THE LAW ON REAL ESTATE BUSINESS 
NEW IMPLEMENTING REGULATIONS

It has been four months since the new Law on Real Estate Business came into effect (New Law on Real Estate Business) on 1 July 2015, and the Government of Vietnam has introduced its first piece of implementing legislation in the form of Decree 76/2015/ND-CP dated 10 September 2015, providing detailed regulations for implementation of the Law on Real Estate Business (Decree 76). Decree 76 will replace Decree 153/2007/ND-CP of the Government, dated 15 October 2007 (Decree 153), which implemented Law No. 63/2006/QH11, entitled the Law on Real Estate Business, passed by the National Assembly on 29 June 2006 (Old Law on Real Estate Business). Decree 76 will take effect as from 1 November 2015.

In this Legal Update, we provide an overview of the significant provisions of Decree 76.

Business Conditions applicable to Investors and Traders in Real Estate Business

The New Law on Real Estate Business provides various conditions with respect to both investors and traders in real estate business with stricter conditions being applied to investors. In particular, there are at least two conditions that apply to both investors and traders in real estate business, as follows:

(i) real estate entities must be incorporated and licensed to engage in real estate business activities in Vietnam. Accordingly, foreign companies which do not have a presence in Vietnam are not permitted to provide cross border real estate services in Vietnam; and

(ii) real estate entities must have a minimum charter capital of VND20 billion (approximately equivalent to US$900,000). This amount has been increased from VND6 billion (approximately equivalent to US$270,000) under the Old Law on Real Estate Business.

We note that based upon various drafts of Decree 76, the amount of legal capital had increased to VND50 billion (approximately equivalent to US$2,250,000). However, this hefty amount was criticised and challenged by various law makers and finally reduced to VND20 billion in Decree 76, which is compliant with the New Law on Real Estate Business. We further note that this statutory legal capital shall be determined based upon the amount of registered charter capital of an enterprise.
Any real estate entities currently operating but not yet satisfying the conditions in terms of legal capital provided under Decree 76 must satisfy such conditions within one year as from the effective date of the Law on Real Estate Business (i.e. 1 July 2015).

Exceptions

Decree 76 expressly identifies exceptions applicable to real estate service entities and entities selling, transferring and leasing real estate on a small scale and not on a regular basis. Such entities are not required to satisfy the two conditions referred to above in relation to the establishment of an enterprise and the minimum amount of charter capital. These small-scale entities comprise:

(i) entities selling, transferring, or leasing real estate not associated with a commercial real estate project;
(ii) family households and individuals selling, transferring, or leasing real estate by way of investment into a real estate project with a total investment capital less than VND20 billion (exclusive of land use fee);
(iii) organisations transferring land use rights, selling a house or building as a result of bankruptcy, dissolution, division or separation of such organisations;
(iv) credit institutions, branches of foreign banks, asset management companies, Vietnam Asset Management Company (VAMC) and other organisations or individuals transferring land use rights, real estate projects or selling buildings subject to mortgage/guarantee for the purpose of debt recovery;
(v) entities transferring land use rights or selling buildings pursuant to a decision by the courts or relevant State agencies arising from a dispute/complaint/denunciation settlement;
(vi) entities investing in the construction of residential houses for the purposes of sale or lease, but not being required to set up an enterprise under the laws of residential housing;
(vii) agencies or organisations permitted by the relevant agencies to transfer land use rights or sell State-owned buildings as provided in the laws on the management of public property; and
(viii) entities selling, transferring, leasing their privately owned real estate.

More conditions for investors

As provided in the New Law on Real Estate and detailed in Decree 76, as compared to traders there are stricter conditions applicable to investors in the real estate sector, including, among others:

❖ **Ratio of equity and debt**

Whilst not expressly specifying the precise ratio between charter capital (equity) and investment capital (equity and debt), Decree 76 refers to the regulations on land and requires that investors in a real estate project must satisfy the conditions on equity in accordance with the laws on investment and land. Accordingly, we note that Decree 43/2014/ND-CP of the Government, dated 15 May 2014, detailing the implementation of a number of articles of the Law on Land (Decree 43) provides that the developers of an investment project using land must have their own capital (equity) for project implementation of no less than:

- 20% of the total investment capital in the case of projects using under 20 hectares of land; and
- 15% of the total investment capital in the case of projects using 20 hectares of land or more.

We note that a similar requirement has been provided under Decree 153, and is applicable to residential housing projects and new urban area projects, but the ratio under Decree 153 is slightly different (e.g. for residential housing projects, the ratio of charter capital and investment capital is 15% in the case of projects using under 20 hectares of land, and 20% in the case of projects using 20 hectares of land or more).

- Escrow deposit

As previously mentioned in our Legal Update on the new Law on Investment and Law on Enterprises (http://www.frasersvn.com/legal-update-new-law-on-investment-and-new-law-on-enterprises/), investors, not only in real estate projects but also in other investment projects using land leased from or allocated by the State, are now required to make a deposit equal to 1 to 3% of the total investment capital to the account of the licensing authority. This requirement is expected to be further developed in a soon-to-be-issued decree implementing the new Law on Investment.

- Land reserve requirement

As previously mentioned in our Legal Update on the new Law on Residential Housing (http://www.frasersvn.com/legal-update-real-estate-2015/), under the previous laws, investors were required to reserve 20% of the total land for social housing purposes. This percentage is not clear under the new Law on Residential Housing, and details are expected to be provided in a soon-to-be-issued decree implementing this new Law on Residential Housing.

Sample Contract for Real Estate Business

Decree 76 provides numerous sample contracts for conducting real estate business, including, among others:

(i) contracts for the purchase and sale of existing houses or buildings/houses or buildings to be formed in the future;

(ii) contracts for the lease and sub-lease of existing houses or buildings/houses or buildings to be formed in the future;

(iii) contracts for the transfer, lease or sub-lease of land use rights; and

(iv) contracts for the transfer of the entire real estate project or part thereof.

It is expressly provided under Decree 76 that such sample contracts are not compulsory but are for reference purposes only, which means that parties are entitled to agree on their own terms and conditions. We note however, that there are certain key provisions, which are required to be included in a real estate contract, and which are identified in Decree 76 and Articles 18, 47 and 53 of the New Law on Real Estate Business. Among the provisions required to be included in a real estate contract are the following:

- names and addresses of the parties;
- information about the real estate;
- price of purchase and sale, lease;
- method of and terms for payment;
- time-limit for handover and receipt of the real estate and the enclosed document;
- warranties;
• rights and obligations of the parties;
• responsibilities for breach of contract;
• penalties for breach of contract;
• events of termination or rescission of the contract and the measures for dealing with such events;
• dispute resolution; and
• effective date of the contract.

We note that existing contracts for real estate business which were signed prior to 1 November 2015 (i.e. the effective date of Decree 76) shall continue to be implemented and are not required to be re-executed in order to comply with the sample contracts and procedures required in Decree 76.

Transfer of Contracts for Purchase and Sale of Residential Houses to be Formed in the Future

According to Article 18.6 of Circular 16/2010/TT-BXD of the Ministry of Construction, dated 1 September 2010, specifying and guiding certain contents of Decree 71 which regulates the implementation of the Old Law on Residential Housing (Circular 16), if an entity not being a real estate company wishes to resell a housing unit, the following procedures must be satisfied:

(i) if the housing unit has been handed over by the developer, then resale must comply with the procedures stipulated in the Law on Residential Housing and the Civil Law (which means the seller must have an ownership certificate for such housing unit (Pink Book) issued by the relevant authorities); and

(ii) if the housing unit has not yet been handed over by the developer, then the contract for sale and purchase may be assigned in accordance with the procedures provided under Circular 16 without having to be made via a trading floor.

Accordingly, as from the effective date of Circular 16 (i.e. 16 October 2010), during the period of time when a housing unit has been handed over by the developer to the purchaser and the relevant Pink Book has not been issued (Pre-issuance Period), the former purchaser (Transferor) is not entitled to resell the housing unit to a subsequent purchaser (Transferee) pursuant to a secondary sale transaction (Resale Transaction). In other words, the Resale Transaction could be only validly entered into during the following periods:

(i) prior to the handover date of the housing unit where the Resale Transaction can be undertaken in the form of a transfer of the contract for sale and purchase of residential housing (Sale Contract); or

(ii) after the issuance of the Pink Book where the Resale Transaction can be conducted in the form of a transfer of the housing unit.

We note that this issue is no longer relevant under the new legislation. In particular, pursuant to Article 123 and Article 182.2 of the New Law on Residential Housing:

(i) if a purchaser purchases a commercial residential unit from a developer who has not submitted an application to request the issuance of a Pink Book, such purchaser is entitled to effect a Resale Transaction by transferring the Sale Contract and the Transferee is responsible for performing all of the obligations under the Sale Contract; and
(ii) in the case that the handover of a housing unit from the developer to a purchaser is complete, but the purchaser has not been issued with the Pink Book up to 1 July 2015, the purchaser is entitled to transfer the Sale Contract in accordance with the procedures provided under the new Law on Residential Housing.

On this basis, with effect from 1 July 2015, the Law on Residential Housing 2014 permits Resale Transactions entered into between the Transferor and the Transferee prior to the application for issuance of the Pink Book, including the Pre-issuance Period. Accordingly, to implement this new entitlement, Section 4 of Decree 76 stipulates certain provisions to conduct Resale Transactions, including but not limited to the following:

(i) the Resale Transaction must be conducted on the basis of each housing unit;

(ii) where there are multiple housing units included in one Sale Contract, the transfer of such Sale Contract must cover all of the relevant housing units; and

(iii) the last Transferee of the Resale Transaction shall be issued with the Pink Book.

We note that further detailed provisions on the conditions and procedures for Resale Transactions are due to be included in a soon-to-be-issued circular, which is expected to replace Circular 16 guiding the new Law on Residential Housing.

**Procedures for Transferring a Real Estate Project**

Under the New Law on Real Estate Business, it is now possible to transfer only part of a real estate project. Accordingly, further conditions and procedures for the transfer of a project, in its entirety or in part, are provided in Decree 76, comprising, among others:

- **The transferee must be a qualified real estate business enterprise**

Under Decree 76, the transferee must be a qualified real estate business enterprise which shall be evidenced by:

(i) its business registration certificate listing real estate business or its charter capital contemplated by the enterprise registration certificate satisfying the legal capital requirement (except for foreign investors who have not yet established an economic organisation under the laws of Vietnam); and

(ii) documents showing its capital ownership for the implementation of the project, for the purpose of the escrow deposit and ratio of equity and debt, as referred to above, which could include:

(a) certification issued by an independent audit organisation or an audited financial statement;

(b) certification of the deposit balance issued by a commercial bank where such enterprise opened its account; or

(c) valuation certificate of the assets’ value of the enterprise issued by a relevant valuation organisation.

- **Notification**

At least 15 days prior to handing over a project, the transferor investors are required to notify in writing all of their customers (if any), as well as publicise in the mass media and on the website of the relevant authority (if any) information about the transfer of a real estate project and the entitlements of customers and related parties.
Transitional period

With respect to current investors who are already engaged in real estate business, Decree 76 expressly provides that their real estate investment projects which have been approved by the relevant State authorities, to which land has been allocated or leased, the transfer of which has been approved in writing, or for which a contract for sale, lease has been signed prior to 1 July 2015, is not required to re-implement the procedures in accordance with this New Law on Real Estate Business.

Conclusion

Together with the expansion of the rights of foreign investors to conduct real estate business and purchase property in Vietnam, these positive changes under the New Law on Real Estate Business, which are implemented under Decree 76 – being the very first implementing regulation that has been issued subsequent to 1 July 2015 – are significant and beneficial to the development of a more vibrant real estate sector in Vietnam. We look forward to further instruments of implementing legislation on residential housing which will contribute to a more transparent and efficient mechanism which is expected to boost the current real estate market in Vietnam.