

LEGAL BRIEFING

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Share Transfer Transaction or Real Estate Project Transfer?

In acquiring a real estate project, in case of foreign buyer, a common way usually is transfer of share, under which the buyer will acquire shares of the owners in the real estate project company in order to become the owner of the project.

This is legally feasible under the Law on Enterprises 2020 and Law on Investment 2020 since real estate business is not restrictive or prohibitive to foreign investments. It is only conditional and approval by competent authority is required. Procedurally, the foreign investor has to obtain an approval for contributing or buying shares or capital in companies in Viet Nam as required under Article 26 of Law on Investment 2020 before entering into the share transaction and registering the transaction with the investment management authority (provincial department of planning and investment or “DPI” for short). As the procedure is set under these laws, it may take 30 days for completion and foreign investor will be recognised in the corporate registration records as the lawful owners or shareholders of the project company.

While the transaction is not an issue under the Laws and with investment authorities in some provinces, it may become an issue and more complicated due to different interpretation by investment management authority in some provinces.

In particular, the authority argues that the transfer of 100% shares of the owners in the company can be interpreted as transfer of the project to new investors, and thus, this can be considered as a project transfer. As such, in their view, provisions or requirements on project transfer “should” be satisfied by the “share” transferee even in cases of share transfer, such as requirements on the legality of the project, (e.g. the project has been granted an approved master plan); or requirements on the capacity of the “share” transferee (e.g. the “share” transferee must be registered with business lines suitable with the development of the project), or so on as required under the Law on Real Estate Business 2014.¹ Some go further by requiring the “share” transferee to obtain an approval for project transfer by the provincial people’s committee as required under the Law on Real Estate Business 2014.² It follows that the foreign investors will be required to return the land to the State, and reapply for land allocation approval under due procedure from the competent authority in order to continue having entitlement in using and developing projects on land.³

In our opinion, the interpretation is wrong in legal perspective of the laws. By nature, transfer of shares is transfer (either partial or full) ownership of the company, while transfer of project is the transfer of ownership over asset. Transfer of assets happens between two entities

¹ Article 49, Law on Real Estate Business 2014

² Article 48.3 and Article 51, *ibid*

³ Article 51.3, *ibid*

already incorporated in Viet Nam while transfer of shares allows foreign investors to take over an existing company incorporated in Viet Nam and acquire management control therein with procedures as set forth under Article 26 of the Law on Investment 2020. Therefore, provisions of laws are different, and hence, relevant requirements are different.

In fact, the interpretation comes from the authority's concerns over the performance capacity of new owners when taking over the project company. However, these concerns are unnecessary and ill-grounded because the transaction brings no change to the project company's performance capacity in reality. Therefore, it is not sufficed to obtain a project transfer approval as required under the Law on Real Estate Business 2014 because the project company is still registered as a the project developer in all legal aspects.

If the developer (or the project company) fails to implement the project as approved in due schedule and process, there are sanctions by authorities under the Land Law and other laws. Thus, the authority in such provinces should not arbitrarily create more hurdles or requirements to investors.

Actually, we have been successful in explaining the differences between the two concepts, although it is sometimes not easy to get them through with our understandings. So, foreign investors in doing real estate businesses in Viet Nam should take into account of this risk as well in dealing with their transferors.

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