

New Laws on Real Estate Business

January 2024

In its 6th meeting session in November 2023, the 15th National Assembly of Vietnam voted and passed the Amended Law on Real Estate Business (**Amended LREB**) and the Amended Law on Residential Housing (**Amended LRH**). These laws, which will come into effect starting 1 January 2025, together with an Amended Land Law currently being considered and expected to be voted on in 2024 (**Amended Land Law**), will form a new set of key laws regulating the Vietnam real estate market.

In this discussion, we set out the noteworthy amendments and compare these with the current Law on Real Estate Business, the current Law on Residential Housing, and their guiding regulations (**Current LREB** and **Current LRH**, respectively).

1. Some welcome amendments

1.1 Certain foreign-invested companies will be treated the same as 100% domestic-owned companies

Under the Amended LREB, **foreign-invested companies** that are **not subject to conditions and procedures applicable to foreign investors under the Law on Investment (FDI Companies not Subject to FI Procedures)** shall be eligible to register and engage in real estate businesses like domestic companies. Upon the effectivity of the Amended LREB, FDI Companies not Subject to FI Procedures will be able to register and participate in certain real estate businesses that were previously prohibited, including:

- (i) selling, leasing, and subleasing **land use rights** after having invested and constructed completely the required technical infrastructures;
- (ii) **purchasing** construction works for sale, lease, or lease-purchase;
- (iii) **purchasing land use rights** with completed infrastructures in a real estate project for sale or lease; and
- (iv) **leasing land use rights** that have been equipped with required technical infrastructures in a real estate project **for subleasing**.

To compare, under the Current LREB, a foreign-invested enterprise was allowed only to enter into the following businesses:

- (i) lease houses and buildings for sublease;
- (ii) with regard to land leased by the State, build houses on the land for leases; build houses or non-residential buildings for sale, lease or lease purchase;
- (iii) receive transfer of part or whole of real estate project from an investor for building houses or buildings for sale, lease or lease purchase;
- (iv) build houses on the land allocated by the State for sale, lease or lease purchase; and
- (v) build houses or buildings on land leased in an industrial park, industrial cluster, export-processing zone, hi-tech zone or economic zone for trading according to land use purposes.

A foreign-invested company that is subject to conditions and procedures applicable to foreign investors is a company whose:

a) over 50% of its charter capital is held by a foreign investor(s) or, in the case of a partnership, the majority of its general partners are foreigners;

b) over 50% of its charter capital is held by a business organization(s) mentioned in Point a) above; or

c) over 50% of its charter capital is held by a foreign investor(s) and a business organization(s) mentioned in Point a) above.

(Article 23.1 of the Vietnam Law on Investment 2020).

*Accordingly, those foreign-invested companies that do **not fall within the above scope** are qualified as **FDI Companies not Subject to FI Procedures** and shall be eligible to register and engage in real estate businesses like domestic companies*

1.2 Bank guarantees for purchasers of residential houses still under construction may be waived by purchasers

Under the Current LREB, residential house developers must secure a financial guarantee from a qualified commercial bank, before the sale or lease-purchase of a house that is under construction (**Future House**). If the developer fails to hand over the Future House according to schedule, the guarantor shall return the option fee and other amounts to the client, as provided in the signed purchase or lease-purchase contract and the financial guarantee.

Under the Amended LREB, this requirement may be waived, at the buyer's option. This allows buyers the flexibility to choose whether the added cost for the guarantee (which is often passed on by developers to buyers) is worth the extra layer of security.

*The Amended LREB defines **residential houses, real properties that will be formed in the future** as “residential houses, construction works that are in the process of investment and construction, or have not yet been accepted and put into use according to the provisions of construction laws.” (**Future Houses or Future Real Properties**)*

1.3 “Floor areas” are now formally defined and can be legally traded

Transactions concerning “floor areas” are now explicitly defined in the Amended LREB. Although these transactions have become common as a matter of practice, their status under Vietnam law was unclear. Now, with the Amended LREB, “floor areas” will formally be considered a “real property” for the purpose of real estate business. This express recognition now opens further possibilities, including giving rise to rights to transfer, dispose of, or encumber (e.g., by mortgage) floor areas and floor areas that will be formed in the future.

1.4 Clear legal framework set out for real estate business over land use rights

The Amended LREB provides a clearer legal framework for the business over **land use rights with completed technical infrastructures**. As discussed in Section 1.1., FDI Companies not Subject to FI Procedures are now eligible to participate in this business. However, in an M&A transaction, overseas investors must consider how to maintain the necessary ownership ratio, so as to remain qualified to participate in this business.

Of note, the Amended LREB, for the first time, specifies the conditions with respect to geographic areas that are eligible for land use rights (with completed technical infrastructures) trading (**Qualified Areas**). In particular, Qualified Areas must (i) **not be located** in a ward, district, or city of a special class, class I, class II and class III urban areas (*refer to the Schedule at the end of this article for the list of special class, class I, class II and class III cities and towns, as at 22 December 2023*); and (ii) **be in an eligible list** issued by the relevant provincial People's Committee.

1.5 Disputes concerning private residential houses may be submitted to arbitration

The Amended LRH now provides that disputes over ownership, use rights, transactions, and management concerning *private residential* houses may be resolved by arbitration if the parties agree. Under the Current LRH, only courts have jurisdiction over disputes involving residential property.

We are aware of certain court decisions where courts take very conservative approaches as regards their jurisdiction over real property disputes (*vis-à-vis* arbitration clauses). As the Amended LRH now allows arbitration of real property disputes as regards private residential houses, the amendments may impact the approach of courts moving forward.

However, as the Amended LRH comes into force on 1 January 2025, it is unclear whether an arbitration agreement, signed before effectivity, will be enforceable after.

2. Newly imposed restrictions

2.1 A lower cap for pre-collections for *hire-purchases* of Future Real Properties

The Amended LREB sets a lower cap of pre-collections of **hire-purchases of Future Real Properties**, regardless of the project. Currently, the cap of 50% of the contract price has only been applied to the **hire-purchases of Future Houses (i.e., residential property)**. When the Amended LREB is effective, developers of all types of Future Real Properties will only be allowed to pre-collect a maximum of 50% of the hire-purchase contract value before the handover.

2.2 Cap deposit for sales, hire-purchases of Future Real Properties.

The Amended LREB, for the first time, provides a cap of 5% of the contract price for deposit payments for sales, hire-purchases of Future Real Properties. Of note, this 5% is inclusive in the 30% first time pre-collection threshold.

Caps (% of the contract price) for pre-collections with respect to the sales or hire-purchases of Future Real Properties under the Amended LREB:

| Payments | Sale | Hire-Purchase |
|---|---|--|
| Deposit | 5% | 5% |
| First pre-collection | 30% <u>(inclusive of the deposit)</u> | 30% <u>(inclusive of the deposit)</u> |
| Before handover | <ul style="list-style-type: none"> 70% for domestic companies <u>and FDI Companies not Subject to FI Procedures</u> 50% for FDI Companies Subject to FI Procedures | 50% |
| Before the purchaser is issued with LURC | 95% | 95% |

(supplemented regulations are emphasised in **bold underlined**)

2.3 Leasing Future Real Properties is no longer eligible

The Amended LREB no longer explicitly provides that Future Real Properties may be leased. All provisions relating to the lease of Future Real Properties were omitted from the Amended LREB (as compared to the Current LREB, e.g., Chapter III), though the right to sell (even through hire-purchase) remains. Therefore, it appears that the Amended LREB no longer permits developers to lease Future Real Properties.

2.4 New prohibition on signing deposit contracts

Under the Amended LREB, developers may **not authorize** other parties to sign **deposit contracts** in relation to their sales, transfers, and hire-purchase transactions. This is now in addition to the prohibitions against delegating authority to sign sale, hire-purchase contracts under the Current LREB.

We note, however, that under the Current LREB, residential house developers are already prohibited from delegating authority to sign deposit contracts.

2.5 Construction must be actually commenced for non-residential Future Real Property, prior to transactions

Under the Current LREB, the foundation of Future Houses must be completed before they may be traded. Under the Amended LREB, the construction of *all* Future Real Properties must have been *commenced* before they may be traded.

Although the initial construction requirement for non-residential Future Real Properties is lower (i.e., construction be merely commenced), this imposes an additional step before developers are allowed to transact over these properties. We note, though,

that the requirement for Future Houses (which is a higher threshold, as the foundation must be completed) remains.

In line with the promulgation of the Amended LREB and Amended LRH, the Amended Land Law is also anticipated. The amendments in the Amended LREB and LRH may preview what we may expect from the final version of the Amended Land Law, including the new business available to foreign-invested entities, and the availability of arbitration.

The Amended LREB and Amended LRH shall come into force on 1 January 2025. It is expected that guiding regulations shall also be issued. In this regard, we suggest that concerned stakeholders seek pre-emptive legal advice from your respective legal counsellors in order to consider how the amendments may impact real estate investments in Vietnam.

| Schedule | | | |
|---|---|--|-----------------------------------|
| Land located in a ward, district, or city in any of the following cities or towns may <u>not</u> qualify for land use rights (with completed technical infrastructures) trading by developers:¹ | | | |
| Special-class urban: Ha Noi and Ho Chi Minh City. | | | |
| Class-I urban | Class-II urban | Class III urban | (belongs to province/city) |
| Hai Phong City | | | N/A |
| Da Nang City | | | N/A |
| Can Tho City | | | N/A |
| Thu Dau Mot City | Di An City | Thuan An City Tan Uyen City Ben Cat Town | Binh Duong |
| Ha Long City | Uong Bi City Cam Pha City Mong Cai City | Quang Yen Town Dong Trieu Town | Quang Ninh |
| Vung Tau City | Ba Ria City | Phu My Town | Ba Ria – Vung Tau |
| Long Xuyen City | Chau Doc City | Tan Chau Town | An Giang |
| Vinh City | | Cua Lo Town | Nghe An |
| Da Lat City | | Bao Loc City | Lam Dong |
| Nha Trang City | | Cam Ranh City | Khanh Hoa |
| Quy Nhon City | | An Nhon Town | Binh Dinh |
| Buon Ma Thuot City | | | Dak Lak |
| Thai Nguyen City | | Song Cong City Pho Yen City | Thai Nguyen |
| Viet Tri City | | Phu Tho Town | Phu Tho |

¹ Updated to 22 December 2023.

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|----------------|--------------------------------|------------------------------|----------------|
| Thanh Hoa City | | Sam Son City Bim Son Town | Thanh Hoa |
| Bien Hoa City | | Long Khanh City | Dong Nai |
| My Tho City | | Go Cong Town Cai Lay Town | Tien Giang |
| Bac Ninh City | | Tu Son City | Bac Ninh |
| Hai Duong City | | Chi Linh City | Hai Duong |
| Hue City | | | Thua Thien-Hue |
| Nam Dinh City | | | Nam Dinh |
| Pleiku City | | | Gia Lai |
| | Phan Thiet City | La Gi Town | Binh Thuan |
| | Ca Mau City | | Ca Mau |
| | Tuy Hoa City | Song Cau Town | Phu Yen |
| | Thai Binh City | | Thai Binh |
| | Rach Gia City Phu Quoc City | Ha Tien City | Kien Giang |
| | Bac Lieu City | | Bac Lieu |
| | Ninh Binh City | Tam Diep City | Ninh Binh |
| | Dong Hoi City | | Quang Binh |
| | Vinh Yen City | Phuc Yen City | Vinh Phuc |
| | Lao Cai City | | Lao Cai |
| | Bac Giang City | | Bac Giang |
| | Phan Rang – Thap Cham City | | Ninh Thuan |
| | Quang Ngai City | | Quang Ngai |
| | Tam Ky City | Hoi An City | Quang Nam |
| | Tra Vinh City | | Tra Vinh |
| | Sa Dec City Cao Lanh City | Hong Ngu City | Dong Thap |
| | Tan An City | Kien Tuong Town | Long An |
| | Vi Thanh City | Nga Bay City Long My Town | Hau Giang |
| | Vinh Long City | Binh Minh Town | Vinh Long |

| | | | |
|--|------------------|--------------------|-------------|
| | Ha Tinh City | Ky Anh Town | Ha Tinh |
| | Phu Ly City | | Ha Nam |
| | Ben Tre City | | Ben Tre |
| | Lang Son City | | Lang Son |
| | Son La City | | Son La |
| | Tuyen Quang City | | Tuyen Quang |
| | Soc Trang City | | Soc Trang |
| | Kon Tum City | | Kon Tum |
| | Yen Bai City | | Yen Bai |
| | | Dien Bien Phu City | Dien Bien |
| | | Hoa Binh City | Hoa Binh |
| | | Hung Yen City | Hung Yen |
| | | Dong Ha City | Quang Tri |
| | | Ha Giang City | Ha Giang |
| | | Cao Bang City | Cao Bang |
| | | Lai Chau City | Lai Chau |
| | | Tay Ninh City | Tay Ninh |
| | | Bac Kan City | Bac Kan |
| | | Dong Xoai City | Binh Phuoc |
| | | Gia Nghia City | Dak Nong |
| | | Son Tay Town | Ha Noi |

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