

Asia Counsel Insights

Asia Counsel Insights provide an overview of key trending legal and business issues in Vietnam and how they may impact your business.

In this **December 2023 edition**, we provide new updates on the amended Law on Real Estate Business 2023, the revised Law on Housing 2023 and Resolution on Global Minimum Tax.

LAW ON REAL ESTATE BUSINESS 2023

On 28 November 2023, the National Assembly of Vietnam passed the amended Law on Real Estate Business No. 29/2023/QH15 ("**LREB 2023**") replacing the 2014 law. The LREB 2023 will take effect from 1 January 2025.

1. "Foreign-invested economic organisation" definition

The term "foreign-invested enterprise" is no longer used in LREB 2023 and replaced by "foreign-invested economic organisation", with references to the Investment Law 2020. This change is intended for consistency between the laws, including the draft revised Land Law.

Under LREB 2023, a foreign-invested economic organisations with no more than 50% capital held by a foreign investor (the "**Deemed Domestic Organisations**") now can carry out all real estate business activities relating to residential houses, construction works and land use rights with technical infrastructure in real estate projects that previously were only allowed for domestic investors.

For instance, a Deemed Domestic Organisation can now purchase, lease-purchase residential houses,

construction works, construction premises in construction works for resale, lease, or lease-purchase, and receive the transfer of land use rights with technical infrastructure in real estate projects for transfer or lease. However, it should be noted that this provision only concerns the forms of real estate trading activities and other aspects of the Law on Land and Law on Housing still applies. As an example, Deemed Domestic Organisations are allowed to purchase residential houses for lease. However, under the Law on Housing 2023, they can only purchase houses from project developers or other foreign individuals and organisations.

2. Vietnamese citizens and people of Vietnamese origin

LREB 2023 specifies real estate investment options for Vietnamese citizens residing abroad (i.e. who still retain Vietnamese nationality). This group will be able to invest in all real estate activities as same as domestic Vietnamese citizens.

Restrictive policies for Vietnamese residing abroad in LREB 2014 will continue to apply to those persons who no longer have Vietnamese citizenship.

3. Information disclosure by real estate developers

A project developer must publish certain prescribed information on their website and the online platform of the Ministry of Construction before selling any off the plan projects. The information that must be published includes the project approvals, status of land allocation and land use rights, any land use restrictions, planning approval, construction permits and certificate of completion of the construction of the building foundation, approved bank guarantee for the project and the sales contract.

4. Real estate business contract templates

LREB 2023 stipulates that project developers must use the prescribed contract forms in the real estate business. This ends the debate on whether the contract forms in Decree 02/2022/ND-CP are mandatory or not and the prescribed contract form must be used in all real estate business transactions.

5. Capital mobilisation by way of customer deposit

LREB 2014 does not have specific provisions on the deposit transaction between the project developer and customers. Many developers usually utilise this arrangement as a tool for capital mobilisation and may request the customers to deposit an amount of up to 90% value of the off-the-plan properties. Under LREB 2023, the maximum amount of deposit that project developers may collect from the customers is no more than 5% of the selling price/lease-purchase price

of the off-the-plan properties. Concurrently, the deposit collection can only be conducted after the off-the-plan properties satisfy the conditions for trading under LREB 2023.

6. Project transfer by foreign-invested enterprises

Under the former law, when receiving a transfer of a real estate project, regardless of the form of land use payment, a foreign-invested enterprise must go through a two-step process: (i) the transferor must return the land to the State after receiving the project transfer approval from the competent agency; and (ii) the State then allocates or leases land to the transferee (the foreign-invested enterprise).

LREB 2023 allows a simpler transfer procedure for foreign-invested transferees if the project land is allocated by the State with land use fee, leased by the State with one-off land rental payment for the entire lease term, or the land payment is not associated with the state budget. In this case, foreign-invested transferees only need to conduct procedures of obtaining the land use right certificate to inherit all rights and obligations in relation to the land use right of the transferred projects.

7. Conditions for project transfer

One of the conditions for project transfer (partially or wholly) under former law is that the project developer has secured the land use rights certificate for the transferred area. This is no longer required under LREB 2023. Instead, the developer can conduct the project transfer if (i) it has obtained the decision on land allocation, land lease or land conversion, and (ii) it has completed all financial obligations on land use right payments of the project including land use fees, land rent and taxes, and charges related to land use rights (if any) before transferring part or all of such project.

RESOLUTION ON GLOBAL MINIMUM TAX

Vietnam has adopted Resolution No. 107/2023/QH15 on the application of additional corporate income tax (“**Resolution 107**”), which attempts to align with the global corporate minimum tax solution under the Global Anti-Base Erosion Model Rules (Pillar Two). Resolution 107 will take effect from 1 January 2024.

Resolution 107 applies to Vietnamese-based companies and organisations of multinational groups having the revenue recorded in the consolidated financial statements of the ultimate parent company of at least EUR750,000,000 in 2 out of the most recent 4 consecutive years (“**Applicable Companies**”).

1. Top-up tax payments and declaration

This resolution adopts the concepts of Qualified Domestic Minimum Top-up Tax (“**QDMTT**”) and Income Inclusion Rule (“**IIR**”) with a minimum corporate income tax rate of 15%:

- QDMTT refers to an additional corporate income tax (CIT) applicable to foreign inbound investments. Foreign-invested companies in Vietnam qualified as Applicable Companies enjoying CIT below 15% must pay an additional amount to the Vietnam’s State Budget on annual basis to ensure compliance with the minimum tax rate.
- IIR refers to a mechanism to control the outbound investments of parent companies in Vietnam qualified as Applicable Companies. Under this scheme, parent companies in Vietnam having subsidiaries in other countries enjoying CIT rates below 15% must pay additional amounts of tax to the Vietnam’s State Budget on annual basis to cover such differences, unless these additional amounts have been paid in foreign countries.

- Detailed formulas for the calculation of additional CIT amounts are provided under Resolution 107, which comprise several factors such as total corporate income tax, net income, the value of tangible assets and deductible wages in Vietnam of the Applicable Companies.

Regarding tax declarations, apart from the standard application form, Resolution 107 requires the taxpayer to prepare an explanation of the differences between financial accounting standards. This implicitly encourages the Applicable Companies to apply globally accepted accounting standards such as IFRS to reduce administrative burden.

2. Potential impacts on investors

- Foreign invested companies in Vietnam who are enjoying tax incentives in Vietnam may need to pay an additional CIT if they satisfy conditions under Resolution 107;
- Outbound investments in low-tax rate countries of Vietnamese investors will also be subject to additional tax if they surpass the threshold provided by Resolution 107;
- More administrative burdens for Applicable Companies, especially in explaining the differences between the application on different accounting standards for tax declaration.

Nevertheless, the Government is discussing support mechanisms to retain both inbound and outbound investment flows and investors can expect the new incentives in the future. We will keep our clients informed on this matter.

3. Transition period

During the transition period (from 2024 to 2032), the Government will facilitate the compliance of Applicable Companies with global minimum tax policies. This includes expanding the criteria for applying zero additional tax and applying exemption of fines and penalties for certain violation on additional tax declaration.

LAW ON HOUSING 2023

On 27 November 2023, the National Assembly passed the revised Law on Housing ("LOH 2023") amending the 2014 law.

1. Principle on housing development in urban areas

Developers of residential projects in certain prescribed urban areas of the major cities in Vietnam may only develop housing projects for house sale, lease purchase, and lease, and will no longer be allowed to transfer land use rights in the form of subdivision and sale of land plots for individuals to build their own houses. This provision aligns with LREB 2023.

2. The rights to houses of foreign-invested economic organisations

Similar to the Law on Real Estate Business 2023, the LOH 2023 replaces the term "foreign-invested enterprise" with "foreign-invested economic organisation". However, the law does not elaborate on this definition. Foreign invested entities can only own residential houses through the following options: (i) investing in housing construction projects in Vietnam (ii) purchasing houses from housing project developers (iii) receiving houses located in housing projects by way of donation or inheritance (iv) purchasing/lease purchasing houses from other foreign owners. However, the law has not clarified whether a Vietnamese incorporated enterprise where foreigners own less than 50% equity interest can own residential housing without these restrictions.

3. Capital mobilisation of housing projects

A project developer is allowed to mobilise the capital by receiving capital contributions or entering into business cooperation contracts, joint ventures or partnerships with other individuals and organisations. In that case, the developer can only distribute the profits earned from the housing project to its partners in cash or by shares based on the agreed capital contribution ratio.



LOH 2023 prohibits project developers from using the above capital mobilisation forms to distribute project products, distribute land use rights in the project or provide priority in purchasing project products to collaborating individuals and organisations.

4. Mortgage of housing projects and off-the-plan houses

LOH 2023 specifies that when housing developers wholly or partly mortgage their projects or off-the-plan houses at licensed credit institutions in Vietnam for project financing purposes, the mortgage must include the mortgage of the associated land use rights. This means that developers can only borrow from banks if there is a land use rights certificate for the project land.

5. Renovation and re-construction of apartment buildings

LOH 2023 provides for comprehensive mechanisms, policies, and measures to renovate and reconstruct old apartment buildings, among which the changes in calculation of building lifespan and application of various incentives for project developers are notable points. The building lifespan will now be determined by competent authorities based on design dossiers and actual use conditions of the building rather than a fixed period as was proposed in the draft law. Project developers will enjoy a number of incentives such as land use fee exemptions, business opportunities in remaining areas after resettlement arrangement, access to financial support, and tax benefits when implementing apartment renovation and re-construction projects.

About Asia Counsel

Asia Counsel is a dynamic international corporate and commercial law firm dedicated to serving clients in Vietnam. Our partners have over 15 years of experience in working on complex and challenging matters in Vietnam. We are committed to helping clients achieve their business strategies and providing outstanding legal services.

If you have any questions on any of the items discussed above, please do not hesitate to contact us.

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