

# Overview of Land Laws for Foreign Resort Developers – Vietnam

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This brief provides an overview of land laws for foreign resort developers in Vietnam. It contains the following:

- (a) General Overview – Foreign Property Investment;
- (b) Corporate Vehicle – Investment Certificate; and
- (c) Administrative Procedures for Implementing a Foreign Invested Resort Project.

The following information has been consolidated and summarized for your convenience only. Should you wish to obtain further information or want to discuss any issues in this brief with us, please contact Seck Yee Chung.

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## A. General Overview – Foreign Property Investment

Property development in Vietnam remains vibrant over recent years, coinciding with the country's rapid economic development and accession to the World Trade Organization.

Vietnam's Constitution (1992) does not allow any private ownership of land (domestic or foreign); rather, it provides that all land in Vietnam belongs to "the People" and "is administered by the State for long-term and stable use."<sup>1</sup> Long-term leasehold interests are primarily available for Vietnamese individuals and organizations. Foreign invested enterprises ("FIEs")<sup>2</sup> are provided only with fixed, durational commercial land leases.

Developments in Vietnamese law have introduced opportunities for FIEs in the property sector.<sup>3</sup> One of the prevailing regulations, Decree No. 84,<sup>4</sup> makes it possible for FIEs duly established in Vietnam<sup>5</sup> to enjoy, in some cases, seventy-year (70) lease terms.<sup>6</sup> Subject to approval by the relevant State Agency at the outset, such lease may be renewed indefinitely, provided that each term does not exceed seventy years (70).<sup>7</sup> With respect to a commercial project like resort development, FIEs can have land use rights up to 50 years.

With respect to lease terms, the foreign investor has the option to pay the land lease rental, either yearly or in a lump sum for the duration of the lease term. The latter provides quasi-freehold rights to the land (i.e., transfer, mortgage, sublease, and capitalization of their land use rights).<sup>8</sup> With regard to residential projects, foreign-invested developers may "buy" projects from local developers once the local developers have fully developed the infrastructure of such projects<sup>9</sup>.

Land use rights ("LUR") registration means the acknowledgment of the lawful land use rights over a particular land plot in the cadastral records, thus establishing the rights and obligations of the land users.<sup>10</sup> In order to protect the legitimate rights and interests of land users,<sup>11</sup> competent State agencies shall grant LUR and Ownership of Residential Property and Other Assets Attached to the Land Certificates ("Land Certificate") to land users. Land Certificates are granted to land users in a unified form issued by the Ministry of Natural Resources and Environment, which is applicable nation-wide for all land categories.<sup>12</sup>

<sup>1</sup> Constitution of the Socialist Republic of Vietnam, 1992, Chapter II, Article 18.

<sup>2</sup> In general, foreign individuals are prohibited from owning land and real estate, except the case where certain foreign individuals/organizations are allowed to buy and own residential apartment unit under Resolution No. 19.

<sup>3</sup> Foreign investors may own up to 100% in enterprises established in Vietnam for real estate and property development.

<sup>4</sup> Decree No. 84/2007/ND-CP dated May 25, 2007, of the Government Providing Supplemental Guidelines on the Issuance of Land Use Rights Certificate, Revocation of Land, Exercise of Land Use Rights, and the Process and Procedures for Compensation, Support, and Resettlement When the State Revokes the Land, and for Handling Complaints Regarding Land ("Decree No. 84").

<sup>5</sup> The FIE has been issued an Investment Certificate by the provincial-state level Department of Planning and Investment ("DPI").

<sup>6</sup> The seventy-year (70) lease term only applies for residential projects or to projects where the initial land use term is perpetual.

<sup>7</sup> Decree No. 84, Articles 23(2)(a), 24(2)(c) & 32(2).

<sup>8</sup> Law No. 13/2003/QH11, adopted by the National Assembly on November 26, 2003, and taking effect on July 1, 2004 ("Land Law"), Article 119(3).

<sup>9</sup> Decree No. 84, Article 24(1)(đ).

<sup>10</sup> Land Law, Article 4(19).

<sup>11</sup> Land Law, Article 4(20).

<sup>12</sup> Land Law, Article 48; Decree No. 88, Article 7.

## B. Corporate Vehicle – Investment Certificate

Investors (foreign and domestic), under the Enterprise Law, may establish (pursuant to the issuance of the Investment Certificate) a corporate vehicle/company that is either a limited liability company (“**LLC**”) or a joint stock company (“**JSC**”), which have corporate governance regulations (e.g., passing of resolutions of the shareholders/investors and the board).

Under the Enterprise Law, an LLC may take the form of either an LLC with two or more members (“**Multiple Member LLC**”) or an LLC with one member (“**Single Member LLC**”). The former is often loosely referred to as a “joint venture” with two to fifty members, while the latter is equivalent to a wholly-owned subsidiary. LLCs are still the most popular form of direct foreign investment in real estate investments in Vietnam.

A JSC must have a minimum of three shareholders in order to be established.<sup>13</sup> The JSC is preferred by some, as it is the only vehicle permitted for issuing securities in order to raise capital and for listing on the stock exchange.<sup>14</sup>

It is common to establish an LLC (whether single member or two members for a joint venture) as the establishment formalities are less burdensome versus the JSC. In addition, most foreign investors have difficulty finding two additional shareholders for the establishment of the JSC.

The foreign investor has more protections and control under the LLC (versus the JSC) structure. As an investor/member of an LLC, the foreign investor has pre-emptive rights (first right of refusal),<sup>15</sup> should a member wish to transfer its capital contributions, whereas under the JSC, shares may be sold ‘over-the-counter’.

Should listing on the stock exchange be desired at some point in the future, the Enterprise Law permits conversion of an LLC into a JSC.<sup>16</sup> In addition, kindly refer to the ‘Forms of Doing Business in Vietnam’ which we sent you last week for further information.

Moreover, the Law on Real Estate Business (“**LREB**”) provides that an enterprise established in the real estate section must satisfy, *inter alia*, the condition that it has met the legal capital requirement.<sup>17</sup>

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<sup>13</sup> Enterprise Law, Article 77(1)(b).

<sup>14</sup> Enterprise Law, Article 77(3).

<sup>15</sup> Enterprise Law, Article 44 (Transfer of Capital Contribution Portion).

<sup>16</sup> Enterprise Law, Article 154.

<sup>17</sup> According to Article 3.1 of Decree No. 153/2007/ND-CP dated 15 October 2007 which provides the guidelines for implementation of the Law on Real Estate Business (“**LREB**”), the legal capital required for a real estate enterprise is 6 billion dong (about US\$316,000).

## C. Administrative Procedures for Implementing A Foreign Invested Resort Project

Before setting up a FIE under the form of an LLC/JSC, the investors have to find an appropriate location and get the in-principle agreement on such location from the relevant Provincial People's Committee.<sup>18</sup> The investors then can apply for appraisal of the assessment report concerning the effects on the environment or an environmental protection undertaking.<sup>19</sup> This should be prepared concurrently with the project's feasibility study and the basic design for the project.

Upon obtaining the in-principle approval, the project appraisal and the approved basic design, the investor may submit the application for issuance of the Investment Certificate in order to set up a FIE. The established FIE will then carry out the site clearance if the land is still occupied by the existing land users/inhabitants.<sup>20</sup> After the land is cleared and compensated, the FIE signs a land lease contract with the relevant Service of Natural Resources and Environment ("SNRE") and is issued the Land Certificate. If the land is contributed by a Vietnamese party to the FIE, the FIE is not required to sign a land lease contract. Alternatively, a land contribution agreement is required to be submitted to the SNRE. The FIE will also then be issued a Land Certificate under its name.

The FIE is required to prepare a dossier seeking approval for fire fighting and prevention. Thereafter, the FIE can apply for a construction permit and carry out the construction of the project.

### **DISCLAIMER**

This brief, Overview of Land Laws for Foreign Resort Developers, Vietnam, has been prepared to provide only general information of the relevant position as at July 2010. Furthermore, there may well be subsequent changes in the law. Information contained in this publication should not be relied upon as legal advice and should not be regarded as a substitute for detailed advice in individual cases.

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<sup>18</sup> Decree No. 12/2009/ND-CP dated 12 February 2009 on Management of Construction Investment projects.

<sup>19</sup> Decree No. 80/2006/ND-CP dated 9 August 2006 Providing Detailed Regulations for Implementation of the Law on Protection of the Environment.

<sup>20</sup> Decree No. 69/2009/ND-CP dated 29 October 2004 Making Additional Provisions on Land Use Planning, Land Use, Land Prices, Land Recovery, Compensation, Assistance and Resettlement.