

REAL ESTATE

Vietnam



LEXOLOGY

Getting The Deal Through

Consulting editor

*Fried Frank Harris Shriver & Jacobson
LLP*

Real Estate

Consulting editors

Devina Rana, Patrick Williams

Fried Frank Harris Shriver & Jacobson LLP

Quick reference guide enabling side-by-side comparison of local insights, including an overview of the legal system; registration and recording; treatment of foreign owners and tenants and of commercial versus residential property; planning and land use; compulsory purchase or condemnation of real estate; bankruptcy and insolvency; use of investment vehicles; acquisitions and leases, including environmental considerations; financing; and recent trends.

Generated 10 December 2021

The information contained in this report is indicative only. Law Business Research is not responsible for any actions (or lack thereof) taken as a result of relying on or in any way using information contained in this report and in no event shall be liable for any damages resulting from reliance on or use of this information. © Copyright 2006 - 2021 Law Business Research

Table of contents

GENERAL

- Legal system
- Land records
- Registration and recording
- Foreign owners and tenants
- Exchange control
- Legal liability
- Protection against liability
- Choice of law
- Jurisdiction
- Commercial versus residential property
- Planning and land use
- Government appropriation of real estate
- Forfeiture
- Bankruptcy and insolvency

INVESTMENT VEHICLES

- Investment entities
- Foreign investors
- Organisational formalities

ACQUISITIONS AND LEASES

- Ownership and occupancy
- Pre-contract
- Contract of sale
- Environmental clean-up
- Lease covenants and representation
- Leases and real estate security instruments
- Delivery of security deposits
- Due diligence
- Structural and environmental reviews
- Review of leases
- Other agreements
- Closing preparations

Closing formalities
Contract breach
Breach of lease terms

FINANCING

Secured lending
Leasehold financing
Form of security
Valuation
Legal requirements
Loan interest rates
Loan default and enforcement
Loan deficiency claims
Protection of collateral
Recourse
Cash management and reserves
Credit enhancements
Loan covenants
Financial covenants
Secured movable (personal) property
Single purpose entity (SPE)

UPDATE AND TRENDS

International and national regulation

Contributors

Vietnam



Tran Thai Binh
binh.tran@lntpartners.com
LNT & Partners



Duong Thi Minh Han
minhhan.duong@lntpartners.com
LNT & Partners



GENERAL**Legal system**

How would you explain your jurisdiction's legal system to an investor?

Vietnam is a country with a civil law system inherited from the French. The National Assembly is the highest legislative body, passing laws and ordinances. The government also passes decrees and has the right to issue legal instruments (eg, orders, government decisions, circulars, guidelines and ministerial decisions) that provide specific regulations to implement the laws passed by the National Assembly. The Vietnamese system does not operate the case laws. However, the recent civil Code 2015 has given case precedents credit as a legal basis for interpretation of the laws. Although the concepts of beneficiary and trustee are inferred in the Vietnamese legal system, they are not premised on the common law system of equity. Consequently, the constructive trust is not recognised.

As a feature of its civil law system, Vietnam's legal system primarily follows written laws and is based on written evidence. Parol evidence is often admissible to the extent of assessing other evidence. Likewise, an oral contract constitutes a valid contract (with limitations), especially in the transfer of movable property. However, any real estate or land transactions must be made in writing and comply strictly with requirements set by the laws (in terms of standard forms and notarisation) to be enforceable.

Injunctive relief is available under Vietnamese laws and is ordered by courts only for cases of emergency. Injunctive relief in relation to real estate includes the attachment of, prohibition of the transfer of rights in, or making changes in or on the property in dispute.

Law stated - 30 September 2020

Land records

Does your jurisdiction have a system for registration or recording of ownership, leasehold and security interests in real estate? Must interests be registered or recorded?

Vietnam requires registration of property ownership stemming from its 'land belongs to the people' concept, under which property owners legally do not have full ownership over the land.

Lands are either allocated or leased by the state to those in demand in terms of either freehold (stable and long-term use) or leasehold (fixed period of time). The concept of leasehold in Vietnam does not operate on the principle as in the common law system. It is a lease of land granted by the state to private parties to exercise their rights thereon for a fixed period of time. The land is returned to the state at the expiration of the term, unless extended.

The rights to the land are limited to land use rights within the extent permitted by the law, such as right to use, possess, enjoy, transfer, collateralise, pledge, exchange, contribute as capital, bequeath as inheritance or donate. The rights over the land and properties attached thereon are recognised and recorded by competent authority under a land use right certificate (LURC). The land users to whom the land is leased or allocated have the rights of ownership over the assets built on the land.

There is a system for registration of land use rights and assets attached on land. Freehold or leasehold by the state must be registered with relevant competent authority. Any lease between private parties is not required for registration. Land use fees are charged by the state, depending on different situations stipulated by the laws. Any security against any land use rights or assets attached on land for any obligation must be registered with the National Registration Agency for Secured Transactions. Any registered security interest is guaranteed title and first in line of priority in the event of bankruptcy.

Foreign invested enterprises (either 100 per cent foreign-owned capital, joint venture or local enterprise of which

capital is contributed by foreign investors implementing the investment project of building houses for sale or for rent) are entitled to the land allocated to them on which the land use fees are charged by the state, on the following conditions:

- the land users have the financial capacity to make use of the land in accordance with the schedule of the investment project;
- escrow is in accordance with investment laws; and
- there is no infringement of regulations or laws.

Law stated - 30 September 2020

Registration and recording

What are the legal requirements for registration or recording conveyances, leases and real estate security interests?

The laws and regulations of Vietnam are applicable nationwide. To register transactions relating to land use rights, the land user must have lawful title over the property and any assets attached to the land. The respective House and Land Registry Department will either update the transfer or issue a new LURC to the transferee for use in recording the transferee's title over the land or the property.

Transfer of title in real estate property must be made in writing, witnessed and notarised by an authorised notary office. Each party to the transaction shall conduct the registration procedure for the title transferred to the transferee with the competent authority, and recognise their name under the certificate of land use right and assets attached on the land. The seller bears the personal income tax on the profit gained from the transfer of the property and the buyer bears the registration fee. The personal income tax imposed on a non-residential seller transferring real estate property is 2 per cent of the transfer price. A corporate entity will bear corporate income tax of 20 per cent on the gain. The buyer bears a registration tax of 0.5 per cent of the contracted price. A notary fee ranging from 0.03 per cent to 0.1 per cent of the contract value is also incurred as part of the transfer transaction and is typically paid by the seller unless otherwise stipulated by the parties.

To minimise the profit gain tax, one of the approaches that the transferor may use is the 'sole property' tax exemption. For example, the transferor may transfer the property to his or her son or daughter, who owns no property. The latter may subsequently transfer the property to the ultimate buyer. As this is the sole property of the son or daughter, he or she is not subject to income tax on the transfer if the transfer is conducted six months after taking over from the parent.

After clearing the registration tax and profit gain tax, the application is submitted to the House and Land Registration Department, where filing and other administrative fees are incurred. These fees are small and are usually below 2 million dong in total.

Any security against land use rights or property attached on land for any financial obligations must be registered with the Land Registry. The property must be in the ownership of the debtor, the certificate of which is in his or her possession. The security agreement entered into between the debtors and the creditors must be in writing, signed and notarised. The registered security is recorded on the LURC.

Lease agreements between private parties are not required by law for registration. Only the transfer of title is required. Individuals need only to sign a lease agreement and are bound thereby.

Law stated - 30 September 2020

Foreign owners and tenants

What are the requirements for non-resident entities and individuals to own or lease real estate in your jurisdiction? What other factors should a foreign investor take into account in considering an investment in your jurisdiction?

Land law does not include the concept of owning land. Instead, there are land use rights over the land, and this is the same for foreign land holders. However, the Law on Housing allows foreign individuals to own or to lease houses in Vietnam (with land use rights attached to the house).

Foreign individuals are allowed to buy properties developed in new residential housing projects by property developers in a quota of 30 per cent of the total housing units in that project, with an ownership duration of 50 years (from the issuance of the title certificate), which is extendable upon expiry.

The housing ownership rights of foreign individuals are the same as those of local housing owners, including the right to sell, lease, give, exchange, bequeath, capitalise, etc. Foreign housing owners are allowed to sell or transfer the property to either local or foreign individuals during their ownership. A foreign buyer will enjoy the remaining duration of housing ownership, while a local buyer will enjoy long-term (or freehold) status with the property. This is good for the foreign owner when exiting from the investment, while the housing value can be remained.

The requirements for owning properties in Vietnam are quite simple. The foreign individual must have full civil capacity for a housing purchase transaction and be lawfully available in Vietnam when entering into the housing purchase agreement.

Foreign entities investing in Vietnam are entitled to lease land use rights over commercial and industrial properties that they own (with a maximum duration of 50 years).

Lease agreements must be made in writing. Before leasing out, the landlord must notify management authority at district level, and pay the applicable tax. Tenants, being foreign individuals or entities, are subject to the following requirements:

- they must have full civil capacity to enter into the housing transaction; and
- they must be lawfully available in Vietnam to sign the Vietnamese house sale contract.

Non-residential entities wishing to invest in a house-building project in Vietnam must obtain investment licences, namely an Investment Registration Certificate or an Investment Approval, pursuant to the law on investment. The project must operate and comply with Vietnamese laws. Non-resident buyers or investors wishing to invest in property in Vietnam need to take into consideration the foreign exchange control factor, which requires that payments made into Vietnam for the purchase of property must be through an account in Vietnam. Non-residential individuals need to be aware that personal income tax imposed on the transfer of real estate property is 2 per cent of the transfer price (ie, the entire receivables from the transfer). Technically, the investment capital or sale proceeds of properties is allowed to be remitted out of Vietnam after the foreign investor's fulfilment of taxes.

Law stated - 30 September 2020

Exchange control

If a non-resident invests in a property in your jurisdiction, are there exchange control issues?

The Law on Foreign Exchange Control sets forth that transactions within Vietnam's territory must be transacted in

Vietnamese dong. In addition, foreign investors, during the implementation of the investment project, are required to maintain an investment account at a bank operating in Vietnam, through which all capital transactions must take place. Non-residential entities must transfer capital into the capital account of the invested company. The investment capital contribution, repatriation of the original investment capital, profits and other receivables must be made through a direct investment capital account of the company. Non-resident individuals must make the payment of the purchase price for the houses through a credit institution operating in Vietnam.

Foreign investors' capital and profit (after finalising and paying applicable taxes), as well as lawful earnings of foreign individuals in Vietnam (eg, salaries from employment and proceeds from the sale of their proceeds), can be remitted to their home country without incurring further remittance taxes. With proper documentation that all applicable taxes have been paid, the procedure to remit abroad at the respective bank should be easy to accomplish.

Law stated - 30 September 2020

Legal liability

What types of liability does an owner or tenant of, or a lender on, real estate face? Is there a standard of strict liability and can there be liability to subsequent owners and tenants including foreclosing lenders? What about tort liability?

Vietnam does not operate the system of tort. Owners and tenants of real estate property may face civil liability if their property causes damages or nuisance to a third party. Administrative or criminal liability may also be imposed if they contravene certain regulations (eg, on safety in construction) and cause severe damages. In principle, subsequent owners succeed in both rights and obligations (including liabilities and responsibilities) once the real property has been transferred, especially with respect to land use or zoning regulations imposed by the state. Owners and tenants incur liability for damage caused by the property unless the damage is entirely the fault of the aggrieved party or in the event of force majeure.

Law stated - 30 September 2020

Protection against liability

How can owners protect themselves from liability and what types of insurance can they obtain?

Assets insurance and damages insurance are available in Vietnamese law. While taking out home insurance is compulsory for those exposed to high risks of fire and explosion, it is only optional and recommended for other ordinary property according to the laws on housing. Developers and consultancy contractors must take out several compulsory insurances during the building stage, in respect of environment, labours and community safety. The insured can also take out third-party liability coverage insurance to insure themselves against damages caused to other parties. These insurances are governed by the Law on Insurance Business 2000 (amended 2010).

The Civil Code provides an 'effectiveness against third party' regime to secure the rights of the contractual parties against third-party claims. The concept imposes on the seller the obligation to warrant that the ownership rights over the property sold to the buyer are free from third-party claims. The seller is obliged by law to take on the side of the buyer if a claim is brought by a third party, and the buyer is entitled to terminate the contract and claim for damages if the third party turns out to have partial or entire rights over the property. Owners may also rely on restrictive covenants or indemnity provisions in their leases to guard against third-party claims.

Law stated - 30 September 2020

Choice of law

How is the governing law of a transaction involving properties in two jurisdictions chosen? What are the conflict of laws rules in your jurisdiction? Are contractual choice of law provisions enforceable?

The choice of law in Vietnam is governed by the Civil Code. Pursuant to the Civil Code, treaties between Vietnam and the relevant country will be the first source for the court to choose the governing law. If there is no such treaty, *lex situs* is applied to resolve matters involving ownership of property. With respect to the rights and obligations of the parties, if a transaction is entered into and performed entirely in Vietnam and related to real estate in Vietnam, the governing law must be Vietnamese law. Otherwise, the governing law will be chosen in accordance with the parties' agreement on the choice of law. If there is no agreement or the agreement is void, *lex loci actus* is applied.

Contractual choice of law provisions are enforceable, providing that they do not conflict with Vietnamese law. However, the application of foreign law must not be contrary to the fundamental principles of Vietnamese law. Vietnamese courts, however, have not yet applied foreign law to decide any case brought before them.

Law stated - 30 September 2020

Jurisdiction

Which courts or other tribunals have subject-matter jurisdiction over real estate disputes? Which parties must be joined to a claim before it can proceed? What is required for out-of-jurisdiction service? Must a party be qualified to do business in your jurisdiction to enforce remedies in your jurisdiction?

Vietnam follows a two-level judgment system: the court of first instance and the appellate court. District courts are first-instance courts and provincial courts are appellate courts. However, in cases involving foreign entities or individuals of seriousness or high value, provincial courts are the first-instance courts and the Supreme Court is the appellate court.

The parties to a commercial transaction may use either the court system or arbitration as the dispute-resolution body. However, the arbitral award is final and enforceable, if not cancelled by the competent court on the ground of undue procedure.

The Civil Proceeding Code sets forth that Vietnamese courts have jurisdiction over matters relating to land use rights.

Law stated - 30 September 2020

Commercial versus residential property

How do the laws in your jurisdiction regarding real estate ownership, tenancy and financing, or the enforcement of those interests in real estate, differ between commercial and residential properties?

The local government's land use plans define which properties are residential and commercial. The biggest difference between residential and commercial real property under the laws of Vietnam is the ownership term of the property: 'stable and long term' use for the former and a limited term of 50 years for the latter, unless extended. Notwithstanding this, the owners' rights and interests in residential and commercial property are the same in terms of tenancy and financing, or enforcement of those rights.

*Law stated - 30 September 2020***Planning and land use**

How does your jurisdiction control or limit development, construction, or use of real estate or protect existing structures? Is there a planning process or zoning regime in place for real estate?

Local governments control the development, construction and use of real estate based on the land use planning and zoning in all areas by land use and construction masterplans. A developer cannot develop residential properties on the land designated for commercial use and vice versa without proper approval from the construction management authority. To carry out construction work, the owner must undergo a complicated process to obtain a construction licence that sets various requirements for the developer or the owner to comply with; for example, the height of the building, the construction coverage, the underground works, and even the appearance of the building must be properly approved before the construction can proceed.

*Law stated - 30 September 2020***Government appropriation of real estate**

Does your jurisdiction have a legal regime for compulsory purchase or condemnation of real estate? Do owners, tenants and lenders receive compensation for a compulsory appropriation?

Land law allows the government to appropriate real estate from land users in the case of developing public utilities, economic development, emergencies or for national security purposes. The appropriation is done through a due and strict process, requiring approval from the highest governing body at the local level, and in some special circumstances from the central government. The land user will be compensated for their land use rights at the land price valued by the authority. In addition, the property owner may also be compensated for investments made on the land, may receive remuneration to resettle in another area, and may obtain other support specific to the situation. As foreign buyers can buy properties in newly planned areas, the risk of clearance or appropriation by the authorities is almost zero.

However, whether tenants and lenders of the owners may be entitled to compensation depends on the agreement between the respective parties.

*Law stated - 30 September 2020***Forfeiture**

Are there any circumstances when real estate can be forfeited to or seized by the government for illegal activities or for any other legal reason without compensation?

Land law allows the local authority to expropriate, without any compensation, the land located or leased to the land user for an investment project if it has violated the land laws by failing to carry out the investment project within 12 months, or 24 months after the construction completion deadline has passed, or misusing the land, or failing to fulfil its legal obligations. Any reduction in demand or dissolution or bankruptcy of the land user also entitles the state to recover the land without compensation. Any forfeiture, recovery or expropriation of the land use rights must be supported by a written decision from the competent authority.

Law stated - 30 September 2020

Bankruptcy and insolvency

Briefly describe the bankruptcy and insolvency system in your jurisdiction.

Bankruptcy proceedings are carried out by courts. An enterprise is deemed insolvent if it fails to pay debts within three months of the due day. The legal representatives, chairman, shareholders or creditors, either secured or unsecured, of the enterprise may petition for initiation of bankruptcy proceedings within the applicable time limit since the insolvency. Once an enterprise is insolvent, the chairman (in the case of joint-stock companies and multiple member companies) or the owners of a partnership must file a petition to the court to initiate bankruptcy proceedings. Only unsecured creditors or partially secured creditors are entitled to file a petition for involuntary dissolution.

Once a petition is accepted by the court, all requests for payment will be suspended. If the bankruptcy proceeding is initiated against an enterprise, the court will nominate a trustee to manage the enterprise's assets. The enterprise is subject to certain restrictions. The entity may be required to acquire written consent from the trustee before paying rent, charges and fees to the seller, lender and landlord.

Recovery (similar to reorganisation) proceedings require the enterprise to prepare and submit its recovery plan to the creditors for approval. Once the plan is approved by the creditors and recognised by the court, a lender may collect rent from the enterprise without being subject to any restrictions. Unless otherwise agreed to by the creditors, the term for executing the recovery plan must not exceed three years from the date of approval.

Law stated - 30 September 2020

INVESTMENT VEHICLES

Investment entities

What legal forms can investment entities take in your jurisdiction? Which entities are not required to pay tax for transactions that pass through them (pass-through entities) and what entities best shield ultimate owners from liability?

The Law on Enterprise sets the legal forms that investors may choose for investment: a limited liability company (owned by a sole investor or several investors), a joint-stock company (which requires at least three shareholders), a partnership, a private enterprise or a sole proprietorship (owned by one investor with unlimited liability).

There is no pass-through entity concept in Vietnamese law, as every entity is taxed on its earnings at the corporate income tax rate of 20 per cent, as the case may be (except for cases with tax incentives). Limited liability companies and joint-stock companies are the most preferable forms in Vietnam, as the owners are only liable up to the charter capital registered with the authorities.

Law stated - 30 September 2020

Foreign investors

What forms of entity do foreign investors customarily use in your jurisdiction?

Foreign investors may invest in Vietnam directly or indirectly. In accordance with the forthcoming Law on Investment 2020, a direct investment includes establishing wholly foreign-owned enterprises, entering into business cooperation contracts with local partners or acquiring shares or equity from existing enterprises, or implementing the investment project.

An indirect investment would be buying stocks, bonds or other valuable financial instruments on the stock market,

security funds, or other intermediaries (defined under Ordinance on Foreign Exchange Control 2005, amended in 2013).

Most foreign investment in Vietnam is made directly. Foreign investors usually choose to acquire shares or enter into business cooperation contracts with local partners to overcome difficulties and complexities in the administrative procedures in this industry. The preferable forms of legal entities are a limited liability company and a joint-stock company.

Foreign individuals may opt to invest by buying condominiums in Vietnam, as allowed under the Residential Housing Law. The condition for this investment is quite relaxed: the homebuyer must be lawfully present in Vietnam. The buyer has ownership rights over the property for 50 years (right to sell, lease, capitalise, bequeath, exchange, etc). The buyer always has the right to sell the property to either a foreigner or a local owner. If selling to the latter, they will have freehold status with the property (instead of the 50-year period applied to foreign owners).

Law stated - 30 September 2020

Organisational formalities

What are the organisational formalities for creating and maintaining the above entities? What requirements does your jurisdiction impose on a foreign entity? Does failure to comply incur monetary or other penalties? What are the tax consequences for a foreign investor in the use of any particular type of entity, and which type is most advantageous?

Forming a company normally follows these steps:

- finding a location;
- preparing and submitting a dossier to apply for an investment certificate;
- obtaining the investment certificate;
- registering the company tax code; and
- creating and registering the company seal.

Apart from an investment registration certificate, a company subject to specific business areas (eg, banking, retail or gambling) may be required to obtain other licences.

Generally, corporate income tax and value-added tax are the most frequent taxes imposed on a company. In terms of tax, the most advantageous type of entity will depend on the particular situation of the investor.

Law stated - 30 September 2020

ACQUISITIONS AND LEASES

Ownership and occupancy

Describe the various categories of legal ownership, leasehold or other occupancy interests in real estate customarily used and recognised in your jurisdiction.

Real estate in Vietnam means the assets on the land (eg, trees, crops and any structures thereon) and the land use rights over the land. Therefore, legal ownership in real estate includes ownership over the tangible assets and the land use rights, and ownership over the assets is limited to the duration of the land use rights.

The land use rights vary depending on the land category in terms of the extent and duration of the rights. Regarding residential housing investment projects for sale or for lease in Vietnam, the state will allocate to the project developer

(either local or foreign) the land for a duration equal to the duration of the project. A foreign homebuyer of such a project is entitled to ownership over the property for a maximum term of 50 years, while a local homebuyer will be entitled to stable and long-term use of the land (similar to freehold). Rights over real estate are recognised under a certificate of land use rights and the assets attached thereon issued by local governments.

Generally, a land user with a land use rights certificate may exercise rights over the real estate, such as the right to transfer, lease, sublease, exchange, donate, contribute as capital, bequeath or mortgage the real estate. However, the extent of these rights varies depending on the category of the land. For example, agricultural land use rights may not be freely transferred to others in some cases.

Foreign investors may acquire land use rights via land lease from the Vietnamese authorities or industrial park developers, or by way of capital contribution from local partners. When leasing land from Vietnamese authorities, foreign investors may elect to pay rent annually or once for the entire lease duration. In the case of annual rental payment, the rent may be reviewed from time to time by the local authority and the land users may be subjected to restricted land use rights (eg, cannot transfer to others if not approved by local authorities). In the case of a one-time payment of rent for the entire lease duration, the land user has the same land use rights as local land users do. With land use rights contributed by local partners, the to-be-formed entity is entitled to the land use rights granted to the local partner.

Law stated - 30 September 2020

Pre-contract

What are the typical pre-contractual steps?

Memoranda of understanding or term sheets, commonly used in Vietnam, are a form of pre-contractual agreement before the execution of a binding contract of sale. As long as the agreement explicitly states that it is non-binding, then it is not enforced by the courts.

In principle, what the agreement is called is not determinative of its enforceability. The Civil Code 2015 provides that any agreement giving rise to lawful rights and obligations to the parties in a transaction is a binding agreement (unless the parties agree otherwise) provided that the contractual parties are of full civil capacity; enter into the contract at their free will, and the purpose and substance do not violate the prohibition provisions of the laws and moral of society. Therefore, whether it is a term sheet, letter of intent, memorandum of understanding or an in-principle agreement used as a pre-contract document for the transaction, in Vietnam all of these may be enforceable if they satisfy the above principles. Before entering into a binding agreement, either party may walk away from the deal without any liability if so stipulated in the agreement.

Law stated - 30 September 2020

Contract of sale

What are typical provisions in a contract of sale?

Typical provisions in a contract of sale for property include:

- the identification of the parties to the transactions;
- details of the property;
- price and payment schedule;
- rights and obligations of the parties;
- representations and warranties;

- breach and termination; and
- dispute settlement.

In real property transactions, the seller usually provides representation and warranties, including good title in the property, no collateralisation to secure for any financial liabilities, no existing encumbrances or disputes and no rights of third parties. As title search is not compulsory under Vietnamese law and there is no public system to carry out a title search over real estate property in Vietnam, the certificate of land use right is the main evidence to present the good title of the seller in the property.

Any income tax incurred from the sale of property is imposed on the seller unless the buyer accepts to undertake that liability.

The down payment is usually 10 per cent of the property value, which is normally held by the seller as a security performance of the transaction. However, when dealing with high-value properties an escrow arrangement may be used. The buyer may forfeit the security performance if the buyer unilaterally and unduly terminates the transaction. Similarly, the seller may have to return the security and pay the penalty equivalent to the amount if the seller unilaterally and unduly terminates the transaction. The parties can contractually agree otherwise.

The seller bears any applicable income tax while the buyer pays the registration tax (unless otherwise agreed by the parties) and the value added tax (10 per cent of the sale price), if either party is an entity. The seller remains liable for any land tax assessed to, or utility charges at, the property until the legal title is transferred to the buyer. In practice, parties agreed on a fixed sale price until closing.

Law stated - 30 September 2020

Environmental clean-up

Who takes responsibility for a future environmental clean-up? Are clauses regarding long-term environmental liability and indemnity that survive the term of a contract common? What are typical general covenants? What remedies do the seller and buyer have for breach?

The Law on Environmental Protection requires the persons causing the harm to the environment to compensate for damages caused thereby and to restore the environment as much as possible to the condition prior to the damage.

Once title is transferred to the buyer, the buyer is liable for environmental damages to the property, including any environmental clean-up as required by the competent authority. A survival provision is not common and it does not shield the existing owner from environmental liability with the authority.

If the seller has agreed to indemnify the buyer, then the buyer may seek indemnity from the seller for any damage incurred on the buyer.

Law stated - 30 September 2020

Lease covenants and representation

What are typical representations made by sellers of property regarding existing leases? What are typical covenants made by sellers of property concerning leases between contract date and closing date? Do they cover brokerage agreements and do they survive after property sale is completed? Are estoppel certificates from tenants customarily required as a condition to the obligation of the buyer to close under a contract of sale?

In selling a property with existing leases, the seller's rights and obligations under existing leases will be transferred to the purchaser. Therefore, the normal representations include:

- tenants' consent to continue the leases until their expiry date;
- all financial obligations and liabilities by the seller in respect of the property before the closing have been cleared or will be at the seller's expense; and
- tenants shall not solicit or induce any existing tenants, suppliers or property managers to take any action that is detrimental to the buyer.

The seller must covenant not to execute any new leases or amend existing leases without the consent of the buyer between the contract and closing date. Estoppel certificates from tenants are customarily required by the buyers.

Law stated - 30 September 2020

Leases and real estate security instruments

Is a lease generally subordinate to a security instrument pursuant to the provisions of the lease? What are the legal consequences of a lease being superior in priority to a security instrument upon foreclosure? Do lenders typically require subordination and non-disturbance agreements from tenants? Are ground (or head) leases treated differently from other commercial leases?

A lease can be subordinate to a security instrument if the security instrument is properly registered with the registration office. In principle, a landlord must seek the lender's consent if it wishes to lease the property to a lessee. Upon foreclosure, the lease must be terminated and the tenant must return the property to the lender, unless otherwise agreed by the parties.

The owner may also collateralise real property that has already been leased. In such cases, the owner must serve written notice to its lessees. However, the lender usually requires the owner to show the subordination or non-disturbance agreements to tenants. In such a situation, the tenant is allowed to remain at the property until the lease term expires, and the lender may be entitled to the rights of the landlord, including the right to the rental payment.

Law stated - 30 September 2020

Delivery of security deposits

What steps are taken to ensure delivery of tenant security deposits to a buyer? How common are security deposits under a lease? Do leases customarily have periodic rent resets or reviews?

The delivery of tenant security deposits to a buyer requires consent from the respective tenant. This may be in the form of a clause in the lease agreement. The landlord often requires security deposits in the form of cash or bank guarantees. Periodic rent review provisions are customarily used by the parties.

Law stated - 30 September 2020

Due diligence

What due diligence should be conducted before executing a contract? Is any due diligence customarily permitted or conducted after contract but before closing? What is the typical method of title searches and are they customary? How and to what extent may acquirers protect

themselves against bad title? Discuss the priority among the various interests in the estate. Is it customary to obtain government confirmation, a zoning report or legal opinion regarding legal use and occupancy?

In low-value transactions, the buyer may ask the seller to show the original title certificate (land use rights and ownership of assets on the land). The certificate provides strong evidence of the seller's lawful title to the property. In high-value and risky transactions, legal counsel is necessary to check the legal status of the property. The due diligence may cover the following aspects:

- the lawful rights of the owner;
- the owner's fulfilment of any financial obligations;
- environmental requirements;
- rights and interests of the parties;
- encumbrances and restrictions;
- constructions and zoning requirement; and
- the owner's compliance with land use requirements.

In Vietnam, purchasers do not have access to title insurance, legal opinions on title or indemnity funds to protect against bad title. Instead, purchasers can protect themselves against bad title by representation and warranty clauses, by agreeing that closing occurs only when they receive title certificates issued by the relevant competent authority under the purchaser's name, or by retaining a certain amount from the purchase price within a specified period.

Vietnamese laws provide statutory priority for registered security instruments. Among registered property interests, the first in time is the first in priority. Among property interests that are all non-registered, the first in time is the first in priority. Priority can be recorded by agreement between the relevant and affected parties.

Law stated - 30 September 2020

Structural and environmental reviews

Is it customary to arrange an engineering or environmental review? What are the typical requirements of such reviews? Is it customary to get representations or an indemnity? Is environmental insurance available?

An environmental impact assessment is required by law for residential projects of more than 400 households or 2,000 users. The assessment must cover and forecast the sources of waste and its impact on the environment and health, the risk management and mitigation measures, the environmental management and monitoring programme implemented, any estimation of costs for the construction of environmental protection works, and environmental protection measures.

It is customary to obtain representations or an indemnity to cover these issues. Environmental insurance is available and recommended by the state, and is compulsory for residential housing projects. A zoning report or legal opinion is advisable, although this is typically arranged only in relation to new development projects or where the buyer intends to build new structures or have a specific purpose for the property.

Law stated - 30 September 2020

Review of leases

Do lawyers usually review leases or are they reviewed on the business side? What are the lease issues you point out to your clients?

It is advisable to have an attorney review leases on legal as well as business issues given the complexity of real estate law in Vietnam, especially with commercial leases, where landlords usually impose various tenant restrictions. Among other things, a tenant should pay attention to:

- any limitation to rights to use the property;
- circumstances under which the landlord may assign its obligations to other parties;
- rent must be quoted in Vietnamese currency; otherwise, the lease may be void;
- circumstances allowing the landlord to terminate the lease: normally the landlord provides more and broader grounds to terminate a lease with a tenant;
- circumstances allowing the tenant to unilaterally terminate the lease without penalty; and
- replacement of the property management company.

Lenders usually prefer the property management agreements to be subordinate to the mortgage to keep in place the continuity of the property management company.

Law stated - 30 September 2020

Other agreements

What other agreements does a lawyer customarily review?

With commercial property as well as high-value transactions, it is highly advisable to retain lawyers to review all documents relating to the transaction. Vietnamese laws on real property are unique, and a proper legal assessment of the terms and conditions contained in the documentation is necessary. Brokerage agreements are voidable if the broker is not qualified under the laws of Vietnam.

Law stated - 30 September 2020

Closing preparations

How does a lawyer customarily prepare for a closing of an acquisition, leasing or financing?

The preparation for closing a transaction, among other things, may include:

- authorisation of the signature in the transaction documents;
- fulfilment of conditions precedent for the closing set forth by the parties;
- verification of original documents as required;
- preparation of transaction documents necessary for the signatories; and
- execution of transaction documents at the notary office or competent authority (if required by relevant laws).

The financing source often requires the financing recipient to hand over original documents regarding the property or the development project for its custody and to duly register the financing transaction to secure its rights and interests.

Lawyers may base their analysis on the constitutional documents of an entity (eg, the articles of association, the business registration certificate and board resolutions) to verify the authorisation of signatures.

There is usually a reasonable period between the contract and closing so that the parties are properly prepared to close the deal. The length depends on the deal size as well as the agreement of the parties. It may be one or two weeks for a low-value deal or several months for a high-value transaction.

Law stated - 30 September 2020

Closing formalities

Is the closing of the transfer, leasing or financing done in person with all parties present? Is it necessary for any agency or representative of the government or specially licensed agent to be in attendance to approve or verify and confirm the transaction?

The law does not require all parties to be present on the closing day to make the signing of the contract valid. The Civil Code provides that an agreement shall be deemed executed on the date the last signature is made, and effective from that date (unless otherwise agreed by the parties). Most property transactions must be conducted before a notary officer except for transactions involving real estate developers. Omitting this procedure may make the agreement voidable and invalid.

In property sale transactions by a real estate developer to a homebuyer, notarisation is not required but certification by a licensed agent is required. The certification is an essential document for the homebuyer to obtain the ownership title.

Law stated - 30 September 2020

Contract breach

What are the remedies for breach of a contract to sell or finance real estate?

The laws on contracts allow a non-defaulting party to claim for all actual damages caused by a breach by the defaulting party. The non-defaulting party can also claim a penalty if the contract so stipulates. In certain cases, it is sometimes advisable to structure a performance security deposit payment whereby the defaulting party loses the deposit (if it is the buyer) or to return the deposit to the non-defaulting party at double the value (if it is the seller). The parties can settle contract breaches themselves; otherwise, disputes can be resolved by a dispute settlement body (a competent court or arbitration).

Law stated - 30 September 2020

Breach of lease terms

What remedies are available to tenants and landlords for breach of the terms of the lease? Is there a customary procedure to evict a defaulting tenant and can a tenant claim damages from a landlord? Do general contract or special real estate rules apply? Are the remedies available to landlords different for commercial and residential leases?

In property leases, the common remedies available to tenants and landlords include claiming for damages incurred by the non-defaulting party (eg, costs to rectify the breach, other third-party claims and so on), applying a penalty if set forth in the lease, forfeiting the security deposit and early termination of the lease. In principle, general contract rules will be applied, but specific real estate laws on a subject matter may take precedence if there is a conflict with general

contract rules.

To evict a defaulting tenant, the landlord must obtain a court order and the enforcement authority will carry out the eviction. The defaulting tenant must pay the rent and for damages incurred up to the time of eviction to the landlord.

Law stated - 30 September 2020

FINANCING

Secured lending

Discuss the types of real estate security instruments available to lenders in your jurisdiction. Who are the typical providers of real estate financing in your country? Are there any restrictions on who may provide financing?

The security instruments available to lenders include collateralisation, pledges, security deposits and guarantees. Collateralisation is used most by lenders, as it allows lenders to retain the property's title document even though the borrower is in the possession and use of the property. The debtor cannot assign the property without the title document but can exploit the property commercially and thus generate earnings to repay the loan. A collateral must be notarised and registered with the relevant land registration department to be valid and enforceable. The collateralisation may grant a lien and charge upon the real estate collateral if it is clearly stated. A valid collateralisation with a lien or charge can operate as a title conveyance to the lender.

Law stated - 30 September 2020

Leasehold financing

Is financing available for ground (or head) leases in your jurisdiction? How does the financing differ from financing for land ownership transactions?

In the context of normal rent of property between private parties, financing is available for both ground and head leases without much difference from financing for land ownership transactions. The most notable difference is that the borrower may have to use other assets as collateral for the loan if his or her interests in the ground (or head) lease cannot cover the loan.

Law stated - 30 September 2020

Form of security

What is the method of creating and perfecting a security interest in real estate?

A real estate collateralisation is perfected by way of notarisation and registration with the relevant Land Registry department. A pledge, however, requires only notarisation to be valid.

Law stated - 30 September 2020

Valuation

Are third-party real estate appraisals required by lenders for their underwriting of loans? Are there government or industry standards for appraisals? Must appraisers have specific qualifications or required government or industry certifications? Who is required to order the appraisal?

Real estate appraisals may be conducted by either a lender or a professional appraiser. If it is a high-value property, an appraisal is often undertaken by a professional appraisal company. Generally, to obtain a practising licence for property valuation, real estate appraisers must:

- possess a university degree on price valuation or have completed a training course on price valuation at a competent institution;
- have at least three years' experience; and
- pass an examination administered by the Ministry of Finance.

Law stated - 30 September 2020

Legal requirements

What would be the ramifications of a lender from another jurisdiction making a loan secured by collateral in your jurisdiction? What is the form of lien documents in your jurisdiction? What other issues would you note for your clients?

Lenders from other jurisdictions may grant loans to investors in Vietnam without the necessity of qualifying to do business in Vietnam. Generally, loans with terms of more than one year must be registered with the State Bank of Vietnam; otherwise, they are voidable. Lenders are subject to corporate income tax from earnings from the loans, which must be withheld by borrowers.

Foreign lenders cannot hold a direct collateralisation or pledge on a borrower's real property, but can do so with other intangible property (such as shares). Foreign lenders may appoint a bank in Vietnam as agent to hold collateral or pledges over the borrowers' properties. There are two separate security registration systems available for real estate property and non-real estate property. Real property security must be registered with the Land Registry. Non-real estate property security must be registered with the National Registration Agency for Secured Transaction. Security instruments are assignable without any restriction.

Law stated - 30 September 2020

Loan interest rates

How are interest rates on commercial and high-value property loans commonly set (with reference to LIBOR, central bank rates, etc)? What rate of interest is legally impermissible in your jurisdiction and what are the consequences if a loan exceeds the legally permissible rate?

The State Bank of Vietnam issues a minimum lending rate with a capped margin from time to time to which credit institutions must adhere. Short-term loans granted by credit institutions to borrowers are subject to a rate capped by the maximum lending rate issued by the State Bank from time to time. Interest rates for loans between businesses are subject to mutual agreement, but cannot exceed 50 per cent of the loan principal published by commercial banks, and interest on overdue outstanding payments must not exceed 150 per cent per year. Fees and lender costs are not included in the interest for the calculation of legally permissible interest rates.

Law stated - 30 September 2020

Loan default and enforcement

How are remedies against a debtor in default enforced in your jurisdiction? Is one action sufficient to realise all types of collateral? What is the time frame for foreclosure and in what circumstances can a lender bring a foreclosure proceeding? Are there restrictions on the types of legal actions that may be brought by lenders?

The borrower is deemed in default if he or she is unable to repay the loan as agreed without any need for further action by the lender. Although the laws on lending grant lenders the right to foreclose the secured assets at the judgment of competent courts on the default of the debtor, the lender may choose to reserve the rights and execute a repayment schedule with the debtor instead. The last recourse is probably to initiate legal proceedings against the debtor.

The concept of 'one action' does not exist in Vietnamese law. Lenders can dispose of assets used as collateral for the loan. If the proceeds from the disposal of the assets are not sufficient to repay the loan (including the principal, interest and other costs), the lender may be pursued for the deficiency. Vietnamese law does not set out a specific timeframe for foreclosure. The timeline for such will therefore depend on various factors, such as the method of foreclosing and the willingness of debtors or the party in actual possession of the property to cooperate. In practice, the whole process may take from six to 12 months to complete.

Pursuant to the Civil Code, the lender may not bring an action against the guarantor if the guarantor proves that the debtor can repay the debt (by way of foreclosure) with the lender. There is no legal restriction on the type or the number of legal actions that can be taken by lenders against defaulting borrowers to recover debt.

Law stated - 30 September 2020

Loan deficiency claims

Are lenders entitled to recover a money judgment against the borrower or guarantor for any deficiency between the outstanding loan balance and the amount recovered in the foreclosure? Are there time limits on a lender seeking a deficiency judgment? Are there any limitations on the amount or method of calculation of the deficiency?

If there is a deficiency between the amount recovered in foreclosure and the outstanding loan, the lender may file a claim against the debtor or debtors to recover a money judgment for the deficiency. Aside from bankruptcy proceedings, there are no limitations on the amount or the method of calculation of the deficiency.

Law stated - 30 September 2020

Protection of collateral

What actions can a lender take to protect its collateral until it has possession of the property?

For lenders to protect their collateral, they should properly register it with the competent authority. In addition, the lender may check the collateral from time to time for information about its status. There is no concept of receivership under the laws of Vietnam. The lender must have an assignment from the borrowers to collect rent directly during the foreclosure. Under the laws of Vietnam, a pledge can be a mortgagee in possession, whereby the mortgagee can possess the collateral. The lender will assume the risks associated with the assets when in possession.

Law stated - 30 September 2020

Recourse

May security documents provide for recourse to all of the assets of the borrower? Is recourse typically limited to the collateral and does that have significance in a bankruptcy or insolvency filing? Is personal recourse to guarantors limited to actions such as bankruptcy filing, sale of the mortgaged or hypothecated property or additional financing encumbering the mortgaged or hypothecated property or ownership interests in the borrower?

Security documents provide for recourse to the mortgaged assets only. If the collateral is properly registered, the loan is a secured debt and has first priority in bankruptcy or insolvency filings.

Law stated - 30 September 2020

Cash management and reserves

Is it typical to require a cash management system and do lenders typically take reserves? For what purposes are reserves usually required?

It is not common to require cash management systems to be lenders or for the lender to take reserves.

Law stated - 30 September 2020

Credit enhancements

What other types of credit enhancements are common? What about forms of guarantee?

Other types of credit enhancements, such as letters of credit or holdbacks, are common. A guarantee must be in writing and may be in various forms, such as a guarantee of completion, performance bond or payment guarantee by a third party. A payment guarantee may be comparable to a limited recourse guarantee for losses or the entire debt. To secure the guarantee, the guarantor is also required to provide collateral.

Law stated - 30 September 2020

Loan covenants

What covenants are commonly required by the lender in loan documents?

The common covenants required by the lender of the borrower are:

- to use the loan for the purpose specified in the loan documents;
- to repay timely the loan and interests;
- to notify the lender of any material effects to its business or of any default;
- to notify the lender of its financial status from time to time; and
- to not make any changes to the collateral.

Law stated - 30 September 2020

Financial covenants

What are typical financial covenants required by lenders?

Typical financial covenants required by lenders include the ceiling ratio between the principal and the collateral value, the ratio of total borrowings to tangible net worth (gearing) or the debt service coverage ratio. Lenders always require the borrower to update their periodical financial reports. It is also common to require ongoing appraisals of the collateral's value.

Law stated - 30 September 2020

Secured movable (personal) property

What are the requirements for creation and perfection of a security interest in movable (personal) property? Is a 'control' agreement necessary to perfect a security interest and, if so, what is required?

Upon collateralising, the collateral as movable property must be registered with the National Registration Agency for Secured Transactions to perfect the security interest, by which the lender's interests to the collateral gain first priority.

Law stated - 30 September 2020

Single purpose entity (SPE)

Do lenders require that each borrower be an SPE? What are the requirements to create and maintain an SPE? Is there a concept of an independent director of SPEs and, if so, what is the purpose? If the independent director is in place to prevent a bankruptcy or insolvency filing, has the concept been upheld?

It is not common to require each borrower to be an SPE in Vietnam. The law treats an SPE like other entities and there is no independent director requirement.

Law stated - 30 September 2020

UPDATE AND TRENDS

International and national regulation

Are there any emerging trends, international regulatory schemes, national government or regulatory changes, or other hot topics in real estate regulation in your jurisdiction? (eg, transition to a new alternative benchmark rate upon cessation of LIBOR as benchmark rate?)

On 19 December 2019, the government issued Decree 96/2019/ND-CP on the land price benchmark. On that basis, provinces will issue a new land price list to be applied in the five-year period 2020–2024. The land price benchmark will be increased, as a result of which the land use right levy and compensation for recovered land will change in proportion.

In other news, land law was removed from the 2020–2021 agenda for law reform during the 9th Session of the National Assembly in May 2020. Considering the complex and sensitive nature of land law, the reform will result in broad and profound impacts on all aspects of the economy, politics and society. Cautions on its revision are inevitable. Tentatively, the draft law is set for review by the National Assembly's in 2023.

It is still too early to predict the regulatory trends regarding land law; however, it is expected that the 9th National Congress Resolution in January 2021 (the strategic, comprehensive, complete and long-term resolution on the country's socio-economic development for the period 2021–2025) will shed light on the Vietnamese government's land planning strategy and other relevant issues on land regulations.

At this stage, the Ministry of Natural Resources and Environment is contemplating amending and supplementing eight major groups of policies, including:

- policies on land use planning and strategy;
- land-based financing, economic and maximising land resources;
- land allocation, land lease, change of land use purposes;
- land acquisition;
- agricultural land management and land concentration promotion policies;
- household compensation, support and resettlement when the state recovers land;
- management and land use of real estate projects; and
- finally revising, amending and supplementing regulations to ensure consistency between land law and other relevant laws, such as those on investment, housing and forestry.

* This chapter was correct at the time of writing in September 2020.

Law stated - 30 September 2020

Jurisdictions

| | | |
|---|---|---|
|  | Australia | Maddocks |
|  | Austria | Fellner Wratzfeld & Partner |
|  | Dominican Republic | Guzmán Ariza |
|  | Finland | Waselius & Wist |
|  | Germany | McDermott Will & Emery |
|  | India | AZB & Partners |
|  | Ireland | Mason Hayes & Curran LLP |
|  | Japan | Nagashima Ohno & Tsunematsu |
|  | Malta | WH Partners |
|  | Mexico | M Shehoah S.C |
|  | Monaco | CMS Pasquier Ciulla Marquet Pastor Svara & Gazo |
|  | Myanmar | Mori Hamada & Matsumoto |
|  | Netherlands | Allen & Overy LLP |
|  | Portugal | PLMJ |
|  | Spain | Monereo Meyer Abogados |
|  | Switzerland | Bär & Karrer |
|  | Thailand | Nagashima Ohno & Tsunematsu (Thailand) |
|  | Ukraine | GOLAW |
|  | United Arab Emirates | Afridi & Angell |
|  | United Kingdom - England & Wales | Fried Frank Harris Shriver & Jacobson LLP |
|  | Vietnam | LNT & Partners |