Vietnamese (“*hàng hóa*”)). It is reasonable to suggest that the concept of “...*goods*...” is universally understood, to native Vietnamese speakers and native English speakers alike, to consist of physical items that are produced and/or prepared to be sold and are capable of being physically delivered to the buyer. It is difficult to imagine any native Vietnamese speaker or native English speaker giving Shares as an example, if asked to give an example of the concept of “...*goods*...”. The position, however, is by no means clear, having regard to the express provisions of the laws of Vietnam.

5.18.3 Article 3 of the Commercial Law defines “...*goods*...” as follows [emphasis added, in the form of underlining]:

“*Goods* comprise:

(a) All types of moveable property, including moveable property to be formed in the future;

(b) Objects attached to land.”

5.18.4 The Commercial Law, however, contains no definition of the concept of “...*moveable property*...”, meaning that we must look to the Civil Code to provide us with a legislated definition of the concept of “...*moveable property*...”.

5.18.5 It is worth noting that the Vietnamese word “...*tài sản*...” is variously translated into either “...*property*...” or “...*assets*...” in English. There is, however, in Vietnamese no distinction between the concept of “...*property*...” and the concept of “...*assets*...”, as the same word (namely, “...*tài sản*...”) is used for either and both of these concepts.

5.18.6 Chapter VII of the Civil Code deals with “...*property*...”. Article 105 of the Civil Code defines the concept of “...*property*...”, as follows [emphasis added in the form of underlining]:

“**Article 105** *Property*

1. Property comprises objects, money, valuable papers and property rights.

2. *Property* comprises *immoveable property* and moveable property. *Immoveable property* and *moveable property* may be *existing property* and *property to be formed in the future*.”

5.18.7 Article 107 of the Civil Code then goes on to specify the following in relation to the concepts of “...*immoveable property*...” and “...*moveable property*...” [emphasis added in the form of underlining]:

“**Article 107** *Immoveable property and moveable property*

1. *Immoveable property* comprises the following types of *property*:

(a) *Land*;

(b) *Houses and structures attached to land*;

5. Legal Analysis: Application of the Commercial Law

(c) *Other property attached to land, houses and structures;*

(d) *Other property as provided by law.*

2. *Moveable property is property which is not immoveable property.*

5.18.8 It is difficult to argue against the proposition that Shares (whether JSC Shares or LLC Charter Capital) fall within the concept of “...*property rights*...”, for the purposes of Article 105.1 of the Civil Code. Article 115 of the Civil Code defines the concept of “...*property rights*...” as follows:

“Property rights are rights which are able to be valued in money, including property rights to subjects of intellectual property rights, right to use land and other property rights.”

5.18.9 Shares undoubtedly:

- (i) constitute and/or represent ownership interests in a Vietnam-domiciled company;
- (ii) constitute and/or give rise to rights of a proprietary nature in and in connection with a Vietnam-domiciled company; and
- (iii) are capable of being valued in money.

On this basis, there can be little serious room for doubt as to the proposition that Shares constitute “...*property*...” for the purposes of Article 105.1 of the Civil Code.

5.18.10 Further, it would seem to be relatively clear that Shares do not constitute Immoveable Property, for the purposes of Article 107.1 of the Civil Code, on the basis that:

- (i) Shares clearly do not constitute land or any form of building or structure attached to land; and
- (ii) there are no express provisions of the laws of Vietnam which specify that Shares constitute Immoveable Property.

5.18.11 Pursuant to the provisions of Article 107.2 of the Civil Code, if Shares are Property but are not Immoveable Property, then they must be Moveable Property.

5.18.12 If Shares are Moveable Property for the purposes of the Civil Code, then by implication it is likely to be the case that they also constitute Moveable Property for the purposes of the Commercial Law, and if this is the case, then it would appear to be difficult to escape the conclusion that Shares may be argued to fall within the definition of “...*goods*...” as set out in the Commercial Law – even though on the face of it this is a manifestly nonsensical result.

5.19 **Conclusions as to the applicability of the Commercial Law to Share Transactions**

5.19.1 On the basis of the analysis set out above, it would appear to be arguable that, for the purposes of the Commercial Law:

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- (i) Shares do constitute “...*goods*...”;
- (ii) Share Transactions do constitute “...*purchase and sale of goods*...” transactions; and
- (iii) accordingly, that Share Transactions – if engaged in for “...*profit-making purposes*...” – are regulated by and must be conducted in accordance with the provisions of the Commercial Law, to the extent that they are not regulated by the express provisions of any more directly relevant Other Relevant Law (such as the Law on Enterprises and the Law on Investment).

5.19.2 This, of course, would be a manifestly absurd result, having regard to the provisions of the Commercial Law which deal expressly with “...*purchase and sale of goods*...” transactions. Those provisions overwhelmingly and clearly contemplate transactions in which actual goods (in the sense of physical items produced or prepared for sale and delivery) are sold, purchased, transported, delivered, and/or received. Looking at the Commercial Law as a whole, it simply cannot be the case that the legislators intended the Commercial Law to regulate Share Transactions as though they were “...*purchase and sale of goods*...” transactions. Nevertheless, the express provisions of the Commercial Law are precisely that – express provisions of a law having been duly promulgated by the National Assembly of Vietnam – and the meaning and effect of their “black letter” wording cannot be excluded on the grounds of a logical and common-sense view of the Commercial Law taken as a whole.

5.19.3 Let us therefore summarise the key propositions that may be distilled from the technical legal analysis set out above:

- (i) Share Transactions may be strongly argued to constitute “...*investment*...” activities, for the purposes of the Commercial Law.
- (ii) Shares may be argued (albeit not strongly) to constitute “...*goods*...”, for the purposes of the Commercial Law – despite the manifest absurdity of this proposition.
- (iii) Share Transactions may be argued (albeit not strongly) to constitute “...*purchase and sale of goods*...” transactions, for the purposes of the Commercial Law – despite the manifest absurdity of this proposition.
- (iv) On the basis at least of Item (i) of this Paragraph 5.19.3 above, Share Transactions may be argued to constitute “...*commercial activity*...”, for the purposes of the Commercial Law, if they are engaged in for “...*profit-making purposes*...”.
- (v) Even if Share Transactions do not constitute “...*investment*...” nor “...*purchase and sale of goods*...” transactions, they will constitute “...*commercial activity*...” for the purposes of the Commercial Law, if they can be said to be engaged in for “...*profit-making purposes*...”, given the reference in Article 3 of the

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Commercial Law to the concept of “...*other activities for profit-making purposes*”.

- (vi) Share Transactions are primarily regulated by the Law on Enterprises and the Law on Investment and/or (in the case of Public Companies) by the Law on Securities (***Directly Relevant Laws***), but to the extent not expressly regulated by any Directly Relevant Laws may be argued to be regulated by the provisions of the Commercial Law.
- (vii) Share Transactions are regulated by the provisions of the Civil Code only to the extent that they are not expressly regulated by:
 - (a) the provisions of any Directly Relevant Laws; or
 - (b) the provisions of the Commercial Law.

What, therefore, does this all mean, for the purposes of SPAs which are governed by the laws of Vietnam?

The background of the slide is an abstract, high-contrast image. It features several overlapping, light-colored planes that create a sense of depth and perspective. These planes are punctuated by numerous small, dark circular rivets or bolts. The overall composition is geometric and industrial, with sharp lines and a monochromatic color palette of greys and blacks, accented by a thin yellow line at the bottom of the image area.

6. Key implications if the Commercial Law applies to Share Transactions

6. Key implications if the Commercial Law applies to Share Transactions

- 6.1 It is abundantly clear that the vast majority of the provisions of the Commercial Law can in no way be said to have any application whatsoever in connection with Share Transactions. The Commercial Law does, however, contain a number of specific provisions dealing with, among other matters:
- (i) “...*remedies in commerce*...”; and
 - (ii) “...*dispute resolution in commerce*...”.
- 6.2 Section 1 of Chapter 7 of the Commercial Law is entitled, “Remedies in commerce” and sets out various provisions dealing with matters of the kind which are listed in Article 292 of the Law on Commerce, namely the following:
- “Article 292 *Types of remedies in commerce***
- 1. *Specific performance.*
 - 2. *Penalty for breach.*
 - 3. *Damages for loss.*
 - 4. *Temporary cessation of performance of contract.*
 - 5. *Termination of performance of contract.*
 - 6. *Rescission of contract.*
 - 7. *The parties may agree to apply other types of remedies provided that such remedies are not contrary to the fundamental principles of the law of Vietnam, to any international treaty of which the Socialist Republic of Vietnam is a member, or to international commercial practice.”*
- 6.3 This is where things start to get tricky, in relation to Share Transactions and SPAs.
- 6.4 In the normal course of events, buyers and sellers in Share Transactions will negotiate freely with one another and will enter into SPAs on the basis of the deal having been negotiated and settled upon between them. This normal approach is consistent with the provisions of Article 3.2 of the Civil Code, which specifies the following:
- “Article 3 *Basic principles of civil law***
- ...
- 2. *Individuals and legal entities establish, perform, and terminate their civil rights and obligations on the basis of free and voluntary commitments and agreement. Any commitment or agreement which does not violate a prohibition by law or is not contrary to social morals is valid for performance by the parties and must be respected by other subjects.”*
- 6.5 It is generally accepted that the Civil Code sets out the fundamental principles of Vietnam contract law, including in relation to matters such as termination of contracts, claims for damages for breach of contract, and liability to compensate aggrieved parties for their losses arising from breach of contract. It is indisputable that Vietnam law contracts such as SPAs cannot contain provisions which are inconsistent with any of the express provisions of the Civil Code and if they do, those provisions will not be enforceable in Vietnam.

6. Key implications if the Commercial Law applies to Share Transactions

- 6.6 It is also generally accepted (and, it is reasonable to suggest, indisputable) that the meaning and effect of Article 4 of the Civil Code is as follows:
- (i) the Civil Code forms the underlying legal basis for all aspects of civil relations in Vietnam;
 - (ii) where there are any Other Relevant Laws which specifically regulate certain sectors and/or activities (such as, in the case of Share Transactions, the Law on Enterprises, the Law on Investment, and, in the case of Public Companies, the Law on Securities) (**Sector Specific Laws**), those Sector Specific Laws apply to regulate the relevant sector and/or activity, in precedence over the provisions of the Civil Code – to the extent that their provisions are not inconsistent with any provisions of the Civil Code;
 - (iii) to the extent that any Sector Specific Laws are silent in relation to any particular matter or activity or are inconsistent with any provisions of the Civil Code, the provisions of the Civil Code will apply to regulate the relevant matter or activity; and
 - (iv) Relevant International Treaties will prevail over the provisions of the Civil Code to the extent of any inconsistency.
- 6.7 If (as may be argued) the Commercial Law does constitute a Sector Specific Law in relation to Share Transactions, this would mean that the provisions of the Commercial Law would apply in relation to Share Transactions in precedence to the provisions of the Civil Code, to the extent that the provisions of the Commercial Law are not inconsistent with the provisions of the Civil Code which set out the Basic Civil Principles.
- 6.8 A number of key implications arise, if it is accepted that the Commercial Law is a Sector Specific Law in relation to Share Transactions.
- 6.9 For example, the Commercial Law contains a prohibition in Article 293 against the imposition of remedies for “...*insubstantial breaches*...”, as follows:
- “Article 293 Imposition of remedies in commerce for insubstantial breaches**
- Unless otherwise agreed, an aggrieved party shall not be permitted to impose a temporary cessation of performance of a contract, termination of performance of a contract or rescission of a contract, for an insubstantial breach.”*
- 6.10 The Civil Code contains no corresponding provision. If the Commercial Law applies to a SPA and constitutes a Sector Specific Law in relation to Share Transactions, this opens up significant scope for buyers or sellers under SPAs to resist termination of the SPA and/or claims for damages arising from termination, by arguing on the basis of Article 293 that the relevant breach was “...*insubstantial*...” – noting that the Commercial Law provides no definition of the concept of “...*insubstantial*...” breach. The Commercial Law does, however, contain a definition of the concept of “...*substantial breach*...” in Article 3.13, namely the following [emphasis added in the form of underlining]:

6. Key implications if the Commercial Law applies to Share Transactions

“Substantial breach means a contractual breach by a party, which causes damage to the other party to an extent that the other party cannot achieve the purpose of the entry into the contract.”

- 6.11 Although the Commercial Law does not specifically state this, it is reasonable to infer that, for the purposes of the Commercial Law, any breach of a contract which does not constitute a “...substantial breach...” must constitute an “...insubstantial breach...”. Even if this is correct, the manifest ambiguity of the definition of “...substantial breach...” leaves open a wide scope for disputing parties to argue that any particular breach of a disputed contract is “...insubstantial...”.
- 6.12 Another example is the concept of “...immunity from liability for acts of breach...”, which is expressed as follows in Article 294 of the Commercial Law:

“Article 294 Immunity from liability for acts in breach

1. A defaulting party shall be immune from liability in the following cases:
 - (a) upon occurrence of an event which the parties have agreed will give rise to immunity from liability;
 - (b) upon the occurrence of an event of force majeure;
 - (c) upon a breach by one party which was entirely due to the fault of the other party;
 - (d) upon a breach by one party which was due to implementation of a decision of a competent State administrative body of which the parties could not have known at the time of entering into the contract.
2. The defaulting party shall bear the burden of proof that an event gives rise to immunity from liability.”

- 6.13 Whilst the Civil Code contains provisions which are broadly consistent with the principles set out in Items (a) to (c) of Article 294.1 of the Commercial Law, it contains no provision being substantially similar to the provisions of Item (d) of Article 294.1. This leaves open another potential line of defence for defendants in claims under SPAs, in circumstances where there would be none if it was clear that the Commercial Law does not apply and is not a Sector Specific Law in relation to Share Transactions or SPAs.

- 6.14 The Commercial Law contains no definition of the concept of “...force majeure...”. The Civil Code does contain a definition of the concept of “...force majeure...” in Article 156.1, which is set out in the context of a provision (Article 156) which deals specifically with the matter of time limitations for initiating legal action in relation to civil cases. In practice, due to the lack of a clear and generally applicable definition of “...force majeure...”, the definition in Article 156 of the Civil Code is often relied upon by parties as embodying the concept of “...force majeure...” for the purposes of Vietnam law, even where the matter of time limitations has no relevance at all. Article 156.1 of the Civil Code specifies the following [emphasis added in the form of underlining]:

“An event of force majeure or other objective hindrance which renders the person with the right to initiate [legal action for a civil case] or make a request not able to do so within the limitation period.

6. Key implications if the Commercial Law applies to Share Transactions

An event of force majeure is an event which occurs in an objective manner which is not able to be foreseen and which is not able to be remedied by all possible necessary and admissible measures being taken.

An objective hindrance is a hindrance which in an objective context results in a person with civil rights or obligations not being able to know that his or her lawful rights and interests have been infringed or not being able to exercise his or her rights or fulfil his or her civil obligations.”

- 6.15 Article 296 of the Commercial Law contains detailed provisions for the extension of deadlines for the performance of contractual obligations, where timely performance is prevented or hindered by events of “...*force majeure*...” – including default extensions which apply if the parties are unable to agree upon a mutually acceptable extension. Again, there is no corresponding provision in the Civil Code. This provision of the Commercial Law (if it applies to Share Transactions and is a Sector Specific Law in relation to Share Transactions) potentially has huge ramifications in the context of Share Transactions, in relation to which time is invariably of the essence (particularly in relation to matters such as the fulfilment of conditions precedent and/or the delivery of completion deliverables). There are many circumstances in which parties may be inclined to endeavour to avoid liability by claiming that their non-performance or delayed performance was due to circumstances beyond their reasonable control.

- 6.16 Another example is the provisions of Article 301 of the Commercial Law, which specify the following in relation to contractual penalties:

“Article 301 Level of penalty

The level of penalty in respect of any one breach of a contractual obligation or the total amount of penalty in respect of multiple breaches shall be as agreed by the parties in the contract, but shall not exceed eight per cent of the value of the contractual obligation which is the subject of the breach, except in the cases stipulated in Article 266 of this Law.”

- 6.17 The Civil Code contains provisions which establish broad principles in relation to contractual penalties but does not impose any limitation on the quantum of contractual penalties.

- 6.18 If the Commercial Law applies to and is a Sector Specific Law for the purposes of Share Transactions, Article 301 of the Commercial Law is a highly problematic provision. In practice, Article 301 of the Commercial Law is a popular “go to” provision, for defendants in litigation or arbitration claims based on Vietnam law governed SPAs, who seek to avoid or minimise the application of contractual claims and liability provisions which they have freely negotiated and entered into.

- 6.19 The Commercial Law sets out in Article 300 a definition of the concept of “...*penalty for breach*...”, as follows:

“Article 300 Penalty for breach

Penalty for breach is a remedy whereby the aggrieved party requires the defaulting party to pay a penalty sum for breach of contract if so agreed in the context, except in cases of immunity from liability stipulated in Article 294 of this Law.”

6. Key implications if the Commercial Law applies to Share Transactions

- 6.20 The Civil Code defines the concept of a “...*penalty for breach*...” in similar but not identical terms but leaves it to the parties to agree upon quantum. Article 418 of the Civil Code provides as follows:

“Article 418 Agreements on penalties for breach

1. *Penalty for breach means an agreement between the parties in a contract, whereby a party breaching an obligation must pay a sum of money to the party whose rights are breached.*
2. *The amount of a penalty for breach shall be as agreed by the parties, unless otherwise provided by relevant law.*
3. *The parties may agree that a party breaching an obligation must only be subject to a penalty for breach without having to compensate for loss and damage, or must be subject to a penalty for breach and also pay compensation for loss and damage.*

Where the parties have agreed on penalties for breach but do not have an agreement on both penalties for breach and compensation for loss and damage, the party breaching an obligation shall be required to be subject to the penalty for breach only.”

- 6.21 Article 300 of the Commercial Law and Article 418.1 of the Civil Code appear to describe the concept of a contractual “...*penalty*...” as it is understood in many jurisdictions worldwide, including common law jurisdictions as well as civil law jurisdictions. That concept essentially entails parties agreeing that upon the occurrence of a specified type of contractual breach, the breaching party will be obliged to pay to the non-breaching party an arbitrary sum of money, by way of “punishment” for the occurrence of the specified contractual breach (**a Penalty**). In many jurisdictions worldwide (including common law jurisdictions as well as civil law jurisdictions), Penalties are, in essence, distinguished from “liquidated damages” provisions, in that:

- (i) Penalties are arbitrary amounts, which may have been agreed between the parties, but do not reflect any genuine pre-estimate of the loss that the non-breaching party would be likely to suffer as a result of the occurrence of the specified type of contractual breach; whereas
- (ii) “liquidated damages” provisions represent the parties’ genuine pre-estimate of the loss that the non-breaching party would be likely to suffer as a result of the occurrence of the specified type of contractual breach.

- 6.22 Common law generally does not permit the use of contractual Penalties and establishes relatively strict rules with which liquidated damages provisions must comply if they are to be enforceable.

- 6.23 Vietnam law clearly does permit the use of contractual Penalties, but, in relation to contracts to which the Commercial Law applies, limits the quantum of a contractual Penalty, in relation to “...*any one breach of a contractual obligation*...” to an amount being equivalent to 8% of “...*the value of the contractual obligation which is the subject of the breach*...”.

- 6.24 There are numerous, obvious and serious problems with Article 301 of the Commercial Law, when read and applied in conjunction with Article 300 of the Commercial Law. Most importantly, the wording of Articles

6. Key implications if the Commercial Law applies to Share Transactions

300 and 301 of the Commercial Law is sufficiently vague and ambiguous as to be open to broad and unpredictable interpretation.

6.25 The Commercial Law (like the Civil Code) does contain provisions which define the concepts of loss arising from contractual breach and damages in relation thereto – and these concepts are distinguished relatively clearly from the concept of a contractual Penalty. The reality, however, is that there are numerous key scenarios in which defendants endeavour – sometimes successfully – to rely on Article 301 in circumstances which are highly unlikely to have been intended or foreseen by the legislators. Examples include defendants (normally the seller in a Share Transaction) seeking to avoid or limit the application of commonly used provisions such as:

- (i) break fee provisions;
- (ii) liquidated damages provisions;
- (iii) indemnity provisions (including tax indemnities, other specific indemnities, and general indemnities);
- (iv) provisions dealing with liability for breach of warranty;
- (v) specific and/or contingent payment provisions, such as provisions requiring the whole or part of a purchase price to be refunded in specified circumstances; and/or
- (vi) provisions deeming diminution in the value of purchased Shares to constitute compensable loss.

6.26 The key problem with Article 301 of the Commercial Law is its ability to be twisted and relied upon by defendants in circumstances which cannot have been intended by the legislators. In addition, from a commercial and logical perspective, if Penalties are permitted by Vietnam law and the Civil Code allows parties to negotiate and agree upon the quantum of Penalties, why would it make any sense for the Commercial Law to impose a limitation (indeed, a very strict limitation) on quantum? It would seem to be fairly obvious that Article 301 was designed with actual commercial transactions in mind. For example, it is fair, reasonable, and logical for Penalties for late delivery of goods to be limited to a specified percentage of the value of the goods.

6.27 The Commercial Law also muddies the waters in relation to contractual liability in the context of Share Transactions, as a result of its purported imposition of principles which, although arguably not inconsistent with any of the Basic Civil Principles:

- (i) are more onerous than those imposed under the corresponding provisions of the Civil Code; or
- (ii) establish principles in relation to which the Civil Code is silent.

6.28 For example, the Civil Code formulates the concept of compensable loss or damage as follows [emphasis added in the form of underlining]:

“Article 360 *Liability to compensate for loss and damage due to breach of obligation*

Where there is any loss and damage resulting from a breach of an obligation, the obligor must compensate for the total loss and damage, unless otherwise agreed or provided by law.”

6. Key implications if the Commercial Law applies to Share Transactions

- 6.29 The Commercial Law, however, does not contain any similar provision contemplating agreements between the parties in relation to specifies compensation liability and/or limitations of liability.
- 6.30 Another key problem with Section 1 of Chapter 7 of the Commercial Law is that it imposes a more onerous standard in relation to the concept of compensable loss and damage, as compared with the standards established under the Civil Code.
- 6.31 Articles 302 to 304 of the Commercial Law specify the following in relation to the concept of compensable loss and damage:

“Article 302 Damages for loss

1. *Damages for loss means the defaulting party pays compensation for the loss caused to the aggrieved party by a breach of the contract.*
2. *The value of damages for loss shall comprise the value of the actual and direct loss which the aggrieved party has borne due to [the breach of] the defaulting party as well as the direct profits which the aggrieved party would have earned in the absence of such breach.*

Article 303 Grounds for liability to pay damages for loss

Except in the cases of immunity from liability stipulated in article 294 of this Law, the liability to pay damages for loss shall arise when the following factors exist:

1. *There is an act in breach of the contract;*
2. *There occurs an actual loss;*
3. *The act un breach of the contract is the direct cause of the loss.*

Article 304 Burden of proof of loss

The party claiming damages for loss shall bear the burden of proof of the loss and the amount of the loss caused by the act of breach and [of the loss of] direct profits which the aggrieved party would have earned in the absence of such breach.”

- 6.32 In contrast, Articles 13, 360, 361, and 419 of the Civil Code specify the following in relation to the concept of compensable loss and damage [emphasis added in the form of underlining]:

“Article 13 Compensation for loss and damage

Individuals and legal entities whose civil rights are violated shall be compensated for all loss or damage, except where otherwise agreed by the parties or otherwise prescribed by law.”

“Article 360 Liability to compensate for loss and damage due to breach of obligation

Where there is any loss or damage resulting from a breach of an obligation, the obligor must compensate for the total loss and damage, unless otherwise agreed or provided by law.”

“Article 361 Loss and damage caused by breach of obligations

1. *Loss and damage caused by a breach of an obligation comprises physical damage and spiritual damage.*

6. Key implications if the Commercial Law applies to Share Transactions

2. *Physical damage is actual physical losses which can be determined, comprising loss of property, reasonable expenses to prevent, mitigate or restore damage, and the actual loss or reduction of income.*
3. *Spiritual damage is spiritual losses caused by harming life, health, honour, dignity, reputation, and other personal interests of a subject."*

"Article 419 *Compensable damage caused by breach of contracts*

1. *Compensable damage caused by breach of contractual obligations shall be determined in accordance with clause 2 of this Article, Article 13 and Article 360 of this Code.*
2. *An obligee may demand compensation for loss and damage in respect of benefits from the contract which the obligee would have enjoyed. The obligee may also request the obligor to pay any fee arising from failure to fulfil contractual obligations without overlapping with the amount of compensation for loss and damage in respect of the benefits from the contract.*
3. *As requested by the obligee, a court may order the obligor to pay compensation for spiritual damage to the obligee. The amount of compensation shall be decided by the court on the basis of the contents of the case."*

- 6.33 Significantly, whilst the applicable provisions of the Civil Code expressly contemplate parties agreeing upon liability structures other than liability to compensate for 100% of loss, the Commercial Law contains no such provisions. If the Commercial Law applies to Share Transactions in precedence to the Civil Code (because it is a Sector Specific Law for the purposes of Share Transactions), this may be argued to prejudice the validity and enforceability of limitation of liability provisions, which are invariably a crucially important part of any SPA.
- 6.34 In addition, the Civil Code, unlike Article 304 of the Commercial Law, contains no provisions imposing a strict burden of proof upon claimants for damages (even though, in practice, claimants for damages arising from breach of contract under the Civil Code are invariably required to prove their loss to a comparatively high standard of proof).
- 6.35 On the basis of the analysis set out above, we can see that if the Commercial Law applies to Share Transactions and constitutes a Sector Specific Law for the purposes of Share Transactions, many of the types of provisions which are standard in SPAs worldwide and which are frequently negotiated and entered into on agreed terms in SPAs governed by Vietnam law, may not be valid or enforceable in Vietnam, whether in whole or in part.
- 6.36 The following is a summary of the types of common SPA provisions whose validity and enforceability may be strongly argued to be prejudiced, if the Commercial Law applies to Share Transactions and constitutes a Sector Specific Law for the purposes of Share Transactions:
- (i) Break fee provisions.
 - (ii) Liquidated damages provisions.

6. Key implications if the Commercial Law applies to Share Transactions

- (iii) Indemnity provisions, including tax indemnities, other specific indemnities, and general indemnities.
 - (iv) Specific and/or contingent payment provisions, such as provisions requiring the whole or part of a purchase price to be refunded in specified circumstances.
 - (v) Provisions deeming diminution in the value of purchased Shares to constitute compensable loss.
 - (vi) Provisions imposing strict liability in specified circumstances, including but not limited to provisions expressly waiving any requirement to prove loss.
 - (vii) Provisions setting out agreed limitations of liability to apply in specified circumstances.
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7. Conclusions and Recommendations

7. Conclusions and Recommendations

- 7.1 The Commercial Law is a stale and outdated law which requires major overhaul. There is clearly a need in Vietnam – as there is in all jurisdictions worldwide – for clear and robust legislation to regulate key aspects of commercial transactions.
- 7.2 In 2021, the Prime Minister approved a plan for developing domestic commerce during the period to 2030 with a vision to 2045, which specifically included review and revision of the Commercial Law to facilitate the operations of business entities, to make the Commercial Law compatible with other laws, and other objectives.¹³ Such review and revision of the Commercial Law is scheduled to be completed before 2025. This initiative is long overdue and sorely needed and we would encourage all relevant State authorities to afford a high degree of importance and priority to this initiative. It is to be ardently hoped that any law replacing the Commercial Law will make clear that it has no relevance or application in relation to Share Transactions.
- 7.3 As things currently stand, although it makes no sense at all from a rational or logical perspective, a strict “black letter law” analysis of the express provisions of the Commercial Law and the Civil Code gives rise to realistic and cogent arguments to the effect that the Commercial Law should be regarded as applying to and regulating Share Transactions, in relation to any matters which are not expressly dealt with in the provisions of the Law on Enterprises or the Law on Investment or other relevant Sector Specific Laws. This causes uncertainty and confusion and detracts from the efficacy of Vietnam law as a governing law in respect of Share Transactions.
- 7.4 The Commercial Law should have no application whatsoever in connection with Share Transactions. The Commercial Law (if it applies to Share Transactions) adds nothing and brings no benefit in connection with Share Transactions. The Law on Enterprises, the Law on Investment, the Law on Competition, the Civil Code, and (in the case of Public Companies) the Law on Securities (in addition to Sector Specific Laws such as the Law on Credit Institutions and the Law on Real Estate Business) are more than sufficient, in the absence of the Commercial Law, to provide a robust regulatory framework for Share Transactions.
- 7.5 The Vietnamese Government and its relevant instrumentalities should act quickly and decisively to clarify, in a legislatively binding manner, that the Commercial Law has no application in connection with Share Transactions or claims under SPAs.

¹ Law No. 36-2005-QH11, entitled the “Commercial Law”, passed by Legislature XI of the National Assembly of the Socialist Republic of Vietnam at its 7th Session on 14 June 2005, as amended and supplemented in accordance with Resolution 51-2010-QH10, passed by Legislature X of the National Assembly of the Socialist Republic of Vietnam at its 10th Session on 25 December 2010 (***the Commercial Law***).

² Law No. 91-2015-QH13, entitled the “Civil Code”, passed by the National Assembly of the Socialist Republic of Vietnam at its 10th Session on 24 November 2015 (***the Civil Code***).

³ Law No. 59/2020/QH14, entitled the “Law on Enterprises”, passed by Legislature XIV of the National Assembly of the Socialist Republic of Vietnam at its 9th Session on 17 June 2020, as amended and supplemented by Law No. 03/2022/QH15 providing amendments to the Law on Public Investment, the Law on Public-Private Partnership Investment, the Law on Investment, the Housing Law, the Law on Electricity, the Law on Enterprises, the Law on Excise Duties, and the Law on Civil Judgment Enforcement, passed by Legislature XV of the National Assembly of the Socialist Republic of Vietnam at its first irregular Session on 11 January 2022 (***the Law on Enterprises***).

⁴ Law No. 54/2019/QH14, entitled the “Law on Securities”, passed by Legislature XIV of the National Assembly of the Socialist Republic of Vietnam at its 8th Session on 26 November 2019 (***the Law on Securities***).

⁵ Law No. 61/2020/QH14, entitled the “Law on Investment”, passed by Legislature XIV of the National Assembly of the Socialist Republic of Vietnam at its 9th Session on 17 June 2020, as amended and supplemented by Law No. 03/2022/QH15 providing amendments to the Law on Public Investment, the Law on Public-Private Partnership Investment, the Law on Investment, the Housing Law, the Law on Electricity, the Law on Enterprises, the Law on Excise Duties, and the Law on Civil Judgment Enforcement, passed by Legislature XV of the National Assembly of the Socialist Republic of Vietnam at its first irregular Session on 11 January 2022 (***the Law on Investment***).

⁶ Law No. 23/2018/QH14, entitled the “Law on Competition”, passed by Legislature XIV of the National Assembly of the Socialist Republic of Vietnam at its 5th Session on 12 June 2018 (***the Law on Competition***).

⁷ Law No. 47/2010/QH12, entitled the “Law on Credit Institutions”, passed by the XIIth Legislature of the National Assembly of the Socialist Republic of Vietnam at its 7th Session in 16 June 2010, as amended by Law No. 17/2017/QH14, entitled the “Law on Amendments to Some Articles of the Law on Credit Institutions”, passed by the XIVth Legislature of the National Assembly of the Socialist Republic of Vietnam at its 4th Session on 20 November 2017 (***the Law on Credit Institutions***).

⁸ Law No. 66/2014/QH13, entitled the “Law on Real Estate Business”, passed by the XIIIth Legislature of the National Assembly of the Socialist Republic of Vietnam at its 8th Session on 25 November 2014 (***the Law on Real Estate Business***).

⁹ Law No. 80/2015/QH13, entitled the “Law on the Promulgation of Legislative Documents”, passed by the XIIIth Legislature of the National Assembly of the Socialist Republic of Vietnam during its 9th session, on 22 June 2015, as amended by Law No. 63/2020/QH14, passed by the XIVth Legislature of the National Assembly of the Socialist Republic of Vietnam during its 9th session, on 18 June 2020 (***the Law on the Promulgation of Legislative Documents***).

¹⁰ Meaning a “...foreign investor...” of the kind defined as such in and/or deemed to constitute a “...foreign investor...” by the provisions of the Law on Investment.

¹¹ The Schedule of Specific Commitments in Services No. WT/ACC/VNM/48/Add.2 dated 27 October 2006 of the Working Party on the Accession of Vietnam.

¹² This is technically a reference to the Law on Construction which was in force and effect at the time of the Supreme Court having handed down its decision in September 2019 (together with the implementing legislation having been issued thereunder). At the time of publication of this article, however, the law which is in force is Law No. 50/2014/QH13, entitled the “Law on Construction”, passed by the Legislature XIII of the National Assembly of the Socialist Republic of Vietnam at its 7th session on 18 June 2014, as amended by Law No. 03/2016/QH14 on amendments to Article 6 and Annex 4 on the list of conditional business lines stipulated in the Law on Investment passed by the Legislature XIV of the National Assembly of the Socialist Republic of Vietnam at its 2nd session on 22 November 2016 (expired), Law No. 35/2018/QH 14 on amendments to some articles concerning planning of 37 laws passed by the Legislature XIV of the National Assembly of the Socialist Republic of Vietnam at its 6th session on 20 November 2018, Law No. 40/2019/QH14 on Architecture passed by the Legislature XIV of the National Assembly of the Socialist Republic of Vietnam at its 7th session on 13 June 2019, and Law No. 62/2020/QH14 on amendments to the Construction Law passed by the Legislature XIV of the National Assembly of the Socialist Republic of Vietnam at its 9th session on 17 June 2020— together with all of the implementing legislation having been issued under any of the foregoing and remaining in force and effect as at the date of this article.

¹³ Decision No. 1163/QD-TTg of the Prime Minister approving Plan of “Developing domestic commerce for the period to 2030 with a vision to 2045” dated 13 July 2021.

Important Legal Notices

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Ho Chi Minh City

19th Floor, Deutsches Haus
33 Le Duan Boulevard, District 1
Ho Chi Minh City, Vietnam
T: +84 28 3824 2733

Hanoi

12th Floor, Pacific Place
83B Ly Thuong Kiet Street, Hoan Kiem District
Hanoi, Vietnam
T: +84 24 3946 1203

Website www.frasersvn.com
Email legalenquiries@frasersvn.com

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