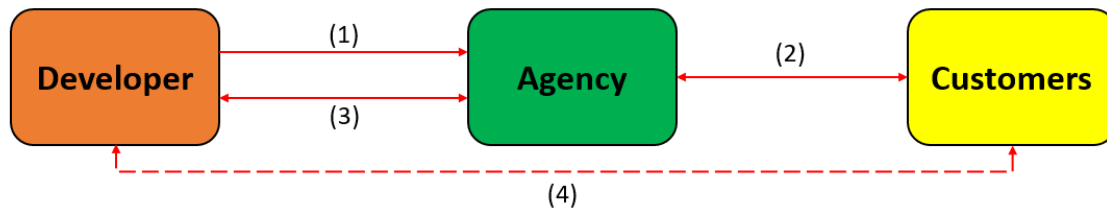


## TRANSACTION STRUCTURE FOR “SELLING” OFF-PLAN APARTMENTS AT PRE-FOUNDATION STAGE IN VIETNAM

Under Vietnamese law, a housing developer (**Developer**) is not allowed to sell apartments formed in the future (**off-plan apartment**) (*căn hộ hình thành trong tương lai*) before completing construction of foundation of the apartment building where such off-plan apartment located (**Pre-Foundation Stage**) (Article 55 of Law on Real Estate Business 2014). However, in practice, by engaging an independent entity to act as an agency/broker (**Agency**), it seems that many Developers have “overcome” this limitation. While there are certain legal risks (as discussed below), the transaction structure involving an Agency at the Pre-Foundation Stage may facilitate capital arrangements and customer acquisition of Developers for housing projects (**Project**).

The diagram and table below demonstrate transaction structure currently employed by some Developers to “sell” off-plan apartments at Pre-Foundation Stage and discuss relevant pros and cons. This post is written by Nguyen Hoang Duong.



Steps	Description	Pros	Cons
1.	<p><i>Service agreement between Developer and Agency (Contract 1)</i></p> <p>1.1. Under Contract 1, Developer will engage the Agency to provide certain services, for example:</p> <p>1.1.1. doing market research to survey and evaluate customers' need and interest in the Project;</p>	<p>1.2. There are certain legal frameworks for the Agency to provide services under Contract 1; and</p> <p>1.3. It is reasonable for the Developer to conduct market research and other preparations for the sale of the Project. Therefore, there should be no regulation restricting Developer</p>	<p>1.4. Upon entering into Contract 1, it is not clear if the Agency may be considered as one of the entities subject to potential restriction discussed at 2.5 - 2.6.</p>

Steps	Description	Pros	Cons
	<p>1.1.2. advising Developer on sale plan/policy; and</p> <p>1.1.3. marketing and selling Project's product after the off-plan apartments is eligible for sale;</p>	<p>to engage Agency to provide services under Contract 1, even at the Pre-Foundation Stage.</p>	
<p>2.</p>	<p><b>Brokerage service agreement between Agency and Customer (Contract 2)</b></p> <p>2.1. Under Contract 2:</p> <p>2.1.1. Customers (<b>Customer</b>) will engage the Agency to support them in purchasing off-plan apartments under the Project;</p> <p>2.1.2. To secure Customer's obligation "to make an offer to purchase the off-plan apartment" (rather than to secure an obligation to enter into sale and purchase contract) and to demonstrate his/her financial capacity, Customer will pay a deposit to Agency;</p> <p>2.1.3. However, the Agency does not guarantee that the Customer will succeed in purchasing the intended off-plan apartment. In other words, the Developer may refuse Customer's offer to buy;</p> <p>2.1.4. Upon the Project is eligible for sale,</p> <p>(a) the Agency will, on behalf of Customer, offer the Developer to buy the off-plan apartment which conforms with Customer's wish;</p>	<p>2.2. Execution of Contract 2 could be practicable, because:</p> <p>2.2.1. The subject matter of Contract 2 is a "task", but not "off-plan apartment";</p> <p>2.2.2. It is reasonable for Customer to research the Project and make necessary preparations for purchasing potential off-plan apartments, even at the Pre-Foundation Stage; and</p> <p>2.2.3. Technically, the restrictions on the sale of off-plan apartment at Pre-Foundation Stage are only applicable to the Developer, but not Agency and Customer under Contract 2;</p> <p>2.3. Payments of deposit under Contract 2 may not be subject to legal requirements on the payment schedule for sale and purchase of the off-plan apartment.</p>	<p>2.4. Under Article 514 of the Civil Code 2015, the subject matter of a service contract must be an act that is capable of being performed. Given the off-plan apartments are still ineligible for sale, one may argue that the "brokerage activity" (subject matter of Contract 2) is incapable of being performed. To avoid this risk, Contract 2 may need to clearly state that the provided services are capable of being performed;</p> <p>2.5. Article 6.8 of the Housing Law 2014 prohibits the Developer to "<i>authorize or assign a party participating in investment co-operation, in a joint venture, in an affiliation, business co-operation or capital contributor or authorize or assign any other organization or individual to sign [...] deposit contracts for transactions regarding housing [...] of the project.</i>" It is not clear whether:</p> <p>2.5.1. The "assignment" (<i>giao</i>) by the Developer under Article 6.8 above means:</p> <p>(a) the Agency will, on</p>

Steps	Description	Pros	Cons
	<p>and</p> <p>(b) the Customer is obligated to enter into deposit agreement or off-plan sale contract with Developer if the offer at 2.1.4(a) is accepted.</p>		<p>behalf of the Developer, sign agreement with the Customer; or</p> <p>(b) the Agency will, on its own behalf, sign agreement with Customer; and</p> <p>2.5.2. The “deposit contracts for transactions regarding housing” (<i>hợp đồng đặt cọc các giao dịch về nhà ở</i>) of the Project means:</p> <p>(a) only transactions which have subject matter to be the housing of the Project; or</p> <p>(b) any transaction which is associated with the housing of the Project.</p> <p>2.6. If the case is 2.5.1(b) and 2.5.2(b), then there is a risk that both Contract 1 and Contract 2 could be held invalid. That said, there is also a counter-argument that the restriction under Article 6.8 of the Housing Law 2014 only applies to entities who participate in the Project as co-investors or sub-investors of the Developer to directly enjoy benefits from the development of the Project. Therefore, as a service provider of the Developer, this restriction should not be applicable to the Agency.</p>
3.	<b><i>Business cooperation contract (BCC) between the Developer and Agency (Contract 3)</i></b>	3.3. Under the housing law, the Develop could enter into transactions to mobilize capital for the development of the	3.4. Arguably, the deposit under Contract 2 is still under Customer’s ownership. Therefore, in order to use the Customer’s

Steps	Description	Pros	Cons
	<p>3.1. While it is not entirely clear in practice on how the Agency could legally transfer the Customer's deposit under Contract 2 to the Developer, a BCC could be a feasible option for Contract 3.</p> <p>3.2. Under the BCC, the parties will agree on their contributions to developing the Project, whereby the Agency will make a contribution in the form of money.</p>	<p>Project from other investors (except for Customers) at the Pre-Foundation Stage after obtaining, among others, approval for mobilizing capital for Project development from local construction authority.</p>	<p>deposit for the BCC, Contract 2 must contemplate agreements allowing Agency to have ownership over the Customer's deposit.</p> <p>3.5. As Agency will become co/sub-investor of the Project upon entering into the BCC, this may trigger the restriction under Article 6.8 of the Housing Law 2014 (see discussion 2.5 - 2.6). However, it is arguable that the Agency sign Contract 2 as the service provider of both Developer and Customer, but not co/sub-investor of the Project because Contract 3 is signed after Contract 2.</p>
4.	<p><i>Agreement regarding off-plan apartment between the Developer and Customer (Contract 4)</i></p> <p>4.1. After the Project is eligible for sale,</p> <p>4.1.1. the Developer may enter into Contract 4 with the Customer in the form of (a) a deposit agreement for sale and purchase of off-plan apartment; or (b) an agreement for sale and purchase of off-plan apartment; and</p> <p>4.1.2. the deposit under Contract 2 will be offset with payments under Contract 4.</p>	<p>4.2. Execution of Contract 4 is now in accordance with the law.</p>	<p>4.3. Contract 4, in relations with Contract 2,3,4 above, could be considered as a concealed transaction. However, this risk should not be material because each contract under transaction structure is practically real and the purpose of each contract is different.</p>