ISSUE N° 01

LOCAL EXPERTISE & GLOBAL STANDARD

ESQUIRES ELITE

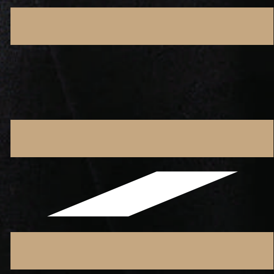
Deal Makers, not Deal Breakers

LUXURY IN THE CLOUDS: LEGAL INSIGHTS INTO PRIVATE JET ACQUISITION

SEVERAL FUNDAMENTAL PRINCIPLES AND CRUCIAL FACETS OF THE PRIVATE JET ACQUISITION PROCESS

English Version

JAN 2024



HERMAN
HENRY &
DOMINIC

Every journey begins with a shared vision. At Herman, Henry & Dominic, that vision is built upon a foundation of unwavering commitment to our clients, colleagues, and the dynamic landscape of Vietnamese law. This first issue of Esquires Elite serves as a testament to that commitment, a platform where we explore the complexities of legal practice and discover innovative solutions to tough challenges.

In the fast-paced world of business and innovation, legal advisors often wear the mantle of gatekeeper, interpreting regulations and ensuring compliance. Yet, as our esteemed partners often remind us, a distinct group of counsels shines brighter, not only for their legal expertise, but for their remarkable ability to unearth creative solutions to complex challenges. They are determined to find solutions instead of dwelling on obstacles. They tackle legal challenges with a forward-thinking and creative mindset, unafraid to explore new territory and question established norms. These solution-seekers are the ones who lead the way and earn respect for going beyond just understanding the law, guiding clients to success.

This is the spirit that defines our team at Herman, Henry & Dominic. It's the core value that drives our practice and fuels our passion for knowledge. And it's the very essence of Esquires Elite.

This publication is not just to inform, but to inspire with valuable perspectives that can help navigate the ever-evolving legal landscape. We believe that the content within these pages will remain relevant and valuable long into the future, serving as a trusted resource for our readers.

Last but not least, this inaugural issue is a dedication to each and every member of our team at Herman, Henry & Dominic. We appreciate your exceptional dedication and hard work every day in advancing the legal interests and well-being of our clients.

So, without further ado, let's delve into the insights.
Welcome to Esquires Elite!

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IV. ABOUT LAW

HERMAN HENRY & DOMINIC

LOCAL EXPERTISE & GLOBAL STANDARD

ABOUT US

HERMAN, HENRY & DOMINIC is an experienced team of lawyers and legal experts, based in Saigon and Hanoi.

- Professionalism
- Effectiveness
- Time & Cost Saving
- Comprehensive Legal
- Advice & Innovative
- Solutions for a wide range of legal issues

LEGAL PRACTICE AREAS

CORPORATE PRACTICE

We provide a full range of services to corporations and investors from various business industries. We handle the incorporation of new companies, the negotiation and drafting agreements and documents on the corporate compliance and regulatory issues under Vietnamese law.

ARBITRATION & LITIGATION

We represent our clients before government's dispute settlement bodies or courts or arbitral forums to resolve civil, commercial, corporate and labor disputes. Our lawyers participate in court proceedings nationwide at all levels, including first instance, appeal, judicial review and retrial hearings. In addition, our litigation group is also a strong option for clients who wish to petition for recognition and enforcement of foreign arbitral awards in Vietnam.

STARTUP

With our team's expertise on complex issues such as entity structuring and formation, taxation, capital raising, securities law, and intellectual property protection, we provide the legal support necessary to launch and grow startup companies.

PROPERTY & CONSTRUCTION

We assist property developers, real estate firms and contractors in legal matters relating to the construction, development and management of residential housing projects, office buildings, commercial shopping malls, hotels and resorts.

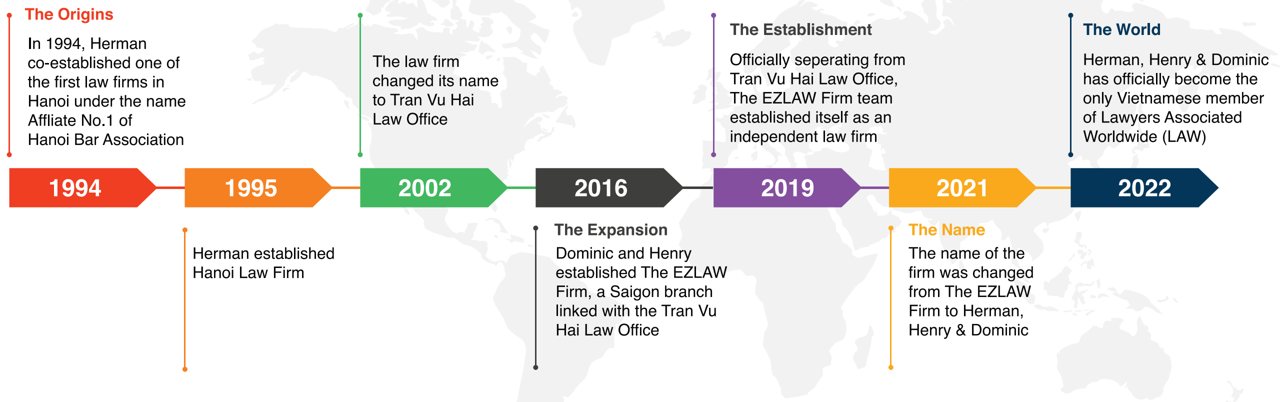
MERGER & ACQUISITION

We advise foreign and local investors, which are involved in domestic and cross-border M&A transactions, including share purchases, restructuring of business, mergers, acquisitions and other related transactions. We also conduct and perform legal due diligence and legal risk assessment and other related services in such M&A transactions or deals.`

FINANCING

We offer comprehensive legal services in the realm of financing arrangements and deals. Catering to businesses, financial institutions, and investors from diverse sectors, our adept legal professionals provide valuable insights and guidance on various financing transactions, such as project financing, acquisition financing, structured financing, and asset-based lending.

OUR HISTORY



OUR KEY LEGAL ADVISORS

TRAN VU HAI (HERMAN)
Partner

TRAN DUC HOANG (HENRY)
Partner

LE CONG DINH (DOMINIC)
Partner

OUR TEAM

Our Saigon Office:
Deal-Maker Team

Located in the financial district of Saigon, our office specializes in Corporate Law, Mergers & Aquisitions, Private Equity, Investment Banking, Financing, and Restrucuring. Our team, trained with a deal-maker mindset, provides expert guidance and innovative solutions in these complex fields, ensuring high-quality outcomes for our clients.

Our Hanoi Office:
Dispute-Resolution Team

Located in the capital of Vietnam, our dispute-resolution team specializes in conflict resolution, effectively advocating for client rights in diverse forums such as government dispute resolution bodies, judicial systems, and arbitration panels. The team is skilled in handling disputes across civil, business, corporate, and labor sectors, leveraging extensive expertise in these areas.

Few things in the high-stakes world of modern business are as exciting, ambitious, and scrutiny as mergers and acquisitions (M&A). These deals are more than just the exchange of assets; they may be also transformative events that redefine the market landscape, create benefits, and sometimes even give rise to industry giants.

The role of a M&A lawyer goes far beyond mere legal compliance or risk mitigation. The primary mission is to close the deal. This is where the “deal-maker” mentality comes into play. Unlike litigation, where the objective is often to win a zero-sum game, M&A is fundamentally about creating value—value for the buying company, value for the selling company, and value for shareholders.

By **TRAN D. HOANG (HENRY)**
Partner at
Herman, Henry & Dominic

M&A LAWYERS: DEAL MAKERS, NOT DEAL BREAKERS

1. Why Closing is the Objective

Aligning with Broader Business Objectives: It's important to remember that M&A transactions are not isolated events but are often part of a larger business strategy. Whether the goal is market expansion, acquisition of key technologies, or diversification, the M&A deal is a means to an end. Lawyers who focus on closing the deal are aligning themselves with these broader objectives, acting not just as legal experts but as strategic partners in achieving the client's business goals.

The Cost of Failure: While the primary objective is to close the deal, it's worth noting that breaking a deal is usually considered a last resort and comes with its own set of costs. These can range from wasted resources in terms of time and money spent on due diligence and negotiations, to reputational damage for both the law firm and the client. The aim is always to identify and mitigate risks early in the process, allowing the deal to proceed to closure rather than collapse.

The Reputational Capital: In the legal world, reputation is a form of currency that can be as valuable as financial capital. Successfully closing deals contributes to a law firm's track record, which can be a significant differentiator in a crowded market. A strong track record not only attracts new clients but also makes it easier to negotiate favorable terms in future deals. Word-of-mouth referrals, industry rankings, and professional recognitions are often predicated on a history of successful deal closures. In essence, each successful transaction is a building block in the firm's legacy, contributing to its standing and reputation in the industry.

2. The Skill Set of a Deal-Closer

The lawyer's function in Mergers and Acquisitions is not limited to that of a legal advisor who merely interprets statutes and drafts contracts. An effective M&A attorney combines the business savvy of a business strategist with the legal knowledge of a legal scholar and the negotiation skills of a competent negotiator. In this section, we will examine the fundamental skills that enable an M&A attorney to successfully close deals.

Legal Knowledge: At the core of any M&A transaction is a complex web of legal requirements and obligations. Understanding corporate law, antitrust regulations, tax implications, and intellectual property rights is fundamental. This legal knowledge functions as the foundation and enables the lawyer to organize the transaction in a way that is not only legal but also beneficial to the client.

Business Acumen: While legal knowledge is a must, an understanding of business strategy is just as important. An M&A lawyer needs to understand the bigger business goals behind a deal, such as growing the market, getting better employees, or integrating new technologies. This business knowledge lets the lawyer match the legal parts of the deal with the strategic goals of the client, thereby facilitating a smoother path to deal closure.

Negotiation Skills: One of the most critical skills in the M&A toolkit is the ability to negotiate effectively. Negotiation in this context goes beyond haggling over price; it involves a nuanced understanding of the other party's motivations, the skill to navigate around potential deal-breakers, and the creativity to find solutions that are acceptable to all stakeholders. The best negotiators know when to push, when to compromise, and when to walk away— a skill that can only be perfected through years of experience.

Emotional Intelligence: Emotional intelligence is often overlooked, but it is very important in the high-stakes, high-pressure world of M&A. If you can read the room, figure out how people are feeling, and change your approach accordingly, you might be able to make the difference between a deal that goes through and one that falls apart. Emotional intelligence also helps build relationships, not just with clients but also with opposing counsel, which can be invaluable in reaching a mutually beneficial agreement.

Risk Assessment: Every deal comes with its own set of risks, from regulatory hurdles to potential financial pitfalls. An effective M&A lawyer must be adept at risk assessment—weighing the potential rewards against the risks and advising the client accordingly. This skill is especially important during the due diligence phase, where hidden liabilities often exist.

Adaptability: The landscape of business and law is constantly shifting, as a result of economic conditions, technological advances, and regulatory adjustments. Adaptability is, therefore, a key talent for any M&A lawyer. To bring a transaction to a successful conclusion, it is essential to be able to adjust to new information, alter strategies mid-course, and adapt to the ever-changing dynamics of the situation.

3. The Psychology of Negotiation

In the complicated dance of Mergers and Acquisitions, where legal knowledge, business sense, and negotiating skills are often the stars of the show, psychology is a quiet player in the background. Psychological strategies used by experienced M&A lawyers can be just as important to making a deal happen as any legal case or financial model. In this part, we'll dive into a few negotiation psychology and look at the subtle tactics that can tip the scales in favor of a successful deal.

Building Trust and Credibility: Building trust is one of the most important parts of negotiation psychology. M&A lawyers with a lot of experience know that people are more likely to deal well with people they trust and respect. From the first handshake to the tone of voice and words used, every encounter is a chance to get to know someone better. For example, a lawyer with a lot of experience might start a negotiation by talking about shared interests or people they know in common. This creates a subtle feeling of connection before getting into the details of the deal.

Laying the Groundwork for Negotiation: Anchoring is a psychological strategy in which the first offer acts as a point of reference for all subsequent talks. Experienced lawyers frequently employ anchoring strategically, establishing a first offer that is favorable to their client while remaining reasonable. This sets the stage for negotiations, subtly influencing the other party's perception of what constitutes a "fair" deal.

Shaping Choices and Preferences: The decoy effect is a psychological phenomenon where the presence of a third option can influence the choice between two main options. In the context of M&A, a lawyer might introduce a less attractive term as a decoy to make the primary offer seem more appealing.

Give a Little, Get a Lot: The idea of reciprocity is deeply embedded in the way people think and act. We have a natural tendency to return favors and keep a balance between giving and getting in our relationships. Skilled M&A lawyers use this concept to their advantage by making calculated concessions that make the other side more likely to make concessions as well. For instance, using the principle of reciprocity, a lawyer who agrees to more lenient payment terms might anticipate a discount on the purchase price in return, thereby guiding the negotiation toward a mutually beneficial outcome.

4. Flexibility in negotiations is a balancing act

In the high-stakes chess game of Mergers and Acquisitions, negotiation serves as the board upon which strategies are played out and victories are secured. While legal expertise provides the groundwork and due diligence establishes the parameters, deals are often made or broken during the negotiation phase. Flexibility is one of the most important aspects of this phase, including the ability to adapt, pivot, and find inventive solutions.

Experienced M&A lawyers often bring a wealth of experience to the negotiation table, having navigated the complexities of numerous M&A deals over the years. This experience equips them with a nuanced understanding of when to hold firm and when to bend. They recognize that not all deal terms are created equal; some are non-negotiable, while others offer room for creative compromise.

For example, an experienced M&A lawyer might be willing to be flexible on payment terms if it means securing a more favorable valuation for their client. They understand that the art of negotiation is not about winning every point but about securing the most important ones.

In contrast, inexperienced M&A lawyers, often eager to prove their mettle, may approach negotiations with a more rigid mindset. While this rigidity can sometimes be an asset—demonstrating a strong stance can be a powerful negotiating tactic—it can also be a liability. A lack of flexibility can lead to deadlocks and may result in lost opportunities for both parties.

For instance, a junior lawyer might insist on stringent indemnification clauses without recognizing that this could be a deal-breaker for the other side. While indemnification is undoubtedly important, an experienced lawyer might find a middle ground that offers adequate protection without risking the deal.

5. Balancing Flexibility and Client Interests

As stated previously, in the dynamic world of Mergers and Acquisitions, flexibility is frequently praised. The ability to adapt, pivot, and discover innovative solutions can determine the success or failure of a deal. This flexibility, however, is not without constraints. A fiduciary duty to safeguard the client's best interests lies at the core of every M&A transaction. So, how can an M&A lawyer balance the requirement for flexibility with the imperative to protect the client's objectives? Let's take a closer look at this delicate balancing act.

The Fine Line: Negotiation flexibility is not a license to compromise on issues that are crucial to the client's interests. From the client's perspective, certain aspects of the transaction may be non-negotiable, including the valuation of the target company, the structure of the payment terms, and the scope of indemnification clauses. Understanding this thin boundary is essential. This is where the lawyer's duty of loyalty comes into play, as a governing principle that establishes the limits of flexibility.

The Concept of 'Red Lines': One practical approach to balancing flexibility and client interests is the concept of 'red lines'—pre-defined boundaries beyond which negotiations will not go. These red lines are usually established in consultation with the client and serve as a framework within which the lawyer can exercise flexibility.

For example, the client may specify that they are not willing to go above a certain price or that certain assets must be excluded from the deal. These become the red lines that guide the lawyer's negotiations, allowing for creative problem-solving within those parameters.

If-Then Scenarios: Another strategy for maintaining this balance is the use of conditional flexibility, often framed as 'if-then' scenarios. This involves making certain concessions contingent upon receiving specific benefits in return.

For instance, in a situation where the seller is demanding a higher upfront payment, a seasoned M&A lawyer might propose a milestone-based payment strategy. This allows the buyer to make smaller initial payments, with additional payments triggered by the achievement of specific milestones. This strategy offers flexibility to the seller while safeguarding the buyer's interest by tying payments to performance.

6. When to Walk Away

There are instances when the most prudent course of action is to do the unthinkable: walk away. This is the polar opposite of the M&A lawyer's mission, a scenario that no one enters a negotiation room wanting to face. But recognizing when to abandon a deal is as important as knowing how to close one.

Every deal has its challenges, but not all challenges can be resolved. Certain red flags serve as non-negotiable deal breakers, signaling that it's time to exit the negotiation table. These could range from unsolvable and unacceptable legal issues, such as antitrust violations, to financial discrepancies that can't be reconciled.

Another scenario where walking away might be the best option is when the cost of closing the deal—be it financial, reputational, or emotional—outweighs the potential benefits. This is often a complex calculation, involving not just quantitative metrics but also qualitative judgments.

On the other hand, it is important to understand that the decision to walk away from a deal should never be taken unilaterally by the lawyer. It's the client's decision, made in close consultation with the lawyer. Thus, effective communication is crucial here, as the lawyer must clearly explain the risks and potential downsides, enabling the client to make an informed decision.

VIETNAM'S EVOLVING ANTI-MONEY LAUNDERING LEGISLATION: A TIMELINE

By **TRAN V. HAI (HERMAN)**
Partner at
Herman, Henry & Dominic

Money laundering is a process of transforming and obscuring the origins of funds acquired through criminal conduct. Essentially, this practice involves the manipulation of criminally-derived wealth to disguise its illegal origins, presenting it as legitimate earnings. Perpetrators engage in a variety of schemes such as complex financial transactions, business investments, or the trade of high-value assets, with the objective of converting 'dirty money'—money tainted by criminality—into 'clean money,' which appears to have a legal source. This article examines the evolution and intricacies of Vietnamese legislation aimed at combatting complex financial crime, charting its evolution and adjustments throughout time.

1.The Era from 1999 to 2012

The Vietnamese legal framework began to address money laundering in the 1999 Penal Code, initially categorizing it under the broader offense of "legalizing proceeds from crime." The term "money laundering" was formally recognized in Vietnamese criminal jurisprudence following the 2009 amendment to the Penal Code. The updated legislation substituted the prior offense with a more specific designation—money laundering. Notably, the 2009 Penal Code refrained from providing an overarching definition of money laundering, instead delineating a set of specific actions that constitute the offense. These stipulated actions are largely in accordance with the provisions established in the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

A significant milestone was achieved on November 30, 2011, when the Supreme People's Court, in collaboration with the Ministry of Public Security and other relevant bodies, promulgated Joint Circular No. 09/2011/TTLT-BCA-BQP-BTP-NHNNVN-VKSNDTC-TANDTC. This directive explicitly detailed the behaviors that fall under the ambit of the money laundering offense as outlined in the 2009 Penal Code revision.

2.The Era from 2012 to 2022

This era marked a significant evolution in Vietnam's approach to combating money laundering, aligning more closely with international standards.

The landmark Anti-Money Laundering Law (AML Law) was introduced by the National Assembly in 2012, establishing a formal definition of money laundering as the process of legitimizing the origins of assets derived from criminal activities. This law broadened the scope of entities required to report high-risk transactions. These included various financial organizations engaged in activities such as deposit acceptance, lending, financial leasing, and payment services. Additionally, non-financial entities involved in businesses like prize-winning games, real estate management and brokerage, trading in precious metals and gems, as well as service providers in accounting, legal services, and enterprise management, were also mandated to report.

A key advancement with the AML Law was the introduction of preventative measures against money laundering, delineating the responsibilities of state agencies and stakeholders in this fight, and establishing protocols for international cooperation.

The criminal law perspective on money laundering remained largely consistent with prior legislation, but with noteworthy enhancements. The 2015 Penal Code, which replaced the 2009 version, provided more detailed provisions in Article 324 regarding the handling of assets obtained from various criminal sources. It outlined penalties for individuals involved in such crimes, with imprisonment ranging from 1 to 15 years, and introduced sanctions for legal entities, including substantial fines and potential suspension or cessation of business operations.

The 2015 AML Law refined the categorization of money laundering into four distinct activities: (i) engaging in transactions to obscure the illegal origins of criminally obtained money, (ii) using criminal proceeds in business operations or other activities, (iii) concealing or impeding the identification of information about the origin and nature of these proceeds, and (iv) involvement in transactions or activities related to the transfer, movement, or conversion of criminal proceeds.

Further clarifications were provided by the Council of Judges of the Supreme People's Court through Resolution No. 03/2019/NQ-HDTP, issued on May 24, 2019. This resolution elucidated critical terms such as "money or property obtained from crime" and expanded the list of predicate offenses leading to money laundering. It also detailed circumstances that constitute the crime and the factors influencing the sentencing framework, thereby enhancing the legal understanding and enforcement of money laundering regulations.

3. The Era from 2022 to the Present

Despite previous measures, Vietnam's placement on the Financial Action Task Force's (FATF) increased monitoring list (the Grey List) persisted. In a decisive effort to address this, the Vietnamese National Assembly passed the new Anti-Money Laundering Law of 2022 on November 15, 2022, superseding the 2012 version. This law introduced substantial amendments, bolstering Vietnam's anti-money laundering framework. Following this, the Government and the State Bank of Vietnam issued Decree No. 19/2023/ND-CP and Circular No. 09/2023/TT-NHNN on April 28, 2023, and July 28, 2023, respectively, to further detail and guide the implementation of this law.

(i) Expanded Scope of Reporting Entities

Reflecting the dynamic economic landscape, the 2022 legislation broadened its ambit to encompass additional entities such as securities brokerage services, investment fund management, and securities portfolio management.

(ii) National Risk Assessment

A pivotal addition in the 2022 law is the provision for a national risk assessment related to money laundering. Every five years, the State Bank of Vietnam, in collaboration with relevant Ministries and sectors, is tasked with conducting this assessment and formulating a subsequent action plan for Government approval. The law delineates the roles and responsibilities of the Government and various Ministries in this collaborative effort.

(iii) Enhanced Prevention Measures

The law introduces more nuanced customer identification criteria, distinguishing between various categories of individual customers, including Vietnamese nationals, foreign nationals (residing or non-residing in Vietnam), dual/multiple nationality individuals, and stateless persons. It specifies the identification information required for each category and their representatives.

In terms of customer risk level classification, the new law adds an intermediate risk category to the existing low and high-risk categories, revising the criteria and assessment procedures for greater accuracy and relevance.

The law also updates and amends suspicious indicators for sectors like securities, insurance, and payment intermediaries, identified as having a medium-high to high risk of money laundering. Decision No. 11/2023/QD-TTg dated April 27, 2023, further adjusts the threshold for large-value transaction reporting from 300 million to 400 million VND for certain non-financial business sectors.

Entities with reporting obligations are mandated to implement comprehensive customer due diligence, risk assessments, and transaction controls. Non-compliance may result in substantial administrative penalties, as outlined in Decree No. 88/2019/ND-CP.

(iv) International Cooperation

The 2022 law establishes principles for international cooperation in anti-money laundering efforts. These principles emphasize respect for independence, sovereignty, national security, mutual benefit, adherence to national laws and international treaties, and bilateral agreements. In instances without existing treaties or agreements, information exchange and cooperation are based on reciprocity, while ensuring compliance with Vietnamese and international law and customs.

In recap, the evolution of Vietnam's anti-money laundering legislation reflects a determined and ongoing effort to align with global standards and combat financial crimes effectively. Starting from the initial legal provisions in the 1999 Penal Code to the comprehensive and detailed Anti-Money Laundering Law of 2022, Vietnam has demonstrated a progressive commitment to identifying, addressing, and preventing money laundering activities. These legislative changes, along with the corresponding decrees and circulars, not only enhance the regulatory framework but also signal Vietnam's dedication to international cooperation and compliance with the Financial Action Task Force's guidelines. As Vietnam continues to adapt its legal system to the dynamic nature of global finance and crime, these laws serve as a testament to the country's resilience and responsiveness in the face of complex financial challenges. The journey of Vietnamese anti-money laundering legislation is a vivid example of legal adaptation and reform, striving to safeguard the integrity of its financial systems and contribute to the global fight against money laundering.

By **PAUL DOMINIC**
Partner at
Herman, Henry & Dominic

‘QUID JUS? AND ‘QUID JURIS?’

The jurisprudence, also known as philosophy of law, traces its origins to the early 19th century when Georg Wilhelm Friedrich Hegel, a seminal German philosopher, introduced his influential work, “Elements of the Philosophy of Right” in 1821 and, shortly after, the English philosopher John Austin contributed to the discourse with his publication, “The Province of Jurisprudence Determined,” in 1832.

Despite such beginnings, the roots of jurisprudence extend back to ancient times. Greek philosophers, notably Aristotle, had already engaged in deep reflections on the nature of law, leaving a legacy that continues to be a subject of study in contemporary jurisprudence.

1. What is Jurisprudence ?

Jurisprudence is a discipline that seeks to understand and expound upon the very essence of law. Its primary purpose is to explore the fundamental concepts, purposes, and principles underlying the law. In modern times, the jurisprudence has become an integral part of legal studies globally, standing alongside other legal theories in law school curricula.

The role of jurisprudence can be multifaceted. It encompasses various tasks, including: (1) defining law and elucidating the principles that constitute the juridical science; (2) offering a distinct methodology for the juridical science; (3) examining law through a sociological view; (4) introducing and clarifying concepts of law; and (5) suggesting legal policies from a 'de lege ferenda' perspective ('de lege ferenda,' a Latin term, refers to the concept of law as it should be or could be in the future, often used in contrast to 'de lege lata,' which means the existing law).

To fully appreciate jurisprudence, it is crucial to delineate its scope and distinguish it from related fields such as philosophy, juridical science, sociology of law and political philosophy. Although there are intersections, each field has its unique focal point.

A key debate in the legal academic community is whether the general theory of law, which aims to define the concept of law and its basic notions, should be considered a part of the jurisprudence. Some scholars argue that the general theory of law falls under the juridical science due to its focus on defining and connecting general concepts of law. Others, however, contend that the general theory of law and the jurisprudence are distinct, because the former goes beyond the mere definition of general concepts to critically analyze legal doctrines and their evolution in response to changes in positive law.

2. 'Quid jus?' and 'Quid juris?'

A central inquiry in jurisprudence is encapsulated by two questions posed by Immanuel Kant, another towering figure in German philosophy, in his work "The Metaphysical Elements of Justice." Those questions are "Quid jus?" (What is law?) and "Quid juris?" (What is of law?).

The first question, "Quid jus?", invites a broad examination of law as a concept, provoking thoughts on the nature of justice and injustice. In contrast, "Quid juris?" delves into the practicalities of law, focusing on its manifestation as a set of legal rules in reality, i.e. positive law. Kant argued that the juridical science might not provide a definitive answer to "Quid jus?", but it could address "Quid juris?".

This distinction underscores a fundamental point: while the juridical science deal with the study and application of law, the jurisprudence defines what law is in its universal concept. A definition of law lies outside the purview of specialized branches of law, but remains a cornerstone of jurisprudence.

Historically, societies always have positive law — sets of enforceable legal rules and institutions designed to guide social conduct. These systems, varying across time and cultures, are the study focus of the juridical science.

Juridical science is broadly categorized into public law and private law, each further subdivided into specialized subects.
For instance, public law includes areas like international law and constitutional law, while private law covers fields such as civil law and commercial law.

Kant further explores this dichotomy in his essay "The Conflict of the Faculties", where he distinguishes the roles of the jurist and the philosopher. He suggests that the jurist is primarily concerned with the study and application of positive law. In contrast, the philosopher's realm includes probing the essence of justice itself.

Jurisprudence's domain extends beyond the practical application of law, which is the primary concern of the juridical science. Jurisprudence delves into the broader, more abstract notions of what law is and should be.

In summary, jurisprudence transcends the practicalities of legal doctrines and positive law. It engages in a deeper, more critical exploration of the law, its underlying principles, and its potential future developments, thus contributing significantly to the broader discourse on legal theory and practice.

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VIETNAMESE BOND FINANCING **COLLATERAL UNDER THE LENS**

In this article, we provide an insightful look at the critical solutions for dealing with diverse collateral difficulties and the dynamic techniques required to react to shifting collateral tactics.

1. Current Framework

In the complex world of finance, companies often resort to bond issuance as a mechanism for raising capital. These bonds constitute a form of debt financing, where the investors extend funds to a company in exchange for future repayment with interest. While this mechanism typically functions seamlessly in stable market environments, it can present complex issues during periods of stock market volatility, particularly in respect to the collateral securing these bonds.

In this context, collateral is an asset pledged by bond issuers as security for bond repayment. It's akin to using your home as collateral for a mortgage loan. If the bond issuer fails to meet its repayment commitments, the investors have the right to seize the collateral. Initially, bond issuers use stocks as collateral, either their own, those of subsidiaries, or those held by their shareholders. But what if the value of these stocks falls significantly? In such circumstances, the bond issuer must find other assets, such as real estate, to maintain the collateral's value.

2. Selection of Bondholders' Representative

Prior to the issuance of bonds, the bond issuers will appoint a representative for the bondholders. The representative is either a depository member of the Vietnam Securities Depository and Clearing Corporation (VSD) or a securities investment fund management company. It's important that this representative shall not be too closely connected to

the bond issuers. Also, they shall not be a guarantee for the bond issuer's payments, own the collateral, or be a significant shareholder or related person of the bond issuer. In cases where the bonds are backed by collateral, the representative assumes the role of receiving and managing the collateral and safeguarding the bondholders' interests by enforcing the collateral.

3. Collateral Management Entities: Securities Companies vs. Banks

Depending on the nature of the collateral, collateral is often managed by either a securities company or a bank. They play an important role in ensuring that bond issuers follow all of the rules and agreements relating to bond issuance. Securities companies are often selected for maintaining stock-based collateral due to their particular experience and regulatory framework. However, it is critical to understand that they are not authorized to manage real estate assets as collateral. This constraint derives from unique regulatory regulations as well as the specialized knowledge necessary in real estate management. Banks, on the other hand, have the legal power and operational competence to manage a broader range of collateral, including both stocks and real estate. Their legal standing and the full regulatory structure within which they operate facilitate this larger spectrum of capacity.

The handling of real estate as mortgage collateral is strictly regulated under Vietnamese legislation. In Vietnam, only regulated credit institutions are permitted to accept real estate as mortgage collateral from corporations. Banks, which are classed as credit institutions under the credit institution law, are thus legally authorized to handle real estate mortgages. Securities companies in Vietnam, on the other hand, are barred from obtaining this authorization because they are not recognized as credit institutions.

4. Solutions for Managing Different Types of Collateral

However, securities law provides a solution in situations where the bonds are publicly offered and the appointed representative is prohibited from receiving certain types of collateral due to specialized regulation. In such cases, the representative is required to appoint a third party to manage the collateral. There are two possible outcomes:

A. Representative Replacement:

The representative may consult with the bondholders to consider replacing the representative. Such a change necessitates the approval of at least 65% of the total outstanding bonds of the same type. It also requires amendments to various documents, including the agreement with the representative, the bond terms and conditions, and any other related documents. This process ensures a smooth transition to a new representative who is capable and legally authorized to manage the collateral.

B. Appointing a Third Party:

Alternatively, the representative can continue to act as an intermediary amongst the bond issuer, bondholders, and other related parties, fulfilling all of their other responsibilities as outlined in the original agreement except for receiving and managing collateral. A third party would be appointed specifically for this purpose, ensuring that the collateral is managed by an organization or institution legally authorized and equipped to handle such responsibilities.

5. Adapting to Changes in Collateral Strategy

In the actual world of bond issuance, situations can arise where a bond issuer must adapt its collateral strategy, such as switching from stocks to real estate or adding real estate to its existing collateral portfolio. This shift often necessitates a change in the entity responsible for managing the collateral. If the initial collateral was in the form of stocks managed by a securities company, and the new or additional collateral is real estate, the representative typically needs to transition the role of collateral management to a bank. This is because, as previously discussed, banks are legally authorized to manage real estate assets, whereas securities companies are not.

In these scenarios, retaining the current representative while appointing a bank to take over the management of the new real estate collateral can streamline the process. This approach minimizes the need for extensive modifications in the bond's terms and conditions, and reduces the administrative burden. The existing representative continues to fulfill their role, ensuring that the bond issuer remains compliant with the bond terms and conditions, and executed agreements. Meanwhile, the bank, as the new collateral manager, takes on the responsibilities associated with managing the real estate assets.

6. Public vs. Private Bond Offerings: Differences in Collateral Management

It's critical to understand that these above-mentioned practices are primarily pertinent to public bond offerings. Public offerings are those where bonds are made available to the public. In this context, the rules and procedures around collateral management, including the appointment of representatives and collateral managers, are often more standardized and regulated to protect a broader range of the investors.

Conversely, in private bond offerings, where bonds are sold to a select group of investors, the rules and practices can be different. Private offerings often involve more tailored arrangements that can be negotiated based on the specific needs and agreements between the bond issuer and the investors. This adaptability allows for different approaches to collateral management, representative roles, and other terms of the bond issuance. The nature of these private transactions often means they are subject to less stringent public disclosure and regulatory requirements than public offerings, allowing for more customized and negotiated terms.

NAVIGATING THE INVESTMENT MENU:
A CULINARY GUIDE TO FUND STRUCTURES

By **TRAN D. HOANG (HENRY)**
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Picture a vast food market, where each stall represents a unique way of serving and presenting dishes. In the world of finance, these stalls can be likened to various fund structures, each designed for specific investment needs and preferences. However, understanding these different structures can often feel like navigating a complex menu in a foreign cuisine. In this series, we aim to demystify these complexities. By using straightforward analogies and relatable examples, we'll break down and explain some of the most common fund structures, making them easy to grasp.

1. Master-Feeder Structure

Imagine you're at a grand dinner party, and everyone is being served food from a central kitchen. Think of this kitchen as the **master fund**. Now, each table at this party represents a different group of guests with their unique dining preferences. These tables are your **feeder funds**. Even though they're all enjoying meals from the same kitchen, some might have dietary restrictions or specific tastes.

In the financial world, the master-feeder structure works somewhat similarly. Here's a breakdown:

The Central Kitchen (Master Fund): This is where the magic happens. Hedge funds use a master-feeder structure to pool money both from local and overseas investors. This centralized fund, the master fund, handles all the investment decisions and trading. It's the heart of operations.

The Dining Tables (Feeder Funds): Investors pour their money into these feeders. Think of them like specific bank accounts or pots of money. Once the cash is in, these feeder funds buy "shares" in our central kitchen (the master fund). Just like you'd buy shares in Apple or Google.

- The twist? When a feeder fund buys into the master fund, it gets its share of the master fund's income - from interest, gains, and even dividends.

The Bill (Fees): When it's time to pay, charges like management and performance fees are settled at the feeder fund level, not the central kitchen.

Variety is the Spice: Now, not all tables at our dinner want the same thing. Similarly, feeder funds can have their own flavors. They can vary in the type of investors they cater to, fee structures, minimum investment amounts, and more. They aren't tied to one specific master fund recipe and have the freedom to invest in various master dishes.

Popularity in the Hedge Fund World: While this two-tiered setup might remind you of other structures, like "funds of funds," it's a star player in hedge funds. Why? It lets fund managers gather a lot of capital (from that grand dinner party) but still offer dishes that cater to specific tastes.

The Common Setup: Usually, you'll find one main offshore master fund paired with two feeders: one domestic and one international. It's a dance of variety and choice, allowing for a range of investment tastes and needs.

In essence, the master-feeder structure provides the perfect blend of centralized efficiency and customized flexibility. It's all about having a grand dinner party but ensuring everyone gets their preferred dish.

2. Fund of Funds (FOF)

Imagine walking into a gourmet food hall, where each stall offers a unique delicacy from various cuisines around the world. Instead of tasting just one dish, you get a sampler platter, allowing you to enjoy bits from multiple stalls. This is the essence of a **Fund of Funds (FOF)**.

Here's a simple breakdown of this gourmet investment approach:

What's on the Platter?: At its core, an FOF is a pooled investment pot. But instead of directly buying ingredients like bonds, stocks, or other securities, it buys "tastes" from other fund stalls. Essentially, its portfolio is a delicious mix of other funds' portfolios.

Where Does It Shop?: An FOF typically fills its basket from other mutual or hedge funds. But here's the catch – it can either have a favorite shopping list or a wanderlust for variety.

- Favorite Shopping List (Fettered): It only picks from stalls (funds) managed by its home food company (managing company).
- Wanderlust (Unfettered): It's adventurous and can select from any stall in the market, regardless of the chef or company behind it.

A Taste of Everything: The magic of FOF lies in its aim for a diversified tasting experience. It aims to offer bites from various fund categories, all assembled on one platter for the investor to relish.

Variety of Dishes: Just as food halls offer everything from sushi to pasta, FOFs come in different varieties. They can be structured as mutual funds, hedge funds, private equity funds, or investment trusts. And remember, they can stick to a favorite list or be adventurous in their selection.

Why Order the Sampler Platter?: FOFs are perfect for those foodies (investors) who don't want to risk eating a whole plate of something unfamiliar. Instead of directly diving into the vast sea of securities or sticking to just one fund, an FOF offers them a curated tasting experience, managed by professional chefs (wealth managers).

Accessibility to Gourmet Delights: Some gourmet stalls, especially those fancy hedge funds, have a high price tag or exclusive entry requirements. But with an FOF, even those with a modest appetite and budget can get a taste of these exclusive investment flavors, which might be out of reach if approached directly.

In the vast food hall of investments, an FOF offers a delightful tasting journey, blending both safety and variety. So, for those unsure of what investment cuisine to indulge in, an FOF sampler platter might just be the answer.

3. Parallel Fund Structures:

Imagine you have two favorite restaurants sitting side by side on a bustling street. Both serve nearly identical exquisite dishes. One, however, is tailored for local diners, while the other caters to international food enthusiasts. This is the flavor of **Parallel Fund Structures**.

Let's dive into this culinary world of finance:

Why Two Restaurants?: Parallel fund structures are like having twin restaurants to cater to a wider crowd. They offer personalized menus, suiting diners' unique tastes and dietary requirements, while still serving dishes from the same beloved recipe book (portfolio of assets).

Twin Dining Experience: Each parallel fund (restaurant) operates alongside the main fund (primary restaurant). They buy ingredients (invest) and update their menu (divest) at the same rhythm, usually matching each other bite for bite (on a pro rata basis). Their kitchen operations and menu policies are pretty much in sync.

Why Not Just One Big Restaurant?: Each parallel fund (or restaurant) might have small tweaks in its setup. These aren't just whimsical changes, but

adaptations made to ensure the place suits the dining (regulatory, tax, or investment) requirements of its patrons.

Delectable Features of Parallel Restaurants: While these eateries are twins, they boast some standard features that make them shine:

- Same Master Chef (Fund Manager): Both places are run by the same culinary genius, ensuring consistent taste and quality.
- Nearly Identical Menus: Diners enjoy the same, or almost the same, delicious dishes in both restaurants.
- Unified Cooking Philosophy: Both places source ingredients, create dishes, and even manage their staff in much the same way.
- Shared Responsibilities: If one restaurant faces a hiccup, like an ingredient shortage or unexpected expenses, its twin is there to share the burden.

In essence, parallel fund structures are about casting a wider net, capturing the varied tastes and needs of investors, while ensuring they all get to savor the delicious offerings of the main portfolio. So, whether you're a local food lover or an international gourmet, there's a seat waiting for you in this twin-dining world!

4. Umbrella Funds:

Imagine walking into a grand culinary plaza, where under one giant roof, you find an array of unique eateries, each specializing in different cuisines. From spicy Asian delights, classic European pastries to fresh Mediterranean salads, each stall is a world in itself. This is what an **Umbrella Fund** feels like in the investment realm.

Let's embark on this gourmet tour:

One Plaza, Diverse Cuisines: An umbrella fund is like this culinary plaza. It's one entity, but inside, it houses a myriad of distinct food stalls (sub-funds). Each stall has its special recipes (investment strategies) and flavor profiles (risk levels). Yet, they all operate under the same health and safety regulations (legal and regulatory framework).

Why Wander Multiple Streets?: Instead of wandering through numerous streets (setting up multiple funds) to savor different cuisines, just stroll through this plaza. Fancy some spicy equity? Or perhaps a mild bond soup? Maybe even a fusion dish from alternative investments? The choice is yours. You pick what satisfies your palate (investment needs).

Famed Culinary Plazas: Think of HSBC Investment Funds or UBS Funds as renowned culinary plazas. They're well-established, house a variety of food stalls (sub-funds), and are recognized in popular locales (like Luxembourg).

Master Chefs at Work: These stalls are run by the crème de la crème of chefs (professional asset management firms or financial institutions). They are masters in their respective cuisines, ensuring that each dish (sub-fund) they serve is crafted with expertise. They use the finest ingredients (assets), and their recipes (strategies) are tailored for optimal taste and satisfaction (returns).

Personalized Dining Experience: When you spend at this plaza, you decide where your money goes. Each stall operates individually, with its flavors, recipes, and culinary rules. This means you can indulge in a spicy dish (high-risk asset) here, and a mild dessert (low-risk asset) there, diversifying your meal experience and ensuring you don't end up with just a fiery mouth (risk of single asset class)!

In essence, umbrella funds are your one-stop culinary plazas in the investment world. They offer a bouquet of flavors, managed by the best chefs, and let you enjoy a diversified dining experience tailored to your taste and hunger levels.

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VENTURING INTO VIETNAM:

INSIGHT TO PRIVATE EQUITY INVESTMENTS

In the ever-evolving global financial landscape, Private Equity Funds (PE Funds) have become a potent investment tool. These funds, like silent partners, inject capital into promising young companies, aiming to reap returns through strategic acquisitions, investments, and eventually, the sale of equity stakes. While the inherent risk of PE investments may raise eyebrows, the potential for high-yield returns and exponential growth often trumps concerns. The worldwide PE market has seen an incredible expansion, fueled by both ambitious investors and enterprises seeking alternative financing solutions, and Vietnam is no exception.

This vibrant Southeast Asian nation, with its tech-savvy population and burgeoning entrepreneurial spirit, has seen the emergence of a diverse landscape of small and medium-sized enterprises (SMEs). These young businesses, brimming with enthusiasm and creativity, are the backbone of Vietnam's economic development. However, their lack of capital often hinders their growth potential. This is where the PE market steps in, bridging the gap between ambitious dreams and financial realities.

1. The PEs

Unlike regulated ventures like stock investment funds, PE Funds are commonly established and operated under the general umbrella of corporate law. This means no specific license or stringent securities regulations apply, offering a seemingly smoother path. While foreign investors can participate in PE activities, establishing or having a majority share in Vietnamese private equity funds involves various legal challenges, such as:

Governmental Approval: Obtaining an Investment Registration Certificate (IRC) or approval for capital contributions, share purchases, or acquisitions becomes mandatory for foreign investors entering the Vietnamese PE market.

Antitrust Measures: When PE deals reach a certain threshold, both the PE fund and the target company must notify the National Competition Commission. This applies, for instance, if a PE fund acquires all shares or a controlling stake in a target company valued above 1,000 billion VND.

Tax Complexities: While PE business profits derived from share transfers or contributed capital are taxed at a flat 20%, the road to determining taxable profits can be intricate. Tax authorities may hold different perspectives and stipulations regarding transfer prices, especially when they deviate from market value or recorded book value.

2. The Targets

In the fast-paced world of Vietnamese PE market, putting together the correct deal structure is critical. Whether it's a tech startup or a seasoned manufacturer, each target company necessitates a tailored approach, addressing challenges from investment to divestment.

Building the Foundation: Share subscription agreements (SSA) and share purchase agreements (SPA) form the backbone of PE transactions in Vietnam. These agreements typically involve PE funds acquiring an initial minority stake in the target company, often paired with an option to purchase additional shares later on, unlocking greater control and influence as the partnership evolves.

Navigating Complexities: When circumstances demand more intricate solutions, instruments like convertible loans and preference shares come into play. These structures offer greater flexibility and control for the PE fund, allowing them to convert debt into equity or receive preferential dividends. Special purpose vehicles (SPVs) can further enhance efficiency by optimizing taxes and adding a layer of legal separation.

Joining Forces: For foreign PE Funds traversing Vietnam's restricted industries, cooperating with domestic counterparts through partnership agreements or establishing joint ventures is critical. This collaboration opens up access to previously unexplored markets and uses both sides' expertise, resulting in a synergistic force for growth.

While Vietnam's booming economy offers numerous prospects, navigating the country's legal system and administrative landscape demands careful planning. By developing well-defined business strategies, seeking expert legal counsel, and meticulously crafting transaction structures, PE Funds can navigate the Vietnamese market with confidence, minimizing risks and maximizing their potential for success.

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BUSINESS REGISTRATION PROCEDURES DURING INTERNAL CORPORATE CONFLICT

Declaration and Legal Responsibility: Founders or the enterprise itself are mandated to declare their registration documents. They bear full legal responsibility for the legality, honesty, and accuracy of the information provided in these documents, including any reports.

Scope of Authority: The business registration authority's role does not extend to mediating disputes among company members, shareholders, or between the enterprise and external parties.

Representation in Limited Liability and Joint-Stock Companies: In scenarios where these companies have multiple legal representatives, the representative handling business registration is charged with ensuring and being accountable for the lawful exercise of their rights and duties as per legal stipulations.

1. Current Framework

The latest law on enterprises and its related regulations (together referred as the "Enterprise Law") mark a significant liberalization and simplification of business registration procedures. These regulatory changes aim to streamline the process, reduce bureaucratic red tape and associated costs for businesses, and thus enhance overall efficiency in business operations.

The framework establishes that the responsibility of the business registration authority is limited to verifying the authenticity of enterprise registration documents. It expressly releases this authority from all liability for legal infractions committed by an enterprise before to or after registration. Let's go into the details:

Use of Seals: A noteworthy relaxation is seen in the non-mandatory use of seals on certain documents, such as business registration applications, change notifications, resolutions, and minutes included in the business registration dossier. However, the application of seals on other documents within the dossier is governed by relevant legal norms.

These reforms clearly articulate a paradigm shift in the approach of business registration authorities. Their role is now more defined as record-keepers based on the validity of documents submitted by businesses and individuals, steering clear of involvement in a company's internal affairs. This shift not only simplifies and eases the business registration process but also strategically circumvents potential entanglements in internal corporate disputes, paving the way for a more business-friendly environment.

2. Case Study

Under the former regulatory framework governing business registration, internal disputes within a company often led to a standstill in processing registration documents by the business registration authority. This deadlock would, in turn, halt the company's operations, leaving it in a state of operational paralysis. However, the advent of the currency Enterprise Law has brought about a notable shift in this process.
The following case study of a pharmaceutical company shows important developments in the legal framework for business registration, particularly in the area of internal corporate disputes.

In this scenario, the company faced a deadlock when Mr. A, who owned a minority investment but served as Chairman and Director, was fired by the main stakeholders, Mr. B and Mr. C, for management infractions. Mr. A's unwillingness to convene or attend the Members' Council meeting, as well as his possession of the business seal, posed an obstacle to the formalization of corporate leadership changes.

However, under the current framework of the Enterprise Law, the necessity of a company seal for business registration change forms has been abolished. This change permits Mr. B and Mr. C to submit the Business Registration Dossier, including the Notification of change of legal representative and the relevant Decision and Minutes of the Members' Council meeting, without the need for a seal. This dossier, being complete and fully declared, satisfies the requirements of Article 4, Clause 20 of the Enterprise Law, ensuring its validity.

Under the previous regulations, such a situation would have led to prolonged legal disputes. The inability to submit a business registration application without the company seal, as required by the former regulations, meant that Mr. B and Mr. C's decision to appoint Mr. B as the new Chairman and Director could not be officially recognized. This impasse typically necessitated legal action against Mr. A for managerial misconduct, with the resolution potentially taking years, during which the company's operations would be severely hampered.

The business registration authority, therefore, is obligated to process this change. With the registration of a new legal representative, in this case, Mr. B, the company can circumvent the obstructive behavior of Mr. A. Additionally, the company has the option to register a new seal, allowing for uninterrupted business operations.

This instance demonstrates the effectiveness of the new regulations in resolving internal corporate disputes more efficiently than before. The elimination of the seal requirement in the business registration process not only expedites the resolution of such disputes but also ensures that the company's operations are not indefinitely stalled due to conflicts over legal representation. This is a significant stride towards fostering a more business-friendly environment, reducing unnecessary legal entanglements, and promoting smoother corporate governance.

SECURING YOUR SIGNATURE: **TRADEMARK PROTECTION IN VIETNAM**

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Trademarks are critical, intangible assets in the business world, intertwined with the selling of goods and services. They're not just tools for trade; they're the essence of a brand's identity, setting businesses apart in a competitive market. To fully harness trademark rights, including transferring, franchising, or enforcing protection, a company must first traverse the legal minefield of registration. This process, overseen by specialized agencies, culminates in the issuance of a Trademark Registration Certificate. In this article, we will look at fundamental trademark principles. In addition, we will provide practical advice for businesses on the path to registering and protecting their trademarks.

1. Exploring the Spectrum of Trademarks

At its core, a trademark is a unique identifier, distinguishing the products or services of various entities. This broad umbrella includes several types, such as:

- Trademarks for goods and services: the classic symbols of trade.
- Collective marks: representing a group or association.
- Certification marks: signifying adherence to specific standards.
- Well-known trademarks: those with widespread recognition.

Vietnam's entry into the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the Vietnam-EU Free Trade Agreement (EVFTA) prompted a significant overhaul of its intellectual property laws. This led to the Vietnamese National Assembly enacting an amended Intellectual Property Law on June 16, 2022. This new legislation not only refines the definitions and procedures for trademark registration but also introduces sound marks into the fold. While comprehensive criteria for these sound marks are yet awaited, their inclusion is a big step forward.

2. Eligibility for Trademark Application Filing

In Vietnam, the right to file a trademark application is remarkably inclusive. Any individual or legal entity, irrespective of nationality, can apply, either directly or through a designated representative. Interestingly, trademark applications can also be filed in a collaborative effort by two or more applicants. This method leads to shared ownership of the registered trademark, which is advantageous for partnerships or joint companies.

3. Key Insights and Legal Nuances in Trademark Registration

a) The process to exclusive trademark protection concludes with the Intellectual Property Office of Vietnam issuing a "green card" or its electronic recording.

It's a common misconception that trademark protection begins either at the application submission, upon notification of a valid application, or after receiving an intent-to-grant notice. In reality, legal protection and the right to enforce trademark rights kick in only after the trademark is officially registered and a Certificate of Trademark Registration is granted.

This certificate serves as a legal foundation, granting the owner the permission to administer, transfer, assign, and defend their trademark rights. The move from applicant to rightful owner is a watershed moment in the trademark journey. Notably, under Vietnam's updated intellectual property laws, the shift towards electronic trademark registration certificates is evident. Physical copies are now secondary, provided only upon specific request at the time of application.

b) To qualify for protection, a trademark in Vietnam must satisfy two key legal criteria.

Firstly, it should be a visible sign such as letters, words, drawings, images, three-dimensional shapes, or a combination thereof, presented in color(s) or as a sound mark that can be graphically represented.

Secondly, the trademark must be distinctly capable of differentiating the owner's goods or services from others. This distinctiveness can stem from unique elements or a combination that forms a recognizable whole. Moreover, the trademark must not fall under the scenarios outlined in Article 73 (ineligible for protection) and Article 74.2 (lack of distinctiveness) of the Intellectual Property Law.

c) A common misconception is that trademark registration in Vietnam guarantees global protection.

In reality, trademark rights are confined to the territory of the issuing Certificate of Trademark Registration. To secure rights in other markets, entities must file separate applications in each territory.

On the other hand, Vietnam's participation in the Madrid system eases this process. This international system is a game-changer for businesses aiming to safeguard their trademarks across multiple countries. By filing application through Marid system in Vietnam, they can extend protection to numerous other member countries under these treaties. This streamlined approach is not only cost-effective but also a significant time-saver, simplifying the complex process of international trademark registration.

d) Vietnam operates on the "First to File" principle for trademarks.

This essentially means that the party who files the first trademark application has the upper hand. If multiple entities file for identical or confusingly similar trademarks for the same goods or services, the certificate is given to the application with the earliest filing or priority date, assuming all criteria are met. In cases when numerous

applications have the same priority or earliest filing date, a protective title is issued only if all applicants agree. If no agreement is reached, none of the applications will be protected. As a result, timely filing is critical for securing your trademark and avoiding legal issues when presenting your goods and services to the market.

e) A common misconception is that a trademark registration certificate grants blanket protection.

In practice, the certificate's protection is limited to the precise items or services stated on it. When registering, it is critical to precisely define the relevant goods or services, which must be classified according to the Nice Agreement's international categorization. The Intellectual Property Office of Vietnam is using version 12-2024 of this classification effective from January 1, 2024. Post-registration expansion of goods or services categories is conceivable, but requires careful study. It should be noted that failure to utilize the trademark for the registered categories for a continuous five-year period may result in calls for the trademark's validity to be revoked for those unused categories.

f) It's advisable to engage an intellectual property representative

People frequently fail to monitor the status of their trademark application. This can result in missed notifications by the Intellectual Property Office of Vietnam, resulting in missed opportunities to respond or act correctly within deadlines. It is advisable to hire an intellectual property representative to avoid such issues. They can efficiently manage and monitor your application, assuring prompt and suitable replies to judgments or notices by the Intellectual Property Office of Vietnam about the trademark application.

4. Trademark Registration Proces in Vietnam

In Vietnam, the trademark registration journey, overseen by the Intellectual Property Office, unfolds in a series of carefully structured steps:

- Application Submission: Applicants or their appointed industrial property representatives must submit their trademark registration applications to the Intellectual Property Office.

- Formal Examination: Within one month of filing, the Intellectual Property Office conducts a formal examination of the application and decides on its validity.

- Application Publication: The Intellectual Property Office publishes the application within two months following its deemed valid acceptance.

- Content Assessment: This phase, lasting no more than nine months from the publication date, involves a thorough assessment of the application's content. Following this, the Intellectual Property Office communicates its decision to either grant or refuse protection for the trademark.

However, the real-world timeline for evaluating a trademark application can extend far beyond these prescribed limits. In practice, it's not uncommon for this process to span 2-3 years, depending on the complexity of the trademark, the specifics of

each case, and any third-party objections or complaints during the evaluation period. This extended timeframe highlights the importance of patience and thorough preparation in the trademark registration process.

5. Navigating Trademark Status Checks and Strategic Brand Management

In the fast-paced world of strategic brand management, staying informed about the status of a trademark is crucial. Utilizing the right resources can provide a wealth of benefits for any business. Key platforms to explore includes Vietnam's Digital Library on Industrial Property, World Intellectual Property Organization (WIPO) Trademark Lookup, and Vietnam Industrial Property Official Gazette.

Leveraging these resources can greatly enhance a business's operational strategy. Potential advantages include:

- Evaluating Trademark Protectability: Assess the feasibility of a trademark before applying for registration.
- Avoiding Infringement: Steer clear of trademarks already protected by others.
- Challenging Competing Trademarks: Object to applications that infringe upon your marks or are strikingly similar.
- Monitoring Business Partners and Competitors: Stay updated on the trademark status of partners and keep an eye on potential or existing competitors.
- Managing Trademark Transfers and Assignments: Identify active trademarks suitable for transfer or assignment.

6. Conclusion

Trademarks are essential in building trust and a positive image among customers, clients, and partners. They are more than just symbols; they are strategic instruments that enhance a brand's reputation and distinctiveness, allowing it to stand out in a crowded marketplace. Filing for trademark protection on time and properly from the start is more than a formality; it's a wise move to gain a competitive advantage not just in Vietnam but also globally.

Anyone would be scared to try to understand how complicated the legal system is. But the stakes are much higher if you are a celebrity, a high-profile businessperson, or a person of social importance. Every contract, social media post, and even personal interaction has the potential to affect a person's job, reputation, and personal life. This higher level of scrutiny and risk shows how important it is to have specialized law services that are tailored to the unique problems and weaknesses that come with fame and social standing.

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WHY CELEBRITIES AND HIGH-PROFILE INDIVIDUALS NEED SPECIALIZED LAWYERS

This article will look at the important question of why celebrities and high-profile individuals need specialized lawyers. We will investigate how the high-stakes environment in which these individuals operate necessitaes a unique legal service. In a world where one mistake can have long-lasting effects, we will look at the many ways that lawyers are not only advocates, but also crisis managers, confidants, and useful resources.

1. The High-stakes Environment

Public Scrutiny: In this age of constant communication, celebrities and other well-known individuals are always under the spotlight. Posts on social media go viral in a matter of minutes, and news sites are always eager to get the latest scoop. Every action, no matter how small, can become a topic

of public discussion. This makes these people especially vulnerable to legal problems, from slander to invasion of privacy. In this kind of environment, expert lawyers play a very important role as both legal and strategic advisors. They help their clients find their way through the complicated maze of public opinion while protecting their legal interests.

Complex Financial Matters: The lives of the rich and popular are often complicated by money issues. It's normal for people to have more than one source of income, to do business across borders, and to have complex stock portfolios. In this case, the job of a specialized lawyer is especially important. Equipped with a deep understanding of tax law, business structures, and investment regulations, these lawyers can offer tailored advice that typical general practice attorneys may lack the bandwidth or expertise to provide.

High-Risk Contracts and Agreements: Even just in the entertainment business, there are many different kinds of contracts, from movie deals to licensing deals for personal brands. When you add in partnerships, endorsements, and the many other contracts that celebrities and other well-known individuals often sign, you have a legal minefield that only experts can navigate. Lawyers in this niche are adept at crafting contracts that not only protect their clients' interests but also anticipate potential future disputes, thereby reducing risks before they happen.

2. Specialization: What Sets These Lawyers Apart

Expertise in Specific Areas: One thing that sets apart lawyers who work with high-profile clientele is that they are experts in very specific areas of the law. This could mean knowing a lot about intellectual property laws, which are important for artists, writers, and singers, or specializing in defamation or privacy laws, which are often important to public figures and celebrities. This specialized knowledge makes sure that the client's specific worries are not only known, but also handled well.

Crisis Management Skills: Lawyers for celebrities and high-profile individuals wear many hats, and one of their most important roles is that of a crisis manager. When a scandal breaks or a potentially career-damaging event unfolds, these lawyers are often the first on the scene, ready to navigate the legal and public relations storm that follows. They coordinate with PR teams, draft press releases, and develop strategies to minimize both legal and reputational damage. Their value goes far beyond the courtroom; they are an important part of their client's crisis-response team.

Network and Resources: Specialized lawyers are also set apart by their extensive network of professional contacts, which can include everyone from top-notch accountants to criminal investigation experts. In high-profile cases, a multi-disciplinary approach is often needed, and having quick access to a wide range of experts can give clients a big edge.

High level of privacy and secrecy: When it comes to celebrities and high-profile people, privacy is not just a good idea—it's a must. In addition to the normal attorney-client privilege, these specialized lawyers often go above and beyond to follow strict rules of secrecy. To protect the client's privacy and image, this could mean encrypted communication channels or even off-the-record consultations with experts to safeguard the client's privacy and reputation.

3. BUILDING A LONG-TERM RELATIONSHIP BASED ON TRUST AND RESPECT

Navigating Continuous Legal Needs: Unlike a one-time law matter, celebrities and other high-profile people need legal help all the time. Whether it's a new endorsement deal, estate planning questions, or a sudden problem that needs help right away, these clients need a lawyer who is basically "on call." For such long-term service, you need a connection that goes beyond a simple business transaction and turns into a partnership. A specialized lawyer doesn't just give legal advice; they become a key member of their client's team and learn about their long-term goals, current concerns, and even personal preferences.

Personalized Service: Every client is different, but in the world of famous people, this difference often comes with a lot of complications. These lawyers offer a "concierge-like" service that is tailored to the needs of each client. For example, they can make non-disclosure agreements for personal staff and coordinate with foreign counsel for overseas ventures. This care for the little things builds trust and respect, which are the foundations of any long-term relationship that works.

Over time, the relationship between prominent clients and their specialized attorneys evolves. It's a connection that has grown over time through trust, specialized knowledge, personalized service, and an understanding of what's at stake on both sides. It goes beyond a normal relationship between an attorney and a client and becomes more like a partnership, one that is very important to the client's business and personal life.

4. CONCLUSION

The role of specialized lawyers in the lives of celebrities and high-profile individuals is comprehensive and irreplaceable. In an ever-changing legal landscape, their role continues to evolve, but the essence remains the same:

to offer an invaluable blend of expertise, service, and discretion, enabling their clients to focus on what they do best while resting easy, knowing that their legal affairs are in the most capable hands.

By **TRAN D. HOANG (HENRY), ESQ.**
Partner at
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The Titanic, despite its grandeur, was felled by an iceberg largely unseen. In the business world, many companies, blinded by ambitiason, overlook the 'legal icebergs' that lurk beneath the surface. While you may be focused on the visible challenges – market competition, financial projections, or brand management – it's often what you don't see that may pose the greatest risk

Prevention
is Better than
Cure:
Legal Insights from a Corporate Counsel

To the corporate visionaries reading this: remember the time your boardroom was buzzing with the thrill of a new deal, only to be later ensnared in the sticky web of litigation? As an attorney who has advised many executives, I have frequently observed how a minor error or omission in judgment can escalate into a substantial legal dilemma. Yet, time and time again, it's evident: "prevention is better than cure."

Imagine, for a moment, that instead of running a corporation, you're steering a massive ship. It's crucial for the ship to avoid icebergs not only because of the immediate damage but also because of the subsequent ripple effects. In a corporation, avoiding legal pitfalls isn't solely about the direct financial costs. The intangible consequences, like a tarnished reputation, stress, and deviation from your company's core mission, may pain far more.

The legal landscape, with its complexities and hazards, is not something to be taken lightly. A slight misstep can lead to regulatory penalties, tarnished reputations, or drawn-out legal battles. These can be avoided or, at the very least, mitigated. How? Through strategic planning and a steadfast commitment to prevention. Let us look at some preventive actions that corporate leaders can take:

Understanding the Legal Landscape: With ever-changing laws and regulations, it's essential for leaders to remain updated. Relying on legal counsel for guidance can help anticipate and prepare for forthcoming challenges.

Contract Reviewing: In the rush of closing deals and forging partnerships, it's tempting to skim over contracts or use templated agreements. Yet, the fine print matters. A rigorous contract review can forestall disputes about deliverables, payments, or intellectual property rights.

Internal Audits and Regular Check-ins: Much like routine health assessments, regular internal audits are essential. They help identify potential issues before they escalate. Frequent interactions with your legal team can further streamline processes and ensure compliance.

Corporate Training: Equipping your team with the appropriate

legal knowledge can be likened to fortifying your company's defenses. Regular training sessions on regulatory changes, contract law, or dispute resolution can foster a culture of legal mindfulness. This proactive approach not only safeguards individual employees but also strengthens the organization's overall resilience.

Crisis Management Plans: Even with the best preventive measures in place, unforeseen challenges can arise. Having a well-thought-out crisis management plan, crafted with the insights of your legal team, ensures you're well-prepared to tackle such situations head-on. Don't wait for a crisis to know your legal counsel. Build strong relationships with them, so they understand your business nuances and can offer tailored advice.

For the forward-thinking corporate leaders out there: while it might be tempting to push legal concerns to the back burner in favor of rapid expansion or immediate profits, such a strategy can be short-sighted. The true hallmark of enduring success is the ability to foresee, strategize, and act with prevention at the core of one's decisions.

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FROM CLAUSE TO COURTROOM: **EMPLOYER'S CLAIM AND CONTRACTOR'S CLAIM IN FIDIC CONTRACT**

The commentary of this article is limited to the FIDIC Red Book - The 1999 edition of the International Federation of Consulting Engineers' Conditions of Contract for Construction for building and engineering works designed by the Employer.

In the realm of FIDIC contracts, both contractors and employers are vested with the right to lodge claims against each other. These claims can pertain to extensions of project timelines or financial compensations grounded in the contractual agreement. For employers, the procedural route for claim submission is outlined in Clause 2.5, while contractors must adhere to the directives of Clause 20.1 of the contract.

Under Clause 2.5, the Employer must notify the Contractor of any claims for payment or extension of the Defects Notification Period, providing detailed substantiation based on specific clauses. This excludes certain utility and material costs. The Engineer assesses these claims, determining any owed payment or extension, which can be deducted from the Contract Price in Payment Certificates. The Employer's right to deductions or claims is confined to the terms of this provision.

Under Clause 20.1, a Contractor must notify the Engineer within 28 days of an event to claim an extension of time or additional payment. Failure to notify within this period results in the forfeiture of the claim and the Employer's release from liability. The Contractor must provide detailed claims with supporting evidence within 42 days of recognizing the event. If the event has ongoing effects, interim and final claims are required. The Engineer must respond to claims within 42 days after receiving the claims. Non-compliance with these procedures can affect the validity and investigation of the claim.

In general, these clauses require that a claim be initiated through a formal notice that painstakingly specifies the nature of the grievance and its basis in the contractual conditions. When such a claim is received, the engineer directed by Clause 3.5, initiates a process targeted at fostering mutual agreement. When agreement cannot be reached, the engineer is responsible for making an unbiased decision on the topic. This decision is legally binding until either side contests it, which could result in legal actions.

In FIDIC contracts, the term "Engineer" refers to a key role that is primarily responsible for administering the construction contract. This role is often filled by a professional engineering consultant or a firm hired by the project owner (often referred to as the Employer in FIDIC contracts).

A focal point of contention in many FIDIC contract disputes, particularly those revolving around project timelines or financial settlements, hinges on the obligatory nature of the claims process. The key question here is whether parties are required to seek resolution through the contract's specified claim processes before resorting to litigation. In this context, Vietnamese courts have demonstrated a variety of interpretations, showing a broad judicial perspective on this procedural requirement.

1. The perspective on the non-mandatory nature

In one prominent legal case, an employer launched arbitration procedures against a group of contractors for a building project governed by a contract based on the FIDIC Red Book 1999. The conflict centered on unpaid obligations that the investor alleged the contractors had failed to pay.

The arbitration, which was handled by a reputable arbitration center, ended in a verdict that mostly favored the employer, requiring the contractors to resolve the outstanding claims. The contractors, on the other hand, contested the ruling, claiming that it breached fundamental principles of contractual freedom and voluntary commitment. They claimed that the employer had not followed the contract's specified claim processes, rendering their right to claim contractor violations null and void.

The matter was brought before Ho Chi Minh city court for review. In their assessment, the court found that the lack of a specific clause preventing the filing of claims meant that the right to highlight contractor violations was not inherently forfeited. Furthermore, there was no evidence to show that the employer's entitlement to payment had been terminated. As a result, the court rejected the contractors' claim that the arbitral tribunal violated basic contract law rules. This decision quietly indicates the court's perspective on the non-mandatory nature of the claim procedure before proceeding to legal action.

2. The perspective on the mandatory nature

In a significant legal decision, the Supreme People's Court reviewed a case involving a subcontracting agreement related to a major construction project. The subcontract, mirroring the FIDIC Subcontract provisions, was between a subcontractor and the principal contractor, with the project being developed by a third party.

Following completion of their contractual obligations and receipt of the acceptance certificate, the subcontractor claimed payment from the principal contractor in accordance with the terms of their agreement. They also tried to hold the project owner (the employer) liable for these payments if the principal contractor failed to perform.

The subcontractor initiated legal proceedings to enforce this payment obligation against both the main contractor and the employer. The subcontractor was awarded joint payment by the principal contractor and the employer after the first-instance court found in his favor. This verdict, however, was challenged.

Upon appellate review, it was highlighted that, according to the contract, direct payment from the employer to the subcontractor was contingent on a specific condition: confirmation from the engineer that the principal contractor had defaulted on payment obligations (excluding retention money). The Supreme People's Court observed that there was no documented confirmation from the engineer regarding the main contractor's failure to pay, leading to the conclusion that the subcontractor's claim against the principal contractor and the engineer was unsubstantiated.

This cassation decision underscores the court's position on the procedural necessity of involving the engineer in claim validation. It implies that for a claim to be recognized under the court, the parties are required to seek resolution through the contract's specified claim processes before resorting to litigation

3. Key Takeaways

A review of numerous legal opinions issued by Vietnamese courts reveals a complex environment in interpreting claim procedures under FIDIC contracts. The discernible difference between the two above-mentioned courts' rulings highlights the variety in judicial approaches. While the Supreme People's Court highlights the need of routing requests through the engineer, the decision of the latter court implies that, while such a procedural step is available, it is not always required.

Given this judicial unpredictability, parties to FIDIC contracts in Vietnam are encouraged to strictly follow the stipulated claim processes. This alignment not only protects their interests but also aligns with the FIDIC standards.

For contractors, it is imperative to understand that under Clause 20.1, timely notification is crucial and acts as a prerequisite for the right to lodge a claim, particularly for requests related to time extensions or additional payments. Clause 20.3 further accentuates this, indicating that failure to comply with the notification timeframe effectively relinquishes the contractor's right to lodge a claim.

Conversely, the employer's claim process under Clause 2.5, though relatively more flexible due to the absence of a strict notification timeline, still necessitates adherence to established protocols. Employers are expected to submit a formal claim and await the engineer's decision before asserting any contractual rights. This distinction, though subtle, is critical in ensuring that both parties navigate the claim processes effectively, mitigating the risk of unfavorable legal interpretations or outcomes.

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TRANSPARENCY IN CORPORATE GOVERNANCE:

SHAREHOLDERS' INFORMATION ACCESS RIGHTS

The heart of effective corporate oversight lies in the fundamental right of shareholders to access corporate information. This right is critical for enabling shareholders to actively monitor and supervise both the company's business operations and its management. Essential to informed decision-making, this right empowers shareholders to judiciously manage and safeguard their investments.

1. Legal Framework for Shareholder Information Rights

Under the Enterprise Law, common shareholders are vested with the right to examine and extract important information of the company. This includes access to the list of voting shareholders' names and contact details, the ability to request rectification of any inaccuracies in their information, and the entitlement to examine, study, and reproduce key corporate documents like the company's charter, General Meeting of Shareholders' minutes, and resolutions.

A significant empowerment comes for shareholders, or shareholder groups, holding 5% or more of the total common shares, or a lesser percentage as outlined in the company's charter. These stakeholders have broader access rights, encompassing minutes and resolutions of the Board of Directors, semi-annual and annual financial statements, Supervisory Board reports, and contracts necessitating Board approval.

For public companies, the legal provisions governing shareholder access to information are more comprehensive, ensuring a higher level of transparency in the inspection of corporate books and records.

2. Mandatory Corporate Disclosures

Legally, businesses are required to disclose specific information, including details from the Enterprise Registration Certificate, their operational sectors, lists of founding shareholders, and information on foreign investors in joint-stock companies, where applicable. Notably, any alterations in the business registration must be promptly publicized on the National Business Registration Portal.

The Accounting Law stipulates that businesses must release their annual financial reports within 120 days following the fiscal year's end. However, this is subject to alteration if other laws, such as those governing securities, credit, or insurance, mandate different disclosure methods or timelines. These disclosures can be made through various channels, including publications, written notices, electronic platforms, or as dictated by law. Despite this, the reality is that many companies, unless they are publicly listed or operate in specific sectors like securities, credit, or insurance, often do not disclose their financial reports.

In addition, the Securities Law lays down explicit disclosure requirements for public companies. These entities must regularly disclose information such as annual financial reports, general meeting details, and governance structures. Additionally, they must report extraordinary events and other significant activities. This framework ensures that public companies are held to higher standards of information transparency compared to their private counterparts. This enables shareholders of public companies to access a broader range of corporate information more readily.

3. Challenges and Obstructions

In the complex web of corporate governance, shareholders' right to access information is both a legal entitlement and a practical necessity. Yet, the journey from legal entitlement to practical exercise of this right is often fraught with challenges and obstructions.

a) Example No.1

For example, a crucial aspect of shareholder rights under the Enterprise Law is the right to "review, search, and extract information" from the list of voting shareholders. For ordinary shareholders in joint-stock companies, this right is perceived as an entitlement to access the comprehensive list of all company shareholders. This access is not merely a procedural matter but a strategic tool enabling shareholders to collaborate, meet necessary ownership thresholds for exercising specific rights, nominate candidates, or pool votes during elections.

However, this right is mired in ambiguity and practical hurdles. Some corporations interpret this provision narrowly, assuming it only allows shareholders to access

their personal information, not the entire shareholder list. This restrictive interpretation undermines the ability of minority shareholders to mobilize support, as acquiring the comprehensive list becomes a logistical and sometimes insurmountable challenge, particularly when company headquarters are geographically distant.

This situation often results in a form of rights infringement, as minority shareholders struggle to gather the necessary support for exercising their legal rights under the Enterprise Law. This challenge raises a pertinent question: what recourse do shareholders have if a company withholds the shareholder list?

b) Example No.2

Another significant aspect under the Enterprise Law is the right of shareholders, especially those owning 5% or more shares, to scrutinize contracts and transactions overseen by the Board of Directors. This oversight is critical for safeguarding the company's assets and preventing mismanagement.

However, this well-intended regulation encounters practical barriers. A frequent point of contention is the exemption of documents deemed to be trade secrets or business secrets. The challenge arises from the lack of specificity in defining what constitutes such secrets, leaving room for subjective interpretations by the companies. This vagueness often leads to a restrictive application of the law, hindering shareholders from accessing crucial information that is fundamental to their oversight role.

In practice, these limitations have forced shareholders to seek legal redress through litigation or arbitration to assert their information rights. These legal actions underscore the necessity for shareholders to secure detailed judgments from courts or arbitration panels.

4. Moving forward

The exploration of shareholders' rights under the Enterprise Law, particularly regarding access to corporate information, reveals a complex interplay between legal entitlements and practical application. While the law aims to empower shareholders with greater oversight and involvement, ambiguities and operational hurdles often lead to conflicts between companies and their shareholders. To foster a harmonious corporate environment while safeguarding shareholder interests, companies should proactively develop and implement comprehensive internal policies regarding information disclosure. These policies should detail the types of information accessible, the procedures for requesting information, and the guidelines for protecting confidential data.

A transparent and consistent policy would mitigate misunderstandings and reduce the likelihood of disputes.

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READY, SET, ARBITRATE: **PRE-LITIGATION IN INVESTMENT ARBITRATION** (PART 1)

I. Introduction

The conclusion of World War II in 1945 signified not just the end of a global conflict but also the waning of protectionist policies worldwide. The reasons for this shift was two-fold: protectionism had previously escalated tensions by compelling nations to aggressively compete for market dominance, contributing to the war's outbreak, and post-conflict, it proved inadequate in aiding both victors and vanquished in rebuilding their devastated economies.

Against this backdrop, the embrace of free trade emerged as a cornerstone in the post-war rebuilding efforts. Over more than three decades, this newfound commitment to open markets catalyzed a paradigm shift. It paved the way for investors to venture into previously inaccessible foreign markets, thanks to sweeping reductions in global tariffs and a newfound support for cross-border investment. This era dismantled the barriers erected by erstwhile policies of market isolation and domestic production favoritism. Consequently, investors were empowered to establish overseas investments, aligning with their global business strategies and capitalizing on the enticing incentives and commitments outlined in bilateral or multilateral investment protection agreements ("**BITs**"). These agreements, formed between the investor's home nation ("**Home State**") and the nation receiving the investment ("**Host State**"), signified a new era of international economic cooperation.

Yet, international investments are not devoid of challenges. High-risk factors are inherent, and

disputes with the Host State regarding investments are not uncommon. When such disputes arise, and amicable resolutions prove elusive, the stakes are high, with the potential for substantial losses. In anticipation of these complexities, BITs have evolved to include a robust mechanism for dispute resolution: international investment arbitration ("Investment Arbitration"). This mechanism offers investors a recourse to safeguard their interests. However, it's imperative to note that Investment Arbitration, while effective, is markedly more intricate and costly than alternative dispute resolution methods like negotiation, mediation, or conciliation.

Therefore, this article aims to provide investors with critical insights and guidelines. These insights are essential for those considering the path of Investment Arbitration against a Host State, ensuring they are well-equipped to make informed decisions. The goal is to navigate these complex waters efficiently, conserving both time and resources, to secure the most favorable outcome in their investment disputes.

II. Key Considerations for Investors Prior to Engaging in Arbitration

1. Selecting the Appropriate BIT:

A pivotal first step in the Investment Arbitration journey involves the careful selection of the appropriate BIT. This decision is crucial, as often there are multiple BITs or multilateral trade agreements that encompass provisions for foreign investment protection between the Home States and the Host States. Take, for example, the relationship between Vietnam and Japan, which involves multiple investment agreements including the Vietnam-Japan Agreement on Liberalization, Promotion, and Protection of Investment (VJEPA), the ASEAN-Japan Comprehensive Economic Partnership (AJCEP), and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).

It's essential for investors to recognize that these agreements vary in terms of the degree of protection they offer to foreign investments. This variation largely stems from the historical and political context in which these agreements were formulated. The CPTPP, for instance, was established in an era where its member

states were keen on maintaining policy-making sovereignty, leading to more constrained commitments towards foreign investment protection and stricter conditions for initiating lawsuits against Host States under the CPTPP framework. On the other hand, VJEPA and AJCEP emerged during a period when Vietnam, ASEAN, and Japan were actively seeking to attract foreign investments, resulting in these agreements featuring stronger commitments to protecting foreign investors and broader conditions under which legal action can be taken against Host States.

This disparity necessitates a comprehensive and insightful analysis of these treaties by investors, as even subtle differences in the wording of investment protection clauses and dispute resolution terms can profoundly influence the outcome of an Investment Arbitration case. Typically, BITs formulated with a focus similar to that of VJEPA and AJCEP are more likely to offer advantageous positions for investors, while treaties like the CPTPP may be more protective of the interests of Host States.

Given the complexity and significance of this choice, it is highly recommended that investors seek the guidance of legal professionals who specialize in Investment Arbitration and international investment law. This expertise is invaluable in navigating the intricate nuances of these treaties and in making an informed decision about which BIT provides the most strategic foundation for arbitration.

2. Corporate Restructuring:

In scenarios where the BITs between an the Home State and the Host State offer less favorable protections compared to BITs between the Host State and a third country, or in the absence of a BIT between the Home State and the Host State, investors might contemplate a corporate restructuring strategy. This move aims to leverage more favorable BIT provisions by aligning with a third country, thereby facilitating arbitration against the Host State.

For example, a Vietnamese company aiming to challenge Japan may find the BIT between South Korea and Japan more advantageous than the one between Vietnam and Japan. In such a case, the Vietnamese company could restructure, transferring its Japanese investment ownership to a South Korean entity it establishes. This entity could then engage in arbitration against Japan under the South Korea-Japan BIT.

However, it's imperative to approach this strategy with caution. Investment Arbitration Tribunals often scrutinize such maneuvers, particularly regarding their legitimacy and intent. They may decline jurisdiction if they perceive the restructuring as 'Treaty Shopping Abuse'—an attempt to manipulate treaty provisions unfairly. Tribunals typically assess the following factors:

> Timing: Restructuring immediately before initiating an arbitration against the Host State can be viewed as treaty abuse, indicating a strategic maneuver rather than a genuine business decision.
>
> Purpose: If the tribunal discerns that the restructuring serves primarily the purpose of arbitration rather than business efficiency, it may be deemed as abusing the process.

To navigate these complexities, investors are advised to contemplate restructuring well in advance of foreign investments. Proactively selecting the most advantageous BIT before investing can ensure an appropriate business structure conducive to potential

arbitration scenarios. If restructuring is considered as a prelude to arbitration, meticulous planning is essential. Legal counsel experienced in Investment Arbitration is crucial to developing a strategy that aligns with both the investor's goals and the principles of fair legal engagement. This approach helps in avoiding the pitfalls of Treaty Shopping Abuse while positioning the investor favorably in any subsequent arbitration under the chosen BIT.

3. Third-Party Funding:

One of the major challenges in pursuing Investment Arbitration is the substantial financial burden it entails. This often puts small and medium-sized investors in a predicament, as they may lack the necessary resources to afford the costs of arbitration, legal fees, and expert advice. In such cases, seeking third-party financial support can be a strategic option, enabling these investors to access the justice system provided by investment agreements. However, this approach requires careful consideration to ensure that it doesn't adversely affect the arbitration's outcome.

Third-Party Funding in Investment Arbitration typically involves a non-disputing third party underwriting the arbitration costs for one of the parties involved, on a non-recourse basis. This means that the investor does not have to repay the funds if they lose the case. However, if the investor wins, the third-party funder is entitled to a portion of the arbitration award, usually a percentage relative to the funding provided.

While this mechanism is generally accepted, it has raised concerns among some Host States about potential breaches of confidentiality and the encouragement of frivolous lawsuits. Notably, the investment protection agreement between Argentina and the United Arab Emirates (UAE) uniquely prohibits third-party funding for arbitration. In most other BITs, third-party funding is not explicitly addressed or prohibited.

Investors considering third-party funding should be mindful of the following:

Financial Stability of the Funding Party: Ensure the third-party funder has adequate financial resources to support the arbitration process to its conclusion. Inadequate funding could jeopardize the investor's ability to sustain the lawsuit.

Disclosure Obligations: Comply with any disclosure requirements at the outset of the arbitration. This typically involves revealing the existence of a third-party funding agreement and the identity of the funder, while the content of the agreement itself may remain confidential. Disclosure is crucial for identifying potential conflicts of interest with the tribunal's arbitrators. Failure to disclose, or late disclosure, can lead to protracted legal proceedings or even annulment of a favorable ruling due to the perceived arbitrator's lack of impartiality. Further insights into this topic will be discussed in Section 5.

Overall, while third-party funding can provide vital financial support for investors seeking justice through Investment Arbitration, it necessitates a strategic approach. Investors must thoroughly vet potential funders, adhere to disclosure requirements, and understand the implications of such funding on the arbitration process.

READY, SET, ARBITRATE: **PRE-LITIGATION IN INVESTMENT ARBITRATION** (PART 2)

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II. Key Considerations for Investors Prior to Engaging in Litigation (cont)

4. Adherence to Procedural Conditions

Once an appropriate BIT has been chosen, investors must diligently adhere to its prerequisite conditions to ensure the Investment Arbitration Tribunal's jurisdiction over their case. These conditions typically manifest in three key clauses:

Cooling-Off Period Clause: This clause mandates investors to engage in earnest negotiations with the Host State before proceeding to arbitration. The duration of this period varies depending on the BIT but commonly spans about 6 months from the dispute's emergence. Compliance is initiated by the investor sending a notification to the Host State's competent authority, which varies by country. For instance, in Vietnam, this authority is the Ministry of Justice.

Exhaustion of Local Remedies Clause: Certain BITs require investors to first seek resolution through the Host State's National Court for a specified period, often 18 months, before escalating to the Investment Arbitration Tribunal. This is to allow the Host State an opportunity to rectify any alleged violations via its judicial system. However, there are exceptions under investors can bypass this requirement if they

can convincingly demonstrate that a fair and satisfactory outcome is unattainable through the Host State's courts.

Forks in the Road Clause: This provision in some BITs offers investors multiple dispute resolution options, with the choice of one precluding the others. These options typically include litigation in the Host State's national courts, suing at an Investment Arbitration, or mediation through an independent party. The choice of method should be made cautiously, as opting for national courts or mediation and not achieving the desired outcome will foreclose the opportunity for International Arbitration.

Investors must recognize that non-compliance with these conditions can significantly delay the arbitration process or even lead to the tribunal's refusal to hear the case. Navigating these procedural nuances requires meticulous planning and legal expertise. Investors are advised to consult with professionals specializing in international investment law to comprehend the intricacies of the selected BIT. This understanding is crucial for saving time and resources and ensuring the most favorable outcome for the investor.

5. Choosing the Right Arbitrator

The selection of arbitrators plays a pivotal role in the Investment Arbitration process, with significant implications for the dispute's outcome. A fundamental principle in arbitration proceedings is the impartiality and objectivity of arbitrators appointed by any of the disputing parties.

As highlighted in Section 3, any failure by an arbitrator to disclose potential conflicts of interest can lead to perceptions of bias, potentially invalidating the arbitral award due to serious procedural violations. Additionally, choosing an arbitrator lacking in experience or specialization in international investment disputes can compromise the quality and reliability of the arbitral award.

Given these considerations, investors must approach the appointment of arbitrators with diligence and scrutiny. It's crucial to investigate any potential connections between the arbitrators and the disputing parties, including the Host State and any third-party funders involved, as mentioned in section 3. This helps to quickly rule out candidates who might have conflicts of interest.

Furthermore, factors like the arbitrator's educational background, professional experience, and their stance in prior similar cases should be carefully examined. Such scrutiny allows investors to gauge the arbitrator's expertise and predict their decision-making tendencies. Understanding whether an arbitrator may lean towards the investor's or the Host State's side can provide valuable insights into the likely direction of the arbitration's outcome.

For effectively conducting this complex due diligence, the support of a lawyer with extensive experience in the field and a network of professional connections is invaluable. Such legal guidance can greatly enhance the efficiency and effectiveness of the arbitrator selection process, maximizing the likelihood of a favorable outcome for the investors. This strategic approach ensures that the chosen arbitrator not only upholds the highest standards of impartiality and competence but also aligns with the specific nuances and demands of the investor's case.

6. Specifying Consensus in Arbitration Notice

An often overlooked yet critical aspect of initiating proceedings under a BIT is the investor's clear expression of acceptance of the Host State's consent to arbitration through Investment Arbitration, as outlined in the BIT. This explicit declaration is essential for establishing the jurisdiction of the Arbitral Tribunal over the claim.

Failure to explicitly express this acceptance in the arbitration notice can give the Host State grounds to challenge the jurisdiction of the Investment Arbitration Tribunal. The Host State might argue that there is no valid legal arbitration agreement between the parties, thus questioning the legitimacy of bringing the case before the Investment Arbitration Tribunals.

To avoid such complications, investors must ensure their arbitration notice is comprehensive and adheres to the basic information requirements set by the BIT and relevant arbitration procedures. This step is crucial for a smooth dispute resolution process and prevents any unnecessary prolongation due to jurisdictional disputes.

In crafting the notice of arbitration, investors should not only affirm their acceptance of the Host State's consent but also meticulously include all necessary details as stipulated in the BIT. This includes the nature of the dispute, the provisions of the BIT alleged to have been violated, and any other pertinent information required for the tribunal to assert jurisdiction. By doing so, investors can preemptively address any potential jurisdictional challenges from the Host State, thereby streamlining the arbitration process.

This strategy underscores the importance of thorough preparation and attention to detail in the early stages of the arbitration process. It also highlights the necessity of having expert legal counsel who can guide the investor in drafting a precise and effective arbitration notice, tailored to meet the specific requirements of the BIT and the nuances of the case at hand.

III. Conclusion

In today's global economy, where international investment forms a critical component of economic growth, the ability to adeptly manage disputes is more than a skill—it's a necessity. A proactive and informed approach to dispute resolution is not just advantageous; it's imperative for investors looking to safeguard their interests in foreign territories.

To successfully navigate the complexities of Investment Arbitration, the backing of a team of seasoned lawyers, well-versed in international investment law, is indispensable. Their guidance can illuminate the nuances of the process, empowering investors to confront the challenges of this dispute resolution mechanism with confidence and a well-founded optimism for a favorable outcome.

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BOD'S WRITTEN OPINIONS: **CONVENIENT AND LEGALLY SOUND**

In the complex realm of corporate management, the Board of Directors (BOD) is a cornerstone in steering a joint-stock company. At its core, the Board of Directors is the company's command center, tasked with making critical decisions and upholding the company's obligations and rights.

Regular meetings are the standard for the BOD, with a quarterly assembly being the bare minimum. They can also summon extraordinary sessions for critical topics. Aside from these in gatherings, the BOD has another tool in its arsenal – resolutions passed through written opinion. This method offers a streamlined alternative to traditional meetings, critical in our fast-paced business world. However, it's not without its complexities. The legality and appropriateness of written opinions are subjects of lively legal debate. The question at the heart of this discussion is: How do we ensure that these written opinions are not just convenient but also legally sound?

1. Ambiguity in Documentation:

The Law on Enterprises in Vietnam and other related regulations provide a detailed framework for collecting written opinions at General Meetings of Shareholders (GMS). This framework encompasses everything from the format of submissions to the complexities of vote tallying and announcing results. However, when it comes to the BOD, the same law offers significantly less guidance on the nuances of written opinion ballots and vote-counting minutes.

This lack of specificity grants a certain level of flexibility in how BODs handle written opinions, but this freedom isn't without its challenges. For instance, the absence of clear guidelines on the design and content of opinion forms can lead to internal disputes. A BOD member, for example, may raise concerns about the validity of an opinion form that doesn't clearly articulate the issues at hand or neglects to set a deadline for responses.

2. The Quorum Puzzle

The concept of quorum—the minimum number of members needed to validate decisions—poses a unique challenge for BOD when employing written opinions. While traditional in-person or virtual meetings have well-defined quorum requirements (at least ¾ of members present initially, and more than half for subsequent meetings), the rules for written opinions are not as clear-cut.

Under current legislation, there's no specified requirement for response rate for the BOD's written opinions. This gap in the law opens the floor to different interpretations. One perspective suggests that for a written opinion to be valid, it must be endorsed by at least ¾ of the BOD members, mirroring the quorum for a physical first meeting. For example, in a BOD with four members, three would need to submit their opinions.

On the other hand, there's a contrasting view that argues against the necessity for a quorum in written opinions, as the law does not explicitly demand it. Proponents of this view believe that a written opinion is valid if it receives a simple majority approval, with the chairperson's vote being decisive in case of a tie.

3. Key Takeaways

Because of the ambiguity surrounding the use of written opinions for BOD resolutions, businesses may find themselves in a problematic operational and legal position. To avoid any legal concerns, detailed procedures governing the collection of written opinions should be included in the company's Charter and internal policies. These internal guidelines should explicitly address the nuances of written opinion – specifying how opinions are solicited, the format of responses, and the quorum requirements for decision validity.

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FOREIGN LOANS: A PRACTICAL GUIDE FOR BORROWERS (PART 1)

This guide focuses on the practical aspects of obtaining a foreign loan, including the steps and actions that borrowers must undertake throughout the process. It does not delve into the technical details of loan terminology or definitions but instead provides a clear roadmap for borrowers to follow. Please note that this guide is based on general principles and practices, and individual circumstances may vary.

1. Preliminary Considerations

Assess Financial Needs and Objectives: Before seeking a foreign loan, the borrower must first evaluate its financial needs and objectives. This includes determining the purpose of the loan, the required amount, and the desired repayment period. Additionally, the borrower should assess its current financial situation and ability to repay the loan. This will help the borrower present a strong case to potential lenders and ensure the borrower choose the most suitable loan product.

Identify Potential Lenders: The borrower should research and identify potential foreign lenders suitable for its specific needs, such as:

- International financial institutions: Such as the World Bank, Asian Development Bank, and other development banks.
- Foreign banks: Commercial banks from other countries with a presence in Vietnam or offering cross-border loans.
- Private investors: Including venture capital firms, private equity firms, and high-net-worth individuals interested in investing in Vietnamese businesses.
- Different types of investors may have different requirements and procedures for granting loans, and these differences should be taken into account when negotiating the loan agreement.

Investment Amount and Currency: The borrower should be clear about the amount and currency of the loan it is seeking. This information is essential for determining the appropriate legal requirements and procedures that apply to the loan transaction.

Evaluating the Business's Creditworthiness: To increase the likelihood of securing a foreign loan, the borrower should assess its creditworthiness and take steps to improve its credit rating. This may involve:

- Review financial statements: Analyze the borrower's balance sheet, income statement, and cash flow statement to determine the borrower's financial health and creditworthiness.
- Calculate financial ratios: Use key financial ratios such as debt-to-equity, current ratio, and debt service coverage ratio to assess the borrower's financial strength and ability to repay the loan.
- Assess credit history: Review the borrower's credit history and report (if any), including any outstanding loans and payment records. Address any credit issues before applying for a foreign loan.

Preparing a Comprehensive Business Plan: A well-prepared business plan is essential for convincing potential lenders of the viability and profitability of the borrower's business. The plan should include a detailed description of the business, market analysis, financial projections, and a clear explanation of how the loan proceeds will be utilized.

2. Pre-Loan Stages

Due Diligence Process: Before proceeding with the loan, the foreign lender may conduct financial and legal due diligence processes. This will enable the lender to assess the borrower's compliance with Vietnamese laws and regulations and the borrower's creditworthiness and financial stability. The borrower should prepare all necessary documentation and information as required by the lender, such as the company's charter, tax registration certificate, any required licenses and permits, financial statements, details of existing loans, and any other relevant information.

Loan Negotiation - Commercial terms: The borrower and the foreign lender will need to negotiate and agree upon the specific commercial terms of the loan, including the loan amount, term, interest rate, repayment schedule, and any fees or charges. The borrower should carefully evaluate the terms of the proposed loan to ensure that it is feasible and affordable. This assessment should consider the company's cash flow projections, the impact of interest payments on profitability, and the ability to meet loan covenants and collateral requirements.

Types of loan structure and form: The parties involved must engage in a thorough discussion to determine the most suitable loan structure (e.g., term loans, revolving credit facilities, syndicated loans, mezzanine financing, etc.) and loan form (e.g., secured loans, unsecured loans, backed loans, asset-based loans, bonds, etc.) within the confines of Vietnam's legal framework. Each loan structure and form caters to distinct needs and objectives, and accommodates varying capacities of borrowers and lenders. Moreover, these options present different degrees of flexibility depending on the specific circumstances, as well as varied benefits and risks.

3. Drafting Loan Agreement

Once the terms have been agreed upon, the lender will prepare a formal loan agreement, which should be reviewed carefully by the borrower and its legal advisors. The loan agreement should include all relevant terms and conditions agreed upon by the borrower and the foreign lender. Key clauses to be included in the loan agreement are the loan amount, currency, interest rate, repayment schedule, security and guarantees, events of default, and remedies in case of default. Any discrepancies or concerns should be addressed before signing the agreement to ensure a clear understanding of the obligations and responsibilities of both parties. The agreement should also address any specific requirements and conditions imposed by Vietnamese law.

Besides the loan agreement, there might be other related documents, such as security documents, intercreditor agreement or a subordination agreement.

4. Registering Foreign Loans

Types of Foreign Loans Requiring Registration: Foreign loans that must be registered with the SBV include: Medium- and long-term foreign loans, and Short-term loans extended with a repayment term exceeding one year.

Periodic Reporting of Foreign Loans to the SBV: Borrowers must regularly, or upon the SBV's request, report the implementation status of short-term, medium-term, and long-term.

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FOREIGN LOANS: A PRACTICAL GUIDE FOR BORROWERS (PART 2)

5. Loan Disbursement and utilization

Disbursement Schedule and Conditions Precedent for Disbursement: The loan disbursement schedule should be agreed upon by the borrower and the foreign lender and documented in the loan agreement. Disbursement can be made in one lump sum or in installments, depending on the terms of the agreement. The borrower must ensure that it is prepared to receive the loan disbursements as per the agreed-upon schedule.

There might be conditions precedent must be satisfied before the lender disburses the funds. These may include obtaining specific approvals, providing evidence of insurance, or executing security documents. The borrower shall keep the lender informed about the progress in satisfying the conditions precedent, and promptly provide any required documentation or evidence.

Currency Conversion: Foreign loans are usually disbursed in a foreign currency. The borrower will need to convert the funds into Vietnamese Dong (VND) to use them in Vietnam. Currency conversion is subject to regulations issued by the State Bank of Vietnam, and the borrower must ensure compliance with these regulations when converting the loan funds. It is essential to consider the exchange rate risks associated with currency conversion and plan accordingly.

Monitor loan disbursement and fund utilization: The borrower must carefully monitor the disbursement of the loan funds, ensuring that they are used for the intended purpose as outlined in the loan agreement and business plan. This may involve creating a detailed budget and financial plan, tracking expenses, and reporting on the use of funds to the lender as required. Proper monitoring and utilization of the loan funds are crucial for avoiding breaches of the loan covenants and ensuring the success of the borrower's business objectives.

Maintain proper documentation and records: Throughout the disbursement and utilization process, the borrower should maintain comprehensive records of all transactions, expenses, and financial activities related to the loan. These records may be required for audits, reporting to the lender, or future loan applications. Maintaining accurate and organized records will help the borrower demonstrate its responsible management of the loan funds and facilitate compliance with the loan covenants and reporting requirements.

6. Compliance

Financial reporting requirements: The foreign lender may require the borrower to provide periodic financial reports and updates on its business activities. This may include the submission of audited financial statements, cash flow projections, tracking financial ratios, or other relevant financial information. The borrower should be prepared to meet these reporting requirements and maintain open lines of communication with the foreign lender.

Compliance with loan covenants: The loan agreement may include various covenants, which are conditions or undertakings that the borrower must comply with throughout the loan term. These covenants may relate to the borrower's financial performance, business operations, or legal compliance. The borrower should be aware of and comply with all loan covenants to avoid potential breaches and the associated consequences.

Environmental and Social Safeguards: Some foreign lenders, especially socially responsible investors and development banks, often require the borrower to adopt an Environmental and Social Management System (ESMS) and comply with certain Environmental and Social Safeguards Policy and Framework, which is a framework for managing environmental and social risks associated with the projects financed by the foreign loan, and can include processes for identifying and assessing risks, implementing mitigation measures, and monitoring and reporting on performance.

Events of default: The loan agreement should clearly define the events of default, which are circumstances that trigger the lender's right to take legal action against the borrower or enforce the loan's security. Common events of default include failure to make timely repayments, breaches of loan covenants, and insolvency events. The borrower should strive to avoid any events of default to maintain a positive relationship with the foreign lender and minimize potential legal risks.

In case of a default, the foreign lender may have various remedies available under the loan agreement and Vietnamese law. These remedies may include accelerating the loan repayment, enforcing security, or taking legal action against the borrower. The borrower should be aware of these potential remedies and take all necessary steps to avoid default and the associated consequences.

7. Repayment

Repayment schedule: The borrower must adhere to the repayment schedule agreed upon in the loan agreement. This schedule typically includes the repayment dates, amounts, and the currency in which the repayments must be made. It is crucial for the borrower to ensure that it has sufficient funds available to make timely repayments and avoid defaulting on the loan.

To ensure timely repayment of the loan, the borrower should develop a detailed repayment plan that aligns with the agreed-upon repayment schedule in the loan agreement. This plan should consider the company's cash flow projections, anticipated revenues, and any seasonal fluctuations in the business that may impact the ability to make payments.

Manage foreign exchange risks: As foreign loans are often denominated in a currency different from the borrower's local currency, the borrower should be aware of the potential foreign exchange risks associated with the loan. This may involve monitoring exchange rates, implementing strategies to hedge

against currency fluctuations, and considering the impact of exchange rate movements on the company's financial performance and loan repayments.

Early repayment and prepayment penalties: If the borrower wishes to repay the loan early or make additional payments beyond the agreed-upon schedule, it should first consult the loan agreement and check for any prepayment penalties or fees. Some foreign lenders may charge a penalty for early repayment to compensate for the loss of expected interest income. The borrower should carefully consider the costs and benefits of early repayment before proceeding.

Loan Restructuring: In the event that the borrower encounters difficulties in repaying its debts or face the risk of default, the borrower may consider debt restructuring with the foreign lender. Debt restructuring may involve adjusting the repayment schedule, lowering the interest rate, or converting the currency of the loan. However, the borrower needs to negotiate carefully with the lender to achieve the best possible terms and avoid negative consequences for the future.

8. Concluding the Loan and Assessing Effectiveness

Obtaining a Loan Clearance Certificate: Once the borrower has fully repaid the loan, it should request a loan clearance certificate from the lender. This document serves as proof that the borrower has successfully repaid the loan and have no outstanding liabilities.

Documentation: The borrower should keep a record of its loan experience, including the loan terms, repayment history, and any challenges encountered. This documentation will serve as a valuable reference for future financial planning and loan applications.

Assessing Effectiveness: The borrower should assess the overall impact of the loan on its business or personal financial situation. Based on the assessment of the loan's effectiveness, the borrower may plan for any future financing needs, and develop a strategy to secure loans with favorable terms and conditions.

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ALTERNATIVE DISPUTE RESOLUTION

IN THE UNITED STATES

1. Judicial Framework

In the United States, the adjudication is an essential function of the state, performed by judges who are public officials within the judicial system. The U.S. boasts a dual court system, public and private, both of which serve two pivotal judicial roles: (1) resolution of disputes, and (2) formulation of legal rules.

This secondary role emerges from the primary role of dispute resolution, effectively acting as an indirect influence on legislative power which traditionally resides with the United States Congress. Legal solutions reached from the resolution of disputes, particularly those articulated in judges' written opinions, may set precedents. These precedents play a vital role in resolving future similar disputes and are recognized as a critical source of law in the Anglo-American legal tradition.

Over the years, the accumulation of these precedents, especially in terms of principles on specific legal issues, has given rise to case law. This form of law coexists with, yet remains distinct from, statutory law — the body of law created by legislative and regulatory bodies.

The judiciary holds a fundamental place in the tripartite structure of the U.S. government. This raises an intriguing question: Is it feasible to have a completely privatized market for judicial services where disputing parties can freely choose their judges, and these judges, in turn, compete based on pricing and the quality of their services? And in this scenario, how can impartiality be preserved? These considerations have prompted the development of Alternative Dispute Resolution (ADR), now an apparent choice for legal and business professionals globally.

If judicial services can be effectively provided outside the traditional state judicial framework, should the private market then embrace state oversight to (1) encourage litigants to first seek out 'private judges' for dispute resolution, and (2) ensure the enforcement of decisions rendered by these judges? These are the central questions surrounding ADR that we will explore below.

2. Understanding ADR

ADR encompasses a spectrum of techniques and processes designed to settle conflicts outside the traditional litigation framework. It offers a more adaptable, private, and often less expensive avenue for parties to resolve their disagreements.

ADR is characterized as a private method of resolving disputes, existing both as an alternative to and in conjunction with the conventional legal adjudication process of the courts. Legal historians, reflecting on the most significant developments in 20th-century Western legal history, would likely emphasize the extraordinary expansion and evolution of ADR as a pivotal phenomenon.

Unlike court litigation, which adheres to strict procedural rules, ADR generally, though not exclusively, hinges on the principle of consensus among the disputing parties. As ADR has evolved, elements of formal adjudication and consensus have variously intertwined within the procedural structures of different ADR forms.

3. Key Types of ADR

The two primary forms of ADR are arbitration and mediation. While arbitration began as a quintessential ADR technique and remains popular, its growing formalization and inclination towards legalistic procedures have led some experts to view it as veering closer to traditional litigation.

In contrast, mediation retains the foundational ethos of ADR, anchored in consensus-building. Consequently, in the United States, mediation is increasingly employed not only to resolve disputes, but also to foster a mutual understanding of issues, thereby nurturing and enhancing existing relationships.

However, in international trade disputes, cultural disparities often necessitate resolution through a third-party arbitrator, rather than a mutual agreement through mediation. This preference for arbitration in global trade agreements underscores its prominence in resolving cross-border disagreements.

4. Advantages of ADR

ADR is esteemed above traditional court litigation for its effectiveness and procedural flexibility, primarily for two reasons:

Diversity in Dispute Resolution: ADR enables parties to avoid the constraints of courtroom litigation, offering the freedom to choose or tailor processes that best suit their unique dispute. This flexibility can lead to resolutions more acceptable to all parties, as opposed to the often unilateral outcomes of court decisions.

Participation and Creativity: Forms of ADR like mediation encourage direct party involvement through negotiation and settlement. This approach is favored for its openness, adaptability, and innovation, contrasting sharply with the rigid and often monotonous nature of traditional litigation.

These attributes have led many legal scholars and practitioners to regard ADR not just as an ‘alternative’ but as an ‘appropriate’ method for dispute resolution, particularly in cases involving individuals. The diversity in dispute types necessitates varied approaches to achieve consensus, hence the preference for ‘appropriateness’ over ‘alternativeness’ in ADR methodologies.

5. Precedent-Setting in ADR

ADR, particularly institutional arbitration, plays a significant role in setting precedents, much like traditional courts. These precedents, emerging primarily from institutional arbitration, contribute to the development of case law, influencing the resolution of future disputes. Unlike court litigation, however, arbitration proceedings are not inherently bound by precedent. Arbitrators and mediators often resolve disputes with fairness and reasonableness without necessarily adhering to legal statutes.

Legal scholars and experts in the United States have identified two primary challenges in the privatization of precedent-setting within the ADR framework:

Intellectual Property Rights and Motivation: Acknowledging intellectual property rights for elements of a specific precedent is complex, which can dampen private judges' motivation to establish precedents. While striving for fair and impartial resolutions is paramount to maintain their reputation, there is little financial incentive for them to devote time to crafting decisions that could serve as templates for future cases, unless such efforts enhance their professional stature and authority more than they offer monetary gain.

Lack of Unified Authority: The absence of a central authoritative body, analogous to the Supreme Court in the judiciary, poses a risk of inconsistency in precedent-setting. In the ADR context, this lack of a unifying authority could lead to conflicting decisions on similar legal issues, undermining the value of ADR systems. To mitigate this, the establishment of respected and influential ADR institutions is crucial, acting as a moderating force and ensuring that arbitrators and mediators address disputes with appropriate diligence.

6. Contribution of ADR to International Trade Law

Despite the above challenges, the evolution of case law within international arbitration institutions, such as the International Centre for Settlement of Investment Disputes (ICSID), has been significant. Over decades, contributions by arbitrators and lawyers from diverse jurisdictions have not only provided references for future disputes, but have also played a role in shaping international trade law. This ongoing development reflects the dynamic nature of ADR and its growing influence in the global legal landscape.

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LEASE SMARTER: **ESSENTIAL INSIGHTS FOR TENANTS**

Understanding and protecting tenant rights in leasing negotiations has never been more important in Vietnam's dynamic real estate market, which is quickly expanding beyond residential spaces to include commercial and service sectors. This surge in property leasing isn't just a trend; it is a rising financial and economic opportunity propelling players toward their individual objectives. Here, the act of signing a real estate lease contract transcends routine legality, emerging as a pivotal safeguard for both landlords and tenants against potential risks and conflicts.

The focus of this article is to offer a comprehensive guide for tenants negotiating the complexities of a real estate lease in Vietnam. A well-crafted and thorough contract is more than just a formal agreement; it's a shield against future disputes and the cornerstone of a harmonious landlord-tenant relationship.

1. Verifying Rental Property Information

Ensuring openness and trust between the tenant and landlord not only reduces legal concerns and potential fraud, but also strengthens both sides' rights and benefits. Therefore, verification rental property information is critical to a successful real estate lease.

Tenants must meticulously examine the property facts and include them in the lease agreement. It's about painting a complete picture - from the property type and location to its usable area, current condition, and any pertinent legal intricacies
.
This act of verification isn't just a formality; it's a tenant's shield. It protects their interests, especially if the reality of the property diverges from its advertised persona. Detailed documentation of the property isn't merely a cautious step; it's a strategic move to minimize legal headaches relating to the property's usage, maintenance, and eventual handover at the lease's conclusion.

2. The Importance of Defining Lease Purpose

The clarity of aim is at the heart of a smooth leasing experience. The definition of a property's intended use within the lease agreement establishes the foundation of mutual understanding between the tenant and landlord.

As a tenant, it's essential to explicitly state whether the property will serve residential or business needs in the contract. This clarity ensures the property aligns with the tenant's specific requirements, satisfying both the legal aspects of the lease and garnering the landlord's consent. Such precision prevents future legal and managerial complications for the landlord throughout the lease duration.

Hence, it's important for tenants to articulate the lease purpose within the contract meticulously. Overlooking this detail can lead to misunderstandings or unwarranted restrictions imposed by the landlord, potentially complicating the tenant's use of the property.

3. Cost Clarification Transparency

The cornerstone of any lease agreement is the transparent and thorough articulation of all associated costs. Understanding and agreeing to these charges upfront assists tenants to arrange their finances effectively and avoid any unforeseen financial burdens.

Tenants must ensure the lease agreement explicitly outlines all fees they are responsible for. This includes rent, security deposits, and utilities such as electricity, water, internet, maintenance, and repair costs. Establishing clear guidelines on the potential adjustment of these costs within reasonable limits is also vital. Tenants should vigilantly ensure that all charges are detailed in the contract, with no hidden fees lurking in the fine print. It is critical that the lease agreement prohibits landlords from unilaterally changing these provisions during the lease time.

While the focus often lies on the rental amount, the broader financial implications encompass a range of legal considerations. These must be meticulously managed to sidestep potential risks and ensure a transparent, fair leasing arrangement.

4. Clarifying Responsibilities in Repairs, Maintenance, and Upkeep

An essential aspect of leasing is the delineation of responsibilities for repairs, maintenance, and upkeep. To preserve their interests, tenants must ensure that the lease contract expressly outlines the responsibilities for property maintenance.

This clarity involves specifying who bears the responsibility for repairs and maintenance in various scenarios, including those mandated by law. In cases where the landlord isn't directly responsible, tenants should have the right, as stipulated in the contract, to either request the landlord to undertake these tasks or to handle the repairs themselves and seek reimbursement.

It's important for tenants to meticulously evaluate and define their maintenance responsibilities in the contract. This aspect is critical in protecting the tenant from any adverse implications and ensuring a clear understanding of each party's role in property upkeep.

5. Establishing Tenant Rights for Utility Usage

A critical element in any lease discussion is reaching an agreement on the tenant's rights to

use property services and facilities. It guarantees that both the tenant and the landlord have a shared understanding of the use and maintenance of the leased property's facilities. Parking spaces, housekeeping services, access to postal and telecommunications networks, and choices for signage or advertising on the site are all common amenities.

Tenants are advised to discuss utility and amenity usage in the lease agreement in advance. This method not only broadens their scope of use at the property, but it also avoids any issues that would necessitate the landlord's consent mid-lease. Establishing precise language in the lease agreement about what amenities are provided and the extent to which they can be used not only meets tenant expectations, but also clearly explains their rights to these facilities throughout the lease term.

6. Guaranteeing Tenant's Right to Peaceful and Uninterrupted Use

A cornerstone of the real estate lease agreement is the landlord's obligation to ensure the tenant's right to peaceful, private, and uninterrupted use of the property. The landlord's failure to uphold this can significantly undermine the contract's efficacy. Therefore, clear stipulations about the landlord's responsibilities are essential to avert disputes and bolster tenant confidence.

By explicitly outlining the landlord's duty to maintain the tenant's peace and privacy, tenants gain assurance that any technical issues or challenges during the lease period will be duly addressed. Furthermore, affirming the tenant's exclusive right to use the property is paramount in safeguarding their privacy and personal space. In the event that the landlord fails to fulfill these responsibilities, the tenant must have the contractual right to demand corrective action or, in extreme cases, to cancel the agreement.

7. Identifying Breaches of the Lease Agreement

A critical component of the lease agreement is the identification of potential breaches. It lays the framework for the tenant to address issues as they arise and, if necessary, to seek compensation or even terminate the contract due to the landlord's non-compliance.

To properly identify a breach, the tenant must be familiar with the legal framework that governs lease agreements as well as the precise terms contained in their contract. When a breach is identified, the landlord is normally obligated to swiftly remedy their duties and refrain from any actions that are damaging to the tenant. This also gives the tenant the ability to request lease termination or negotiate for remedies, such as timetables for rectifying infractions and compensating for losses.

8. Understanding the Consequences of Lease Termination

The termination of a lease agreement carries substantial implications for both tenant and landlord, often involving significant financial and legal consequences. Terminating a contract improperly, in violation of agreed terms, can lead to legal disputes and additional costs.

For the tenant, premature termination can result in losses such as forfeited deposits, relocation costs, and potential damages or penalties. Additional expenses might include early termination fees and legal costs, especially in cases where disputes arise. Therefore, tenants must thoroughly understand the regulations surrounding lease termination. This knowledge is essential for protecting their interests and ensuring they are well-prepared for any potential outcomes of ending a real estate lease.

In conclusion, renting a property involves much more than a mere transactional decision; it is a significant legal undertaking. The real estate lease agreement is critical in defining the rights and responsibilities of both parties. Finalizing such an agreement demands careful deliberation of numerous factors, tailored to various scenarios and unique circumstances.

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STATUTE OF LIMITATIONS: A KEY PLAYER IN CIVIL DISPUTES

Imagine you're a business owner in a high-stakes legal dispute. Time is not just money; it's a crucial factor that can make or break your case. This is where the statute of limitations comes into the spotlight. It's not just a legal term; it's a game-changer in civil litigation. In this article, we'll explore this concept via the lens of a dramatic real-life saga: the clash between two well-known but unnamed corporations (let's call them the Sword and the Shield). By studying their tale and the legal rules at play, we'll unlock a deeper appreciation of how the statute of limitations can shape the destiny of legal battles.

1. An Exciting Courtroom Case Study

The stage is set in 2012 with a basic goods purchase contract, but little did the Sword and the Shield know that this would lead them to a legal showdown. Fast forward to March 1, 2017. The air is tense in their Town's People's Court, as the Sword files a complaint against the Shield. What's the catch? The Sword had sat on this case since 2013, well aware of the violation of their rights.

Enter the statute of limitations, the unsung hero (or villain, depending on your perspective). The Shield, in a strategic move, calls for the application of this legal boundary to halt the proceedings. The court's decision on July 31, 2017, to suspend the case throws a wrench in the story. The Sword, refusing to back down, takes their fight to the higher court, the People's Court of their Province. However, its challenge hits a wall as the appellate court stands firm, leaving us with the conclusion of the gripping commercial dispute case between the Sword and the Shield.

2. Figuring Out the Statute of Limitations

The plot took an unexpected turn in the epic legal war between the Sword and the Shield when the Shield, despite being the alleged culprit, cleverly utilized the statute of limitations to quash The Sword's complaint. This twist in the tale underscores the statute's decisive impact in civil litigation. But what exactly is this legal tool, and how does it shape the battlefield of business law?

Picture the statute of limitations as a ticking clock set by law, counting down to a deadline. Once time runs out, the legal landscape shifts dramatically. This statute marks the timeframe within which you can suit up and bring your legal grievances to court. Miss this

window, and your right to battle for justice in court vanishes into thin air.

The countdown starts ticking from the moment you realize (or should have realized) that your legal rights have been violated. And here's the kicker: not all conflicts are scheduled at the same time. Countdown clocks differ depending on the type of case. This variation adds another layer of complication to the legal strategy.

Here’s a snapshot of different timeframes for various disputes:

- For contract dispute, you have a 3-year timer.
- In commercial clashes, the clock runs for 2 years.
- Labor disputes, you get a year.

Zooming back to our headline case, the Sword first became aware that their rights were being violated in 2013. They did, however, commence their legal salvo in March 2017. The 2-year period for a commercial dispute had already expired under the regulations. As a result, the court's gavel fell, sealing the Sword's fate: their right to suit had eroded with the passage of time.

3. Key Takeaways

The legal drama of the Sword and the Shield is a masterclass in the subtleties of the statute of limitations, specifically why the court did not dismiss the action immediately. Let's deconstruct this with some crucial points that demonstrate the legal system's deliberate dance.

The Silent Role of Courts in Statute of Limitations: Unlike what one might expect, current civil procedure laws don't empower courts to proactively reject a lawsuit when the statute of limitations clock has run out. This restraint is echoed in the guidelines from the Supreme People's Court Judicial Council, which explicitly state that an expired statute of limitations isn't a valid reason for courts to proactively dismiss a lawsuit.

The Power of Request in Applying the Statute: The real power to invoke the statute of limitations lies not with the court, but with the parties involved. A court can only apply this rule if either of the disputing

parties makes the request before the court's final judgment or decision. This procedural nuance played a critical role in the case between the Sword and the Shield.

Judicial Neutrality and Party Rights: The Supreme People's Court underscores the importance of maintaining a balance between the parties during a trial. Judges are advised not to guide the parties on exercising their right to request the application of the statute of limitations. This approach aims to preserve the equality and autonomy of the parties involved.

Evolving Legal Landscape: A historical perspective reveals that earlier civil procedure laws (like the Civil Procedure Code 2004) did allow courts to proactively dismiss cases if the statute of limitations had lapsed. However, the 2015 Civil Procedure Code shifted this responsibility to the parties themselves, making it essential for them to actively assert the statute as a defense.

4. Conclusion

In the case of the Sword versus the Shield, our voyage through the legal maze leads to an eye-opening conclusion: a thorough study of legal regulations, along with a sharp comprehension of the case facts, is critical. This astute combination allowed the Shield to effectively traverse the legal seas. Their story is more than just a legal saga; it is a powerful reminder of the power and necessity of procedural understanding in civil litigation.

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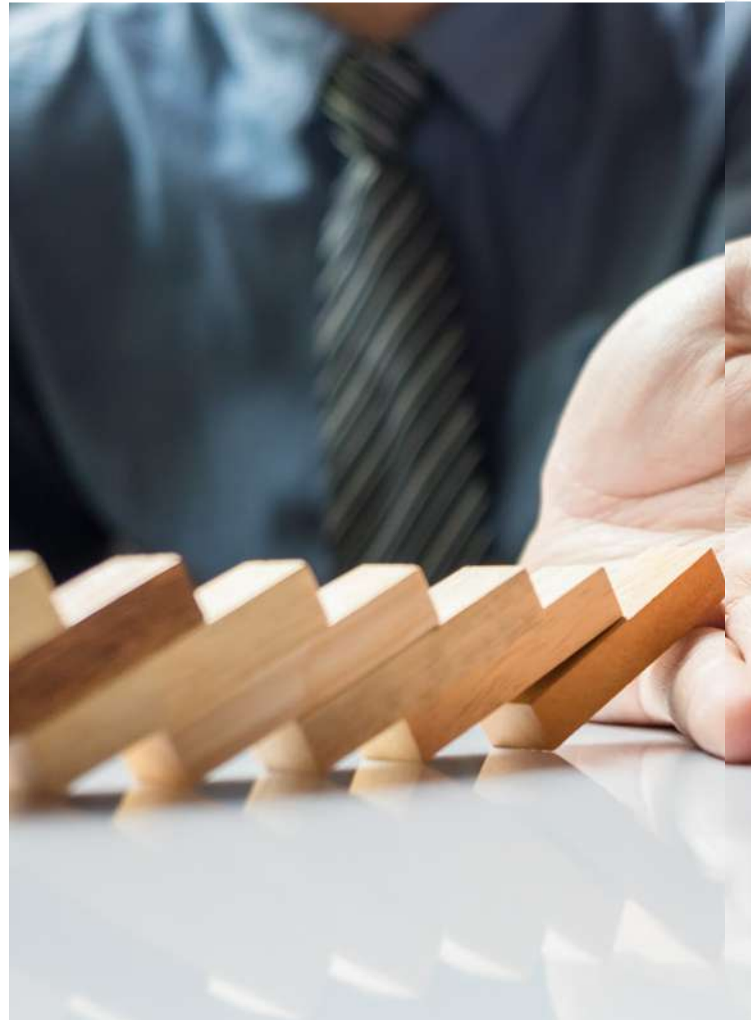
THE LAWYER'S COMPASS IN CLIENT CRISIS MANAGEMENT

In the middle of a media storm or the quiet hum of a boardroom, a disaster can happen at any time, turning a normal day into a dangerous walk on a tightrope between legal and reputational risk. Imagine a well-known CEO getting caught up in a scandal or a company's data breach touching millions of people. In these situations, the first person you call is a lawyer, who is trained to help you navigate the tricky waters of a crisis.



1. The Onset of a Crisis

A crisis often comes on like a thief in the night: out of the blue, unwanted, and unsettling. As an experienced lawyer, you learn that the reaction to an event is what starts a crisis, not the event itself. The first moments are very important because they set the stage for either control or escalation.

Identifying a crisis – characteristics and early signs: Recognizing the problem is the key to handling a situation well. A lawyer needs to be aware of the early warning signs, like a financial problem, a whistleblower's alert, or a story that is about to start. A crisis usually has a high threat to the client's interests, a sense of urgency, and a lack of clarity. But in these traits is chance—a chance to stop something from happening, get ready for something, or take action.

The immediate actions a lawyer must take: The lawyer's quick move upon recognition is analogous to a captain battening down the hatches. This includes safeguarding confidential information, assembling the crisis management team, and creating communication channels. Rapid response is critical, but so is planned action; every step must be guided by legal ramifications and strategic foresight.

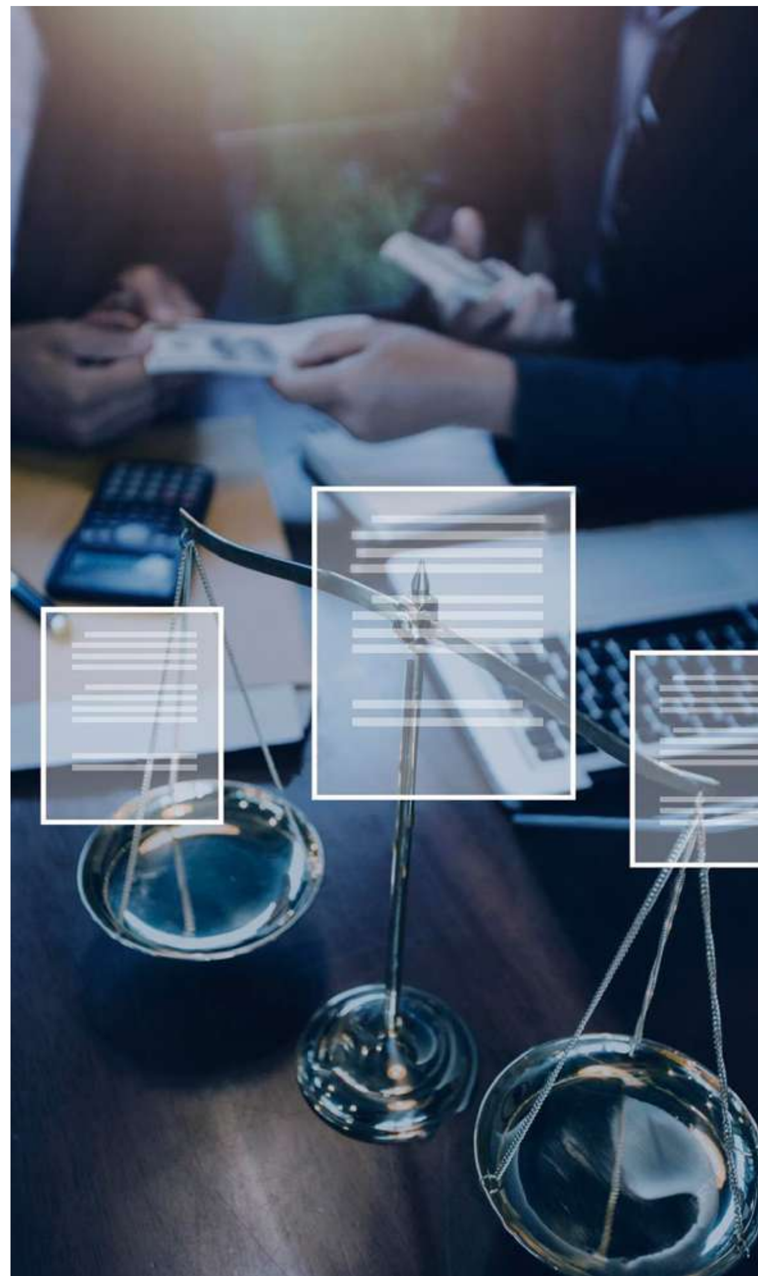
2. Legal Risk Assessment

At the heart of crisis management is often a setting full of legal landmines, where one mistake can make things worse. As an experienced mapper plots a course through dangerous waters, a lawyer's first job is to carefully look at these risks.

Mapping the legal landscape of the crisis: As the crisis unfolds, the lawyer must swiftly identify the legal implications. What laws are at play? Who are the potential claimants? What are the regulatory consequences? This mapping is a complex process,

often under the pressure of time and scrutiny, requiring the lawyer to draw upon a deep well of legal knowledge and experience.

<u>Mitigating legal exposure and liabilities:</u> With the map laid out, the path to mitigation becomes clearer. The attorney must prioritize actions to reduce the client's exposure to lawsuits, regulatory penalties, and other legal repercussions. This could mean advising on immediate corrective measures, guiding the recall of a defective product, or navigating the intricacies of a financial restatement.



3. Strategic Communication

Once the legal risks are assessed and the mitigation strategy is set in motion, the focus shifts to the art of communication. A lawyer's advisory role expands to encompass the delicate task of shaping the crisis narrative.

Public statements and press releases: In the eye of a storm, a lawyer helps craft a message that is clear, concise, and controlled, often becoming the ghostwriter of the company's conscience. The message must balance legal prudence with the need for transparency and empathy. For high-profile individuals, statements must reflect sincerity and accountability, whereas corporations must communicate a commitment to corrective action and uphold their responsibility to stakeholders.

The do's and don'ts: It is critical to control the flow of information. The lawyer advises on what to reveal and, more importantly, what to withhold due to legal privilege or strategic interests. The dos include timely updates and factual accuracy, while the don'ts discourage speculation and the dissemination of potentially privileged information.

4. Regulatory and Compliance Considerations

Navigating the maze of regulatory requirements in the midst of a crisis is a pivotal chapter in our story. Lawyers must guide their clients through this maze, ensuring that each step complies with regulatory bodies' stringent requirements.

Navigating regulatory inquiries and investigations: When regulators knock at the door in the wake of a crisis, a lawyer's role is twofold: to defend the client and to translate complex legal jargon into layman's terms. They walk the client through the complexities of responding to investigations, subpoenas, and interviews, always keeping the client's exposure in mind.

Ensuring ongoing compliance amidst a crisis: Crisis can be very distracting from day-to-day life, but following the rules must not be put on hold. Even as the crisis happens, a lawyer makes sure that current operations continue to follow the rules set by regulators. This could mean giving advice on how to change operations right away or putting in place new controls to stop problems from happening in the future.

5. Litigation and Legal Proceedings

As the crisis plays out, the threat of lawsuits grows. This is where a lawyer's strategic thinking is really put to the test, as they try to steer their clients through the tricky waters of possible legal proceedings.

Preparing for potential lawsuits: Forewarned is forearmed. The lawyer must plan for and anticipate the lawsuits that frequently follow a crisis. This includes gathering evidence, documenting response efforts, and putting together a strong legal defense. Whether the threats are from shareholders, regulators, or the general public, the attorney's work during this period is critical for any future battles.

Engaging in settlement negotiations: There is no need to go to court for every charge. Lawyers often have to negotiate on behalf of their clients in order to reach agreements that are best for them. This tricky dance involves figuring out how strong possible claims are, how much it will cost to go to court, and the cost of public opinion, which can't be seen.

Turning the tide in the courtroom: There are times when you can't avoid going to court. Here, we'd talk about a significant case where a lawyer's litigation strategy, which might have included both a tough defense and a well-planned public relations campaign, turned things around in their client's favor. An important courtroom win can help people understand how strong and determined a company is to fix a problem.

6. Reputation Management and Repair

In the aftermath of a crisis, the legal fallout is frequently accompanied by a potentially more dangerous threat—reputational harm. In this case, the lawyer's role extends beyond the courtroom and into the court of public opinion.

Legal strategies to protect and rebuild reputation: A legal strategy must be combined with a reputation management strategy. Lawyers provide advice on actions and communications that not only adhere to legal standards but also to ethical and social expectations. They work to safeguard trademarks, brand integrity, and key figures' personal reputations within the client's organization.

Working with PR professionals: A lawyer frequently works with public relations professionals to create a message that is proactive in repairing reputational damage rather than reactive. This collaboration is delicate, with the lawyer ensuring that the PR narrative stays within the bounds of what is legally prudent, and the PR team pushing for a narrative that positively reflects on the client.

7. Learning from the Crisis

The storm of crisis eventually abates, leaving a landscape altered and a wealth of hard-earned wisdom. Here, the lawyer's role shifts to one of a teacher and a guide, helping clients to distill lessons from the tumult and fortify themselves for the future.

Lessons learned: After the immediate threats have been dealt with, it is important to do a reflective analysis. The lawyer helps to break down what happened and figure out what went well and what could have been better about the client's response. This examination of what happened after the fact is not meant to find fault, but to understand what happened and make future responses better.

Implementing changes to prevent future crises: Based on the analysis, the lawyer plays a critical role in advocating for changes in policy, procedure, and even corporate culture to protect against future crises. They may assist in the development of new compliance measures, advise on the implementation of stronger governance structures, or assist in the development of staff training programs.

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FROM TRUST TO TRAGEDY RETHINKING LEGAL REPRESENTATIVE IN THE WAKE OF ABUSE

1. The Law

The position of a Legal Representative (LR) within a corporation is crucial in the Vietnamese corporate environment and is precisely specified by particular laws and regulations. The LR represents the company in all transactions and legal procedures; their authority includes the exercise of rights and the fulfillment of obligations on the company's behalf.

The present Enterprise Law requires LRs to perform out their duties with uncompromising honesty, prudence, and a firm dedication to the best interests of the company. This fiduciary duty entails remaining loyal to the company and refraining from using their position or corporate assets for personal gain or the benefit of third parties.

2. The Tragedy

However, when dealing with the scenario of a limited liability company with two members (equity stakeholders), the Enterprise Law creates a crucial gap when one of them, who also serves as the LR, is prosecuted and detained. In such instances, the company's LR is immediately assumed by the remaining equity stakeholder. While important, this shift poses a possible paradox because it fails to appropriately handle the safeguarding of the company's interests as well as the interests of the absent or prosecuted equity stakeholder. This becomes more troublesome when the new LR is also an equity stakeholder, putting them in a potential conflict of interest with the company.

Unfortunately, real-life examples abound in which such conditions have given birth to actions by the new LR that prioritize personal wealth over the wellbeing of the organization. They have used their power to orchestrate choices that directly benefit themselves or their linked entities, frequently attempting to accomplish asset transfers or alter the company's business activity while the other shareholder is unable to do so owing to legal procedures.

Consider the following real-life example: corporation X is a limited liability corporation with equity stakeholders Mr. A and Mr. B. Mr. A, who is also the LR, had provided millions of dollars in financial resources to Company X's ambitious construction project. One day, Mr. A was tragically held for a provincial law enforcement investigation, facing claims of "abusing trust to appropriate property." During his confinement, the company's seal and documentation were passed to Mr. B, who then completed the full transfer of Company X's project to one of his personal companies. Mr. A learned about the issue after his release when the provincial People's Procuracy concluded that there was insufficient evidence of criminal wrongdoing. He addressed Mr. B right away, demanding the return of his large investment in the project. Mr. B, to his surprise, declined, leaving Mr. A devastated by the theft of the company and the embezzlement of his invested assets. Overwhelmed by bitterness and frustration, Mr. A resorted to violence by throwing acid at Mr. B, accidently injuring Mr. B's son. This terrible episode led to Mr. A's prosecution and subsequent 13-year prison sentence for intentional infliction of injury, leaving a path of destruction in its wake.

3. The Prevention

To avoid such harrowing tragedies in the corporate landscape, it is critical that, if an equity stakeholder of a two-member limited liability company serving as the LR is detained, such equity stakeholder appoints a competent and legally astute individual from their circle of acquaintances or family to delegate some or all of their rights within the company. When the detained shareholder is unable to find a suitable proxy through personal relationships, hiring a respected and competent attorney to act as their proxy becomes a wise option of action. This arrangement serves as a safeguard to ensure that intervention is available if the other equity stakeholder engages in actions that are contrary to the interests of the company.

Furthermore, if the detained equity stakeholder has doubts or concerns, or has information indicating that the current LR (the other equity stakeholder) has engaged in actions detrimental to the company's welfare, they must promptly submit a written request to the court or the relevant authorities. This request should request the agency to temporarily halt changes to the LR position or to freeze the company's assets. Such safeguards are required to protect the LR's legitimate rights and interests against potential infringement, hence establishing a more equitable and secure corporate environment.

4. The Lesson

When a legal crisis occurs within a corporation, prompt and quick action is critical. The tragic experience of Company X emphasizes the significance of prompt action and vigilance. To preserve all stakeholders' rights and interests, it is critical to respond quickly, appoint competent proxies if necessary, and engage legal authorities when conflicts emerge. Proactive measures are not only advantageous; they are also required to avoid disastrous repercussions and safeguard the integrity of the organizational landscape.

VIETNAM AND THE CPTPP:

Charting a Future of Growth and Adaptation

By **NGUYEN H. HIEU (HICE)**
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Picture this: a landmark FTA, the CPTPP, which Vietnam inked in March 2018 alongside 10 other pioneering nations – Canada, Mexico, Peru, Chile, New Zealand, Australia, Japan, Singapore, Brunei, and Malaysia. This list has only grown, with the United Kingdom joining the pact in July 2023, and several others like China, Taiwan, Ecuador, Costa Rica, and Uruguay queuing up for membership.

However, the CPTPP's route to completion is one of resilience and adaptation. Born from the ashes of the Trans-Pacific Partnership (TPP) negotiations, which commenced in 2010, the CPTPP took a transformative turn following the United States' withdrawal. It finally emerged, phoenix-like, to take effect globally on December 30, 2018, and specifically in Vietnam on January 14, 2019.

As we approach the fifth anniversary of these significant milestones, it's time to turn the spotlight on how the CPTPP has transformed Vietnam's economic landscape. In the parts that follow, we will unpack a few key and basic considerations for Vietnam in this multilateral international treaty.

1. Navigating the 'Negative List' Principle

The 'negative list' approach, a guiding philosophy that spells opportunity for foreign investors, is at the heart of the CPTPP. This approach is refreshingly straightforward: unless a sector is explicitly listed under the restricted market access category, foreign investors can dive in without facing any barriers. It's like having an open invitation to most sectors of Vietnam's vibrant economy.

But what happens when an investor is juggling multiple international investment treaties, each with its own set of market access rules? This is when strategic decision-making comes into play. Investors have the freedom to choose the treaty that best serves their business interests across all sectors, as long as they adhere to the entire range of rights and obligations outlined in that treaty. It's a delicate balancing act between opportunity and duty.

2. Deciphering Tax Reduction Commitments

a. Tax Reduction

Tax reduction under the CPTPP Agreement in Vietnam isn't a one-size-fits-all affair. It's a complicated process that can be categorized into three distinct groups:

Immediate Tariff Elimination: Think of this as the express lane. Certain products and sectors are earmarked for immediate tariff elimination, resulting in faster market access.

Scheduled Tariff Elimination: This is the gradual path. Here, tariffs are phased out according to a predetermined timeline, offering a paced transition for both businesses and the economy.

Tariff-rate Quota System: This group operates on a quota-based system, blending elements of limited access and tariff reduction. It's a strategic approach, balancing market protection with competitive access.

In the dynamic arena of international trade, Vietnam has made a decisive leap with the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). This isn't just any agreement; it's a watershed moment in Vietnam's global integration journey. The CPTPP stands shoulder to shoulder with the EU-Vietnam FTA (EVFTA) as one of the two most comprehensive and ambitious Free Trade Agreements (FTAs) that Vietnam is a part of.

b. Vietnam's Tariff Transformation

Vietnam's commitment under the CPTPP is a bold stride towards economic openness. The country has pledged to reduce rates on nearly all (100%) of its tariff lines. The impact was immediate: with the CPTPP's enforcement in Vietnam, 66% of these lines dropped to a zero tariff. Fast forward three years, and this number climbs to an impressive 86.5%.

But the journey doesn't end there. Vietnam is expected to take another step forward on January 1, 2024. The country intends to eliminate tariffs on a broader range of imports, increasing the percentage of zero-tariff lines to 90. How's about the remaining goods? They're on a steady course towards reduced tariffs as per the agreed schedule. This tariff transformation is not just a policy shift; it's a magnet for foreign investment, setting the stage for 2024 and beyond.

c. The Reciprocal Commitment of CPTPP Members

The CPTPP isn't a one-way road. Its other members have pledged to reduce 97% to 100% of import taxes on Vietnamese goods, in response to Vietnam's commitment. The timeline for these tariff eliminations is detailed in the Tariff Commitment Schedule under the CPTPP, offering a clear roadmap for Vietnamese exporters.

This reciprocal tariff elimination has boosted Vietnam's exports, promoting growth in this sector and supporting the Vietnamese economy as a whole. It's a testament to the power of mutual commitment in international trade agreements.

d. Understanding the Rules of Origin

The CPTPP's tariff benefits aren't handed out indiscriminately. They come with a catch - the Rules of Origin. To enjoy these preferential tariffs, goods must be verifiably sourced from CPTPP member countries. This means goods must either be wholly obtained or produced within member countries, entirely produced from materials originating in these countries, or meet specific product rules.

Additionally, the agreement embraces the De Minimis rule, which allows a 10% threshold for non-originating elements in a product while still qualifying it as 'originating.' Moreover, the CPTPP introduces a novel aspect in certifying the origin of goods; unlike other FTAs, this responsibility can fall on importers, producers, or exporters, offering a new layer of flexibility in trade.

3. Unpacking the Commitmen to Greater Openness

The CPTPP Agreement's powerhouses are its chapters on Investment (Chapter 9), Cross-Border Trade in Services (Chapter 10) and Financial Services (Chapter 11), along with the detailed stipulations in Annexes I and II addressing Non-Conforming Measures for these sectors. These sections form the backbone of the agreement, outlining key policies that shape the landscape of trade and investment services.

a. Obligations of Member Countries

Member countries of the CPTPP have pledged specific obligations, ensuring a balanced and fair environment for cross-border service providers and foreign investors, such as:

- **National Treatment (NT): Ensuring cross-border service providers and foreign investors are treated on par with domestic ones.**
- **Most Favoured Nation Treatment (MFN): Granting cross-border service providers and foreign investors the most favourable treatment given to ones from other nations.**
- **Minimum Standard of Treatment (MST): A baseline of fairness and equity.**
- **Expropriation: Safeguarding against unfair nationalization or property seizure**
- **Market Access: Unrestricted entry into various service sectors.**
- **Transfer of Funds: Facilitating smooth cross-border financial transactions.**

And the list goes on.

b. Vietnam's Market Access Commitments:

With the 5-year mark of the CPTPP's enforcement approaching, Vietnam is set to modify its market access restrictions, signal a shift towards greater openness, such as: Non-infrastructure-based Telecommunications: The foreign investment cap below 70% will be lifted; Infrastructure-based Telecommunications: The foreign investment cap will rise from 51% to 65%; or Entertainment, Culture, and Sports: The existing 51% cap on foreign investment will be removed; and so on.

While these reforms may not significantly affect foreign investors' rights, they do strengthen their strategic capacity to obtain management rights. More importantly, the changes to capital contribution limitations are expected to attract greater foreign investment into Vietnam's booming service sectors.

c. Non-Conforming Measures

In simple terms, the concept of “non-conforming measures” addresses the exceptions and conditions under which certain regulations of CPTPP member countries (including Vietnam) do not have to fully comply with the standard rules set out in the agreement. For instance, it may include special rules a country has for foreign banks operating within its borders or specific regulations for financial products like credit cards or electronic payment services. These non-conforming measures are listed in schedules attached to the agreement, detailing the specific exceptions each country has maintained.

4. Conclusion

The period between 2021 and 2022 stands as a testament to Vietnam's burgeoning trade prowess. The nation's trade turnover with other CPTPP countries soared to $104.5 billion in 2022, marking a substantial 14.3% increase from the previous year. These figures are more than simply statistics; they represent Vietnam's growing worldwide footprint in international trade.

The CPTPP has unquestionably accelerated Vietnam's trade and investment landscape. It's not just the tax incentives and stringent investment regulations that have spurred this growth; it's the opening up of markets that has paved the way for innovation and potential economic expansion. As Vietnam stands on the cusp of a new era of reduced tariffs and relaxed foreign investment restrictions, the country's economic prospects look brighter than ever.

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SEAL OF APPROVAL: **THE VITAL ROLE OF BOARD MEMBERS IN COMPANY CONTRACTS**

1. Setting the Scene

Limited liability companies with multiple members are a common sight in Vietnam's dynamic commercial scene. The Board of Members, a vital force directing the ship, is at the heart of these entities. This body is more than simply a formal gathering; it is the beating core of key decision-making, particularly when it comes to certifying contracts and transactions of significant heft or those enmeshed with specific, intricate organizations.

Here's where the narrative thickens: if contracts and transactions are not approved by the Board, they risk being more than merely frowned upon. Picture this – a contract, inked yet unendorsed by the Board, dangling on the edge of legitimacy. It's a perilous situation in which the lack of a Board's approval could mean the contract doesn't fully bind the corporation or, worse, is thrown out in court. But the ripple effect doesn't stop there. The financial fallout is just the tip of the iceberg. Below the surface lurks the potential tarnish on the company's hard-earned reputation, not to mention the legal tightrope walked by those who penned the deal and the related parties.

2. The Board's Critical Role in Greenlighting Key Contracts

The law sets the beat in the delicate dance of corporate governance, especially when it comes to contracts and transactions that require the Board's approval.
Let's break this down:

The high-stakes transactions come first, as they have the potential to change the company's financial picture. We're talking about loan agreements, lending agreements, asset sales agreements, and a myriad of other contracts that are specifically included in the company's charter. The critical figure in this case is 50% - any contract involving assets worth 50% or more of the total asset value in the most recent financial statement falls into this category, which we'll refer to as "Major Value Contracts." But wait, there's a catch: the company's charter may establish a lower bar, bringing more deals under the Board's purview.

Then there's the "Contract with Related Parties." This is where the company's path crosses with those who have a seat at the decision-making table or their related persons. Think contracts and transactions involving company members, their authorized representatives, the Directors or General Directors, and even the legal representatives of the company. It doesn't stop there. Managers of the parent company, those who have a say in appointing these managers, and their related parties also join this group.

3. The Dangerous Waters of Unapproved Contracts

a) The High Stakes of Major Value Contracts:
Let's look into Major Value Contracts that was not approved from the Board of Members. Such contracts, according to the Supreme People's Court, might lead to a legal quagmire. They are viewed as civil transactions that are not inherently binding on the corporation, especially if they are signed by a person who has stepped outside of their allowed boundary. It's a tricky scenario on the verge of legal recognition.

For instance, as highlighted in a guide of the Supreme People, credit contracts that account for more than 50% of the company's total asset value in the latest financial report are typically under the Board's jurisdiction. If a representative signs off on such a deal without the Board's go-ahead, it's deemed a civil transaction that falls outside of their purview.

However, there's a catch. Even in the absence of the Board's explicit approval , if there's concret evidence – like the loan amount flowing into the company's coffers, being used and recorded in its books – it's akin to the company giving the contract a silent thumbs-up. This scenario actually is mentioned in the Civil Code 2015. It's a legal tightrope, where the absence of formal approval can be overshadowed by the reality of how the funds are handled, potentially binding the company to the contract.

b) The Complexities of Contracts with Related Parties

When it comes to Contracts with Related Parties, the legal landscape becomes even more complex. Under the Enterprise Law, any such contract that does not have the consent of the Board of Members is in jeopardy. If a court deems it inappropriate, the contract can be declared invalid. The consequences are severe: the individuals who signed the contract, as well as anyone associated with it, may be held liable for any damages incurred and may be required to restore any advantages gained from the deal to the corporation.

In actuality, courts do not immediately declare these contracts void. Instead, they set out on a fact-finding mission to investigate whether the Board was aware of the arrangement and whether they implicitly agreed to it by failing to oppose. This approach helps courts assess the contract's legal standing and shapes the litigation process.

4. The Balancing Act: Legal Compliance and Practical Application

The Supreme People's Court, through its judgments, has shed light on a crucial aspect of corporate law: even without the Board's explicit approval, a contract can still stand if there's evidence that the Board was in the know and chose not to object. However, in reality, demonstrating that the Board was aware and non-objecting can be a legal minefield - complex, time-consuming, and loaded with difficulties.

To avoid these legal entanglements and potential risks, both the company and its members and representatives should strictly follow the corporate law playbook. Obtaining Board clearance for essential contracts and transactions is more than a formality; it is a safeguard against legal vulnerabilities. It is about protecting not just the company's interests, but also the individuals involved - the signatories, family members, and any associated persons - from the consequences of liability, damages, and the requirement to refund gains acquired from such contracts.

BOARD CLEARANCE FOR ESSENTIAL CONTRACTS AND TRANSACTIONS IS MORE THAN A FORMALITY; IT IS A SAFEGUARD AGAINST LEGAL VULNERABILITIES.

GREEN BONDS 101

Within the ever-evolving realm of sustainable finance, green bonds have emerged as a crucial tool utilized by companies aiming to harmonize their expansion strategies with conscientious environmental management. This article delves into certain basic aspects and considerations of Green Bond issuance, offering valuable insights for businesses considering this path.

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1. Understanding Green Bonds

At their core, Green Bonds mirror traditional bonds, but with one key difference: the proceeds are entirely intended for eco-friendly initiatives.

Green Bonds open avenues to a diverse investor demographic, notably those with a keen interest in Environmental, Social, and Governance (ESG) criteria. This diversity not only broadens the funding base but also potentially secures more favorable financial terms due to high demand and limited supply. Additionally, issuing Green Bonds enhances a company's reputation, showcasing a tangible commitment to sustainable practices.

Vietnam's journey towards a dedicated legal framework for Green Bonds reflects a broader global movement towards sustainable finance. While the current regulatory environment lacks specificity, the government's commitment to fostering green investment sets the stage for significant growth and innovation in this sector.

2. The Anatomy of a Green Bond

The structure of a Green Bond is very similar to that of a traditional bond. However, there are a few key differences that make a bond "green". Here are some of the main components of a Green Bond:

Use of Proceeds: The issuer of a Green Bond specifies how the proceeds from the bond will be used. These funds are exclusively earmarked for financing environmentally-friendly projects or assets.

Green Bond Framework: The issuer of a Green Bond creates or uses a "Green Bond Framework" which outlines the types of projects that will be financed with the bond proceeds, as well as the environmental standards that the projects must meet. The framework can be reviewed and verified by a third-party certification organization to ensure that the bond's environmental impact is accurately reported.

Reporting: The issuer of a Green Bond must report on the environmental impact of the projects that are financed with the bond proceeds. This reporting is typically done annually and can also be verified by a third-party certification organization.

Issuer's Environmental Performance: Some Green Bonds require the issuer to disclose their environmental performance metrics and goals to demonstrate their commitment to sustainability.

3. Typical investors in Green Bonds

Green Bonds attract a spectrum of investors, from institutional entities like pension funds to individual retail investors. Each investor class brings unique priorities and requirements, making it essential for issuers to understand and cater to these diverse needs. Here are some of the most common types of investors in Green Bonds:

• Socially Responsible Investors: These investors are focused on investing in companies or projects that meet environmental or social criteria, in addition to financial criteria. Green Bonds are often considered a socially responsible investment because they finance projects that have a positive environmental impact.

• Retail Investors: This includes individual investors who purchase bonds through their brokerage accounts or other investment vehicles. Green Bonds may be attractive to retail investors because they offer the opportunity to invest in projects that have a positive impact on the environment.

• Development Banks: These institutions, such as the World Bank or European Investment Bank, invest in sustainable development projects in developing countries. Green Bonds can be an effective way for these institutions to raise capital to finance their sustainability initiatives.

• Institutional Investors: This includes pension funds, insurance companies, asset managers, and other institutional investors that manage large pools of capital, who are attracted to Green Bonds because they align with their mission or mandate to invest in environmentally-friendly projects or assets.

On the other hand, while not commonplace, guarantees in Green Bonds can be offered by multilateral banks, export credit agencies, insurance companies, or banks. These guarantees enhance the bond's appeal by boosting the issuer's creditworthiness.

4. The Role of Escrow Account

Investors often request that issuers use an escrow account in Green Bond issuances to provide additional security and transparency for investor. An escrow account is a separate bank account that is established by the issuer of the Green Bond, and into which the bond proceeds are deposited. The funds in the escrow account are then released to the issuer once certain conditions have been met, such as the completion of the projects financed by the bond or the verification of the bond's compliance with the Green Bond Framework.

While the use of an escrow account in Green Bond issuances can provide several benefits for investors and enhance the credibility of the bond offering, some issuers may be hesitant to use an escrow account for several reasons. First, the establishment and maintenance of an escrow account can be costly and time-consuming for the issuer, as it requires additional legal and administrative work. Second, the use of an escrow account can limit the flexibility of the issuer to use the bond proceeds, as the funds can only be released once certain conditions have been met. Third, the establishment of an escrow account can create additional legal and regulatory requirements for the issuer, including the need to comply with banking regulations and reporting requirements.

5. Strict Covenant Requirements

When investors in Green Bonds request that issuers commit to a range of strict and large covenants, including limitations or prohibitions on change of control, cross defaults, disposals, mergers, acquisitions, negative pledges, quasi-security, and change in business, they are often looking to protect their investment and ensure that the issuer is able to meet its obligations under the bond.

While some of these covenants may be common and reasonable, others can be too strict or even unreasonable. For example, limitations or prohibitions on change of control, mergers, or acquisitions can significantly limit the issuer's ability to grow or expand its business, while negative pledges and quasi-security can restrict the issuer's ability to borrow or secure other financing.

To avoid these issues, issuers of Green Bonds should carefully review and negotiate all covenants with investors to ensure that they are reasonable and appropriate for the issuer's business operations. Additionally, including qualifiers, carve-outs or exceptions in the covenants can provide some flexibility for the issuer while still meeting the requirements of the investors.

6. Environmental and Social Safeguards

Investors, especially socially responsible investors and development banks, often require issuers of Green Bonds to adopt an Environmental and Social Management System (ESMS) and comply with certain Environmental and Social Safeguards Policy and Framework, which is a framework for managing environmental and social risks associated with the projects financed by the bond, and can include processes for identifying and assessing risks, implementing mitigation measures, and monitoring and reporting on performance.

These policies and frameworks are often non-negotiable for investors, as they are critical to ensuring that the projects financed by the bond meet the investor's environmental and social impact objectives. Therefore, issuers should assess whether they have appropriate systems and processes in place to implement and comply with such policies.

On the other hand, in some cases, issuers may be able to negotiate some flexibility in the implementation of these requirements. For example, an issuer may be able to negotiate a longer timeframe for implementing an ESMS, or may be able to propose alternative monitoring and reporting mechanisms that are better suited to their operations.

7. Reporting and verification

Reporting and verification are critical components of Green Bond issuances, as they provide transparency and assurance to investors that the bond proceeds are being used in a manner consistent with the environmental and social objectives of the bond.

Reporting typically involves regular disclosures by the issuer of the bond regarding the use of bond proceeds, the environmental and social impact of the projects financed by the bond, and other key performance indicators that are relevant to the investor's environmental and social impact objectives. Reporting can be done through a variety of channels, including regular disclosures in financial reports or standalone sustainability reports, or through online platforms that allow for more frequent and detailed reporting.

Verification involves the independent assessment of the issuer's compliance with the Green Bond Framework and other environmental and social standards. Verification can be done by third-party auditors or verifiers, who provide an independent assessment of the issuer's compliance with the Green Bond Framework and other environmental and social standards. Verification can also be done by internal auditors or other stakeholders who provide an independent assessment of the issuer's compliance with the Green Bond Framework and other environmental and social standards.

Green Bond issuers should carefully consider their reporting and verification obligations when issuing Green Bonds. They should work closely with their investors and advisors to establish a reporting and verification framework that meets the needs and expectations of all parties, and that provides transparency and assurance to investors that the bond proceeds are being used in a manner consistent with the environmental and social objectives of the bond. And, they should make sure that they have appropriate systems and processes in place to manage such process.

8. Greenwashing

Greenwashing occurs when an issuer of Green Bonds makes false or misleading claims about the environmental and social impact of the projects financed by the bond. To avoid the risk of being accused of greenwashing, issuers should negotiate closely and carefully with investors to ensure that the environmental and social impact of the projects financed by the bond are accurately represented and reported.

On the other hand, it is also important for issuers to have flexibility in using the bond proceeds. This flexibility can enable issuers to respond to changing market conditions and opportunities, and can ultimately lead to greater environmental and social impact. To negotiate for flexibility in using bond proceeds, issuers can work closely with investors to understand their environmental and social impact objectives and to identify areas where flexibility may be appropriate. For example, an issuer may seek flexibility to allocate bond proceeds to a range of projects or to use bond proceeds for working capital or other general corporate purposes.

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Herman, Henry & Dominic

SHAREHOLDERS' RIGHTS AND LEGAL RECOURSE: ANNULMENT OF GMS RESOLUTIONS

The resolution passed by a General Meeting of Shareholders (GMS) is a cornerstone in the governance of a joint-stock company, significantly influencing shareholders, the company itself, and its stakeholders. However, instances arise where GMS resolutions may be illegal or detrimental, triggering a need for annulment. The potential for annulment acts as a significant check and balance within the corporate structure, providing shareholders with a means to challenge and rectify decisions that may otherwise compromise the company's integrity or their equitable interest.

1. Criteria for Annulment of GMS Resolutions

Under the current Enterprise Law, there are two primary grounds for the annulment of a GMS resolution:

Firstly, a resolution may be annulled if the process of convening and decision-making at the GMS grossly contravenes the stipulations of the Enterprise Law or the company's charter. Such egregious violations might include failures in distributing draft resolutions, unauthorized convening of meetings, or breaches of prescribed deadlines for resolution dissemination.

Secondly, a resolution is subject to annulment if its substance directly violates legal provisions or the company's charter. This includes resolutions that infringe upon business law or the company's charter, those that harm the company or its shareholders, or those enacted through abuse of power or deceptive tactics.

However, the Enterprise Law specifies that not all procedural deviations in GMS proceedings warrant annulment. Only serious breaches of the Enterprise Law or the company's charter are grounds for such action. The ambiguity surrounding what constitutes a "serious violation" often leads to varied interpretations in legal disputes. Thus, the resolution of these disputes heavily depends on the discretion of the adjudicating bodies.

2. Determining the Appropriate Forum for Annulment of GMS Resolutions

The question of which authority is competent to address requests for the annulment of GMS resolutions is pivotal. Under the Enterprise Law, these matters fall within the jurisdiction of either Arbitration or the Courts. The chosen forum—Arbitration or Court—depends on the parties' agreement and carries distinct advantages and challenges.

Arbitration is favored for its expediency and flexibility, standing apart from the more procedural nature of court proceedings. It allows parties to select their arbitrators, ensuring expertise and impartiality, and to choose convenient locations and timings for hearings. The confidentiality of arbitration proceedings safeguards sensitive business information, making it an attractive option for many businesses.

To invoke arbitration for annulment of a GMS resolution, the company's charter must reference arbitration, or the parties must have an agreement to this effect, acknowledging that the dispute is commercial in nature. A significant limitation of arbitration is the lack of compulsory enforcement of its awards, relying instead on voluntary compliance, which may lead to non-execution of the award.

Courts, conversely, offer authoritative adjudication with mandatory enforcement of judgments. This binding nature ensures compliance and the protection of the winning party's rights. However, court procedures can be protracted and rigid, often requiring more time and resources, which can be burdensome for businesses where time is of the essence. Moreover, the public nature of court trials can lead to the disclosure of confidential business information, and the possibility of appeals can delay the final resolution.

3. Disclosing Annulments of GMS Resolutions

The obligation to disclose critical information is an integral aspect of corporate governance, especially for public companies. The Securities Law mandates public companies to disclose extraordinary information in certain scenarios, including when a court judgment or decision directly related to the company's operations is issued. This includes decisions to annul GMS resolutions of. Such disclosures are to be made on the company's website, the portal or website of the state ownership representative body, or the enterprise information portal, ensuring shareholders and stakeholders are informed about significant developments affecting the company.

In the complicated landscape of corporate governance, the annulment of GMS resolutions stands as an important legal recourse for shareholders. When used judiciously, it empowers shareholders to actively safeguard their rights and interests against resolutions that are detrimental, unlawful, or in violation of a company's charter. This legal mechanism serves not only as a corrective tool but also as a preventive measure, ensuring that the decision-making processes within a company adhere to legal and ethical standards.

AI'S IMPACT ON THE LEGAL REALM

CHALLENGING TRADITIONAL MASTERY?

By **TRAN H. THAI (ABEL)**
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Consider the words of Elon Musk: We are seeing the most destructive force in history here. We will have something that is smarter than the smartest human. There will come a point where no job is needed - you can have a job if you want one for personal satisfaction, but the AI will be able to do everything'. This perspective invites us to reflect on the historical waves of industrial revolutions and their impact on professions, particularly in the legal field.

Rewind to the late 18th century: the first industrial revolution. The advent of the steam engine revolutionized transportation, rendering animal traction obsolete. Despite fervent opposition from horse-drawn carriage magnates, who raised countless concerns about the steam vehicles' stability, safety, and environmental impact, the new technology prevailed. This shift not only led to the redundancy of horses but also threatened the economic stronghold of carriage company owners.

Fast forward to the late 19th century, marked by the second industrial revolution. Here, electrified machinery and mass production lines began replacing artisans, farmers, and manual laborers. Another leap, some sixty years later, introduced the third industrial revolution, characterized by computers, the internet, and digital technology, challenging traditional office roles for the first time.

In our recent past, less than four decades have passed, yet we've witnessed a seismic shift in technology-related employment, impacting everyone from tech behemoths like Google, Amazon, and Microsoft to burgeoning startups. This change, driven by advancements in artificial intelligence (AI), the Internet of Things (IoT), and other fourth industrial revolution technologies, has reshaped the job landscape.

Now, let's pivot to the legal profession. Is AI poised to replace lawyers in the same way? Can we envision a future where legal expertise, once a human domain, becomes an automated service, accessible without traditional costs? This is a provocative question, opening the floor for a deeper exploration of AI's role and potential in transforming the legal industry."

1. Understanding AI: More Than a Mere Chatbot in the Legal Arena?

Let's demystify AI as referenced in this discourse. When we talk about AI here, we're delving into the realm of sophisticated chatbots like ChatGPT, Google Bard, and others, commonly known as large language models. These aren't your ordinary digital assistants; they're complex systems engineered to mimic human-like text generation.

At their core, these models rely on probabilities to predict what word comes next in a sequence. Imagine a vast treasure trove of language—a library containing everything from classic literature to modern-day articles, coding scripts to dynamic web content. These models absorb this diverse linguistic diet, learning to anticipate the next word in a sentence based on the context set by its predecessors.

Once trained, these models become adept at weaving words together, each new word informed by the ones that came before it. This results in text generation that feels natural and coherent, almost as if it were penned by a human.

But there's more. These AI models aren't just repeating what they've learned; they're constantly evolving. With self-learning capabilities, they digest information autonomously, learning from new experiences and refining their performance over time. This isn't limited to text generation either. They're capable of language translation, summarizing complex texts, and even engaging in nuanced question answering. Their prowess in understanding and producing natural language is a key strength, especially in the field of natural language processing.

Now, the pressing question: Can these 'simple tactics' of AI truly rival lawyers in their own game, the intricate legal 'chessboard' they've mastered over centuries? This isn't just a question of raw computational power or data processing but rather a contemplation of AI's role in redefining the legal landscape.

2. AI's Legal Debut: A New Era in Legal Practice?

The year 2023 marked a significant milestone in legal technology, as a law firm in Australia boldly experimented with ChatGPT for drafting a compensation claim statement, drawing inspiration from the landmark 1992 Mabo case. The firm's assessment? ChatGPT's output paralleled that of a novice attorney.

Further exploring ChatGPT's legal acumen, researchers Kwan Yuen Iu and Vanessa Man-Ji Wong conducted a study using a simplified narrative from the 1932 Donoghue vs. Stevenson case. Their demands from ChatGPT were comprehensive: drafting litigation documents, cross-examination dialogues, and various legal advisories. Intriguingly, they peppered the inputs with deliberate errors to test the AI's comprehension prowess.

Their findings were revelatory. ChatGPT, equipped with a suite of sophisticated legal templates, demonstrated an ability to craft documents ranging from request letters to non-bias letters and opinion pieces. More impressively, it showcased the capability to refine content autonomously, based on factual inputs, and to engage in simple event comprehension, legal reasoning, argumentation in confrontations, and even basic legal strategizing.

This development spurred tech giants like Google and Microsoft to unveil their own AI chatbots, such as Bard and Bing. Notably, Harvey, another AI tool, has gained traction in legal research, document drafting, and litigation strategy. Major law firms like Allen & Overy, Macfarlanes, and PwC have begun incorporating Harvey into their practices. Additionally, other AI innovations like DoNotPay, JusticeBot, LegalZoom, and Vietnam's Legback deserve mention for their unique contributions.

The broader impact of these advancements is profound. AI companies are increasingly positioned to educate consumers on legal matters, a domain traditionally dominated by lawyers. Recent studies suggest a mere 20% resolution rate for legal issues in the past three years, highlighting the accessibility and cost challenges in traditional legal services. In contrast, the convenience of information technology empowers clients to swiftly seek legal solutions, often prioritizing automated tools over consulting a lawyer. As this trend gains momentum, it signals a significant shift in client preferences and legal service delivery, even when costs and efficiency are comparable.

3. AI in Law: A Balancing Act Between Innovation & Tradition

As AI continues to evolve, it casts a familiar shadow, reminiscent of the carriage magnates of the first industrial revolution. This time, however, it's the legal profession grappling with the challenges and opportunities posed by AI. The legal landscape today faces hurdles in adapting to AI, with crucial issues like security, information accuracy, and copyright law forming the crux of the debate. Interestingly, these very issues are where lawyers find their strength.

a. Navigating Security Concerns

The surge in AI adoption brings with it pressing concerns about data security. AI systems, central to training language models and generating content, are not immune to risks of data breaches or inadvertent information exposure. The process of assimilating various articles for public training can open up vulnerabilities, potentially exposing sensitive information.

While many AI firms commit to safeguarding data, often, these assurances don't translate into foolproof security measures. This gap poses a significant threat, especially in the legal sector where confidentiality is paramount.

The intersection of AI and attorney-client privilege raises complex questions. The potential for AI to compromise the confidentiality of sensitive client information looms large, posing risks to privacy and reputational harm. Consequently, many law firms remain cautious, restricting the use of AI in handling legal information.

b. The Copyright Conundrum

The rapid evolution of AI technology has thrust copyright issues into the legal spotlight. The critical question here is about the ownership of works produced by AI: Does the right belong to the AI's creator or the user?

AI's capability to generate original content—from music to texts—has outpaced the legal framework governing authorship and ownership. The absence of clear laws on whether AI qualifies as an "author" or "creator" leaves a murky area in copyright law.

Efforts are underway globally to navigate this new terrain, with some regulations suggesting AI be recognized as a "creative entity," granting ownership rights to the user or owner of the AI. Yet, many aspects, including liability for AI's potential intellectual property infringements, remain unresolved, fueling ongoing debates among researchers and policymakers.

c. The Quest for Accurate and Objective Information

AI's text generation, governed by probabilities and contextual cues, prioritizes fluency over accuracy. This has raised concerns in the legal field, where the distinction between fact and AI-generated fiction is crucial. A notable example occurred in May 2023, when a New York lawyer inadvertently used ChatGPT-generated, nonexistent case citations in a federal court submission. This incident underscores the challenges in AI's current information accuracy.

While efforts to enhance AI's accuracy are ongoing, AI's inherent objectivity—free from human biases and emotional influences—holds promise for more impartial legal services. But can this objectivity truly compensate for the current limitations in accuracy?

As we contemplate AI's role in the legal domain, perhaps it's time to envision a scenario where AIs themselves compare notes, providing us with intriguing anecdotes to ponder over our next social gathering.

4. AI and Lawyers: An Ongoing Tussle in the Legal Landscape

The evolving landscape of AI in the legal domain paints an uncertain picture regarding its ultimate impact. Clients seeking legal assistance aren't just looking for expertise; they're also drawn to the strategic relationships lawyers have nurtured over time. These connections, particularly in the legal world, are invaluable in streamlining workflows and boosting efficiency.

Lawyers with extensive networks serve as crucial links between clients and key players like judges and government agencies. Their ability to navigate the legal system with agility and a deep understanding of procedures and regulations is irreplaceable. This relational aspect forms the crux of a lawyer's role, highlighting their unique value in the legal process.

Turning to AI's inherent superiority in certain domains, it's crucial to recognize that machines were designed to excel in tasks where they augment human capabilities. The first language model, introduced in 1980, is a testament to this evolution. Research suggests it may take between 43 to 66 years for such technologies to achieve full maturity, implying that a significant shift isn't too distant.

However, the way these technologies are utilized ultimately lies in human hands. This perspective aligns with that of Jason M. Allen, who, using AI Midjourney, created 'Théâtre D'opéra Spatial'. This AI-generated artwork, printed on fabric and submitted to the Colorado State Art Fair on August 29, 2022, clinched the first prize, competing against traditionally hand-painted art.

Allen's words resonate deeply in this context: “The ethics isn’t in the technology. It’s in the people.” This statement underscores the fundamental truth that, while AI may evolve and integrate into various fields, including law, the ethical use and application of such technology remain a human responsibility.

Fun Fact: Originally crafted by human intellect, this engaging article on the evolving relationship between AI and the legal profession was further refined with the assistance of ChatGPT-4, demonstrating a perfect blend of human creativity and AI innovation.

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CAN YOU STOP YOUR EMPLOYEES FROM WORKING FOR COMPETITORS? THE LEGAL TRUTH

In today's information-driven world, the value of confidential business information has skyrocketed. From proprietary trade secrets to sensitive customer data, safeguarding these intellectual assets is paramount for companies seeking a competitive edge. One key tool in this arsenal is the Non-Disclosure and Non-Competition Agreement (NDCA), a legal document increasingly used in the Vietnamese business landscape.

At its core, NDCA is a contract between a company and its employees. It serves two key purposes:

- Confidentiality: The employee undertakes to keep sensitive company information confidential, both during and after their employment. This includes trade secrets, customer lists, financial data, and any other information deemed critical to the company's success.
- Non-compete: In exchange for valuable training or access to confidential information, the employee agrees not to work for a competitor or engage in any activity detrimental to the company's interests. This prevents the company from losing its competitive advantage as a result of staff desertion.

While NDCA offers a powerful shield for business secrets, its effectiveness in Vietnam has been a subject of ongoing debate. The debate surrounding the validity of non-compete clauses within NDCA highlights a complex balancing act between individual rights and business interests. On one hand, the principle of freedom of choice enshrined in Vietnamese law protects the ability of individuals to pursue their chosen career paths without undue restrictions. On the other hand, businesses argue that NDCA is a vital tool for safeguarding valuable trade secrets and confidential information, allowing them to invest in employee training and innovation without fear of their knowledge being appropriated by competitors.

1. Argument Against NDCA

This viewpoint draws its strength from the principle of "freedom of choice", enshrined in the Vietnamese Constitution and Labor Code. These documents guarantee citizens the right to choose their profession, job, and workplace. Proponents of this view argue that NDCA with non-compete clauses can restrict this fundamental right, potentially limiting an individual's career opportunities and economic mobility.

There have been court decisions that have ruled non-compete agreements unenforceable due to their conflict with established legal principles. These courts' perspective emphasizes the importance of protecting individual freedom and ensuring that employees are not unfairly constrained in their career paths. By advocating for the unenforceability of non-compete clauses, they seek to prevent potential imbalances in the employer-employee relationship and safeguard the freedom of choice in the labor market.

However, this perspective also raises concerns about the potential impact on businesses. Proponents of NDCA argue that it is an essential tool for protecting valuable trade secrets and confidential information. Without such safeguards, companies may be hesitant to invest in employee training and development, ultimately hindering innovation and competitiveness.

2. Arguments in Favor of NDCA

Contractual Freedom: Proponents of NDCA emphasize the principle of "contractual freedom", stipulated in the Vietnamese Civil Code. They argue that as long as such agreements are entered into voluntarily and without coercion, they should be considered valid and enforceable. This viewpoint aligns with the notion of autonomy and individual responsibility in contractual relationships.

Protection of Trade Secrets: Businesses heavily invest in developing valuable trade secrets and confidential information. NDCA serves as a legal barrier, preventing employees from misappropriating such assets for personal gain or sharing them with competitors. This protection is deemed essential for encouraging innovation and ensuring a fair competitive environment.

Compensation for Training Costs: Companies often invest in training and development programs for their employees. NDCA with non-compete clauses can serve as a form of compensation for such investments, ensuring that the company reaps the benefits of its training initiatives and minimizes the risk of losing its investment to competitors.

There are numerous cases resolved through arbitration that demonstrate this point of view in action, which uphold the NDCA and require the employee to compensate the employer for damages, particularly when it comes to protecting confidential information and protecting businesses from unfair competition.

However, this viewpoint also raises concerns about potential abuse. Critics argue that certain employers might misuse NDCA with non-compete clauses to unfairly restrict employee mobility and stifle economic growth.

3. Key Takeaways

As previously indicated, the legal landscape surrounding NDCA in Vietnam paints a complex picture, with diverse perspectives shaping their enforceability. While the absence of specific legal regulations regarding non-compete clauses creates uncertainty, there are a few key takeaways that businesses should consider:

- Voluntary Agreements: NDCA is more likely legally binding when demonstrably entered into voluntarily and without coercion, upholding the principle of contractual freedom.

- Protecting Confidential Information: It should be shown that the company relies on NDCA to safeguard valuable trade secrets and confidential information, fostering innovation and ensuring fair competition.

- Reasonable Restrictions: Non-compete clauses should be designed with reasonable scope and duration, balancing business interests with employee mobility and career opportunities.

- Dispute Resolution: Choosing the appropriate dispute resolution body (e.g., arbitration or courts) is important for ensuring a fair and efficient resolution of any disputes arising from NDCA.

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LUXURY IN THE CLOUDS: LEGAL INSIGHTS INTO PRIVATE JET ACQUISITION

Purchasing a private aircraft is a complicated process that goes much beyond simply exchanging money for a fancy possession. It necessitates a thorough awareness of diverse legal, financial, and operational issues. For the discerning buyer, understanding these dynamics is not only advantageous; it is also required for a successful and fulfilling ownership experience. In this article, we will examine several fundamental principles and crucial facets of the private jet acquisition process.

1. Formation of Offshore Companies and Ownership Structures

When it comes to owning a private jet, forming an offshore business might be a game changer.

Navigating Legal Offshore Waters: Creating an offshore corporation for aircraft ownership requires more than just looking for a tax haven. It's a strategic move that can provide significant benefits such as confidentiality, asset protection, and, in many cases, operational flexibility. This, however, entails comprehending and abiding to the legal frameworks of the chosen country. Beyond initial establishment, the legal ramifications include continuous compliance with international norms, anti-money laundering requirements, and cross-border taxes legislation.

A Tailored Approach to Ownership Structures: There is no one-size-fits-all jet ownership structure. Each option, from sole ownership to complex partnership structures or fractional ownership, has its own set of legal, tax, and operational issues. For example, while sole ownership provides complete control, it lacks the cost-sharing advantages of a partial ownership model. Joint ownership structures, on the other hand, might minimize individual economic burdens but necessitate more complex legal agreements to handle shared use, obligations, and liabilities.

2. Sales Agreement Negotiations

Negotiating a private jet sales agreement is analogous to conducting a symphony, where each note must precisely sync with the next.

Crafting the Agreement: A private jet sales agreement is much more than a basic buy-sell transaction. It includes a variety of critical components, such as pricing and payment terms, as well as delivery conditions and warranties. Understanding and negotiating these agreements necessitates not just legal knowledge, but also a thorough understanding of aviation intricacies. Each provision, whether it addresses maintenance records, pre-purchase inspections, or customizing demands, is critical to protecting the buyer's rights.

New Construction vs. Pre-Owned: The decision between purchasing an existing jet and commissioning a new one from the manufacturer throws fresh dynamics into the bargaining process. Buying a used jet needs a sharp eye for detail in evaluating the aircraft's history and condition, with the contract reflecting factors such as wear and tear, maintenance history, and quick availability. Buying a new plane, on the other hand, necessitates extensive negotiations over customizations, delivery timeframes, and post-delivery assistance. Each option necessitates a tailored approach to contract negotiation, reflecting the distinct qualities and dangers involved.

3. Pre-Delivery Payment (PDP) Financing

Pre-Delivery Payment (PDP) Financing arises as a critical component in the difficult process of acquiring a tailored private jet. It provides the financial leverage required for making pre-delivery payments, allowing the aircraft to be built without placing undue burden on the buyer's cash.

The Importance of PDP Financing in Jet Acquisition: When a buyer chooses a custom-built private jet, manufacturers frequently request significant payments in stages before the aircraft is completed and delivered. These sums can be substantial, accounting for a sizable portion of the total cost of the jet. PDP Financing is used to enable these payments. Without such financing, the buyer would be required to tie up a significant amount of capital during the construction phase, which could be financially expensive and impracticable. PDP Financing helps purchasers to keep their liquidity and financial flexibility while assuring the jet's construction goes as planned.

Risk and Protection Balancing: PDP Financing agreements have complicated legal and financial structures. These contracts must have specific conditions defining payment schedules, interest rates, and payback schemes. Furthermore, they must provide safeguards for both the lender and the buyer. This includes provisions for what happens if the manufacturer delays or fails to complete the jet's construction, or if the buyer runs into financial issues. Maintaining a fair balance in these agreements necessitates meticulous legal knowledge and negotiation abilities.

4. Integrating Long-Term and PDP Financing

The incorporation of PDP and long-term financing in private jet buying is a clever financial approach. It offers a methodical strategy to handling the large capital required for jet ownership. This technique not only promotes a smoother financial transition from construction to ownership, but it also matches with the buyer's broader financial and operational goals.

<u>The Symbiotic Relationship Between PDP and Long-Term Financing:</u> While long-term finance and PDP financing are separate, they can work in tandem. While PDP Financing handles the initial phase of jet development, long-term financing is used to cover the whole cost of the jet after delivery. Long-term financing is frequently structured to replace PDP Financing as soon as the plane is completed. This seamless transition is critical because it assures a continual flow of funds, reducing capital burden on the buyer.

<u>Transition Planning:</u> The strategic change from PDP to long-term financing is like to transferring the baton in a relay race – it must be smooth and well-timed. When properly structured, this transfer can give significant financial rewards. It enables buyers to efficiently leverage their money by using PDP Financing in the early phases and then shifting to a long-term financing option that distributes the cost over a longer period. This technique not only alleviates current financial burdens but also corresponds with long-term cash flow and investment goals.

5. Various Financing Structures for Private Jets

In addition to the traditional long-term financing schemes, there are various alternative financing possibilities for private jet buys. Each of these structures provides distinct benefits and considerations, allowing buyers to tailor their financial strategy to their own needs and circumstances. For example:

Rental Financing: For individuals who prefer not to own the aircraft entirely, lease finance is an appealing choice. The jet is leased from a lender or leasing business in this setup. Leases are classified into two types: operating leases and finance leases. Because the lessee is not responsible for the jet at the end of the lease term, operating leases are often short-term and flexible. Finance leases, on the other hand, are longer-term and frequently result in ownership at the end of the lease period. Depending on the lessee's financial status, both approaches provide tax and accounting advantages.

Cooperative and fractional ownership: Joint or fractional ownership might be cost-effective alternatives for purchasers who do not require full-time access to a private jet. Joint ownership entails splitting the costs of purchase and operation with one or more partners. Owners can purchase a share of a jet, providing them access for a set number of hours per year, through fractional ownership, which is frequently administered by specialist businesses. These choices decrease the financial burden of ownership greatly, but they necessitate comprehensive legal arrangements to govern usage, prices, and duties.

Securitization: Securitization allows high-net-worth individuals or organizations owning a portfolio of planes to finance fresh acquisitions. This entails pooling existing assets (in this example, aircraft) and creating marketable securities in exchange for them. While this can yield large funds, it is a difficult procedure that takes great financial and legal knowledge to carry out.

Asset-Backed Lending: This approach, like securitization, involves using the jet or other assets as collateral to acquire funding. This structure can provide attractive conditions, especially if the borrower has a good credit history and substantial assets. It does, however, put the assets at risk in the case of a default.

6. Aircraft Registration and Regulatory Compliance

Regulatory compliance and aircraft registration are critical components of the private jet ownership process. They necessitate considerable thought, strategic decision-making, and constant attention. Mastery of these areas ensures not only the legality of the jet's operations, but also the investment's safety, efficiency, and lifespan.

The Legal Situation Regarding Aircraft Registration: Registering a private jet is more than just a formality; it is a critical legal process with far-reaching consequences. Aircraft registration is more than just a record of ownership; it designates the jurisdiction in which the aircraft will operate, which influences everything from operating requirements to tax ramifications. Choosing the best register is a strategic decision that is influenced by aspects such as political stability, reputation, regulatory framework, and cost. Because each register has its unique set of requirements and perks, this is an important option to make during the acquisition process.

Registration of Aircraft and Operational Readiness: The registration process is also important for the aircraft's operational preparedness. It is not only about obtaining legal recognition; it is also about ensuring that the aircraft meets all of the technical and safety standards imposed by the register. This includes getting the requisite certificates, adhering to airworthiness rules, and adhering to environmental norms. The registration process ensures that the jet is not only legally compliant, but also operationally safe and ready.

7. Operations and Insurance

Operating contracts and insurance are critical parts of private aircraft ownership that necessitate thorough legal oversight and strategic preparation. They provide the framework for the jet's operation and protection. These factors, when properly designed and managed, assure not just regulatory compliance and operational efficiency, but also the jet owner's peace of mind. They are essential tools for protecting the owner's investment and allowing seamless enjoyment of the unique benefits of private jet ownership.

Operational Contracts: Operational contracts cover a wide range of agreements that are required for the day-to-day operation and upkeep of a private jet. Contracts with operators who handle the aircraft, maintenance agreements, and hangar space arrangements are just a few examples. Each contract serves a specific purpose and necessitates careful legal drafting to safeguard the owner's rights. Operator agreements, for example, spell out the responsibilities and liabilities of the party in charge of the aircraft, ensuring operational efficiency and compliance with aviation rules. Maintenance contracts, on the other hand, are critical for keeping the aircraft in top shape by addressing maintenance work schedules, scope, and standards. Details like as liability clauses, service level agreements, and termination terms must be considered while negotiating these contracts.

Adequate Insurance Coverage: Insurance is essential for mitigating the hazards involved with private jet ownership. It is not only a legislative necessity, but also an important risk management tool. Adequate insurance coverage extends beyond hull insurance to include liability insurance, crew insurance, and even coverage for specific dangers such as war and terrorism. Legal evaluation of insurance policies is essential to ensure that they provide complete protection, cover all potential dangers, and correspond with the operational profile of the jet. Negotiating terms with insurers, recognizing exclusions, and ensuring coverage limits are enough are all critical elements in this process.

As we close this article, remember that private jet ownership is more than a symbol of status; it's a journey of strategic and thoughtful stewardship. With the right approach and guidance, it can be an incredibly fulfilling and advantageous venture, offering unmatched experiences in the realms of both business and leisure travel.

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