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VIETNAM



VIETNAM BUSINESS GUIDE



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FOREWORD

Vietnam is a very exciting place to live and work and the journey it has taken since opening to business has also been extraordinary. BritCham and our previous incarnation, British Business Group Vietnam, as the first licensed international chamber of commerce in Vietnam, has been fully involved in that journey since 1998.

Vietnam has, once again, shown its determination to further develop its role within the business world, achieving positive GDP growth even during the tumultuous period of the last 18 months, and is looking forward to benefitting from its resilience, as well as embracing the opportunities the world economy presents. From being thought of as a low-cost manufacturer, the country is moving into more value-added sectors and high-tech as well as service sectors.

The Chamber helps all British companies or subsidiaries, whether they are already in-country or are thinking about entry, by supporting them to join the market, providing dedicated resources, working closely with the Department of International Trade, Embassy, and Consulate General promoting British business as well as opportunities available.

From manufacturing, high-tech, green energy, finance, healthcare, as well as education and training, Vietnam, a country of 96 million people, has the fastest-growing middle class of the region, growing at over 9% per year.

I hope you find this guide useful and interesting and I can assure you of a warm welcome and support, as well as outstanding beaches and hotels! Vietnam really does have everything!

Christopher Jeffery
Britcham Vietnam

PREFACE

During the decade it took to build ACSV Legal, Vietnam has undergone a profound and exciting evolution. This offers investors and operators a compelling spectrum of opportunities in 2021 and beyond, that simply didn't exist when we originally opened our doors with a total staff of three.

Looking back over the past decade, Vietnam has delivered on its potential at a breakneck pace. The legal framework has been substantially improved together with a rapid modernisation of the taxation system. The equity and debt capital markets have added significant depth and breadth, offering new funding channels to companies as they grow. The country's entrepreneurial spirit has also benefitted from the emergence of a vibrant venture capital and private equity sector over the same period. This has resulted in a dynamic start-up community and put many mid-sized companies on the path to a stock market listing.

Free trade agreements (FTAs) have been signed with significant trade blocs such as the US, the EU and within Asia, which have been instrumental in expanding the industrial base into electronics, consumer goods, and automobiles. This has been fueled, in part, by an almost doubling of annual foreign direct investment, to USD20 billion, since ACSV Legal began. In tandem with this, Vietnam's transportation infrastructure development has facilitated the movement of goods and services and contributed to an increasingly mobile labour force.

Rapid urbanisation, growth in per capita GDP to almost USD3,000, and a growing sophistication in bank credit have been instrumental in the pace of property development, the change in city skylines and the property ownership profile across the country.

As we look forward from 2021, there is likely to be a phase of exciting new developments for business generation. Private companies, many of which are family-owned, are on the verge of a generational transition that will create investment avenues for external strategic investors. The implementation of privately managed pension programmes will act as a catalyst for fintech innovation, long-term financial security for the population, and result in sustained inflows into capital markets. In terms of industrial infrastructure, the energy industry will be a critical focus for investment as countrywide generation is forecast to almost triple to 130GW by 2030. The rapid expansion in renewable power sources will also refocus attention to energy storage solutions and shift to more energy-efficient technologies. The ongoing relocation of production facilities into Vietnam will also require innovation in logistics, supply chain management, and process management across the entire manufacturing base of the country.

As with any economy and market in the midst of such tumultuous change, there are an equal number of legal and commercial challenges to resolve. To help our clients navigate these, we have developed expertise in many practice areas including corporate M&A, private equity, real estate, tax, structuring, banking and finance, and regulatory compliance. This spans many industries, in particular energy, healthcare and wellness, retail, distribution, logistics, supply chain, education, manufacturing, and technology.

From our position as one of the fastest-growing law firms in Vietnam, we look forward to delivering this accrued expertise to ACSV Legal's clients over what promises to be a fascinating, and rewarding, decade ahead.

Mark Oakley
Managing Partner



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LEGAL NOTICE

This guide contains only brief information and includes legislation in force as of 31 March 2021. It does not exhaustively cover the various topics in it. This guide is prepared for general information only and is not intended to be a full analysis of the points discussed. This guide is also not intended to constitute, and should not be taken as legal, tax or financial advice by ACSV Legal lawyers. The information in this guide may not be applicable or suitable for your specific circumstances or needs and you should seek separate advice (from us) for your specific situation. Any reference to any specific law or practice has been compiled or arrived at from sources believed to be reliable and ACSV Legal lawyers do not make any representation as to the accuracy, reliability or completeness of such information. Even though we endeavour to provide accurate and timely information, we cannot guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future.

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INVESTING IN VIETNAM



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1. INVESTING IN VIETNAM

1.1 Investor

The 2020 Law on Investment, which came into force on 1 January 2021, retains a distinction between foreign and Vietnamese investors. Therefore, different procedures often apply depending on whether the investor is foreign or domestic. For instance, unlike local businesses, international investors are required to register their investment or to obtain certain documents before their investment project can begin. For the purposes of this guide, we will focus on foreign investors who conduct investment activities in Vietnam, or who are considering an investment in this promising destination.

According to local law, a foreign investor is defined as follows:

- An individual with a foreign nationality;
- An organisation incorporated in a foreign jurisdiction; or
- A Vietnamese-incorporated enterprise in the following cases:
 - a. More than 50% of its charter capital is held by a foreign investor(s), or a partnership where a majority of partners are foreign individuals in the case of a partnership enterprise;
 - b. More than 50% of its charter capital is held by an enterprise(s) prescribed in paragraph (a) above;
 - c. More than 50% of its charter capital is held by a foreign investor(s) and an economic organisation(s) prescribed in paragraph (a) above.

An additional consideration when structuring an investment in Vietnam is whether the proposed activity is subject to additional requirements. In particular, special approvals and application procedures may apply to an investment if it falls into a so-called conditional sector (see paragraph 1.4 for more details on conditional sectors or business lines).

1.2 Forms of Investment

A foreign investor can invest in one of the following ways:

- Incorporation of an economic organisation (in the form of an enterprise);

- Investment in the form of capital contribution or shares purchased in an existing enterprise;
- Conclusion of a public-private partnership contract (PPP contract); or
- Conclusion of a business cooperation contract (BCC).

1.2.1 Incorporation

A foreign investor must generally apply for an investment registration certificate (IRC). This is issued by the competent Department of Planning and Investment (DPI) prior to the incorporation of a commercial entity (see paragraph 10.2 for more information about the registration of an investment).

Following the registration of the underlying investment, the new economic organisation has to be incorporated in accordance with the local laws on enterprises or other regulations. Again, the competent authority for this procedure will be the DPI.

1.2.2 Approval for Capital Contribution or Acquisition

A foreign investor may need to obtain the DPI's explicit approval (M&A approval) before capital can be contributed or shares acquired in an already existing (foreign-owned or local) enterprise. Under the 2020 Law on Investment, this is the case where the capital contribution or acquisition results in an aggregate foreign ownership of more than 50% of the charter capital of the existing enterprise. Further restrictions apply if the existing enterprise is engaged in any business which is conditional for foreign investors.

Additionally, M&A approval will be required if the existing enterprise – by way of its legal conduct of business – possesses a certificate of land-use rights (LuRs) concerning a plot of land in a frontier or coastal island, town, ward or other areas which have an impact on national defence and/or security.

The (new) 2020 Law on Investment, which entered into force as of 1 January 2021, retains clear distinction between a foreign and Vietnamese investor.

FORMS OF INVESTMENT IN VIETNAM



Incorporation



**Share Acquisition/
Capital Contribution**



BCC



PPP

1.2.3 PPP Contract

The PPP Law was passed by the National Assembly on 18 June 2020. Under this law, a PPP contract is used for construction, upgrading, renovation, expansion, modernisation or operation and trade of public facilities or services such as roads and airports or public utilities such as power plants.

For a PPP contract, foreign investors - together with their project enterprises - will have to sign a PPP contract with the relevant national state agency. This engagement is subject to the approval(s) of competent authorities. These authorities will select the investor at their own discretion, taking into consideration the negotiation result on the contract, the valid bid, the information about the investors' capacities (current at the time the PPP contract is signed), and the respective bidding documents.

The PPP Law came into effect on 1 January 2021 and, in establishing a new form of local investment engagement, forms the first of such regulations that Vietnam has implemented.

1.2.4 BCC

In the case of a BCC, a foreign investor does not need to establish an economic organisation. Instead, the investor concludes a BCC with a Vietnamese or foreign investor and establishes a steering board to implement the investment project as agreed in the BCC. The contractual structure that binds both parties serves as the rules of the investor's engagement in this form of investment. The parties agree to the functions, tasks, and powers of the respective steering board. Similar to the setup of a local company, parties to a BCC must apply for an IRC if they include one or more foreign investors. A foreign party to a BCC may establish an operating office in Vietnam to implement the BCC. This office must be registered with the DPI, which supervises its operation.

1.3 Banned Business Lines

There are several business lines in which business investment is prohibited and, therefore, impossible, irrespective of whether it is conducted by a foreign or domestic investor. The so called banned business lines include, for example, any commercial trading activities in certain types of chemicals or minerals, as well as objects/animals that are under the protection of environmental laws. As of 1 January 2021, under the 2020 Law on Investment, these banned business lines have been extended to also include debt-collection services.

1.4 Conditional Sectors or Business Lines

Besides banned business lines, there are also so-called conditional business lines or sectors. These are defined as being conditional to extra requirements before being eligible for investment. Under the 2020 Law on Investment, there are currently 227 conditional business lines. These include,

among others, accounting and insurance services, securities trading, and businesses related to gambling and lotteries, oil and gas, healthcare, transport, real estate, education, banking and finance, and agriculture.

Enterprises partaking in any of these business lines could be asked to meet conditions related to a licence, certificate of satisfaction of conditions, practising certificate, certificate of professional indemnity insurance coverage, other written certification or documentation, and/or conditions satisfied without any written certification or consent. The relevant requirements are provided in greater detail in separate guiding decrees and circulars.

1.5 Restrictions

1.5.1 Introduction

Vietnam has committed to open its market to foreign investors under various FTAs – a process that started when it became a member of the World Trade Organisation (WTO) in 2007. Certain sectors were opened completely without restrictions. For other sectors, however, a foreign investor may be faced with notable restrictions related to conditions regarding:

- The ratio of foreign ownership in an enterprise;
- Forms of investment;
- Scope of investment activities;
- Vietnamese parties participating in the implementation of investment activities; and/or
- Other conditions prescribed in local laws, ordinances, decrees and international treaties on investment.

The possibility of restrictions is one of the major points a foreign investor should be aware of and take into consideration when choosing a suitable form and structure of investment in Vietnam. Moreover, and this is a general problem, it is not always easy to locate relevant legal or administrative guidance. Applicable laws are often scattered across different, partly overlapping legislative documents throughout the legal system.

1.5.2 Restrictions in Foreign Ownership

In principle, a foreign investor is permitted to own an unlimited proportion of the charter capital of an economic organisation, except where it engages in a business line conditional to foreign investors. This may be the case regarding ownership ratios in industries such as banking, civil aviation, and certain telecommunication services and state-owned enterprises (SOEs) which are privatising (known as equitisation) or converting their ownership into another form.

1.6 In-principle Approval on Investment

Some investment projects require an in-principle approval from either the National Assembly, the Prime Minister, or the provincial People's Committee. This procedural loop can pose a significant hurdle to the implementation of investment projects and usually requires special attention from local advisors.

1.6.1 National Assembly

The following projects must obtain in-principle approval from the National Assembly:

- Projects that will have a significant or potentially serious impact on the environment, such as a nuclear power plant; or a project that requires conversion of the land-use purpose of a special-use forest, an upstream protective forest, frontier protective forest of 50 hectares (ha) or more, a protective forest as windbreaker, shelter from flying sand or breakwater or for reclamation from the sea with an area of 500 ha or more, and forests for production with an area of 1,000 ha or more;
- Projects that require conversion of the land-use purpose of wet rice cultivation of two harvests or more on an area of at least 500 ha;
- Projects that will relocate 20,000 people or more in mountainous areas or 50,000 people or more in other areas; and
- Projects that require an application of a special mechanism or policy to be decided by the National Assembly.

1.6.2 Prime Minister

The Prime Minister of Vietnam is the competent authority to approve, in principle, the following investment projects (which do not fall within the authority of the National Assembly as listed in paragraph 1.6.1 above):

- Projects, regardless of capital sources, that meet one of the following criteria:
- Relocation of 10,000 people or more in mountainous areas or 20,000 people or more in other areas;
- Construction of new airports and runways, new passenger terminals at international airports, and new cargo terminals with a capacity of at least 1 million tons per year; and commercial operation of passenger air transportation;
- Construction of new seaports or seaport complexes in a special seaport; new seaports or seaport complexes with investment capital of at least VND2.3 trillion within a Type 1 seaport;
- Construction of residential houses (for sale, lease, or hire purchase) or urban zones which require an area of at least 50 ha, or under 50 ha but cover a population of at least 15,000 people in an urban area; land areas of at least 100 ha, or under 100 ha but cover a population of at least 10,000 people in a non-urban area; or which reside within preservation areas of a recognised national monument, irrespective of its used land or population;

- Development of infrastructure of industrial parks or export-processing zones;
- Processing of petroleum and gas; or
- Casinos or other betting businesses, except for electronic games with prizes for foreigners.
- Projects of foreign investors related to telecommunications services with network infrastructure; afforestation, publication, and press;
- Projects requiring the simultaneous in-principle approval of at least two provincial People's Committees; and
- Other projects which fall within the authority of the Prime Minister under the current laws, including the laws on public investments.

1.6.3 Provincial People's Committee

The following projects must obtain in-principle approval from the provincial People's Committee (if they do not fall within the authority of the National Assembly or the Prime Minister as listed in paragraphs 1.6.1 and 1.6.2 above):

- Projects which acquire land from the state without auction, tendering or transfer, or require the conversion of land-use purpose, except for land of a household or individual for which the in-principle approval is not required under the Law of Land; construction of residential houses (for sale, lease or hire purchase) or urban zones which require an area of under 50 ha and cover a population of under 15,000 people in an urban area; land of under 100 ha and which covers a population of under 10,000 people in a non-urban area or which is domiciled within a development-restricted area or historic centre (as determined in the urban planning project) of a special urban area; and projects of a foreign investor or foreign-invested economic organisation conducted in a frontier or coastal island, town, ward or other areas which have an effect on national defence and/or security. However, the in-principle approval for projects conducted in an industrial zone, export-processing zone, high-tech zone or economic zone conforming to the master plan approved by the authorities shall be granted by the zone's management board; and
- Construction and commercial operation of golf courses.

1.7 Environmental Protection

An investor must prepare an environmental impact assessment report (EIAR) for the projects listed below. This can also be outsourced to an independent contractor.

- Projects which require the in-principle approval of the National Assembly, Government, or Prime Minister;
- Projects which utilise land of a natural preservation area, national park, historic-cultural monument, world heritage site, biosphere preservation area, or a ranked scenic beauty site; or
- Projects which could have adverse impacts on the environment.

Projects not mentioned above or business plans not required to formulate an investment project under the laws on investment can be implemented with an environmental

protection plan (EPP).

While an approved EIAR is a precondition for the in-principle approval (if required), the EPP can be approved at any time before the project or plan is implemented.

As of 1 January 2022, when the 2020 Law on Environmental Protection enters into force, the EIAR and EPP will be replaced by a preliminary assessment of environmental impact, an assessment of environmental impact and an environmental licence. These shall be granted to projects subject to their negative impact on the environment.

1.8 Transfer of Investment Project

An investor can transfer part or all of the project to another investor when the following specific conditions are satisfied:

- The transferred part of the project is not terminated as prescribed in the Law on Investment;
- Transferee(s) who are foreign investors must satisfy investment conditions applicable to foreign investors of the project, if any;
- Compliance with the laws on land, residential houses and real estate business if the project transfer concerns the transfer of land and/or assets attached to land;
- Compliance with conditions in the in-principle approval, the IRC or other relevant regulations, if any; and
- Compliance with the laws on management and use of state capital invested in production and/or trading activities at enterprises with respect to SOEs.
- Where the project has been issued with an IRC, the parties must generally submit an application attached with the project transfer contract to the DPI for its information regarding the investor implementing the project in the IRC.

1.9 Termination of Investment Projects

Under the 2020 Law on Investment, the operation of an investment project will be terminated in the following circumstances:

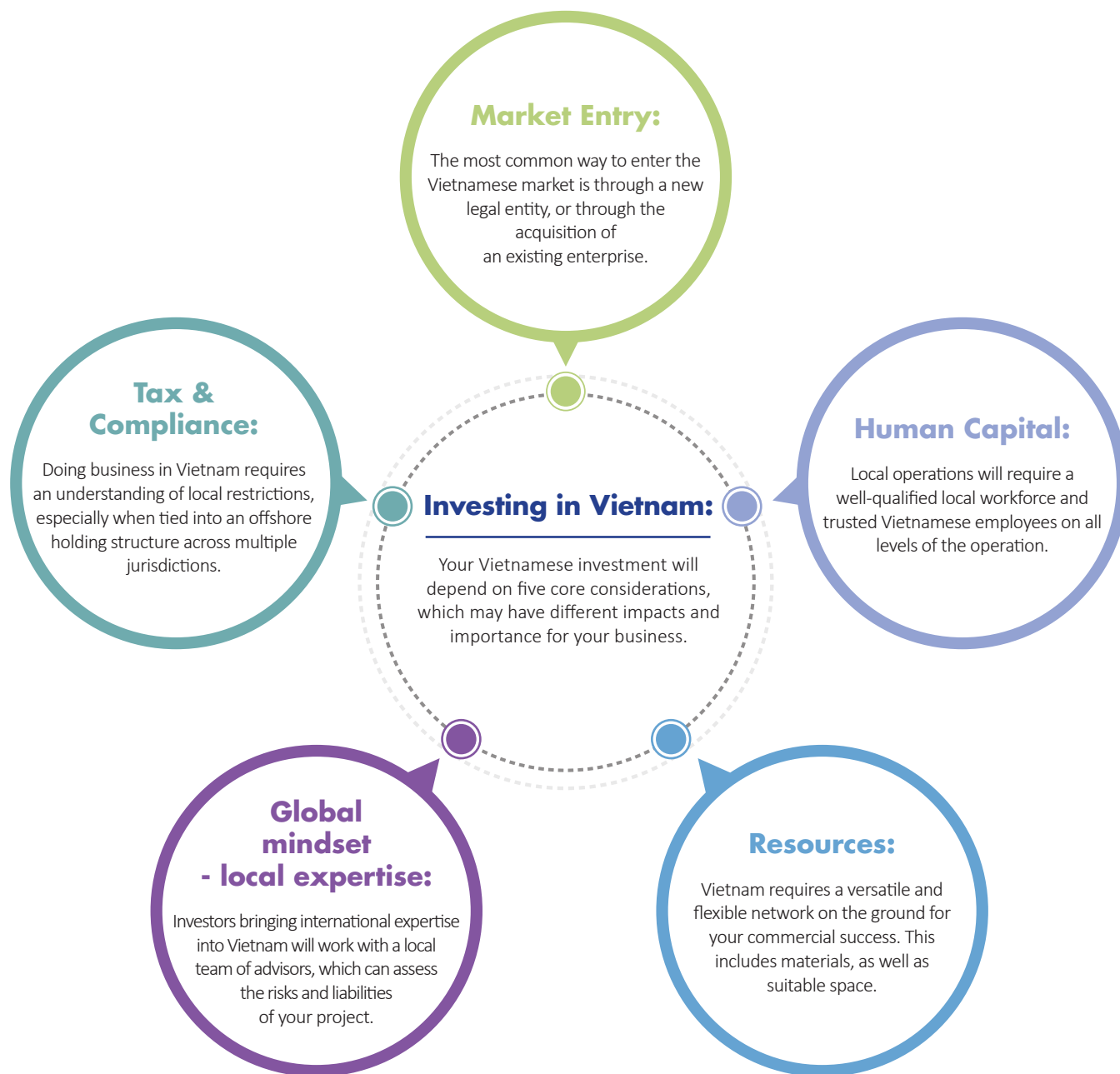
- The investor decides to terminate operations of the project;
- The project is terminated according to the terms of the contract or company charter;
- The project duration is over;
- The project causes certain issues which may subject its operation to termination as decided by the DPI but the issues cannot be resolved by the investor;
- The land of the project is withdrawn by the state due to a failure to use the land as prescribed by the laws on land, or the investor is no longer permitted to use the investment location and fails to complete procedures for a change of the investment location within six months from the day on which the permission on the use of the investment location is terminated;
- The project has been suspended and the DPI cannot contact the investor or their legal representative after 12 months from the date the suspension began;



- The investor fails to deposit or to obtain a guarantee on the deposit obligation as prescribed by law;
- The project is terminated under a decision of the court or arbitral tribunal; and
- The investor performs the investment activity based on a false transaction, i.e. a transaction falsely entered into

for the purpose of concealing another civil transaction or evading responsibilities to a third person.
Subsequently, the investor needs to liquidate the investment project in accordance with the applicable laws including the Law on Asset Liquidation and the Law on Land.

INVESTING IN VIETNAM





LEGAL ENTITIES

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2. LEGAL ENTITIES

2.1 Introduction

A foreign investor can choose from a variety of legal entities to carry out a project. Currently, typical options for a foreign-owned legal entity include:

- A limited liability company (LLC) in the form of either a single-member LLC or a multiple-member LLC; and
- A shareholding or joint-stock company (JSC).
- This chapter sets out the differences between these two types of legal entities.

2.2 Definitions

- A single-member LLC is an enterprise under the ownership of an organisation or individual;
- A multiple-member LLC is an enterprise under the ownership of between two and 50 organisations or individuals; and
- A JSC is an enterprise with at least three shareholders. There is no restriction on the maximum number of shareholders, who may be organisations or individuals.

2.3 Liability

The liability for these various legal entities is as follows:

- The single-member LLC's owner is liable for debts and other liabilities up to the single-member LLC's charter capital;
- The members of a multiple-member LLC are liable for debts and other liabilities to the extent of their contributed capital; and
- The shareholders of a JSC are liable for the debts and other liabilities of the JSC to the extent of their own contributed capital.

2.4 Enterprise Registration Certificate

An enterprise registration certificate (ERC) is required for all economic organisations established in the form of an enterprise. The ERC is granted by the competent authority and contains certain information about the economic organisation. In order to obtain the ERC, various documents need to be submitted (see paragraph 10.1 for more information about the ERC).

2.5 Management Structure

The 2020 Law on Enterprises sets out different management structures for the various legal entities.

The management structure of a single-member LLC must include a president or a members' council and a director or general director if owned by an organisation; or a president

and a director or general director if owned by an individual. As for those owned by an SOE, the structure must also include an inspection committee.

The management structure of a multiple-member LLC shall include a members' council (with a chairperson) and a director or general director. As for SOEs or their subsidiaries, the structure must also include an inspection committee.

With respect to a JSC, except for public JSCs which may need to be managed under another structure if stipulated in the Law on Securities, their management structure shall include a general meeting of shareholders (GMS), a board of management (BOM), and a director or general director. The structure must also include an inspection committee if there are at least 11 shareholders or if the institutional shareholder(s) hold at least 50% of the total shares. Otherwise, at least 20% of the BOM's members must be independent and there must be an audit committee under the BOM.

The director or general director is the person who manages the day-to-day business operations of the company. Vietnamese law does not differentiate between the two. In practice, an enterprise can opt to appoint this person as either director or general director based on its business models and management requirements. Hereinafter we will, therefore, only refer to the general director.

2.6 Meeting of a Members' Council, a BOM or a GMS

The governing bodies in an LLC or JSC shall meet as follows:

- For the members' council of a single- or multiple-member LLC, the meetings will be convened at the request of the chairperson of the members' council;
- In case of a multiple-member LLC, the members' council must meet at least once per year and the meeting may also be convened on an extraordinary basis at the request of a member or group of members which satisfies relevant qualifications as prescribed by law; and
- For a JSC, the BOM will meet at least once per quarter and the GMS once per year.

2.7 Quorum

To meet the legal requirement for a meeting of a members' council, BOM or GMS which convenes for the first time, the required quorum is as follows:

- For a single-member LLC, the votes of at least two-thirds of the members' council are required;
- For a multiple-member LLC, at least 65% of the members representing the charter capital is required; and
- For a JSC, at least three-quarters of the members are required for a BOM and more than 50% of the total number of shareholders' voting slips for a GMS.

Where the meeting falls short of the required quorum, subject to certain requirements as stipulated by law, it may be convened for a second and third time for the members' council in a multiple-member LLC and the GMS in a JSC. The specific percentage necessary will be stipulated in the company charter.

2.8 Resolution

2.8.1 Numbers Required to Approve a Resolution

Unless otherwise stipulated in the company charter, the law requires a minimum number of members or shareholders to agree with a certain resolution in order for it to be approved at a meeting:

- More than 50% (or 75% for certain material decisions) of the members attending the meeting or the total voting shares held by the attending members of a single-member LLC;
- The number of votes representing at least 65% (or 75% for certain material decisions) of the aggregated capital of the attending members of the meeting in a multiple-member LLC; and
- The majority of attending members in a BOM meeting at a JSC, except when a higher percentage is required in the company's charter. In a tied vote, the chairperson of the BOM has the final decision. The number of votes representing more than 50% (or at least 65% for certain material decisions) of the total voting shares of the attending shareholders in a GMS meeting at a JSC. That said, if the resolution causes adverse changes to the rights and obligations of shareholders holding preferential shares, the resolution can only be approved if voted for by shareholders holding at least 75% of the total number of these preferential shares.

The resolution may also be approved by collecting written opinions from members of a multiple-member LLC or shareholders of a JSC with the following rates:

- At least 65% of the charter capital of the multiple-member LLC; and
- More than 50% of the total voting shares of the JSC, or at least 75% of the preferential shares for a resolution causing adverse changes to the rights and obligations of the relevant preferential shareholders.

The specific percentage will be stipulated in the company charter.

2.8.2 Effective Date

The law prescribes when a resolution or decision of the members' council or GSM is effective:

- From the date of passing or from the effective date stated in the resolution, unless otherwise stipulated in the company charter for single- and multiple-member LLCs; and
- From the date of passing or from the date stated in the resolution for a JSC.

If certain requirements are satisfied, a member (or group of members) and a shareholder (or group of shareholders) can request a court or arbitrator to cancel a passed resolution. However, except for cases where a preliminary injunctive relief applies, the resolution remains effective until a decision issued by the court or arbitrator takes effect.

2.9 Legal Representative

2.9.1 General

A company must have at least one legal representative who fulfils the following functions on its behalf:

- Represents the company to exercise the rights and perform the obligations arising out of company transactions;
- Acts as the plaintiff, defendant, and person with related interests and obligations in arbitration proceedings or court; and
- Exercises other rights and performs other obligations under the laws of Vietnam.

It is possible to have more than one legal representative, which may be a suitable arrangement for roles that cover a number of countries and, therefore, require a lot of travel. This is a consequence of the law requiring that, if none of the legal representatives stay in the country, someone needs to be authorised to act on their behalf. The rights and obligations of the respective legal representatives should be laid down in the company's charter to avoid any uncertainty.





2.9.2 Who can be a Legal Representative?

- The president or chairperson of the members' council of a single-member LLC owned by an organisation is the legal representative of the company. The general director can be the legal representative if so prescribed by the company charter.
- For a multiple-member LLC, the chairperson of the members' council and the general director can be the legal representative of the company. The chairperson will automatically be the legal representative if the company charter is silent in this regard.
- The chairperson of the BOM or the general director can be the legal representative of a JSC when there is only one legal representative subject to the company charter. If the charter does not specify, the chairperson of the BOM shall be the legal representative. The chairperson and the general director shall automatically be the legal representatives of the company when there is more than one legal representative.

The role of the legal representative differs from that of the general director, whose powers are limited to those listed in the 2020 Law on Enterprises and cluster around the daily management of the company. The legal representative has, in principle, unlimited power to act on behalf of the company. The legal representative's signature is required on numerous filing documents, such as:

- Company creation (application for an ERC);
- Establishment of branches or representative offices;
- Company dissolution;
- Changes in the ERC;
- Adjustments to the registered capital;
- Registration of an offshore loan;
- Application for licences;
- Tax returns; and
- Opening a company bank account.

2.10 Capital Contribution

2.10.1 Charter Capital

- The charter capital of a single- and multi-member LLC shall be the total value of capital contributed by the member(s) to the company.
- The charter capital of a JSC consists of the total aggregated par value of shares of all classes sold by the company.
- At the time establishment is registered, the charter capital is the total value of assets or capital that the member(s) undertake to contribute to the LLC, or the total aggregate par value of shares of all classes which have been registered for subscription and stated in the company charter.

2.10.2 Nature of Capital Contribution

Capital contribution can be in VND, freely convertible foreign currency, gold, land-use rights, intellectual property rights (IPR), technology, technical know-how, or other assets which can be valued in VND.

2.10.3 Time Limit for Capital Contribution

- The owner of a single-member LLC and the members of a multiple-member LLC must contribute assets or capital as registered with the relevant authorities within 90 days of the ERC being issued.
- The shareholders of a JSC must pay, in full, the number of shares registered for subscription within 90 days of the ERC being issued unless the company's charter or share subscription agreement stipulates a shorter time limit.

2.10.4 Failure to Contribute Capital within the Required Period

If capital is not contributed within the required period of 90 days, or as agreed, the following needs to be done:

- The owner of a single-member LLC must register an adjustment of the charter capital equal to the actual value of the contributed capital within 30 days of the last day on which the charter capital should have been fully contributed. The owner is responsible for the extent of the capital he/she has undertaken to contribute to the financial obligations of the company arising before the adjustment of the charter capital is registered.
- A member of a multiple-member LLC who fails to contribute all the capital as promised automatically ceases to be a member of the company. Meanwhile, a member who fails to pay part of the capital as promised

shall have the rights corresponding to the capital already paid. The capital of a multiple-member LLC that has not been contributed will be offered for sale pursuant to the decision of the members' council. In this case, a multiple-member LLC must register an adjustment of the charter capital within 30 days of the last day on which the charter capital should have been fully contributed.

- A shareholder of a JSC who fails to contribute capital for all the number of shares registered automatically ceases to be a shareholder of the company. Meanwhile, a shareholder who fails to pay for part of the number of shares registered will have rights in proportion to the number of shares paid.
- If shares have not been fully or partially paid, a JSC shareholder who did not pay in full cannot assign the right to purchase the number of unpaid shares to someone else. Furthermore, the shares of a JSC that have not been paid for are deemed unsold shares. The BOM has the right to sell these shares. In this case, a JSC must register an adjustment of the charter capital and founding shareholders within 30 days of the last day on which the shares should have been fully paid.

2.10.5 Increase of Charter Capital

- A single-member LLC can increase its charter capital by making additional investments, or by converting to a multiple-member LLC or a JSC and raising capital from new members or shareholders.
- A multiple-member LLC can increase its charter capital by increasing the capital of its members, or by raising capital from new members.
- A JSC can increase its charter capital by issuing new shares.

SETTING UP A BUSINESS IN VIETNAM



2.10.6 Decrease in Charter Capital

- A single-member LLC can decrease its charter capital by returning part of the contributed capital. This is possible if it has continuously carried out business activities for more than two years since the company was registered, and guarantees payment of all debts and other liabilities after the owner has been repaid (the so-called lock-in period); or in case of a failure by the owner to pay the capital contribution in full for the charter capital within 90 days.
- A multiple-member LLC can decrease its charter capital by returning part of the contributed capital. This is possible if it has continuously carried out business activities for more than two years since the company was registered, and guarantees payment of all debts and other liabilities after the owner has been repaid, by redeeming contributed capital from its members; or in case of a failure by its members to pay the capital contribution in full for the charter capital within 90 days.
- A JSC can decrease its charter capital following a decision of the GMS, and shall return part of the contributed capital to the shareholders in proportion to their ratio of share ownership, if the JSC has conducted business

activities for two consecutive years from the date the company was registered. The JSC shall ensure its capacity to pay all debts and other liabilities upon return to the shareholders.

The charter capital of a JSC can also be decreased by redeeming issued shares for no more than 30% of the total number of ordinary shares sold and part or all of the dividend preference shares sold; redeeming sold shares at a request of a shareholder who voted against certain matters of the JSC; or in case of a failure to pay in full for the charter capital by the shareholders within 90 days.

2.11 Shares

- Single- and multiple-member LLCs cannot issue shares.
- A JSC can issue shares that can be bought and sold by shareholders.
- After a member has contributed capital in full, a multiple-member LLC must issue certification to the member(s) corresponding to the value of their contributed capital.



2.12 Listing

- Single- and multiple-member LLCs cannot list their contributed capital.
- A JSC can list its shares provided listing conditions are satisfied.

requirements need to be met. In particular, foreign investors must have operated their offshore business for at least five years before they can establish a branch in Vietnam. Branches are permitted to conduct a wide range of commercial activities including the purchase and sale of goods, unless specifically prohibited in the licence granted to the branch or under local laws.

2.13 Other Commercial Presences

2.13.1 General

Two other types of commercial presence could be established to represent foreign investors in Vietnam:

- A representative office; and
- A branch.

The activities these entities can perform depend on treaties between Vietnam and the country where the head office is located. For business activities that are outside the scope of a treaty, or where no treaty exists, an authorisation from the competent Vietnamese authorities is needed.

Since these are not independent legal entities, the parent company is liable for various aspects such as debts and obligations. Legal claims can (only) be brought against the parent company.

2.13.2 Representative Office

If a foreign investor wishes to have a presence in Vietnam, but does not want- or is not yet ready- to invest in the country, a representative office might bridge the gap. In general, setting up a representative office is quicker and less complicated than acquiring an ERC and IRC. One of the conditions is that the foreign investor's business must have been operational for at least one year before the foreign investor can submit an application.

Vietnamese law prohibits a representative office from performing profit-generating activities. It cannot conclude agreements to sell or provide products. However, it can, for example, conduct business enhancement or marketing activities such as displaying goods or services at its office. A representative office can also play an important role in facilitating operations and business objectives on behalf of the offshore company by liaising with the local authorities in Vietnam and leading negotiations with potential business partners.

The head of the representative office can sign economic or commercial contracts with businesses in Vietnam on behalf of the offshore company on the condition that there is a specific power of attorney from the offshore company for each contract. A representative office can also employ foreign and Vietnamese staff in accordance with Vietnamese law.

2.13.3 Branch

Foreign investors in certain business sectors- such as banking, computing, construction, franchising, non-life insurance, and some securities services - could set up a branch as an alternative to establishing a new company. However, specific

TAX



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3. TAX

3.1 Introduction

Like many other countries, Vietnam has various taxes, some of which are applicable to either businesses or individuals. Tax planning is one of the most important factors when managing a company, especially in a new market.

If certain conditions are met, exemptions and/or reductions can be granted in order to incentivise investment in certain areas or sectors.

3.2 Personal Income Tax

3.2.1 Scope

The Personal Income Tax (PIT) Law applies, in principle, to both Vietnamese and foreign individuals who are resident in Vietnam or have income sourced from Vietnam. An individual is considered a resident if he/she:

- Is present in Vietnam for 183 days or more in a calendar year or during a period of twelve consecutive months from their date of entry into Vietnam (this can be checked from passport entry/exit stamps);
- Is a foreigner with a temporary or permanent residence card, or a Vietnamese citizen with a regular residential location registered as a permanent residential address in Vietnam; or
- Has an irregular residential location or locations such as a hotel room(s) and/or leased house(s) in Vietnam with an aggregated lease term of 183 days or more in a tax year.

If these criteria are not met, individuals will be considered a non-resident. In cases b. and c., individuals may be considered non-resident if they are present in Vietnam for under 183 days in a tax year and able to prove that they are a resident under another tax jurisdiction.

3.2.2 Taxable Income

Generally, taxable income comprises ten main types: income from employment, business, capital investments, capital transfers, real estate property transfers, winnings or prizes, royalties, franchises, inheritances, and gifts.

3.2.3 Tax Rates

For employment incomes of residents, a progressive system applies ranging from 5% to 35% depending on the annual or monthly taxable income. Meanwhile, for non-residents, a flat rate of 20% shall be imposed on the income derived from Vietnam.

For non-employment-related income, rates vary from 0.1% to 20% subject to whether the taxpayer is a resident or non-resident and depending on the type of income; the way PIT is calculated also depends on the type of income.

Nevertheless, if a resident performs services but does not

have a labour contract - or the term of the labour contract is under three months with payments each time amounting to VND2 million or more in total - in general, 10% will be withheld and paid directly to the tax authorities. However, this does not mean that the resident does not have to finalise his/her annual tax.

3.2.4 Tax Allowances

The monthly taxable PIT income will be reduced by VND11 million for personal allowance and an additional VND4.4 million for each dependant, such as eligible parents or children. It is important to note that the dependent allowance is not automatic. The taxpayer needs to register their dependents and provide supporting documents to the competent tax office. Contributions to mandatory social, health and unemployment insurance schemes and local voluntary pension schemes can also be deducted but are subject to a cap. Contributions to certain approved charities can also be deducted.

3.2.5 Tax Codes

Everyone with taxable income is required to obtain a tax code.

3.3 Corporate Income Tax

3.3.1 Scope

The Corporate Income Tax (CIT) Law applies to corporate taxpayers in Vietnam. Unlike the PIT Law, the CIT Law does not explicitly include the concepts of resident and non-resident. Instead, it adopts the principle that a corporate taxpayer - whether located in Vietnam or overseas - must pay CIT for its income raised in Vietnam, or raised worldwide through its business facilities in Vietnam, unless otherwise stipulated in treaties to which Vietnam is a party.

For instance, if a foreign investor has a subsidiary company incorporated in Vietnam or a permanent establishment in Vietnam, they must pay CIT to the Vietnamese authorities on their worldwide income earned through the Vietnamese subsidiary company or in connection with the operations of the permanent establishment. However, the CIT Law also applies to companies without a permanent establishment in Vietnam. If this is the case, the company is only required to pay tax on income raised in Vietnam.

CIT is imposed on earnings obtained through the trading of goods or services, or from other activities such as capital transfers or real estate transactions.

3.3.2 Tax Rates

The general tax rate is 20%. This applies to all companies, except those exploring and extracting oil, gas, and other rare resources which are subject to higher tax rates. CIT incentives of 10% or 17% may be applied provided that certain requirements are met.

3.3.3 Calculation

CIT is calculated based on the taxable profit of a company. The elements needed for this calculation are: total domestic or foreign-sourced revenue, deductible expenses, non-taxable income, carry-forward losses, and other assessable income. For expenses to be deductible, the following criteria need to be satisfied:

- The expenses actually arose and are related to the activities of production and business of the enterprise; and
- The expenses are supported by complete invoices, source vouchers, and/or bank statements as stipulated by law.

Fines, penalties, and taxes are not deductible. Under certain conditions, and sometimes limited to a maximum duration, start-up expenses; charitable contributions; payments to foreign affiliates (royalties, loan interest, and service fees); depreciation and amortisation of tangible and non-tangible assets; and interest expenses can be deducted while net operating losses can be carried forward for a certain amount of time.

3.4 Capital Gains Tax

3.4.1 General

It is important to note that, under Vietnamese law, gains on the disposal of capital or securities in a Vietnamese entity - such as an LLC or JSC - are subject to CIT or PIT. The law distinguishes between a corporate entity and an individual taxpayer with different regimes being applied.

3.4.2 Corporate Entity

For a corporate entity disposing of capital or securities in a Vietnamese entity, the gain is treated as other income and will be taxed at the standard rate of 20%.

However, for a foreign corporate entity that does not have a permanent establishment in Vietnam, has performed business in Vietnam for a period of less than 183 days, or has not adopted Vietnamese accounting regimes or been issued with a tax code, the CIT tax rate is 0.1% of the proceeds when disposing of securities of a JSC. Meanwhile, when the capital of an LLC is disposed of, CIT on gains from transfers of capital will be levied at a rate of 20% on the gain.

3.4.3 Individual

If an individual tax resident disposes of the securities of a JSC, the gain will be subject to PIT at a rate of 0.1% of the proceeds. When the capital of an LLC is disposed of, PIT is levied on capital transfer gains at a rate of 20%. If the individual is a non-tax resident and disposes of capital or securities in a Vietnamese entity, the gain is subject to PIT at a rate of 0.1% of the proceeds.

3.5 Value-added Tax

Value added tax (VAT) applies to goods and services used for manufacturing, business, and consumption in Vietnam. For input VAT to be creditable, the company must obtain a proper VAT invoice from the supplier and other documentation, if required, such as bank statements where the payment is VND20 million or more. In general, the VAT invoice needs to be requested on the same day the service or good is purchased.

3.5.1 Tax Rates

The standard VAT rate is 10% and is applicable to most goods and products. There are two other rates: 0% and 5%, with the first applying mainly to exported products and services and the latter generally applying to essential goods and services. In addition, a VAT exemption applies to medical or veterinary services, certain insurance services, and certain financial operations.

3.5.2 Calculation

There are two methods to calculate the payable amount: the tax credit method or by calculating tax directly based on added value.

3.5.3 VAT Invoices

Companies may use template invoices, self-printed invoices, or electronic invoices. The tax invoice template must contain stipulated items and be registered with the local tax authorities. There cannot be any corrections of the invoices after they have been issued. If a mistake is made, the entire invoice needs to be cancelled (or amended, in a limited number of specific cases). Therefore, in Vietnam, it can be quite difficult to amend an invoice. A document called a minute, signed by relevant persons, is needed to do this.





3.6 Other Taxes

3.6.1 Foreign Contractor Tax

Foreign organisations and individuals doing business in Vietnam, or deriving income raised in Vietnam, may be subject to foreign contractor tax (FCT). Generally, FCT is comprised of CIT and VAT. The FCT rates, and the income used for calculating FCT, vary depending on the transaction and taxpayers' tax filing status. In particular, the applicable tax rates and taxable incomes may be different from those stated in paragraphs 3.3 and 3.5 if the taxpayer fails to meet any of the following requirements:

- The taxpayer possesses a permanent establishment in Vietnam in the case of a corporation, or is a tax resident in Vietnam in the case of an individual;
- The taxpayer performs business in Vietnam for a period of 183 days or more; and
- The taxpayer has adopted Vietnamese accounting regimes, has registered with a tax authority, and has been issued with a tax code.

The foreign contractors may benefit from double tax agreements between Vietnam and their home country.

3.6.2 Import and Export Duty

All goods entering Vietnam are subject to import duties which are classified into three categories: ordinary rates, preferential rates, and special preferential rates. The applicable rate depends on the trading relationship between Vietnam and the exporting country. Apart from being subject to import tax, in certain situations, Vietnam also imposes an

anti-dumping tax, anti-subsidy tax, and safeguard tax. Export duties with rates from 0% to 40% are levied on certain goods such as agricultural products like rice, forest products, fish, and natural minerals.

3.6.3 Special Consumption Tax

The production or import of certain goods such as cigarettes, alcoholic drinks, passenger vehicles with less than 24 seats, aircraft, and playing cards, as well as the provision of certain services, in particular those related to karaoke parlours, casinos, and golf links, are subject to special consumption tax (SCT). In other jurisdictions, this is also called excise tax.

SCT rates differ depending on the type of goods and services, but can be as high as 150%. Taxpayers producing SCT-taxable goods using SCT inputs are entitled to claim a credit for the amount of SCT paid on the materials imported or purchased from local suppliers.

3.6.4 Natural Resources Tax

Natural resources tax is levied on the exploitation of natural resources such as petroleum, mineral products, forest products, seafood, and natural water. Tax rates range from 1% to 40% depending on the specific type of exploited natural resources. Progressive tax rates apply to the production output of petroleum, natural gas, and coal.

3.6.5 Property Tax

The Vietnamese Government has announced its intention to adopt a property tax regime. As per a draft law publicised on the website of the National Assembly, the planned property

VIETNAM TAXES AT A GLIMPSE



tax may be imposed on certain non-agricultural land-use rights, construction facilities, aircraft, yachts, and vehicles. In terms of non-agricultural land-use rights, the land-use rights holders may have to pay this tax with rates of up to 2% per square metre. However, so far, no legislative schedule has been publicised outlining a timescale for the draft Law on Property Tax to be passed and implemented.

3.6.6 Environmental Protection Tax

Environmental protection tax is levied on the production and importation of products that are considered 'non-environmentally friendly' and which could have a negative impact on the environment. These products include petrol, oil, grease, coal, hydrochlorofluorocarbons, plastic or nylon bags as well as some chemicals (pesticides). Tax rates are based on specific tax levels per unit of product such as litre, kilo, or tonne.

3.6.7 Business Licence Tax

All companies have to pay an annual business licence tax. The amount of this tax is proportional to the registered charter capital of the taxed entity.

3.6.8 Non-agricultural Land-use Tax

This tax is imposed on residential land in rural and urban areas used for non-agricultural production and business such as:

- The construction of industrial parks;
- The construction of production and business establishments;

- Mineral exploitation and processing; and
- The production of construction materials and pottery articles.

Certain areas may be exempt or eligible for a reduction, such as investment project land in places eligible for investment promotion or land in areas with socio-economic difficulties. There are also objects on which no land-use tax will be imposed, such as land used for public purposes (e.g. roads, bridges, schools and hospitals).

3.7 Tax Reporting

3.7.1 Tax Reports

Companies have to submit monthly or quarterly reports to the regional tax office. These must include VAT, CIT and PIT returns as well as a report on the use of VAT invoices. VAT and CIT reports may also need to be submitted on a receipts basis in certain circumstances, such as when transferring real estate. Companies have to pay VAT, CIT, and PIT by the report submission deadline. If the reporting or payment is not completed before the deadline, a fine can be imposed.

3.7.2 Annual Tax Report

The company's financial statement, alongside its PIT and CIT return statements, all have to be submitted to the regional tax office on an annual basis.

3.7.3 PIT Declaration and Payment

An employer must declare and pay PIT either monthly (by the 20th day of the following month) or quarterly (by the 30th day following the reporting quarter). The amounts paid are

reconciled at the end of the year to determine the total tax liability. Foreign experts who are tax residents and about to terminate their assignment in Vietnam are also required to finalise their PIT before exiting Vietnam.

3.7.4 Capital Gains Declaration and Payment

The responsibility for declaring capital gains to the tax authorities depends on the nature of the party (corporate entity or individual) and on the residency of the entity (offshore / Vietnamese or tax resident / non-tax resident).

Seller	Buyer	Obligation to declare and pay
Vietnamese entity	Any	Seller
Offshore entity	Vietnamese entity	Buyer
Offshore entity	Offshore entity	Vietnamese target company
Non-tax resident individual	Vietnamese entity / Tax resident individual	Buyer
Tax resident individual	Any	Seller

subsequent quarter for companies with business activities that started less than twelve months ago or with annual revenue of VND50 billion or less for the previous year.

3.8.4 Capital Gains Finalisation

Capital gains need to be declared. However, again, the deadline for making a declaration depends on the nature and residency of the party. Below is a summary of the main timelines that generally apply depending on the identity and nationality of buyer and seller.

Seller	Buyer	Time to declare
Vietnamese entity	Any	Year-end CIT finalisation
Offshore entity	Vietnamese entity	When transaction occurs
Offshore entity	Offshore entity	When transaction occurs
Non-tax resident individual	Vietnamese entity / tax resident individual	Monthly or quarterly
Tax resident individual	Any	When transaction occurs

3.8 Tax Finalisation

3.8.1 PIT Finalisation

Normally, the employer will submit the tax declaration to the Vietnamese authorities for its payments to employees by the end of the year. If an employee works for two employers under a labour contract or another kind of agreement, neither company can finalise the tax over a calendar year, unless the labour contract or agreement is of a term less than three months or the monthly average amount paid by the other companies is more than VND10 million. In that case, the employee can authorise the company to submit on his or her behalf. Otherwise, the employee has to submit the tax declaration. An annual final tax return must be submitted, and any additional tax must be paid within 90 days from year's end.

3.8.2 CIT Finalisation

The annual CIT return must be filed and submitted no later than 90 days from year's end. If the annual CIT submission is filed late, a company can be fined. The same applies if an incorrect declaration is made causing failure to pay tax to the fiscal authorities.

3.8.3 VAT Finalisation

VAT return forms must be filed monthly by the 20th day of the subsequent month, or quarterly by the 30th day of the

3.9 Audit

Foreign-owned entities, credit institutions, insurance enterprises, public companies, and securities institutional traders must be audited at least once a year. This audit must be completed within 90 days from the end of the calendar year. All auditing activities will follow the Vietnam Accounting Standards (VAS) which differ from the International Financial Reporting Standards (IFRS). These Vietnamese standards are issued by the Ministry of Finance based on the international standards on auditing. Vietnam is expected to adopt the IFRS (phased in from 2022 to 2025) which will likely impact the current way of doing business in the country.

3.10 Double Taxation Avoidance Treaties

It is interesting to note that Vietnam has concluded agreements with almost 80 countries to prevent their nationals from being taxed twice. Double taxation avoidance (DTA) treaties can apply to individuals and companies. The content of a DTA differs per country and it is, therefore, good practice to ask for advice on the applicability of a DTA in an individual case.

INCENTIVES



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4. INCENTIVES

4.1 Introduction

Vietnam currently has about 326 industrial parks (IP) (industrial zones or export processing zones) and 17 coastal economic zones.

In the first half of 2019, IP and economic zones attracted 340 newly-registered foreign investment projects worth almost US\$8.7 billion. The leading provinces in attracting foreign investment are Bac Ninh, Binh Duong, Dong Nai, HCMC and Thanh Hoa, mainly due to better transportation infrastructure.

Besides the traditional IPs, some of the newer parks have been set up as a township outside larger cities as integrated work, live, play, and learn areas. These townships include shopping malls, offices, supermarkets, schools, hospitals, hotels, apartments and townhouses.

Thanks to attractive incentives, companies now also set up their business in other areas outside HCMC, Hanoi, and Da Nang. Since 1 July 2018, new concepts have been introduced for IPs: the auxiliary industrial zone (AIZ), or supporting industry zone, and the eco-industrial zone (EIZ). An AIZ is an IP specialising in manufacturing auxiliary industrial products and providing services supporting their manufacture. An EIZ, on the other hand, is an IP in which enterprises are required to engage in cleaner production, make effective use of natural resources, and enter into manufacturing cooperation and affiliation to tighten industrial symbiosis in order to promote economic, environmental and social efficiency in these enterprises.

4.2 Choice of Location

Investors unsure of where to establish a new business or investment project should take into consideration a number of factors such as whether to choose an area outside or within an industrial park. In both cases, the following points should be taken into account, depending on the business or factory project in question:

- Infrastructure and connectivity with the global or local supply chain;
- Access to suitable staff;
- Complicated procedures for site clearance and infrastructure construction;
- Import duties when importing materials;
- Access to distributors; and
- Incentives.

Investors who opt for an industrial park need to decide on the preferred location, as operating near similar companies will mean easier access to staff. Additionally, customs warehouse keepers can support with customs clearance, provide transportation services and act as distributors for the deposited goods.

As mentioned above, one factor to consider is whether certain (monetary) incentives are granted in the prospective investment area. However, it is important to emphasise that Vietnam's tax incentive regime is relatively complex.

Incentives are listed in various documents, making it very difficult to find all relevant information. Therefore, investors should assign local advisors to assess the most preferable location for their investment plan.

4.3 Tax Incentives

4.3.1 Industries and Sectors

Tax and land use incentives can be granted to new or extended investment projects in 'investment-encouraged' areas across the country. These incentives can also be granted to business sectors including education, health, high-tech, scientific research, environmental protection and infrastructural development, among others.

Incentives are also given to producers of high-priority products. These include accessories, components and spare parts used for assembling goods in industries such as textiles and garments, footwear and leather, electronics, agricultural machinery, automobiles, shipbuilding and the prioritised mechanical sector alongside supporting products used in high tech industries. Investors can also claim certain incentives when investing in product distributing chains, technical or other facilities or coworking spaces supporting small and medium-sized enterprises (SMEs) and start-ups.

4.3.2 AIZ

Projects pertaining to the infrastructure development of an AIZ - including subzones - may be entitled to tax exemption and rent reduction for land leases; a land lease term of up to 70 years (the norm is 50 years); and priority access to state loans, ODA funds, foreign loans under government guarantees and other kinds of loans.

Meanwhile, investment projects related to manufacturing supporting industry products as listed in Decree No. 111/2015/ND-CP of 3 November 2015 may enjoy certain tax incentives relating to CIT as well as export and import duties. Moreover, these projects may enjoy priority participation in training or assistance programmes for start-ups, SMEs, and other relevant programmes administrated by the competent authorities.

4.3.3 EIZ

Eco enterprises in EIZs can enjoy preferential loans from the Vietnam Environment Protection Fund, Vietnam Development Bank, and/or other financial sources related to clean industries. They will also have priority participation in technical support or investment enhancement programmes. Furthermore, eco enterprises will be prioritised in calls to provide technology market information and cooperate in industrial symbioses in the scope of production and business activities.

4.3.4 Specific Areas

Investors in areas with poor socio-economic conditions, such as those with weak infrastructure, lack of an experienced labour force, or remote and rural areas, may be eligible for tax reduction and exemption.

4.3.5 Tax Holidays

Tax holidays can consist of a 10% rate reduction for 15 years and a 17% reduction for 10 years, starting from the commencement of operations. It can also consist of a 50% reduction for two to nine years; or a tax exemption of two to four years, followed by a rate reduction. The specifics need to be carefully examined and assessed together with legal counsel, as the regulations of Vietnamese investment law are numerous and difficult to navigate.

4.4 Other Incentives

If they meet the relevant criteria, enterprises may be eligible for training or assistance programmes and others organised by the competent authorities. Qualifying enterprises may also receive preferential loans, invitations to participate in technical support or investment enhancement programmes, information on the technology market and cooperation opportunities, exemption from duties on imported goods, and exemption from and reduction of land rental fees and non-agricultural land-use tax.

Most important types of investment incentives

- Tax holidays
- Tax discounts
- Preferable land allocation
- Import duties



COMPETITION

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5. COMPETITION

5.1 Introduction

Competition is necessary to give consumers a choice of products at reasonable prices. However, in an unregulated market, companies will try to obtain as much profit as possible. This can lead to an imbalance of market shares or unequal opportunities for all market participants. In Vietnam, the Competition Law contains provisions similar to those in more developed countries. These include competition-restricting acts, unfair competition acts, orders and procedures for settling competition cases, and measures for how to handle violations of competition legislation. The Competition Law applies to business organisations and individuals including enterprises producing or supplying products and services for public utility, enterprises operating in state-monopolised industries and sectors, alongside foreign enterprises and professional associations operating in Vietnam.

5.2 Application

As is common when dealing with Vietnamese regulations, stipulations of the Competition Law are sometimes difficult to interpret as there is no formal clarification and guidance on all the provided concepts. One of the most crucial points is the scope of the law. The Competition Law states that it applies to, among others, foreign enterprises operating in Vietnam. However, no definition is given as to what 'operating' means in practice. This, in turn, has caused confusion over what level of activity is necessary to qualify. It is, therefore, advisable to interpret the legislation broadly in that any kind of operation in Vietnam at any level can make a foreign enterprise subject to the application of the Competition Law. In general, it is understood that foreign businesses without direct operations and a physical or legal presence in Vietnam are likely to fall within the scope of the Competition Law when they have a local subsidiary or provide sales in Vietnam. Participants of foreign economic concentrations will need to determine whether they are subject to the law's merger control regime. Vietnamese Competition Law will be applicable if agreements or concentrations have or have the potential to significantly restrict competition in the (Vietnamese) market.

5.3 Anti-competitive Agreements and Other Conduct

There are a number of agreements that restrict competition and, therefore, run a risk of illegality. To determine whether an agreement is legal, it is important to look at the relevant contents of the agreement, the relevant market of the parties, the trade lifecycle of the parties' products and services, and/or the level of restrictive effect on competition assessed by the National Competition Commission (NCC), the highest authority handling state management of competition under the Ministry of Industry and Trade.

- The agreements are absolutely prohibited if they:
 - Prevent, restrain, or disallow other enterprises from entering the market or developing business;
 - Abolish from the market enterprises other than the parties of the agreements; or
 - Conspire in biddings.
- If the parties are in the same relevant market, prohibited agreements are those that:
 - Directly or indirectly fix prices;
 - Distribute outlets, sources of supply of goods, or provision of services; or
 - Restrict or control produced, purchased, or sold quantities or volumes of goods or services.
- If the parties are in the same relevant market and the agreements may cause an appreciable restrictive effect on competition, prohibited agreements are those that:
 - Restrict technical or technological development and investments;
 - Impose conditions or unrelated obligations on the signing of purchase/sale contracts for goods/services;
 - Prevent transactions with parties other than the parties thereto;
 - Limit consumption or supply of goods or services of parties other than the parties thereto; or
 - May cause other restrictive effects on competition.
- If the parties have different production, distribution, or supply businesses constituting a trade lifecycle of a product or service and the agreements may cause an appreciable restrictive effect on competition, prohibited agreements are those that:
 - Directly or indirectly fix prices;
 - Distribute outlets, sources of supply of goods, or provision of services;
 - Restrict or control produced, purchased or sold quantities or volumes of goods or services;
 - Restrict technical or technological development and investments;
 - Impose conditions or unrelated obligations on the signing of purchase/sale contracts for goods/services;
 - Prevent transactions with parties other than the parties thereto;
 - Limit consumption or supply of goods or services of parties other than the parties thereto; or
 - May cause other restrictive effects on competition.
 - If the agreement benefits consumers and certain criteria are met, such as causing technical innovation, an exception may be granted.

5.4 Dominant Position

If an enterprise or group of enterprises has a dominant or monopoly position, certain acts by those enterprises are prohibited.

- A dominant market position is deemed to exist if an enterprise has a market share of 30% or more, or if it possesses considerable market power;
- A dominant market position is deemed to exist if a group

of enterprises act and possess together considerable market power, or

- Two of them have a combined market share of 50% or more;
- Three of them have a combined market share of 65% or more;
- Four of them have a combined market share of 75% or more; or
- Five or more of them have a combined market share of 85% or more.

The above group of enterprises does not include those possessing a market share of less than 10%. The considerable market power of an enterprise or group of enterprises is determined based on the following factors:

- Market shares of the enterprises in the relevant market;
- Financial strength and size of the enterprises;
- Barriers to market entry and expansion for other enterprises;
- Ability to acquire, access, or control the distribution or consumption market, or sources of supply of goods or services;
- Advantages in technology and technical infrastructure;
- Right to own, acquire, and access infrastructure;
- Right to own or use subject matters of intellectual property;
- Ability to switch to other sources of supply or demand of relevant goods and services; or
- Particular factors in the sector or industry where the enterprises are performing their business.

An enterprise is deemed to hold a monopoly position if it does not have any competitors in the relevant market.

5.5 Abuse of Dominant or Monopolistic Position

An enterprise or group of enterprises with a dominant or monopoly position in the market is prohibited from performing the following acts:

- a. Selling goods or services at prices below the total cost price resulting in competitors being eliminated;
- b. Imposing unreasonable purchase or sale prices of goods or services, or fixing minimum resale prices, causing damage to customers;
- c. Restricting production or distribution, limiting the market, or hindering technical or technological development, causing damage to customers;
- d. Applying different commercial terms on similar transactions, causing restriction to market entry or expansion by or the elimination of other enterprises;
- e. Imposing conditions or unrelated obligations on the signing of sale or purchase contracts, causing restriction to market entry or expansion by or the elimination of other enterprises;
- f. Preventing competitors from entering or expanding in the market; or
- g. Other acts abusing the dominant position as prescribed by other laws.

An enterprise or group of enterprises with a monopoly position is prohibited from performing acts mentioned in items b. to f. and from imposing adverse conditions on

consumers, taking advantage of the monopolistic position to unilaterally change or cancel an executed contract without legitimate reasons or performing other acts abusing the monopolistic position as prescribed by other laws.

5.6 Mergers and Acquisitions

The Competition Law defines the concept of economic concentration which covers mergers, consolidations, and acquisitions of controlling stocks and joint ventures between enterprises.

An economic concentration is prohibited if it causes or could cause substantial anti-competitive effects on the Vietnamese market. Enterprises must file a dossier of notification to the NCC regarding their planned economic concentration which falls within any of the following:

- The total assets in the Vietnamese market of the enterprise or group of affiliated enterprises to which the enterprise is a member are valued at VND3 trillion (~USD130 million) or more in the fiscal year preceding the expected year of the economic concentration;
- The total sales or purchase volume in the Vietnamese market of the enterprise or group of affiliated enterprises to which the enterprise is a member are valued at VND3 trillion (~USD130 million) or more in the fiscal year preceding the expected year of the economic concentration;
- The transaction value of the economic concentration is valued at VND1 trillion (~USD43 million) or more; or



- The joint market share of the enterprises planning to participate in the economic concentration accounts for 20% or more of the total share in the relevant market in the fiscal year preceding the expected year of the economic concentration.

Greater thresholds are applied with respect to the economic concentration of credit institutions, insurance enterprises, and securities companies. It is important to note that the economic concentration can only be carried out after the NCC's confirmation has been obtained stating that the economic concentration is not prohibited under the Competition Law. Certain economic concentrations, though not prohibited, can only be performed and maintained where relevant conditions are satisfied as stipulated in the confirmation of the NCC.

Completing an investigation, the investigation report and case file will be handed to the chairperson of the NCC who shall then issue a decision.

The Competition Law includes a number of provisions regarding the investigation and handling procedures of competition cases, competition-related proceedings, and procedures to seek exemption from the above-mentioned prohibitions.

5.7 Penalties and Liabilities

The main penalties for violating the Competition Law consist of warnings or monetary fines at a certain percentage of the total annual revenue. There are also supplementary penalties such as revocation of a licence, confiscation of profits derived from the violation or materials and facilities used to commit the breach. In addition, violators may also be subject to remedial measures such as a restructuring of the enterprise that has abused its dominant position.

5.8 Leniency

Enterprises that have voluntarily delivered a report helping the NCC detect, investigate, and handle a prohibited anti-competitive agreement may receive full or partial immunity from fines under the leniency policy. The immunity is to be decided by the chairperson of the NCC if the reporting enterprises meet all the following requirements:

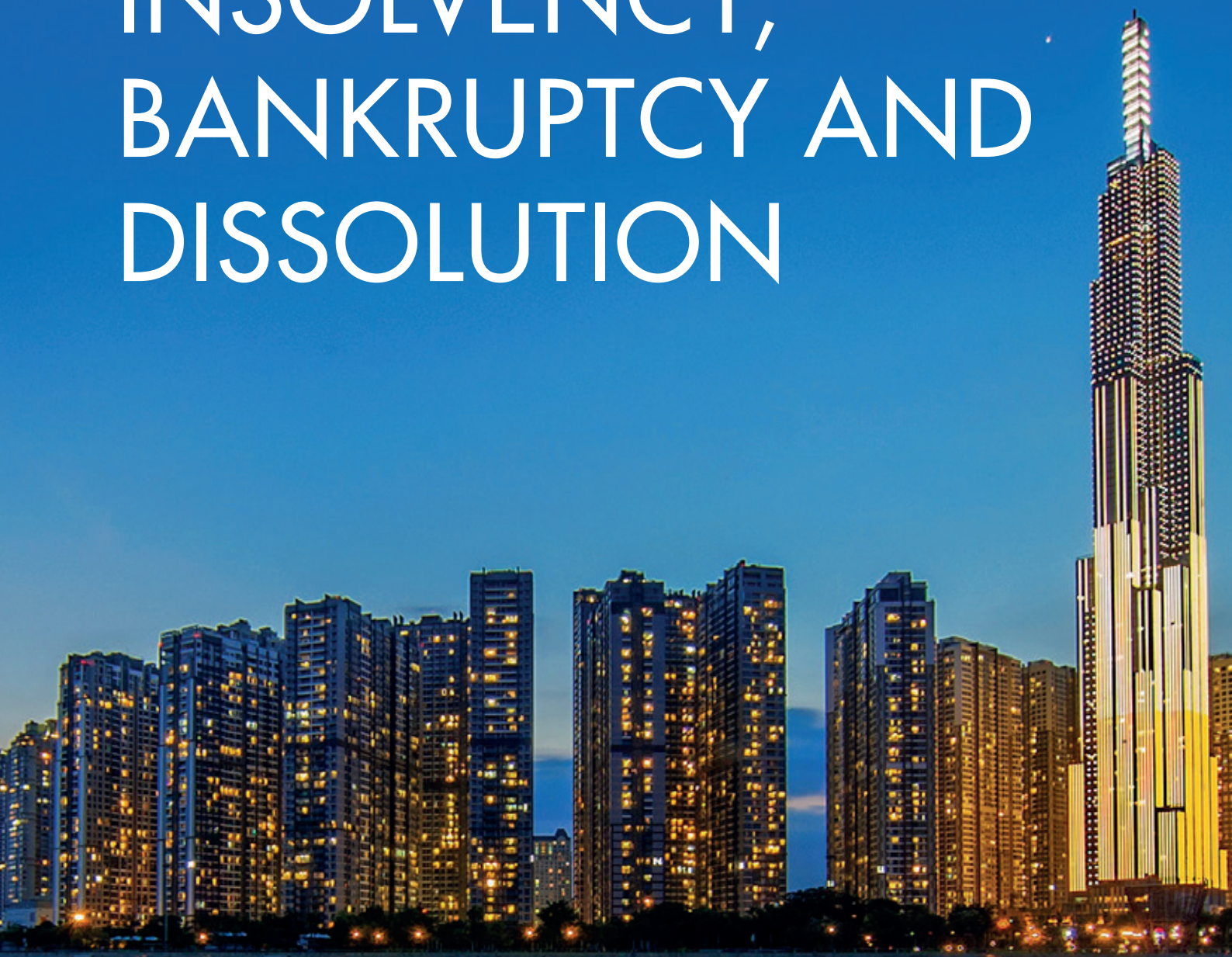
- It is a party to the agreement;
- It has voluntarily reported the violation before being investigated;
- It has provided honest and relevant evidence; and
- It has provided full cooperation during the investigation.

The immunity does not, however, apply with respect to an enterprise that has taken a role in forcing or organising for other enterprises to participate in the agreement. The immunity only applies to a maximum of three enterprises that have first filed for entitlement of the immunity at the NCC. The immunity, if granted, is equal to 100% of the monetary fine for the first-filing enterprise, 60% for the second, and 40% for the third-filing enterprise.

5.9 Enforcement and Administration

Reports and claims on violations of the Law on Competition must be submitted to the NCC. In principle, these reports and claims must be submitted within three years of the date of the violation. The chief of the Investigation Office on Competition, an organisation under the NCC, upon its verification of the submitted information and evidence, can issue a decision on investigating the possible violation. After

INSOLVENCY, BANKRUPTCY AND DISSOLUTION



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6. INSOLVENCY, BANKRUPTCY AND DISSOLUTION

6.1 Insolvency

The main law governing the insolvency of companies established in Vietnam is the Law on Bankruptcy. An enterprise will be considered insolvent if it fails to repay an unsecured or partially secured undisputed mature debt within three months of the due date. An insolvent enterprise may be subject to bankruptcy proceedings as decided by a competent local court.

The Law on Bankruptcy does impose special requirements for credit institutions in the insolvency process. Specifically, before the court accepts a bankruptcy petition, an insolvent credit institution must undergo 'special control' imposed by the State Bank of Vietnam (SBV). This was additionally codified in the 2017 Law amending the Law on Credit Institutions.

6.2 Bankruptcy

6.2.1 Introduction

An enterprise is bankrupt when it is declared as such by the People's Court in the province or district where the company is headquartered, after a petition is filed to commence bankruptcy proceedings. The competent court is determined based on the complexity and nature of the case. Under the Law on Bankruptcy, the following persons are required to file a bankruptcy petition when the company has become insolvent:

- The owner of a private enterprise or a single-member LLC;
- The chairperson of the BOM of a JSC;
- The chairperson of the members' council of a multiple-member LLC;
- A partner of a partnership; or
- The legal representative of a company in any form.

If a person specified above fails to make a bankruptcy filing when the company has become 'insolvent', he or she will be subject to a monetary fine of VND1-3 million (US\$43 130). Further to this, unsecured or partially secured creditors, union representatives, an elected representative of the company's employees, or company shareholders have the right, but are not required, to file a bankruptcy petition upon observing that the company has become insolvent.

Acceptance of the bankruptcy petition triggers a six month look-back period, known as a 'preference period'. A court may rule some transactions aimed at dissolving assets of the company during this period invalid. In this case, any recovered assets must be included in the total assets of the debtor company. For transactions involving a related party to the debtor, a preference period of 18 months will apply.

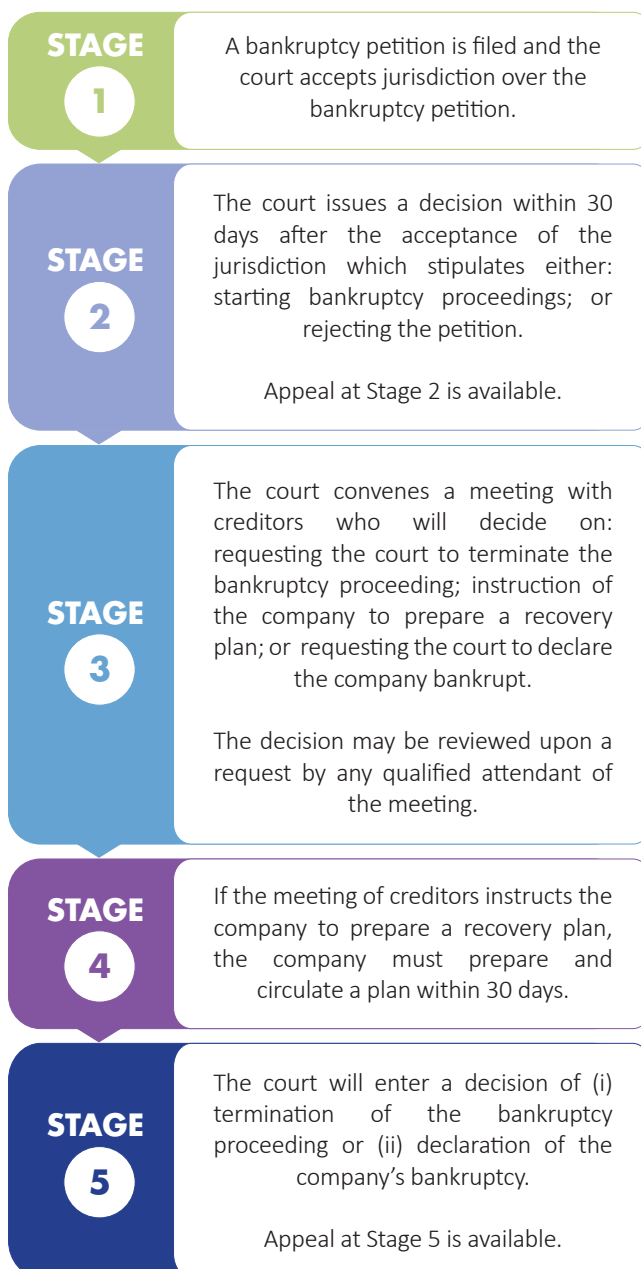
6.2.2 Bankruptcy Stay

Once a bankruptcy order is entered, secured creditors may enforce a claim against a debtor's assets. Generally, secured loans are repaid with the relevant secured assets, unless those assets are designated under the business recovery plan for the company.

The court may permit immediate enforcement of secured assets if there is a risk of destruction or a substantial decrease in value. Transactions subject to review may include asset transfer under market price, conversion of an unsecured debt into a debt secured or partly secured by the company's assets, a transaction outside the company's normal business operations, and donating assets.

6.2.3 Stages of a Bankruptcy Proceeding

A bankruptcy proceeding follows various stages with possible appeals at the second and fifth stages. Certain primary stages of a typical bankruptcy proceeding are set out below:



6.2.4 Bankruptcy Administration

Under certain circumstances, an immediate order of bankruptcy may be issued, followed by the liquidation of the company and settlement of its obligations. This may arise where the company lacks the assets to pay the basic bankruptcy fees, the court determines that the company cannot be rehabilitated, the company is unable to prepare a recovery plan, or the recovery plan is not approved or followed.

Once the court accepts the bankruptcy petition, the judge will appoint an asset management officer or an asset management and liquidation company. The role of the asset manager is to oversee the business operations and liquidate the company assets. These tasks include preparing the asset inventory, preparing the company's list of creditors and debtors, taking steps to protect assets, preventing the unauthorised sale or transfer of assets, selling assets in accordance with decisions of the court, and organising the valuation and liquidation of assets.

Waivers and/or forbearance agreements do not require any regulatory registrations, approvals, or filings (such as registration with the SBV).

6.2.5 Amendments to Credit Agreements

Amendments to credit agreements can range from technical amendments to restructuring financial covenants, payment terms, and security packages. If the credit agreement has been registered with the SBV, and if the changes alter this original registration, the SBV registration must be amended. The approval of other regulatory bodies may also be necessary. For instance, if the amendments entail modifications to a corporate charter, the business registration authority must register the revised charter.

6.2.6 Debt-for-Equity Swaps and Capital Cures

Due to caps on many key investment sectors, these tools may not be practical solutions in Vietnam. In addition, because such remedies fundamentally alter the borrower's capital structure, burdensome regulatory steps may be involved. This is particularly relevant where the borrower is already a foreign-invested entity. When a company is restructured, all revised foreign ownership must be permissible under Vietnamese law. In most cases, amendments to the corporate charter, ERC and IRC will likely be required as well.

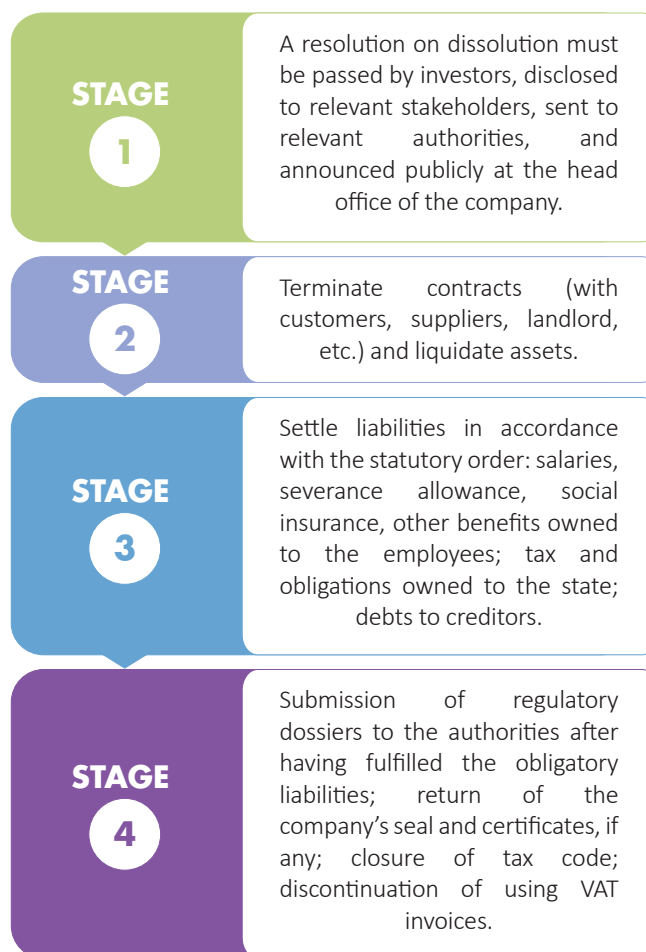
6.2.7 Voluntary Dissolution

Under Vietnamese law, an enterprise may be dissolved voluntarily in the following cases:

- The operation duration stated in the company's charter expires without any decision on extension; or
- The dissolution is decided by the owner of a sole enterprise; by all general partners of the partnership; by the members' council or the company owner of an LLC; or by a shareholders' meeting for JSCs.

An enterprise will only be dissolved if all debts and liabilities are resolved and the company is not currently involved in a

dispute at court or arbitral tribunal. The voluntary dissolution procedures of a company include the following steps with relevant parties and regulatory authorities:



6.2.8 Taxes

At dissolution, an enterprise must apply for a tax code closure announcement at the Tax Department. Any company entering a voluntary solvent dissolution in Vietnam will be subject to a final tax audit. Tax clearance with the tax authorities is both exhaustive and costly. Bearing in mind the excessive pressure that the Vietnamese government has been under to reduce the fiscal deficit over the last few years, the target of re-collected tax liabilities through an audit and inspection is planned for by local tax authorities. As a result, a tax audit upon liquidation is likely to result in tax claw-back, penalties, and interest on late payment for the dissolving entity.

To be prepared for the an entity should be diligent in the course of their business to remain compliant with tax requirements, as well as up to date with common tax liabilities which may arise during the tax audit process at dissolution.

6.2.9 Risks

Common tax risks to be aware of include, but are not limited to:

VAT

- Underpayment or under declaration of VAT payable; or
- Failure to provide proof of non-cash payment for goods and services purchased (valued at VND20 million or more).

CIT

- Insufficient recognition of income;
- Failure to provide supporting documentation of benefits-in-kind for employees;
- Interest-free loans, likely to be considered interest income by tax authorities.

PIT

- Incorrect tax residency status determination of expatriate employees;
- Failure to include benefits-in-kind in taxable income.

FCT

- Under payment or failure to pay tax imposed on payments of service charged to offshore companies;
- Incorrect exchange rates used for converting payment in foreign currencies.





7. FOREIGN CURRENCY EXCHANGE AND PROFITS REMIT

7.1 Foreign Currency Exchange

7.1.1 General

VND is not freely convertible. Payment and remittance of foreign currencies - whether inbound, outbound, and even within Vietnam - are subject to controls by the SBV and the banking system in general.

7.1.2 Prices in VND

Under Vietnamese law, transactions, price listing, payments, advertisements, quotations, price determination and prices reflected in contracts in Vietnam must be in VND. Trading in foreign currencies is only permitted in a few cases. These include residents' capital contribution to foreign investment projects in Vietnam, certain internal transfers of capital, certain activities of domestic or foreign contractors, and the sale of certain goods or provision of services between residents and non-residents. The SBV can decide to exempt other activities.

7.1.3 Foreign Investments

To implement foreign investment in Vietnam, other than indirect investments, foreign investors can transfer capital in a foreign currency before the IRC is granted to the investor. This transfer can be conducted when the following conditions are met: the purpose is related to the pre-investment stage,

there is an agreement between relevant parties, and the transfer is completed via a capital account opened at a permitted credit institution.

The strict control of foreign currency exchange also affects the payment and closing arrangements for M&A transactions. As a result, these may be more complicated than in countries with less foreign exchange control.

7.2 Profit Remittance

Vietnam guarantees that foreign investors can transfer certain assets offshore if they fulfil their financial obligations and submit proper documentation to relevant parties. It applies to the following assets:

- Invested capital and proceeds from the liquidation of investments where the foreign-invested company is terminated or dissolved, investment capital is reduced, or the investment project or BCC is liquidated or terminated;
- Profits derived from investment activities which can be transferred annually or at the expiry of an investment project where the transfers have been declared to competent tax authorities; and
- Other monies and assets lawfully owned by the investor.
- If such assets include VND, foreign investors can purchase foreign currency at a permitted credit institution for remittance purposes.

8. BORROWING AND LENDING

A foreign investor can borrow money for investment by way of onshore or offshore loans. However, they must comply with legal requirements such as the purpose and registration of the loan being filed with the SBV as prescribed by law. In the case of an offshore loan, the borrower may receive money from a non-resident through an offshore loan agreement. This could be in the form of a loan contract, a contract of goods, a purchase and sale on deferred payment, a loan provision entrustment contract, a financial leasing contract, or issuance by the borrower of debt instruments.

REPATRIATION OF FUNDS



8.1 General Structure of a Loan

There are three forms of onshore loans: a short-term loan with a maximum term of one year, a medium-term loan with a term of one to five years, and a long-term loan with a term of more than five years. For offshore loans, there are two main groups: a short-term loan with a term of up to one year and a mid- and long-term loan with a term of more than one year.

8.2 Conditions to Access a Loan

8.2.1 Onshore Loans

Onshore loans may be granted if a borrower has civil capacity according to Vietnamese law, there is a lawful need for the loan, the borrower's plan to use the loan is feasible, and the borrower has the financial capacity to repay it. Currency used for onshore loans can be agreed upon by the parties. However, it is worth noting that foreign currency loans can only be granted by permitted credit institutions to residents in certain situations. These include payments for imported goods or services and short-term loans for short-term capital needed to export goods. In other situations, SBV approval is required.

8.2.2 Offshore Loans

Borrowers must meet several conditions to obtain an offshore loan. These include using the loan for its agreed purpose; executing an offshore loan agreement; and securing credit lines of the loan, if any. The loan must be in a foreign currency, with VND only permitted by law in particular circumstances. In certain cases, it is necessary to register the loan with the SBV.

The borrower can be a company, a cooperative, a credit institution, or a branch of a foreign bank established and operating in Vietnam, and must not have received a Government guarantee for its offshore loans. Vietnamese law is vague regarding offshore loans to an individual. Therefore, if the foreign investor is an individual residing in Vietnam and intends to access offshore loans, his/her loan will be subject to the approval of the SBV.

8.3 Secured Assets

A Vietnam-based credit institution can take security over movable assets such as shares and equity interests, equipment and machinery, cars, stocks and goods in circulation, deposits, accounts, receivables, and insurance proceeds. These institutions can also take security over immovable assets such as land-use rights and assets attached to land. However, an offshore lender can only take security over movable assets due to Vietnamese laws and regulations on real estate for foreign entities/individuals.

NOTARISATION, AUTHENTICATION AND LEGALISATION



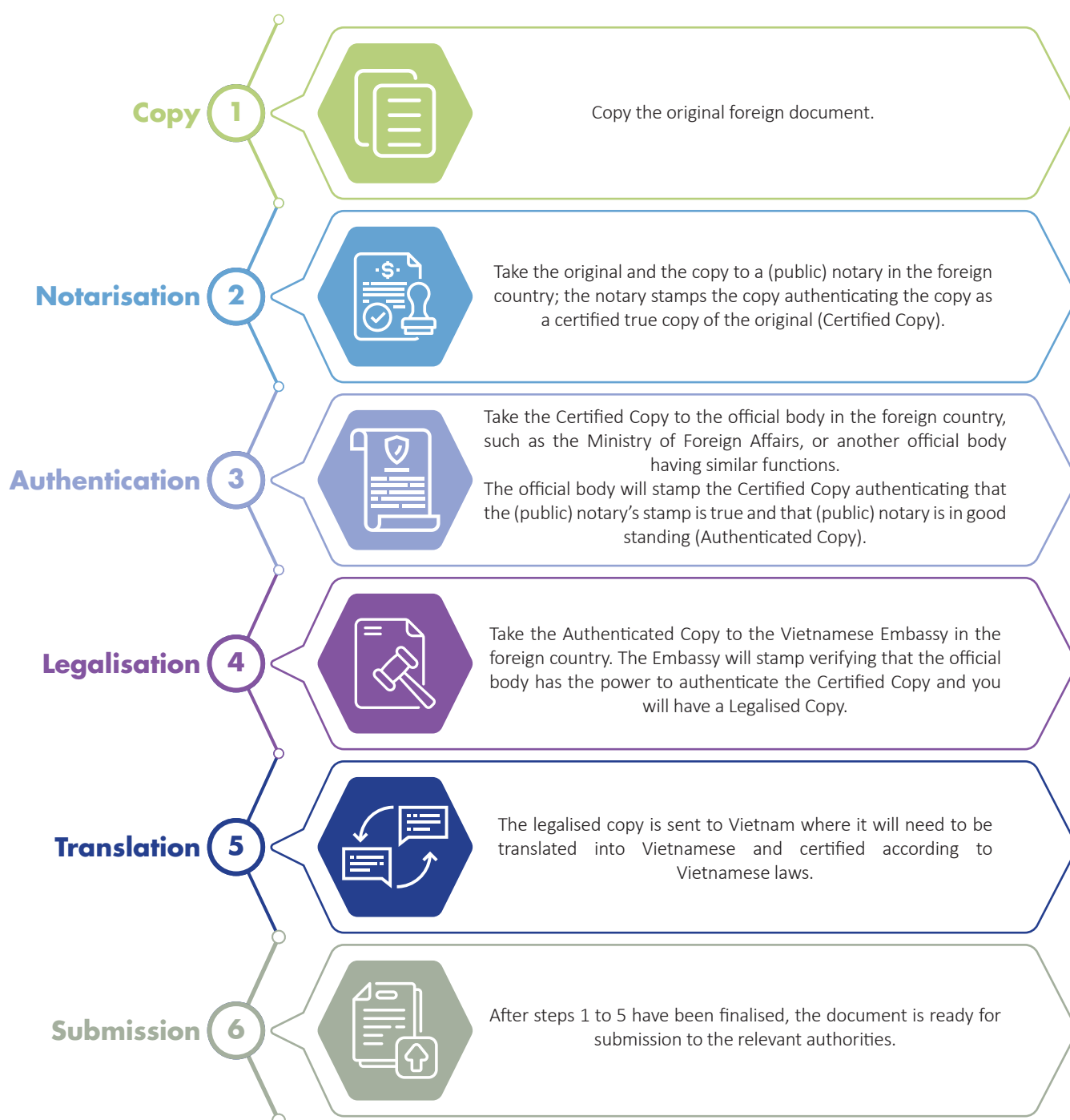
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9. NOTARISATION, AUTHENTICATION AND LEGALISATION

The authorities will not accept a foreign document used for the purpose of incorporating (or restructuring) a foreign-invested company in Vietnam- nor for a work permit- unless that document is legalised and notarised. Some documents must also be translated into Vietnamese if prescribed by law. The process for this formalised procedure will typically be as follows:

Depending on the origin of the document, additional steps may be required to obtain a foreign document in the required public form. Sometimes, some of these steps can also be done in Vietnam, such as translation, authentication or legalisation. However, this will also depend on the document's country of origin.

FORMAL REQUIREMENTS: NOTARISATION, AUTHENTICATION AND LEGALISATION



IRC AND ERC



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10. IRC AND ERC

All private business enterprises in Vietnam must have an ERC, and some also require an IRC. For instance, domestic investors or enterprises in which foreign investors hold an equity share of 50% or less only need an ERC to establish a new enterprise. Foreign investors and companies in which foreign investors hold more than 50% equity may also be required to obtain an IRC for a newly-created enterprise.

Foreign investments in an existing enterprise through an M&A transaction are not required to apply for an IRC. Instead, an application for an M&A approval may be required in certain cases (see paragraph 1.2.2 for more information regarding M&A approvals).

10.1 ERC

The ERC is issued by the licensing authority. It contains information about the company registration such as the name of the enterprise and enterprise code number which serves as its identification for its entire corporate life cycle. It also contains the head office address; the full name, permanent residential address, nationality, and identity card or passport number of legal representatives; and the registered amount of charter capital.

10.2 IRC

The IRC is also issued by the licensing authority. The IRC is required in case a foreign investor, or an enterprise treated as a foreign investor, carries out an investment project by establishing a company in Vietnam. When investors apply for an ERC, the IRC must be included in the application file. It contains information registered by the investors about an investment project, such as information about the investor, the location of the project, as well as its scale and objective.

10.3 Timeline and Required Documents

10.3.1 IRC

Preparing the application dossier for an IRC, including the translation and execution of all documents, might take between two and four months. A variety of documents will need to be translated, legalised and notarised to be included in the application file. Passport copies, financial documents, and investment proposals may also need to be notarised. After the application dossier has been submitted, the law states that it will take 15 days for the IRC to be issued. However, in practice, it might take longer in some cases.

10.3.2 ERC

In general, it takes about three business days to obtain an ERC. In practice, however, it might take longer.

10.3.3 Post-establishment Formalities

Once the ERC has been obtained, several administrative formalities need to be fulfilled within the respective time limits. These include the payment of licence tax and publication on the national enterprise registration information portal.

EMPLOYMENT AND LABOUR LAW



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11. EMPLOYMENT AND LABOUR LAW

11.1 Scope

The 2019 Labour Code, which came into effect on 1 January 2021, applies to all individuals – foreign and Vietnamese – working for Vietnam-based organisations or Vietnamese individuals, but also to Vietnamese nationals working overseas. Exceptions to this rule exist where an international treaty to which Vietnam is a party state otherwise.

A labour contract means an agreement between an employee and an employer on a paid job that details the wage, the working conditions, and the rights and obligations of each party. An agreement, though agreed by the parties to be named otherwise, still remains a labour contract so long as it has contents demonstrating a paid job with wages, administration, management and/or supervision by a party.

11.2 Labour Contract

The 2019 Labour Code sets out the provisions to protect the rights of employees and employers. One of the provisions is related to the labour contract.

Although no longer compulsory, it is recommended that the contract is in Vietnamese or in dual language with the Vietnamese version prevailing in cases of inconsistency. The contract must be signed by the employee. However, if the employee is aged under 15 it must also be signed by their legal representative, or otherwise consented to in writing by the legal representative if they are under 18 years old. Since 2021, men can generally retire at 60 years and three months, while the usual retirement age for women is 55 years and four months. The retirement ages then increase by four months each year for women and three months each year for men until 2035.

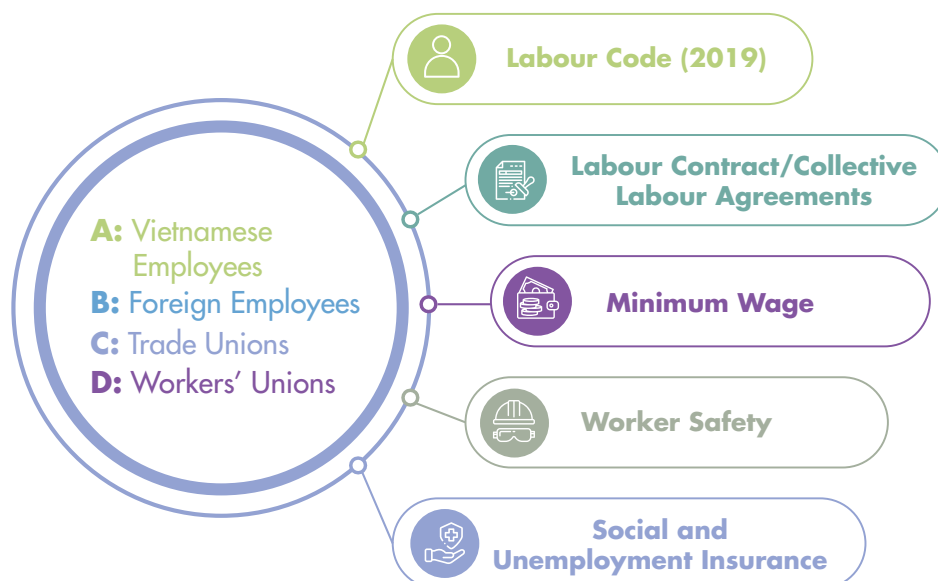
An individual may enter into employment contracts with more than one employer. If an individual receives income from more than one employer, this will impact the PIT finalisation and the payment of social, health and unemployment insurance schemes, which needs to be dealt with appropriately. If an individual has more than one place of work, unless the 2019 Labour Code stipulates otherwise, the primary place(s) shall be recorded in the labour contract. When employees are required to travel to other temporary locations, in general, employers shall reimburse all reasonable travel expenses. This reimbursement may be deductible from the company's CIT if it is aligned with certain regulatory requirements.

11.3 Contract Types

There are two types of labour contract:

- A definite-term labour contract (of up to three years); and
- An indefinite-term labour contract (no duration defined).

SCOPE OF VIETNAMESE LABOUR LAW



11.4 Probation

Probation can apply only once for a job and the length is based on its nature and complexity. A probation period can be up to 180 days for jobs of certain enterprise managers; 60 days for jobs requiring professional or technical college-level qualifications or higher; 30 days for jobs with intermediate-level specialised or technical expertise, technical workers, and professional staff members; and six working days for other jobs. The salary during the probationary period cannot be lower than 85% of the full wage. A separate probation contract may be entered into prior to entry into the labour contract.

11.5 Additional Clauses

Covenants on confidentiality and protection of intellectual property and business secrets are allowed via written provisions in the labour contract or in separate agreements. Agreements on non-solicitation and non-competition, if requiring covenants less favourable for the employee than those stipulated under the labour laws (e.g. restraining the employee from working for competitors), should be made in writing and in a separate document from the labour contract to secure their validity and enforceability.

Reinforcing this interpretation of Vietnamese labour law, HCMC People's Court has upheld an arbitral award of the Vietnam International Arbitration Centre (VIAC). In the arbitral award, VND205 million (~US\$9,070) was awarded to the employer because the employee had violated a non-compete clause in a separate non-disclosure agreement. In addition, there are some specific regulations for female, elderly and teenage workers in terms of salaries, working time, days off and type of workplaces for the full protection of their individual benefits.

11.6 Renewal of Contracts

It is possible to renew contracts with a definite or fixed term. It is important to stay alert as the law contains some restrictive provisions designed to protect the employee.

When a definite-term contract expires, parties can sign a new fixed-term contract. If they fail to do so, but the employee continues working, the contract will automatically be converted into an indefinite-term contract. Employers should also be aware that a fixed-term contract can only be renewed once. Once the second term has expired and the employee continues working, an indefinite-term contract must be entered into. This restriction, however, does not apply to foreign employees, elderly employees, employees hired to be directors in SOEs, or current members of the management board of the representative organisation of employees.

11.7 Minimum Salary

The wage of an employee working in the private sector must not be lower than the minimum wage rate stipulated by the Government. There are various regional minimum wage rates that depend, amongst others, on the region where the person works. These regions are defined by the Government and need to be looked at in detail when scouting locations for investing in Vietnam.

11.8 Overtime

The regular working time is eight hours a day and 48 hours a week maximum. For work requiring contact with dangerous and/or harmful factors, employers are responsible for applying the work time limits in accordance with national technical regulations and related laws. Employers are entitled to require employees to work overtime under the following conditions:

- The employee agrees; and
- Overtime hours will not exceed 50% of the normal working hours per day; with a maximum of twelve hours per day, 40 hours per month, and 200 hours per year.

In some special sectors and industries such as textiles and garments, leather, electronic products, aquaculture processing, and telecommunications, alongside extraordinary cases such as a lack of necessary workforce for urgent work, overtime is higher and capped at 300 hours per year. An employer is required to notify the relevant Department of Labour, Invalids and Social Affairs (DOLISA) in writing to implement an overtime policy exceeding 200 hours per year.

11.9 Maternity and Paternity Leave

A female employee is entitled to six months of maternity leave. When she gives birth to more than one child at the same time, she will be entitled to additional leave. During maternity leave, Vietnamese employees receive a monthly remuneration worth the average of their latest six months' salary or remuneration on which the social insurance premium was based. However, there is a maximum salary cap that applies at a multiple of 20 times the applicable minimum wage in the region. When an employee is nursing a child under one year of age, she is entitled to a break of 60 minutes per day.

A male employee paying a social insurance premium is entitled to five days of paternity leave if the child is born naturally, or seven days if the child is born by surgery or at under 32 weeks. The number of days increases if more than one child is born at the same time.

11.10 Paid Leave

An employee is entitled to a minimum of twelve days paid annual leave, exclusive of public holidays, if the employee works twelve months in full. In practice, companies often allow employees to take pro-rata leave.

Employees will be given an additional day of annual leave for every five years of consecutive service for an employer. Apart from this, employees are entitled to take leave on the 11 Vietnamese public holidays. Expatriate employees are also entitled to a day off for the traditional new year, if different from 1 January, and another for the national day of his/her country. Furthermore, employees could be entitled to paid leave to attend special personal occasions such as weddings or funerals.

11.11 Sick Leave

A Vietnamese employee is entitled to paid sick leave. The maximum number of paid sick leave days within a year is between 30 and 60 and is based on the number of years the employee has paid their social insurance premium. It can also vary depending on the job.

Parents are entitled to paid leave to care for their sick children. A parent is entitled to a maximum of 20 days a year if the child is younger than three years old, and up to 15 days if the child is between three and seven years old. Payment during this leave is calculated in the same way as their own sick pay and is covered by the social insurance fund.

11.12 Unilateral Termination by an Employer

11.12.1 Allowed

An employer is entitled to unilaterally terminate a labour contract in the following circumstances:

- a. The employee repeatedly fails to perform work in accordance with the terms of the labour contract. This is determined based on the assessment criteria of work performance level in the rule issued by the employer upon consulting a grassroots-level employee representative organisation which includes the grassroots-level trade union and other employee organisations at an enterprise (labour union), if any;
- b. The employee is ill or injured and remains unable to work after receiving treatment for 12 consecutive months (indefinite-term contract), six consecutive months (definite-term contract of between 12 and 36 months), or more than half of the contract duration (definite-term contract of less than twelve months);
- c. The employer, while taking all measures to remedy the problem, has to reduce the number of employees due to natural disasters, fire, epidemics, or other force majeure reasons;
- d. The employee fails to attend the workplace within 15 days of the expiry of suspension of the labour contract;
- e. The employee reaches retirement age;
- f. The employee arbitrarily leaves his/her work without

proper reason for five consecutive working days or more; or

- g. The employee provides untruthful information affecting his/her recruitment.

In cases of a., b., c., e., and g. the employer must send the employee a written notice prior to their termination as detailed below, at least:

- 45 days for indefinite-term contracts;
- 30 days for definite-term contracts of between 12 and 36 months; or
- Three working days for definite-term contracts of less than 12 months or for termination of the contract due to illness or injury of the employee.

11.12.2 Not allowed

There are also circumstances in which the employer cannot unilaterally terminate the labour contract:

- The employee is suffering from an illness, work-related accident, or occupational disease and is being treated or nursed under the decision of a competent health institution, except for the reasons set out in 11.12.1.b.;
- The employee is on annual leave, personal leave, or any other type of leave permitted by the employer; or
- The employee is pregnant, on maternity/paternity leave, or nursing a child younger than twelve months.

11.13 Unilateral Termination by an Employee

An employee may unilaterally terminate a labour contract prior to its expiry by sending a prior notice of at least 45 days for indefinite-term labour contracts, 30 days for definite-term contracts of between 12 and 36 months, or three working days for definite-term contracts of less than 12 months. However, prior notice is not required in the following cases:

- The employee is not assigned to the job or workplace, or is not given the working conditions as agreed in the labour contract, except for extraordinary cases where the employer is permitted in law to assign jobs other than those agreed in the labour contract;
- The employee is not paid in full or on time, except for force majeure cases where the payment is delayed as permitted in law;
- The employee is maltreated or is subject to forced labour or other behaviours affecting his/her health, dignity or honour, including sexual harassment at the workplace;
- A female employee is pregnant and must quit the job as prescribed by a competent health establishment;
- The employee reaches retirement age; or
- The employer provides untruthful information affecting the implementation of the labour contract.

11.14 Illegal Unilateral Termination

11.14.1 By Employer

In case of unlawful unilateral termination of employment, the following consequences shall be imposed on the employer:

- If an employer violates the notice period requirements, the employer must compensate the employee with an amount that is pro-rata to the salary for the working days without prior notice.
- If the employee agrees to return to work, the employer must pay compensation of at least two months' salary as well as the salary, social insurance, health insurance, and unemployment insurance for the period in which the employee was not allowed to work. If the position is no longer vacant, both parties will negotiate to modify and/or supplement the labour contract;
- If the employee refuses to return to work, the employer is required to compensate the employee as stated above and, in addition, pay a severance allowance of half a month's salary for each year of employment; and
- If both employer and employee agree to discontinue the employment relationship, the employer is required to pay the compensation and severance allowance stated above and additional compensation of at least two months' salary as agreed by the parties.

11.14.2 By Employee

In cases of unlawful unilateral termination of employment, the following consequences shall be imposed on the employee:

- The employee is not entitled to severance allowance and must compensate the employer with half a month's salary in accordance with the labour contract;
- If the prior notice term is violated, the employee must compensate the employer with an amount pro-rata to his/her salary for the working days absent without prior notice; and
- The employee shall be obliged to return the training costs to the employer as stipulated by law.

11.15 Other Reasons for Termination

11.15.1 Redundancy

Termination on the grounds of redundancy (structural and technical changes or economic reasons) is also possible. Employers seeking to make redundancies of two or more employees are required to draft a labour usage plan, consult with the labour union (if any) on the plan, and file the plan with DOLISA. It is important to note that an employer must also draft a labour usage plan when changes in company structure or technology would affect the employment of more than one employee. The plan must be notified publically to employees within 15 days of the date it is approved.

If new vacancies cannot be allocated to employees, employers have the right to terminate labour contracts after consulting the labour union to which the employee is a member, if any,

as well as notifying the provincial People's Committee and the employee at least 30 days in advance. Each redundant employee with at least twelve months' service is entitled to a redundancy allowance. The amount of the allowance is equal to one month's salary for each year of employment with a minimum of two months' salary.

11.15.2 Corporate Restructuring, Reformation or Transfer of Asset

An enterprise which is an employer must prepare a labour usage plan in case it is divided, split, consolidated, merged, sold, leased, or converted into another enterprise form; or its ownership or use right over its asset(s) are transferred affecting the jobs of many employees.

The current and future employers are responsible for implementing the labour usage plan which has already been approved. Where employees are laid off, they are entitled to the redundancy allowance worth one month's salary for each year of employment with a minimum of two months' salary.

11.15.3 Other

Employment is also terminated in the following circumstances:

- On the expiry of labour contracts, except for those of executive members of the labour union that shall survive until the expiry of his/her office term;
- The job has been completed in accordance with the labour contract;
- Both parties agree to terminate the labour contract;
- The employee is sentenced to a jail term or the death penalty, or is prohibited from performing the job prescribed in the labour contract by a legally enforceable court decision;
- The employee is a foreigner working in Vietnam but is deported following a valid decision of a court or a competent authority;
- The work permit becomes invalid with respect to a foreign employee who works in Vietnam;
- The employee is deceased or a court declares that the employee has lost the capacity for civil acts, is missing, or deceased;
- The employer, which is an individual, is deceased or a court declares that she/he has lost the capacity for civil acts, is missing, or deceased; or the employer, which is not an individual, terminates its operation or is notified by a competent authority of failing to have a legal representative or an equivalently authorised person;
- The employee reaches retirement age;
- The employee is dismissed for breach of labour discipline; or
- The probation, where stated in the labour contract, does not meet the requirement or a party rescinds the agreement on probationary work.

11.16 Severance Allowance

If an employee has worked for a company for twelve months or more and is not covered by the unemployment insurance scheme, he/she is entitled to a severance allowance equal to the aggregate amount of half a month's salary for each year of employment where the labour contract is terminated for reasons other than structural or technical changes; economic reasons; or corporate restructuring, reformation, or transfer of assets by the employer. An employee is, for example, (partly) not covered if he/she worked for the company before the introduction of unemployment insurance in 2009 or if he/she is a foreigner and is not covered by the insurance. Severance allowance will not be paid in the following circumstances:

- The employee is entitled to a pension;
- The labour contract is unilaterally terminated following the employee's failure to attend work without proper reason for five consecutive working days or more;
- The work permit becomes invalid or the employee is deported from Vietnam; or
- The employee is dismissed for breach of labour discipline.

Severance allowance depends on the average monthly salary mentioned in the labour contract during the six months prior to termination.

11.17 Collective Labour Agreements

Vietnam also has the concept of collective labour agreements. These are written agreements that have been agreed upon between the employer and the labour collective following a collective bargaining session. The labour collective only needs a simple majority to vote in favour of the collective labour agreement. It is binding and both the employers and employees, whether starting work prior to or as of the binding date, must implement and comply with it when it has been signed by legal representatives of the employer and the labour collective.

Collective labour agreements shall prevail against labour contracts and other rules of the employer if it stipulates greater rights, obligations, and interests for the parties. In Vietnam, sector-specific agreements exist, known as industry collective labour agreements. These agreements may also apply to a non-member enterprise if it has a scope of application covering more than 75% of employees or enterprises in the same industry in the industrial zone, economic zone, export processing zone, or high-tech zone as decided by the competent authority.

11.18 Work Permit

11.18.1 General

In principle, a foreigner would need a work permit to work in Vietnam unless he/she belongs to an exempted group. These groups include foreign lawyers, intra-corporate transferees in certain industries, chiefs of Vietnam-domiciled representative

offices or projects, foreigners who marry a Vietnamese person living in Vietnam, or owners or BOM members of a Vietnam-registered LLC or JSC with contributed capital at a value stipulated by the Government.

Individuals with a business visa can perform certain commercial activities. Those with a tourist visa cannot work at all. The consequences of not having a work permit while working in Vietnam are monetary fines for both foreigner and company and expulsion of the foreigner. A work permit is valid for up to two years and can be extended only once for a maximum of a further two years. Employers must still apply for a certificate to exempt them from obtaining a work permit.

11.18.2 Requirements to Obtain a Work Permit

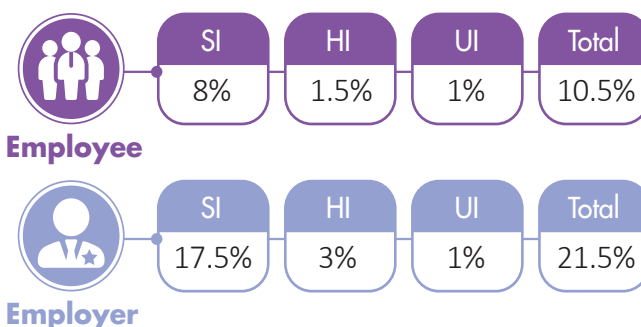
Foreign workers who want to work in Vietnam must satisfy the following conditions when applying for a work permit:

- Be at least 18 years of age and have full capacity for civil acts;
- Be in good health, as stipulated by the Ministry of Health;
- Have expertise, technical skills, or working experience; and
- Not have been or currently be subject to a criminal conviction or prosecution in Vietnam or other jurisdictions.

In order to hire a foreigner, a company needs to obtain approval from the People's Committee. Once this approval has been granted, all relevant documents - such as a health certificate from a recognised hospital, (non)criminal records, and proof of expertise or experience - need to be submitted to obtain a work permit. Many of these documents need to be notarised, legalised and translated.

11.19 Mandatory Insurance

Vietnamese employees and their employers are required to contribute to social insurance (SI), health care insurance (HI), and unemployment insurance (UI). Foreign employees, together with their employer, are not required to contribute to UI, but are subject to the SI and/or HI in certain circumstances. The rates of SI, HI, and UI contributions paid for Vietnamese employees are:



The salary used for the calculation of the contributions consists of the monthly salary rate and certain allowances prescribed in the labour contract. However, the amount is capped.

11.20 Labour Unions

11.20.1 Trade Unions

A trade union at an enterprise is the most common type of labour union. According to the Law on Trade Unions, a trade union is formed on a voluntary basis as a grassroots-level unit of the national trade union. Together with state agencies and economic and social organisations, the trade union cares for and protects the legitimate and legal rights and interests of employees at the company.

The trade union can also participate in investigating and monitoring the operations of the company. All employees are entitled to form a trade union. Their employer is required to acknowledge the status of a legally established trade union and, on request, to assist with the formation and provide facilities in order for the trade union to function.

Both public and private sector employers are required to contribute to a fund for trade union activities. This contribution is equal to 2% of the employer's salary fund. Based on this, SI is paid for its employees, irrespective of whether or not a trade union has been established at the workplace.

11.20.2 Worker's Union

Aside from the trade union, employees may also establish, access and take part in the operations of a worker's union at an enterprise, if granted with a registration certificate by the competent authority. This new type of labour union was introduced in the 2019 Labour Code.

A worker's union can operate in parallel with, and with rights and obligations equal to, a trade union in protecting the legitimate rights and interests of employees. However, membership of a worker's union cannot include both ordinary employees and employees directly involved in making decisions on working conditions, recruitment, labour discipline, termination of labour contracts, or assigning employees to do other work.

At the time of its registration, a worker's union must have the minimum number of members who are employees working at the enterprise as stipulated by the Government.

11.21 Internal Labour Rules

11.21.1 General

Employers with ten or more employees must have written internal labour rules (ILRs) and register them with DOLISA. Prior to issuing, amending, or supplementing ILRs, the employer must consult the labour union, if any. The ILRs must be shared with employees and the main contents must be posted at necessary locations in the workplace.

Employers with ten or more employees must register their ILRs with the competent authority. The ILRs shall come into effect 15 days after this registration is completed. In practice, the registration could be delayed if the competent authority challenges or questions any of the contents of the ILRs.

11.21.2 Content

The ILRs must contain:

- Working hours and rest breaks;
- Rules on workplace order;
- Labour safety and hygiene rules;
- Anti-sexual harassment rules as well as processes and procedures for dealing with sexual harassment at the workplace;
- Rules on protection of assets, business secrets, and confidentiality of the company's technology and intellectual property;
- Cases in which the employer is permitted to temporarily assign an employee to do work other than that stated in the labour contract;
- Conduct by employees which constitutes a breach of labour rules;
- Penalties imposed for breaches of labour rules;
- Liability in case of damages; and
- A person with the authority to handle labour discipline.

11.22 Disciplinary Actions

The 2019 Labour Code sets out disciplinary actions and details procedures about how these actions can be implemented.

The following disciplinary actions can be imposed:

- Reprimand;
- Deferral of wage increase for a maximum of six months;
- Demotion; and
- Dismissal.
- Dismissal can only apply when:
 - An employee commits an act of theft, embezzlement, gambling, deliberate violence causing injury, or uses drugs at the workplace;
 - An employee discloses technology or business secrets, infringes the employer's intellectual property rights, causes serious loss or damage or threatens to cause particularly serious loss or damage to the employer's property or interests, or commits an act of sexual harassment at the workplace which is stipulated in the ILRs;
- The employee is disciplined through the deferral of a wage increase or demotion and then commits a second offence during the period when the initial disciplinary measure had not been absolved. A second offence means a case where the employee recommits the breach for which he/she has already been dealt with for a breach of discipline and for which the disciplinary action record has not yet been removed as stipulated by law; or
- An employee arbitrarily takes an aggregate of five days off in a period of 30 days or an aggregate of 20 days off in a period of 365 days without proper reason.

Employers are not permitted to deal with a breach of labour discipline in any form where such a breach has not been stipulated in the ILRs, agreed in the labour contract or codified in the laws on labour.

11.23 Work Safety

Employers are required to implement safety measures in the workplace. They will be liable if work-related accidents or occupational diseases cause injuries or casualties to their workforce in the course of their employment. For instance, employers must pay full salary to an employee who takes leave required for treatment, as well as all medical costs and expenses not covered by health insurance. Employers are also required to compensate the employee with an amount stipulated by law based on the reduced level of their working ability due to a disease or accident which was not entirely their fault. Furthermore, employers must pay financial support equal to at least 40% of the compensation stated above, even when the cause of the accident can be attributed to the employee.

11.24 Employees' Data Protection

Vietnam does not have a law specifically regulating the personal data of employees nor protecting employee privacy. In general, the law requires consent from an individual if their personal information is collected, processed, used, or stored. In May 2018, the general data protection regulation (GDPR) of the European Union (EU) entered into force. Even though this is an EU regulation, it can still apply to companies in Vietnam as it protects the rights of EU citizens outside the EU. The fines imposed by EU authorities can be as high as EUR20 million, or up to 4% of annual worldwide turnover.

11.25 Discrimination and Harassment

Discrimination causing diminishing equality in job opportunities on the basis of gender, race, skin colour, national or social origin, ethnicity, age, maternity or marital status, beliefs, religion, political opinion, family responsibilities, HIV infection, disability and/or sexuality are prohibited under the 2019 Labour Code. The same applies to establishing and joining labour unions and participating in labour union activities.

In 2015, the Industrial Relations Committee of Vietnam issued a code of conduct on sexual harassment at the workplace. This code can be used as a basis and guidance for companies to develop and adopt their own policies on sexual harassment. When there are grounds to assume that an employer's decision or behaviour breached labour law, the employee can make a claim or deposit a denunciation to the employer or labour inspectors to protect his/her rights and interests.

11.26 Labour Dispute Resolution

In general, the Vietnamese Labour Code is very employee-friendly and makes it quite difficult to fire someone. Emphasis is also placed on negotiation and conciliation in order to resolve labour-related disputes. If this fails, court action may be instituted with the appropriate court. Often,

a mutual agreement to terminate the working relationship is the easiest and fastest way.

11.27 Dissolved or Bankrupt Companies

Where an enterprise is dissolved or declared bankrupt, the payment of wages, severance allowances, social and health insurance, job loss insurance, and other interests of the employees in accordance with the collective labour agreement and signed employment contracts must be prioritised.



INTELLECTUAL PROPERTY RIGHTS



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12. INTELLECTUAL PROPERTY RIGHTS

12.1 Introduction

The Civil Code and the Law on Intellectual Property contain the most relevant provisions related to intellectual property (IP). Vietnam is also a signatory to various international agreements such as the Paris Convention, the Madrid Agreement, the Stockholm Convention of 1967, the Berne Convention for the Protection of Literary and Artistic Works, and the Geneva Convention for the Protection of Producers of Phonograms against Unauthorised Duplication of their Phonograms.

Registration may be required to protect IP. Generally, registration of copyright will create prima facie evidence for protection. However, it is important to note that the rights are protected upon registration on a 'first-to-file' priority basis for most other IPRs. Therefore, it is essential to register a patent or trademark before introducing products or services to the Vietnamese market. The first-to-file rule does not apply to trade secrets, geographic indicators, and trade names entitled to legal protection upon fulfilling certain conditions for formation and usage.

In the case of joint ventures or mergers, enterprises should conduct due diligence on potential partners and decide if they can register the intellectual property rights. Investors need to be sure that the registration is done on their behalf or that the partner is willing to transfer the rights if the partnership ends. Though it has improved over recent years, IP protection remains one of the most significant issues for investors. It is one of the biggest reasons why some companies are hesitant to invest. Despite recent efforts by Vietnamese lawmakers to close the gaps in the regulatory framework, implementation continues to cause issues in practice.

12.2 Patents

Vietnamese regulations acknowledge two types of patent: utility solutions (petty patents) and patents for invention. A patent can be submitted through direct filing, including by a foreign applicant within the relevant term. A patent is locally protected if it meets the requirements of novelty step, inventive step (not applicable to utility solutions), and industrial applicability.

The validity of patents for utility solutions is ten years from the filing date, and 20 years for inventions. To maintain the validity of a Vietnamese patent, the owner must pay the fee annually. Documentation required to file a Vietnamese patent consists of the patent's specification, claims of the patent or amended claims, drawings, and certified copies of priority documents.

12.3 Trademarks

The trademark system in Vietnam protects symbols, three-dimensional objects, colours, and other visual devices used to identify a business' products or services. Trade name rights are established through perpetual and public use rather than the need to be formally registered. Online domain names are registered on a first-to-file basis. Locally registered trademarks

last for ten years and can be renewed every decade. Trademarks can be registered in Vietnam or based on the Madrid Protocol.

12.4 Industrial Design

Industrial design means the outward appearance of a product embodied in three-dimensional configuration, lines, colours or a combination of these elements. Under Vietnamese law, IP rights to an industrial design shall be established based on a decision of the competent state body. It can be granted based on Vietnam's Law on Intellectual Property or an international treaty to which Vietnam is a member. Generally, an industrial design shall be eligible for protection when it can demonstrate that it is novel, creative, and susceptible to industrial application. However, some items are ineligible for protection as industrial designs. These include where the outward appearance of a product is due to the technical features, the outward appearance of civil or industrial construction works, or where the shape is invisible during the use of the product.

Authors who have created industrial designs through their labour and at their own expense can register an industrial design. Organisations or individuals who have supplied funds and material facilities to authors in the form of job assignment or hire can register it as well, unless otherwise agreed. A protection title, also known as an industrial design patent, shall recognise the owner of the industrial design; the author of the industrial design; and the subject matter, scope, and term of protection. An industrial design patent is valid for five years from the date granted and may be renewed for two consecutive terms of five years.

Applications must be submitted using a template together with documents and photos describing the registered subject matter and specifying the registration rights. The application must be submitted to the Intellectual Property Office of Vietnam, after which a decision should take one month from the submission date. In practice, however, it could take longer.

When different parties file applications for (almost) identical industrial designs, a protection title will be granted to the one with the earliest priority or filing date amongst those satisfying all conditions. If two or more applications meet the conditions and have the same earliest priority or filing date, a protection title shall be granted to one application only with agreement from all applicants. Without such an agreement, no protection title shall be granted.

12.5 Copyright

The registration of copyright is conducted at the National Copyright Office. In Vietnam, copyright also applies to computer programs, which cannot be patented because they lack (one or more) requirements for being granted a patent. Vietnam's copyright IP is governed by the Berne Convention on copyright which states that the minimum protection from publication will be 75 years for cinematographic works, photographic works, dramatic works, works of applied art, and anonymous works; and 50 years after the death of the author for other works. While no copyright registration is required in Vietnam, registering a copyright is advisable.

CONTRACTS



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13. CONTRACTS

13.1 Source of Contract Law

The two laws most relevant when drafting a contract are the Civil Code and the Commercial Law. Together, they form the basic framework for commercial contract law in Vietnam. The first applies to all types of contracts while the latter, in principle, only applies to commercial and profit making contracts. Provisions in the Commercial Law and industry-specific laws, such as the Law on Construction and the Petroleum Law, have, in general, precedence over the general provisions established by the Civil Code.

13.2 Principles

The Civil Code and Commercial Law contain provisions on certain basic principles, such as:

- Freedom to contract: parties to a contract are generally free to agree on the contents of their contract, as long as they do not contradict prohibitive provisions of law and social ethics;
- Formation of a contract: the law provides rules of offer and acceptance; and
- Contractual terms: there are no specific rules to determine whether a statement does or does not constitute a contractual term.

13.3 Choice of Law

Unless otherwise stipulated by law, parties may agree on a jurisdiction of their choice as governing law if a contract involves a foreign element (e.g. if one of the parties is foreign). The chosen law can only be applied if such foreign or international commercial laws are not contrary to the principles of Vietnamese law. If no law has been agreed, the contract will be governed by the law of the country to which it is most closely connected. However, Vietnamese law will generally apply if the contract involves real estate, employment, or consumer matters.

13.4 Language

The law remains silent as to the language(s) that may be used in locally concluded agreements. Therefore, when foreign companies engage in a transaction with individuals and organisations in Vietnam, they often use Vietnamese or bilingual contracts (English and Vietnamese). However, in case of a dispute, the contract will generally be examined on the basis of the Vietnamese language version. If the counterpart is a Vietnamese Government agency, the law states that contracts need to be held entirely in Vietnamese. Some specific laws also prescribe that contracts that do not include such state enterprises have to be drafted in Vietnamese.

13.5 Formation

The Civil Code does not prescribe a specific form for a contract, so contracts can be written or verbal. Generally, a written contract has been entered into when all parties have signed the contract, while an oral contract is deemed to have been executed when parties have reached an agreement on its content.

13.6 Interpretation

For the interpretation of a contract, the following factors can be taken into account:

- The real intention of the parties at the time when the transaction was entered into (during the process prior to and after the time of establishment and performance of the contract);
- The objective of the transaction and the nature of the contract;
- The customary practice of the place where the transaction was entered into;
- The way which, when effective, the contract will best benefit the parties;
- The mutual intentions of the parties (in case of a conflict between the mutual intentions of the parties and the wording in the contract); or
- The weaker party, in case the stronger party - i.e. the drafting party - inserts contents disadvantageous to the party in a weak position.

13.7 Invalidity

A contract may be deemed invalid for reasons of illegality, contradicting social ethics, falsification, lack of capacity, misunderstanding, deception, threat or compulsion, duress, or if the subject of the contract lacks cognition and behavioural control. A contract can also be invalid in case of non-compliance with the form, unless either party has undertaken at least two-thirds of its performance under the contract.

The law contains provisions as to the consequences of an invalid contract, the time limit within which a party can request the court to declare a civil transaction invalid, and how third parties' interests can be protected.

13.8 Breaches and Sanctions

The Commercial Law defines two types of breach:

- Contractual breach: the failure of a party to fully or properly perform its obligations according to the agreement between the involved parties; and
- Substantial breach: a contractual breach by a party which causes damage to the other party to an extent that the other party cannot achieve the purpose behind their entry into the contract.

13.9 Exemption from Liability

A party that breaches a contract shall be exempted from liability in the following cases:

- Exemption agreed upon by the parties;
- Force majeure;
- One party is entirely at fault caused by the other party; or
- Implementation of a decision of a competent state management agency which the party could not have known at the time the contract was entered into.

13.10 Remedies

The Commercial Law defines several remedies to a breach of contract. These include specific performance of contracts, fines, forcible payment of damages, suspension or stoppage of contract performance, or cancellation of contracts. Unless otherwise agreed, aggrieved parties are not entitled to suspend or stop contract performance or cancel contracts against insubstantial breaches.

13.11 Complaints and Legal Proceedings

One party may need to lodge a complaint with another party before starting legal proceedings before a court. If the party does not submit a complaint within a certain time, it may be assumed that neither party has issues with the goods or services delivered. For the statute of limitations for lodging a complaint, a distinction is made with regards to the quantity or quality of goods delivered and other contractual obligations. The statute of limitations for initiating legal proceedings is two years from the infringement of lawful rights and interests, or nine months from the date of goods delivery in case of suits against a logistics service provider that has received a complaint regarding its services. The Civil Code includes a three-year statute of limitations with regard to contractual issues. Investors may need to consult their legal counsel as to which statute of limitations may apply to particular cases.

13.12 Dispute Resolution Clause

Parties to commercial transactions may agree to use arbitration, either in Vietnam or overseas, instead of a court procedure. However, it is important to be aware that it is not always easy to have a foreign arbitral award recognised in Vietnam (please find more information on arbitral awards in paragraph 17).

13.13 Convention on Contracts for the International Sale of Goods

Since 1 January 2017, the United Nations Convention on Contracts for the International Sale of Goods (CISG) has been

applicable in Vietnam. Over 80 countries are signatories to the CISG and it provides a unified legal framework for the sale of goods between member countries. The CISG is expected to support the commercial activities of traders with regards to customers and counterparts abroad by providing a legal framework that improves efficiency and minimises costs and uncertainties that previously hampered trading, in particular with regard to disputes.

The CISG will automatically govern all international sales contracts between companies based in Vietnam and those in other signatory countries, unless parties agree otherwise. It might also apply to contracts between Vietnam-based companies and those in non-signatory countries.

13.14 Electronic Signatures and Contracts

In Vietnam, electronic signatures can be in the form of words, letters, numerals, symbols, sounds, or other forms by electronic means, logically attached or associated with a data message and capable of certifying the person who has signed and approves its content. A handwritten signature is not always needed for a contract to be considered valid, and a contract cannot be refused because it is electronic.

Where the law requires information to be in writing, a data message will meet this condition if the information is accessible and usable for reference when necessary. Parties can agree to use (certified) e-signatures to sign a data message in the transaction process.

14. CORRUPTION AND BRIBERY

Corruption remains a global issue, and one which has a particular impact on Vietnam's business environment. Vietnamese leaders have made significant commitments to address this issue. However, this task is neither simple nor straightforward, despite the country's aggressive approach in dealing with major corruption cases.

In 2019, Transparency International, a non-profit organisation, ranked Vietnam 96th out of 180 countries and regions in its Corruption Index with a score of 37/100. This score decreased by one point in 2020, causing Vietnam's rank to fall to 104th. Within ASEAN, Vietnam and Malaysia are the only two countries to see a statistically significant improvement in their Corruption Perceptions Index score. However, on a scale of 0 (highly corrupt) to 100 (very clean), Vietnam is still among two-thirds of the world's countries to score below 50.

Consistent with the United Nations Convention against Corruption, to which Vietnam is a party, the Vietnamese Penal Code and the Law on Anti-Corruption criminalise both public and private sector corruption. In particular, acts such as attempted corruption, abuse of office, as well as active and passive bribery are prohibited. Punitive measures range from fines to capital punishment, depending on the severity of the offence. Recently, several defendants have been convicted in high-level bribery court cases, however, the overall impact of corruption is still high.

Under the 2015 Penal Code, the threshold for a gift subject

to criminal bribery is VND2 million. This amount applies to material interests but not to non-material interests which are not defined. However, these are generally understood to be related to sexual relationships, promotions, privileged information, etc.

The privatisation of SOEs, also called equitisation, helps to reduce corruption while also increasing efficiency. These enterprises often have a no-profit mentality, which invites corruption and makes the companies less competitive in a market economy.

15. MONEY LAUNDERING

The current Law on Anti-Money Laundering has been effective since 1 January 2013. It requires businesses to report transactions over a certain threshold and suspicious transactions to the Financial Intelligence Unit within the SBV. In addition, certain businesses need to check the identity of their clients in certain transactions. Failure to comply with these legal provisions may result in a number of sanctions, ranging from monetary fines to prison terms and, in some cases, a ban on holding certain professional positions for a particular amount of time. It is also important to note that violation of this law by an employee could result in corporate criminal liability.



CORPORATE CRIMINAL LIABILITY

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16. CORPORATE CRIMINAL LIABILITY

16.1 Introduction

On 1 January 2018, a new Penal Code came into force bringing Vietnamese law more into line with international standards. Now, a broad range of violations can lead to criminal liability for a business. Certain violations- particularly those committed by individual employees- may not lead to criminal liability, however, they may still damage the business' reputation. It is important to note that violations on tax, competition, the environment, business, and trading- while not criminal acts- can be administratively sanctioned both for individual and corporate entities. The main difference between the two systems is that the statute of limitations under the administrative procedure is much shorter and the punishments are lower.

16.2 Corporate Criminal Liability

Not all criminal offences by individual employees lead to criminal corporate liability. The Penal Code contains two articles that set out the offences leading to corporate criminal liability, and each respective applicable article also includes information on criminal corporate liability. For example, corporate criminal liability is introduced for offences such as insurance fraud, tax evasion, violation of competition regulations, financing terrorism, money laundering, pollution, manufacturing of counterfeit products, violation of IPR laws, violation of several food safety laws, and corruption. It is important to note that bribery is excluded.

16.3 Conditions

For a company to be held criminally responsible, certain conditions need to be met. The first is that only a commercial juridical person can be criminally responsible. According to the Civil Code, "[a] commercial juridical person means a juridical person whose primary purpose is seeking profits and its profits shall be distributed to its members and include enterprises and other business entities". Therefore, only legal entities that make a profit can be criminally responsible, regardless of their business line or company nature.

The second requirement under the Penal Code is two-fold. It states that a commercial juridical person can be criminally responsible if it can be proven that the criminal offence has been committed in the name and the interests of that person and is under their instruction or approval. A criminal prosecutor has to prove these requirements before a commercial juridical person can be found criminally responsible.

16.4 Criminally Liable Entity

The Penal Code applies to both a foreign and/or Vietnamese commercial juridical person. However, for a subsidiary, the parent company will not be responsible as it is an independent entity. Meanwhile, for a representative office or branch, the parent company could be responsible as they are not independent legal entities. In the Penal Code, there is no provision on criminal offences committed in a corporate group (parent and subsidiary). So, it is not clear yet under what conditions the foreign parent company could be held criminally responsible for offences committed by directors, managers, or representatives of local Vietnamese entities.



If a convicted commercial juridical person is divided, separated, consolidated or merged, the succeeding corporate legal entity will inherit rights and duties from the convicted corporate legal entity and will be responsible for any pecuniary penalties and damages. The fact that a corporate legal entity is criminally liable does not exempt the criminal liability of an individual.

16.5 Territorial Scope

The Penal Code states that any Vietnamese citizen or corporate legal entity may be held responsible for crimes defined under the code committed either inside or outside of Vietnam. The new Penal Code also provides that a foreign corporate entity shall be subject to criminal responsibility for offences committed abroad if the offence infringes the lawful rights and interests of Vietnamese citizens, the interests of Vietnam, or interests under an international agreement to which Vietnam is a signatory.

16.6 Criminal Liability for Legal Representatives

A legal representative may be charged with certain violations of the 2019 Labour Code regarding the dismissal or laying off of staff; forcing someone to resign; anti competitive behaviour; or evasion of social, unemployment, or health insurance payments. Furthermore, it is important to understand that, in Vietnamese law, there is no relevant provision dealing with the liability of directors or managers for not adopting (intentionally or negligently) measures to prevent a crime. However, according to the Penal Code, any person (with some exceptions) who conceals a crime or who knows that a crime is being prepared, being carried

out, or has happened but fails to report it could be criminally responsible.

16.7 Punishment and Additional Measures

Depending on the offence and the person or entity having committed it, punishment can be a monetary fine, restraining measures, a forced suspension or termination of business operations, or a ban on conducting certain business activities and/or raising capital. Punishments can be higher where there are aggravating circumstances such as recidivism, crimes committed in a professional way or by a group, abuses of power and position, or offences committed in the name of an agency or organisation. In these cases, possible additional measures include: compulsory dismantling of works, compulsory removal from Vietnam's territory, destruction of goods, bans and confiscatory measures.

LEGAL SYSTEM AND DISPUTE RESOLUTION

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17. LEGAL SYSTEM AND DISPUTE RESOLUTION

17.1 Legal System

The Vietnamese legal system consists of a Constitution, Codes, Laws, Ordinances, Decrees, Decisions, Circulars, Directives, and Resolutions. Codes, Laws, and Ordinances are referred to by name. However, Decrees, Decisions, Circulars, Directives, and Resolutions are usually referred to by their number, signing date, and the acronym of the issuer.

Legal texts are published in the Official Gazette. Decrees and Circulars contain guidelines to implement Laws, Codes and Ordinances. Local governmental agencies may also issue Official Letters further guiding the implementation of any of these pieces of legislation.

ISSUER	DOCUMENT
National Assembly	Constitution, Law, Code, Resolution
Standing Committee of the National Assembly	Ordinance, Resolution
President	Directive, Decision
Government	Decree
Prime Minister	Directive, Decision
Ministries and their equivalent State Agencies	Circular
Justice Council of the Supreme People's Court	Resolution
Chief Justice of the Supreme People's Court and Head of the Supreme People's Prosecutor	Circular
State Audit Office of Vietnam	Decision
People's Council	Resolution
People's Committee	Decision

However, even though the legislative system is fully developed and adequate in principle, uncertainty lingers in practice. This is due to imprecise, unclear, and overlapping guidance throughout the hierarchy of legal texts. For instance, the implementing guidelines of former laws often continue to apply even after new laws have superseded their parent legislation. Furthermore, the ranking of legal texts is not always observed in practice, with Circulars prevailing over Decrees and even Laws, in some cases.

Another aspect to consider in the Vietnamese legal system is the vast degree of administrative discretion, as authorities have significant interpretative authority. In this context, practice can be as important as the literal reading of a text when there is relatively little transparency or accountability. The fact that regulations are mostly passed at the central level, while their implementation, administration, and enforcement are mainly decentralised, only adds to this uncertainty. This means that, in practice, the legal system is a heavy and costly administrative burden on foreign investors and remains one of the key deterrents.

17.2 Governing Law

Business investment activities in Vietnam must comply with Vietnamese law including, amongst others, the Law on Investment and the Law on Enterprise. Parties can choose a different law to govern their contract(s) under certain circumstances, (e.g., if at least one party is a foreign investor).

17.3 Dispute Resolution

17.3.1 Court system

The Constitution of Vietnam governs the country's judicial system, together with the Law on the Organisation of People's Courts and the Law on the Organisation of People's Procuracies.

Vietnam is a one-party socialist republic. The judiciary falls under the leadership of the Communist Party of Vietnam and is accountable to the National Assembly. Judges and procurators are all members of the Party.

The Supreme People's Court is the country's highest court. Below that, there are three levels of People's Courts:

- The high People's Courts;
- The provincial-level People's Courts; and
- The district-level People's Courts.

The High Courts in Hanoi, Da Nang, and HCMC are appellate and cassation courts respectively responsible for the northern, central, and southern regions of the country. The provincial courts are both trial and appellate courts, while district courts are trial courts.

Business, commerce or labour-related cases where one party or the related asset is located offshore, or which require judicial assistance by an overseas representative agency of Vietnam, foreign court, or other foreign competent authority are generally subject to the jurisdiction of the provincial court.

There is a people's procuracy for every People's Court.

The people's procuracies are the prosecutorial authority and are responsible for supervising and inspecting judicial compliance by government agencies, officials and other people in Vietnam.

Recently, case law has been more developed and applied in Vietnam's judicial bodies. For instance, Resolution 04/2019/NQ-HDTP of the Justice Council of the Supreme People's Court requests courts, regardless of their hierarchical level in the system, to review and recommend their own precedent court judgements and decisions for the Supreme People's Court to consider and develop into official case law. Moreover, it is stipulated that court judges must ensure the application of case law in their judgements and decisions so that matters falling within similar legal circumstances are resolved in the same way. It is important to note that case law is only binding after it has been selected and announced as a precedent in accordance with the law. As of 12 March 2021, there were 43 decisions officially announced by the Chief Justice of the Supreme People's Court as precedent. Such precedent cases present diverse subject matters in legal areas such as criminal law, inheritance law, contract law, labour law, insurance and real estate law.

17.3.2 Enforcement

A court judgment or decision, if not voluntarily enforced by the losing party, may be referred to the civil judgment enforcement agency. Enforcement of a judgment or decision is time-consuming as there is an overload of cases that need to be enforced.

17.3.3 Mediation

Vietnam is not a litigious society and a large number of disputes are resolved outside court. Vietnamese laws also highly emphasise the role of mediation and, in certain contexts, it is a mandatory part of a litigation procedure such as for civil, labour, marriage and family litigations. Indeed, Vietnamese laws set out different mechanisms for mediation such as out-of-court and in-court mediation. Generally speaking, out-of-court mediation is conducted outside the courtroom and is independent from orthodox litigation proceedings convened by the court. Meanwhile, in-court mediation is required to take place at civil courts during the course of instance trial.

Apart from the out-of-court and in-court mediation mentioned above, following a successful pilot scheme of pre-proceeding mediation and negotiation at courts in resolving civil and administrative disputes from March 2018, the Law on Mediation and Negotiation at Courts came into force on 1 January 2021. The mediation or negotiation will be performed voluntarily before the courts are to accept jurisdiction in the case as required under the laws on civil or administrative proceedings. The court's decision recognising the result of a successful mediation shall be legally valid and cannot be appealed. However, it may be reviewed if it has been created without satisfying the relevant proceeding conditions.

17.3.4 Arbitration

Arbitration is an alternative to dispute resolution in Vietnam but is restricted to governing commercial disputes. A domestic arbitration award is automatically enforceable and, therefore, unlike a foreign arbitral award, does not have to be recognised first to be locally enforceable. There are currently more than 30 domestic arbitral institutions operating in Vietnam, according to the Ministry of Justice on its official website (<https://btp.moj.gov.vn>). The most well-known Vietnamese arbitration institution is the Vietnam International Arbitration Centre (VIAC) at the Vietnam Chamber of Commerce and Industry.

Foreign investors tend to refer to foreign arbitration due to a lack of confidence in the capability and transparency of Vietnamese courts. Since Vietnam has joined the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, arbitration clauses agreed between the parties have to be respected. However, Vietnamese courts are still entitled to decide whether or not a foreign arbitral award can be recognised and deemed enforceable in Vietnam within certain boundaries.

As a result, it is worth noting that, in practice, Vietnamese courts may reject the enforcement of an award on the grounds that it "is not in line with basic principles of Vietnamese law". This may be even more frustrating for litigious companies when the interpretation of the basic principles of Vietnamese law was addressed in the underlying proceedings. This, in turn, leads to a frequent reopening of cases which adversely affects all parties to the trial. Even when an arbitral award is accepted it can often take years to actually enforce it in Vietnam.

Therefore, investors would be well advised to anticipate this issue with local enforcement and try to steer clear of any legal disputes. This can be done through careful preparation and negotiation of the underlying agreements and very close control of their Vietnamese counterparties.

17.3.5 Dispute Resolution in Investment Treaties

In 2018, Vietnam joined the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). The CPTPP came into effect in Vietnam on 14 January 2019 and is expected to open significant opportunities for foreign investors who may take advantage of favourable incentives established by the agreement to build up lucrative businesses in Vietnam.

In particular, amongst others, for securing equality and transparency in dispute resolution related to investment activities of foreign investors of member countries, the CPTPP sets out its own specific dispute resolution mechanism by which investors can initiate a claim against invested member states. Under the CPTPP, parties in dispute are requested to initially attempt to settle disputes in an amicable manner - i.e., consultation and negotiation - before taking recourse to arbitration. If the dispute has not been resolved within six months of the respondent receiving a written request for consultation, the claim can be submitted for arbitration under the ICSID Convention, ICSID Additional Facility Rules, UNCITRAL Arbitration Rules, or rules of other arbitration institutions subject to the parties' agreement.

The issuance and enforcement of a tribunal award shall be subject to the conditions and requirements stipulated under the CPTPP. This includes, among others, that the investor may only claim losses or damages that have been incurred in its capacity as an investor. The tribunal may also award costs and attorney's fees incurred by the investor in connection with the arbitral proceedings. However, the tribunal may not award any punitive damages, as this is not aligned with the stipulations of the treaty. Nevertheless, it is worth noting that, where the investor submits the claim to a court or administrative tribunal of Vietnam, that selection shall be definitive and exclusive. Consequently, the investor may not submit the claim to arbitration under the CPTPP thereafter.



ABOUT ACSV LEGAL

ACSV Legal is a vibrant and dynamic, Vietnam based law-firm, located in Ho Chi Minh City with unparalleled domestic expertise. We have one of the premier Corporate / M&A practices in Vietnam and we have extensive experience in private equity transactions with a strong commercial focus. We have advised various clients on (re-)structuring their businesses in the light of investments in or outside Vietnam.

Our clients are typically businesses within South-East Asia which are experiencing significant growth, as well as leading international and local corporations who need advice on a broad array of multi-jurisdictional transactions. We have advised our clients on matters in a wide range of sectors and industries such as healthcare, beauty and fitness, pharmaceutical, food and beverage, IT and technology, hospitality and leisure, education, retail, manufacturing and distribution, apparel and fashion, Fintech and payment services.

We have a team of experienced lawyers who are qualified in Vietnam, the UK, the US, Germany, and Malaysia in civil and common law jurisdictions. The languages spoken at ACSV Legal include Vietnamese, English, German, Japanese, Italian, Dutch, French and Malay.

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