



# Interpreting new real estate statutes

Real estate funding is expected to increase further thanks to new rules on investment. **Tran Thai Binh, Nguyen Thi Phuong Thao, and Tran Huong Giang** at LNT & Partners analyse how the new rules can impact the market in the future.

**W**hile Vietnam has been an investment spotlight for its explosive real estate market in recent years, the complex web of legislation governing this area have by and large deterred foreign investors.

Vietnam passed the new Law on Investment 2020 and issued related Decree No.31/2021/ND-CP in March, providing details and implementation of the law, which stamp out barriers to certain domestic sectors, provide more incentives for desired investment projects, and attempt to ensure uniformity of the legal framework.

The Law on Investment 2020 detailed three methods of investors determination. First is an auction of the land use right in accordance with the laws on land. Competent authorities shall organise an auction of the land use right in a case of allocation or lease of land for implementation of a project, and where the proposed area of land for project implementation has already been cleared. Second is bidding for the selection of an investor. Authorities shall organise biddings to select investors for implementing the projects in the cases specified in Article 1 of the 2013 Law on Bidding, in which the investment projects using land are included. Third is investor determination regarding to the Law on Investment 2020 other than the above two methods.

For projects subject to in-principle approval and not

subject to auction or bidding, the competent authorities shall approve the investment in principle and concurrently approve the investor in several cases. Firstly, if the investor receives an assignment of, capital contribution portion or lease of an agricultural land use right to implement a project for non-agricultural production or business and the land is not subject to land resumption by the state in accordance with the laws on land.

Secondly, local authorities shall approve if the investor has the land use right, except for the case of land resumption by the state for purposes of national defence and security or the state resumes the land for socioeconomic development in the national or community interest.

The third factor is if the investor implements the investment project in an industrial zone or high-tech zone, and the fourth option involves other cases not subject to an auction or bidding in accordance with laws.

While the Law on Investment 2014 did not specify in detail methods of investor determination and approval, these methods were practically covered by pre-existing legislation. The Law on Investment 2020 simply consolidates these methods in its body.

In respect to the second method of investor determination, under the Law on Investment 2020 and Decree 31, for projects subject to investment

in-principle approval under laws on investment, competent authorities shall issue such approval before organising bidding to select investor implements the project.

The investor that succeeds in bidding shall conduct procedures for land allocation or land lease related to laws on land and laws on bidding, and implement the project in accordance with the in-principle approval and the decision accept the results of selection.

In addition, Decree 31 has lifted the barriers in relation to land allocation or land lease for land-using projects subject to bidding procedures. Prior to the effectiveness of such legislation, some local authorities rejected to allocate or lease land to the project enterprise established by the investor who succeeded in bidding, since there was no regulation clearly stipulating so.

However, Decree 31 amends Article 60 of Decree No.25/2020/ND-CP by replacing the phrases “the investor” and “the investor who succeeds in bidding” with “the investor who succeeds in bidding or the project” enterprise established by the investor who succeeded in bidding for implementing the project”.

### Conditions for investors

Under the Law on Investment 2020 and Decree 31, foreign investors shall have the same treatment as domestic investors, except in cases where such foreign investors seek to invest in organisations engaging in business lines with conditional market access; business lines with market access prohibition to foreign investors; or in economic organisations that have a certificate of land use rights on an island, at a border or coastal commune, or in another

area that affects national defence and security.

In general, foreign investors that purchase capital contribution or share capital in economic organisations engaging in real estate trading must meet several conditions. They include limitation on foreign ownership of contributed capital or share capital; conditions on forms and scope of investment; conditions on capacity of investors or partners participating in related activities; investment to ensure national defence and security; and investment to comply with regulations and conditions for receipt of land use rights and conditions for use of land on islands, at borders, or in coastal communes.

Further conditions involve utilisation of land, labour, and natural resources; manufacturing or supplying public goods and services or those currently a state monopoly; owning and trading houses and real estate; and applying forms of state support and subsidies to a number of branches, domains, or development of regions or territories.

Although not being mentioned in the Law on Investment 2014 specifically, in practice, all of the conditions have been strictly applied, except for the fairly new conditions relating to land in areas affecting national defence and security.

The Law on Investment 2020 focuses on the increase in foreign ownership in local companies. It has strictly controlled foreign investors by reducing the threshold for an enterprise to be treated as a foreign investment enterprise from “from 51 per cent and above” under Law on Investment 2014 to “over 50 per cent” under the new invest-

ment laws; which is apparently reasonable.

### Real estate transfer procedures

Prior to the Law on Investment 2020, this procedure is solely subject to the laws on real estate trading. For real estate projects issued with either investor approval regarding Article 29 of the Law on Investment 2020 or the Investment Registration Certificate related to Article 37, procedures will be implemented in accordance with the newer law.

For other real estate projects without the above-mentioned investor approval or an investment registration certificate (investment law transfer procedure), the investor shall follow procedures under the laws on real estate trading (real estate transfer procedures).

There are two notable changes in respect to the investment law transfer procedure. Firstly, it specifies a single government authority for application and contact which is the investment approval body. This is different from the real estate route where, depending on the case, the investor has to determine the authority to submit the application to.

For instance, the legislation stipulates that for real estate projects that are not a new urban area or housing development, the application shall be submitted to a specialised department prescribed by the people’s committee. In practice, the application might be passed around among different authorities which might claim no jurisdiction to decide and indeed, it will frustrate the transferor and the transferee in the process.

Second, the investment

law transfer procedure follows a one-step approach. Particularly, applications are sent to the competent investment registration authority where the eligibility for transfer is cross-examined by relevant authorities; and any approval shall recognise the transferee and the transferor, with the project part being transferred along with the investment registration certificate as well.

In contrast, under the real estate law transfer procedure, the competent authority shall only issue a decision to permit the project transfer. Within 30 days from such a decision date, the transferor and transferee must complete the execution of the transfer contract and project transfer. Before the transferor hands over the project to the transferee, the transferor must notify all its clients (if any) and announce by means of mass media 15 days prior, via at least three consecutive issues of a local newspaper, a local television station, or a website of the central agency in terms of the transfer, rights, and interests of clients and relevant entities.

The transferor must also transfer all documents of the whole/part of the project being transferred along with a list of documents to the transferee. The conditions in respect to the transfer approval remain. However, it seems in theory, the process which requires the transferor to notify is being phased out.

From the above observations, the investor should pay close attention to contract structuring and liaise closely with the provincial people’s committee as the procedure might vary significantly based on local interpretation and geographical features of the real estate project itself. ■

