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Real Estate 2022

Vietnam

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Law and Practice

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1. GENERAL

1.1 Main Sources of Law

The main sources of real estate law include:

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

1.2 Main Market Trends and Deals

In the wave of the COVID-19 pandemic, a number of businesses have undergone financial restructuring and real estate has become the subject of disposal plans. Sales and leasebacks of property, including warehouses or factories in industrial parks, has emerged in the real estate industry.

However, reputable major developers are still going strong in investments in outer urban areas considered desirable. It is anticipated that M&A deals in the real estate industry will boom in 2022, once the economy begins the recovery from the COVID-19 pandemic.

Further, since large amounts of capital could not be used in production due to COVID-19, much of it has been directed towards real estate, creating a thriving market alongside price increases and supply shortages. This trend encourages developers to launch housing development projects increasing activity in this market.

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, benefitting the young and tech-savvy population. This emer-

gence of technology in the real estate industry will create a more vibrant and robust market.

Securitisation and tokenisation in real estate has commenced 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 and 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 House, Law on Investment) have been exposed, Land Law 2013 is currently under review for reform.

For example, 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. This, if passed, will attract more foreign buyers.

Another possible review to the Land Law 2013 is public auction of land for property development projects. This is currently a big issue, affecting many developers and causing delays and obsta-

cles in acquiring land. This, if passed, will also improve the real estate market.

Regulations are expected on the land-use mechanism and 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.

Furthermore, the Land Law 2013 views and defines “foreign-invested enterprise” inexplicably from the Law on Investment. This has caused significant confusion in the application of laws by foreign-invested enterprise in its rights and obligations relating to lands and investing in real estate markets and is expected to change.

2. SALE AND PURCHASE

2.1 Categories of Property Rights

In Vietnam, rights to a real estate include rights attached to the land, ie, land-use rights (LUR) and ownership right to the building structure on the land (if any). There is no term of land ownership in Vietnam, since land is by law under “ownership of the people”. Subset of the LURs of a land user include right to transfer (not to sell), capitalise, lease (or sublease), bequest, exchange, give, and pledge or mortgage such LUR, similar to ownership right. 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 is to acquire all or some of such rights.

Depending on land categorises (leased land or allocated land), the 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 only sell property attached thereon; while industrial park developer holding the same cannot transfer but can sub-lease land in the industrial park with infrastructure completion.

2.2 Laws Applicable to Transfer of Title

The title of real estate may include LURs and building structures on the land. The Law on Land specifically deals with LUR matters, while other laws (eg, Civil Code, Law on Residential Housing, Law on Real Estate Business, Law on Investment and sometimes Law on Enterprises) deal with matters relating to the construction structure or real estate business. There is no clear separation of real estate types, ie, residential, industrial, offices, retail or hotels; and hence, in general, a real estate transfer transaction may become the subject of various laws dependent on different subject matter. However, due to the different LUR, 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.

2.3 Effecting Lawful and Proper Transfer of Title

Transfer of real estate title is lawful and valid if the transaction documents follow with the law and 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 “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 recorded by the Land Registry Office under

provincial-level Departments of Resources and Natural Environment (DONRE) and reflected in 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 validity and legal status of the real estate at relevant sources (eg, Land Registry Office or DONRE and notary offices) before signing the transfer agreement and executing payment. In case of encumbrances on the property (pledges, mortgages, governmental recovery order, enclosures, etc), these are recorded at such authorities.

According to the law on notarisisation, it is required that the parties to a real estate transfer transaction sign the document(s) in person with the witnessed by a notary officer. E-signatures are not allowed yet. 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 individual 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. The legal due diligence usually includes:

- legal capacity of the seller/transferor and legal status of the land of real estate;
- valid title on the property/investment project and the land on which the property/investment project is premised;
- validity of land use rights to and compliance on 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.

During the pandemic, site checks may be difficult due to travel restrictions, but this is becoming less of an issue.

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, court order enforcement, or urban zoning order.

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

However, while 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 by obligating the seller to ensure R&W are true and remain so.

Depending on the agreement drafting techniques, a misrepresentation or a wrong warranty can lead to invalidity or cancellation of the agree-

ment or breach by the party who makes such misrepresentation or incorrect warranty.

There are several remedies available in Vietnam contract law, eg, specific performance, penalty, performance suspension, contract cancellation, unilateral termination and/or damage compensation. It depends on how the parties agree in the document, and/or subject to the laws.

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 preferable 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 aspect of the purchase transactions; and the laws on companies, laws on investment if the purchasing real estate 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, circulars by ministries from time to time that provide guidance of implementing or clarifying certain provisions of such laws. Since these are hard law, they are binding and also govern real estate transactions.

2.7 Soil Pollution or Environmental Contamination

The Law on Environmental Protection and Law on Investment requires that an investment or development project is required to have environmental impact assessments or declarations with protection measures before the project

implementation. The Vietnamese laws (Article 15 of the Law Environmental Protection 2020; Articles 172 and 602 of the Civil Code 2015) expressly hold liable the subject causing environmental pollution that generates damages and require those to cease the acts of violation, apply remedial measures and make compensation in accordance with the laws, even not at its fault. In addition, if there is serious contamination to the land with life-threatening effects, such land can be subject to expropriation by the competent authority.

Although the party causing the contamination is held liable under the laws, such environmental issues are usually found after an acquisition, so the most effected 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 incorporate in the transaction documents proper clauses 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 defines 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, encouraging and supporting policies of localities, scale and/or importance of project, the authorities may consider proposals from developers for changing 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, then developers may also provide proposals.

2.9 Condemnation, Expropriation or Compulsory Purchase

Law on Land, Law on Residential Housing and Law on Compulsory Purchase of Assets provide foreclosure, expropriation, 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 benefits;
- due to violation of laws on land by land users;
- lawful termination of land using (including termination of investment project using land);
- voluntary return;
- life-threatening occasions; and
- land requisition by the state to conduct performance for national defence or security, or in a state of war or emergency, or prevention and combat of natural disasters.

The Law on Residential Housing 2014 provides for purchasing by local authorities of residential housing units from developers for governmental use.

Depending on the causes of the expropriation, the process may be conducted a bit differently. In theory, the government will decide on the purchase, expropriation or recovery in writing to the property owners with references to 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 an agreement cannot be reached by consulting with relevant bodies to be fair on the market price. Authorities may proceed with the purchase while

the owner has the right to appeal the decision. If the purchase is ruled wrong 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 such compensation because of the different views between them and the authorities, but land compensations can 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 property-owning company (SPV) (share deal).

In an asset deal, the sale and purchase transaction must comply with the laws of land and real estate trading, especially when it is a 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 land 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 taxes, notarisations fees, LURC issuance charge, LURC appraisal charges, stamp duty, etc. In the case of the 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 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.

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 Law on Land or 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 it is not treated as asset deal. If the acquisition of shares in the SPV is conducted by foreign investors or foreign-invested entity leading:

- the foreign ownership ratio in the SPV to be 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
- to an increase (at any rate) in foreign ownership ratio in SPV if the SPV is operating in conditional businesses to foreign buyers (real estate trading is included), then such investors have to obtain an approval from investment management body (provincial department of planning and investment, or DPI) for such acquisition (Article 26 of 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 on the seller of the shares at

20% on taxable income for resident individuals or corporations, and sometimes 0.01% of the share value for joint stock companies. However, this should be carefully reviewed since there are different views by tax authorities 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:

- he or she holds a valid passport with immigration stamps when entering Vietnam;
- the property is in a commercial residential housing development project by a licensed developer;
- 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 renewable upon expiry, compared to “long-term” ownership by local homeowners. Foreign owners can sell his or her 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 lim-

ited ownership rights over purchased apartment units, eg, for its 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. However, as a market practice, lenders usually accept a loan around 70% of the property value.

In acquiring commercial real estates, 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 buyer may consider several other options such as corporate bonds by private placement, convertible loans, business cooperation, 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 have other assets or personal guarantees as collateral as well.

3.2 Typical Security Created by Commercial Investors

While raising fund 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

The Vietnamese jurisdiction allows for foreign lending subject to restrictions on the purpose, currency, security transaction, the maximum principal of and 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 enterprise, having obtained the land-use right through land allocation or land lease from the state, shall only charge its land-use right and/or assets attached on land to credit institutions duly incorporated in Vietnam. However, any charge of real estate to any foreign lender is not permitted and recognised as having no legal authority. However, foreign lenders can hold the LUR as collateral indirectly 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

Security over the land-use right must satisfy the following:

- obtaining land-use right certificate;
- free from dispute;
- land-use right is not distrained for any judgment enforcement; and
- still within land-use term.

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 on 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 shall 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).

In order to be effective against third parties, the collateral as real estate must be registered with Land Registry Office to take priority against 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

Please refer to **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 the 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 shall 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 shall 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 shall be resolved by the General Meetings of Creditors.

3.10 Consequences of LIBOR Index Expiry

LIBOR index is neither applicable nor a common practice in Vietnam. Therefore, the expiry of the LIBOR index does not affect the Vietnamese lending market.

4. PLANNING AND ZONING

4.1 Legislative and Governmental Controls Applicable to Strategic Planning and Zoning

Planning and zoning of the regions (rural and urban areas) and projects must be approved

by 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 shall be the basis for competent authority (normally the competent provincial Department of Construction) to issue a construction permit to the developer before building the project. Unless exempted, any building or refurbishment without a valid construction permit shall be deemed as a violation of the laws on construction.

4.3 Regulatory Authorities

Parcels of real estate must be developed according to its designated use as approved planning and zoning by the competent authority, subject to the level of planning. The provincial People's Committee shall 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 those residential housing projects) are required to seek approval on the detailed construction planning from the competent People's Committee (mostly at district level).

Generally, laws on construction, (urban) planning and land shall be the most significant on 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 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 project 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 and having undertaken procedures required on the construction, eg, design assessment approval, construction permits, etc.

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 to 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 conduct of authorities or officers under the Law on Complaints or Law on Denouncements.

4.6 Agreements with Local or Governmental Authorities

Projects using land-use rights of which purpose is classified into 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 usually executed for projects of private-public partnership under the Law on Private Public Partnership and/or Law on Tender.

4.7 Enforcement of Restrictions on Development and Designated Use

Please refer to **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 either:

- acquiring the property through project transfer (asset deal);
- acquiring a property-holding entity (share 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 cooperating with other entities through a Business Cooperation 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 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 and 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 non-listed. In the event of listing, its sale of shares shall be governed by the laws on securities. Like 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.

In the event the entity is chosen to be the developer of a real estate project under the laws on

investment, the entity must prove owners' capital of 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.

5.4 Applicable Governance Requirements

In investing in real estate project, any organisation or individual must satisfy the following conditions:

- must be duly established under the laws of Vietnam;
- publication of the entity as a developer and the real estate; and
- the real estate satisfies mandatory conditions:
 - (a) having obtained the LURC, not subject to any dispute on right of land-use or ownership;
 - (b) not distrained for any judgment enforcement; and
 - (c) the land is within the land-use term.

5.5 Annual Entity Maintenance and Accounting Compliance

Foreign-invested companies must have accounting books audited annually for submission to tax authorities. The cost may vary depending on the complexities of the work.

6. COMMERCIAL LEASES

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

Entities or individuals shall be granted the land in form of either 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, the land-allocation may either be a limited period

or for a long-term use. The terms are extendable, subject to the discretion of the states.

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

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 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 Civil Code 2015. Other terms are freely negotiable by the parties of the lease without being contrary to or prohibited by the regulations of the laws.

In the first year of the coronavirus pandemic, the lease contract could be terminated based on the clause of force majeure, the occurrence of which is objective and unforeseeable and all remedial measures are exhausted within its capacity. However, this can be hardly applicable in the following breakout since coronavirus is now less unpredictable, so the tenant cannot terminate the lease based on the force majeure clause leading the failure to pay rent. Most 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 be varied from two to five years, and some extended to seven years, with the rent adjusted annually;
- the maintenance and repair of the real estate occupied by the tenant shall be carried out by the landlord at the expense of the tenant; and
- the rent payments made either monthly or half-yearly.

6.5 Rent Variation

Rent variation is highly variable according to 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 lease 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 subject to the parties to negotiate on 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 that the ten-

ant is required to pay a deposit prior to the effect of the lease, which 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 case of common areas, then co-owners have that responsibility. In property leases, the property owner will have that obligation unless it is passed to the tenants in the lease contracts.

6.10 Payment of Utilities and Telecommunications

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

6.11 Insurance Issues

As a common practice, the tenant shall bear the insurance premium for policies that cover all risks on the real estate and public liabilities. However, it is also common that the property owner will 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. However, business interruption insurance policy is more unusual in this market given that tenants have suffered significant losses following the coronavirus pandemic, and landlords have had to give up basic rent due to the tenant's 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 on the leased property and shall bear the cost if there is any loss and damages.

Subject to negotiations between the parties, a landlord may further impose restrictions on the tenants on the use of the properties, if those 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 appreciate 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 of 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 for compensation of damages caused to the landlord or the building.

6.14 Specific Regulations

Apart from the general rules above, specific regulations are always subject to the categories of real estate applicable to the leased property. Residential houses subject to the lease must satisfy the following qualifications required by law on housing, including:

- not being subject to any encumbrances, ie, any dispute, claim, petition on the ownership;
- not distrained from any enforcement of effective judgment or administrative order of the competent authority; or

- 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, corporate ethics.

6.15 Effect of the Tenant's Insolvency

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

- the deposit money (if any) shall be forfeited by the tenant;
- the landlord can take back the leased property. The landlord would be required to return the amount of rent corresponding with the remaining leasing 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 bankruptcy process, any payment for payables (including basic rent) incurred before would be stalled and shall only be made subject to statutory level of priority 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 the deposit prior to the lease to protect itself against the failure by the tenant to meet payment obligations. The deposit amount is ideally equivalent to three-month payables (inclusive of the basic

rents 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 shall 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 jurisdiction 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 on 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, being free from dispute and not distrained by any judgment enforcement, and still within the lease term from 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 tenant within three months after the due date;
- the tenant's insolvency;
- using the leased real estate for the wrong purpose;
- deliberately cause detrimental damages to the leased real estate;
- repair, improve, upgrade, alter or sub-lease the leased real estate without agreement or written consent from the landlord; and
- cause nuisances, fail to keep public hygiene, security and etc that affects other residents with warnings from the local authorities.

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

- fails to repair real estate that does not meet the safety requirements for use or causes damages to the tenant;
- increases the rent at unreasonable rate;
- right of use is limited by the rights of a third party; and
- any breach of representation and warranties by the landlord in respect of the real estate.

6.20 Registration Requirements

Lease of land-use right and property (houses or construction building) must be executed in writing following the form provided by laws (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 Land-use Right Certificate 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 the litigation, which may take a sig-

nificant amount of time (two to six years) to complete.

However, in reality, landlord may engage authorities (representative from People's Committees, police, etc) to prevent the tenant from entering the property (eg, changing the lock, re-occupying the property, disconnecting electricity, water supply). By doing so, the tenant may have to abandon the property. However, such measures are also controversial, and in some cases, may constitute or reach 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. Please refer to **2.9 Condemnation, Expropriation or Compulsory Purchase**.

On the other hand, a third party can hardly have rights against commercial lease interest if it is not a party to the contract, unless the contractual parties agree otherwise or there is a registered pledge existing prior to the lease by which the lease shall be terminated if the leased property is subject to disposal procedures following the pledge settlement. 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. Then, such a land lease termination also affects the property lease as well. If the land lease termination is lawful then any damages caused to the property lease shall be borne by the land tenant. Otherwise, the landlord may be responsible to the land

tenant in bearing the compensation caused to the property lease, if any.

7. CONSTRUCTION

7.1 Common Structures Used to Price Construction Projects

Construction project pricing may include:

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

7.2 Assigning Responsibility for the Design and Construction of a Project

Construction usually involves:

- the project's developer;
- building contractor;
- supply contractor of building products and materials or assembling equipment etc; and
- 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 shall 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. It 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 on the construction investment activities must be procured, including the 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 it is the contractor causing continuous delays to the schedule agreed by the parties (unless the parties agree otherwise). Penalty 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 contracts,

and duly delivered to the developer before the effectiveness of construction contracts.

The security to guarantee a performance is valued at a range from 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 construction contractual relationship as preventive measures against non-payments 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 credits; 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 reasons.

Alternatively, while this neither is prescribed nor prohibited by laws, 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 an 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 the 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 transferring 100% shares of that entity). Therefore, the “share 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 the registered capital. The tax is a small amount (around USD135/year). 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 laws. Foreign individuals are only permitted to purchase commercial residential houses from real estate developer.

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

Individuals shall bear the PIT at the rate of 5% on taxable income from renting properties, and 2% on 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 laws. Corporate investing in certain projects may also be entitled to tax exemption or tax rate reduction for a certain time.

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