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Since the effective date of the Law on Real Estate Business (1 July 2015), Vietnamese authorities have issued different legislative documents to enhance its practical implementation, including, among others, Decree 76/2015/ND-CP, dated 10 September 2015, on the implementation of certain provisions of the Law on Real Estate Business (“**Decree 76**”). However, as the Law on Real Estate Business and the Law on Investment were amended last year, the continued application of Decree 76 would lead to several inconsistencies between these Laws and Decree 76.

The state therefore issued Decree 02/2022/ND-CP on 6 January 2022, which will come into effect and completely replace Decree 76 from 1 March 2022 (“**Decree 02**”).

Below are some points of Decree 02 that are notable and may impact participants in the real estate market.

1. Conditions of real estate business are revised and clarified

The statutory VND 20 billion minimum charter capital requirement for real estate business companies was abolished under the latest amendments to the Law on Real Estate Business.¹ Decree 02 removes the relevant provisions under Decree 76 to be consistent with such amendments.²

Under the Law on Land and its subordinate regulations, if a person is selected to be a real estate development project investor, such investor must have equity equal to 20% or more of the total investment capital for a project using less than 20 hectares of land, and equal to 15% or more of the total investment capital for a project using 20 hectares of land or more. Decree 02 reiterates the same regulation unlike Decree 76.³ As a result, both the Law on Land and the Law on Real Estate Business will have duplicate equity capital regulations for the time being, which is unlikely to have any impact in practice.⁴

A truly new condition is that a real estate business company must publicize, and update from time to time, the following statutory information on the enterprise website and trading floor (if trading via floor):⁵

¹ Article 75.2(a) of Law on Investment amending certain provisions of the Law on Real Estate Business.

² Article 4.1 of Decree 02.

³ Article 4.2 of Decree 02.

⁴ Amendments to the Law on Land also are under discussion and adjustment in this regard may be made.

⁵ Article 4.1(b) of Decree 02.

- (i) information of the company (i.e., name, address, legal representative and phone number);
- (ii) information of the real estate being traded;
- (iii) information on the mortgage of homes, construction works, and real estate projects being traded (if any);
and
- (iv) information on the quantity and the type of real estate being traded, specifying the quantity and type of real estate that has been sold, transferred, or hire purchased and that are trading.

It is expected that the new disclosure regulations will help the real estate market become more transparent and expose customers to less risk of fraudulent or misleading transactions.

For existing enterprises (excluding small-scale and irregular businesses⁶), Decree 02 requires them to satisfy all the business conditions above within six months from 1 March 2022, or they will not be allowed to continue their real estate business.⁷

2. Statutory templates of real estate business contracts

(a) Previous Regulations

Under Decree 76, the contract templates applicable to real estate business activities were issued for reference only. Thus, the parties were not required to follow such templates in any real estate transactions.

(b) What Has Changed?

Decree 02 provides eight contract templates that are mandatorily applicable to the relevant types of real estate business transactions as follows:⁸

- (1) contracts for the sale and purchase/hire purchase of apartments;
- (2) contracts for the sale and purchase/hire purchase of tourist apartments (so-called “condotels”) or office apartments with lodging facilities (so-called “officetels”);
- (3) contracts for the sale and purchase/hire purchase of residential homes;
- (4) contracts for the sale and purchase/hire purchase of other construction works other than those listed in items (1), (2) and (3) above;
- (5) contracts for the lease of residential homes and other construction works;
- (6) contracts for the transfer of land use rights;
- (7) contracts for the lease/sub-lease of land use rights; and
- (8) contracts for the transfer of all or a part of a real estate project.

Such contract templates, however, do contain certain placeholders for “other agreements” through which the parties may flexibly insert other terms and conditions, provided that such terms and conditions not be contrary to law and social ethics.

Despite such potential flexibility, it is likely that the parties’ freedom of agreement will be tested since any new

⁶ Essentially, it means the persons/organizations engaging in real estate transactions in specific cases, such as bankruptcy or dissolution transactions, as opposed to a full-time real estate business.

⁷ Article 14.6 of Decree 02.

⁸ Article 6 of Decree 02.

terms and conditions are subject to the interpretation of the state authority. It is notable that the licensing authorities were supposed to have the right to reject applications for project transfers on the basis that a project transfer contract is “not compliant” with the statutory contract template in an earlier iteration of Decree 02 during the drafting stage. Though such rejection right, fortunately, is not prescribed officially in Decree 02, the possibility remains that the licensing authorities might attempt to challenge new terms and conditions in practice during the review of the relevant contracts.

Finally, these statutory contract templates will be applied to the contracts to be executed on or after 1 March 2022. This requirement is even applicable to project transfer contracts that are not executed but waiting for a decision on approval of transfer.⁹

3. Change of the schedule to resolve complaints for project transfer

(a) Previous Regulations

Under Decree 76, the transferor in a real estate project transfer is required to resolve all complaints of customers and other relevant parties before executing a project transfer contract.

(b) What Has Changed?

Though the regulations of Decree 02 maintain the transferor’s obligation to resolve all complaints of customers and other relevant parties, the transferor is now required to resolve all such complaints after project transfer contract execution and before handing over the transferred project to the transferee.¹⁰

As such, this new regulation is more relaxed for the parties because it allows them to execute the project transfer contract before resolving the complaints (if any). However, Decree 02 still fails to clarify the form and scope of the complaints covered and what constitutes resolution of such complaints. Thus, any complaint may disrupt and delay the handover process. Additionally, the definition of, and the criteria of completion for, handing over a transferred project are not clearly fleshed out in Decree 02, or the Law on Real Estate Business, which might become problematic in practice.

4. National defense and security factors in project transfers for a foreign-invested transferee

Though Decree 02 clarifies certain aspects of the real estate project transfer procedures, a new bureaucratic requirement is now added to the process.

Specifically, when the parties wish to transfer a project located on an island or along a border area and the transferee is a foreign-invested entity, the licensing authority must collect the opinions of the Ministry of National Defense and the Ministry of Public Security to ensure national defense and security.¹¹

The regulation is consistent with the principles of the investment laws that require parties to M&A transactions to obtain national defense and security clearance. Therefore, it will effectively prevent foreign investors from

⁹ Article 14 of Decree 02.


¹⁰ Article 11.5 of Decree 02.

¹¹ Article 13.1(c) of Decree 02.

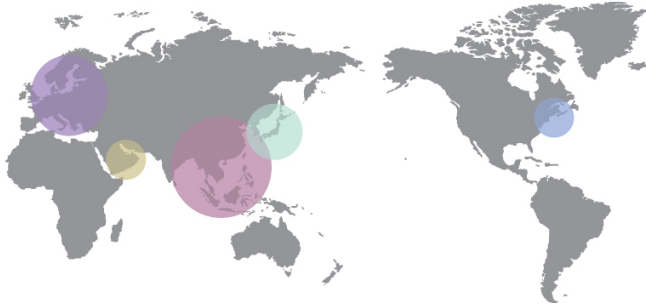
circumventing the M&A procedure by acquiring a project via project transfer, which was possible under Decree 76. Furthermore, at the ministerial level, the clearance procedures may become significantly protracted in practice because Decree 02 does not stipulate any deadline or schedule for such national defense and security clearance.

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