

VIETNAM

Law and Practice

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LNT & Partners



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and high-profile litigation and arbitration matters. The real estate group closely monitors and tracks any commercial and legal developments in Vietnam's real estate market and ensures clients receive up-to-date advice from advisers who know the law and are equipped to anticipate real estate trends. The firm's clients, ranging from public to private, are highly appreciative of this pragmatic approach to tackling issues in what is arguably one of Vietnam's most regulated sectors.

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1. General

1.1 Main Sources of Law

The main sources of real estate law include:

- the Law on Land 2013;
- the Law on Real Estate Trading 2014;
- the Law on Residential Housing 2014; and
- the applicable decrees or decisions issued by the government or the prime minister, and circulars from the ministries that provide guidance for implementing or clarifying certain provisions of said laws.

1.2 Main Market Trends and Deals

In the past 12 months, not many real estate projects have been launched due to the downturn in the real estate and financial markets. This period may be viewed as a pause for adjustment of the market. Nevertheless, businesses have been undergoing financial restructuring, and real estate has become the subject of disposal plans. While asset transfer remains the primary option to raise capital, sales and leasebacks of property, including warehouses or factories in industrial parks, have emerged in the real estate industry as an option for corporate finance restructuring. Asset pools are also an option for residential or mixed-use residential property buyers who want to bring their property into trading in the market.

The real estate industry is still recovering from the COVID-19 pandemic, but this is no longer the major factor in measuring the development of the Vietnamese real estate market. However, large amounts of capital which could not be used in production due to COVID-19, have been directed towards real estate, creating a thriving market alongside price increases and supply shortages. This trend has encouraged developers to launch housing development projects, thereby increasing activity in this market.

In fact, policy consideration has had the biggest impact on the real estate market in the past 12 months. The State Bank of Vietnam recently announced a decrease in the interest rate for short-term loans in some industries. This is anticipated to raise the capital loan market and boost general economic development in Vietnam, simultaneously boosting development in the real estate market. Following this trend, it is anticipated that developers will be involved in more M&A transactions in the coming year.

1.3 Impact of Disruptive Technologies

Among other innovative technologies, proptech has developed rapidly, allowing for real estate purchases, financial support, project management or leasing via digital platforms, benefiting the young and tech-savvy population. This emergence of technology in the real estate industry will create a more vibrant and robust market.

Securitisation and tokenisation have commenced in real estate in Vietnam, with the introduction of smart contracts into the system of decentralised finance foreseeable in the near future. There are no regulations on financial technology in conjunction with the real estate market at present, and although not anticipated in the next year, expectations are that these will be enacted by the competent authority in response to energetic investment in the field.

Furthermore, apps related to crowdfunding in real estate investment are predicted in the near future, further attracting the young, tech-loving generation.

1.4 Proposals for Reform

As certain limitations between the Law on Land 2013 ("Land Law 2013") and other relevant laws (such as the Law on Residential Housing and the Law on Investment) have been exposed,

the Land Law 2013 is currently under review for reform. The amended Land Law is expected to be passed in Q4 of 2023. Below are the main areas under review.

Public Auction of Land for Property Development

An aspect of the Land Law 2013 that needs to be reviewed is public auction of land for property development projects. This is currently a big issue, affecting many developers and causing delays and obstacles in acquiring land. A revision might therefore also improve the real estate market.

Rights and Obligations of Foreign-Invested Enterprises

Furthermore, the Land Law 2013 views and defines “foreign-invested enterprise” inexplicably from the point of view of the Law on Investment. This has caused significant confusion in the application of laws regarding foreign-invested enterprises in terms of rights and obligations relating to land and investment in real estate markets. A review of the Land Law 2013 is therefore expected to bring change, clarity and transparency in the application of the law.

Land Compensation for Property Development Projects

Another issue of the Land Law that needs amending is land compensation for property development projects. Poor land compensation policy has caused the unfair distribution of land benefits, resulting in many complaints and disputes from land users, developers and local authorities. Should this amendment be passed, there will be a selection of approved real estate developers in the market, with many incapable developers being chased out.

Foreigners’ Leased Land-Use Rights Over Residential Houses

In respect of residential housing, the Law on Residential Housing 2014 allows individual foreigners to buy and own dwelling housing units on land in Vietnam for a definite term of 50 years, but there is no clear mechanism on land-use rights granted or leased to such a foreign owner under the Land Law 2013. It is likely that the Land Law 2013 will be amended to allow foreigners to hold leased land-use rights over residential houses for 50 years, with possible renewal to correspond with the Law on Residential Housing 2014. Thus, if passed, this will attract more foreign buyers, although there is still a long way to go.

Land-Use Mechanism and the Issuance of Certificates on Land-Use Rights and Ownership

The amendment to Decree No 43/2014/ND-CP has also been under drafting since 2022 to provide guidance on the Land Law in respect of, among others, the land-use mechanism and the issuance of certificates on land-use rights and ownership of the new form properties, namely, shophouses, condotels, resort villas or officetels, which have multiple-use functions (including residential) following the instruction of the prime minister in the Directive 11/CT-TTg dated 23 April 2019. However, this has not been passed and it appears that this may only occur when the amendment to the Land Law 2013 has been enacted.

Consolidation of the Legal Framework and Enhancement of Effective Management of Real Estate Trading

Following the prime minister’s Directive 13/CT-TTg dated 29 August 2022, proposals on amendments to the Law on Real Estate Business and the Law on Residential Housing are expected

in the future. It is anticipated that the government's main purpose will be to consolidate the legal framework for and enhance the effective management of real estate trading. There will also be regulation amendments to restructure the capital market as a foundation to strengthening the real estate market.

2. Sale and Purchase

2.1 Categories of Property Rights

In Vietnam, rights to real estate include rights attached to the land, ie, land-use rights (LUR) and ownership rights to the building structure on the land (if any). There is no term of land ownership in Vietnam, since land is by law under the "ownership of the people". Subsets of the LURs of a land-user include the right to transfer (not to sell), capitalise, lease (or sublease), bequest, exchange, give, and pledge or mortgage such LUR, similar to ownership rights. On the other hand, a real estate owner has ownership over the building property while holding LURs to the land.

As such, theoretically, acquiring land in Vietnam means to acquire all or some of such rights.

Depending on land categories (leased land or allocated land), entitlement to all or some of the LURs by land-users may vary. For example, a land-user holding leased land with annual payment of rent is not allowed to transfer the LUR but can sell property attached thereon; while an industrial park developer holding the same cannot transfer but can sublease land in the industrial park on the completion of infrastructure on the land.

2.2 Laws Applicable to Transfer of Title

Title to real estate may include LURs and building structures on the land. Land Law 2013 specifically deals with LUR matters, while other laws (eg, the Civil Code, Law on Residential Housing, Law on Real Estate Business, Law on Investment, Law on Enterprises, and even the Law on Taxes) deal with matters relating to construction structure or real estate business. There is no clear separation of real estate types, ie, residential, industrial, offices, retail or hotels; hence, in general, a real estate transfer transaction may become the subject of various laws depending on the different subject matters. However, due to the different LURs, there are differences in deal structures, procedures and documents in deals transferring such real estate. As such, different laws apply in real estate transfer transactions.

It should be noted that Vietnam law follows a strict title registration system which provides that property title will not be properly recognised by law until it is properly registered with the competent authorities.

2.3 Effecting Lawful and Proper Transfer of Title

Transfer of real estate title is lawful and valid if the transaction documents are compliant with the law and the title conveyance is properly registered with the land registry authority. The title to real estate is recognised and recorded in the certificate on Land Use Right, Ownership of House and Other Assets Attached to Land (LURC) in a standard pink-coloured form issued by the Ministry of Resources and Environment. In communications, this form is usually referred to as the "pink book".

The transfer agreement must be executed in writing and notarised by a licensed and competent notary office (with certain exceptions) to

be valid. A title transfer is deemed completed once registered and recorded by the Land Registry Office under provincial-level Departments of Natural Resources and Environment (DONRE) and reflected in a LURC with the transferee as the current land user and/or real estate owner.

There is no concept of title insurance in Vietnam. However, a buyer should check the validity and legal status of the real estate at relevant sources (eg, the Land Registry Office or DONRE and notary offices) before signing the transfer agreement and executing payment, since there may be encumbrances on the property (pledges, mortgages, government recovery orders, enclosures, or land-use restrictions, etc). Such encumbrances are not centralised and may be recorded by different authorities. There should therefore be a careful legality check on the property.

According to the law on notarisation, it is required that the parties to a real estate transfer transaction sign the document(s) in person, witnessed by a notary officer. E-signatures are not yet allowed. However, the transferor or transferee may have its representative execute such document(s) or conduct title registration by power of attorney. In general, the principal is responsible for any act by the representative in relation to the transfer transaction, which complies with that described in the power of attorney.

2.4 Real Estate Due Diligence

Due to its complex nature, buyers, who are either individuals or corporate entities investing in real estate projects, should conduct due diligence with the engagement of legal, technical and finance experts in respect of the land and investment property. Legal due diligence usually includes checking:

- the legal capacity of the seller/transferor and the legal status of the land of the real estate;
- the valid title of the property/investment project and the land on which the property/investment project stands;
- the validity of the LURs and compliance to the real estate development; and
- any encumbrances on the real properties, including zoning restrictions, title disputes, current collateral with the properties, and/or unpaid financial obligations by the seller/transferor.

2.5 Typical Representations and Warranties

In real estate transactions, buyers require sellers to make representations and warranties (R&W) that:

- the seller is duly incorporated or has full power and capacity to transact;
- the seller owns the valid title to the land and/or project investment;
- the seller is granted the proper investment and development rights in the real estate project, including development approvals, construction licences, environmental assessments and others (if the seller is a developer); and
- the real estate is not subject to encumbrances, restrictions, disputes, foreclosure, a court order enforcement, or an urban zoning order.

During COVID-19, new R&W were created, eg, waiver for a party that failed to perform an obligation due to the virus or as a direct result thereof.

However, the concept of R&W is coined in the common law system; it is not expressly regulated by civil law. A legal adviser in the field may take a stricter approach in enforcing these require-

ments by obliging the seller to ensure R&W are true and remain so.

Depending on the agreement drafting techniques, a misrepresentation or an incorrect warranty can lead to invalidity or cancellation of the agreement, or breach by the party who makes such misrepresentation or who has an incorrect warranty. It is the responsibility of the parties to include clauses on the survival period of R&W.

There are several remedies for buyers and sellers available in Vietnam contract law, eg, specific performance, penalty, performance suspension, contract cancellation, unilateral termination and/or damage compensation. These depend on what the parties agree in the document, and/or subject to the law.

Any breach of the R&W constitutes breach of a contract. In breach of R&W, the aggrieved party may be entitled to seek remedy and compensation for damages actually incurred by them. While R&W insurance is not common in this jurisdiction, it is becoming popular for sellers in most high-value M&A transactions.

2.6 Important Areas of Law for Investors

In respect of purchasing real estate, investors are required to closely observe the laws on land and real estate trading governing specific aspects of the purchase transactions; and the laws on companies and laws on investment if the real estate being purchased is in form of M&A transactions. If the real estate is a residential house, the investors are further required to comply with the laws on housing.

These may include laws enacted by the National Assembly, decrees or decisions issued by the government or prime minister, or circulars issued by ministries from time to time that provide guid-

ance in implementing or clarifying certain provisions of such laws. Since these are hard laws, they are binding and also govern real estate transactions.

2.7 Soil Pollution or Environmental Contamination

The Law on Environmental Protection and the Law on Investment require that an investment or development project should have environmental impact assessments or declarations with protection measures before the project implementation. Vietnamese laws (Article 15 of the Law on Environmental Protection 2020; and Articles 172 and 602 of the Civil Code 2015) expressly hold liable the subjects causing the environmental pollution that generates damage, and requires them to cease the acts of violation, apply remedial measures and make compensation in accordance with the laws, even when they are not at fault. In addition, if there is serious contamination to the land with life-threatening effects, such land may be subject to expropriation by the competent authority.

Although the party causing the contamination is held liable under the law, such environmental issues are usually found after an acquisition, so the party most affected is the buyer, ie, the current owner/land-user. Therefore, the buyer should conduct due diligence on environmental issues in acquisition transactions to assess the risks and liabilities in this regard, and should incorporate proper clauses in the transaction documents to mitigate or exclude the risk of such liability.

2.8 Permitted Uses of Real Estate Under Zoning or Planning Law

Provincial authorities apply master plans on land use, development and urban zoning every ten years and review these on a five-year basis.

For example, a master plan provides land-use purposes that define where residential housing projects or industrial projects can be developed, how high and how much the construction coverage is, etc. By law, this information is publicly accessible. However, in reality, it is usually not fully available and accessible because it is not centralised. A buyer should use consultancy services to access such information.

Depending on the investment, the encouraging and supporting policies of localities, the scale and/or importance of a project, the authorities may consider proposals from developers to change master plans to suit or facilitate such projects, on a case-by-case basis. In general, the developers must carry out projects in accordance with set master plans, except for locations where the local authority has not yet set master plans, in which case, the developers may also provide proposals.

2.9 Condemnation, Expropriation or Compulsory Purchase

The Land Law 2013, Law on Residential Housing and Law on Compulsory Purchase of Assets provide for foreclosure, expropriation, and compulsory purchase of assets, including real estate. In general, land and real estate could be expropriated in the following circumstances:

- for national security and defence purposes;
- for social and economic development serving national and public benefit;
- due to violation of the laws on land by land-users;
- lawful termination of land using (including termination of an investment project using land);
- voluntary return;
- life-threatening events; and
- land requisition by the state for national defence or security, or in a state of war or

emergency, or to prevent and combat natural disasters.

The Law on Residential Housing 2014 also provides for purchase by local authorities of residential housing units from developers for government use.

The process of expropriation may be conducted in different ways, depending on the cause of expropriation. In theory, the government will communicate the purchase, expropriation or recovery in writing to the property owners with references to the causes of expropriation and its legal basis. In the case of a purchase, the purchase price may be agreed with the owner or decided by the authorities, if agreement cannot be reached on a fair market price through consultation between the relevant bodies. The authorities may then proceed with the purchase, although the owner has the right to appeal the decision. If the purchase is ruled unfair at later stage, the owner can receive compensation.

According to the master plan approved by the authorities, land can be taken by the authorities for economic development purposes (eg, industrial parks or infrastructure development), and the authorities will set up a compensation council to assess and apply compensation and damages to land-users. In reality, land-users usually do not agree with the compensation given because of the differing views held by them and the authorities, but land compensations can still be enforced.

2.10 Taxes Applicable to a Transaction

In transferring real estate, there are two types of deals:

- sale and purchase of real estate assets (asset deal); or

- transfer of shares in a property-owning company or “SPV” (share deal).

Asset Deal

In an asset deal, the sale and purchase transaction must comply with the laws of land and real estate trading, especially for an estate project where additional conditions apply. Any transaction relating to land must be in writing and notarised by the competent notary office for effectiveness unless one of the contractual parties is a real estate trading entity. Any change in the user of the land or ownership of the sold property must be registered with the Land Registry Office for recognition of the lawful title.

In general, taxes and charges incurred may include VAT (on transactions relating to property attached to land), income tax, notarisation fees, a LURC issuance charge, LURC appraisal charges, stamp duty, etc. In the case of individual transfer of real estate, personal income tax is applied at the rate of 2% of the transfer price to the individual seller, and in the case of corporate real estate owners, 20% of the income earned from the transfer incurred by corporate sellers, plus VAT on the sale price (currently 10%). By law, the buyer has to pay a stamp duty of 0.5% of the purchase price in title conveyancing registration. Taxes must be paid before the completion of the title registration.

Share Deal

An alternative to the asset deal is to structure the transaction as a share deal, ie, an acquisition of the SPV that owns the real estate through share purchase. The share transfer procedure is then mostly done under the Law on Investment and Law on Enterprises rather than the Land Law 2013 or the Law on Residential Housing (if the property is residential housing). There is a difference in cases of transfer of shares in such an

SPV (either minority or majority or total shares) because this is not treated as an asset deal. If the acquisition of shares in the SPV is conducted by foreign investors or a foreign-invested entity leading to:

- the foreign ownership ratio in the SPV being more than 50% of its charter company by increasing the ratio from under 50% to above 50%, or increasing the ratio from 50% to above; or
- an increase (at any rate) in the foreign ownership ratio in the SPV if the SPV is operating in conditional businesses to foreign buyers (real estate trading is included);

then such investors have to obtain approval from an investment management body (the provincial department of planning and investment, or DPI) for such acquisition (Article 26 of the Law on Investment 2020).

A share or equity transfer contract is made in writing without having to be notarised by notary officers. Any change in corporate ownership is subject to registration with the Business Registration Office of the competent DPI. Income tax may be incurred by the seller of the shares at 20% on taxable income for resident individuals or corporations, and sometimes at 0.01% of the share value for joint stock companies. However, this should be carefully reviewed since the tax authorities have different views on this matter.

The distribution of transaction costs can be negotiated and agreed by the transactional parties.

2.11 Legal Restrictions on Foreign Investors

There are several requirements and restrictions for foreign investors in acquisition transactions

relating to real estate under Vietnam law. For example, the Law on Residential Housing 2014 permits individual foreigners to buy housing real estate (mostly condominiums or apartments) in newly developed property projects if they meet the following conditions:

- the foreign investor holds a valid passport with immigration stamps from when they entered Vietnam;
- the property is in a commercial residential housing development project by a licensed developer; or
- the property is not in a national security and defence area.

The developer is allowed to sell its units to foreign buyers but no more than 30% of the total units in the project. Foreign homeowners have ownership over the housing real estate for the term of 50 years, and this is renewable upon expiry, compared to “long-term” ownership by local homeowners. Foreign owners can sell their unit to a foreign or local buyer. If selling to a local buyer, then that local buyer is entitled to restore “long-term” ownership to the unit. Foreign owners have the same ownership rights as a Vietnamese homeowner (sell, lease, lend, give, mortgage, etc). However, foreign-owned companies incorporated under Vietnam law have limited ownership rights over purchased apartment units, eg, for the owner’s use only (not leasing to others).

Foreign investors can develop real estate development projects (residential, commercial, industrial, hotels and offices, etc) under Vietnam law by obtaining the land from the authorities or acquiring it from Vietnamese corporate landholders.

3. Real Estate Finance

3.1 Financing Acquisitions of Commercial Real Estate

A homebuyer may use the purchased property as collateral for obtaining a loan to finance a purchase (even a property under construction). However, as a market practice, lenders usually accept a loan around 70% of the property value. The lending interest rate is normally the long-term interbank lending rate plus a margin of 2% to 3%.

In acquiring commercial real estate, finance is more complex because the lenders assess the loan repayment capacity of the borrower, in addition to the real estate value. Yet, the same principle in lending is applied, ie, the borrower must have funds available of at least 30% of the real estate value and a loan for the remaining amount, subject to conditions assessed and agreed with the creditors, which can be local or foreign-owned banks operating in Vietnam. Loans can also be structured and provided by overseas banks, parent companies, shareholders or business partners overseas.

In addition, the buying entity may consider several other options such as corporate bonds by private placement, convertible loans, business co-operation, joint ventures with other entities, or collection of advances from the homebuyers of off-plan properties if the project is a residential housing development project. The borrower may use other assets or personal guarantees as collateral as well.

3.2 Typical Security Created by Commercial Investors

While raising funds from credit institutions is most common, the lender usually requires the first charge over:

- the land on which the project is premised;
- the right in respect of the project development;
- off-plan properties; or
- the receivables or proceeds from the sale of the properties.

3.3 Restrictions on Granting Security Over Real Estate to Foreign Lenders

In Vietnam, foreign lending is allowed subject to restrictions on the purpose, currency, security transaction, the maximum principal and the fees or expenses incurred on the foreign loan. Foreign lending must be registered with the State Bank of Vietnam if the loan term is more than 12 months.

Furthermore, the laws on land provide that enterprises, including foreign directly invested enterprises, having obtained the land-use right through land allocation or land lease from the state, may only charge its land-use right and/or assets attached on land to credit institutions duly incorporated in Vietnam. Any charge of real estate to any foreign lender is not permitted and is not recognised as having any legal authority. However, foreign lenders can hold the LUR indirectly as collateral through an agent bank in Vietnam with the proper legal structure.

3.4 Taxes or Fees Relating to the Granting and Enforcement of Security

Security over real estate needs to be duly executed and registered with the competent authority and usually incurs land registration and notary's fees.

3.5 Legal Requirements Before an Entity Can Give Valid Security

To give security over a land-use right the following are required:

- a land-use right certificate;
- the right must be free from dispute;
- the land-use right may not be distrained for any judgment enforcement; and
- the right must still be within the land-use term (with at least seven years' land-use right remaining).

3.6 Formalities When a Borrower Is in Default

When a borrower is in default, the credit institution (lender) is required to consider loan repayment restructuring within ten days prior to the agreed due date, taking into consideration the financial capacity of the credit institutions and evaluation of the borrowers' debt repayment capacity. If the lender refuses to execute the debt restructure and decides to recognise the delayed payment as an overdue debt, a notice must be served to the borrower of its repayment status concerning such overdue debt.

The collateral realisation will proceed according to the agreement between the lenders and borrowers, and after notice on the same is served to the borrower and other secured creditors within 15 days prior to realisation (if not otherwise agreed). Subject to various factors, the time needed to realise real property security varies. In the event of realisation by way of auction, there are more parties involved, which causes the procedure to be prolonged. It also takes time to find the appropriate buyer to acquire the property at a reasonable price. Generally, the expected range of time to successfully enforce and realise on real estate security is approximately six to 12 months or more.

In order to be effective against third parties, the collateral as real estate must be registered with the Land Registry Office to take priority over unsecured obligations. In respect of other

secured obligations on the same collateral, the priority order is based on the chronological order of establishment.

3.7 Subordinating Existing Debt to Newly Created Debt

Existing secured debt will be subordinated to the newly created debt if the latter is properly registered while the former is not, or if the lenders/creditors agree on the change of order of priority for repayment.

3.8 Lenders' Liability Under Environmental Laws

See 2.7 Soil Pollution or Environmental Contamination.

3.9 Effects of a Borrower Becoming Insolvent

The effect on the security interest when the borrower is insolvent and subject to a bankruptcy case processed by a competent court is dependent on whether it is subject to the business recovery plan. If not, then the secured assets will be realised in accordance with the agreement between the parties if the secured obligations fall due. If the obligation is not due, the competent court will postpone the security agreement and repayment made by realisation of the secured property if the agreement is concluded before it is subject to a bankruptcy case.

If the secured property is subject to a business recovery plan, its realisation will be resolved by the general meetings of creditors.

3.10 Consequences of LIBOR Index Expiry

The LIBOR index was not applicable in Vietnam. Its expiry has therefore had no effect on the Vietnamese lending market.

4. Planning and Zoning

4.1 Legislative and Governmental Controls Applicable to Strategic Planning and Zoning

Planning and zoning of regions (rural and urban areas) and projects must be approved by the competent authority (including the People's Committee at provincial and district level).

4.2 Legislative and Governmental Controls Applicable to Design, Appearance and Method of Construction

The design of the building must comply with the master plan (if any) and be appraised and approved. The approved design will be the basis for the competent authority (normally the competent provincial department of construction) to issue a construction permit to the developer before the project is built. Unless exempted, any building or refurbishment that does not have a valid construction permit will be deemed as violating the laws on construction.

4.3 Regulatory Authorities

Parcels of real estate must be developed according to their designated use as approved by the competent authority, subject to the level of planning. The provincial People's Committee will approve planning on land use at the district level, which must comply with the planning approved by the senior authority. Any functional areas, subject to size, are required to compose the sub-zoning for development of investment projects.

Any projects larger than five hectares (or two hectares for residential housing projects) are required to seek approval on detailed construction planning from the competent People's Committee (mostly at district level).

Generally, laws on construction, (urban) planning and land are the most significant in matters of development and designated use of real estate.

4.4 Obtaining Entitlements to Develop a New Project

In developing a new real estate project, project investment and investor selection approval are usually required under Article 29 of the Law on Investment 2020 (collectively referred to as “Investment Approvals”). Depending on the scale, social and economic impacts, or national security issues, such approvals may be under the authority of the National Assembly, the Vietnam government, or the People’s Committee at provincial level. These issuing authorities must consult with the relevant authorities on related aspects and issues in the investment project application (eg, zoning, planning, land use, environment, national defence, etc). Therefore, such opinions influence and impact investment project approval.

The application dossier for the project investment approval is provided under Article 33 of the Law on Investment 2020, aiming to describe the suitability of the project with master plans, land-use needs, economic, social and environmental impacts, technologies to be used, market access, etc. The law sets forth the timeline for investment projects, and investor selection approval may take three to six months, but it usually takes longer.

Basically, the investor may conduct the real estate project after Investment Approvals have been granted and the procedures required on the construction, eg, design assessment approval, construction permits, etc, have been undertaken.

Foreign-invested enterprises or foreign investors who invest in Vietnam (Law on Investment) either by developing a new real estate project or

completing a major refurbishment, which may also be considered as an investment project under the Law on Investment 2020, are further required to get an investment registration certificate under this law.

4.5 Right of Appeal Against an Authority’s Decision

There is no mechanism for investors to appeal against rejection by the authorities of an investment project proposal or application under the Law on Investment.

However, as an investor under the law of Vietnam, during the investment implementation stage, the investor has the right to appeal against administrative decisions or the conduct of authorities or officers under the Law on Complaints or the Law on Denouncements.

4.6 Agreements With Local or Governmental Authorities

Projects using land-use rights, the purpose of which is classified in the entitlement of a land lease, are required to enter into a lease agreement with the competent authority. Most agreement types with state authorities are executed for projects of public-private partnership under the Law on Public Private Partnership and/or the Law on Tender.

4.7 Enforcement of Restrictions on Development and Designated Use

See 4.3 Regulatory Authorities and 4.4 Obtaining Entitlements to Develop a New Project.

5. Investment Vehicles

5.1 Types of Entities Available to Investors to Hold Real Estate Assets

Usually, investors may hold real estate assets by:

- acquiring the property through project transfer (asset deal);
- acquiring a property-holding entity (share transfer deal); or
- setting up a new company to invest in the real estate project.

In some cases, foreign investors may enter into a joint venture with local partners who hold LURs over land parcels to set up project companies to develop real estate projects. This depends on the corporate structure intended by the developers. The types of entities available include limited liability and joint stock companies.

Investors can also hold real estate by co-operating with other entities through a Business Co-operation Contract (BCC) as provided under the Law on Investment. Although the investors may not have a direct holding in the real estate assets in the BCC, they will have influence in policy-making in the entity that owns the real estate assets, depending on the structures agreed therein.

5.2 Main Features of the Constitution of Each Type of Entity

A limited liability company (LLC) is divided into two types, ie, a single-member LLC or a multiple-member LLC. In the former, there is only one member, while the latter may include at least two but no more than 50 members. Members of an LLC are liable to the company limited to the proportion of capital contributed.

A joint stock company (JSC) includes at least three founding shareholders and could be listed or unlisted. In the event of listing, its sale of shares will be governed by the laws on securities. As with an LLC, the shareholders' liability to the company is proportionate to the shares held in the company.

5.3 Minimum Capital Requirement

There is no minimum capital required to set up an entity investing in real estate.

However, in the event the entity is chosen to be the developer of a real estate project under the laws on investment, the entity must have owners' capital equivalent to at least 20% of the total investment capital in the real estate project below 20 hectares, and at least 15% in a project of more than 20 hectares. There must be proof of such capital capacity for the authority to approve the project.

5.4 Applicable Governance Requirements

When investing in a real estate project, the following conditions must be satisfied:

- the entity/individual investing must be duly established under the laws of Vietnam;
- the entity/individual's role as developer and the name of the real estate must be published; and
- the real estate must comply with the following mandatory conditions –
 - (a) it must have an LURC and not be subject to any dispute on LURs or ownership;
 - (b) it may not be distrained for any judgment enforcement; and
 - (c) the land must be within the land-use term.

5.5 Annual Entity Maintenance and Accounting Compliance

Foreign-invested companies must maintain accounting books and have these audited annually for submission to the tax authorities. The cost may vary depending on the complexity of the work. Furthermore, foreign-invested companies must also report periodically to the authorities on their investment activities.

6. Commercial Leases

6.1 Types of Arrangements Allowing the Use of Real Estate for a Limited Period of Time

Entities or individuals will be granted the land either in the form of land allocation or land lease by the state for a specified period, always subject to the purpose of using the land. While the land-use term of a land lease is for a limited period, land allocation may either be for a limited period or for long-term use. The terms are extendable, subject to the discretion of the state.

These primary land-users may use the land, undertaking construction on it and leasing it out for a limited term under a commercial lease, but may not exceed the term granted by the state.

6.2 Types of Commercial Leases

A commercial lease is not classified into any type, and the payment by the tenant is dependent on the negotiation between the parties. However, besides the basic rent of real estate, tenants usually have to bear:

- utilities charges;
- management and maintenance fees; and
- insurance.

In the case of lease of a retail space, tenants may incur a “percentage rent”.

6.3 Regulation of Rents or Lease Terms

General rules on leasing real estate are provided under the Law on Real Estate Trading 2014 and the Civil Code 2015. The recent Decree 02/2022/ND-CP provides that lease agreements must comply with the contract templates promulgated in the decree. Other terms are freely negotiable between the parties to the lease, as long as they

are not contrary to, or prohibited by, regulations under the law.

In the first year of the COVID-19 pandemic, the lease contract could be terminated based on the clause of force majeure, the occurrence of which is objective and unforeseeable, and which exhausts all remedial measures within its capacity. However, this was hardly applicable in the following breakout, since COVID-19 was less unpredictable, so the tenant could not terminate the lease based on the force majeure clause as a reason for failure to pay the rent. In most cases, landlords will apply the rent abatement/deduction and declare the contract terminated.

6.4 Typical Terms of a Lease

The typical terms are subject to the nature and purpose of the lease:

- the typical length of the lease term may vary from two to five years, and some may be extended to seven years, with the rent adjusted annually;
- the maintenance and repair of the real estate occupied by the tenant will be carried out by the landlord at the expense of the tenant; and
- the rent payments must be made either monthly or half-yearly.

6.5 Rent Variation

Rent is highly variable according to the different real estate sectors. For instance, in the commercial lease of retail space, rent will be adjusted on a regular basis. The frequency and rate of rent adjustment is entirely subject to the landlord's discretion. However, in respect of land leases in an industrial park, the rent is paid in a lump sum for the entire lease term and no variation is applied.

6.6 Determination of New Rent

Unless the lease is a lump-sum payment, lease contracts usually have a rent review clause based on the market price at the time. Some may choose to determine the increase in rent at a particular rate in the lease contract as the lease continues. The proposed increase in rent is permissible if it is reasonable.

6.7 Payment of VAT

VAT is incurred on the basic rent at the rate of 10%.

6.8 Costs Payable by a Tenant at the Start of a Lease

It is entirely up to the parties concerned to negotiate any costs payable by the tenant at the start of a lease, other than the basic rent. However, it is common practice in this jurisdiction for the tenant to be required to pay a deposit prior to the lease taking effect, which amount is kept by the landlord during the entire lease term. In a commercial lease, a booking fee may also be applied.

6.9 Payment of Maintenance and Repair

By law, the maintenance and repair of a privately owned property is the obligation of the owner. In the case of common areas, co-owners share that responsibility. In property leases, the property owner will have that obligation unless it is passed to the tenants in the lease contract.

6.10 Payment of Utilities and Telecommunications

Utilities and telecommunications expenses incurred in privately used areas will be measured by separately installed gauges and independently borne by the specific user. Expenses incurred in public areas will be borne by the property owner or shared or allocated to the tenants as stipulated in the contract.

6.11 Insurance Issues

It is common practice for the tenant to bear the insurance premium for policies that cover all risks on the real estate and public liabilities. However, it is also common practice for the property owner to procure insurance for the building structure. The insurance will be in the name of the tenant and the landlord, and at the coverage rate requested by the landlord.

Business interruption insurance is more unusual in this market, given that tenants have suffered significant losses following the COVID-19 pandemic, and landlords have had to forego basic rent due to tenants' business closure.

6.12 Restrictions on the Use of Real Estate

As per general regulations, tenants are obliged to lease and use the property according to its intended purpose, function, design and other agreements under the lease contract. Tenants are required by law to preserve, maintain and repair minor effects at the leased property and will bear the cost if there is any loss or damage.

Subject to negotiations between the parties, a landlord may impose further restrictions on tenants regarding the use of a property, if these restrictions are not contrary to the law, especially in the case of land or factory leasing in industrial parks, where tenants must observe the regulations on environmental protection.

6.13 Tenant's Ability to Alter and Improve Real Estate

The tenant is permitted to alter or improve the real estate, but always subject to the consent or approval of the landlord, even if such maintenance and improvement increase the value of the property. If the leased property is depreciating, not due to any fault of the tenant and the

landlord fails to act on the notice given by the tenant, the tenant may carry out alterations or improvements to the leased real estate in the absence of consent by the landlord, but is usually required to submit the alteration plan and design to the landlord for approval. In addition, the tenant must have a security bond or amount paid to the landlord, such as a deposit, for compensation of damages caused to the landlord or the building.

6.14 Specific Regulations

Apart from the general rules above, specific regulations may apply, subject to the category of real estate into which the leased property falls. Residential houses subject to a lease must satisfy various requirements stipulated by the law on housing, including:

- not being subject to any encumbrances, ie, any dispute, claim or petition on the ownership;
- not being distrained from any enforcement of effective judgment or administrative order of the competent authority; or
- not being subject to any decision on land revocation, notice on clearance or destruction by the competent authority.

In respect of industrial property, it is subject to compliance with regulatory requirements on construction, environmental protection, firefighting and prevention, public security and order, labour safety and hygiene, and corporate ethics.

6.15 Effect of the Tenant's Insolvency

Generally, in a contract, the landlord is entitled to terminate the lease on the insolvency of the tenant, ie, failure to fulfil its debt liability within three months of the due date as provided by the laws on bankruptcy. At that point, and always subject to agreement between the parties:

- the deposit money (if any) will be forfeited by the tenant; and
- the landlord can take back the leased property.

The landlord would be required to return the amount of rent corresponding to the remaining lease period if the rent for the entire lease term was made in a lump-sum payment.

If the tenant is subject to a decision on the initiation of a bankruptcy process, any payment for payables (including basic rent) incurred before would be stalled and would only be made subject to the statutory level of priority of payments after the decision on the declaration of bankruptcy by the competent court.

6.16 Forms of Security to Protect Against a Failure of the Tenant to Meet Its Obligations

A landlord would require the tenant to make a deposit prior to the start of the lease to protect the landlord against failure by the tenant to meet payment obligations. The deposit amount is ideally equivalent to three months' payables (inclusive of the basic rent and other service charges, maintenance and repair fees, etc).

6.17 Right to Occupy After Termination or Expiry of a Lease

Upon the termination or expiry of a lease, the tenant is required to reinstate the premises in the condition agreed by the parties. Any further occupation will be subject to hold-back charges at the rate pro rata to the basic rent. The landlord has the right to re-enter the property without prior notice and change the lock or to take any necessary measures to take back the real estate.

6.18 Right to Assign a Leasehold Interest

The contractual rights and obligations of commercial leases can be assigned and novated to an assignee prior to the expiry of the lease term by which the lease held by the tenant will be terminated. In the assignment of rights, written notice of the same is required to be served to the landlord. The novation requires the prior consent of the landlord. Any commercial sublease must have prior agreement or written consent from the landlord.

The leasehold interest in land under Vietnamese law cannot be understood like the common law system. The land is leased out to a land-user by the state usually for a defined term to develop an investment project, and the land-use rental is incurred by the land-user (either paid annually or in a lump sum). Generally, any transfer of leasehold title in land-use right is conditional on the lump-sum payment of rent being made to the state, having obtained the LURC, the land being free from dispute and not distrained by any judgment enforcement, and still within the lease term of the state. The transfer must be made in writing, notarised and registered. Otherwise, the leasehold title is not assignable.

6.19 Right to Terminate a Lease

The landlord has the right to terminate the contract due to:

- failure of payment by the tenant within three months after the due date;
- the tenant's insolvency;
- the tenant's use of the leased real estate for the wrong purpose;
- the tenant deliberately causing detrimental damage to the leased real estate;
- the tenant repairing, improving, upgrading, altering or sub-letting the leased real estate

without agreement or written consent from the landlord; and

- the tenant being a nuisance or failing to maintain public hygiene, security, etc, in a way that affects the other residents, and despite warnings from the local authorities.

The tenant has the right to terminate the contract if the landlord:

- fails to repair real estate which does not meet the safety requirements for use, or which causes harm/damage to the tenant;
- increases the rent at an unreasonable rate;
- limits the tenant's right of use while limiting the rights of a third party; and
- if there is any breach of representation and warranties by the landlord in respect of the real estate.

6.20 Registration Requirements

A lease of land-use right and property (houses or construction building) must be executed in writing following the form provided by law (if any). The lease of land-use right must be registered with the Land Registry and the tenant is entitled to be recorded on the LURC for the lease term, as provided by law.

6.21 Forced Eviction

It is not easy to evict a tenant from an estate without a court ruling or order. To do so, the landlord has to bring the case before the court and pursue litigation, which may take a significant amount of time (two to six years) to complete.

However, in reality, the landlord may engage the authorities (representatives from the People's Committees, the police, etc) to prevent the tenant from entering the property (eg, by changing the lock, re-occupying the property, disconnecting the electricity and water supply), as a result

of which, the tenant may have to abandon the property. However, such measures are also controversial, and in some cases, may constitute a legal violation with criminal liability.

6.22 Termination by a Third Party

A lease can be terminated if the land on which the property is located is subject to land expropriation by the competent authority. See 2.9 **Condemnation, Expropriation or Compulsory Purchase**.

On the other hand, a third party can hardly have rights against a commercial lease interest if it is not a party to the contract, unless the contractual parties agree otherwise, or there is a registered pledge that pre-dates the lease by which the lease can be terminated if the leased property is subject to disposal procedures following the settlement of the pledge. If the leased property is the collateral to any pledge, the lessor as the property owner is required by law to inform the lessee of the same. Otherwise, the lessor may be liable for any damages caused by the non-disclosure.

Furthermore, since an owner may own a property on land leased from a landlord, there is a possibility that the landlord may terminate the land lease agreement while the property owner is leasing its property to a third party. In this case, the land lease termination also affects the property lease. If the land lease termination is lawful then any damages caused to the property lease will be borne by the land tenant. If the land lease termination is not lawful, however, the landlord may be responsible to the land tenant in bearing the compensation owed to the property lessee, as well as the cost of any other damages that arise as a result of the unlawful termination.

7. Construction

7.1 Common Structures Used to Price Construction Projects

Construction project pricing may include:

- a lump-sum price;
- a fixed price;
- a fixed price with adjustments;
- a time-based price; and
- a price with combined methods.

7.2 Assigning Responsibility for the Design and Construction of a Project

Construction usually involves:

- the project's developer;
- the building contractor;
- the supply contractor of building products and materials or assembling equipment etc; and
- the advisory contractor in survey, design, project management, monitoring, piloting, assessing, etc.

The (main) contractors and/or construction management board (if established by the developer for project management) are directly responsible and liable for the scope of works undertaken in terms of quality and safety before the laws and the developers. Any secondary contractor will be liable before its main contracts. Assigning contractors' responsibilities wholly or partially must be agreed and/or approved by the owner in formal and written documents, otherwise such assignment is invalid and ineffective. The assignment of responsibility must not be contrary to, and must always comply with, the laws on construction management in quality, progress, quantity, occupational safety and environmental control.

7.3 Management of Construction Risk

Risks in construction are usually passed to (main) contractors under contract between the parties through penalty and indemnification. Nevertheless, mandatory insurance against risks in construction investment activities must be procured, including construction and public liability policies.

7.4 Management of Schedule-Related Risk

It is provided under the laws of construction that the construction schedule of the project must be properly monitored by the developer, monitoring department, main contractors or any related parties. A delay at any stage must not affect the overall investment schedule.

In the event of delays in the construction schedule, the principal of the construction contract is entitled to suspend the performance of the contract; and to unilaterally terminate the contract if the contractor is causing continuous delays to the schedule agreed by the parties (unless the parties agree otherwise). Penalties and damages are available for the breach in construction schedule, either for the contractual parties or third parties, being the developer or the owner if agreed by the parties.

Furthermore, the developer is required to submit a request for amendment to the general investment schedule.

7.5 Additional Forms of Security to Guarantee a Contractor's Performance

In order to guarantee the performance of contractors, the owner may require contractors to comply with additional forms of security such as a deposit, escrow or any form of guarantee, which may include parent or bank guarantees. The specific guarantee must be agreed in detail

between the developer and the main contractors, and duly delivered to the developer before the construction contracts come into effect.

The security to guarantee a performance is valued within a range of 2% to 10% of the contract value. Higher risks will come with higher rates, but the value is capped at 30% of the contract value and must be approved by the competent body (Article 16 of Decree 37/2015/ND-CP).

7.6 Liens or Encumbrances in the Event of Non-payment

The project developer or owner of the building may provide proof of the ability to make payment to the (main) contractors with whom they have the contractual construction relationship as a preventative measure against non-payment by the developer.

Guarantees of payment capacity may be satisfied by laws involving the following measures:

- approved plan on capital distribution;
- letters of guarantee by banking or credit institutions;
- letters of credit; or
- loan agreements.

Payment guarantees must be available prior to the execution of the construction contract to ensure that the developer complies with the payment schedule agreed with the contractor in the construction agreement. Laws prohibit the developer from entering into a construction agreement without payment guarantees available as prescribed, unless the construction is for emergency purposes.

Alternatively, while this is neither prescribed nor prohibited by law, the developer may agree with the contractor to hold a lien over the building

in the event of non-payment by the developer (or the owner of the property). However, this is uncommon construction practice in Vietnam, as are other encumbrances, such as a pledge over the building.

7.7 Requirements Before Use or Inhabitation

Before any building or project commences, the developer must obtain a certificate of occupancy issued by the competent authority.

8. Tax

8.1 VAT

Goods and services used for production, trading or consumption in Vietnam are subject to VAT. In respect of the transfer of real estate, VAT is incurred by the purchaser of the property at a rate of 10% of the transfer price of the real estate (excluding the land value announced by government authorities).

8.2 Mitigation of Tax Liability

In case of sale or transfer of real estate by corporate seller/transferor (asset deal), VAT (10%) and corporate income tax (CIT) are applied. CIT is 20% of the capital gain from the property. However, if structured in selling shares of a JSC (share deal), then taxes may be 0.01% of the transferred shares (even when transferring 100% of the shares of that entity). Therefore, the “share transfer deal” approach is commonly used in acquisition transactions of real estate development projects.

8.3 Municipal Taxes

Business-licence tax (or licensing fee) is applied to every business based on its registered capital. The tax is a small amount (around USD135/year). However, in addition, the entity (as a property owner) has to pay land tax based on the land price and land area.

8.4 Income Tax Withholding for Foreign Investors

Foreign investors as corporates are not allowed to directly obtain possession of real estate in Vietnam. Any investment in real estate must be made through an entity established under Vietnamese law. Foreign individuals are only permitted to purchase commercial residential houses from a real estate developer.

Corporate will bear the corporate income tax on the taxable income earned from the rent or sale of real estate at a rate of 22%.

Individuals will bear the PIT at a rate of 5% of taxable income from renting properties, and 2% of the sale or transfer price from the sale of real property.

8.5 Tax Benefits

Individuals owning real estate may be entitled to tax exemption from the income earned from the transfer of residential houses, land-use rights and assets attached to land if those are the only residential houses/land, or the transactional parties have relative relationships provided by law. Corporate investing in certain projects may also be entitled to tax exemption or tax rate reduction for a certain time.

Trends and Developments

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LNT & Partners is a major full-service independent law firm based in Vietnam with the attorneys and experience to handle transactions and litigation requiring international expertise. With over 70 highly qualified professionals, it is a prominent law firm with international and domestic clients, including Fortune Global 500 companies as well as renowned Vietnamese listed companies. The firm provides advisory and transactional work in corporate and M&A, competition, pharmaceutical, real estate, infrastructure and finance, as well as complex

and high-profile litigation and arbitration matters. The real estate group closely monitors and tracks any commercial and legal developments in Vietnam's real estate market and ensures clients receive up-to-date advice from advisers who know the law and are equipped to anticipate real estate trends. The firm's clients, ranging from public to private, are highly appreciative of this pragmatic approach to tackling issues in what is arguably one of Vietnam's most regulated sectors.

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Amendments to the Land Law and Notes to Foreign Investors in Real Estate Deals in Vietnam

The Vietnam government is collecting public opinion to amend its Law on Land 2013 (the “Land Law”) and is planning to pass the “Amended Land Law” in Q4 2023. This article is an introduction to a few hot issues under discussion and our view of the possible impacts, plus our notes to foreign investors in real estate deals in Vietnam.

Issues of hot debate in amending the Land Law

Compensation in land acquisition by the state

Under the Land Law, the state has the power to acquire land from land-users in certain circumstances (eg, for national defence or security, for constructing infrastructure projects in the public interest, or for socio-economic development, etc). Accordingly, in such forced acquisitions, the state will compensate the land-users who have to yield up their land for such public or national-interest projects.

For years, this principle has caused many conflicts of interest among the authorities, land-

users and those who stand to gain from such forced acquisitions. The Land Law has therefore been amended many times in order to deal with this issue and to better harmonise the interests of the people losing their land. The spirit set by the highest authorities is that land-users should be paid compensation equal to the “market price” and/or be given land lots for settlement equal to their “original land”. However, this spirit has never been easily realised, despite amendments to the Land Law through the years (most recently 2013), simply because it is never easy to define the “market price” fairly to the parties involved. For example, the Land Law 2003 provided that provincial governments should issue a land price table annually (based on “market price”) to be used in the calculation of land compensation. This did not work that well, so the Land Law 2013 provided instead that a land-price valuer should be summoned and consulted. Once again, however, land-users remained unhappy with this method.

This has therefore been the main root of land disputes and protests in Vietnam for years, and the government is trying to fix this in the coming Amended Land Law.

From the ongoing discussions, it appears that the issue of trying to figure out a better way to define land price (equal to the “market price”) for land compensation diverges from the trend that land compensation, especially in land acquisition for commercial purposes, should be a mutual arrangement between land-users and project developers. This also means that forced acquisitions, in the case of socio-economic development, would not include projects for commercial purposes. According to this trend, developers will have to deal directly with land-users to acquire land for the development of business projects, with limited involvement on the part of government authorities. This may result in more scarcity in land banks for project development, and input costs would be higher in developing a project, and in our view, the Amendment could lead to mechanisms, such as auctions, bidding or exchange of projects (eg, the obligation of developing resettlement areas), being applied to project developers.

Land administrative procedure

Land administrative procedures are not always straightforward and simple, especially in economic hubs like Ho Chi Minh City, Hanoi or Danang. Procedures in land compensation, land recovery and allocation, land price appraisal, financial obligation determination, etc, cost developers a lot of time and resources, even though the procedures are seemingly straightforward in the applicable Land Law. This is also the area where bribery has become rooted in bureaucracy, leading to hopes that the upcoming Amended Land Law will put an end to this.

However, in our assessment and that of Deputy Prime Minister Ha, the Land Law itself cannot address all of these problems, since there are areas inter-linked with other laws that also need to be amended or even overhauled. For instance,

the procedure to submit an investment project proposal to the authorities for approval involves the Land Law, the Law on Real Estate Trading 2014, the Law on Residential Housing 2014 (the “Housing Law”), and the Law on Investment.

But at least these issues have been put on the discussion table and are receiving attention. Therefore, it appears possible that there may be certain changes or reforms to the procedures on approving land-use plans, zoning or setting up a centralised database on the land register.

Reform of land database and record system

Cadastral information is controlled and held at different levels by the administrative authorities. Land and property databases are filed at district level, while databases of entities are filed at provincial departments that handle resources and environments. However, such databases are not linked together and centralised, causing a great deal of inconvenience to both the public as well as the authorities. Even though the aim of digitalising and centralising information on land and real estates was established long ago in the Land Law 2013 and other laws, this has not yet been implemented due to incapacity and lack of effort from the administration.

The second draft of the Amended Land Law has incorporated provisions on online land-record systems. Public services in relation to land, including public administrative services and information provision, extraction services and other public land services can now be conducted online. The intention is to move towards paperless procedures, unity and conformity in the land-record system.

The recent implementation of technology in such areas as population databases should make it possible for the Amended Land Law to regulate

these areas in more detail. As such, this will also be of great benefit to land-users in general, particularly, for example, in making encumbrance checks quicker and more exact. It is also hoped that this system will reduce speculating in the market, since property information will be more transparent and accessible.

Land-use rights for foreign land-users

The Land Law needs to deal with and clarify this issue in more detail. For example, even though the Housing Law allows foreign buyers to buy and own properties if they meet certain conditions, this policy has not been implemented consistently due to restrictions and unclear regulations in the Land Law. As a result, the issuance of ownership titles to foreign buyers has been stuck for years.

Foreign-invested enterprise (“FIE”) is loosely defined under the current Land Law 2013. This has created a certain mismatch in the concept of FIE under the laws on investment, which to some extent has hindered the application and defining of the land-use rights of FIE under the Land Law. The Amended Land Law is trying to correct this mismatch by being silent on the definition of the foreign-invested enterprise. While attempts were made in the first draft to refer to foreign-invested enterprises as those being subject to the investment procedures applicable to the foreign investor under the laws on investment, the second draft has taken a significant step by crossing out such definition. It is possible that the Amended Land Law may regulate this in such a way that an FIE will also be treated as a corporate entity in general, the same as local enterprises.

Another area of discussion is whether land should be mortgaged to foreign credit institutions. Under the current Land Law 2013, land can be mortgaged to banks operating within Viet-

nam only. Many hope that this will be changed so that corporate users of land-use rights may mortgage land and properties through foreign credit institutions. However, this may still be a long way off.

The Amended Land Law, even when passed, may not bring significant changes to foreign investors’ access to state land banks compared to the current Land Law 2013, but at least clarifications in the Land Law will make the rights of foreign land-users more transparent. Let’s take the issue of asset mortgage, for example; it is not certain in the current Land Law 2013 whether a foreign home-buyer can mortgage their property for financing. It is likely that this issue will be clarified and addressed in the Amended Land Law to the extent that foreign land-users may almost have equal rights to a real estate owner in Vietnam. Alternatively, the delay in issuing ownership titles to foreign home-buyers may be resolved soon.

Some notes to foreign investors in real estate deals in Vietnam

Vietnam has recently become attractive and preferred by foreign investors, both individuals and entities, for real estate investment, due to its market growth and investment yields. The current adjustments to the market, in which local developers holding large land banks have to restructure and exit, creates opportunities for foreign investors in this playground.

However, the distinctions and differences in the real estate laws of Vietnam usually confuse foreign investors. And thus, below are some notes to investors in order to successfully wrap up a real estate deal in Vietnam.

Not all land-use right certificates are the same

The Land Law provides the concept of “land-use rights” (LURs) instead of land ownership, as it is known in other jurisdictions. Both local and foreign land-users have LURs, but sometimes these are not the same. The certificate of land-use rights (LURC) operates as state recognition of your LURs and this document is therefore essential in exercising the rights of a land-user. However, all LURCs are not legally the same, even though their appearance may be the same (red, with standard format), and the scope of rights may be very different in each LURC. For example, leased land-use rights with annual payment of rent are not freely transferable, except under certain conditions. Furthermore, LURs in relation to farming land are far different from those of commercial land or residential land.

Therefore, the first thing to do in a deal is to ask if the vendor has a proper LURC to the property. The prospective investor should then check the LURC to access critical information on the property. The LURC should also be cross-checked against the database held by the relevant authorities.

Due diligence is always essential

Due diligence is an essential step that should be conducted by foreign investors in any real estate deal in Vietnam, even in the case of a simple transaction such as the purchase of an apartment unit in a housing development project. As an example, the Housing Law stipulates a few conditions that the housing developer and the home-buyer have to fulfil before they are qualified to enter into a sale-and-purchase agreement, otherwise, such sale-and-purchase agreement can be declared null and void. Obviously, the rights and interests of the buyer would not be well protected under a void agreement. Depending on the deal’s complexity, the scope

of due diligence may vary. However, there are at least some basic areas to look at:

- the requisite conditions on the purchaser under the applicable laws;
- the lawful ownership rights and land-use rights of the vendor to the property;
- any encumbrances, caveats and restrictions to the property;
- any financial obligations of the vendor in respect of the property; and
- any ongoing disputes or claims over the property.

In acquiring commercial properties and/or projects, the due diligence steps must be more thorough and detailed, and professional advice is needed to ensure good outcomes.

Strict compliance in procedures

Foreign investors should strictly comply with the rules or procedures in transactions in order to minimise their risk. Specifically, the Housing Law requires individual foreign buyers to legally enter into Vietnam as a prerequisite to buying a property in Vietnam, and the buyers must conduct the transaction via a bank account opened at a bank operating in Vietnam. This means that payments to the vendor or payments received from future buyers (at the investment exit stage) should go through this account, otherwise the foreign investor may not remit their capital out of Vietnam.

If the investor is an entity, then the investor has to make a direct investment in Vietnam by maintaining an entity incorporated in Vietnam or by having shares or capital in a business incorporated under Vietnam law. The investor also naturally has to comply with laws relating to business and doing business in Vietnam.

Properly drafted transactional documents

Needless to say, transactional documents are vital to any deal, and these should be drafted by professionals in accordance with the applicable laws and specific circumstances, bearing in mind that the subject matter relates to various areas of law, and furthermore, that Vietnam law in property matters is sometimes not properly developed and clear enough. Therefore, such matters should be undertaken with capable advisers and professionals who have experience and a good understanding of local laws and matters, but who will also be able to deal with the requirements of international investors.

In a particular dispute that was resolved by an international arbitration centre abroad, because this was in a clause in the agreement, the claimant had to apply for recognition by a competent court in Vietnam for local enforcement. This request was rejected on the ground that the dispute (relating to land-use rights in Vietnam) was under the sole jurisdiction of a Vietnamese court. As such, the poorly drafted clause was worthless, as it had no positive outcome for the party.