

Comments on New Law on Real Estate Business 2023 – Part 2

In this post, we continue discussing the new changes introduced by the Real Estate Business Law 2023. Part 1 of our discussion can be found [Here](#).

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- 1. New restriction when collecting deposit for purchase of off-plan real estate**
 - 1.1. Under the Real Estate Business Law 2023, real estate developers can only collect a deposit of up to 5% of sale price of the relevant real estate from purchasers *when the residential houses, construction works are qualified to be put into trading*. The law further requires a deposit agreement to expressly set out the sale price and area of the off-plan real estate. The off-plan real estate under the deposit agreement must satisfy conditions for sale under law. This indicates that collecting a deposit is considered putting relevant off-plan real estate into business.
 - 1.2. The new requirements may pose significant difficulty for real estate developers with weak financial capacity when it comes to funding for pre-construction phase of their projects.
- 2. Bank guarantee for sale of off-plan houses is optional**
 - 2.1. Under the current regulations, the developers must obtain a bank guarantee from a permitted commercial bank in Vietnam. The bank guarantee serves as security for the purchasers in case the developers fail to adhere to the house handover schedule and their financial obligations agreed under the sale contract. The bank guarantee is currently mandatory in all cases of selling off-plan housing by real estate developers. In practice, the fee for arrangement of bank guarantee may be significant and this fee is usually added to the purchase price.
 - 2.2. Pursuant to the new Real Estate Business Law 2023, in principle, real estate developers are still obliged to obtain bank guarantee for their financial obligations toward houses purchasers but the purchasers will have discretion to decide whether their purchase of the off-plan houses will be backed by a bank guarantee. The new regulation offers customers cost savings when purchasing an off-plan house from a reputable developer.
- 3. New conditions for business involving land with technical infrastructure in real estate projects**
 - 3.1. The Real Estate Business Law 2023 imposes various conditions for business involving land use rights (LUR) attached to technical infrastructure in a real

estate project. Among others, the law requires the transfer, lease, sub-lease of LUR having ready-built infrastructure to be “in accordance with” (*phù hợp với*) the approved objectives and content of relevant real estate project. It is not clear how to interpret the phrase “in accordance with” (*phù hợp với*). One may take a strict view that the developer’s investment license must expressly include the business purposes of transferring, leasing, and sublease LUR having ready-built infrastructure. In practice, the most common real estate project which solely involves LUR business is development of industrial parks and subleasing LUR with ready-built infrastructure. However, the investment licenses of industrial park developers rarely explicitly mention the objective of subleasing LUR with ready-built infrastructure.

- 3.2. The Real Estate Business Law 2023 contemplates three options for developers to do business solely involving LUR in real estate projects:
 - 3.2.1. **Option 1:** Transferring LUR in form of land subdivision (*phân lô bán nền*) to individuals so that they can construct residential houses by themselves;
 - 3.2.2. **Option 2:** Transferring LUR to organizations to invest in construction of residential houses, construction works; and
 - 3.2.3. **Option 3:** Lease, sublease LUR to organizations to construct residential houses, construction works.
- 3.3. Regarding Option 1, among other conditions, the law further requires the developers to obtain authority’s confirmation that the land has been qualified for business before transferring the relevant land use rights to the customers. This new requirement is similar to a condition to sell off-plan residential houses and could be a protection for the individual customers purchasing land use rights to build houses for themselves.
- 3.4. Regarding Option 2,
 - 3.4.1. A real estate investor may consider Option 2 as an alternative to acquire land from master developer to construct real properties; and
 - 3.4.2. It would be better if the law can expressly clarify that the transfer of land use rights with ready-built infrastructure will not be considered as transfer of real estate project and subject to the regulations on transferring investment project. Under the investment law, a change to the project’s land area could trigger the requirement on applying for amendment to the investment law licenses. Accordingly, the lack of clarification may give rise to an issue as to whether the transferor must amend the IRC upon selling the land use rights to other organizations; and
- 3.5. The law suggests that the transferee of the land use rights under Option 2 and

Option 3 must invest and develop construction works on the land in accordance with the approved detailed planning and project schedule (*quy hoạch chi tiết và tiến độ dự án được chấp thuận*). It is not clear whether such provision refers to the detailed planning and implementation schedule of (a) the primary project of the transferor or (b) the secondary project of the transferee or (c) both. In our view, it is likely that the secondary investors must at least comply with the detailed planning of the approved primary project. Therefore, if an investor intends to construct a building with different planning parameters, purchasing or leasing land use right with ready-built infrastructure in an existing real estate project may not be appropriate options.

4. Clarification on the concept of “transfer of real estate project”

4.1. The Real Estate Business Law 2023 defines “transfer of real estate project” to mean a developer assigns the whole or part of a real estate project, rights, obligations, responsibilities, lawful interests of such developer and rights, obligations of such developer towards related parties (if any) with respect to the transferred real estate project or transferred part of the real estate project to transferee via written contract. While the Investment Law 2020 fails to provide a legal definition for the concept of “transfer of investment project”, the Real Estate Business Law 2023 appears to clarify what are the subject matters of a transfer of real estate project.

4.2. The Real Estate Business Law 2023 further provides that the transfer of the whole or a part of a real estate project is for the transferee to continue the construction investment, doing business when the project is still within implementation schedule (*trong thời hạn thực hiện*) as approved by the competent authority. This suggests that regulations on transfer of real estate project will only be applied if the transfer is exercised during the construction of the project. Accordingly, the transfer of ready-built construction works under relevant real estate projects could not be considered as a transfer of real estate project. This interpretation is in line with the Ministry of Construction’s guidance in an earlier [Official Letter](#).

5. New conditions for transfer of real estate project

The table below summarizes key changes to conditions for transfer of real estate project and our respective comments:

No.	Key changes	Comments
5.1.	Transfer of real estate project must not cause changes to master plan, objectives of the project,	5.1.1. The new law replaces the current Real Estate Business Law 2014's restriction on changes to the “content of the project” when conducting real estate transfer with

No.	Key changes	Comments
	rights and benefits of relevant parties.	<p>a requirement on maintaining the “master plan of the project.” The new regulation seems to suggest that the transferee may make changes to the content of the real estate project provided that the changes are still in line with the relevant master plans.</p> <p>5.1.2. However, this change may not be meaningful. This is because the new law still requires the transferee to revise project application dossier, construction planning and re-apply for construction permit if there is any change to the “content” of the transferred project (See 5.2).</p>
5.2.	<p>Upon completion of the project transfer, <i>the transferee will become the developer of the relevant real estate project.</i> The transferee of the whole or a part of the project is not required to re-apply for new set of project licenses <i>unless there is change to the content of the transferred project.</i></p>	<p>5.2.1. In essence, this provision is similar to that under the current Real Estate Business Law 2014. However, the new law expressly recognizes the legal status of developer of the transferee; and</p> <p>5.2.2. The new law does not make clear whether the transferee can implement the procedures for project transfer and project amendment at the same time.</p>
5.3.	<p>In case the project is mortgaged to secure obligations in accordance with the law, the mortgage must be released before the transfer.</p>	<p>The law appears not to allow the parties to agree on waiving this condition. Accordingly, a transferor who has mortgaged the project to secure a bank loan may find it difficult to structure the loan repayment and deregister the mortgage over the project to proceed with the project transfer.</p>
5.4.	<p>Where the transferor only transfers a part of the real estate project, the construction works or using, and business</p>	<p>It is not clear how the authority will determine if the transferred part satisfies the “independent” criterion.</p>

No.	Key changes	Comments
	<p>purposes of the construction works of such transferred part must be independent of the other parts of the real estate project.</p>	
5.5.	<p>The transferor is not required to have certificate of LUR but must obtain land allocation/lease decision and fulfill all financial obligation on land in order to transfer the whole of part of the project.</p>	<p>5.5.1. Under the current law, the transferor must have certificate of LUR covering the land of the transferred part of the project in order to transfer such part.</p> <p>5.5.2. This new condition is a welcome change given that the transferor's LUR is not solely proven by the LUR certificate. In practice, even if the transferor has completed all requisite procedures, obtainment of the LUR certificate may still take a substantial time.</p>

6. Model contracts for transaction involving real properties

- 6.1. Similar to the existing law, the Real Estate Business Law 2023 provides various types of contracts in doing real estate business and assigns the Government the responsibility of regulating model contracts for real estate transactions. The new law does not specify whether the usage of model contracts is mandatory. Therefore, clarification on this issue is expected in the forthcoming decree.
- 6.2. In our view, except for the sale of residential houses where the purchasers are individuals, all other model contracts should only be used as a non-binding reference source only.

For more further discussion on this issue, please click [Here](#).

7. New conditions for transfer of a contract for purchase/lease and purchase of real estate

- 7.1. The conditions for transferring sale contracts under the Real Estate Business Law 2023 are essentially similar to those under the existing regulations. Those conditions include the following:
 - 7.1.1. Condition 1: the Real Estate Business Law 2023 only allows transfer of contract for purchase/lease purchase of a house or construction works (generally, "sale contracts") if the application for the Certificate of land use

right, ownership of house and other assets attached to land (LURC) has not been submitted to competent agencies.

7.1.2. Condition 2: The tentatively transferred sale contract must not be subject to any ongoing dispute. According to the new law,

- (a) a sale contract may only be considered as being in dispute if there has been a notification of the competent authority of dealing with a dispute [relating to such contract]. This regulation seems to suggest that if the dispute has not been referred to the authorities for settlement, the buyer may still transfer the sale contract to another party. In such case, the resolution of relevant dispute may become complicated;
- (b) the sale contract is still qualified for transfer if it has been disputed and the dispute has been *resolved* by the competent authorities through legally effective judgments, decisions, or awards;

7.1.3. Condition 3: The house, construction works under sale contract are not subject to encumbrance or mortgage to secure the fulfillment of obligations as prescribed by law, except in cases where the mortgagee agrees; and

7.1.4. Condition 4: The transferred sale contract must be established in accordance with law on real estate business. It is not clear if the sale contract must be formulated based on the model contract under the current law in order to satisfy this requirement.

7.1.5. Regarding real estate eligible for transfer of sale contract, it is not clear why the Real Estate Business Law 2023 does not allow transfer of sale contract having subject matter of off-plan construction works and floor area of construction works. Logically, if the sale contract having subject matter of off-plan residential house is eligible for transfer, then the contract having subject matter of off-plan construction works and floor area should have the same treatment.

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