



Legal guide
to investment
in Vietnam



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An aerial photograph of a tropical coastline. The top half of the image shows a dense, lush green forest. Below the forest is a narrow strip of white sand beach, dotted with large, dark rocks. The water is exceptionally clear, showing a gradient from light turquoise near the shore to a deeper blue further out. The water's clarity reveals the sandy bottom and some submerged rocks. In the lower-left corner, there is a large, semi-transparent blue geometric shape that overlaps the water and extends towards the bottom edge of the frame.

Destination Vietnam

Allens is delighted to present its *Legal Guide to Investment in Vietnam*, a guide that aims to identify and unravel many of the legal and regulatory issues that foreign investors will face when considering an investment opportunity in Vietnam.

Vietnam has been, and will continue to be, an attractive investment destination for foreign investors. Foreign direct investment in Vietnam reached an all-time high of nearly US\$12 billion in 2015 and continues to show strong signs of growth.

In recent years, the legal landscape for doing business in Vietnam has changed significantly with the introduction of new laws, including the key laws on enterprise and investment. These developments are underpinned by the Government's continuing commitment to encouraging investment and further integrating Vietnam into the international market.

Allens is a leading law firm with partners, lawyers and corporate services staff across Asia and Australia, and a global network spanning 40 offices and 28 countries. We have consistently been recognised as one of the leading law firms in the region, with a depth of experience in the Vietnam market which spans over 20 years.

We are often called on to assist foreign clients of all sizes, and in a range of industries, in establishing new businesses or acquiring existing businesses in Vietnam. We offer on-the-ground partners who are at the forefront of negotiating and managing large and complex transactions and projects in a rapidly evolving market. They are supported by a team of Vietnamese and international lawyers who are geared towards commercial, efficient and timely advice.

The global alliance between Allens and Linklaters allow us to deliver an integrated service to our clients, with one point of contact and a unified team comprising the best resources of each firm in Africa, Australia, Asia, Europe, the Middle East, South America and the US.

This guide aims to make investing in Vietnam easier to understand, and discusses the legal and regulatory environment that investors will face in Vietnam. Of course, each investment decision is different and the laws and regulations in Vietnam are evolving. Accordingly, this guide is intended only as a summary of the issues, and is not a legal opinion. If you require more information or advice about your particular circumstances, please do not hesitate to contact any of our partners listed at the end of this booklet.

This guide is current as at September 2017.

Vietnam at a glance

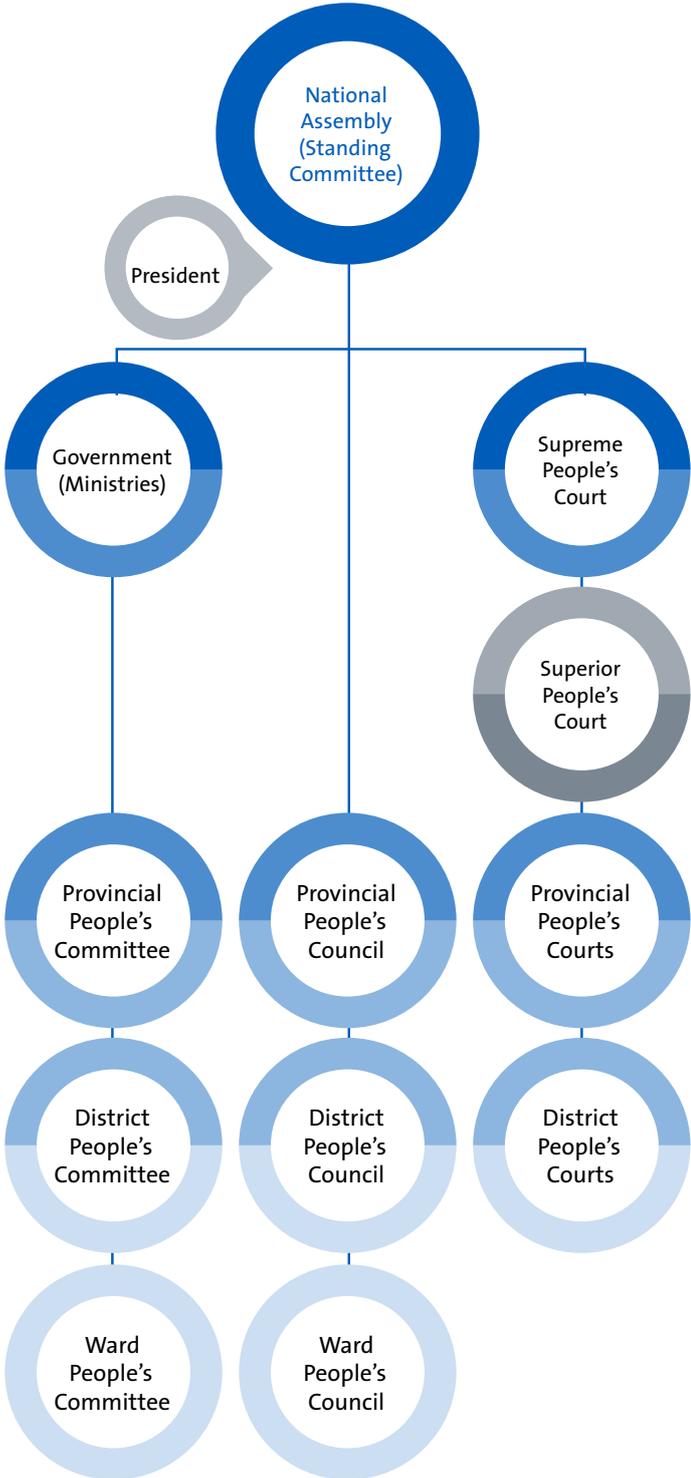
Vietnam is widely regarded as an attractive investment destination. Favourable government policies and laws, combined with Vietnam's natural assets and advantages, have produced a stand-out performer in South-East Asia and the wider region. Important factors include:

- > according to the World Bank, by 2015 Vietnam's population was more than 91 million, making it the 14th-largest nation in the world by population. This large population has a strong demographic profile for investors, with a young, educated workforce (70 per cent of the population being of working age) and an adult literacy rate of 94 per cent – at the same time, Vietnam continues to enjoy low labour costs without the same upward pressure that has appeared in other traditionally low-cost environments (eg China);
- > although Vietnam's GDP growth has decelerated in recent years, in line with the global economy, Vietnam remains one of the fastest-growing economies globally. According to the Asian Development Bank, Vietnam's GDP grew 6.2 per cent in 2016 and is forecast to grow by a further 6.5 per cent in 2017;
- > Vietnam is ideally geographically located at the heart of the Asia-Pacific region and is committed to global trade integration – as evidenced by Vietnam's accession to multiple free trade agreements with some of the largest economies in the world, such as the 2015 agreement with the European Union; and
- > following the global financial crisis, Vietnam has adopted a range of measures aimed at stabilising its economy, in an effort to retain investor confidence, such as restructuring its banking system. The Government has also taken action to cut red tape and relax conditions for foreign investment, including the complete overhaul of the Law on Investment in 2014, and the relaxation of some of the foreign ownership caps applying to public and listed companies.

The system of government

Vietnam has a stable political system controlled by the Communist Party of Vietnam. The Communist Party has the leading role in administering the nation. Its chief body, the Politburo, is elected by members of the Central Committee.

Figure 1: Key Vietnamese State institutions



‘All State powers are centralised in the National Assembly. Under the Assembly, the Government performs executive functions, supported by local-level authorities. The hierarchy of People’s Courts makes up the judicial arm, responsible for resolving disputes and hearing appeals from matters tried in the lower courts.’

Vietnam’s political system is underpinned by the principle of centralised democracy. All State powers are centralised in one supreme body, the National Assembly, a unicameral legislature. They are then delegated to lower bodies in the hierarchy. The National Assembly holds two sitting sessions each year. When the National Assembly is not in session, the Standing Committee is empowered to act on its behalf.

The Government, the executive arm of the State, is the highest administrative body, responsible for executing the legal instruments enacted by the legislature. It comprises the Prime Minister, Deputy Prime Ministers and Ministers (who head up ministries and ministerial equivalent bodies, eg the Ministry of Finance and the State Bank of Vietnam).

The central-level State apparatus is mirrored at the local level. Each province or city is administered by a Provincial People’s Council, an elected body similar to the National Assembly, and the People’s Committee, an executive body similar to the Government. Each Provincial People’s Committee has a number of departments that are counterparts to the Ministries at the central level, and are responsible for State administration of their respective sectors in the relevant province or city. The same structure is repeated at the district level and the ward level, with officers dedicated to one or several areas of responsibility.

The judicial body of the State comprises the People’s Courts, which are responsible for resolving disputes based on the laws. However, they do not have the power to review or interpret the laws. That said, selected precedents have recently become recognised as a source for interpretation of law in Vietnam, though in very limited and specific circumstances. If published as an official precedent, a judgment must only be relied upon if the facts and circumstances are analogous to the matter under dispute, and the issue at hand cannot be answered or dealt with under current legislation.

The structure of laws

The Vietnamese legal system is often said to be similar to a civil law jurisdiction, in that its only source of law is written legislation, commonly referred to in Vietnam as ‘legal instruments’.

Vietnamese law is made up of tens of thousands of legal instruments. Higher-ranking legal instruments set out more general rules, while lower-ranking legal instruments provide details for implementing the higher-ranking ones. Different bodies within the Vietnamese system have the authority to issue different legal instruments. The list below indicates the key types of legal instruments in hierarchical order.

Figure 2: List of key legal instruments and issuing bodies

Legal instrument	Issuing body
<ul style="list-style-type: none"> > The Constitution > Laws (including Codes) > Resolutions 	<ul style="list-style-type: none"> > National Assembly
<ul style="list-style-type: none"> > Ordinances and resolutions 	<ul style="list-style-type: none"> > Standing Committee of the National Assembly
<ul style="list-style-type: none"> > Decrees 	<ul style="list-style-type: none"> > The Government
<ul style="list-style-type: none"> > Decisions 	<ul style="list-style-type: none"> > The Prime Minister
<ul style="list-style-type: none"> > Circulars 	<ul style="list-style-type: none"> > Ministers, Chief Justice, Chief Procurator
<ul style="list-style-type: none"> > Resolutions 	<ul style="list-style-type: none"> > Council of Judges of Supreme People’s Court

International treaties

Vietnam is also party to a large number of international treaties. Under Vietnamese law, international treaties take precedence over domestic legislation, except for the Constitution, which is the supreme law of the land in all circumstances.

An aerial photograph of a coastline. The top half shows dark blue water with white foam from waves crashing against a rocky shore. The bottom half shows a dense forest of trees with brownish-yellow foliage. A large, semi-transparent grey diagonal shape covers the bottom-left portion of the image, extending from the bottom-left corner towards the center.

Foreign investment

Forms of foreign investment

A foreigner can invest in Vietnam in several ways, including establishing a new enterprise, acquiring or investing in an existing enterprise, setting up a branch or representative office, or using contractual arrangements. In determining the structure of its investment in Vietnam, a foreign investor will need to consider such factors as:

- > the scope and nature of the proposed investment and business activities, and the related licensing requirements;
- > whether there are any foreign ownership restrictions in the relevant investment sector;
- > whether it is necessary or desirable to involve a local partner; and
- > the tax implications of the available structures.

Establishing a new enterprise

Foreign investors who want a direct presence in Vietnam and who do not want to inherit an existing business can set up a new enterprise in the country, whether as a wholly owned subsidiary or as a joint venture with foreign or Vietnamese partners.

To do this, the investor must register an ‘investment project’, which is defined as ‘a set of proposals for the expenditure of medium and long-term capital in order to carry out investment activities in a specific geographical area and for a specified duration’. The investor also needs to go through procedures to establish an enterprise to implement the investment project.

Approval of the investment project is in the form of an Investment Registration Certificate (**IRC**), which will set out key details of the project, including its objective, duration and investment capital (equity and debt). Certain types of projects may require an in-principle approval by the National Assembly, the Prime Minister or the relevant local People’s Committee before the IRC is issued (eg projects for investment in airports, seaports, petroleum, casinos and golf courses).

Once the IRC is issued, the investor must then apply for an Enterprise Registration Certificate (**ERC**) to establish the new enterprise that will implement the investment project. Further details on enterprise establishment, including the forms of available enterprise, are provided in Section 3 of this Guide.

Acquisition of, and investment in, an existing enterprise

Investors may also choose to invest in Vietnam by acquiring all or part of an existing enterprise. If this route is taken, external regulatory approvals will often be required, though the precise procedural requirements for effecting such an acquisition will depend on:

- > the sector in which the target entity operates;
- > the form of the target entity (whether a single- or multiple-member limited liability company, or a shareholding company, and whether it is a private, public, or listed company); and
- > the foreign ownership ratio in the target company after the acquisition.

For example, foreign investors are required to obtain an approval from the local Department of Planning and Investment for an acquisition of a stake of 51 per cent or more in an unlisted target company, or for an acquisition of any stake in an unlisted company operating in a ‘conditional’ sector (see below).

Branches and representative offices

As an alternative to establishing, or acquiring or investing in, an enterprise, Vietnam’s Law on Commerce allows certain foreign business entities to establish two other forms of presence in Vietnam: a branch or a representative office. Both must be licensed by the relevant authorities.

A branch may be established by a foreign business entity only in certain WTO-committed sectors, including banking, insurance, securities and legal services.

A representative office, on the other hand, may be established by any foreign business entity wanting to seek, and expedite, opportunities for the commercial activities of that foreign business entity in Vietnam: eg through market research, marketing, liaising with authorities regarding investment in Vietnam, and overseeing the implementation of the foreign entity’s contracts in Vietnam.

A representative office:

- > is not an independent legal entity and the foreign entity does not own equity in the representative office; and
- > must not directly conduct profit-making activities.

Public private partnerships

Foreign investors, in theory, can invest in public sector projects under public private partnership (**PPP**) arrangements. The PPP regime was first legislated in 2010 and, from March 2015, officially replaced the 'Build-Operate-Transfer' (**BOT**) regime, which had been in place since 1992. While the law describes the PPP framework as applicable to construction, renovation, upgrading, expansion, management and operation of infrastructure facilities and provision of public services, the fact is that in seven years, there has been no major foreign-invested project conceived and implemented under the PPP regime. Recently signed power projects and those currently under negotiation are legacy projects from the BOT regime. Investors may receive certain incentives from the Government when investing in such projects, such as fixed input prices and output consumption guarantees, a flexible foreign exchange regime and tax breaks (see below).

PPP investment is discussed in more detail in Section 15 of this Guide.

Business cooperation contracts

A business cooperation contract (**BCC**) is a written contract between investors, agreeing to cooperate to undertake certain business activities and to share the profits or products arising from such activities. No separate legal entity or company is established and there is no limitation on liability for participants. An IRC must be obtained for BCCs involving foreign investors.

BCCs are relatively uncommon in practice, and have been used mainly in the petroleum and telecommunication sectors.

Limitations on foreign investment

Prohibited and conditional sectors

There are certain sectors in which investment is prohibited for both foreign and domestic investors (such as projects detrimental to national security).

In addition, there is a number of sectors in which foreign investment is 'conditional'. These include import, export and distribution; postal services and telecommunications; transport and ports/airports; education and training; broadcasting and television; and the production, publishing and distribution of cultural products.

Approval of investment in conditional sectors requires a detailed analysis of the application for investment approval, beyond that required for investment in non-conditional sectors. This may include consultation with relevant ministries, and preparation and presentation of evidence relating to the investor's expertise and experience in the relevant industry.

The applicable conditions may also include a minimum amount of investment capital, requirements for professional qualifications, or limitations on the specific products or customers of the enterprise.

Foreign ownership cap

Limitations are also imposed on foreign investors in certain sectors in terms of percentage of ownership. For instance:

- > the aggregate foreign investment in Vietnamese commercial banks is limited to 30 per cent; and
- > 'equitisation plans' for State-owned enterprises undergoing the process of equitisation (ie privatisation) may specify foreign ownership limits.

In 2015, the 49 per cent cap on foreign ownership in all public companies (including listed companies) was removed. A public company can now increase its foreign ownership cap up to 100 per cent, unless it operates in a business line conditional for foreign investment, in which case the cap will be as prescribed by law or, in the absence of any cap specified under the law, a 49 per cent cap will apply.

Investment incentives

Depending on the nature of the investment project, certain investment incentives may be granted in the form of:

- > lower corporate income tax;
- > exemption from import duty on goods imported to form fixed assets, raw materials, supplies and components for implementation of the investment project; and/or
- > exemption from, or reduction of, land rent, land use fees and land use tax.



Enterprises in Vietnam

Company forms

There are three main private company forms for both domestic and foreign-invested enterprises:

- > single member limited liability company (**SLLC**);
- > multiple member limited liability company (**MLLC**); and
- > shareholding company, also referred to as a joint stock company (**SC**).

Other less common forms include sole proprietorship and partnership companies.

Figure 3: Comparison of key features of the main private company forms

SLLC	MLLC	SC
Investors and their investment intentions		
<ul style="list-style-type: none"> > The sole investor may be an organisation or an individual. > Cannot be listed. 	<ul style="list-style-type: none"> > Two or more investors (referred as 'members') who may be organisations or individuals. > The number of investors must not exceed 50. > Cannot be listed. 	<ul style="list-style-type: none"> > Three or more investors (no upper limit) who may be organisations or individuals. > May be a 'public company' (more than 100 shareholders or that has made a 'public offer' via mass media) and, therefore, subject to higher disclosure and other requirements. > Can be listed.
Capital or form of equity investment		
<ul style="list-style-type: none"> > 'Charter capital' is the capital that the investor has contributed, or undertaken to contribute, within 90 days from establishment. > Cannot issue shares. > Subject to conditions, can issue bonds to raise capital, but not convertible bonds. 	<ul style="list-style-type: none"> > 'Charter capital' is the capital that the members have contributed, or undertaken to contribute, within 90 days from establishment. > Cannot issue shares. > Subject to conditions, can issue bonds to raise capital, but not convertible bonds. 	<ul style="list-style-type: none"> > 'Charter capital' is divided into equal portions called shares, which must be paid up within 90 days from establishment. In ordinary cases, each share has a par value of VND 10,000. > Must have ordinary shares and may have preference shares, including voting preference shares, dividend preference shares, redeemable preference shares and other types stipulated in the charter. > Subject to conditions, may issue bonds to raise capital, including convertible bonds.
Transfer or assignment of capital		
<ul style="list-style-type: none"> > Where an investor transfers only part of the charter capital, the SLLC must register for conversion into an MLLC. > The new member must also be registered in the Enterprise Registration Certificate issued by the Business Registration Office. 	<ul style="list-style-type: none"> > An investor wishing to transfer all or part of its capital contribution must first offer to sell such share of capital contribution to all other investors proportionally. > The transferor ceases to have member's rights and obligations when the transferee is registered in the members' registry maintained by the company. > The new member must also be registered in the Enterprise Registration Certificate issued by the Business Registration Office. 	<ul style="list-style-type: none"> > Shares may be freely transferred (unless they are subject to certain limitations on founding shareholders in the first three years, or otherwise restricted under the charter or law). > Voting preference shares may not be transferred. > The transfer of shares will be completed on the date the new shareholder is registered in the shareholders' registry maintained by the company.

Each company form offers investors 'limited liability', to the extent of the capital agreed to be contributed by the investor.

The preferred company form will depend on the individual circumstances of the investment, including the number of investors, the size of the project, the nature and sector of the project, the desired complexity in the governance structure and whether there is any intention to list the investment entity. A LLC is usually chosen when the investors want a simple company form with a limited number of investors, while a shareholding company is the preferred choice if the investors need more flexibility to raise additional capital in the future.

Establishment of an enterprise

Enterprise Registration Certificate

An enterprise needs to obtain an Enterprise Registration Certificate (**ERC**) upon its establishment. The enterprise has legal personality from the date of issue of the ERC (equivalent to a certificate of incorporation in other jurisdictions). As discussed in Section 2 of this Guide, the establishment of a foreign invested enterprise additionally requires an IRC before an ERC can be issued.

Charter

All Vietnamese companies must have a charter, the equivalent of a constitution or articles of association of a company in other jurisdictions. The charter sets out basic company details and the rules for management of the company.

Seal

An enterprise may use one or multiple corporate seals after notifying the licensing authority and publishing the seal sample on the national business registration website.

Corporate governance

Vietnam's Law on Enterprises and its implementing legal instruments establish a standard corporate governance framework, including management structures, internal decision-making processes, and duties and liabilities of corporate managers, which applies to all companies by default unless otherwise altered, subject to a certain permitted extent, by the charter.

It should also be noted that the Law on Securities and its implementing legal instruments supplement this framework for public and listed companies with regard to eg compositions of boards of directors and disclosure requirements.

Enterprise management

An enterprise in Vietnam has multiple levels of authority in its governance structure, each with well-defined responsibilities and powers. As Figure 4 below shows, the organisational and management structure will vary according to the type of enterprise. Shareholding companies have more complex corporate governance than other company forms.

Legal representative

The legal representative of a Vietnamese company is the person authorised to represent, and sign documents on behalf of, the company. A company may have one or multiple legal representatives. In the latter case, the allocation of power and authority between the legal representatives must be specified in the charter. The legal representative(s) must be registered in the ERC of the company.

- > *For an SLLC*: the legal representative is the chairperson of the members council or the company chairperson (as appropriate) unless the charter specifies otherwise.
- > *For an MLLC*: the legal representative will be specified by the charter.
- > *For an SC*: the legal representative may be the chairperson of the board of management or the general director.

Figure 4: Management structures in the main private company forms

SLLC	MLLC	SC ¹
<p>Members council</p> <ul style="list-style-type: none"> > Where the investor appoints more than one authorised representative, they form the members council (MC). The investor appoints one authorised representative as chairperson of the MC. > The MC is the highest authority in an SLLC. <p>Chairperson of an SLLC</p> <ul style="list-style-type: none"> > Where the investor appoints only one authorised representative, that person will be the chairperson of the SLLC. <p>Authorised representative</p> <ul style="list-style-type: none"> > A corporate investor must appoint one or more individuals as its authorised representative(s). <p>General director</p> <ul style="list-style-type: none"> > The MC or the chairperson appoints a general director (GD) to manage the day-to-day business operations. This position is similar to that of a CEO. The GD can concurrently be a MC member or the chairperson. <p>Inspectors</p> <ul style="list-style-type: none"> > A corporate investor must appoint inspectors (the number of which is not limited under the law) who oversee the actions of the MC, or chairperson, and the GD and report to the investor. > Where the investor is an individual, the SLLC has a chairperson and a GD and is not required to have inspectors. The investor can concurrently be the chairperson and the GD. 	<p>Members council</p> <ul style="list-style-type: none"> > The MC comprises all the investors (or their authorised representative, in the case of corporate investors). > The MC is the highest authority in an MLLC. Specified matters must be decided by the MC. > Unless the charter provides otherwise, voting thresholds are set at 65% for basic matters and 75% for certain specified matters. Voting power of each MC member is based on the ratio of capital owned or represented by them. <p>Chairperson of the MC</p> <ul style="list-style-type: none"> > The MC appoints one council member as chairperson of the MC. <p>General director</p> <ul style="list-style-type: none"> > The GD manages the day-to-day business of the MLLC and is responsible to the MC. > The GD is appointed by the MC. <p>Inspection committee</p> <ul style="list-style-type: none"> > An MLLC with more than 11 members must have an inspection committee. > The inspection committee has the responsibilities, powers and conditions stipulated in the charter. 	<p>General meeting of shareholders</p> <ul style="list-style-type: none"> > The general meeting of shareholders (the GMS) comprises all shareholders who have the right to vote. > The GMS is the highest authority in an SC. The law specifies certain matters requiring GMS approval. Voting thresholds are set at 51% for basic matters and 65% for certain specified matters (unless the charter specifies higher thresholds). Voting power of each shareholder is based on the ratio of ordinary shares with voting rights held by it, though this can be changed by voting preference shares. <p>Board of management</p> <ul style="list-style-type: none"> > The board of management (the BOM), akin to a board of directors, has three to 11 people appointed (via cumulative voting, or another method if set out in the charter) by the GMS. > Investors holding specified percentages have the right to nominate candidates for election to the BOM. > Voting by the BOM is based on headcount and decisions are passed by simple majority. > The BOM supervises the GD. <p>Chairperson of the BOM</p> <ul style="list-style-type: none"> > Appointed by the BOM and, unless otherwise provided in the charter, the chairperson has a casting vote and may also be the GD. <p>General director</p> <ul style="list-style-type: none"> > The GD, equivalent to a CEO, is appointed by the BOM and is responsible for the day-to-day management of the SC. <p>Inspection committee/Internal audit committee</p> <p>An SC that has 11 or more shareholders or has corporate shareholders holding more than 50% of the total shares of the company must also have either:</p> <ul style="list-style-type: none"> > an inspection committee; or > at least 20% of its BOM members being independent and an internal audit committee sitting under the BOM.

¹ Different rules may apply to public and listed SCs, which can vary depending on the size of the company. For example, all public companies must have a BOM with at least 1/3 being non-executive members, and 'large scale' public companies and all listed companies must have 5-11 members on their BOM, of which 1/3 must be independent.

Duties and liabilities of enterprise managers

The Law on Enterprises sets out four general duties for enterprise managers, MC members and chairman for SLLC and chairman for MLLC.

- *honesty and prudence*: managers must exercise delegated rights and perform their delegated duties in an honest and prudent manner and to the best of their ability for the protection of the legitimate interests of the company and its members/shareholders;
- *loyalty*: managers must act in the best interests of the company and its members/shareholders. They must not abuse their position or misuse information, know-how or business opportunities of the company;
- *timely, complete and accurate notification*: managers must make notification of any substantial shareholding owned by them, or associated persons, in other enterprises as required by law; and
- *strict compliance*: managers must strictly comply with the law, the charter of the company and the decisions of the company's members/shareholders in the implementation of their delegated rights and duties.

Managers are personally liable under the Law on Enterprises where contraventions of the law causes damage to the company. There are also potential civil liabilities for damage caused to others and criminal liability, such as for the negligent performance of duties or offering bribes.

Distribution of profit

The law stipulates certain principles for the distribution of profits and requires that companies set out detailed rules in their charters. A company may distribute profits (including the payment of dividends by a shareholding company) only if:

- it has fulfilled its legal financial obligations (including payment of tax); and
- it is still able to pay its debts after the profit distribution.

For a MLLC, the distribution of profits must be made in proportion to the investors' portion of charter capital.

There are also foreign exchange regulations to consider when seeking to distribute profit offshore. In particular, all distributions must be transferred offshore.

Profit distribution to foreign investors in an enterprise established through direct investment may only be made after the end of the financial year and the enterprise has cleared its tax and financial obligations with the State. Banks may request the enterprise to present tax clearance reports and sometimes audited financial statements for this purpose.

Disclosure

Vietnamese law contains various provisions on the public disclosure and statutory reporting of certain information about companies and their investors.

For example, all companies must make the content of their ERC and other incorporation information available on the national business registration website. Shareholding companies are required to report to the licensing authority any change in the ownership of foreign shareholders, or changes to the information of their BOM members, inspectors or GD and to publish their charter, annual financial reports, BOM members' and inspectors' reports and BOM members' and managers' profiles on their website.

Public (including listed) shareholding companies and their shareholders are subject to additional, more onerous, disclosure requirements, such as disclosure of any information that may impact on the price of their securities, or to report to the State Securities Commission and the relevant stock exchange on changes of major shareholders (a shareholder who owns at least 5 per cent of the issued shares) or a change of more than 1 per cent in the ownership of an existing major shareholder.

An aerial photograph of a river with vibrant green water, likely due to algae or pollution. The banks are composed of cracked, brownish soil, suggesting a dry or semi-arid environment. A diagonal grey overlay is present in the bottom-left corner.

Securities and the stock market

Securities market regulation

The Law on Securities provides the broad framework for securities regulation in Vietnam, specifically legislating:

- > public offers of securities (which are distinct from listings in Vietnam);
- > operations and management of public companies (including listed companies);
- > the securities trading markets (ie, presently the Hanoi and Ho Chi Minh City stock exchanges and the Unlisted Public Companies Market (**UPCoM**));
- > securities registration, depository, clearance and payment facilities;
- > securities businesses, including securities companies, funds management companies, securities investment companies and custodian banks;
- > public funds and members funds; and
- > disclosure of information by public companies.

Key bodies in the securities industry

State Securities Commission

The key securities regulator in Vietnam is the State Securities Commission (**SSC**), whose work is overseen by the Ministry of Finance (**MOF**). The SSC is the body that licenses securities businesses, approves public offers of securities and takeovers, oversees management of the markets and market participants and investigates breaches of, and enforces, the securities laws.

Ho Chi Minh City and Hanoi stock exchanges

Vietnam currently has two stock exchanges, the Ho Chi Minh City Stock Exchange (**HOSE**) and the Hanoi Stock Exchange (**HNX**), though the Government has expressed an intention to merge them in the near future.

Beyond listing and trading securities, HOSE also offers an official mechanism through which new Government bonds are issued and is the secondary market for the trading of existing Government bonds.

To qualify for admission on either exchange, a company must first conduct an approved public offer of shares. Both exchanges also apply various (though different) listing criteria including minimum capital requirements, required periods of profitable activities prior to listing,

minimum number of non-major shareholders (ie the public spread) and commitments by management to retain their interests in the company for a minimum specified period. The listing conditions for HNX are generally lower than those applicable to HOSE, though HOSE is the larger and more liquid market.

Both exchanges also apply trading rules and restrictions, including trading price bands to minimise price fluctuations (though, again, these differ between HOSE and HNX).

The types of securities that have been commonly traded on the two exchanges are ordinary shares, fund certificates (including units in exchange-traded funds) and bonds. The Law on Securities contemplates the offering of derivatives such as options, futures, forward contracts, warrants and securities indices. However, while a framework for the trading of such derivatives has started to be developed, the market is still in its infancy and is not expected to be fully developed until at least 2020.

The Law on Securities also contemplates the ability for offshore issuers to publicly offer their securities to Vietnamese investors and list the securities on the HOSE or HNX in order to raise funds for their investment projects in Vietnam, though in practice we are not aware of that happening to date.

The Unlisted Public Companies Market

“All public companies must register their securities with the Vietnam Securities Depository. Listed securities are traded on one of Vietnam’s two stock exchanges and there is also an unlisted public companies market.”

The UPCoM is a market established and managed by the HNX under rules approved by the SSC to regulate ‘over the counter’ securities of unlisted public companies. Admission of securities for trading on the UPCoM is, by default, mandatory for all public companies, and the trading of their securities will be made through the Vietnam Securities Depository (VSD). That said, despite the mandatory nature of this requirement, there remain many unlisted public companies that have not sought to have their shares admitted for trading on UPCoM.

'Listing' on UPCoM provides the advantages of a central and transparent trading platform, but also means that certain trading rules and restrictions apply, including a requirement for all trades to be conducted via put-through or order-matching methods as well as an applicable trading price band (though a much wider band than that applied by HOSE and HNX, given the more illiquid nature of these shares).

Vietnam Securities Depository

The law requires all public companies to register their securities with the Vietnam Securities Depository (**VSD**), the single central securities depository of Vietnam. VSD is a limited liability company owned by the State and whose principal functions include:

- > to register and deposit securities which are publicly issued, listed and traded on the stock exchanges and UPCoM;
- > to clear and settle transactions of securities traded on the stock exchanges and UPCoM; and
- > to act as a transfer agent and handle corporate actions for issuers that have securities that are publicly issued, registered and listed on the stock exchanges and UPCoM.

State Capital Investment Corporation

The State Capital Investment Corporation (**SCIC**) is Vietnam's sovereign wealth manager, the official entity assigned to manage state capital created on the 'equitisation' of State-owned enterprises. In other words, SCIC holds and manages State-owned shares (making it the 'State shareholder') of State-owned enterprises that have been transformed into shareholding companies.

Key features of the Vietnamese securities market

Public companies

A public company is any shareholding company which meets one or more of the following criteria:

- > has issued shares via a public offering;
- > has its shares listed on one of the stock exchanges;
- > has its shares owned by more than 100 investors (excluding institutional investors) with paid-up charter capital of at least ten billion Vietnamese dong.

Public companies are subject to enhanced filing and disclosure requirements. Certain disclosure requirements are also mandatory for major shareholders (being those holding at least 5 per cent of the total voting shares of a company).

In addition, SSC registration and approval rules apply to private placements by public companies and to 'public offers to acquire' the securities of public companies and closed end funds. Subject to certain exemptions (eg approval by shareholders), an SSC-approved 'public offer to acquire' securities (effectively a takeover offer) is mandatory if an offer would lead to the offeror owning 25 per cent or more of the shares or issued fund certificates in the target company or fund respectively, and upon each incremental 10 per cent increase thereafter (or 5 per cent if the offer is within one year from the close of the previous offer tranche).

Public offers and listing

In Vietnam, the processes of a public offer and listing are different, although both may be conducted simultaneously.

An initial public offering, which must precede or coincide with any application to list, is an offer to sell shares, bonds or fund certificates via the mass media or to at least 100 investors (excluding institutional investors).

A public offer:

- > must be approved by the SSC; and
- > is made by way of a prospectus, which is registered with the SSC as part of the approval process.

The securities to be sold in a public offer must be denominated in Vietnamese dong.

On the other hand, listing is the process of taking a privately owned organisation (including a company that has previously conducted a public offer or a State-owned company undergoing an equitisation process) and making its securities available to the public via trading on a stock exchange. As noted earlier, there are different requirements for listings on HOSE or HNX, with HOSE generally applying more stringent conditions.

Disclosure

Market disclosure rules apply to public companies, bond issuers, securities companies, funds management companies, securities investment companies, major shareholders and stock exchanges.

“In 2015, the 49 per cent blanket cap applicable to foreign investment in public companies was removed. Foreign investors can now invest up to 100 per cent in public companies which do not operate in restricted or conditional business lines for foreign investment.”

Public companies are required to make both periodic disclosures, such as annual audited financial information, and ‘extraordinary’ disclosures to the SSC and to the relevant exchange, if the company is listed. The rules specify the particular circumstances and events that must be disclosed as well as an overriding requirement to make timely disclosure of any information which impacts on the price of securities.

Insider trading

Vietnamese law prohibits the use of inside information (ie information not publicly disclosed which could have a major impact on the price of securities) to purchase or sell securities for oneself or for a third party (or advise another to do so). Depending on the amount of profit illegally earned or losses avoided, violators may face criminal penalties of up to seven years imprisonment (for individuals) and VND10 billion fine (for companies).

Foreign participation

A common method for foreign investors to indirectly invest in Vietnam is via the securities market, particularly the stock exchanges. Foreign investors wishing to invest in listed or unlisted securities in a public company must first:

- > obtain a securities trading code from the VSD;
- > open an indirect investment capital account in VND at an authorised bank in Vietnam; and
- > open a securities custodian account.

An investor may trade through a securities company, authorised transaction representative, or local fund manager depending on the investor’s desired level of supervision of their investments.

Historically, a blanket 49 per cent cap applied to foreign investment in public companies. However, from 1 September 2015, a public company is allowed to increase its foreign ownership ratio up to 100 per cent, subject to the SSC’s approval, unless it operates a business activity that has a foreign ownership limit or is ‘conditional’ for foreign investment (in which case the

limit will be as provided in law or, if no specific limit is provided, 49 per cent). The foreign ownership limit in equitised State-owned companies will be determined in accordance with the law on equitisation, including the equitisation plan for the relevant company.

Securities businesses

Special licensing procedures under the SSC apply to various securities businesses, including:

- > *Securities companies*: which engage in securities brokerage, self-trading, underwriting and securities investment consultancy;
- > *Funds management companies*: which manage funds and investment portfolios; and
- > *Securities investment companies*: shareholding companies which invest in securities, including holding shares in Vietnamese companies. These are akin to an incorporated fund investing in securities.

Licensing requirements include minimum legal capital requirements, infrastructure requirements (eg computer systems) and staff qualifications.

Funds

Vietnam’s funds sector includes both public funds and members’ funds.

Public funds, which may be ‘closed’ or ‘open’ to redemption requests, must comply with various requirements as to the number of investors and the minimum subscriptions. Their operations, including the nature and percentage of their investments, are also regulated.

Members’ funds are subject to less regulatory scrutiny and investment restrictions than public funds, being largely governed by the agreement of the members in the fund’s charter. Such funds also require fewer investors and simpler internal management structures.

An aerial photograph of a dense forest with a road and a river. The forest is mostly green with some yellow and orange trees, suggesting autumn. A road runs vertically through the center of the forest, and a river flows along the right edge. The text 'Banking & Finance' is overlaid in white, bold font in the upper middle section. A semi-transparent white diagonal shape is in the bottom left corner.

Banking & Finance

State management of banking

Vietnam's banking and finance sector remains tightly controlled. Like many other jurisdictions, Vietnamese credit institutions (including commercial banks, branches and representative offices of foreign banks, non-bank credit institutions (ie finance companies), microfinance and peoples' credit funds) are overseen and regulated by a state body, the State Bank of Vietnam (**SBV**).

The SBV is a quasi-ministerial body and the SBV Governor has the powers of a Minister. Among other tasks, the SBV:

- > manages currency and banking operations;
- > acts as a bank to credit institutions;
- > is responsible for issuing and revoking licences issued to credit institutions;
- > is the authority with whom certain loan transactions must be registered; and
- > sets base interest rates and prudential ratios to be observed by credit institutions.

Financing

Loans

Entities established in Vietnam, whether domestic or foreign-invested, are permitted to obtain loan funds from onshore and offshore lenders.

The IRC of a foreign-invested enterprise will stipulate both the charter capital (ie the equity to be contributed by the investors) and the overall 'investment capital' of the project. The difference between these two amounts is colloquially referred to as the 'loan capital', being the amount that the entity is permitted to borrow by way of medium and long-term loans (ie loans with a term of more than one year). While there is no official thin-capitalisation rule (except in certain cases, such as mining or PPP projects), the authorities often apply a 70:30 debt to equity ratio when approving a project, although this may differ depending on the sector in which the entity operates.

All private sector loans from non-residents to residents (ie **foreign loans**) are subject to supervision and monitoring by the SBV. In particular, medium or long-term foreign loans must be registered with the SBV prior to drawdown. This registration process is akin to an approval process as the loan will not be registered

if it does not meet certain stipulated conditions. Moreover, funds will not be able to enter Vietnam for drawdown or be allowed to be repaid to the foreign lender without the requisite registration approval.

Security for loans

The Civil Code provides for a variety of forms of security transactions, the most commonly used being pledges, mortgages and guarantees.

Assets that may be used as security include:

- > money and valuable papers (eg project bank accounts, shares, capital contributions or bonds);
- > fixed and floating assets (eg machinery and inventory);
- > immoveable assets (eg land use rights, ships, aircraft, rights to exploit natural resources);
- > contractual rights (eg rights to insurance proceeds, rights to claim debts or rights under project agreements); and
- > assets to be formed in the future (eg future real property).

Generally, security transactions are effective from the time they are lawfully entered into, except for security transactions that are subject to a mandatory registration requirement which only become effective from the time of registration.

It is mandatory to register certain security transactions, including:

- > a mortgage of land use rights; and
- > a mortgage of aircraft and ships.

“Vietnamese credit institutions and banking operations are overseen and regulated by the State Bank of Vietnam.”

Other than in certain specific cases (eg mortgages over land use rights which must be registered with the relevant land registration office in the province where the land is located), most security transactions are registered with the National Registration Agency for Secured Transactions (**NRAST**). It is not mandatory to register security transactions with NRAST but, if done, this will give lenders priority over earlier unregistered security transactions over the same assets and future security transactions over the same assets (regardless of whether such transaction is registered or not). Given this priority, prudent lenders will seek to register their security interests wherever possible.

Foreign investment in the financial sector

Banks

Although the law permits foreign credit institutions to establish wholly-owned banks in Vietnam, foreign ownership in Vietnamese banks continues to be subject to strict limits.

Firstly, the aggregate level of ownership of all foreign investors in any Vietnamese bank must not exceed 30 per cent.

Within this overall limit, several other sub-limits apply including:

- > except in the case of a foreign 'strategic investor', the maximum shareholding that can be held by a foreign investor is 5 per cent in the case of any one individual, 15 per cent in the case of any one foreign organization, and 20 per cent in the case of any one foreign organisation together with its affiliates; and
- > the maximum shareholding of any one foreign 'strategic investor' is 20 per cent.

There are regular reports that the Government is considering relaxing these aggregate and/or individual limits, especially as it is widely reported that Vietnamese banks need to raise a significant amount of additional capital to deal with bad debts and the introduction of the Basel II requirements. However, to date, no concrete proposals have been put forward.

In special cases, to allow for the restructuring of weak banks or to regulate the safety of the banking system, the Prime Minister may permit a higher level of foreign investment in a bank deemed to be 'weak' on a case-by-case basis. However, the determining criteria are unclear and, to date, we believe only one such approval has been given (though not yet implemented).

Broadly, a foreign 'strategic investor' is a reputable foreign credit institution with sufficient financial capability and experience to enable it to assist the target Vietnamese bank with its development and to provide it with 'strategic advantages'. Additional criteria that must be met by the potential foreign strategic investor include minimum total assets, international operating experience, an international credit rating and an agreement to provide assistance to the Vietnamese commercial bank (such as to help implement new technologies, develop banking products and services,

improve financial, management, and monitoring capability, etc. and usually termed a 'Technical Services Agreement').

In addition to the maximum shareholding limits set out above, a foreign credit institution is only permitted to be a foreign strategic investor in one Vietnamese bank and may not hold (as a non-strategic investor) more than 10 per cent of the share holding in any other shareholding credit institution (which covers banks, finance companies and finance leasing companies) in Vietnam.

Finance companies

Foreign investors are permitted to establish 100 per cent foreign-owned finance companies in the form of limited liability companies or to acquire up to 100 per cent of the charter capital of a Vietnamese limited liability finance company. However, in the latter case, any one foreign investor together with its related persons (eg affiliates) may not hold more than 50 per cent of the charter capital of the target finance company.

Meanwhile, foreign investors cannot establish a finance company in the form of a shareholding company. Instead, they are only allowed to acquire shares in existing shareholding finance companies, subject to the same foreign ownership rules as applicable to banks as set out above. However, unlike banks, there is no cap on the aggregate foreign ownership level.

A foreign investor acquiring a stake in a limited liability finance company must not be a strategic shareholder, owner or founding member of any other credit institutions in Vietnam.

Insurance companies

In general, the Vietnamese insurance market is welcoming to foreign investors and foreign ownership in an insurance company can be up to 100 per cent.

In fact, while the non-life/general insurance market is dominated by domestic insurers, the key players in the life insurance market are mainly foreign-invested companies.

Foreign investors may establish a new wholly-owned subsidiary or acquire shares in existing domestic insurance companies. In the latter case, investors acquiring more than a 10 per cent stake are subject to stringent requirements that only large international

insurance corporations can satisfy; for example (i) being an insurance company with at least 10 years of experience in the relevant insurance sector, (ii) having total assets of at least US\$2 billion, (iii) being profitable for the past three years, and (iv) the source of capital for the investment must not be loan or entrusted capital.

A foreign investor acquiring a stake in a limited liability finance company must not be a strategic shareholder, owner or founding member of any other credit institutions in Vietnam.

Bankruptcy

The Law on Bankruptcy applies to enterprises and co-operatives operating under Vietnamese law. There have been very few formal bankruptcy cases in Vietnam to date under either the old law or the current law. There is no bankruptcy or insolvency regime to govern individuals.

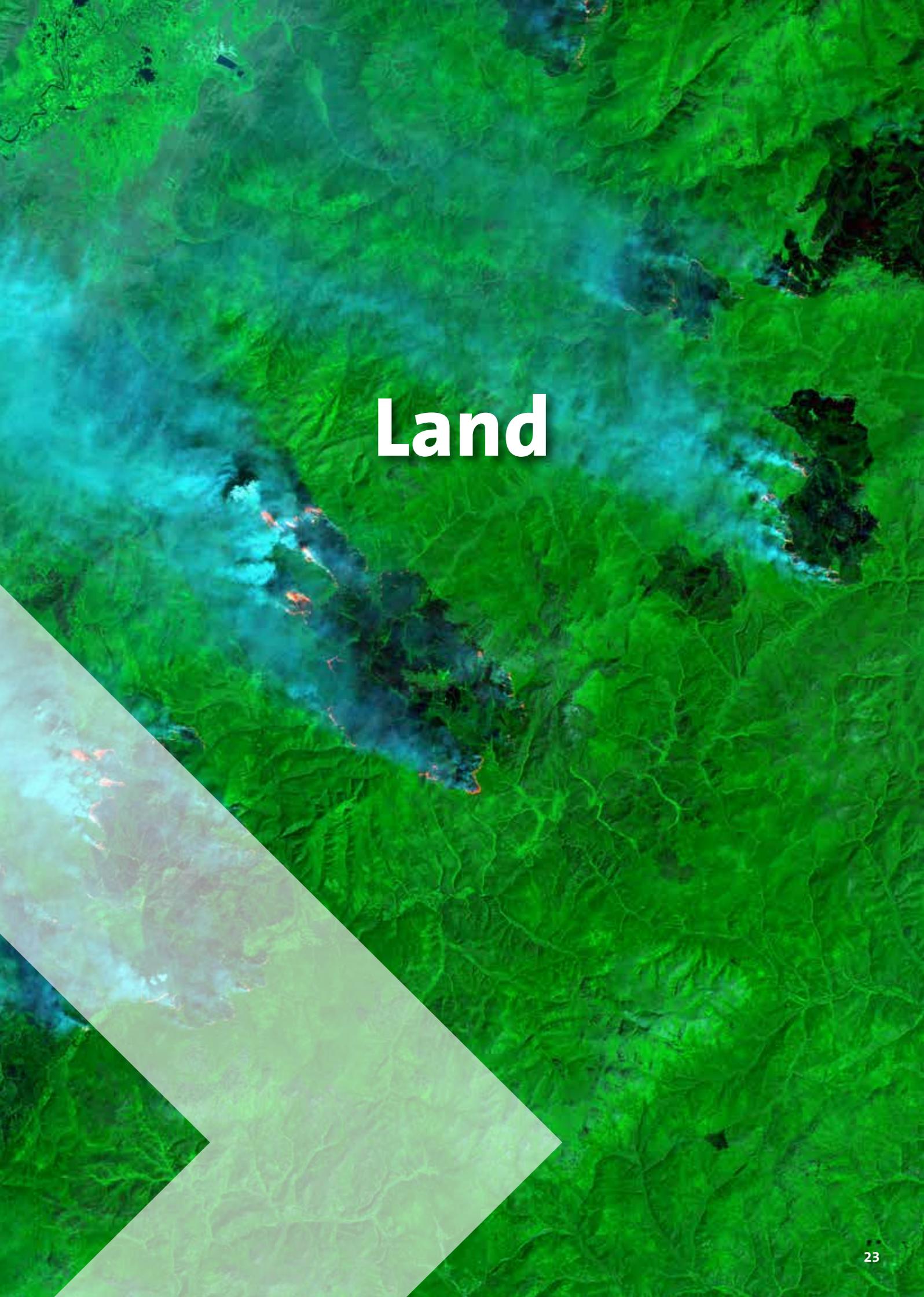
An enterprise is considered insolvent when it is unable to pay its debts within three months from the due date. Once an enterprise fails to pay its due debts on demand, any unsecured or partially secured creditor, employee, or shareholder of the enterprise may file a bankruptcy petition with the court. The ability of secured creditors to enforce their security is suspended following the filing of the petition and for the duration of the bankruptcy procedure. The resultant bankruptcy procedure can include the recovery of business operations or the liquidation of the enterprise and, finally, a declaration that the enterprise is bankrupt. Upon liquidation, secured creditors broadly receive priority in payment in respect of the assets over which they have security.

Asset distribution in bankruptcy is managed by an enforcement authority, while the management of the company during the bankruptcy process is carried out by a court-appointed trustee in insolvency. Lenders should also note that, as with many other jurisdictions, there is a six-month clawback period – in other words, in certain circumstances a court may declare certain security arrangements granted within the six months prior to the decision of the court to commence bankruptcy proceedings to be void.

Foreign exchange control

Subject to certain special exceptions within the territory of Vietnam, all transactions, payments, advertisements, quotations (including listing or setting of prices, as well as recording of prices in agreements and similar documents) must be in Vietnamese dong. The prohibition of foreign currency use extends to the practice of linking price to fluctuations in the exchange rate between Vietnamese dong and a foreign currency.

In respect of investment activities, the Government controls foreign exchange via the system of investment capital accounts. Foreign investors are allowed to transfer revenue and disbursements via direct investment capital accounts in both foreign currencies and Vietnamese dong or via indirect investment capital accounts in Vietnamese dong, depending on the investment forms (ie direct or indirect investment).

An aerial photograph of a dense green forest with a winding river. A semi-transparent map overlay is visible in the bottom-left corner, showing the geographical context of the area. The word "Land" is centered in white text.

Land

Land ownership

Under Vietnam's Constitution, all land is collectively the property of all the people of Vietnam. As such, no one, whether Vietnamese or foreign, is permitted to 'own' land in respect of holding indefeasible title.

Instead, a person (a **land user**) can get access to land use rights in one of the following ways:

- > by allocation from the State, for a definite or indefinite period;
- > by leasing from the State;
- > by sub-leasing through a developer of an industrial zone or high-tech zone;
- > by transfer from an existing land user; or
- > by way of capital contribution by an existing land user.

The availability of each of these options, and the nature of the land use rights conferred under them (eg whether for a definite or indefinite period and whether the land user has the right to lease or sub-lease or use their land use rights as security) will depend on whether the land user is:

- > Vietnamese (either an individual or a domestic entity);
- > 'overseas Vietnamese' (an ethnically Vietnamese individual who is not a Vietnamese citizen); or
- > a foreigner (either an individual holding a foreign passport or a foreign-invested enterprise established in Vietnam).

Land use rights and ownership of assets located on land are evidenced by a 'Certificate of Land Use Right, House Ownership and Other Assets attached to Land', commonly referred to as a Land Use Rights Certificate (**LURC**).

Allocation of land by the State

Allocation of land use rights by the State, in particular for an indefinite period, is the closest thing to true land ownership available in Vietnam. Land allocation can be made for residential purposes and for investment into housing development projects.

- > **For residential purposes:** Foreigners cannot be allocated land from the State for residential purposes. Land allocated to Vietnamese individuals for residential purposes will be for an indefinite period (also known as 'stable and long term use').

- > **For investment purposes:** A foreign-invested enterprise can be allocated land for the construction of residential housing for sale or lease. In this case, the land is allocated for a definite period up to a maximum of 50 years, but not exceeding the duration of the relevant investment project. However, Vietnamese buyers in residential housing projects may be entitled to 'stable and long term use' without having to pay additional land use fees.
- > **Rights of users of allocated land:** Generally, a land user who has been allocated land and has paid land use fees may assign (ie sell), lease, donate or mortgage those rights. Additionally, the land user may contribute those rights as capital into a joint venture.

Land leased from the State

Land can be leased from the State by both domestic and foreign-invested enterprises and by Vietnamese individuals. Land can be leased for agriculture, production and business purposes. This includes infrastructure construction, manufacturing facilities, hotels and resorts, mining and residential housing for lease.

- > **Lease tenor:** Maximum lease terms are prescribed for different types of leases. Leases to domestic and foreign-invested entities may be for a maximum 50-year period (although, in certain cases – such as projects of national importance – a 70-year term is permitted). The term however must not exceed the duration of the relevant investment project. Extensions are possible, but not guaranteed, and the extended term must not exceed the original term.
- > **Rights of lessee:** All lessees of land from the State must pay land rental. Domestic enterprises and foreign-invested enterprises may pay rental either annually or in a lump sum upon commencement of the lease. Land users paying rental annually may not mortgage or contribute their land use rights (although they may mortgage or contribute any assets on the land). By contrast, a land user who pays the full land rental upfront (where the costs are akin to purchasing the land use rights) may transfer, sub-lease, mortgage or contribute their land use rights in much the same way as a party to whom land has been allocated.

Land sub-leased from developers

Vietnamese laws also establish and recognise specific zones for development, including industrial, export-processing and high-tech zones. Land for these zones can be leased to foreign-invested enterprises and domestic enterprises (ie the **developer**), who develop and operate in these zones. Once construction of the infrastructure for the zone is completed, the developer can sub-lease the land to sub-lessees, including to foreign-invested enterprises. If the developer pays land rental on a lump sum basis, it may sublet the land and collect rent either by an annual payment or a lump sum payment. However, if the land rental is made annually, the developer must only collect the rent annually from the sub-lessees in the relevant zone.

- **Features of land sub-leased in development zones:** Each zone is supervised by a management committee made up of representatives of various government bodies. A number of incentives may be available to developers of the zones, as well as the sub-lessees in the zones, depending on the nature of the zone and the sub-lessee's project. Land may be leased in a zone for production and business purposes on a long term basis. Sub-lessees must pay land rental and infrastructure fees to the developer in accordance with their land lease contract, and they are entitled to be issued with an LURC.
- **Rights of sub-lessees:** Sub-lessees paying annual rent may not assign, mortgage or contribute their land use rights (although they may mortgage or contribute any assets on the land). By contrast, a sub-lessee who pays the full land rental up-front to the developer may transfer, mortgage or contribute their land use rights in much the same way as a party to whom the State has directly leased land with up-front payments of land rental.

Land transfer

The law contemplates and regulates several forms of land transfer, including assignment (equivalent to 'sale'), inheritance, gift and capital contribution.

- **Right to transfer land and receive transferred land:** Land users with the right to assign their land use rights can generally assign them to any Vietnamese individual or domestic enterprise. Foreign-invested enterprises and foreign individuals cannot receive assignments of land use rights from existing land users, other than by way of capital contribution from

a Vietnamese enterprise, or as part of the purchase of residential housing or transfer of an entire real estate project.

- **Rights of land user receiving transferred land:** Generally the rights of the entity or individual to whom rights are transferred will be the same as those held by the person initiating the transfer. For example, transferred land use rights which are subject to a maximum term will be transferred for the duration of that term (except for Vietnamese purchasers in residential housing projects, who will be entitled to land use rights for an indefinite period). A person or entity to whom rights are transferred can generally transfer, lease, donate, mortgage or contribute those land use rights.

“In Vietnam, all land is collectively the property of all the people of Vietnam. Therefore, no one in Vietnam is permitted to ‘own’ land and only have ‘land use rights’ in respect of the land.”

Contribution of land use rights as capital

Some land users are able to use their land use rights as capital to invest in enterprises. A common example of this is where the Vietnamese party to a joint venture contributes their rights as capital to the joint venture company.

- Generally, in order to contribute land use rights, the Vietnamese party must have been allocated or leased the land use rights and have paid all land use fees or land rental in full.
- Once contributed, the joint venture enterprise has the same rights as the land users who were allocated or leased land by the State with full payment of land use fees or land rental. They may assign, lease, donate, mortgage or even contribute those land use rights.

Zoning and land management

Zoning and planning is determined at each level of Government, from the National Assembly down to the District People's Committees.

There are two main categories of land in Vietnam: land for agricultural purposes and land for non-agricultural purposes (which includes residential land and land for business or production purposes).

The purpose for which a particular land site may be used must be consistent with the zoning and planning decisions of the relevant authorities for that particular site, or the area including the particular site, and will be specified in the LURC. The specification can be quite prescriptive, for example, the land is to be used to build a shoe manufacturing facility. The LURC (and if necessary, the relevant zoning and planning decisions) must be amended before the site can be used for an alternate purpose.

Property development

'Real estate business', which includes property development and property related services, is a 'conditional' investment sector. Foreign investors who wish to conduct real estate business in Vietnam need to take into account the following:

- > **Permitted activities of foreign-invested enterprises:** foreign-invested enterprises can (i) lease houses or other buildings for sub-letting; (ii) lease land from the State for the development of residential housing for lease or for the development of non-residential properties for lease or sale; (iii) receive an allocation of land for development of residential housing for sale or lease; and (iv) receive an assignment of the whole, or part, of a real estate project which is incomplete and requires significant development.
- > **Prohibited activities of foreign-invested enterprises:** foreign-invested enterprises cannot purchase houses or other buildings for resale or lease, nor receive an allocation of land for subdivision of land lots for sale. In contrast, there is no such prohibition on Vietnamese enterprises conducting these real estate activities.
- > **Presales:** the presale of residential housing during the construction and development phase is subject to completion of the foundation construction of the houses/apartment buildings. An approval from the provincial construction department on qualification

of the housing for sale must be granted prior to the presale. In addition, the developer must obtain a bank guarantee to secure its obligation to refund advance payments to purchasers.

- > **Capital requirement:** A real estate company must have a minimum equity capital of VND20 billion.

Housing regime for foreigners

Effective from 1 July 2015, restrictions on the purchase of residential houses by foreigners have been significantly relaxed. In principle and subject to restrictions, a foreign individual may purchase and own houses in Vietnam, if that person is permitted entry into Vietnam.

Foreign organisations (including foreign-invested enterprises established in Vietnam) eligible to purchase and/or own houses in Vietnam include:

- > Foreign invested enterprises that are licensed to develop residential projects;
- > Foreign invested enterprises that are not engaged in residential development; and
- > Branches, representative offices of foreign companies; foreign funds and foreign bank branches that are licensed to operate in Vietnam.

However, in the second and third scenarios above, the foreign organisation must use the purchased houses only to provide accommodation for their employees and must not use the houses as office space or to lease out.

The current housing regime sets out restrictions on the maximum number of houses in an apartment building, residential area or a street that foreigners can purchase and own. For example, the total number of apartments that may be purchased in one building by foreigners is capped at 30 per cent of the total number of apartments in the building.

Generally, foreign owners may have the same rights as those of Vietnamese owners, including the rights to sell, mortgage, lease, contribute as capital, donate and bequest. However, the ownership term is limited to 50 years for foreign individuals (except those who are married to Vietnamese citizens), or to the term of the investment registration certificate for foreign organisations.

An aerial photograph of a coastline. The top half shows dark blue-green water with white foam from waves crashing against large, light-colored rocks. The bottom half shows a wide, sandy beach in shades of orange and brown. A diagonal white and light blue graphic element separates the water from the beach.

Environment

Vietnam enacted its first Law on Protection of the Environment in 1993 with a replacement law implemented in 2005. In line with international trends on greater awareness of environmental issues, a new, more comprehensive law was introduced in 2014. Recent years have seen an even further heightening of environmental consciousness and concern in Vietnam.

Recent cases of environmental pollution have placed a spotlight on the importance of environmental laws and protection, in particular as they relate to foreign investment activities. Depending on the severity of the environmental damage caused, breaches of environmental laws can result in fines, compulsory clean-ups and relocations, suspension or prohibition of operations, monetary compensation for damage caused and criminal sanctions.

Generally, Vietnam's environmental laws require investors to:

- > carry out environmental protection measures in the manner set out in their environmental impact assessment report or environmental protection plan (discussed further below);
- > prevent and restrict adverse impacts on the environment from their activities, including appropriate minimisation and management of waste;
- > comply with applicable environmental standards (including technical standards on the quality of soil, water, air, noise, light and radiation);
- > rectify any environmental pollution created by their activities; and
- > pay environmental taxes and protection charges.

State management

The Ministry of Natural Resources and Environment (**MONRE**) is the primary authority responsible for environmental matters. In addition, other ministries and state bodies are entrusted with responsibility for particular aspects of environmental protection and management. In particular:

- > MONRE, the relevant ministries or the provincial People's Committees (depending on the type of project) are responsible for organising the evaluation and approval of environmental impact assessment reports and environment protection plans; and
- > the Natural Resources and Environment Inspectorate and Environment Police are responsible for supervising and inspecting relevant entities for compliance with environmental regulations.

“All large projects require an approved environmental impact assessment report (EIAR). It is a breach of law not fully to implement measures stated in the EIAR.”

Environmental impact

Environmental impact assessment report

Certain types of projects require the preparation of an environmental impact assessment report (**EIAR**), including projects subject to an investment policy approval of the National Assembly, Government or Prime Minister; projects using land of nature reserves, national parks, historical and cultural relic sites, world heritage sites, biosphere reserves or 'beautiful landscapes' which have been ranked; and projects likely to have adverse environmental impacts.

The EIAR assesses the environmental status of the project site and potential environmental impacts, setting out specific measures and undertakings to minimise adverse impacts on the environment and opinions of agencies, organisations and the community who may be directly affected by the project.

The EIAR must be prepared in the early stage of project preparation (ie prior to issuance of the construction permit or operational permit required for the project) by the project owner (or a qualified consultancy firm hired by the project owner).

Depending on the type of the project, the EIAR must be submitted for appraisal and approval by MONRE, the relevant ministries or the provincial People's Committee.

Such EIAR must be revised if there is a change in the project location, an increase in scale or capacity or technological change of the project causing greater adverse environmental impacts, or the project is not implemented for 24 months from the date of approval.

Environmental protection plan

Project owners who are not required to prepare an EIAR must prepare and register a written environmental protection plan (**EPP**) with the local People's Committee at the provincial or district level (depending on the type of the project) before commencement of their projects.

The EPP must cover location, form and scale of the undertaking, as well as the energy used and types of waste produced, and set out specific measures to treat waste and minimise adverse impacts on the environment.

The EPP must be revised and re-registered if there is a change in the project location or the project is not implemented for 24 months from the date of registration of the EPP.

An aerial photograph of a dry, cracked landscape, likely a salt flat or a desert. The ground is covered in a network of deep, irregular cracks, creating a mosaic of polygonal shapes. The colors range from light beige and tan to dark green and black, suggesting different mineral compositions or perhaps a thin layer of water reflecting the sky. A large, white, semi-transparent arrow is overlaid on the image, pointing from the top-left corner towards the bottom-right corner. The word "Competition" is written in a bold, white, sans-serif font across the center of the image.

Competition

Competition law and authorities

Vietnam's Law on Competition establishes two broad categories of prohibited conduct: anti-competitive conduct and unfair business practices.

Two departments under the Ministry of Industry and Trade are tasked with implementing the Law on Competition: the Vietnam Competition Authority (VCA) and the Vietnam Competition Council (VCC).

The most important duty of the VCA is to control the process of economic concentrations, ie assessing mergers and acquisitions. In addition, the VCA is responsible for receiving complaints and conducting investigations of anti-competitive conduct and unfair business practices, and assessing exemption requests.

Among other responsibilities, the VCC deals with anti-competitive cases (eg receipt of reports on investigations, imposing fines, resolving complaints and participating in administrative procedures, etc.).

“Vietnam's competition law may apply to foreign-to-foreign offshore transactions and a merger filing in Vietnam prior to closing may be required.”

Scope of application

The Law on Competition applies to all enterprises established in Vietnam, including foreign-invested enterprises and overseas enterprises operating in Vietnam. Although the phrase 'overseas enterprises operating in Vietnam' is not defined clearly, it is understood to encompass a foreigner's commercial presence in Vietnam, such as:

- > overseas enterprises that have a subsidiary, a representative office or a branch in Vietnam;
- > overseas enterprises that provide services in Vietnam (eg foreign contractors) with or without an office in Vietnam; and
- > overseas enterprises that distribute their products into Vietnam directly or via a distributor.

As the precise application of the Law on Competition on foreign-to-foreign offshore transactions is unclear, this issue should be examined on a case-by-case basis.

Anti-competitive conduct

The anti-competitive conduct prohibitions are broadly similar to those in place in many other jurisdictions, in that the Law on Competition prohibits:

- > certain agreements in restraint of competition;
- > abuse of dominant or monopoly market position; and
- > certain market concentrations (mergers and acquisitions).

Agreements in restraint of competition

The Law on Competition prohibits a variety of agreements that restrain competition, eg agreements to exclude other competing enterprises, or agreements between parties who have 30 per cent or more of market share to fix prices, share consumer markets or restrain technological developments or the quantity of goods.

Abuse of dominant market position

It is unlawful for an enterprise in a position of market dominance or monopoly to abuse that position. Examples include selling goods or services below cost in order to exclude competitors, preventing market participation by new competitors or forcing enterprises to accept unrelated obligations ('third line forcing').

The test for a dominant market position is based on market share (more than 30 per cent for an individual enterprise, more than 50 per cent for two enterprises combined) and, in the case of individual enterprises, the ability to restrain competition.

Economic concentrations

The Law on Competition also regulates 'economic concentrations', including mergers, consolidations, acquisitions, joint ventures or 'other forms of concentration stipulated by law'.

An economic concentration whereby parties have a combined market share of more than 50 per cent is prohibited, unless an exemption is granted or the enterprise post-concentration is a 'small-to-medium [sized] enterprise'. The market share of the parties is determined by the turnover of such parties in the relevant market.

Other exemptions apply where one or more of the parties is at risk of being dissolved or becoming insolvent (the 'failing firm defence') or where the economic concentration enhances export or socio-economic development or technological progress.

Where parties have a combined market share of 30 to 50 per cent and intend to conduct an arrangement resulting in economic concentration, they must notify the VCA, unless the economic concentration results in a small-to-medium sized enterprise. Within seven working days after receipt of the notification, the VCA must notify the applicants in writing if their submission is complete (contains all information required by the VCA). Within 45 days of the VCA's notification, the VCA will issue its decision on whether or not to approve the economic concentration, however, this time limit may be extended depending on the complexity of the case. Parties cannot complete the arrangement of concentration until they have received approval from the VCA.

Unfair business practices

Prohibited unfair business practices are directed toward protection of consumers and small and medium sized enterprises.

These include prohibitions on:

- > misleading instructions;
- > infringement of business secrets;
- > coercion in business;
- > disruption of a competitor's business;
- > defamation of a competitor's business;
- > advertisements or promotions aimed at unfair competition;
- > discrimination by industry associations;
- > illegal multi-level (pyramid) selling; and
- > other unfair business practices which fall within the definition under the Law on Competition.

An aerial photograph of a coastline. The top half of the image shows deep blue water with some whitecaps. Below the water is a narrow strip of sandy beach, followed by a wide expanse of green, forested hills. The hills are illuminated by warm, golden light, suggesting either sunrise or sunset. The word "Employment" is overlaid in white, bold, sans-serif font across the middle of the image. In the bottom left corner, there is a large, dark grey geometric shape that looks like a stylized arrow or a corner cut. In the bottom right corner, the number "33" is visible.

Employment

The Labour Code of Vietnam, together with its implementing regulations, creates a uniform legal framework for employment in Vietnam. Vietnam is a pro-employee jurisdiction and Vietnam's employment laws are prescriptive and include wide-ranging protections for employees, both Vietnamese and foreigners. It is not possible to contract out of these statutory provisions.

Employment contract

Parties are generally free to negotiate and document their own employment contracts, provided that the terms are not less favourable than those prescribed by law, eg. in relation to minimum annual leave, sick leave and maternity leave entitlements.

Employment contracts must be in writing, other than for temporary jobs for a period of less than three months.

Duration of employment

The Labour Code prescribes three types of employment contracts:

- > indefinite term contracts;
- > definite term contracts of between 12 and 36 months in duration; and
- > definite term contracts of less than 12 months in duration (generally for a particular assignment or seasonal work).

Definite term contracts may only be renewed once. After expiry of a renewed definite term contract, the employee's contract will become an indefinite term contract if the employee continues working for the employer.

An employee may be employed on a trial or probationary basis for a limited period of up to 60 days.

Internal labour rules

Employers with more than 10 employees must have written internal labour rules (**ILRs**) which set out rules regarding the working environment at the employer's organisation. An ILR is an important legal document without which employers will not be able to apply disciplinary actions to employees or terminate labour contracts with employees, even in circumstances specifically contemplated by law.

The employer must consult with the company's trade union (or, if a trade union has not been established, the district level trade union) about the contents of the ILRs and register the ILRs with the Department of Labour, War Invalids and Social Affairs (**DOLISA**) in order for the ILRs to become effective and enforceable.

Trade unions

An enterprise is not required to proactively set up a trade union within its organisation. The district level trade union will initiate the process for establishment of a trade union at the enterprise within six months of the enterprise's establishment, at the request of employees or the enterprise. Both employees and employers are required to contribute funds to support this trade union. In practice, it would be difficult for an employer to retrench, apply disciplinary actions or terminate employment without the participation of the enterprise's trade union.

Collective labour agreements

If requested by the majority of employees in the company, the employer and the enterprise's trade union shall enter negotiations for a collective labour agreement (**CLA**) setting out the parties' agreement on the working conditions and the parties' rights and obligations. The CLA must be registered with DOLISA.

Employing foreigners

Generally expatriate employees working for more than three months require a work permit to work in Vietnam, except in limited exempted cases (eg. board members of shareholding companies).

The employer is responsible for obtaining the work permit for the foreign employee, which is tied to one specific position with that specific employer only. If the employee changes position or works for another employer, a new work permit is required. Each work permit has a maximum term of 24 months and can be reissued for subsequent terms at the employer's request.

Under Vietnam's Commitments to the World Trade Organisation, if a foreign invested enterprise routinely transfers expatriate managers in and out of Vietnam, at least 20 per cent of the total number of the managers, executive directors and experts of the enterprise must be Vietnamese citizens. However, each foreign invested enterprise in Vietnam will be allowed to have at least three foreign managers, executive directors and experts. The employer is required to have a training plan and specific apprenticeship agreements to train Vietnamese employees to eventually replace foreign employees.

Compulsory insurance contributions

Both employees and employers are required to contribute to compulsory insurances which include social insurance, health insurance and unemployment insurance.

Figure 6: Compulsory insurance contribution rates

	Social insurance	Health insurance	Unemployment insurance
Employee contribution	8%	1.5%	1%
Employer contribution	17.5%*	3%	1%

*Effective from 1 June 2017, may be adjusted from 1 January 2020.

The salary used for calculation of the above contributions is the employee's monthly salary, including salary-related allowances, and, from 1 January 2018, other additional amounts as prescribed by law, but this is capped at no more than 20 times the basic salary as regulated by the Government.

The social insurance fund covers payments for the employees' sick leave, maternity leave and retirement pensions. Employers are not obliged by law to pay an employee's salary or pension allowances during such periods off work.

Depending on the period of contribution of unemployment insurance, an employee may be entitled to an unemployment allowance if they are out of work. An employer is not required to pay severance allowance or retrenchment allowance to the employee upon termination of labour contract in respect of any working period when the employee and the employer have contributed to unemployment insurance.

Termination of employment contract

An employee may unilaterally terminate an indefinite labour contract without cause by serving 45 days advanced notice to the employer. For definite term contracts, the employee may only terminate their contract with cause and after serving advance notice.

However, an employer can only unilaterally terminate a labour contract with an employee in very limited circumstances (eg. the employee's poor performance, long-term illness, or the employer's restructuring or transfer of the business). The employer requires ILRs and the enterprise trade union (or trade union at district level) to satisfy due process requirements failing which means the termination can be held invalid.

An aerial topographic map of a river basin, showing a network of rivers and tributaries. The terrain is color-coded by elevation, with higher elevations in brown and lower elevations in blue. A large white diagonal shape, resembling a stylized letter 'L' or a large arrow, is overlaid on the bottom-left portion of the map. The text 'Intellectual Property' is centered in the upper-middle part of the map.

Intellectual Property

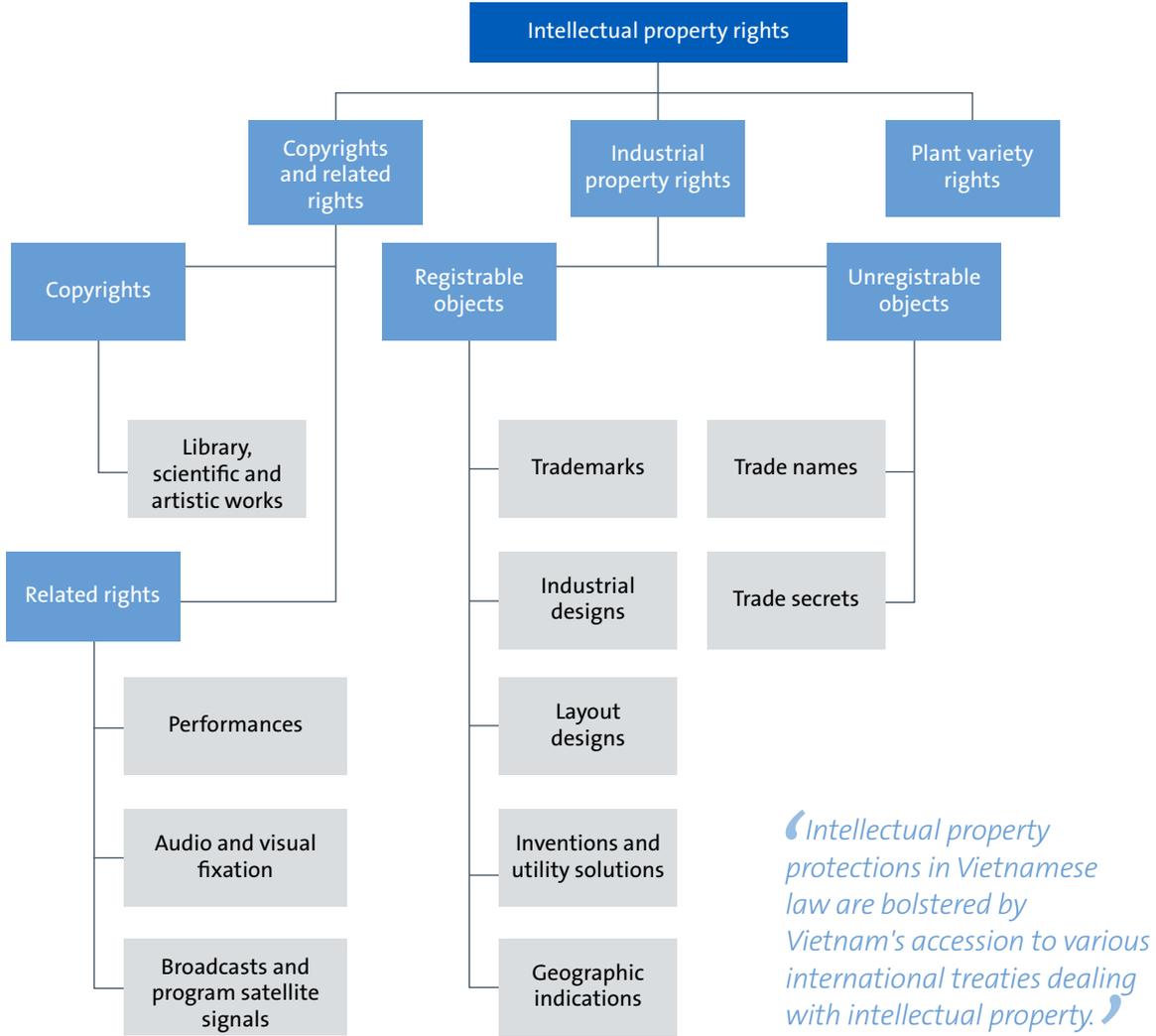
Vietnamese law recognises and protects a wide range of intellectual property rights including copyright, trademarks, industrial designs and inventions. Intellectual property protections under Vietnamese law are bolstered by Vietnam’s accession to various international treaties dealing with intellectual property, such as the Paris Convention for Protection of Industrial Property, the Bern Convention for Protection of Literary and Artistic works, the Patent Cooperation Treaty and the Madrid System for International Registration of Trademarks.

Protection and management of intellectual property

Various Vietnamese ministries are responsible for the management and protection of intellectual property, including:

- > the Ministry of Science and Technology, via its agency the National Office of Intellectual Property (NOIP), responsible for industrial property matters;
- > the Ministry of Culture, Sports and Tourism, via the Copyright Office, responsible for copyright matters; and
- > the Ministry of Agriculture and Rural Development, responsible for plant variety matters.

Figure 7: Intellectual Property rights



Copyright

Works protected by copyright law in Vietnam are similar to those covered in other jurisdictions and include literature, science, music, films, computer programs and data.

While moral rights (including the right to publish, or to authorize other persons to publish, the work) are generally protected for an indefinite term, economic copyright lasts for a term of 50 years from the death of the author. For film, photographic and applied art works, as well as the work of anonymous authors, moral rights and economic rights of copyright owners last for 75 years from the date of first publication of the work.

Although copyright is automatic on creation, a system of registration also exists in Vietnam. Registrations are processed by the Copyright Office, with the certificates issued being valid proof of copyright ownership in Vietnam. Copyright registrations are also recorded in a National Register of Copyright and Associated Rights.

Contracts assigning or licensing copyright must be in writing and comply with specific requirements set out in the Law on Intellectual Property.

Trademarks

Trademarks are protected in Vietnam once they have been registered with the NOIP or they have been accepted for protection by the NOIP having been filed through the Madrid System (that is filed in another member country of the Madrid Agreement or the Madrid Protocol), designating Vietnam as a contracting party (of where the trademark is to be protected). There are also specific protections for 'well-known' marks.

Consistent with international practice, trademarks are registered in relation to particular goods and services. The term of protection is 10 years (renewable for consecutive 10-year terms) and international principles of 'first to file' and 'priority' apply.

Contracts for assignment of industrial property rights (including trademarks and invention patents) must be registered with the NOIP. Licences for industrial property rights do not have to be registered, but will only be enforceable against third parties if registered.

Inventions (patents)

Protection of inventions, by way of patent, is granted by the NOIP. The term of protection is 20 years from the filing date.

Enforcement of intellectual property rights

Under Vietnamese laws, infringements of intellectual property rights may result in civil remedies, administrative or criminal penalties, as well as intervention from Customs at the Vietnamese border where applicable, as outlined below:

- › Civil remedies include preliminary injunctions to seize, collect and preserve evidence of infringement as well as compensation for damage caused by the infringement.
- › Administrative sanctions (including confiscation, warnings or fines) may be imposed by inspectorates, police officers, market management offices, customs officers and People's Committees.
- › Criminal sanctions (including imprisonment) can apply for certain conduct, including infringement of copyright and related rights and industrial property rights.
- › Customs' intervention at Vietnam's borders can include provisional suspension of customs procedures for imported or exported goods suspected of infringing intellectual property rights.



Tax

Common taxes

Most Vietnamese taxes are similar to those that investors would expect to find in other jurisdictions. These include:

- > **Corporate income tax (CIT):** levied on the profits of entities conducting production activities or businesses in goods and services. Taxable income also includes income from securities transfers, capital transfers, real property transfers and loan and rental income.
- > **Personal income tax (PIT):** levied on individuals’ salaries and wages, business income, as well as income from capital investments (including interest and dividends), securities transfers, real property transfers, winnings or prizes, royalties, franchises, inheritances and gifts.
- > **Capital gain tax (CGT):** this is not a separate tax in Vietnam, but is part of the CIT or PIT applied for capital transfer. A tax rate of 20 per cent on the income generated or a flat rate of 0.1 per cent on the total sale proceeds will apply, depending on whether the transfer is considered a transfer of capital or transfer of securities, or whether the transferor is an individual or an organization.

Increasingly, the Vietnamese tax authorities are seeking to impose CGT in respect of foreign-to-foreign offshore transactions, if they relate to assets in Vietnam.

- > **Value added tax (VAT):** levied on goods and services used for manufacturing, business and consumption in Vietnam.

Figure 5: Tax rates

CIT	PIT	VAT
<ul style="list-style-type: none"> > Standard CIT rate is 20%. > Higher CIT rates (between 32% and 50%) apply to enterprises operating in petroleum, gas and other natural resources sectors. > Preferential CIT rates of between 10% and 17% apply to enterprises in certain sectors (such as education, training, high-tech, health care and social housing) or areas with difficult socio-economic conditions. CIT holidays and rate reductions are also available in certain cases. 	<ul style="list-style-type: none"> > PIT rates on salaries and business income are progressive (in 5% increments). The lowest rate, 5%, applies to the first 5 million Vietnamese dong (c.US\$220) of monthly taxable income and the highest rate, 35%, applies to monthly taxable income of more than 80 million Vietnamese dong (c.US\$3,500). > Particular rates apply to other types of income, for example 5% on capital investments, 25% on capital gains (or 2% on sale proceeds) from real property transfers and 0.1% on sale proceeds in share transfers. 	<ul style="list-style-type: none"> > The standard VAT rate is 10%, which applies to all applicable goods and services for which an alternative rate is not provided. > Rates of 5% and 0% can also apply depending on the nature of the transaction, for example the 5% rate applies to goods and services in agriculture and goods used for education.

Other taxes

Other taxes include:

- > *Import and export duties*: duty rates for import include standard, preferential and special preferential rates, depending on the country from which the goods are imported and the particular trade agreements between that country and Vietnam. Generally, Vietnam encourages exports such that only a few goods are subject to export duties;
- > *Foreign contractor tax*: not a separate tax in itself, but rather a series of guidelines for the taxation of foreign organisations that do not have a permanent establishment in Vietnam and foreign individuals doing business or having income in Vietnam (referred to in shorthand as ‘foreign contractors’). The guidelines stipulate how different taxes, such as PIT, CIT (including CGT) and VAT apply to transactions involving ‘foreign contractors’ and, in certain cases, require the Vietnamese counterparty, the bank or the stock exchange to withhold taxes on behalf of the ‘foreign contractor’;
- > *Special sales tax*: a form of excise (ranging from 10 per cent to 70 per cent) applied to specific goods and services including cigarettes, alcoholic drinks, passenger vehicles, aircraft and playing cards, and services such as karaoke parlours, casinos and golf;
- > *Natural resources tax*: a form of tax (ranging from 1 per cent to 40 per cent) imposed on the exploitation of Vietnam’s natural resources such as crude oil, natural gas, minerals, natural forest products, natural marine products and natural water;
- > *Property tax*: non-agricultural land used for residential purposes and business purposes are subject to a non-agricultural land use tax rate from 0.03 per cent to 0.15 per cent on the land value.
- > *Environment protection tax*: a form of tax applying to goods deemed detrimental to the environment such as petroleum, coal, certain types of plastic bags and certain chemicals. The payable tax amount is calculated based on absolute tax rates and the volume of the goods.
- > *Business licence tax*: a small tax amount calculated on the basis of the registered capital of an enterprise, payable at the time of business registration and subsequently on an annual basis.
- > *Stamp duty*: a duty imposed on the required registration of ownership of certain assets, eg real estate assets, transportation vehicles and guns with a rate ranging from 0.5 per cent to 20 per cent.

An aerial photograph of a forest with a large tree trunk in the center. The word "Contracts" is written in white, bold, sans-serif font across the middle of the image. A large, semi-transparent white triangle is overlaid on the bottom-left corner of the image.

Contracts

Source of contract law

Vietnamese contract law is predominantly sourced from the following legislation:

- > the Civil Code, which applies to all types of contracts; and
- > the Law on Commerce, which applies to commercial and profit-making contracts (though the law may also apply to a contract between a commercial party and a non-commercial party, if the non-commercial party so chooses).

Generally, provisions of the Law on Commerce as well as provisions of industry-specific laws (such as the Law on Construction for construction contracts and the Petroleum Law for petroleum contracts) will take precedence over the general provisions established by the Civil Code, to the extent that they do not contradict certain core principles.

Principles of contract law

The Civil Code and the Law on Commerce provide a basic framework for commercial contract law, including provisions on:

- > **Freedom of contract:** parties to a contract are generally free to agree on the contents of their contract, insofar as they do not contradict prohibitive provisions of law.
- > **Formation of a contract:** the law provides rules of offer and acceptance. Similarly to other civil law legal systems, consideration is not required for the formation of a contract.
- > **Contract terms:** there are no specific rules to determine whether a statement does or does not constitute a contractual term. There is also no recognised doctrine of implied terms. As to the interpretation of contracts, the following factors will be taken into account: (i) the intention of the parties, (ii) customary practices at the place of signing of the contract, (iii) the nature, purpose and overall content of the contract and (iv) the interpretation that benefits the non-drafting party may be favoured (though this is often sought to be excluded by an express term of the contract).

- > **Breach of contract:** a breach of contract is categorised as either a fundamental breach or an ordinary breach. A fundamental breach is one that renders the innocent party unable to achieve its objectives when entering the contract. Unless otherwise agreed by the parties, only a fundamental breach allows the non-breaching party to terminate, temporarily suspend, or void the contract. Meanwhile, an ordinary breach only allows the non-breaching party to seek other remedies, such as a contractual penalty (if provided in the contract) or damages.

“As a general rule, parties to Vietnamese contracts are free to negotiate the terms of their contracts.”

- > **Remedies for breach of contract:** the remedies available for the breach of commercial contracts are as follows.
 - specific performance;
 - penalty for a breach: parties are allowed to agree on the level of penalty, subject to a general limit of 8 per cent of the value of the breached obligation (though there is no limit for non-commercial contracts);
 - damages: the quantum of damages is the value of actual and direct loss and direct loss of profits. The aggrieved party has a responsibility to mitigate the loss. Liquidated damages are not provided for under the law and, as the result, their enforceability remains an unsettled issue;
 - temporary suspension of performance of contract;
 - termination; and
 - cancellation (ie rendering the contract null and void).

Parties may agree on other types of remedy provided that they are not contrary to the fundamental principles of Vietnamese law, international agreements and international commercial practices. Since the concept of ‘fundamental principles of law’ is rather ambiguous, it may be interpreted differently by different judges. This creates uncertainty in terms of enforcement and must be factored in when formulating the remedy.

-
- > **Null and void contract:** a contract may be deemed null and void for reason of illegality (ie in breach of a prohibitive provision of law), contradicting social morals, forgery, lack of capacity, misunderstanding (eg mistake), deception, duress, if the subject of the contract is not performable, or non-compliance with the required formality, unless either party has performed at least two-thirds of its obligations under the contract.
 - > **Choice of law:** if a contract involves a 'foreign element' (ie one of the parties is foreign), the parties may agree on a law of a jurisdiction of their choice as the governing law. If there is no agreement, the contract will be governed by the law of the country to which it is most closely connected to. Notwithstanding these principles, if the subject of the contract is real property, or if it is an employment contract or consumer contract that affects the employee's or consumer's minimum benefits under Vietnamese law, Vietnamese law will apply. The choice of governing law and dispute resolution for contractual arrangements are considered in more detail in Section 13.

An aerial photograph of a river delta, likely the Nile, showing a prominent blue-tinted water channel that curves through the landscape. The surrounding land is a mix of tan and light green, with intricate patterns of erosion and sediment. A large, semi-transparent white arrow points from the bottom-left towards the center of the image, partially overlapping the river channel.

Dispute Resolution

In any international investment, the choice of dispute resolution forum and governing law is essential to ensure the certainty, stability and enforceability of contractual rights and obligations.

Foreign investors in Vietnam often find themselves negotiating with their Vietnamese partners and other counterparties over:

- > the choice of either Vietnamese courts, foreign courts, Vietnamese arbitration or international arbitration as the forum for resolution of any disputes arising in relation to their investment; and
- > the choice of either Vietnamese law or foreign law as the governing law of their contract.

“Foreign investors may, in most cases, choose that a dispute is to be resolved by international arbitration.”

Making the ‘right’ choice will depend on the particular circumstances of each individual contract. It is important to understand the advantages and risks posed by each possible choice, as well as the mandatory Vietnamese rules that may impact on the available choices.

Governing law

The governing law of the contract is the law that is applied in regulating the relationship between the parties to the contract. This is different from the mandatory law of the place where the contract is performed (eg regulations on labour or environment), which must be complied with, irrespective of the chosen governing law. A choice of foreign governing law will generally not release a foreign investor from any obligation under Vietnamese law.

Generally speaking, Vietnamese law permits the choice of foreign law only where the contract involves a ‘foreign element’, which typically means the involvement of a foreign party or asset, where the subject of the civil relationship is located overseas or when the grounds for establishing, altering or terminating the civil relationship are subject to foreign law. However, the ability to choose foreign law has conditions attached to it, including that the result of the application of the foreign law (or the choice of foreign law) must not contradict the ‘fundamental principles of Vietnamese law’ – and this concept has no clearly defined parameters.

The following laws contain specific provisions relating to the application of foreign law.

- > the Investment Law allows a choice of foreign law when at least one contractual party is a foreign investor or a foreign-invested economic organisation, but only where the agreement to choose a foreign law does not contradict Vietnamese law;
- > the Law on Commerce permits a choice of foreign law for commercial contracts involving ‘foreign elements’, again provided that the foreign law does not contradict the ‘fundamental principles of Vietnamese law’;
- > the Civil Code allows parties to a contract involving a ‘foreign element’ to choose a foreign law provided that the choice does not contradict the ‘fundamental principles of Vietnamese law’. Notwithstanding that, if the subject of the contract is immovable property, the governing law applicable to the transfer of the ownership or other rights towards the immovable property, including rental, security or other civil obligations, must be the law of the country in which the immovable property is located. With respect to labour contracts or consumer contracts, if the chosen law by parties in the labour contract or consumer contract affects the minimum benefits of the employees or consumers under Vietnamese law, Vietnamese law will still apply. In addition, foreign law cannot be applied if it is impossible to determine the contents of the foreign law.

The fact that these choices of foreign law are subject to certain principles and provisions of Vietnamese law (which cannot be definitively determined) may mean that a choice of foreign governing law, even where permitted in principle, may not ultimately result in the application of foreign law in the manner intended or anticipated by the foreign party, in particular if the matter ends up in a Vietnamese court.

Dispute resolution forum

There are three main dispute resolution forums available for investment and commercial agreements in Vietnam: Vietnamese courts, Vietnamese arbitration or international arbitration.

While in theory, the parties can also choose the courts of a foreign jurisdiction, judgments of such courts can only be enforced in Vietnam in very limited circumstances. Therefore, such a choice is rarely made.

Vietnamese courts

Recourse to the domestic courts is often suggested by Vietnamese partners and counterparties. Foreign investors, however, may be reluctant to agree to this choice, due to their unfamiliarity with the Vietnamese courts and potential concerns about the impartiality, independence and efficiencies of the court system.

Vietnamese arbitration

Domestic arbitral awards are enforceable in the same way as court judgments.

Historically, the choice of Vietnamese arbitration for disputes has been less popular, due to limitations in the commercial arbitration framework, including a lack of autonomy in appointing arbitrators and the inability of arbitration tribunals to order interim relief.

The Law on Commercial Arbitration, which came to effect from 1 January 2011, addressed the shortcomings of the previous version of the law, making the choice for domestic arbitration more attractive as a dispute resolution forum for foreign investors.

International arbitration

International (or foreign) arbitration is expressly permitted under the Investment Law for disputes involving at least one foreign investor or foreign invested company. Foreign arbitration is also effectively permitted for commercial disputes, by the Commercial Law, which, in very general terms, allows disputes to be resolved either by courts or arbitration.

Most cross-border investment contracts provide for dispute resolution by arbitration in a country that is a member of New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, often Singapore. Although Vietnam is a party to the New York Convention, the (limited) experience to date suggests that enforcement of foreign arbitral awards may be difficult and Vietnamese courts may refuse enforcement on highly technical or obscure grounds under cover of a finding of failure to have complied with the 'fundamental principles of Vietnamese law'.

The importance of this issue will depend on where a potential defendant's assets are located, and whether any award could be enforced outside of Vietnam.

An aerial photograph of a desert landscape. The foreground is dominated by a large, light-colored, textured area that appears to be a salt flat or a similar mineral deposit. A dark, winding road or river cuts through the landscape, leading towards the background. The background shows a mix of brown, orange, and blue tones, suggesting a rugged, arid environment. The text "Oil and Gas" is overlaid in the center of the image.

Oil and Gas

Since 1993, the Petroleum Law, together with its implementing regulations, has provided the legal framework for petroleum operations in Vietnam. The Ministry of Industry and Trade (**MOIT**) is the State authority tasked with overseeing and licensing the petroleum sector. Vietnam Oil & Gas Group (**PVN**), otherwise known as PetroVietnam, in its capacity as the State company conducting petroleum operations and entering into petroleum contracts for conduct of petroleum operations, is in effect the de facto authority for State management in the petroleum sector.

Form of investment

The Petroleum Law requires investors to enter into petroleum contracts with PVN in order to carry out petroleum operations. A petroleum contract must be approved by the Prime Minister and only comes into effect once an investment registration certificate is issued with regard to such a contract. In normal cases, the maximum duration of a petroleum contract is 25 years, during which the maximum exploration period is five years. In the case of petroleum investment projects and natural gas projects the Government wishes to encourage, such maximum durations can be 30 years and seven years, respectively. The duration of a petroleum contract and the exploration period therein may be extended, but not more than five years and two years, respectively. However, in special cases, including for reasons of national defence and security or when the petroleum block has complex geological conditions, or is in deepsea, continued extensions are possible if approved by the Prime Minister.

Petroleum contracts may take the form of production sharing contracts, petroleum contracts under which a joint operating company is established, joint venture contracts to establish incorporated joint ventures or other forms.

Production sharing contract

A production sharing contract (**PSC**) is the most common form of petroleum contract. Since 2005, all PSCs must comply with the standard form of PSC issued by the Government, except in certain cases approved by the Prime Minister. The current PSC form was issued in 2013. In most cases, where the contractors of the petroleum project comprises of two or more contractor parties, a PSC is accompanied by a joint operating agreement entered into by all contractor parties to govern the relationship amongst them. One of the contractor parties is designated as the operator of the PSC, and it must have an operating office in Vietnam for this purpose.

Petroleum contract

A petroleum contract (**PC**) is an extended form of the conventional PSC, which was used in some upstream petroleum projects prior to 2005. Unlike a typical PSC where one of the contractor parties is designated as the operator, a PC provides for the establishment of a joint operating company (**JOC**) to be the operator of the petroleum block. The JOC acts as the representative of the contractors and neither makes profit nor pays taxes. A PC is normally accompanied by a charter of the JOC and an operating agreement between the JOC and the contractors.

Joint venture contracts

PVN and investors may, instead of entering into a PSC or a PC, establish a joint venture company for the purpose of conducting petroleum operations. This form of investment is uncommon. The most well-known joint venture operating in upstream petroleum operations in Vietnam is Vietsovetro, which is a joint venture between PVN and a state-controlled Russian petroleum company, established under a bilateral treaty between the States of Vietnam and Russia.

Method of investment

Investors can invest in petroleum operations in Vietnam by way of tendering to enter into a petroleum contract for a petroleum block. The tender is held by PVN under the supervision of the MOIT. In special cases, the MOIT may advise the Prime Minister to appoint a contractor to enter into the petroleum contract.

Alternatively, investors may farm-in to existing petroleum blocks, either by way of acquiring participating interests in the petroleum block (**Direct Assignment**) or acquiring shares in the company holding the participating interests (**Indirect Assignment**).

In the case of Direct Assignment, the assignment is subject to a statutory pre-emption right of PVN under the Petroleum Law and, if provided in the petroleum contract and other related contracts (eg the joint operating agreement), the pre-emption right of other contractors. The assignment must be approved by the Prime Minister and only comes into effect once an amended investment registration certificate is issued to record the transfer of the interest to the assignee.

In case of Indirect Assignment, depending on the terms of the petroleum contracts and other related contracts, the assignment may be subject to pre-emption rights and may require approval of PVN and other contractors. This is the case for PSCs using the 2013 standard form. From December 2015, an Indirect Assignment must be reported to PVN and the MOIT, and income from the transfer of shares in such Indirect Assignment will be taxed in Vietnam.

Production sharing mechanism

In most of the cases, the contractor(s) bears all costs of exploration in a petroleum project and those costs are not reimbursable if no commercial discovery is made. If a commercial discovery is made, and the development area goes into production, petroleum produced is divided to:

- > royalty petroleum: the amount of petroleum either taken in kind or with payment by the Government;
- > cost recovery petroleum: the amount of petroleum allocated to the contractor(s) for cost recovery of petroleum operation costs, including exploration and development costs and other costs relating to petroleum operations; and
- > profit petroleum: the remaining amount of petroleum to be divided between PVN and the contractor(s).

Local content requirement

Generally, the law and petroleum contracts provide a number of local content requirements in relation to petroleum operations in Vietnam.

In terms of the supply of goods and services, the contractor has an obligation to give priority to the use of local services and of goods if they are comparable to imported services and goods in terms of price, quality and supply schedule.

On human resources, foreign parties must give priority to the recruitment of Vietnamese citizens for the petroleum operations and must have plans on training and recruiting Vietnamese to replace their foreign employees.

A contractor also has the obligation to supply part or all of the petroleum produced in Vietnam for domestic consumption if requested by the Government of Vietnam. In the case of crude oil, the amount of crude oil required to be supplied for domestic consumption will be determined pro-rata to the contractor's entitlement to crude oil under the relevant petroleum contract, weight being placed on the entitlement to crude oil of all contractors producing crude oil in Vietnam.

An aerial photograph of a desert landscape. A wide, winding river flows through the center, with a large dam structure visible on the right side. The terrain is arid, with sparse vegetation and rocky outcrops. The sky is clear and blue. The text 'Infrastructure Investment' is overlaid in the center in a bold, white font with a drop shadow.

Infrastructure Investment

The legal framework for public private partnerships (*PPPs*), originally introduced in Vietnam in 1993, was consolidated in 2015 under the Government's Decree 15. Being part of the broader regime of investment laws, it comprises various specific regulations on project financing, the management and handover of PPP projects, the investment guarantees and incentives available for investors, and the relationship between the Government, investors, project enterprise and lenders.

Investment on a PPP basis

A PPP project is conducted on the basis of a contract between the Government and the investor and/or the project enterprise in order to implement, manage and operate an infrastructure or public utility project. A project contract can take the form of:

- > Build – Operate – Transfer (*BOT*);
- > Build – Transfer – Operate (*BTO*);
- > Build – Transfer (*BT*);
- > Build – Own – Operate (*BOO*);
- > Build – Lease – Transfer (*BLT*);
- > Build – Transfer - Lease (*BTL*); or
- > other similar types of project contracts to be agreed with the Government.

Capital sources

Capital for a PPP project can come from three sources: the investors, lenders and the Government. State investment capital may be in the form of a project subsidy on current or capital account or contributed as profit earning capital in the normal way. State investment capital in the nature of a subsidy may be provided to:

- > fund construction of the project facility if the revenue from the project is insufficient to recover investment capital and generate profit;
- > fund construction of auxiliary works or arrange compensation, site clearance and settlement; and
- > support revenue.

Investment procedures

There are six stages in the investment procedure of a PPP project.

- > *Formation and announcement of the project*: A project can be proposed by either the investor or an authorised government agency. In each case, the project must be included in the relevant development master plan and is subject to evaluation and approval by the relevant Government agency. The approved project is then publicised for registrations of interest.
- > *Preparation, appraisal and approval of feasibility study report*: the authorised Government agency will arrange the preparation of the feasibility study report. If the project is initiated by an investor, the Government may appoint such investor to prepare the feasibility study.
- > *Selection of investor: investors are selected according to the Law on Tendering under one of the following forms*: (i) public tender if more than one investor registers interest; (ii) appointment of investor in case only one investor registers its interest or for reasons of intellectual property, trade secrets, know-how, capital arrangement or the level of efficiency in the implementation of project. Subject to the Prime Minister's approval, tendering may be waived for particular projects that could not be covered by the selection methods provided under the Law on Tendering.
- > *Execution of investment agreement*: prior to entering into the definite project contract, the investors and the authorised Government agency will negotiate an investment agreement that sets out the particulars of the draft project contract and the rights and obligations of each party in obtaining the investment registration certificate and establishing the project enterprise.
- > *Obtaining an investment registration certificate and establishing the project enterprise*: these will be carried out by the investors. Please refer to Section 2 and Section 3 of this Guide for more information.
- > *Official signing of the project contract*: this is conditional upon the investment registration certificate being issued.

Implementation, finalisation and handover of the project facility

During the term of the project, the project enterprise is responsible for the quality of the work and for the management and commercial operation of the project facility in accordance with the project contract and under the supervision of the authorised government agency.

At the end of the project term, the investors may have to hand over the project facility to the Government in accordance with the project contract.

Investment incentives and guarantees

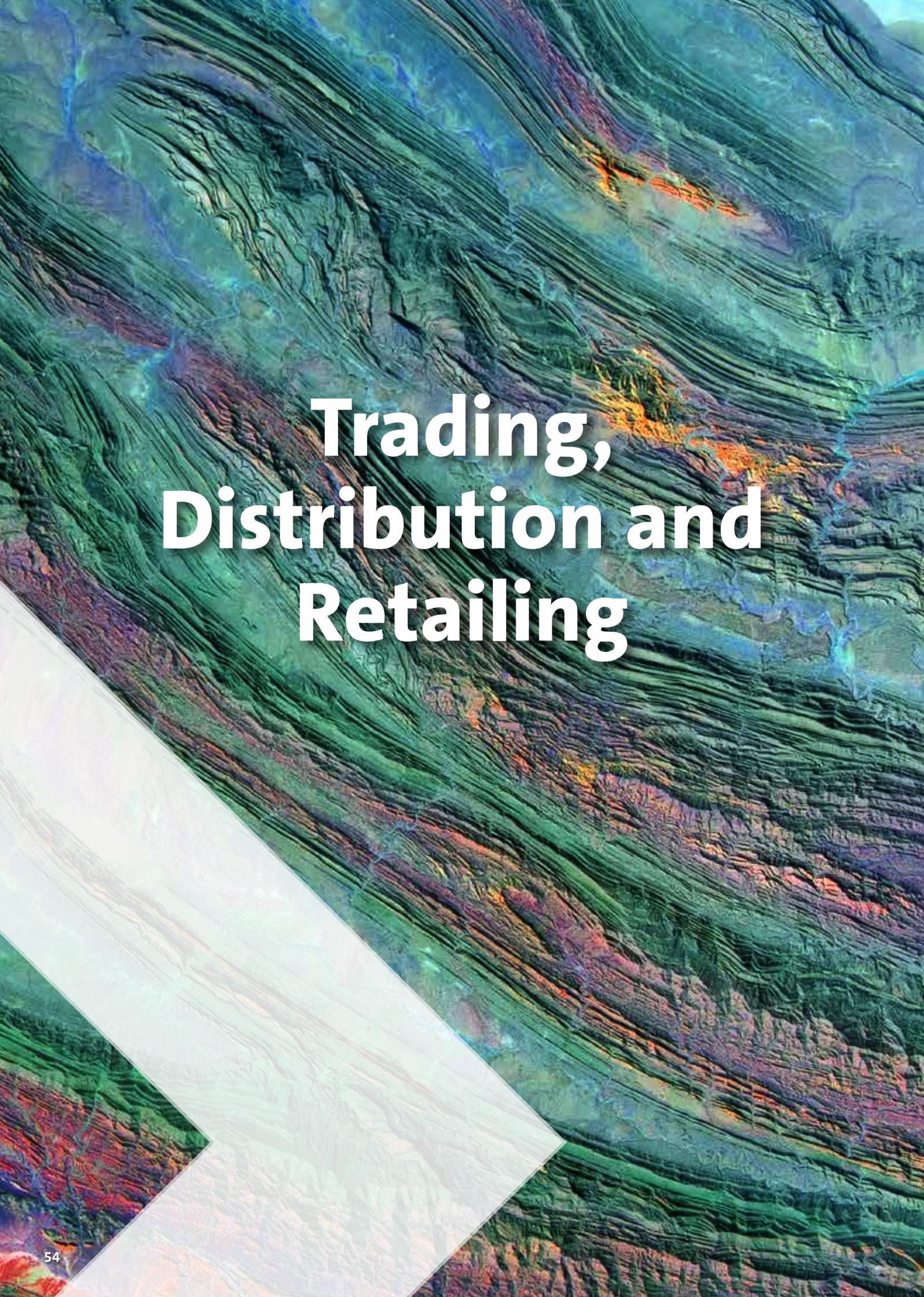
To support and encourage investment in infrastructure, a number of investment incentives and Government guarantees are available for PPP projects, including (i) tax incentives, (ii) land rent/land use fee exemption or reduction; (iii) guarantee for the provision of raw materials, consumption of output products, and other contractual obligations; (iv) guarantee for the obligation of State-owned enterprises to sell fuel and raw material to, and purchase products and services from, the project enterprise; (v) guarantee of foreign currency availability; (vi) guarantee of no-nationalisation; and (vii) Government's support in terms of public utilities.

In addition, parties may choose foreign arbitration for resolution of disputes between the Government and foreign investors. Parties may also choose foreign law as the applicable law for the project contract and any contracts whose performance is guaranteed by the Government.

Lenders in PPP projects

The law generally acknowledges the participation of lenders in PPP projects and provides for general rights of lenders, including:

- > *Step-in right*: the lenders, the authorised Government agency and the relevant parties to the contract must enter a written agreement to confirm the lender's step-in right. If the investors or project enterprise fail to discharge certain obligations prescribed in the project contract or the loan agreement, the lender may exercise its right to step in and assume all or part of the rights and obligations of the investor and project enterprise.
- > *Assignment*: an investor may assign part or all of its rights and obligations in the project contract to the lender or to another investor, subject to a written agreement signed by all the parties to the project contract and the assignee.



Trading, Distribution and Retailing

Given its demographics, the potential of Vietnam's consumer market is very appealing. Historically, however, foreign investors were largely locked out of this market due to restrictions on trading, including importation, exportation and distribution.

This situation changed upon developments and commitments under the US-Vietnam Bilateral Trade Agreement in 2001 and Vietnam's accession to the WTO in 2007. Vietnamese regulations on trading activities are now more open and the retail sector has since developed dramatically.

The changes in law have offered great opportunities for foreign investors to boost their trading investments in Vietnam. The past few years have witnessed an increasing number of large M&A transactions, as well as many fresh investments from foreign investors, in the retail sector.

Import and export

Under commitments made by Vietnam as part of its accession to the WTO, foreign-invested enterprises have the general right to import products and sell them to licensed distributors and export products purchased from distributors to offshore customers from the date of accession.

Certain products, however, remain prohibited or restricted for trading by foreign-invested enterprises.

Following international commitments, Vietnam has opened up its import and export sectors to foreign investors.

While such trading is permitted, importation and exportation remain 'conditional' investment sectors and require additional sublicenses. Despite this, the process to apply for and obtain approvals for a wholly foreign owned company engaging in import and export activities have been fairly well defined and several foreign companies have set up subsidiaries in Vietnam to engage in these activities.

Distribution

'Distribution' refers to the trading, ie purchase and sale, of products (imported and/or sourced locally) to organisations (ie wholesale) and to end-users (ie retail).

Retail distribution has been opened to wholly foreign owned enterprises from 1 January 2009. However, given the length of time it takes to consider an application and the complicated nature of the process, investors may expect some delays in licensing and establishing enterprises in this sector.

Moreover, a wholly foreign owned enterprise that is permitted to engage in retail activities, may generally only open more than one retail outlet if it can satisfy an 'economic needs' test in respect of its intended store location, which is designed as a tool to allow the Government to control the number of retail outlets of foreign investors in Vietnam. An exception to this is when the enterprise establishes additional retail outlets with a size of 500 square metres or less in 'an area which has been approved under the provincial planning for trading activities of goods and has completed infrastructure', eg a mall. The exception to the economic needs test has been considered as a favourable condition for foreign investors to establish and operate their retail outlets. Specifically, the sharp growth of retail stores in commercial centres and the model of convenience stores of foreign investors in Vietnam in recent years is evidence of the significant impact of such exemption.

Franchising

A wholly foreign owned company in Vietnam can engage in the franchising of its goods or services, provided that it satisfies relevant investment conditions. In general, these conditions apply equally to foreign invested and local franchisors and franchisees.

All franchisors (whether they are offshore companies, foreign-owned companies established in Vietnam or local Vietnamese companies) must have operated for at least one year before franchising or sub-franchising within Vietnam. Similarly, a Vietnamese master franchisee (ie sub-franchisor) wishing to sub-franchise the trading rights which it has received from a foreign franchisor must have operated the master franchise for a least one year prior to sub-franchising.

While the law does not require that the franchising agreement itself be registered, franchising from overseas (including from export processing zones, non-tariff areas or separate customs areas specified by Vietnamese law) into Vietnam must be registered with the relevant authorities. Domestic franchising and Vietnam-to-overseas franchising are not required to be registered, but are subject to reporting requirements under the law.



Allens: assisting your investment in Vietnam

On the ground in Vietnam

Allens is a leading international law firm in Vietnam and a well-established part of the business community, with our first office in Hanoi being opened in 1993.

Our team advises clients on all legal aspects of investing and doing business in Vietnam, including: mergers & acquisitions; corporate and licensing; energy, resources and infrastructure projects; banking & finance; competition law; real estate; employment; and dispute resolution. The depth of our experience in Vietnam means that we can identify issues and find practical solutions.

Our on-the-ground partners are leading the way in negotiating and managing large and complex contracts, projects and transactions. Our Head of Vietnam, Bill Magennis, has been resident in Vietnam for nearly 25 years. We currently have four partners in Vietnam – in Ho Chi Minh City, Robert Fish and Linh Bui, and in Hanoi, Chung Le and Melissa Keane.

They are supported by a large team of experienced Vietnamese and international lawyers who are geared towards sound, efficient and timely advice. We have a large team of experienced foreign and Vietnamese lawyers who assist in advising on matters of international and Vietnamese law.

Independent recognition

Our focus on excellence and on our clients has led to many accolades. Our expertise is recognised by leading independent legal directories, based on client feedback and peer review. Our Vietnam practice is consistently ranked Band 1 by *Chambers Asia Pacific* and as a Top Tier Firm by *The Legal 500 Asia Pacific* across multiple areas of law. Our Partners are also recognised by these directories as leading individuals in their fields. In 2015, we were named Vietnam Law Firm of the Year by Chambers.

Experience where it counts

We have close working relationships with all of the main Vietnamese authorities. These relationships have been developed over the past two decades through our work for large state-owned enterprises and on large, sensitive investment and development projects requiring liaison with officials; through workshops and training we have provided to various authorities; and through our advice on draft laws at the request of government bodies.

Vietnam Laws online database

In addition to providing legal services, our practice is widely regarded as one of the premier providers of legal translation services in Vietnam. Since 1993 we have been translating and publishing Vietnam's legal instruments regulating foreign investment and business.

Our Vietnam Laws online database (available at www.vietnamlaws.com) is a subscription online searchable database containing our English translations of more than 4,580 Vietnamese legal instruments.

“The firm is very familiar with local regulation in Vietnam and offers very prompt and professional responses.”

Chambers Asia Pacific, 2019

“Always very switched-on and responsive on fast-paced deals. They are creative and are able to look at the big picture to come up with practical solutions.”

Chambers Asia Pacific, 2019

Asia office network

Allens' international alliance with Linklaters provides our clients with access to market leading lawyers through a global network of 40 offices across 28 countries. The alignment of our complementary practices enables us to offer an integrated service to clients, with one point of contact, a unified team drawn from the best resources of each firm and consistent quality advice and support.

Allens and Linklaters are long established in the Asia region. In addition to Hanoi and Ho Chi Minh City offices there are offices in Hong Kong, Shanghai, Beijing, Singapore, Tokyo, Bangkok, Jakarta, Seoul, Brisbane, Melbourne, Sydney, Perth and Port Moresby.



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