

Land use rights certificates in Vietnam

Do they protect Bona Fides Transferees?

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Background

Real estate is a special class of asset which is enduring in nature and (depending upon applicable law) is capable of being held for long periods of time. Legal ownership over real estate in many jurisdictions worldwide is commonly evidenced by a formal legal document and/or registration within a governmental land titles system, which record the ownership of the real estates asset and transfers of that ownership from one entity to another. As a result, in many jurisdictions worldwide it is relatively easy to trace, with clarity and certainty, the historical chain of ownership of a real estate asset (as well as the placement or removal of easements or encumbrances over the asset) – often going back for many years into the past.

In Vietnam, the land titles system is fundamentally different to the land titles systems of many jurisdictions worldwide, although there are some similarities. Under the Constitution of Vietnam and relevant Vietnamese law, all of the land in Vietnam is owned by all of the citizens of Vietnam collectively, and the people have appointed the State to administer all of the land of Vietnam on behalf of the people. In carrying out this land administration function, the State (via numerous different organs of State) either allocates or leases to persons and entities “land use rights”, which are rights to use a specified parcel of land for a specified purpose, sometimes for a specified and finite period and sometimes indefinitely. The holding of land use rights is recorded in a State-issued certificate, known as a “Certificate of Land Use Rights and Ownership of Residential Houses and Other Assets Attached to Land” (**a LURC**). Thus, under the laws of Vietnam, whilst a person or entity is capable of “owning” (in the sense of holding good and clear legal title) (**Owning**) real property assets which are constructed on land (**Building**), no person or entity in Vietnam is capable of Owning any land in Vietnam (albeit that people and entities are capable of being the duly registered holder of land use rights over a specified parcel of land).

When land use rights or Buildings are transferred from one person or entity to

another, the transfer is recorded on the face of the applicable LURC. Similarly, when mortgage security is placed over land use rights or Buildings, the imposition and release of that mortgage security are recorded on the face of the applicable LURC. Accordingly, it is reasonable to suggest that LURCs may be regarded as providing reliable and State-issued evidence as to the historical chain of “title” (or, at least, the Vietnamese equivalent of “title” (**Title**) and the security status of the relevant land use rights (and, where applicable, the relevant Buildings).

In reality, however, new or amended LURCs can be and sometimes are issued in a manner which is not strictly compliant with applicable law, for any number of reasons including administrative errors, incorrect application of Vietnamese law, or transparency issues (**Invalid LURC Issuances**). Invalid LURC Issuances may occur when land use rights are first allocated or leased by the State, when Buildings are first registered on the face of the LURC, or when land use rights (and, where applicable, Buildings) are transferred from one person or entity to another.

From the perspective of a buyer and/or transferee of land use rights and/or Buildings, who enters into the relevant purchase and/or transfer transaction in a bona fides manner and with “clean hands” (**a Bona Fides Transferee**), it becomes crucial to understand whether or not:

- (a) the issuance of a new or amended LURC in effect “cures” any defects in Title which may otherwise have arisen from an historical Invalid LURC Issuance;
- (b) the Bona Fides Transferee may be exposed to any liability or other risks as a result of the historical Invalid LURC Issuance; and
- (c) there is anything that a Bona Fides Transferee can do, in order to eliminate or mitigate any liability or risk exposures of the kind referred to in Item (b) immediately above.

We explore the answers to these key questions (**the Key Questions**) in the analysis set out below.

Technical legal analysis

1. General principles in relation to Bona Fides Transferees – the Civil Code

Although the applicable legislative provisions do not specifically address the Key Questions, the Civil Code (2015) of Vietnam (**the Civil Code**) does contain some general principles which may be regarded as affording legal protection to registered owners or holders of registerable assets (such as land use rights or Buildings) (in Vietnamese: “*bên thứ ba ngay tình*”), in circumstances where a previous transfer of ownership or holding (as applicable) is void and/or unenforceable. Specifically, Clause 2 of Article 133 of the Civil Code provides the following:

“Where a civil transaction is invalid, but the property has been registered at a competent state authority, and then transferred to a bona fide third person by way of another civil transaction and such person established and performed the transaction based on such registration, such transaction shall not be invalid.”

The provisions of Clause 2 of Article 133 of the Civil Code may be said to establish relatively clear legal principles to the effect that:

- (a) the Title held by a Bona Fides Transferee in land use rights and/or Buildings as registered on the face of an LURC is not prejudiced by the fact of an historical Invalid LURC Issuance; and
- (b) the issuance of an amended LURC to and in the name of a Bona Fides Transferee may be said in effect to “cure” any defects in Title arising from any historical Invalid LURC Issuances.

2. Protections against revocation of LURCs – the Land Law

The Law on Land (2013) of Vietnam (**the Land Law**) contains express provisions which require State authorities of competent jurisdiction (**State Authorities**)

to revoke LURCs which have been issued in the form of an Invalid LURC Issuance, but expressly exclude from this principle LURCs which are held by Bona Fides Transferees.

Specifically, Clause 2 of Article 106 of the Land Law specifies in Item (d) that the following is among the circumstances in which State Authorities are obliged to revoke LURCs:

*“(d) The Certificate is not issued by the competent authority, issued to the incorrect land user, issued for an incorrect total land area, conditions for the issuance are not sufficiently satisfied, issued for an improper land use purpose or land use term or land use origin as prescribed by the land law, **except for the case in which the person to whom the certificate is granted has transferred the land use rights or ownership of land-attached assets in accordance with the land law.**”*

Thus, Clause 2 of Article 106 of the Land Law may also be said to establish relatively clear legal principles to the effect that:

- (a) the Title held by a Bona Fides Transferee in land use rights and/or Buildings as registered on the face of an LURC is not prejudiced by the fact of an historical Invalid LURC Issuance; and
- (b) the issuance of an amended LURC to and in the name of a Bona Fides Transferee may be said in effect to “cure” any defects in Title arising from any historical Invalid LURC Issuances.

Practical observations

1. Key legislative protections do not apply in the context of share or equity acquisitions

Clearly, the legal principles outlined in Section 2 above have no application in circumstances where a buyer or transferee purchases and/or receives a transfer of

issued shares or contributed charter (equity) capital (**Shares**) in a company (**a Landholding Company**), which in turn is the registered land user of land use rights and/or owner of Buildings, as registered on the face of an LURC held in the name of the Landholding Company. In this scenario, the buyer and/or transferee of Shares is not a Bona Fides Transferee, for the purposes of the Civil Code or the Land Law, and thus the legislative principles outlined in Section 2 above will have no application in relation to any historical Invalid LURC Issuances existing in respect of any LURC held by the Landholding Company (unless, of course, the Landholding Company is itself a Bona Fides Transferee).

2. State Authorities may not always uphold the key legislative protections

In practical terms, State Authorities may in many cases take a highly conservative, restrictive, and/or obstructive approach, in dealing with any LURC in respect of which historical Invalid LURC Issuances have been discovered. Despite the existence of the key legislative principles outlined in Section 2 above, State Authorities and their individual officials will in practical terms often be reluctant to allow Bona Fides Transferees to exercise and/or enjoy their full rights as a registered land user and/or Building owner, in circumstances where it has become apparent that the LURC is tainted by one or more historical Invalid LURC Issuances. Potential mortgagee banks may also take a similarly conservative, restrictive, and/or obstructive approach, upon becoming aware of historical Invalid LURC Issuance issues.

3. Risk elimination or mitigation strategies

Careful and detailed legal due diligence in relation to land use rights and/or Buildings – covering the entirety of their historical chain of Title – is of absolutely paramount importance, from the perspective of any potential buyer and/or transferee of land use rights, Buildings, or Shares in a Landowning Company. LURCs cannot necessarily be relied upon completely as evidencing good, clear, and unencumbered

legal Title in land use rights or Buildings, despite the legislative protections in favour of Bona Fides Purchasers as outlined in Section 2 above.

The risk exposures arising from historical Invalid LURC Issuances may be eliminated or mitigated in a number of ways, including:

- (a) remedial actions, required to be taken as conditions precedent to the sale and/or transfer transactions (including to obtain official approval and/or consent from relevant State Authorities, where applicable and appropriate); and
- (b) specific indemnity protection, in favour of the buyer and/or transferee in applicable sale and/or transfer transactions, where possible secured by partial purchase price retention, bank guarantees, or other types of post-completion security.

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