

Intellectual Property Transactions in Vietnam: Overview

by Linh Thi Mai Nguyen, Thanh Phuong Vu, Chi Lan Dang and Son Thai Hoang, *Tilleke & Gibbins* and Duc Anh Tran, T&G Law Firm LLC (TGVN) (local firm affiliated with Tilleke & Gibbins)

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A guide to intellectual property transactions law in Vietnam. The Q&A gives an overview of maintaining an IP portfolio, exploiting an IP portfolio through assignment and licensing, taking security over IPRs, IP and M&A transactions, and the impact of IP on key areas such as competition law, employees and tax.

IP Assignment

Assignment Basis and Formalities

1. On what basis can the main IPRs be assigned? What formalities apply?

Patents

Basis for patent assignment. Patent rights can be assigned in whole or in part. Pending applications can also be assigned (Articles 115 and 138, Law on Intellectual Property (IP Law)).

Formalities for patent assignment. Patent assignments must be in writing (Article 138, IP Law). The assignment is only valid when it is recorded with the *Intellectual Property Office of Vietnam* (IPO). For recordal, the assignment agreement must be signed by both parties. Notarisation is not required if the original deed of assignment is submitted. The assignment agreement must contain mandatory information and terms (Article 140, IP Law .)

As a patent assignment is only effective between the parties and against a third party when it is recorded by the IPO, it should be recorded as soon as possible for the benefit of the parties.

Utility Models

See above, *Patents*.

Trade Marks

Basis for trade mark assignment. A trade mark can be assigned in whole or part, for all or some of the goods/services. The assignment must be for all of Vietnam, not just a part of Vietnam (Article 138, IP Law).

A trade mark assignment must not cause any confusion about the ownership or origins of the goods or services bearing that mark.

Trade mark rights can only be transferred to either a person or an entity that satisfy conditions to register the mark, as set out in:

- Article 139.4 of the IP Law, which provides that "The assignment of the rights to marks must not cause confusion as to properties or origins of goods or services bearing such marks".
- Article 139.5 of the IP Law, which provides that "Rights to marks may only be assigned to organizations or individuals who satisfy conditions for persons having the right to register such marks".

Trade marks must be assigned with goodwill.

Formalities for trade mark assignment. See above, *Patents*.

Copyright

Basis for copyright assignment. Copyright can be assigned in whole or part.

All co-owners of a work, performance, audio-visual recording, or broadcast must agree on a copyright assignment. If it consists of separate parts detachable for independent use, copyright holders or related right holders can assign their rights in their separate parts to other organisations or individuals.

Moral rights, except for the right of publication, cannot be assigned. Performers cannot assign their moral rights (Article 29.2, IP Law).

A moral rights' waiver clause is recommended to be included in a copyright assignment, though the validity of such a clause remains untested before the courts and local authorities.

Formalities for copyright assignment. A copyright assignment must be in writing signed by both parties and contain the following mandatory information:

- Names and addresses of the assignor and the assignee.
- Assignment basis.

- Payment price and mode.
- Rights and obligations of the parties.
- Liability for contractual breaches.

(Article 46, IP Law.)

Copyright assignment is valid between the concerned parties and third parties even without recordal at the Copyright Office of Vietnam (COV). Recordal of copyright assignment is optional.

Design Rights

Basis for design rights assignment. See above, *Patents*.

Formalities for design rights assignment. See above, *Patents* (Articles 138 and 140, IP Law)

Trade Secrets and Confidential Information

Basis for assignment. Trade secrets and confidential information can be assigned in whole or in part in accordance with provisions on contracts under the Civil Code of Vietnam.

Formalities for assignment. Vietnam's IP Law and subordinate legal documents are silent on formalities for assignment of trade secrets and confidential information. It is recommended to have the assignment agreement in writing, with appropriate provisions to maintain confidentiality.

Domain Names

No formalities are required. An assignment of domain names should be in writing because the assignor must submit an assignment of domain name application to the domain name registrar.

The *Vietnam Internet Network Information Center* (VNNIC) under the Ministry of Information and Communications is responsible for registration of ".vn" domain names.

Main Terms for Assignments

2. What main terms should be included in an assignment of IPRs?

An assignment of IPRs must include several mandatory terms, including:

- Price (consideration), which must be specifically indicated.
- Names and addresses of the parties.
- Details of the assigned works.
- Rights and obligations of the parties.

(Article 140, IP Law.)

A moral rights consent clause and/or a waiver can be included in a copyright assignment. However, to date, whether a consent clause and/or a waiver is valid has not been tested before the courts.

IP Licensing

Scope and Formalities for IP Licensing

3. On what basis can the main IPRs be licensed? What formalities apply?

Patents

Scope of a patent licence. A patent licence can be exclusive, non-exclusive, or sole (Article 143, IP Law). A pending application cannot be licensed.

Compulsory licensing is available (Article 145, IP Law).

Patents can be licensed in whole or part. Licences can include territorial and term restrictions (Article 143, IP Law).

Formalities for a patent licence. A patent licence must be in writing (Article 141, IP Law) and signed by both parties. Notarisation is not required if the original licence agreement is submitted. The licence agreement must contain certain mandatory information and terms, and must not contain provisions that unreasonably restrict the licensee's rights (Article 144, IP Law).

A patent licence is effective as agreed by the parties but it must be registered at the IPO to be effective against a third party (Article 148.2, IP Law).

As a patent licence is only effective against a third party when it is recorded by the IPO, it should be recorded as soon as possible for the benefit of the parties.

Utility Models

See above, *Patents*.

Trade Marks

Scope of a trade mark licence. A trade mark licence can be exclusive or non-exclusive. A trade mark licence can include jurisdictional and territorial restrictions. An industrial property object licence contract must contain the principal contents of the licensing scope, including limitations on use right and territorial limitations (Article 144, IP Law).

Only registered trade marks can be licensed.

A trade mark can be licensed in whole or part (for all or some of the goods/services for which it is registered), provided that the licence does not cause confusion to customers as to the owner of the mark after licensing.

Trade marks must be licensed with goodwill.

Formalities for a trade mark licence. A trade mark licence must be in writing, signed by both parties, as regulated under Article 141.2 of the IP Law which states: "Licensing of industrial property objects must be established in the form of a written contract".

A licence is valid between the parties on signing and is valid without registration with the IPO or any other authorities.

Parties wishing to register a trade mark licence must do so during the validity period of the licensed trade mark. It was common to register trade mark licences with the IPO when the recordal was mandatory for the licence to be effective with third parties. However, currently this requirement no longer exists and fewer licence agreements are recorded at the IPO. However, recordal at the IPO may be beneficial to the trade mark owner and its licensee in proving rights for enforcement and defending a non-use cancellation claim.

The IP Law, as revised after Vietnam signed the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), eliminates the requirement to register a trade mark licence to establish its validity against third parties (Article 18.27). In other words, a grant of international trade mark licensing rights is not required to be registered with any relevant IP authorities, including the IPO.

Copyright

Scope of a copyright licence. Copyright can be licensed on an exclusive, non-exclusive or sole basis.

Copyright can be licensed in whole or part. The licence can include jurisdictional restrictions and time limits.

All co-owners of a work, performance, audio-visual recording, or broadcast must agree on licensing of the copyright and/or related rights. If it consists of separate parts detachable for independent use, copyright holders or related right holders can license their rights in their separate parts to other organisations or individuals.

Under Article 47.1 of the IP Law, authors can grant a licence of the right to name the work to the owner of a corresponding work. Publication rights can also be licensed. Authors or performers cannot license the other moral rights specified in Articles 19.2, 19.4, and 29.2 of the IP Law.

It is unclear whether moral rights can be waived. While a moral rights waiver clause can be included in a copyright licence, the validity of such a clause remains untested before the courts and local authorities.

Formalities for a copyright licence. A copyright licence must be in writing and signed by both parties, and include the following terms:

- Full names and addresses of the licensor and licensee.
- Grounds for the licence.
- Scope of the licence.
- Price and method of payment.
- Rights and obligations of the parties.
- Liability for contractual breach.

(Article 48, IP Law.)

Terms relating to performance, amendment, termination, and cancellation of the licence must comply with the Civil Code.

A copyright licence is valid between the concerned parties and third parties. There is no regime for recordal of a copyright licence before the COV.

Design Rights

Scope of a design rights licence. A design licence can be exclusive, non-exclusive, or sole (Article 143, IP Law). A pending application cannot be licensed.

Design rights can be licensed in whole or part. A licence can include territorial and term restrictions.

Formalities for a design rights licence. See above, *Patents*.

Trade Secrets and Confidential Information

Scope of a licence. See above, *Patents*.

Formalities for a licence.

Vietnam's IP Law and subordinate legal documents are silent on the formalities required for a licence of trade secrets and confidential information. It is recommended to have a licence agreement signed by both parties in writing, with appropriate provisions to maintain confidentiality.

Main Terms for Licences

4. What main terms should be included in an IP licence?

An IP licence must include the following terms:

- Names and addresses of the parties.
- Information to identify the licensed IPRs.
- Type, scope (including territorial scope), term, and price of the licence.
- Rights and obligations of the parties.
- Signatures of the parties' representatives.

(Article 144, IP Law.)

Research and Development Collaborations

Improvements and Derivatives

5. How should research and development collaborations address improvements and derivatives?

An IP licence must not have provisions that unreasonably restrict the licensee's rights. In particular, it must not include provisions that do not derive from the licensor's rights, such as:

- Prohibiting the licensee from improving the IP (other than trade marks).
- Binding the licensee to transfer any improvement of the IP by the licensee to the licensor at no expense to the licensor.

(Article 144.2, IP Law.)

In other words, the law provides that the licensee owns IPRs in their improvements. The law does not allow a licensor to restrict or prohibit the use of improvements to which the licensee may have contributed.

Improvements/derivatives must be clearly defined in the licence.

Vietnamese law does not have any restrictions on the creation of improvements/derivatives.

Unless there is a contractual provision stating otherwise, the creator of improvements or modifications to a licensed object owns the improvements and modifications. Separate terms are not necessary.

If ownership of improvements/derivatives automatically vests in a particular party, there must be separate terms permitting use or access by the other parties.

If improvements/derivatives are created by the licensor or jointly created by the licensor and licensee, an assignment of improvements/derivatives from the licensor to the assignee, coupled with a non-exclusive licence back to the assignor, would be a good way for both parties to be able to continue to use the improvements/derivatives.

Joint Ownership of IP

6. How does joint ownership of IP arise?

Generally, joint ownership of IPRs can arise by operation of law. For example, if there is a co-operative arrangement between two companies to create or develop a computer software program that enjoys copyright protection under the IP Law, the two companies can be recognised as joint owners.

It is not common for companies to set up joint ventures, unless they are operating in a field where the government requires a joint venture, such as telecommunications. When a joint venture is set up, the joint venture agreement often provides that ownership of IPRs is not transferred to the joint venture partner but remains with the original owner.

Most companies that are heavily involved with IPRs set up 100% foreign-owned companies. This not only protects their IPRs but also ensures control of the company's management.

7. What key issues arise in terms of the parties' rights to exploit and enforce jointly owned IP? How should these issues be dealt with in the agreement between the parties?

Exploiting and Enforcing Jointly Owned IP

Joint owners are entitled to use their IPRs equally.

Co-owners of IP must jointly act when they want to deal with that IP (including licensing or assigning it to a third party or using it as security).

If a licence of co-owned IP has not been signed by all the co-owners, their signed written consent to the licensing of the IP must be given to enable the licence to be recorded at the IPO. The co-owners cannot change this position by contract.

However, where the joint ownership is of a work, performance, audio-visual recording, or broadcast consisting of separate parts detachable for independent use, copyright holders or related rights holders can license their rights in their separate parts to other organisations or individuals. In this case, each co-owner can deal with its separate part as it wishes, without the consent of the other co-owners.

IPR holders can bring a lawsuit or an arbitration proceeding to protect their legitimate rights and interests (Article 198.1(d), IP Law).

Joint Ownership Provisions in Collaboration Agreements

Joint ownership provisions in collaboration agreements should be as detailed as possible, especially on matters relating to:

- Information to identify licensed IPRs.
- Type, scope (including territorial scope), term, and price of a licence.
- Royalties from licensing and other exploitation.
- Prosecution and renewal.
- Enforcement.
- Termination of co-operation.

To avoid any issues in enforcing IPRs in the event of infringement, the agreement must also clearly specify who is responsible for initiating enforcement actions.

Background IP refers to IP relevant to a collaborative venture or open innovation project supplied by the partners at the start of the project. Ownership of background IP is usually retained by the owner or the party with control of the use of the IPRs before the collaboration project started.

Foreground IP refers to all IP produced by the collaborative venture or open innovation project during the term of the project. Foreground IP is generally shared and considered jointly owned.

IP Audit

8. What are the main steps in conducting an IP audit in your jurisdiction to determine the content of an IP portfolio?

Patents

The main step in an IP audit in Vietnam to determine the content of an IP portfolio is to verify that the IPRs (including patents) are still in force by searching the databases of the IPO and *WIPO*.

Additionally, it is necessary to determine whether all licences, assignments, and amendments have been properly recorded with the IPO. A search of all registrations or applications in the name of the target company or owner must be requested.

Utility Models

See above, *Patents*.

Trade Marks

See above, *Patents*.

Copyright

The main step in a copyright audit in Vietnam to determine the content of an IP portfolio is to verify whether there is any existing identical or confusing similar IPRs through a search on the COV's database *on its website*. However, this database is not always up to date and search results may not be reliable or exhaustive. Additionally, the content of copyrighted work is not available on this database. For more accurate results, a search can be conducted on the COV's internal database by using an IP adviser's services.

Design Rights

See above, *Patents*

Trade Secrets and Confidential Information

Trade secrets are established based on their lawful acquisition and confidentiality. IP audits for this type of right (determining whether trade secrets and/or confidential information are in force and searching for related licences, assignments, and amendments) might not be available or easily accessible.

IP Aspects of M&A

IP Due Diligence

9. What IP-related due diligence is commonly carried out in both a share sale and an asset sale?

Share Sale or Merger

The same type of IP related due diligence is carried out in a share sale and an asset sale. Generally, due diligence includes:

- Checking the validity of IP registrations.
- Checking whether the target's products infringe third-party IPRs.
- Reviewing licences to ensure they have been properly registered.

For trade marks, it is advisable to examine whether they have been used in Vietnam. A trade mark can be cancelled for non-use if it is not used in the five-year period before an action is brought for cancellation based on non-use.

Additionally, it is necessary to check product registrations with health authorities for products such as cosmetics, food, and pharmaceuticals.

Asset Sale

See above, *Share Sale or Merger*.

Warranties/Indemnities

10. What IP-related warranties are commonly given by the seller to the buyer in both a share sale or merger and an asset sale?

Share Sale or Merger

In both a share sale and an asset sale, the seller generally provides a warranty that it has good title to the IPRs.

Asset Sale

See above, *Share Sale or Merger*.

Transfer of IPRs

11. How are the main IPRs transferred in both a share sale and an asset sale?

Share Sale or Merger

In current practice in Vietnam, a transfer of IPRs in a share sale and an asset sale is often treated as an assignment of IPRs, while a transfer of IPRs in a merger is treated as an amendment of IPR ownership.

After a transfer, if the owner of the IPRs changes, the assignment or amendment must be recorded with the IPO. If there is no change in the name of the owner of the IPRs, but only a change in the shareholder of the entity holding the IPRs as in a share sale, it may not be necessary to record the assignment/amendment agreement with the IPO.

For information on formalities to assign each of the main IPRs, see *Question 1*.

Asset Sale

See above, *Share Sale or Merger*.

Lending and Security Interests

12. Can security be taken over IPRs?

It is rare to take security over IPRs (registered or unregistered) in Vietnam but it is not legally prohibited. There have been cases of security being taken over copyright and trade marks.

There are no guidelines on valuing IPRs, and authorities are often sceptical of IPR valuations.

The Law on Enterprises 2020 provides that IPRs are considered assets and can be used to contribute to a company's capital.

13. What are the main security interests taken over IPRs and how are they created and perfected?

The main security interests taken over IPRs (patents, utility models, trade marks, copyright, and design rights) are a pledge and a mortgage. Security interests taken over IPRs must be registered with the *National Registration Agency for Secured Transactions (NRAST)* under the Ministry of Justice. The following documents must be submitted:

- Request in the prescribed form.
- Power of attorney if the request is filed by an IP agent.
- A security document signed by the parties, such as a security agreement, security transaction, or notification of distrained assets if the request in the prescribed form is not signed by both parties.

The authors are not aware of any trade secrets and confidential information having been registered for a pledge and a mortgage at the NRAST. Theoretically, trade secrets and confidential information might be entitled to be so registered at the NRAST.

Settlement Agreements

14. What are the main considerations when entering an IP litigation settlement agreement?

If the IP holder's goal is to profit from the unauthorised use of its IPR, a grant of a licence to the infringer in exchange for royalties, back-royalties, and/or a settlement fee is a settlement option.

To conclude a civil proceeding, the parties can sign a settlement agreement in the presence of a judge. Within seven days from the date of settlement, if there is no opposition to the agreement, the court issues a decision on recognising the settlement to conclude the case.

In principle, the court resolves the case based on the claimant's claims. The court does not review any matter outside such claims. If the parties have disputed the matter in another jurisdiction, the court is not obliged to review it.

Costs

In Vietnam, the court calculates and fixes the amount of court fees, including for any settlement process, after they issue a notice on accepting the case. This means there are no separate fees for a settlement process.

Typically, the parties negotiate to choose who will pay the court fees during the settlement. However, if the parties can settle the dispute through mediation arranged by the court before the first-instance trial, they only have to pay 50% of the fee for the first-instance trial. Costs incurred before commencing litigation are borne by the claimant.

In IP litigation, attorney fees can only be claimed in court. The parties are not required to involve the court in the allocation or calculation of legal costs.

The court must provide grounds for the parties to settle agreements at any time during the litigation process. The settlement agreement must be made by mutual consent, without falsification or coercion. Otherwise, the agreement can be challenged in the cassation procedure. This applies to all types of disputes.

If the parties can settle the agreement before the first-instance trial or during the litigation process, the court issues a decision recognising the settlement which has immediate effect. The litigation is then closed, so the settlement agreement terms are kept confidential.

Enforcement

There is no special mechanism to enforce a settlement agreement more efficiently or more quickly than the normal mechanism to enforce any other type of contract. If a party breaches the settlement agreement, the non-breaching party can initiate a fresh lawsuit.

Under Article 144 of the IP Law, a licence cannot include a no-challenge clause. Such a clause will be found invalid if the court reviews the licence.

In addition, the IP Law prohibits provisions that unreasonably restrict the licensee's rights, particularly those that do not derive from the licensor's rights (see *Question 17*).

Competition Issues

The Competition Law contains various provisions that could restrict settlement agreements. This includes prohibiting agreements that provide for an exclusive arrangement, or non-competition restrictions, where the parties have a dominant position in the relevant market or such agreements have or potentially have the effect of significantly restricting competition in the market in Vietnam, unless the transaction is exempt under the law.

Employees and Consultant Agreements

Employees

15. Who owns each of the main IPRs created by an employee in the course of employment?

Ownership

Generally, based on Article 39 of the IP Law, an employer owns the IPRs created by an employee in the course of employment if the employer has assigned the task of creating the work to that employee. To avoid any potential conflict, the task must be specifically assigned and clearly indicate the works to be created.

In terms of copyright, the employee retains moral rights, including the right of attribution and the right to integrity of the work. It is unclear whether moral rights can be waived but it is prudent to ask the employee to sign a waiver of any moral rights.

Compensation

In relation to invention and industrial design patents created in the course of employment, the employer must pay the employee (Article 135, IP Law):

- 10% of the profits received from use of the invention or industrial design.
- 15% of royalties received from licensing the invention or industrial design.

However, the parties can waive these statutory licensing rates or agree different rates.

For copyright, the IP Law does not require an employer to pay compensation to an employee for ownership of copyright to works created by the employee in the course of employment.

Main Steps

To avoid disputes with employees about IPR ownership, a business can enter into an agreement under which works created by its employees are work-made-for-hire. This can also be done through the employer's internal labour rules or labour contracts, stating that the employer owns all IPRs created by the employee.

Consultants

16. Who owns each of the main IPRs created by an external consultant?

Ownership

Generally, an organisation/individual that has supplied funds and material facilities to authors in the form of a job assignment or hiring is the owner of any resulting IPRs, unless otherwise agreed by the parties.

Main Steps

To ensure it owns each of the main IPRs and avoid any potential dispute over IPR ownership, a business must carefully draft its contract to fully cover its rights and interests, especially in the provisions related to:

- Scope of assignment (which should be specified).
- Payment.
- Parties' rights and interests in the ownership of the created IPRs.

Key Issues in IP Transactions

Competition Law

17. What are the most common national competition law issues that arise in the exploitation of the main IPRs?

Vietnamese competition law in relation to IPRs is not well developed. However, authorities often refuse to record licences if there are terms and conditions that are considered unfair. Under the IP Law, a licence must not contain provisions that

unreasonably restrict the licensee's rights. In particular, a licence must not include the following provisions that do not derive from the licensor's rights:

- Prohibiting the licensee from improving the IP (other than trade marks) or compelling the licensee to transfer free of charge to the licensor improvements made by the licensee or IPRs to them (see *Question 5*).
- Directly or indirectly restricting the licensee from exporting goods produced or services provided under the IP licence to territories where the licensor neither holds the respective IPR nor has an exclusive right to import such goods/ services.
- Compelling the licensee to buy all or a certain percentage of raw materials, components, or equipment from the licensor or a third party designated by the licensor, except to ensure the quality of goods produced or services provided by the licensee.
- Prohibiting the licensee from complaining about or bringing lawsuits about the validity of the IPRs or the licensor's right to license.

Any of the above provision(s) is automatically invalid.

Products produced under a licence must clearly indicate on their packaging that the product was produced under licence.

Additionally, the following competition law provisions relate to IPRs, for example:

- Comparative advertising is not allowed.
- Misappropriation or imitation of a commercial indication of a competitor's product or services can be an act of unfair competition, subject to an administrative fine or civil action. A commercial indication can include trade dress, a trade mark, or other aspects of a product.
- Appropriation of a domain name can be an act of unfair competition under Vietnamese law.
- Any acts of abuse of a dominant or monopoly position by an enterprise which has significant market power created or established by the right to own or use IPRs will be prohibited (Article 24.1 and 26.1(g), Competition Law 2018).

18. What exclusions or exemptions are available for national competition law issues involving the exploitation of the main IPRs?

As competition law is not well developed in relation to IPRs not many exemptions are available (see *Question 17*).

Under the IP Law, parallel imports are allowed in Vietnam. However, many IPR holders can still act against parallel imports on non-IPR grounds, such as smuggling goods without invoices or with an unidentified origin or sources, improper labelling, or failure to meet registered product quality or specifications.

Tax

19. What are the main taxes payable by a licensor on the licensing of the main IPRs?

The main taxes payable by a licensor on the licensing of the main IPRs include:

- VAT (standard rate of 10%).
- Corporate income tax (CIT) (standard rate of 20%).

A foreign licensor without a business entity in Vietnam that generates income in Vietnam based on a licence with a Vietnamese licensee is considered a foreign contractor in Vietnam. All fees generated under such licences, including royalty fees, are subject to foreign contractor tax (FCT).

FCT consists of VAT and CIT as follows:

- VAT: 5%.
- CIT: the rate for royalty fees is 10% unless reduced under a tax treaty.

20. What are the main taxes payable by a seller on the sale or transfer of the main IPRs?

A sale of IPRs is subject to the same taxes as IP licences (see *Question 19*).

Non-Tariff Trade Barriers

21. Are there any non-tariff trade barriers affecting IP development and licensing transactions?

The authors are not aware of any non-tariff trade barriers affecting IP development and licensing transactions.

Contributor Profiles

Linh Thi Mai Nguyen, Head of Trade Marks Vietnam

Tilleke & Gibbins

T +84 24 3772 5559

F +84 24 3772 5568

E mailinh.n@tilleke.com

W www.tilleke.com

Professional and academic qualifications. Hanoi Bar Association; LLM, Franklin Pierce Law Center, University of New Hampshire; LLB, Hanoi Law University

Areas of practice. Trade marks.

Languages. Vietnamese, English

Professional associations/memberships. INTA Trademark Office Practices Committee; Asian Patent Attorneys Association (APAA); executive board of the Vietnam Intellectual Property Association (VIPA); VIPA International Co-operation Committee.

Thanh Phuong Vu, Patent Executive

Tilleke & Gibbins

T +84 24 3772 5571

F +84 24 3772 5568

E phuongthanh.v@tilleke.com

W www.tilleke.com

Professional and academic qualifications. Qualified IP Agent; LLB, Hanoi Law University; MEng (Chemical/Biomolecular), National University of Singapore; BEng (Biotechnology), Hanoi University of Technology

Areas of practice. Patents.

Languages. Vietnamese, English

Professional associations/memberships. APAA, VIPA.

Chi Lan Dang, Trade Mark Executive

Tilleke & Gibbins

T +84 24 3772 5612

F +84 24 3772 5568

E chi.d@tilleke.com

W www.tilleke.com

Areas of practice. Trade marks.

Non-professional qualifications. LLB, Hanoi Law University

Languages. Vietnamese, English

Professional associations/memberships. VIPA.

Son Thai Hoang, Trade Mark Executive

Tilleke & Gibbins

T +84 24 3772 5580

F +84 24 3772 5568

E son.h@tilleke.com

W www.tilleke.com

Areas of practice. Trade marks, Copyrights.

Non-professional qualifications. LLB, Hanoi Law University

Languages. Vietnamese, English

Professional associations/memberships. VIPA.

Duc Anh Tran, Legal Consultant

T&G Law Firm LLC (TGVN) (affiliated with Tilleke & Gibbins)

T +84 24 3772 8811

F +84 24 3772 8822

E duc.t@tgvn.vn

W www.tgvn.vn

Areas of practice. Trade marks; copyright.

Non-professional qualifications. LLM, Queensland University of Technology (Australia); LLB, Hanoi Law University

Languages. Vietnamese, English

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