

Comments on New Law on Real Estate Business – Part 1

Dated: 16 January 2023

After a quite lengthy debate and discussion, on 28 November 2023, the National Assembly officially adopted a new law on real estate business (**Real Estate Business Law 2023**). The Real Estate Business Law 2023 is expected to enhance the real estate business environment and resolve some long-standing legal issues. However, the new Real Estate Business Law 2023 will have to wait until 1 January 2025 to take effect. The deferred effectiveness of the Real Estate Business Law 2023 is probably intended to give the National Assembly more time to promulgate the new land law, which to some extent could be considered as the “foundation” for formulating the Real Estate Business Law 2023.

In this post and subsequent ones, we highlight notable changes introduced under the new Real Estate Law 2023 and, if necessary, make a comparison with the current Real Estate Business Law 2014.

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1. Scope of application

1.1. The scope of application under the current Real Estate Business Law 2014 remains unchanged under the Real Estate Business Law 2023. However, the new law now expressly excludes the following cases from the scope of application:

1.1.1. Agencies and organizations that sell residential houses and construction works, transfer land use rights due to bankruptcy, dissolution, division, or de-merger; assignment of ownership (*chuyển quyền sở hữu*) of residential houses, construction works, land use rights due to division, de-merger, consolidation, merger in accordance with law;

1.1.2. Agencies, organizations, entities that sell, transfer, lease real estate as public property in accordance with law;

1.1.3. Organizations and individuals that sell houses, construction works, transfer land use rights under judgements, decisions of courts, awards of commercial arbitration, or decisions of competent authorities when settling disputes;

1.1.4. Credit institutions, foreign bank branches, asset management company and asset management company of credit institutions that sell houses, construction works, transfer land use rights, transfer real estate projects which are put up as guarantee or collateral for debt recovery in accordance with law;

1.1.5. Organizations and individuals that sell, lease, sub-lease land use rights which are not land use rights having technical infrastructure made available for business in real estate projects; and

1.1.6. Leasing social housing invested by Vietnam General Confederation of Labor to workers.

1.2. Under the current implementing regulations, transactions described from 1.1.1 to 1.1.4 are not typically considered as “doing real estate business” and not required to satisfy conditions for doing real estate business. However, technically, they are still subject to the Real Estate Business Law 2014.

1.3. Though it is not expressly provided as an exception, the Real Estate Business Law 2023 also excludes organizations and individuals who (a) sell houses, construction works, floor area in construction works on non-business purpose basis, and (b) sell, lease, provide lease-purchase of house, construction works, floor area in construction works at a degree below “small scale” from its application. Unlike Real Estate Business Law 2014, the exception does not apply to the sale of land use rights.

2. New definition on “Real Estate Projects”

2.1. The Real Estate Business Law 2023 defines a “**Real estate project**” to mean a an investment project *to construct works for the purpose of doing business* in houses, construction works, land use rights with technical infrastructure that are approved by competent authorities in accordance with the law. Real estate projects include investment projects for construction of houses; investment projects for construction of urban areas; investment projects for construction of rural residential areas; investment projects for construction of construction works serving purposes of education, health, sports, culture, office, commerce, services, tourism, accommodation, industry, and mixed-use construction works; investment projects for construction of technical infrastructure works; investment projects for construction of infrastructure structures for industrial parks, industrial clusters, and high-tech zones.

2.2. The new definition of “real estate project” seems clearer and fixes drafting mistake we raised in the previous Draft of the law (see [Here](#) for more details).

3. No rules on application of Law on Real Estate Business and related laws

3.1. The new Real Estate Business Law 2023 does not adopt the rules on application of the law on real estate business in relation to other relevant laws under draft law on real estate business we discussed in a previous post (see [Here](#)). This omission may give rise to disappointment since the rules on application of the law on real estate business under the previous draft were a welcome change and are expected to address unnecessary conflicts between the applicable laws.

4. Types of real estate assets being capable of trading

4.1. Under the Real Estate Business Law 2023, an existing residential house or construction work is now defined to mean residential house or construction work

which have been *accepted for operation*. Under the Real Estate Business Law 2014, existing residential house or construction work is residential house or construction work which has been *put into operation*. Accordingly, the scope of existing real estate assets is now expanded to include assets which have not been handed over to the customers, but which have been accepted for operation.

4.2. As discussed at 1.1.5, the Real Estate Business Law 2023 will no longer govern all types of transaction involving land use rights. Instead, only land use right having infrastructure in a real estate project could be made available for real estate trading.

4.3. The Real Estate Business Law 2023 now clarifies types of construction works that could be made available for real estate trading. Those include, among others, construction works having functions of tourism, accommodation, and mixed-use. Though the Real Estate Business Law 2023 only provides a few general regulations on such types of construction works, it is an attempt to set out a clear legal framework for development and operation of condotel and officetel projects.

4.4. The Real Estate Business Law 2023 now expressly recognize the trading of floor area of construction works (e.g., an office floor or a retail floor) (see further at 9).

5. Public disclosure of information about real estate put into business

5.1. The government seems to take a serious view on public disclosure of information on real estate made available for trading by imposing more requirements on the real estate developer. In particular,

5.1.1. The scope of information and documents required for public disclosure are now broader and more detailed than those under the current law. Specifically, the Real Estate Business Law 2023 expressly requires the real estate developer to publish all key licenses and permits of its project, including, among others, in-principle approval, approved master plan, decisions on land allocation or land lease, and construction permit;

5.1.2. In addition to public disclosure of requisite information in the developer's website, the developer will be required to publish the relevant information on housing and real estate market portal of the government; and

5.1.3. Completing public disclosure of information is a condition to put the real estate available for trading.

5.2. The above changes are welcomed and expected to enhance the transparency of the real estate market. However, we think that the disclosure requirements should only apply to real estate products which are sold to individual customers who is usually incapable of doing due diligence against the developer and the real estate projects. For transactions between two professional real estate developers or

customers, the requirements for public disclosure are less necessary.

6. Thin capital rule for all real estate developers

6.1. Under the Real Estate Business Law 2023, *enterprise doing real estate business via [implementing] real estate project* must have its own capital for implementation of the real estate project equal to at least 20% of the total investment in case of project using less than 20 hectares of land; or to at least 15% of the total investment in case of project using 20 hectares of land or more. The Real Estate Business Law 2023 further provides that in case such enterprise has multiple real estate projects at the same time, it must have its own capital amount sufficient to allocate for all on-going projects so that each project will satisfy the requirement above. The thin capital rule under the Real Estate Business Law 2023 is an updated version of that under current Decree 2/2022.

6.2. The wording of this regulation seems to suggest that the rule will only apply to the project company who directly owns the project, rather than the sponsor/shareholder of the project company.

6.3. However, it is still not clear when the equity capital condition is considered to be satisfied. There are two possible interpretations as follows:

6.3.1. the equity capital condition could be considered satisfied when the sponsor/shareholder contributes at least 15% or 20% of the total investment capital of the project to the charter capital of the project company. This interpretation is consistent with the thin capital rules under the current land law; or

6.3.2. the equity capital condition could be considered satisfied when the sponsor/shareholder maintains the equity capital of the project company to be at least 20% of the total investment capital of the project at all times. This is the most aggressive (and unreasonable) interpretation of the condition. Since under this interpretation, even if the investor has completed construction of the project and sold all its products, the investor still has to maintain sufficient equity capital.

6.4. In practice, it is likely that the first interpretation will be adopted. But it would be much better if the draftsman of the Real Estate Business Law 2023 could fix this issue in the upcoming guidance decree.

7. Scope of doing real estate business of foreign-invested organizations

7.1. The Real Estate Business Law 2023 finally makes clear the scope of doing real estate business of foreign-invested organizations (FIO) to include the development of infrastructure on land via a real estate project in order to transfer, lease, sub-lease land use right having ready-built infrastructure. Under the current real estate

business regulations, a FIO can only do real estate business with respect to houses and construction works. This results in a practical issue that the FIOs have to rely on the regulations of the Land Law 2013 to do real estate business concerning land use rights while there is a theoretical risk that their business is not in line with the Real Estate Business Law 2014.

7.2. In term of drafting aspect, the Real Estate Business Law 2023 now consistently uses the term “foreign-invested economic organization” (*tổ chức kinh tế có vốn đầu tư nước ngoài*), which appears to mean the same concept as provided in the Investment Law 2020. Under the current Real Estate Business Law 2014, the draftsman uses the term “foreign-invested enterprise” (*doanh nghiệp có vốn đầu tư nước ngoài*) with no clear legal definition.

8. Sale of existing house or construction works without sale of the underlying land use right

8.1. Under the Real Estate Business Law 2023, the sale of existing houses or construction works without sale of the underlying land use right can be conducted if the land law or housing law allows so. This change makes the Real Estate Business Law 2023 consistent with the Land Law 2013 (and perhaps, the upcoming new land law), which allows the owner of a house or construction work could be different from the user of the underlying land use right.

9. Sale and lease-purchase of separate floor area of construction works is permitted

9.1. The Real Estate Business Law 2023 now follows the current land law’s approach when expressly recognizing the sale and purchase of each separate floor area of construction works if it satisfies certain conditions. Among the conditions, the Real Estate Business Law 2023 requires the construction works having the transferred floor area must be constructed in the land having use form of land assignment from State with fee or leasing land from State with one-off rental payment for the whole lease term. This regulation gives rise to the following issues:

9.1.1. It appears that the draftsman of the Real Estate Business Law 2023 is not updated with the proposed changes in the new land law. Under the proposed new land law, it is likely that the cases land users can lease land with form of one-off rental is very limited. Whereas, the land used for developing the construction work having transferred floor area may be land leased with annual land rental (e.g., land for commerce, service); and

9.1.2. The Real Estate Business Law 2023 already sets out a condition that the parties under the sale contract must specify the financial obligation on the land applicable to the transferred floor area. Accordingly, the rental payment form of the underlying land should not be relevant.

10. Sale of products of delayed real estate projects is not permitted

10.1. Existing houses or construction works belonging to a real estate project can only be sold if the real estate project, among other things, complies with the approved implementation schedule. Accordingly, a real estate developer of a delayed real estate project may not be able to sell its products under the Real Estate Business Law 2023. This could be tough condition given for real estate developer given that delays in implementing a real estate project is quite common.

11. Foreign-invested companies' lease of real estate for use

11.1. In practice, it is very common that a foreign-invested enterprise (FIE) leases real estate (e.g., factory or office building) from a real estate developer to conduct its day-to-day business in Vietnam. However, one may not notice that this activity is not expressly recognized in the current Real Estate Business Law 2014. In particular, under Article 14 of the Real Estate Business Law 2014, a FIE is only entitled to purchase or lease and purchase houses and construction works from real estate developers for use. This appears to be a drafting mistake of the draftsman. See further discussion on this issue [Here](#).

11.2. The Real Estate Business Law 2023 finally fixes this drafting mistake. Under Article 15 of the Real Estate Business Law 2023, a FIE will be entitled to lease construction works and construction floor area from real estate developers to use for its day-to-day business.

12. Real estate developer must have no pending administrative violation in order to make its real estate available for trading

12.1. According to Article 19.1(p) of the Real Estate Business Law 2023, if the developer is subject to administrative sanction against violation of laws on investment, construction, land, housing, real estate business, tax with respect to the houses and construction works made available for business, then such developer may only sign the contract for sale, lease, and lease-purchase of such houses and construction works upon it has fulfilled all relevant administrative sanction decisions. It is not clear what happens if the developer has signed the sale contracts before being imposed the relevant administrative sanctions.

13. Landlord's right to unilaterally terminate the lease

13.1. Similar to the current Real Estate Business Law 2014, the Real Estate Business Law 2023 allows a landlord to unilaterally terminate the lease contract in case the tenant fail to pay rent after 3 months from the due date. In our view, this arrangement may only be feasible if the monthly rental amount is not substantial and the lease contract is signed with an individual customer or a household. In many high-value commercial leases between businesses, the landlord cannot wait for three consecutive months in order to terminate the lease. Perhaps, the Real Estate Business

Law 2023 should allow the parties to agree otherwise on such case.

14. New conditions for off-plan real estate to be made available for trading

14.1. The Real Estate Business Law 2023 introduces some new conditions applicable to off-plan real estate in order to be put into trading. Among these new conditions, Article 24.5 requires that houses and construction works made available for trading must be under a real estate project that has been approved in accordance with law and the approved content of such real estate project must include the investment purposes of constructing houses and construction work for sale and lease-purchase. This regulation has unclear intention and may give rise to the following issues:

14.1.1. The wording of Article 24.5 seems to suggest that if the developer's original application provides that the houses and the construction works are developed for lease, then technically the developer cannot sell such houses and construction works after completing the construction. This approach seems unreasonable and imposes significant restrictions on how a real estate developer conducts its business; and

14.1.2. In case the developer's original application provides that the houses and the construction works are developed for sale, then it is not clear if the developer can retain the ready-built houses and construction works for lease.

14.2. Perhaps, to avoid the potential risks discussed above, the developer should include objectives of developing houses and construction works for lease and/or for sale.

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