

Informed Counsel

Analysis of Recent Legal Developments in Thailand and Vietnam



contents

- 1 Foreign Land Acquisition
In Vietnam, where land belongs to the state, it is important to understand the mechanics of foreign land acquisition.
- 3 Trade Competition Act
Thailand's Trade Competition Act prohibits abuse of market dominance, anticompetitive agreements, and unfair trade practices.
- 4 Renegotiating Employment Conditions
Companies that are investing in Thailand need to understand the legislative framework for handling employment conditions and labor disputes.
- 6 Punitive Damages
Recent legislation enables Thai courts to award punitive damages to injured persons.
- 7 FDA Restrictions on Advertising
The Thai Food and Drug Administration (FDA) is aggressively prosecuting misleading claims and false statements.
- 8 Protecting Drug Patents
Evergreening applies to various methods for protecting patented pharmaceuticals—methods that are especially important in Asia.
- 10 Fair Use
The Supreme Court of Thailand narrowly construes the fair use exception to copyright infringement.
- 11 IPR Protection in Vietnam
Vietnam's government is taking bold actions against infringement of intellectual property rights.
- 12 Tilleke & Gibbins Updates
Tilleke & Gibbins has recently been honored by The Legal 500 Asia Pacific and Asia IP.

AN OVERVIEW OF FOREIGN LAND ACQUISITION IN VIETNAM



Left | **MICHAEL K. LEE**
Department Head, Commercial
michael.l@tillekeandgibbins.com

Right | **NGUYEN QUOC VINH**
Senior Associate
vinh.n@tillekeandgibbins.com

By way of background, according to official doctrine, land in Vietnam belongs to the people, while the use of such land is administered on the people's behalf by the State. Thus, "land ownership" is more appropriately referred to as a "land use right" (LUR). The State administers an LUR by issuing a Land Use Right Certificate (LURC), similar to a title deed to real property in the West. LURCs designate, among other things, the duration and purpose of the land use. Any use of the land beyond the scope of the LUR can lead to a withdrawal of the LUR by the State.

The duration of an LUR is usually 50 years, but may be up to 70 years or in perpetuity (land in perpetuity is called "allocated land") for land used for residential and other specified uses (such as for agriculture or military use). There are six forms of LURs:

1. An allocation of land with payment of a land use fee not sourced from State funds;
2. An allocation of land with payment of a land use fee sourced from State funds;
3. An allocation of land without payment of a land use fee;
4. A land lease of 50-70 years with land rental payment annually;
5. A land lease of 50-70 years with a lump-sum payment for the whole of the lease term; and
6. A land lease of 70 years with an automatic renewal of an additional 70 years at the end of each term with a lump-sum payment, which is equivalent to the land use fee (this form is available for residential use land only).

Each form of LUR carries with it different rights and obligations. For example, only LURs in the form of (1), (5), and (6) listed above may be mortgaged. The "land use fee" is essentially equivalent to the market price of the land as if the land were to be sold as a fee simple in the West. The land rental is roughly based on land rental rates (which are published by the local government bodies annually) applicable to the land in question, and a lump-sum payment is the annual land rental rate multiplied by the number of years in the lease (e.g., 50-70 years). Thus, the land use fee is usually much higher than the amount for lump-sum payment. Where the land rental rates are lower than the fair market price of the land, the local authorities have the discretion to increase the land rental rates.

Routes to Land Acquisition

For foreign real estate investors and developers in Vietnam, there are three primary routes for land acquisition: (1) via a land lease (either by annual or lump-sum payment) directly with the State; (2) via project transfer; and (3) via contribution of the land as equity into a joint venture company (JVC) by a Vietnamese party to a joint venture with a foreign entity. Foreign entities or foreign-invested entities in Vietnam are generally prohibited from directly purchasing land from private Vietnamese entities.

Continued on page 2

FOREIGN LAND ACQUISITION (from page 1)

Land via the State

Unless the government has already cleared the land, the acquisition of land via lease from the State will often involve the procedure of land clearance, which involves the process of the State withdrawing the land from the existing occupiers and then compensating them. The funds for compensation usually come from the foreign developer; however, the funds that the developer provides for the clearance are offset by any land use fee or land rental payment owed to the State.

In order to soften the strict prohibition of direct acquisition of land from local land users, an alternative means is

entities. Since a direct transaction in land between a Vietnamese and a foreign entity is prohibited, a Vietnamese JVC between a foreign developer and a Vietnamese entity may be established and, once established, the Vietnamese entity (Vietnamese individuals do not qualify) will be allowed to transfer the LUR to the land to the JVC in the form of equity contribution. When allocated land is contributed as equity into a JVC for a project for the sale of residential units, the land use term is normally indefinite. Land for office buildings or the lease of residential units may also be acquired on a joint venture basis, but the land use term will only be for 50 years.

However, only allocated land with full payment of a land use fee not sourced from State funds may be used to contribute—other forms of LURs are not eligible for equity contribution. This criterion is the most common focal point in pre-land acquisition due diligence and structure. Another common issue occurs when the use specified in the LURC is not the one desired by the developer and an approval of the change in land use is required. Often, the land use is not in the form that it needs to be, and a pre-acquisition agreement (usually in the form of an MOU or Head of Terms) is entered into between the parties, which outlines the steps necessary to get the LUR in the form necessary

“the acquisition of land via joint venture is the most common method of land acquisition primarily because it involves less State discretion in obtaining approval than the other routes and because most of the commercially desirable land remains in the hands of private Vietnamese entities”

available. If only one or a few land users are currently using the land, they can agree on the compensation amount(s) with a foreign developer and then release the land back to the State so that the State may lease the land to the foreign developer. However, this method will require the acquiescence of the State. As discussed in further detail below, in general, only allocated land with full payment of a land use fee not sourced from State funds may be contributed as equity to a JVC. Therefore, usually the only practical route remaining for the other types of LURs is for the Vietnamese entity to release the land back to the State and for the State to lease the land to the foreign developer. When commercially viable, the foreign developer may choose to obtain the LUR on an annual rental basis. Where the land is not located in a business district center, the local State authorities will sometimes insist on a lump-sum payment to increase revenue for their local budgets.

Land via Project Transfer

In Vietnam, not only must all developers find a way to obtain the land, they must also obtain a license from the State to develop a project on the land. One route for foreign developers to acquire land is to receive an assignment of a project licensed for land development from a local developer. However, obtaining approval of the project transfer from the State, in practice, is more discretionary than approving the acquisition by capital contribution. This fact, coupled with the fact that the legislation for allowing foreign entities to acquire land by project transfer has been in effect for less than three years, has made this route less popular and less reliable than the other available options.

Land via Joint Venture

The acquisition of land via joint venture is the most common method of land acquisition primarily because it involves less State discretion in obtaining approval than the other routes and because most of the commercially desirable land remains in the hands of private Vietnamese

for contribution.

Once the parties are ready, the document necessary to consummate the land transaction and establish a joint venture is commonly called the “joint venture agreement” (JVA). The JVA will set out the commercial terms between the parties on issues such as how and when the land will be contributed as equity into the JVC, the establishment of the JVC, and how the JVC will be operated, including the JVC’s decision-making process and compensation for land. After the project is approved by the grant of an Investment Certificate, the parties will need an agreement on equity contribution in-kind (i.e., LUR) to be executed between the Vietnamese entity and the JVC, which will record the formal transfer of the land to the JVC.

Capitalization and Payment for the Land

The usual commercial aim of most land transactions is for the foreign developer to own most of the JVC and, through it, control the land, and for the Vietnamese party to “cash out” on, at least, some of the value of the land. These commercial aims raise a unique structuring issue because of the equity contribution requirement. Luckily, the law is silent on whether all or only a part of the land must be contributed as equity by the Vietnamese party. The law is also silent on the minimum amount of equity the Vietnamese party must have to qualify as a bona fide real estate joint venture. However, in practice, the acceptable amount of equity needed to be held is 15% to 25%.

Therefore, the common way around the structuring problem is for the Vietnamese party to transfer its LUR to the JVC, but for the parties to agree that only a portion of the land value will be counted as equity contribution to the JVC and that the remaining balance of the land value will be paid to the Vietnamese party by the JVC from the cash equity contribution made by the foreign party. Thus, in the end, the land is fully paid for, the Vietnamese party cashes out, and the foreign party is recognized for its equity contribution while, indirectly, paying for the land. 🏡