



## Key Changes to Foreign Investment in Real Estate Businesses and Foreign Use of Land in Vietnam

### 1. Introduction

On 18 January 2024, the National Assembly of Vietnam passed the New Land Law (No.31/2024/QH15), which together with the New Housing Law (No.27/2023/QH15) and the New Law on Real Estate Business (No. 29/2023/QH15, hereinafter “New LREB”) passed in 2023, will take effect from 1 January 2025.

Among key objectives, these new laws are expected to create more favorable conditions to ease the unnecessary obstacles for foreign investment in the real estate market and foreign access to land use rights in Vietnam.

This article highlights significant legal changes affecting the real estate market and land use of both local and foreign investors in general.

### 2. Key Changes to Real Estate Legislation

#### (1) The New Land Law

##### a. More clarity on the definition “Foreign Invested Enterprises” (FIEs)

The current Land Law (No. 45/2013/QH13) made a distinction between domestic economic organizations and Foreign Invested Enterprises (FIEs) and restricted the activities of FIEs under the current Land Law, but the definition of FIEs was not clear in the law. In practice, however, all enterprises with foreign capital, regardless of the proportion, were considered FIEs.

On the other hand, the New Land Law uses the term “foreign investment economic organization” (FIEO) in place of FIEs, and defines an FIEO as “an economic organization that must meet the conditions and follow the investment procedures stipulated for foreign investors in order to implement a project using land in accordance with the Law on Investment” (Article 3, Paragraph 46 of the New Land Law). Based on this definition, an enterprise with foreign capital may be considered a FIEO as follows (Article 23, paragraph 1 of the Law on Investment (No. 61/2020/QH14)):

- (a) Those having more than 50% of their charter capital held by a foreign investor(s)
- (b) those having more than 50% of their charter capital held by an entity/entities prescribed in item (a) above
- (c) those having more than 50% of their charter capital held by foreign investor/investors and an entity/entities prescribed in item (a) above

The important point here is that under the New Land Law, organizations that do not meet the above criteria (a) through (c) will be treated in the same manner as local companies. In other words, an enterprise that is considered an FIE under the current Land Law may not fall within the scope of an FIEO under the New Land Law, and this leaves room for various advantages.

The specific advantages of not falling under the category of FIEO include the ability to acquire a Land Use Right (LUR) from individuals/institutions and to create a mortgage (at non-credit institutions). The details are as shown in Chart 1.

Chart 1: Differences in Regulations for Companies with Foreign Capital under the Land Law

	FIEs (under the current Land Law)	FIEO (under the New Land Law)	Not qualified as FIEO (under the New Land Law)
To acquire LUR (from individuals/institutions)	×	△ (Possible for land in industrial parks, industrial clusters and high-tech parks <sup>1</sup> )	○
To receive LUR in form of State allocation	△ (allocable in the case of the development of commercial housing only <sup>2</sup> )	△ (allocable in the case of the development of commercial housing only <sup>3</sup> )	○
To receive LUR because of reorganization	×	×	○
To accept LUR as a gift	×	×	○
To mortgage an LUR itself	△ (Only if the land use fee is paid in a lump sum. Limited to financial institutions in Vietnam <sup>4</sup> )	△ (Only if the land use fee is paid in a lump sum. Limited to financial institutions in Vietnam <sup>5</sup> )	△ (Only if the land use fee is paid in a lump sum. Available to mortgage LUR to corporations and individual mortgages in addition to financial institutions <sup>6</sup> )

Source: Prepared by the author

## b. Lump-sum/annual payment of land use fees

The methods by which a company receives LUR from the State can be broadly classified into (1) receiving an allotment of LUR and (2) receiving a lease of LUR. In the case of receiving LUR through method (2), there are two methods of land rent payment; lump-sum payment and annual payment.

Which payment method is chosen should be determined by considering the regulations under the Land Law. Namely, under the current Land Law, when a lump-sum payment is adopted, transfer, sublease, or mortgage of the LUR is allowed. On the other hand, when adopting an annual payment, there were certain restrictions on the act of disposal of LUR (Articles 174 and 175 of the current Land Law, Article 33 and 34 of the New Land Law). However, the recent amendment slightly relaxes the restrictions when adopting annual payments, allowing for the transfer of the right to lease land if annual rents have not been fully deducted from the land user's payments for land recovery (Article 34, Paragraph 1c of the New Land Law).

See Chart 2 for details on the restrictions under the New Land Law depending on the method of payment of land use fees.

<sup>1</sup> Article 28.1c of the New Land Law

<sup>2</sup> Article 55.3 of the current Land Law

<sup>3</sup> Article 119.3 of the New Land Law

<sup>4</sup> Article 183.2(b) and Article 183.3(d) of the current Land Law

<sup>5</sup> Article 41.2(b) and Article 41.3(d) of the New Land Law

<sup>6</sup> Article 33.1.dd and Article 34.1.b of the New Land Law

Chart 2: Restrictions according to the method of payment under the New Land Law

	Lump sum payment of land use fee	Annual payment of land use fee
<b>Transfer</b>	○	△ (Transfer of right to lease land is allowable if annual rents have not been fully deducted from the land user's payments for land recovery. Transferrable only in conjunction with assets incidental to the land <sup>7</sup> )
<b>Sublease</b>	○	△ (Limited to authorized investments in the construction and commercial operation of infrastructure in industrial parks, industrial clusters, hi-tech parks or economic zones <sup>8</sup> )
<b>Mortgage arrangement</b>	○	×

Source: Prepared by the author

Furthermore, under the current Land Law, LUR holder's had the authority to choose between annual or lump-sum payments. However, under the current amendment, the land use fee lump-sum payment can only be selected in the following cases (Article 120, Paragraph 2 of the New Land Law):

- Use of land for implementation of projects on investment in agriculture, forestry, aquaculture or salt production
- Use of land in industrial parks, industrial clusters, hi-tech parks, or worker dormitories in industrial parks
- Use of land for public purposes including business purposes; use of commercial and service land for tourism and office leases
- Use of land to build social houses for rent in accordance with regulations on housing

As a result of this amendment, investors investing in projects other than (a) through (d) will be forced to pay annual land use fees. In this case, investors will not only be subject to restrictions on transfer, sublease, and mortgaging, but will also face the disadvantage that land prices will fluctuate from year to year, making it difficult to predict land costs for the entire investment project period.

### c. Use of arbitration in land-related disputes

The current Land Law did not permit the use of Vietnamese commercial arbitration as a means of resolving disputes related to land (Article 203 of the current Land Law). However, the New Land Law stipulates that Vietnamese commercial arbitration may be selected for "disputes between the parties arising from commercial activities related to land" (Article 236, Paragraph 5 of the New Land Law)<sup>9</sup>. Therefore, after the enforcement of the New Land Law, when drafting contracts for commercial activities related to land, it may be a advisable to include an arbitration clause that provides for the use of Vietnamese commercial arbitration such as the Vietnam International Arbitration Center (VIAC).

<sup>7</sup> Article 34.1c of the New Land Law

<sup>8</sup> Article 34.1.e of the New Land Law

<sup>9</sup> However, Article 470(1)(a) of the Law on Civil Procedure (No.92/2015/QH13) still stipulates that the courts of Vietnam shall have exclusive jurisdiction over "civil cases involving rights to real estate in Vietnam", and it is unclear how this provision and the New Land Law will be interpreted or whether they will be unified in further amendments.

#### **d. Extension of the land use term**

Under the New Land Law, the land use term for land-using investment projects may be adjusted before it expires when certain conditions are met (Article 175 of the New Land Law).

For example, suppose a company is assigned an LUR by a third party for the purpose of developing a hotel. In this case, the land use term in the case of transfer of LUR for the land with definite land use term is the remaining period of the land use term defined prior to the transfer of LUR (Article 174 of the New Land Law). However, since the company has acquired the LUR to implement a land-using investment project in the form of hotel development, it is possible to set another land use term based on the time of land acquisition and extend the land use term if certain conditions are met.

### **(2) The New LREB**

#### **a. Expansion of possible business scope by foreign companies**

Like the New Land Law, the New LREB also clarifies the definition of FIEs and classifies FIEs into two categories: those that meet the requirements (1) through (3) of Article 23, Paragraph 1 of the Investment Law (i.e. an FIEO – see 2(1) a. above) and those that do not. The latter are allowed to conduct business without being subject to the restrictions on the scope of business by FIEO (Article 10, Paragraph 1 and Paragraphs 3 to 5 of the revised Real Estate Business Law).

In addition, under the current LREB (No. 66/2014/QH13), the real estate business that FIEs could engage in is limited to transactions involving only houses and buildings. In practice, however, many FIEs developed infrastructure facilities (roads, water, power supply, sewerage, etc.) in industrial parks, not houses or buildings, and then they subleased the land together with the facilities.

Therefore, considering the current situation described above, the recent amendment also now allows FIEO to "invest in infrastructure construction in real estate projects for the purpose of transferring, leasing, or subleasing land use rights of land with infrastructure" (Article 10, Paragraph 3b, and Paragraph 4 of the New LREB).

#### **b. Transactions of unfinished buildings**

When purchasing a new property in Vietnam, a deposit is often paid before the building is completed, but under the current LREB there was no explicit limitation on the amount of the deposit that a developer could collect.

However, in response to a recent rash of real estate frauds in Vietnam and many cases of cheating on deposits<sup>10</sup>, the New LREB limits the amount of a deposit that a developer can collect in advance to 5% of the sales price or less (Article 23.5 of the New LREB). This has enabled purchasers to enter the real estate investment market in a less risky manner.

### **(3) The New Housing Law**

#### **a. Financing through corporate bonds**

Under the current Housing Law (No. 65/2014/QH13), it was not clear whether corporate bonds could be used to finance housing developments. However, the New Housing Law clearly states that financing through corporate bonds may be used (Article 114, Paragraph 1(b) of the New Housing Law).

#### **b. Clarify the developer selection process for commercial housing investment projects**

Under the current Housing Law, the developer selection process for a commercial housing investment project required prior acquisition of LURs for residential land use (Article 22, Paragraph 2 c, Article 23, Paragraph 1, and Article 23, Paragraph 4 of the current Housing Law).

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<sup>10</sup> For example, the case at the following URL: <https://www.viet-jo.com/news/social/221230162835.html> (last viewed on July 1, 2024)

In contrast, the New Housing Law seems to stipulate that it is not necessary to obtain an LUR for residential purposes in advance as a requirement for the developer selection process (Article 36, Paragraph 3 of the New Housing Law). However, the stipulation is ambiguous, and it is unclear for what purpose LURs would satisfy the requirement, so it will be necessary to closely monitor future practice.

### c. Relaxation of requirements for securing social housing

Under the current Housing Law, commercial housing investment projects of a certain size are required to have 20% of their residential land area set aside for social housing (Article 54, Paragraph 3 of the current Housing Law). However, under the revised Housing Law, investors are no longer necessarily required to set aside such land area for social housing, as they are obligated to do one of the following (Article 83, Paragraphs 2 and 3 of the New Housing Law):

- (i) Reserve part of their projects' residential land area with technical infrastructure systems for building social houses
- (ii) Arrange land areas with technical infrastructure systems outside their projects in such urban areas for building social houses
- (iii) Pay an amount equivalent to the value of land areas with technical infrastructure systems for building social houses

## 3. Conclusion

These new regulations are expected to have a significant impact on the Vietnamese real estate market in the future. However, there can be a gap between the law and practice in Vietnam, and time may be required for practice to catch up with the changes made by the revised law. Japanese companies should make comprehensive risk judgments by grasping the outline of the new real estate laws and regulations, and by checking the practical application of the new laws and regulations from time to time.

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