



**Legal Guide to  
Investment in Vietnam**



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The material contained in this Legal Guide to Investment in Vietnam is intended to inform readers of general legal developments in Vietnam. It is not intended, and should not be relied upon, as legal advice. Readers who require further information in relation to any legal instrument or matter mentioned in this issue are encouraged to contact one of our Vietnam offices.

The content of this guide is current as at June 2012.



An aerial photograph of a coastline, showing a mix of blue water and green land. The water is a deep blue, and the land is a lighter green, with some brownish areas. The coastline is irregular, with many small inlets and peninsulas. The text "Vietnam at a Glance" is overlaid on the left side of the image in white.

# Vietnam at a Glance

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# Vietnam at a Glance

Vietnam is widely regarded as an attractive place to invest. Favourable government policy and laws have combined with Vietnam's natural assets and advantages to produce a stand-out performer in South-East Asia. Influential factors include:

- according to the World Bank,<sup>1</sup> in 2010 Vietnam had a population of nearly 87 million, making it the 13th-largest nation in the world by population, with an adult literacy rate of 93 per cent;
- government estimates put 2011 GDP per capital at US\$1,300, following a growth rate of 5.89 per cent in 2011. The Government has targeted a GDP increase of about 4 per cent for 2012; and
- Vietnam was listed, in a recent United National Conference on Trade and Development survey, as the eighth most popular destination for transnational corporations' foreign direct investment in 2010-2012.

## Investment environment

### Economy

Over the past 25 years, Vietnam has shifted from a central command-based economy to one with significant market elements. During this period, the economy has experienced rapid growth.

According to the Ministry of Planning and Investment's Foreign Investment Agency, Vietnam's major industrial sectors are manufacturing and agriculture. Key exports include crude oil, marine products, rice, coffee, rubber, tea, garments and shoes and pepper, while major imports include machinery and equipment, petroleum products, fertiliser, steel products, grain and motorcycles.

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## Geography

Vietnam is located in the south-eastern-most extremity of the Indochina peninsula and occupies more than 331,600 square kilometres, making it the third-largest country in South-East Asia. Border neighbours are China to the north and Laos and Cambodia to the west.

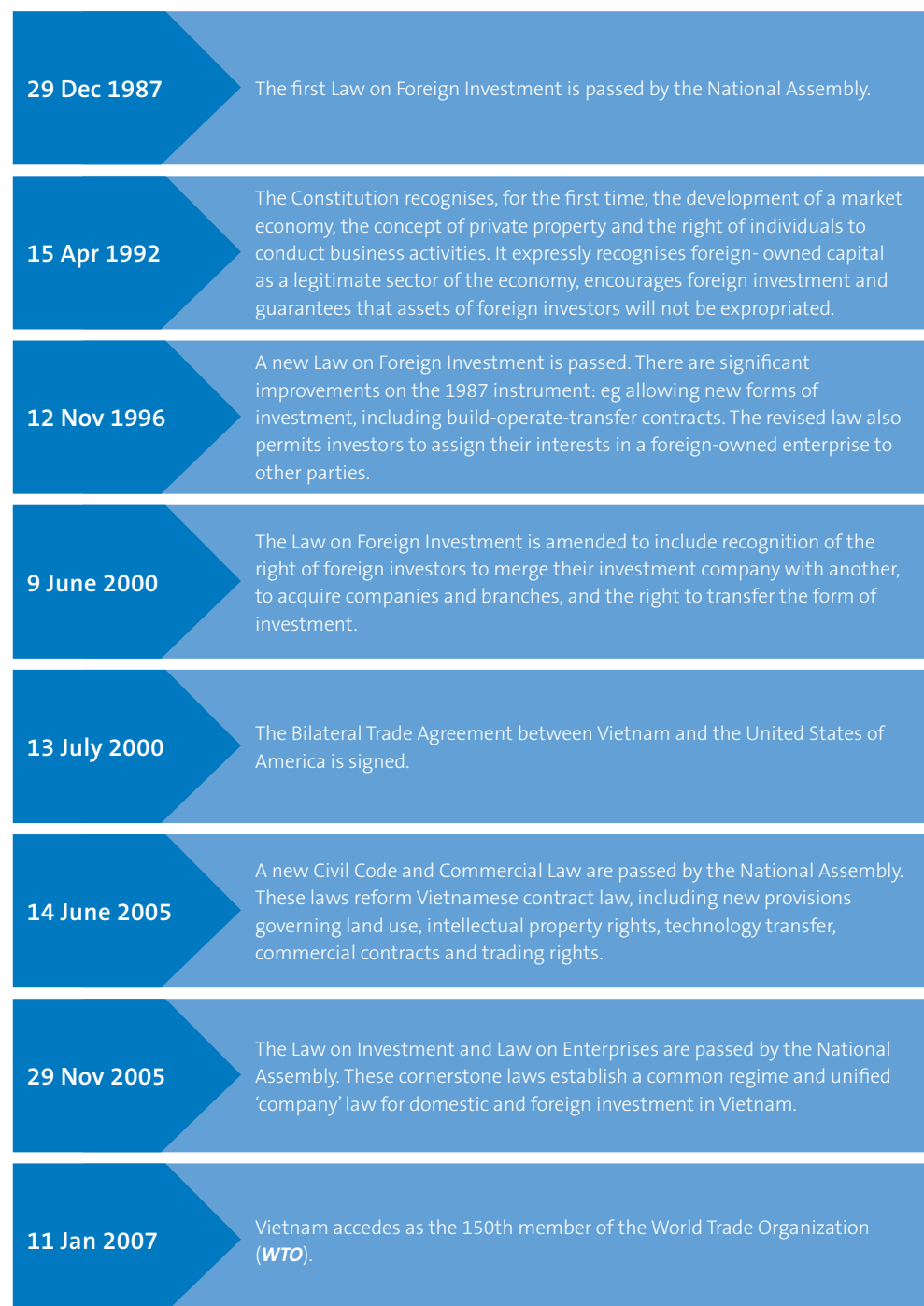
With a north-to-south distance of approximately 1,650 kilometres, Vietnam's land is varied, with mountain ranges and highlands in the north-west, north-east and central regions, and plains and river basins in the north and south regions.

## Government policy – Đổi mới and beyond

Following a historical period of closure, in 1986 Vietnam introduced the Đổi mới (or 'economic renovation') policy, a key aim of which was to open Vietnam to foreign investment. The reforms introduced under this policy have transformed Vietnam from a centrally planned economy to a socialist-oriented market economy.

Vietnam's efforts to attract foreign investment have been very successful since the late 80s. The Foreign Investment Agency reports that by 15 December 2011 Vietnam had more than 13,667 registered foreign investment projects, with a total registered capital of around US\$198 billion. These investments ranged across a variety of sectors, with manufacturing, real estate, hospitality, construction and information and communication all key sectors attracting large amounts of direct foreign investment.

Figure 1: Key legislative and policy developments for Vietnam as an investment destination.







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

## The National Assembly

Vietnam's political system is underpinned by the principle of centralised democracy. All state powers are centralised in one supreme body, and are then delegated to lower bodies in the hierarchy.

The unicameral National Assembly is the supreme state authority in Vietnam.

- It is the only body with the power to make the Constitution and laws.
- There is no separation of power in the Vietnamese legal system. The powers of all other state bodies derive from the National Assembly and all other state bodies are accountable to the National Assembly.
- In its current term (Legislature XIII), it comprises 500 elected delegates, representing 63 cities and provinces in Vietnam. Elections are held every five years, the most recent having been held in May 2011.
- There are two sitting sessions each year.
- Decisions are made by majority vote, except for certain special matters (eg amending the Constitution) that require a two-thirds majority.

## The Standing Committee of the National Assembly

The Standing Committee is a permanent body of the National Assembly empowered to act when the National Assembly is not in session. The main functions of the Standing Committee are to:

- pass ordinances on matters for which it is not yet possible for a law to be passed by the National Assembly;

- prepare for sessions of the National Assembly, including reviewing and commenting on draft laws; and
- act, while the National Assembly is not in session, on matters including the appointment of Deputy Prime Ministers, Ministers and other members of the Government.

## The Government

The Government is the executive arm of the state, responsible for executing the legal instruments enacted by the legislature. It comprises the Prime Minister, Deputy Prime Ministers, and Ministers heading ministries and ministerial equivalent bodies. Ministries and other bodies most relevant to foreign investment in Vietnam include:

- the Ministry of Foreign Affairs;
- the Ministry of Planning and Investment;
- the Ministry of Industry and Trade;
- the Ministry of Finance;
- the Ministry of Labour, War Invalids and Social Affairs; and
- the State Bank of Vietnam.

The Prime Minister is appointed by the National Assembly, which, in turn, recommends nominees for the positions of Deputy Prime Minister and Ministers.

The Government holds monthly meetings to hear reports and debate and to pass decrees and resolutions on specific issues within its jurisdiction. Decisions are made by majority vote.

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## Local-level government

The central-level state apparatus is mirrored at 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 matching the Ministries at the central level, such as the Department of Planning and Investment. These departments are responsible for state administration of their respective sectors in the 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 People's Councils have the authority to pass resolutions; however, in practice, most regulation at the local level comes from the People's Committees.

## The People's Courts

The People's Courts form the judicial arm of the state. They are responsible for resolving disputes based on the laws, but do not have the power to review or interpret the laws. The People's Courts include:

- the Supreme People's Court: the highest court and the final court of appeal over matters tried in the lower courts;
- the Provincial People's Courts in 63 cities and provinces: these courts have jurisdiction to hear appeals from District People's Court decisions; and
- the District People's Courts.

Both the Supreme People's Court and each Provincial People's Court are divided into

five divisions: the Economic Court, the Civil Court, the Criminal Court, the Labour Court and the Administrative Court. Although not officially assigned, in practice each individual judge in the District People's Court is often responsible for a special list such as the economic, civil or criminal one.

Judges are law graduates who have received judicial training provided by the Judicial Academy and have had prior work experience in the court system. Judges are appointed for a period of five years, without guarantee of re-appointment.

Jurors also play an important role in the judicial process. These are non-legally trained people elected by the local People's Council, also for a term of five years. A typical trial court is made up of one judge and two jurors (or assessors). The court makes its decision by a majority vote, which means that the judge can be outvoted by the jurors. A court acting on appeal will be made up of three judges and no jurors.

## The President

The President is the head of the State of Vietnam. In the law-making process, he or she promulgates the Constitution, laws passed by the National Assembly and ordinances passed by the Standing Committee. He or she is also responsible for negotiating and concluding treaties in the name of the state and ratifying other treaties, except where approval of the National Assembly is required. The President also acts as the commander in chief of the military forces, recommends candidates to the National Assembly for the positions of Prime Minister, Chief Justice, and Chief Procurator, and appoints judges of the Supreme Court.

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## 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'.

Court judgments are not a source of law: judges do not have the power to interpret the law and court judgments are not binding in subsequent cases.

Like China's legal system, Vietnam's may be described as a transitional legal system, as it moves from a centrally controlled system to one where the rule of law applies.

## Hierarchy of laws

Vietnamese law is made up of more than 10,000 legal instruments. In this hierarchy, 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 instrument in hierarchical order.

Legal instrument	Issuing body
<ul style="list-style-type: none"><li>• The Constitution</li><li>• Laws (including Codes)</li><li>• Resolutions</li></ul>	<ul style="list-style-type: none"><li>• National Assembly</li></ul>
<ul style="list-style-type: none"><li>• Ordinances and resolutions</li></ul>	<ul style="list-style-type: none"><li>• Standing Committee of the National Assembly</li></ul>
<ul style="list-style-type: none"><li>• Decrees, regulations and resolutions</li></ul>	<ul style="list-style-type: none"><li>• The Government</li></ul>
<ul style="list-style-type: none"><li>• Decisions and directives</li></ul>	<ul style="list-style-type: none"><li>• The Prime Minister</li></ul>
<ul style="list-style-type: none"><li>• Circulars</li></ul>	<ul style="list-style-type: none"><li>• Ministries</li></ul>
<ul style="list-style-type: none"><li>• Decisions</li></ul>	<ul style="list-style-type: none"><li>• Ministers</li></ul>

## International treaties

Vietnam is also party to a large number of international treaties. Under Vietnamese law, international treaties take precedence over domestic legislation. To the extent of any inconsistency, international treaties apply.

# Foreign Investment

An aerial photograph of a river delta, showing a complex network of water channels. The water is a mix of vibrant green and earthy brown, creating a textured, organic pattern. The channels are irregular and interconnected, with some larger, more prominent ones and many smaller, branching ones. The overall appearance is that of a natural, undulating landscape.

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# Foreign Investment

## Forms of foreign investment

There are two principal forms of foreign investment in Vietnam:

- direct investment – where the investor invests capital and participates in the management of the investment (eg the establishment of a corporate enterprise); and
- indirect investment – where the investor invests through the purchase of securities, or through intermediary financial institutions where the investor does not participate directly in the management of the investment activity.

## Direct foreign investment forms

A foreign investor can directly engage in the Vietnamese market in several ways. Foreign investors must determine whether they wish to invest alone or with other foreigners, or partner with one or more Vietnamese investors. At the same time, investors must consider and choose the most appropriate form of investment, including whether to establish a new company, invest in an existing company with an active management role, or pursue an alternative form of investment presence, such as a branch, representative office or business cooperation contract.

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The choice of investment form will depend primarily on the investment aim. It may also be dictated by particular rules applying to particular sectors. For example, for investments in the services sector, the commitments made by Vietnam when it joined the WTO will be a key determinant in selecting the form of investment. Authorities generally apply these commitments as de-facto limitations on foreign ownership, approving foreign investment only up to the level agreed in the schedule of commitments. Some of these commitments specify that investment in certain service sectors may only be made in the form of a joint venture with a Vietnamese partner.

## Establishing a new enterprise

A foreign-invested enterprise, whether wholly foreign-owned or in the form of a joint venture with Vietnamese partners, must be approved by the relevant authorities.

In order to be approved, a foreign-invested enterprise must have an 'investment project', being 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.

Approval of the investment project, and establishment of the foreign-invested enterprise, take the form of an 'Investment Certificate', the equivalent of a certificate of incorporation or business registration certificate. The investment certificate sets out key details, including:

- the approved project of the enterprise and the business lines in which the enterprise may operate;
- the approved duration of the project; and
- the 'charter capital' (or equity) of the enterprise.

In addition to the investment certificate, a Vietnamese-established entity must have a 'Charter', the equivalent of by-laws, constitution or articles of association of a company in other jurisdictions.

Newly established joint ventures between foreign and Vietnamese investors also require a 'Joint Venture Contract', governing certain key elements of their relationship. This contract sits alongside the charter as part of the enterprise's constituent documents.

Having determined that a Vietnamese-established enterprise is the most appropriate form of investment, investors will also need to consider and choose from the various forms of enterprise described in Section 3 of this Guide.

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## Investing in an existing enterprise

Investors may also choose to invest directly in Vietnam, by acquiring a stake in an existing Vietnamese enterprise. Often, extensive internal and external authority approvals will be required. The precise procedural requirements for effecting such an acquisition will differ, depending on:

- whether the target entity already has foreign investors and an investment certificate for an approved project;
- whether the investor is acquiring existing equity by way of transfer, or newly issued equity;
- the form of the target entity (whether a single or multiple-member limited liability company, or a shareholding company); and
- the sector in which the entity operates.

## Branches and representative offices

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

A branch may be established by a foreign business entity only in certain sectors, including banking, insurance, securities, law and some trading.

A representative office, on the other hand, may be established by any foreign business entity to seek and expedite opportunities for the commercial activities of that foreign business entity: 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.

## Business Cooperation Contract

A Business Cooperation Contract (**BCC**) is a written agreement between a foreign investor and a Vietnamese partner in which the parties agree to cooperate to undertake certain business activities in Vietnam and to share the revenue or profits arising from such activities. No separate legal entity or company is established and there is no limitation on liability for participants.



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A foreign investor can choose from several ways to invest directly in Vietnam. One of several factors to consider is whether the investor wishes to invest alone, with other foreigners or partner with one or more Vietnamese investors.

## Indirect foreign investment

The primary form of indirect foreign investment into Vietnam is via the country's stock exchanges. Indirect investment in this form requires comparatively less regulatory approval than direct investment, concentrating on administrative requirements such as the establishment and registration of trading codes, opening bank accounts, and periodic disclosures.

Regulation of the Vietnamese securities market, and foreign investment in the market, is considered in more detail in Section 6 of this Guide.

## Limitations on foreign investment

### Prohibited and conditional sectors

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

In addition, there are a number of sectors in which foreign investment is 'conditional'. These include:

- broadcasting and television and production, publishing and distribution of cultural products;
- transport and ports/airports;
- real estate business;
- import, export and distribution;
- mining;
- aquaculture;

- education and training;
- post and telecommunications;
- tobacco; and
- hospitals and clinics.

Approval of investment in these conditional sectors requires detailed analysis of the application for investment approval, beyond that required for investment in non-conditional sectors. This may include consultation with relevant line ministries, and preparation and presentation of evidence relating to the investors' expertise and experience in the relevant industry. In certain sectors, the Prime Minister's approval is required. Other applicable conditions may include minimum levels of investment capital, requirements for professional qualifications or insurances, or limitations on the specific products or customers of the enterprise.

### Foreign ownership caps

There are also certain sectors in which foreign investment is limited in terms of percentage of ownership. For instance:

- aggregate foreign investment in Vietnamese established joint stock banks is limited to 30 per cent (with more detailed single investor limits – see Section 7.3 below);
- unless a lower percentage applies, there is a blanket 49 per cent cap on foreign ownership in all public companies, including those listed on the Ho Chi Minh City Stock Exchange and the Ha Noi Stock Exchange; and
- 'equitisation plans' for state-owned or invested enterprises undergoing the process of equitisation may specify foreign ownership limits.



# Enterprises in Vietnam



# Enterprises in Vietnam

## Types of corporate enterprises

Since 2006, for both domestic and foreign-invested enterprises, there are three main private company forms:

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

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

SLLC	MLLC	SC
Investors and their investment intentions		
<ul style="list-style-type: none"> <li>• The sole investor may be an organisation or an individual</li> <li>• Cannot be listed</li> </ul>	<ul style="list-style-type: none"> <li>• Two or more investors (or members) who may be organisations or individuals.</li> <li>• The number of investors must not exceed 50</li> <li>• Cannot be listed</li> </ul>	<ul style="list-style-type: none"> <li>• Three or more investors (no upper limit) who may be organisations or individuals</li> <li>• May be a 'public company' (more than 100 shareholders or has made a 'public offer' via mass media) and therefore subject to higher disclosure and other requirements</li> <li>• Can be listed</li> </ul>
Capital or form of equity investment		
<ul style="list-style-type: none"> <li>• 'Charter capital', which is the capital that the investor contributes or undertakes to contribute in a certain period of time</li> <li>• Cannot issue shares</li> <li>• Cannot reduce charter capital</li> </ul>	<ul style="list-style-type: none"> <li>• 'Charter capital', which is the capital that the members contribute or undertake to contribute in a certain period of time</li> <li>• Failure to contribute in full and on time gives rise to a debt owed by the relevant investor to the MLLC</li> <li>• Cannot issue shares</li> </ul>	<ul style="list-style-type: none"> <li>• 'Charter capital' is divided into equal portions called shares</li> <li>• 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</li> <li>• May issue all types of securities to raise funds and may issue bonds, including convertible bonds</li> </ul>
Transfer or assignment of capital		
<ul style="list-style-type: none"> <li>• Where an investor transfers only part of the charter capital, the SLLC must register for conversion into an MLLC</li> </ul>	<ul style="list-style-type: none"> <li>• Investors wishing to transfer all or part of their capital contribution must first offer to sell such share of capital contribution to all other investors proportionally</li> </ul>	<ul style="list-style-type: none"> <li>• Shares may be freely transferred (except for certain limitations on founding shareholders for the first three years)</li> <li>• Voting preference shares may not be transferred</li> </ul>

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Each private corporate form offers investors ‘limited liability’, to the extent of the capital agreed to be contributed by the investor.

The preferred form for investment 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.

## Distribution of profit

The law provides specific rules on the distribution of profits and an enterprise’s charter must include ‘rules for distribution of after-tax profits’. A company may distribute profits (including the payment of dividends by an SC) only if:

- it has fulfilled its legal financial obligations (including payment of tax); and
- it can pay its debts after the payment.

For an MLLC, distribution of profits must be in proportion to the investors’ portion of charter capital.

There are also foreign exchange regulations to consider when seeking to move profit distributions offshore. In particular, where investment in an existing Vietnamese established entity is required to be made through a capital contribution account, all distributions must be brought offshore through this same account.

## Corporate governance

Vietnam’s Law on Enterprises and implementing legal instruments establishes the corporate governance framework, including management structures, internal decision-making processes, the duties and liabilities of corporate managers, and information disclosure requirements.

## Enterprise management

An enterprise in Vietnam has multiple levels of authority in the governance structure, each with well-defined responsibilities and powers. As Figure 4 below shows, the organisational and management structure varies according to the type of enterprise.

## The legal representative

The legal representative of a Vietnamese company, stipulated in the charter, is the only person authorised to represent and bind the enterprise.

- For an SLLC: the legal representative is either the chairman of the members council, chairman of the SLLC or the general director.
- For an MLLC: the legal representative is either the chairman of the members council or the general director.
- For an SC: the legal representative is either the chairman of the board of management or the general director.

Figure 4: Management structures in the main private company forms

SLLC	MLLC	SC
<p>Members council</p> <ul style="list-style-type: none"> <li>Where the investor appoints more than one authorised representative, they form the members council (the <b>MC</b>). The investor appoints one authorised representative as chairman of the MC</li> <li>The MC is the highest authority in the SLLC</li> </ul> <p>Chairman of the SLLC</p> <ul style="list-style-type: none"> <li>Where the investor appoints only one authorised representative, that person will be the chairman of the SLLC</li> </ul> <p>Authorised representative</p> <ul style="list-style-type: none"> <li>A corporate investor must appoint one or more individuals as its authorised representatives</li> </ul> <p>General director</p> <ul style="list-style-type: none"> <li>The MC or the chairman of the SLLC appoints a general director (the <b>GD</b>) to manage the day-to-day business operations. This position is similar to that of a CEO. The GD must not be a related person of a member of the MC or the chairman of the SLLC, nor of a person authorised to directly appoint the authorised representative or the chairman of the SLLC</li> </ul> <p>Inspectors</p> <ul style="list-style-type: none"> <li>The investor must appoint one to three inspectors who oversee the actions of the MC or chairman of the company and the GD and report to the investor</li> <li>Where the investor is an individual, the SLLC has a chairman and a GD. The investor can be the chairman and GD</li> </ul>	<p>Members council</p> <ul style="list-style-type: none"> <li>The MC comprises all the investors (or their authorised representative in the case of investors who are enterprises)</li> <li>The MC is the highest authority in an MLLC. Specified matters must be decided by the MC</li> <li>Voting thresholds are set at 65% for basic matters and 75% for certain specified matters. Some enterprises are permitted to lower these thresholds to a simple majority, but this depends on several factors, including the home country of any foreign investors</li> </ul> <p>Chairman of the MC</p> <ul style="list-style-type: none"> <li>The chairman of the MC is appointed by the MC</li> </ul> <p>General director</p> <ul style="list-style-type: none"> <li>The GD manages the day-to-day business of the MLLC and is responsible to the MC</li> <li>The GD is appointed by the MC</li> </ul> <p>Inspection committee</p> <ul style="list-style-type: none"> <li>An MLLC with more than 11 members must have an inspection committee</li> <li>The inspection committee has the responsibilities, powers and conditions stipulated in the charter</li> </ul>	<p>General meeting of shareholders</p> <ul style="list-style-type: none"> <li>The general meeting of shareholders (the <b>GMS</b>) comprises all shareholders who have the right to vote</li> <li>The GMS is the highest authority. The law specifies certain matters requiring GMS approval. Voting thresholds are set at 65% for basic matters and 75% for certain specified matters. Some enterprises are permitted to lower these thresholds to a simple majority, but this depends on several factors, including the home country of any foreign investors</li> </ul> <p>Board of management</p> <ul style="list-style-type: none"> <li>The board of management (the <b>BOM</b>), akin to a board of directors, has three to 11 people appointed (via cumulative voting) by the GMS</li> <li>Investors holding specified percentages have the right to nominate candidates for the BOM</li> <li>Decisions are passed by simple majority</li> <li>The BOM supervises the GD</li> </ul> <p>Chairman of the BOM</p> <ul style="list-style-type: none"> <li>Appointed by either the GMS or the BOM, the chairman has a casting vote and may be the GD</li> </ul> <p>General director</p> <ul style="list-style-type: none"> <li>The GD, akin to a CEO, is appointed by the BOM and is responsible for the day-to-day management of the SC</li> <li>The GD cannot concurrently be the GD of other Vietnamese companies</li> </ul> <p>Inspection committee</p> <ul style="list-style-type: none"> <li>If an SC has more than 11 investors, or more than 50% of the shares are held by investors who are enterprises, it must have an inspection committee</li> <li>The inspection committee supervises the BOM and the GD</li> </ul>

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## Duties and liabilities of enterprise managers

The Law on Enterprises sets out four general duties for enterprise managers:

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

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

## Disclosure

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

For example, shareholding companies are required to send all investors a summary of the annual financial reports, with full reports prepared and available for inspection. Additional, more onerous, disclosure obligations apply to companies listed on the stock exchanges.

An investor who acquires more than 5 per cent of the shares in a shareholding company must register its ownership with the competent authorities. Again, there are additional requirements if the company is a public or listed company.





# Land



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# Land

## Land ownership

Under Vietnam's Constitution, all land is collectively the property of the entire people. As such, no-one, Vietnamese or foreign, is permitted to 'own' land, in the sense of holding indefeasible title. Instead, the right to use land is obtained in one of several ways:

- by allocation from the state, for a definite or indefinite period;
- by lease from the state;
- by sub-lease from the developer of an industrial zone or urban zone;
- by transfer from an existing land user; or
- by way of capital contribution from an existing land user.

The availability of each of these options, and the nature of the land use rights conferred under them (eg whether they are 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 foreign (either an individual 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 or 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 land ownership available in Vietnam. Generally, a land user who has been allocated land and paid land use fees may assign (sell), lease, donate or mortgage those rights, and they may also contribute those rights as capital into a joint venture. Foreign-invested entities and foreign individuals cannot be allocated land.

- Land may be allocated to Vietnamese individuals or domestic enterprises for agricultural or residential/infrastructure purposes, including for the construction of residential housing for sale or lease. The purpose for which the land can be used is set out in the LURC.
- Land may be allocated for an indefinite period (referred to as 'stable and long term use') or a definite period. Land allocated to Vietnamese individuals and entities for residential purposes will be for an indefinite period. However, land allocated to a domestic enterprise

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Developers may be allocated land or lease it from the state. In either case, if residential housing is built and transferred to an eligible buyer, the buyer receives land use rights for a ‘stable and long term use’.

to implement an investment project (other than a residential development) or to construct business facilities such as a factory, will be for a definite period, with, generally, a maximum 50-year term. Extensions of the term may be permitted but are not guaranteed.

- For most allocations of land, a land use fee must be paid by the user. These are paid in full at the beginning of the term. Land use fees are determined by reference to the Official Land Price (published by the Provincial People’s Committee) or the market price (to be established by a valuation company and approved by the Provincial People’s Committee, if the Provincial People’s Committee considers that the Official Land Price is significantly different from the market price).
- If the land site requires clearance (eg if people are living on or using the site) compensation and site clearance must be completed before a formal allocation will be granted to a new land user (eg a developer).

### Land leased from the state

- Land can be leased from the state by both domestic and foreign-invested entities and by Vietnamese individuals.
- Land can be leased for production and business purposes. This includes infrastructure construction, manufacturing facilities, hotels and resorts, mining and residential housing for sale or lease.
- Maximum lease terms are prescribed for different types of leases. Leases to domestic and foreign-invested Vietnamese entities may be made for a maximum 50-year period (although in certain cases a 70-year term is permitted) but 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.

- For residential development for sale or lease, foreign-invested enterprises may be granted a lease term of 70 years with the option to extend without payment of additional land rental; while domestic developers may be allocated land for an indefinite period. In both cases, developers will pay the same amount of money to the state and purchasers of the developed residential housing will be allocated land for an indefinite period without obligation to pay additional land rental or land use fees.
- All lessees of land from the state must pay land rental. Foreign invested enterprises may pay rental either annually or in a lump sum on commencement of the lease. Vietnamese individuals and entities may only pay rental annually or otherwise convert to land allocation with payment of land use fees (they cannot pay rental in a lump sum). Land users paying annual rental 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 up-front (where the costs are akin to ‘buying’ the land) may transfer (assign), sub-lease, mortgage or contribute their land use rights in much the same way as a party to whom land has been allocated.

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## Land sub-leased from developers

Vietnamese land laws also establish and recognise specific zones, including industrial, export-processing, high-tech, economic and new urban zones. These zones are either leased to foreign-invested entities, or allocated to domestic entities, who construct and operate the zones. Once infrastructure for the land is completed, the developer can sub-lease the land to lessees, including to foreign-invested enterprises.

- These zones (if located in the same province) are supervised by a management committee established under the Provincial People's Committee.
- A number of incentives may be available to developers of the zones, as well as lessees in zones, depending on the nature of the zone and the lessee's project.
- Land may be leased in a zone for production and business purposes on a long term basis.
- Lessees must pay land rental and infrastructure fees to the developer according to their land lease contract, and they are entitled to be issued with a LURC.

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 land user who pays the full land rental up-front may transfer (assign), mortgage or contribute their land use rights in much the same way as a party to whom the state has allocated or leased land with up-front payments of land use fees or land rental.

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

- 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. However, a pilot program has recently commenced that permits certain eligible individual foreigners and foreign invested companies to purchase an apartment with associated land use rights for a 50-year term within a residential complex.
- 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 that are subject to a maximum duration will be transferred for the duration of that term. An exception to this is where a foreign-invested enterprise leases land for the purposes of constructing residential housing. Eligible purchasers (transferees) are entitled to land use rights for a 'stable and long term use' (ie an indefinite period).
- A person or entity to whom rights are transferred can generally transfer, lease, donate, mortgage or contribute those land use rights.

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A common structure in land development investments is for the Vietnamese party to contribute their land use rights as capital into the investment joint venture. To do this, the Vietnamese partner must have been allocated the land use rights and have paid all land use fees.

## 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 capital to the joint venture by contributing their rights in relation to a piece of land.

- Generally, in order to contribute land use rights, the Vietnamese party must have been allocated the land use rights and have paid all owing land use fees in full.
- Once contributed, the joint venture enterprise has the same rights as land users who are allocated land by the state with full payment of land use fees. They may assign, lease, donate, mortgage or even contribute the 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 larger area including the site, and will be specified in the LURC and may be quite prescriptive, eg that it is to be used

to build a shoe factory. 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 management, is a 'conditional' investment sector. While foreign-invested companies can construct houses or buildings for sale or lease, or invest in upgrading land and infrastructure on leased land to sub-lease that land, they may not purchase houses or buildings for sale or lease, nor lease houses or buildings in order to sub-lease them.

The sale of houses and buildings must generally be conducted through a 'real estate trading floor'. Particular rules (and limitations) apply to the 'pre-sale' of houses or apartments during the construction and development phase.



# Contracts



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# Contracts

## Source of contract law

Vietnamese contract law is principally contained in:

- the 2005 Civil Code, which applies to all types of contracts; and
- the 2005 Commercial Law, which applies to contracts by, and between, businesses.

Generally, provisions of the Commercial Law covering specific types of contracts, as well as those in other specific laws (such as the Law on Construction for construction contracts) will override the general principles established by the Civil Code.

As a general rule, parties to Vietnamese contracts are free to agree on the specific contents of their contracts.

## Freedom to contract

The Civil Code provides that parties to Vietnamese contracts are generally free to agree on the specific contents of their contracts. Within that context, it provides a basic framework for contract law in Vietnam, including provisions on:

- key contractual elements, including offer, form, contents, timing and types of contract;
- principles for interpreting unclear contracts;
- matters that invalidate a contract; and
- specific rules for common types of civil contracts, including for the sale and purchase of property, services and insurance.

Civil contracts involving Vietnamese and foreign parties are often governed according to the laws of the country in which they are performed, unless agreed otherwise. However, a contract entered into in Vietnam and performed entirely within Vietnam must 'comply with Vietnamese laws', a stipulation generally understood to require that such contracts be governed by Vietnamese law. The choice of governing law and dispute resolution for contractual arrangements are considered in more detail in Section 13, below.



An aerial photograph of a coastline. The top half of the image shows a mix of green and brownish terrain, possibly a forested or agricultural area. A dark, narrow strip of land, likely a beach or a road, runs diagonally from the bottom left towards the middle right. Below this strip is a body of water with a vibrant turquoise or light blue hue, suggesting shallow depths or coral reefs. The overall composition is dynamic and scenic.

# Securities and the Stock Market

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# Securities and the Stock Market

## Securities market regulation

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

- public offers of securities (which, in Vietnam, are distinguished from listings);
- public companies (which include, but are not limited to, listed companies);
- the securities trading markets (both the stock exchanges and the unlisted market);
- securities registration, depositary, clearance and payment facilities;
- securities businesses, including securities companies, fund management companies, securities investment companies and custodian banks;
- public funds and members funds; and
- disclosure of information.

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.

## 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 players and investigates breaches of, and enforces, the securities laws.

### Ho Chi Minh City Stock Exchange and the Ha Noi Stock Exchange

The Ho Chi Minh City Stock Exchange (**HOSE**) and the Ha Noi Stock Exchange (**HNX**) are Vietnam's two stock exchanges. Beyond listing and trading securities, the HNX also offers an official mechanism through which new government bonds are issued and is the secondary market for existing corporate bonds.

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## The Unlisted Public Companies Market

To qualify for admission on either exchange, a company normally must first conduct an approved public offer of shares. However, the exchange may allow the listing of shares of a public company without the public company having to make a public offer. Both exchanges also apply various listing criteria, including minimum capital requirements, required periods of profitable activities before listing, minimum number of shareholders ('spread') and commitments by management to retain their interests in the company for a minimum specified period.

Both exchanges also apply trading rules and restrictions, including trading price bands to minimise price fluctuations.

The types of securities that are traded on the two exchanges are limited to ordinary shares, fund certificates and bonds. The Law on Securities contemplates other types of securities such as options, forward contracts, warrants and securities indices that can be publicly offered but it will take some time before the securities market reaches an appropriate level of maturity to accommodate the offer of these more sophisticated instruments.

The securities law also contemplates the ability of offshore issuers to publicly offer their securities to Vietnamese investors as well as listing the securities on the HOSE or HNX. This concept is relatively new and is likely to require further regulation by the MOF.

The Unlisted Public Companies Market (**UPCoM**) is a market recently established by the MOF, SSC and HNX to regulate 'over the counter' shares and convertible bonds of unlisted public companies. Admission of a public company's shares or convertible bonds for trading on UPCoM is, by default, mandatory for all public companies because, by law, they must all register with the Vietnam Securities Depository (**VSD**) (see below) and the VSD will not accept share transfers that have not been transacted via UPCoM or a regulated market. 'Listing' on UPCoM provides the advantages of a central, transparent trading platform, but also means that certain trading rules and restrictions apply, including a requirement that all trades be put through UPCoM (except for public offers or takeovers) and a trading price band.

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## Vietnam Securities Depository

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

- to register and deposit securities that are publicly issued and listed and traded on the stock exchanges and UPCoM;
- clear and settle transactions of securities traded on the stock exchanges and UPCoM; and
- 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 freed up by the 'equitisation' of state-owned enterprises. The 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 that meets one or more of the following criteria:

- has issued shares via a public offer;
- has its shares listed on one of the Stock Exchanges; or
- has its shares owned by more than 100 investors (excluding institutional investors) with paid-up charter capital of more than 10 billion Vietnamese dong.

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Foreign investors wishing to invest in Vietnam's stock markets will need a trading code and either a securities company, an authorised transaction representative or a local fund manager through whom they will trade.

Public companies are subject to filing and disclosure requirements, and there are also disclosure requirements for major shareholders (being those holding at least 5 per cent).

In addition, SSC registration and approval rules apply to private placements (being offers that are not public offers) by public companies and an SSC-approved 'public offer to acquire' securities (effectively a takeover offer) is mandatory where an offer to purchase voting shares in a public company would lead to the offeror owning 25 per cent or more of the shares in that company.

### Public offer and listing

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

A public offer, 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;
- is made by way of a prospectus, which is registered with the SSC as part of the approval process; and
- must denominate the securities offered in Vietnamese dong.

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 the equitisation process) and making it available to the public via trading on a stock exchange. A public offer may also be made by an existing major shareholder offering its equity stake to investors, in order to take the company public and provide a means for the shareholder to exit.

### Disclosure

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

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 particular circumstances and events that must be disclosed, as well as an overriding requirement to make timely disclosure of any information that impacts on the price of their securities.

### Insider trading

Vietnamese law prohibits the use of inside information (information not publicly disclosed that 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). Potential penalties can range from relatively small fines in comparison with developed jurisdictions, to imprisonment of up to seven years for a serious insider trading offence.

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## Foreign participation

As discussed in Section 2, 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 must first:

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

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.

Foreign ownership caps and restrictions, discussed generally in Section 2.4 above, include a blanket 49 per cent cap on foreign investment in listed shares and public companies. Orders from foreign investors will not be put through the trading system if there is no room for foreign investors in relation to the particular listed company. Additionally, lower caps, such as those applying to banks, will apply even where an entity is listed.

## 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 consulting;

- *Funds management companies*: which manage funds and investment portfolios; and
- *Securities investment companies*: shareholding companies that invest in securities, including holding shares in Vietnamese companies. These are akin to an incorporated fund investing in securities. Currently, no securities investment companies have been licensed.

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

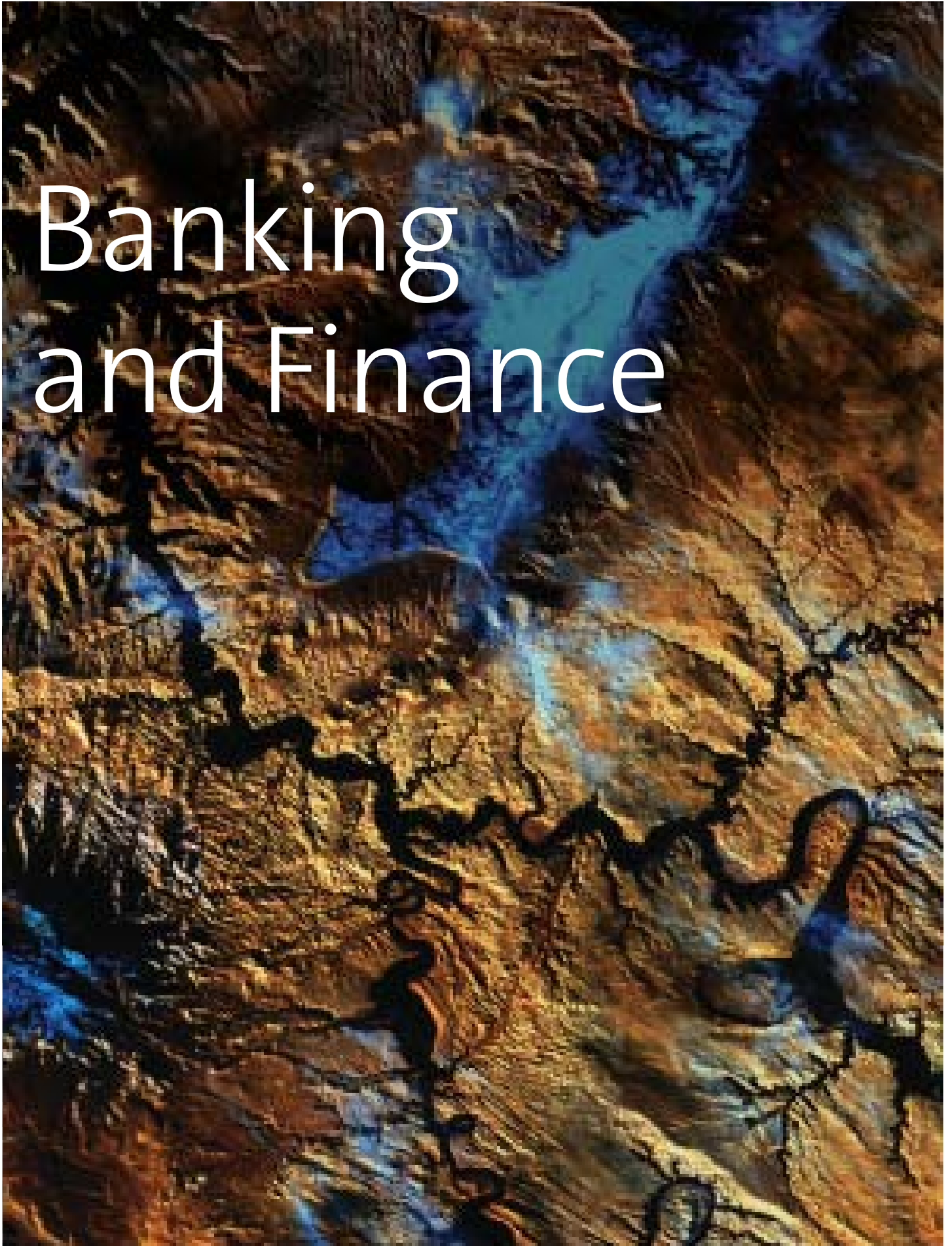
## Funds

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, is 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.

# Banking and Finance



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# Banking and Finance

## State management of banking

Vietnam's banking and finance sector remains tightly controlled. As in many other jurisdictions, Vietnamese credit institutions (including commercial banks) and the banking operations of other organisations are overseen and regulated by a state body, the State Bank of Vietnam, or 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; and
- is the authority with whom certain loan transactions must be registered.

## Financing

### Loans

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

The investment certificate of a foreign-invested enterprise will stipulate both the charter capital (the equity contributed by

the investors) and the 'investment capital' of the enterprise. 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. While there is no official thin-capitalisation rule, authorities often apply a 70:30 debt to equity ratio, although this may differ depending on the sector in which the entity operates.

All private sector foreign loans are subject to supervision and monitoring by the SBV. In particular, medium or long-term foreign loans (those with a term of more than 12 months) must be registered with the SBV before drawdown. This registration process is akin to an approval process; the loan will not be registered if it does not meet the stipulated conditions. Moreover, money will not be able to enter Vietnam for draw-down, or be repaid to the foreign lender, without the requisite registration approval.

### Security for loans

The 2005 Civil Code provides for several forms of secured transaction, the most commonly used being pledges, mortgages and guarantees.



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

Assets that may be used as security include:

- money and valuable papers;
- fixed and floating assets;
- land use rights (although only by certain land users and only to domestic Vietnamese credit institutions) and assets attached to land, such as buildings;
- rights to exploit natural resources; and
- assets to be formed in the future.

Generally, security transactions are effective from the time they are lawfully entered into, except for secured transactions that are required to be registered, which are only effective from the time of registration.

It is mandatory to register certain security transactions, including:

- mortgage of land use rights;
- mortgage of planted production forests; and
- mortgage of aircraft and ships.

Most securities that require registration are registered with the National Registration Agency for Secured Transactions (**NRAST**), although specific registration bodies apply to certain transactions. For example, mortgages over land use rights must be registered with the relevant land administration office in the province where the land is located.

Even where registration is not compulsory, it is sometimes permitted. If a secured transaction is registered, the transaction becomes legally binding against a third party from the time of registration. Given this priority, prudent lenders will seek to register securities with NRAST wherever possible.

## Foreign investment

Although the law now permits wholly foreign-owned banks to operate in Vietnam, foreign ownership in Vietnamese commercial banks remains limited. First, the total level of foreign shareholding of all foreign investors (and their affiliates) must not exceed 30 per cent. Within this limit, several other limits apply, including:

- the maximum shareholding by a foreign investor, which is neither a foreign credit institution nor a foreign strategic investor, is 5 per cent;
- the maximum shareholding of any one foreign credit institution is 10 per cent; and
- the maximum shareholding of any one foreign 'strategic investor' is 15 per cent, although, in special cases, the Prime Minister, based on the proposal of the Governor of the SBV, may make decisions permitting a higher level of shareholding, up to 20 per cent.

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Broadly, a 'foreign strategic investor' is a reputable foreign credit institution with sufficient financial capability and experience to enable it to assist the Vietnamese bank in its development and to provide it with 'strategic advantages'. Additional criteria relate to minimum total assets, international operating experience in the banking sector, international credit ratings and the provision of undertakings to assist the Vietnamese bank.

In addition to the maximum shareholding limits, a foreign credit institution is only permitted to be a foreign strategic investor in one Vietnamese bank.

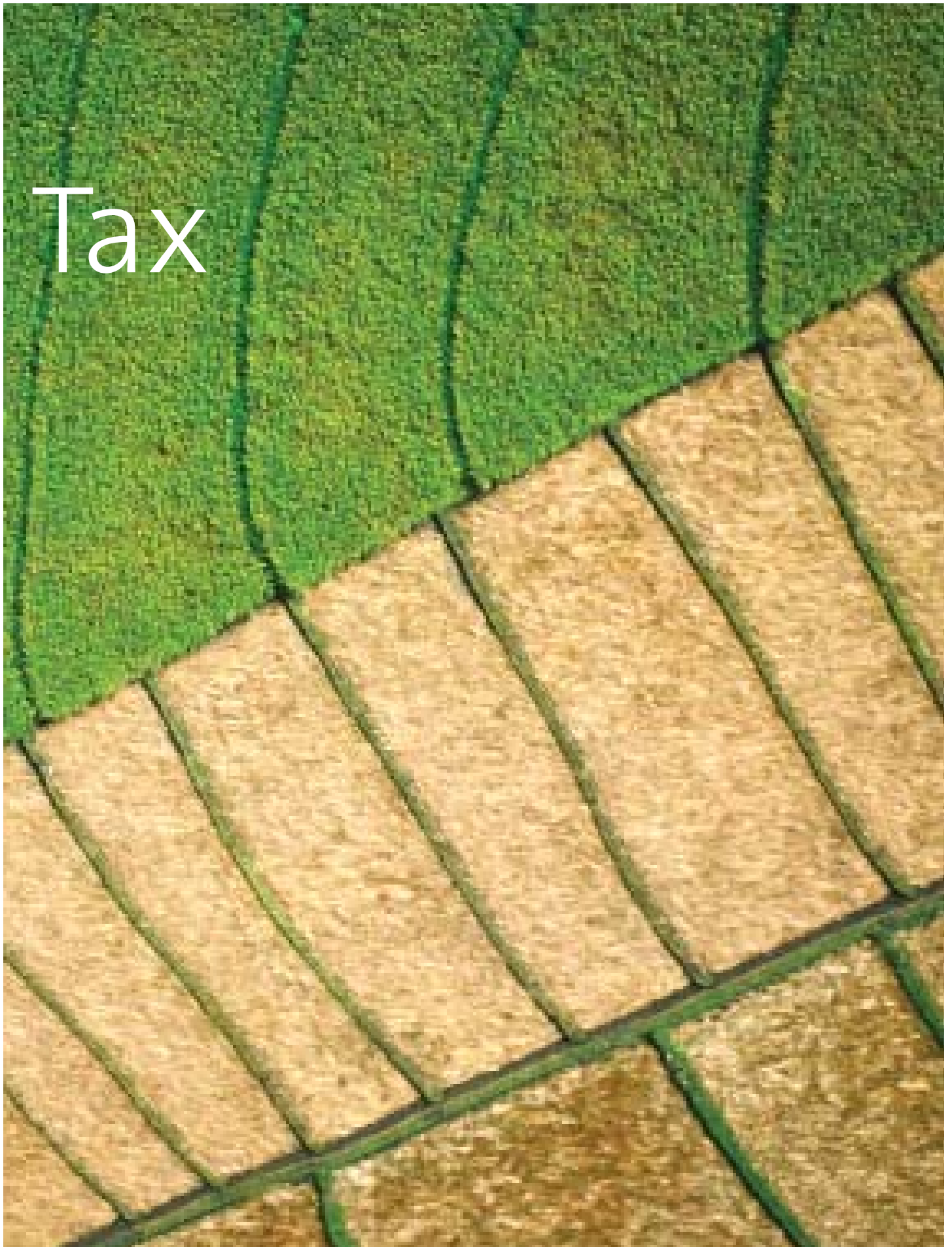
These limits apply equally to foreign investment in listed and unlisted commercial banks.

## Bankruptcy

The Law on Bankruptcy applies to enterprises and co-operatives operating under Vietnamese law. There is no bankruptcy or insolvency regime to govern individuals.

An enterprise is considered insolvent when it is unable to pay its due debts when they fall due. Once an enterprise fails to pay its due debts on demand, any unsecured or partially secured creditor or shareholder of the enterprise may file a bankruptcy petition with the court. The resultant bankruptcy procedures can include the recovery of business operations or the liquidation of the enterprise and, finally, a declaration that an enterprise is bankrupt. On the liquidation of an enterprise, secured creditors broadly receive priority in payment for the assets over which they have security. While, historically, there have been very few formal bankruptcy cases in Vietnam, press articles indicate that the number of bankruptcies has increased considerably in recent years.

# Tax



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# Tax

## Common taxes

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

- Corporate income tax: levied on the income of entities conducting production activities or businesses in goods and services. Taxable income also includes income from capital transfers and from real property transfers and loan and rental income;
- Personal income tax: levied on salaries and wages, as well as income from capital investments (including interest and dividends), securities transfers, real property transfers, winnings or prizes, royalties, franchises, inheritances and gifts; and
- Value added tax: levied on goods and services used for manufacturing, business and consumption in Vietnam.

Figure 5: Tax rates

Corporate income tax	Personal income tax	Value added tax
<ul style="list-style-type: none"><li>• Standard rate is 25%.</li><li>• Higher rates (between 32% and 50%) apply to enterprises operating in petroleum, gas and other natural resources sectors.</li><li>• Preferential rates of 10% and 20% apply to enterprises in certain sectors such as education, training and health care, and to newly established entities in certain economic zones and areas with difficult socio-economic conditions. These preferential rates may apply for a limited period, eg 10 years, after which the standard rate applies. Tax holidays and rate reductions are also available in specified cases.</li></ul>	<ul style="list-style-type: none"><li>• PIT rates on salaries are progressive, with higher rates (in 5% increments) applying to portions of an individual's monthly income. The lowest rate, 5%, applies to the first 5 million Vietnamese dong earned each month. The highest rate, 35%, applies to any earnings per month of more than 80 million Vietnamese dong.</li><li>• Particular rates apply to other income: eg 5% on capital investments, 25% for real property transfers (capital gains) and 20% for share transfers.</li></ul>	<ul style="list-style-type: none"><li>• Standard rate is 10%, which applies to all applicable goods and services for which an alternative rate is not provided.</li><li>• Rates of 5% and 0% can also apply, depending on the nature of the transaction: eg the 5% rate applies to goods and services in agriculture and goods used for education.</li></ul>

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## Other taxes

Other taxes include:

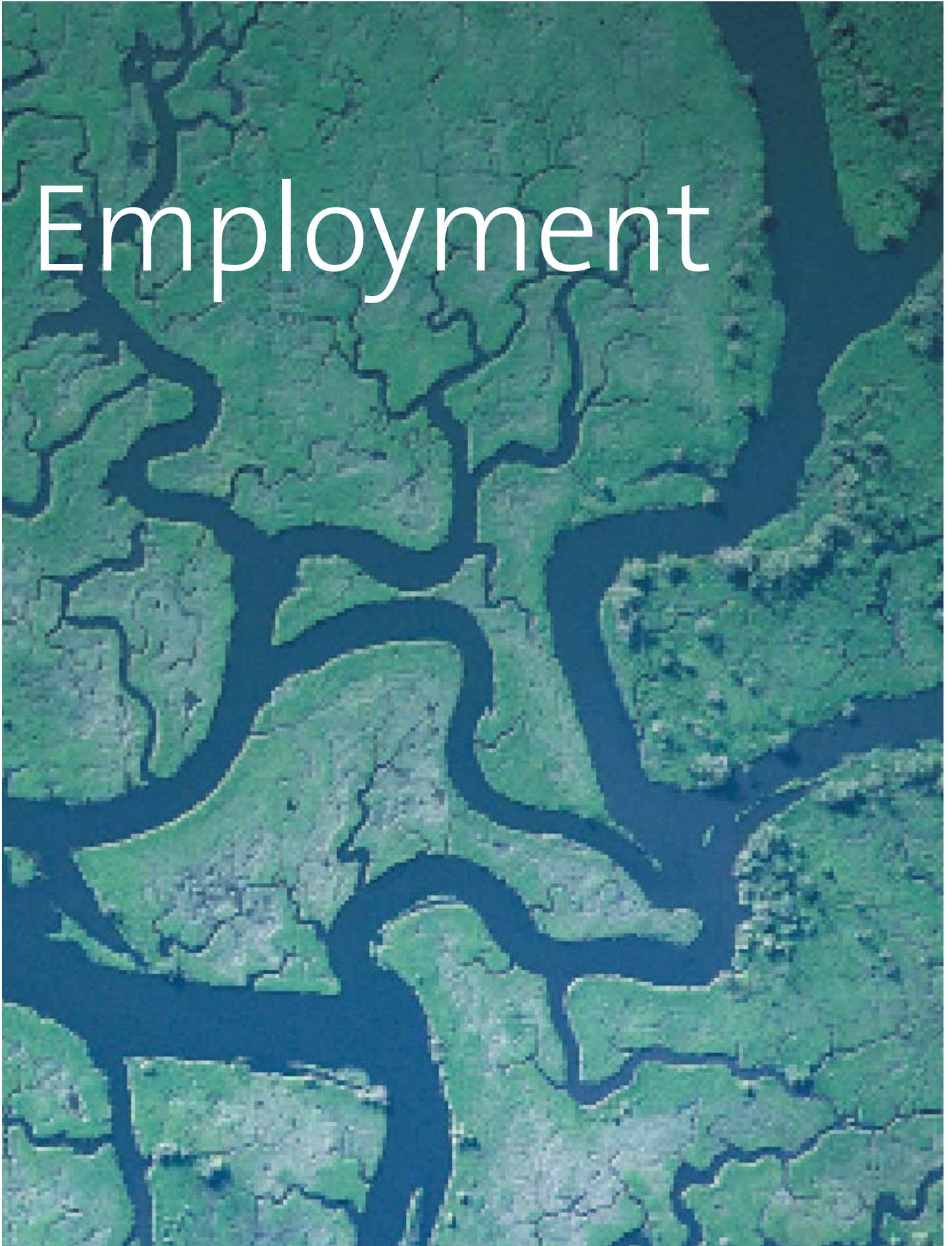
- import and export duties: duty rates for import include standard, preferential and special preferential rates, depending on the country from which the goods are imported and the particular trade agreements between that country and Vietnam. Generally, Vietnam encourages exports such that few goods are 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 not having Vietnamese legal entity status and of foreign individuals doing business or having income in Vietnam (the shorthand term for which is ‘foreign contractors’). The guidelines stipulate how other taxes, such as PIT, CIT and VAT, apply to these contracts and, in certain cases, require the Vietnamese counterparty to withhold taxes on behalf of the contractor; and
- special sales tax: a form of excise applying to specific goods and services, including such goods as cigarettes, alcoholic drinks, passenger vehicles, aircraft and playing cards, and such services as those related to karaoke parlours, casinos and golf.

There are other tax-like compulsory insurance contributions, set out in the Labour Code, which must be paid by employers and employees. These are considered in more detail in Section 9.6 of this Guide.





# Employment



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# Employment

The Labour Code, together with its implementing regulations, creates a uniform legal framework for employment. Vietnam's employment laws are prescriptive and include wide-ranging protections for employees.

The National Assembly is currently considering a new Labour Code, which is expected to be passed by the end of 2012.

The labour laws of Vietnam apply both to local Vietnamese and foreigners working in Vietnam, and it is not possible to contract out of the terms of the employment legislation.

## Employment contracts

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.

The contract must be in Vietnamese, but if one party is a foreigner, the contract may be in dual languages, although the Vietnamese version prevails to the extent of any inconsistency.

The Labour Code stipulates minimum wages, which differ depending on the location of employment.

## 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 (being, generally, for a particular assignment or seasonal work).

Definite term contracts may be renewed, but once only. After the first renewal, the contract is deemed to become indefinite if the employee continues working.

An employee may be employed on a trial or probationary basis for a limited period (of up to 60 days). If the probationary contract is not terminated at the end of that period, the employee will be deemed to be placed on an unconditional employment contract.

## Internal labour rules

Employers of more than 10 employees must have written internal labour rules (**ILRs**), which govern compliance with working hours, rest periods, rules and order, occupational health, safety and hygiene, protection of assets and confidentiality of technology and business secrets. Often, the ILRs set out the conduct that is seriously



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detrimental to the assets or wellbeing of the employer, to add clarity to the grounds for termination of employment contracts. The trade union representative or employees' representative must be consulted on the contents of the ILRs, and they must be registered at the relevant Department of Labour, War Invalids and Social Affairs (**DOLISA**) to be enforceable.

## Trade unions

Within six months after establishment of an enterprise, the local trade union is supposed to establish a trade union at the enterprise. Both employees and employers are required to contribute funds to support this trade union. Once a trade union has been established, a collective labour agreement (**CLA**) is also required. This is a written agreement between a labour collective and an employer, regarding working conditions, use of labour and labour relations between the parties. The CLA must be registered with DOLISA.

## Employing foreigners

Expatriate employees working for more than three months generally require a work permit to work in Vietnam. Broadly, work permits will be issued to foreigners who are managers or experts directly managing businesses in Vietnam and with no criminal record. A work permit will last for a maximum of 36 months, after which it may be renewed, subject to the employer satisfying certain conditions. A work permit is tied to the specific employer who applied for the employee's work permit, and the foreigner may legally work only for that employer.

Although there is no express provision on this point, in practice, where a company 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. The employer is required to have a training plan and specific apprenticeship agreements to train Vietnamese employees to replace foreign employees.

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## Compulsory insurance contributions

Both employees and employers are required to contribute to compulsory insurances.

Figure 6: Compulsory insurance contribution rates

	Social insurance	Health insurance	Unemployment insurance
Employee contribution	7%	1.5%	1%
Employer contribution	17%	3%	1%

Employees are entitled to allowances from the social insurance fund when they take sick leave or maternity leave, and employers are not obliged to pay employees their salary during such leave periods. Depending on the nature and period of unemployment, unemployed persons may also receive financial assistance from the unemployment insurance fund.

# Competition





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# Competition

## Competition law and authorities

Vietnam's competition laws establish two broad categories of prohibited conduct: anti-competitive conduct and unfair business practices.

These laws also create two competition authorities: the Vietnam Competition Administration Department (**VCAD**) and the Vietnam Competition Council (**VCC**) to administer the competition laws.

VCAD's responsibilities include:

- accepting complaint files;
- conducting investigations of competition cases concerning practices in restraint of competition and unfair business practices;
- assessing exemption requests and forwarding files either to the Minister of Trade or the Prime Minister for their decisions;
- controlling the process of economic concentration (ie assessing mergers and acquisitions); and
- imposing certain penalties.

The VCC is responsible for:

- dealing with competition cases concerning practices in restraint of competition after investigation by VCAD;
- establishing case-specific competition panels of VCC members to hold hearings into competition cases; and
- imposing penalties.

## 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).

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## Agreements in restraint of competition

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

## Abuse of dominant market position

It is also unlawful for an enterprise in a position of market dominance or monopoly to abuse its position in specified ways: eg by 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 together) 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 where the parties have a combined market share above 50 per cent is prohibited, unless an exemption is granted or the post-concentration enterprise is a 'small to medium enterprise'.

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 the parties have a combined market share of 30-50 per cent, the concentration must be notified to VCAD, unless the economic concentration results in a small-to-medium enterprise. The parties cannot complete the concentration until they have received notification from VCAD that it does not consider the concentration to be prohibited.

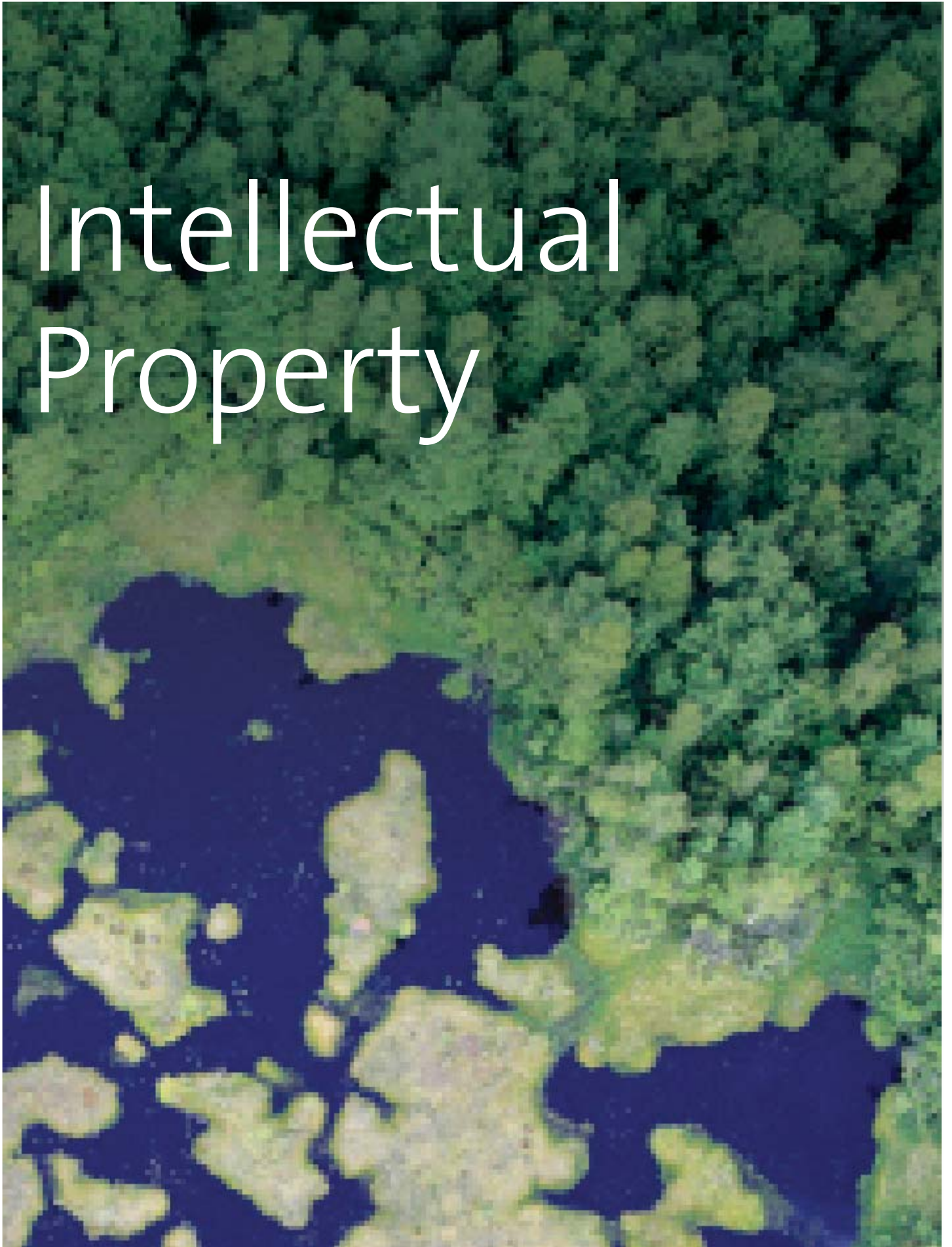
## Unfair business practices

Prohibited unfair business practices are directed toward protection of consumers and small and medium enterprises. These include prohibitions on:

- misleading instructions;
- infringing business secrets;
- coercion in business;
- disruption of competitor's business;
- defamation of a business;
- advertisements or promotions aimed at unfair competitions;
- discrimination by industry associations; and
- illegal multi-level (pyramid) selling.



# Intellectual Property



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# Intellectual Property

## Comprehensive protection and management of intellectual property

Intellectual property protections in Vietnamese law are bolstered by Vietnam's accession to various international treaties dealing with intellectual property.

Building on protections enshrined in the Constitution, Vietnam's Intellectual Property Law, passed in 2005, protects a wide range of intellectual property rights including copyright, trade marks and inventions. Intellectual property is also regulated and protected through Vietnam's accession to various international treaties, including:

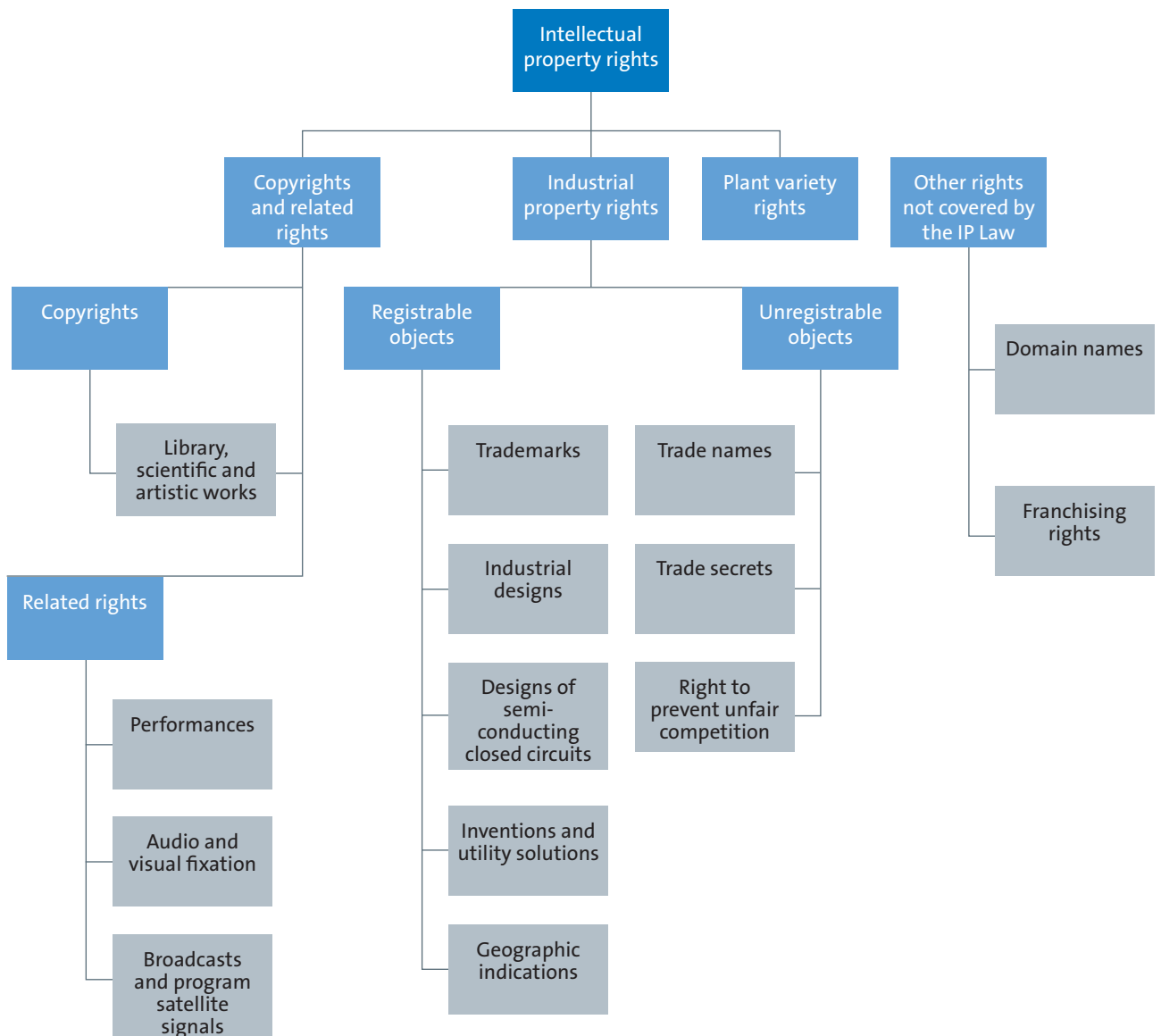
- the Paris Convention for the Protection of Industrial Property;
- the Berne Convention for the Protection of Literary and Artistic works;
- the Agreement on Trade-Related Aspects of Intellectual Property Rights (**TRIPS**); and
- the Madrid Agreement on International Registration of Marks and the Protocol for the Madrid Agreement (together, the **Madrid System**).

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

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



Figure 7: Intellectual property rights



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## 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 collections.

While moral rights 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, stage and applied art works, as well as those of anonymous authors, economic copyright lasts for 75 years. If a cinematographic work, photographic work, stage work or fine art work has not been published within 25 years from the date of its formulation, the term of protection is 100 years calculated from the date of its formulation.

Although copyright is automatic on creation, a system of registration also exists. 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, designating Vietnam. There are also specific provisions for 'well-known' marks:

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

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

## Inventions (patents)

Protection of inventions, by way of patent, is granted by the NOIP. The term of protection of an invention is 20 years from the filing date, and that of a utility solution is 10 years from the filing date.

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## Enforcement of intellectual property rights

By dealing expressly and in detail with enforcement of intellectual property rights, the Law on Intellectual Property addresses several shortcomings in its predecessor laws. The law provides intellectual property right holders whose rights are infringed with options of civil, administrative, criminal and customs remedies.

- Civil remedies include preliminary injunctions to seize, collect and preserve evidence of infringement, as well as compensation for damages caused by 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 breaches causing 'serious' consequences.
- Customs intervention at Vietnam's borders can include provisional suspension of customs procedures for imported or exported goods suspected of infringing intellectual property rights.



# Environment



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# Environment

Large projects, including most mining projects and industrial zones, require an approved environmental impact assessment report.

Vietnam enacted its first Law on Protection of the Environment in 1993. In line with international trends for greater awareness of environmental issues, a new, more comprehensive, law was introduced in 2005. 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 environmental damage caused, breaches of environmental laws can result in fines, compulsory clean-ups and relocations, suspension or prohibition of operations and monetary compensation for damage caused.

Generally, Vietnam's environmental laws require investors to:

- take environmental protection measures in the manner set out in their environmental impact assessment reports or environmental protection undertakings (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. Among other tasks, MONRE:
- evaluates strategic environmental assessment reports;
- issues certificates of satisfaction of environmental standards; and
- supervises, inspects and deals with breaches of the environmental laws.

In addition, other ministries and state bodies are entrusted with responsibility for particular aspects of environmental protection and management. In particular, the People's Committees, at all levels, organise the evaluation and approval of environmental impact assessment reports, while the Natural Resources and Environment Inspectorate supervises activities, and inspects manufacturing businesses and services establishments for compliance.

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## Environmental impact

### Environmental impact assessment reports

Certain types of projects require preparation of an environmental impact assessment report (**EIAR**). The lengthy list of applicable projects includes nationally important (large) projects, telecommunications construction projects, industrial zones, many light and heavy manufacturing facilities, most mining projects, and large-scale tourism and entertainment projects.

- EIARs assess the environmental status of the project site and potential environmental impacts, and set out specific measures and undertakings to minimise adverse impacts of the project on the environment and to take appropriate measures to protect the environment. They must also contain any opinions of local authorities and community representatives, should there be any objection on environmental grounds to the project or disagreement with the proposed environmental protection measures.
- EIARs are prepared concurrently with the feasibility studies for these projects.
- Project owners may prepare the EIARs themselves, or hire a qualified consultancy firm to do so.

- EIARs are submitted for appraisal to MONRE, relevant ministries or Provincial People's Committees, depending on the type of project, and, in particular, the level of authority required to approve the project.
- Where an EIAR is mandatory, the project may only be approved and issued with an investment certificate, construction permit or operational permit once the EIAR has been approved.

### Environmental protection undertakings

Manufacturing, business and services enterprises that are not required to prepare an EIAR must make written environmental protection undertakings (**EPUs**), which are registered with the local District People's Committee. The undertakings cover location, form and scale of the establishment, as well as the energy used and types of waste produced. They must also include an undertaking to minimise and treat waste and comply with environmental laws. A certificate showing registration of the EPUs is required before manufacturing or other business activities may commence.





# Dispute Resolution



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# 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 counter-parties over:

- the choice of either Vietnamese 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.

Under Vietnamese law, parties can always choose Vietnamese law and Vietnamese courts in their contracts. This is, in fact, the default position. In addition, where the relationship is a commercial one under the Law on Commercial Arbitration, parties can choose to arbitrate under that law. However, the choice of foreign law or international arbitration can be more problematic.

Making the ‘right’ choice will depend on the particular circumstances of each individual contract, and 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 a foreign law only where the contract involves a ‘foreign element’, which typically means the involvement of a foreign party or an asset located overseas. But the permission for a choice of foreign law is often heavily qualified, including by the proviso that the foreign law (or its choice or its application) must not contradict the ‘fundamental principles of Vietnamese law’. In particular:

- the Investment Law allows a choice of foreign law ‘with respect to foreign investment activities’, but only where Vietnamese law is silent and the application of the chosen foreign law does not contradict the fundamental principles of Vietnamese law;

The new Law on Commercial Arbitration will usher in a new chapter for arbitration in Vietnam; in particular, for international commercial arbitration.

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For foreign investors, a choice may sometimes be made as to whether to resolve disputes in the Vietnamese courts or by arbitration.

- the Commercial Law 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; and
- as discussed in Section 5, although the Civil Code allows parties to a contract involving a ‘foreign element’ to choose a foreign law (provided that the choice does not contradict a provision of Vietnamese law), the Code further stipulates that where the contract is signed and performed wholly in Vietnam, it must be governed by Vietnamese law.

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

## Dispute resolution forums

Three main choices of dispute resolution forum are available for investment agreements in Vietnam: Vietnamese courts, Vietnamese arbitration or international arbitration.

### Vietnamese courts

Recourse to the domestic courts (described in more detail in Section 1.3 above) 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.

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## Vietnamese arbitration

Domestic arbitral awards are enforceable in the same way as court judgments. Historically, however, the choice of Vietnamese arbitration for disputes was less popular, due to limitations in the commercial arbitration framework, including a lack of party autonomy in appointing arbitrators and the inability of arbitration tribunals to order interim relief.

From 1 January 2011, the Law on Commercial Arbitration replaced the former 2003 Ordinance. The new law addressed several of the shortcomings of the previous regulation, making a choice of domestic arbitration more attractive as the dispute resolution forum for foreign investors.

Enforcement in Vietnam of any eventual award made by a foreign arbitration body is an important factor to consider in making a choice of foreign arbitration as the forum for dispute resolution. Vietnam is a party to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards. However, the (limited) experience to date suggests that enforcement of foreign arbitral awards may be difficult and Vietnamese courts may refuse enforcement on quite technical or formal grounds. The relevance of this issue will depend on where a potential defendant's assets are located, and whether any award could be enforced outside of Vietnam.

## International arbitration

International (or foreign) arbitration is expressly permitted under the Investment Law for contracts involving foreign investors or foreign invested companies. 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.

While there is no general law permitting a choice of international arbitration for non-commercial disputes, as Vietnam will only enforce foreign arbitral awards in commercial disputes, there would, in any event, be little value under Vietnamese law in obtaining a foreign arbitral award in a non-commercial dispute.

# Trading, Distribution and Retailing

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# Trading, Distribution and Retailing

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

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

This situation, though, has changed dramatically in recent years, particularly due to developments and commitments commencing with the US-Vietnam Bilateral Trade Agreement in 2001 and, more recently, Vietnam's accession to the WTO.

## Import and export

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

Certain products, however, remain prohibited or restricted for trading by foreign-owned enterprises, while others are subject to a scheduled phasing-in.

While such trading is permitted, it remains a 'conditional' investment sector and, therefore, the processes, required documentation for and consideration of an application for an investment certificate to undertake these activities may take

time. That said, the process to apply for and obtain an investment certificate for a wholly foreign-owned company engaging in trading is now fairly well defined and several foreign companies have set up subsidiaries in Vietnam to engage in trading activities.

## Distribution

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

Retail distribution was opened to wholly foreign-owned enterprises from 1 January 2009, and certain products remain subject to a schedule for later market opening. Given this relatively recent change, 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 may only open more than one retail outlet subject to an 'economic needs' test. As such, foreign retailers may consider franchising their retailing operations to a Vietnamese party.

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## Franchising

Franchising activities in Vietnam are broadly governed by the Commercial Law. Under the WTO Commitments, from 1 January 2009, a wholly foreign-owned company in Vietnam can engage in franchising its goods or services. Again, for some products and services (eg restaurants) additional delayed schedules apply before fully opening these sectors to foreign investment.

There is no requirement to obtain any specific licence from the Ministry of Industry and Trade in order to open and operate a franchised business. The requirement is only that the business licence or investment certificate of the franchisee allows it to conduct the proposed business. This condition applies equally to foreign invested and local franchisees.

While the law does not require that the franchising agreement itself be registered, a Vietnamese or a foreign trader who wishes to franchise their trading rights must register their 'franchising activities' with the authorities.

All franchisors (whether they are off-shore companies, foreign-owned companies established in Vietnam or local Vietnamese companies) must have operated for at least one year before franchising into Vietnam or sub-franchising within Vietnam.

Similarly, a Vietnamese master franchisee wishing to sub-franchise the trading rights that it has received from a foreign franchisor must have operated the master franchise for at least one year before sub-franchising.





An aerial photograph of a coastline, showing a mix of blue water, green land, and brownish terrain. The text is overlaid on the left side of the image.

# Allens: Assisting your Investment in Vietnam

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# Allens: Assisting your Investment in Vietnam

## On the ground in Vietnam

Allens is a leading international law firm in Vietnam. Our Ha Noi office was the first licensed office of any foreign law firm in Ha Noi, opening there in 1993. We opened in Ho Chi Minh City in 1997.

Allens is a well-established part of the Vietnamese business community. We currently have three resident partners in Vietnam. Bill Magennis and Hop Dang have both practised in Hanoi for many years (in the case of Bill Magennis, for close to 20 years) and both have extensive experience in advising on large-scale projects, M&A transactions and dispute resolution. Robert Fish heads our Ho Chi Minh City office, and specialises in corporate, M&A and banking and finance.

Our team advises clients on all legal aspects of investing and doing business in Vietnam, including: real estate; construction; banking and finance; corporate; foreign investment; mergers and acquisitions; employment; dispute resolution; and tax.

We employ a number of experienced foreign and Vietnamese lawyers who assist in advising on matters of international and Vietnamese law. As a result, we offer a 'one-stop shop' in Vietnam on all legal matters.

## Independent recognition

Our focus on excellence and on our clients has led to many accolades. For example, the Vietnamese operations have been, most recently, independently recommended by:

- *Chambers Asia 2012* as a leading foreign firm in banking & finance, corporate/M&A, capital markets, dispute resolution and real estate & projects; and
- *Asia Pacific Legal 500 2012* as a leading firm in the fields of banking and finance, capital markets, corporate/M&A, dispute resolution, insurance, projects and energy, real estate and construction, telecommunications, media and technology and tax.

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## Experience where it counts

We have close working relationships with all of the main Vietnamese authorities. These relationships have been developed over the past 16 years through our work for large state-owned enterprises; our work on large, sensitive investment projects requiring liaison with officials; the 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 the premier provider of legal translation services in Vietnam. Since 1993, we have been translating and publishing Vietnam's legal instruments regulating foreign investment and business.

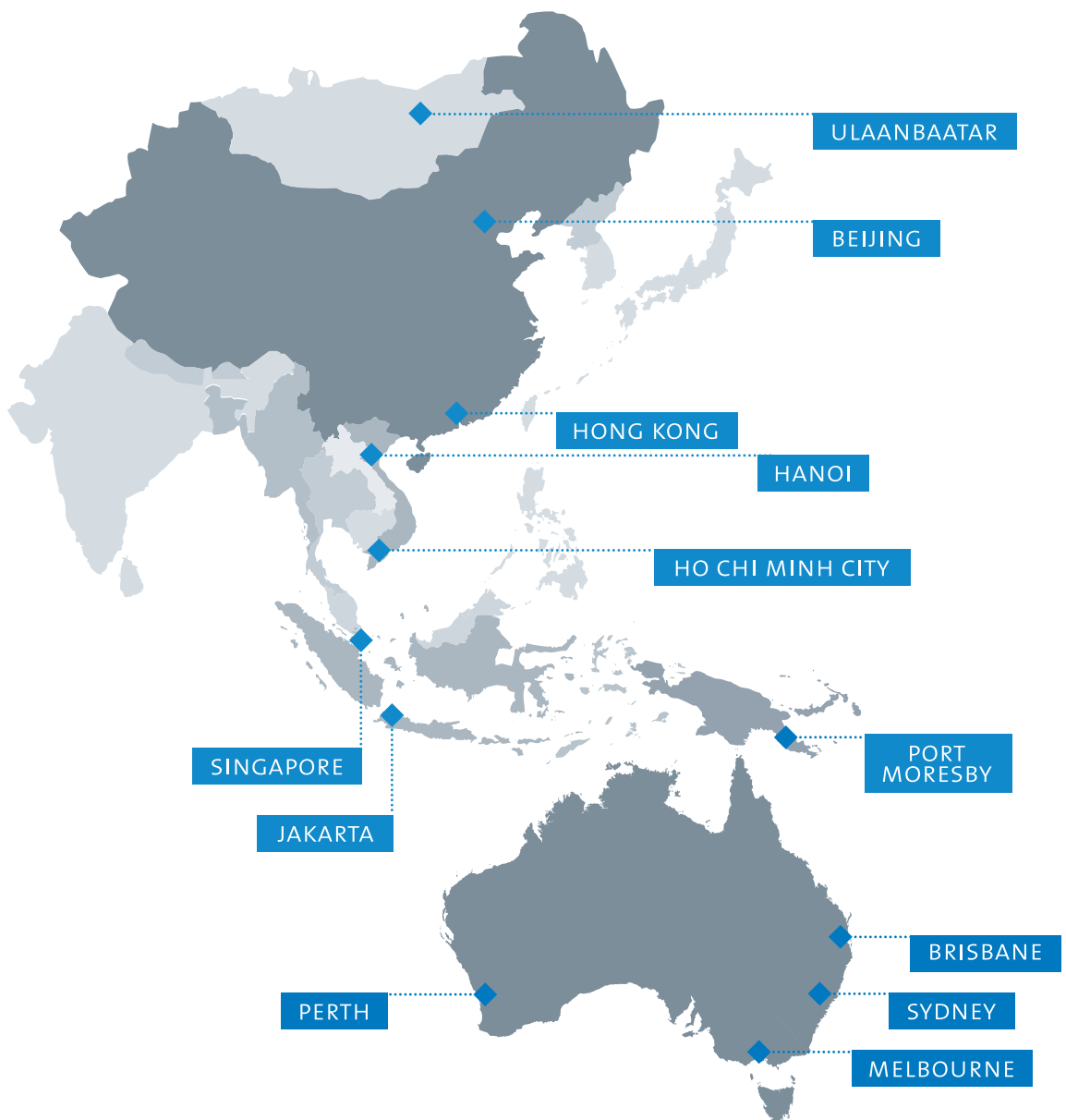
Our Vietnam Laws online database (available at [www.vietnamlaws.com](http://www.vietnamlaws.com)) is a subscription online searchable database containing our English translations of more than 3,900 Vietnamese legal instruments.

## Vietnam Legal Update

Also available at [www.vietnamlaws.com](http://www.vietnamlaws.com) are current and back issues of the *Vietnam Legal Update*. *The Vietnam Legal Update*, published monthly since 1997, reports on recent developments in Vietnam's laws regulating investment and business.

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Our Vietnam offices are part of, and supported by, Allens' regional network of offices.



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## ➤ Allens’ Vietnam experts

Allens is a leading international law firm with partners, lawyers and corporate services staff across Asia and Australia.

We work with 55 of the world’s top 100 companies, eight of Australia’s top 10 companies and 77 of Australia’s top 100 companies.

Through an integrated alliance with Linklaters, Allens’ network of market-leading lawyers spans 40 offices across 29 countries, also providing clients with access to emerging markets in Africa, Asia, India and South America.

Our teams of lawyers offer knowledge of local law, language and business culture. Our language skills include English, Vietnamese, Mandarin, Shanghainese, Cantonese, Thai, Indonesian, Malaysian, Korean and Japanese.

We are committed to helping our clients succeed in Asia. The firm’s combination of experience and expertise has been instrumental in helping our clients to successfully handle some of the region’s most high-profile deals.



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