

RAJAH & TANN ASIA

LAWYERS  
WHO  
KNOW  
ASIA

A GUIDE  
TO THE  
REAL ESTATE  
INDUSTRY



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# A Guide to the Real Estate Industry

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## FOREWORD



There are many sayings about the attractiveness of real estate investments. "*Buy land, they don't make it anymore.*" (Mark Twain) "*Landlords grow rich in their sleep without working, risking or economizing.*" (John Stuart Mill) "*Don't wait to buy real estate. Buy real estate and wait.*" (Will Rogers).

If only it were that simple. Real estate is immovable, and therefore very much tied up in the legal, regulatory, and market environment in which it finds itself, as well as the local customs, practices, and perspectives which influence or dictate the investors in that market. A keen understanding of all these considerations is critical to working out the basic features of any real estate deal – the most advantageous structure, the indispensable and the unacceptable terms, and the costs of completion, compliance, and enhancement. This is no easy feat when it comes to regions such as ASEAN and China – each a huge group of multiple and varied jurisdictions with enormous promise but each also having different laws, regulations, and native conditions and cultures.

Rajah & Tann Asia is pleased to present this Guide to you which we hope will be a useful aid to investors who are navigating or looking to navigate this part of the world for their real estate investments. The first edition of the Guide was published in 2019 and this Guide in its second edition is a product of the combined efforts and expertise of the real estate lawyers in our regional offices across ASEAN and in Shanghai. The journey of putting it together has been most rewarding and this Guide is a further testament that we indeed know Asia.

*This publication is up to date as of May 2021.<sup>1</sup>*

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<sup>1</sup> Except the Philippines chapter that is updated as of July 2021.

# Guide to the Real Estate Industry

## INTRODUCTION



This guide gives a brief overview of certain key insights to the real estate industry in Cambodia, China, Indonesia, Lao PDR, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam. Topics covered include the legal framework, types of real estate, ownership and tenure, taxes and other important aspects for investors of real estate to note.

Across all our offices, we work together as one highly rated team with in-depth and extensive experience, having dealt with numerous significant – including some of the largest – real estate transactions in the region.

Our multinational and multi-linguistic team of highly regarded real estate lawyers, paralegals, and legal executives brings enormous experience and professionalism to real estate transactions of every kind and across multiple jurisdictions. When faced with challenging and complex cross-border issues, we are able to draw upon the local knowledge of our specialists in each of our regional offices to synergise and deliver expedient coordinated advice with similar strategies to our clients.

A key pillar of our strength is our Rajah & Tann Asia network with offices in Cambodia, China, Indonesia, Lao PDR, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam, as well as dedicated desks focusing on Japan and South Asia. With the most extensive legal network in Asia, our lawyers have a tight grasp of the local

culture, business practices, and language not just within their own home countries, but in the other markets in which they frequently conduct cross-border deals as well. Our depth of transactional and regulatory experience allows us to advise clients strategically and creatively, from structuring to eventual execution and implementation of the transaction.

This gives us an unparalleled edge over our competitors in presenting and pursuing solutions that are both practical and cost-effective. It provides our clients with the "home advantage" in any corporate real estate matters.

It is important to seek specific legal advice in any corporate real estate matters, and our team would be pleased to discuss your specific objectives and requirements.

# CAMBODIA

**Real estate is considered one of the fastest growing sectors in Cambodia. The political stability, as well as the fast, stable, and growing economy, combined with infusions of foreign capital, has fueled a real estate boom not only in the capital city of Phnom Penh, but also in other parts of the country.**

The rapid growth of the real estate and construction sectors also drives the regulatory review and development pertaining to these sectors.



The Ministry of Land Management, Urban Planning and Construction ("**MLMUPC**"), being the competent land

<sup>2</sup> Royal Kram No.NS.RKM.0801.14 promulgating Land Law dated 30 August 2001.

<sup>3</sup> Sub-Decree No. 46 on the Procedure to Establish Cadastral Index Map and Land Register dated 31 May 2002.

<sup>4</sup> Sub-Decree No. 48 on Sporadic Land Registration dated 31 May 2002.

authority, is continually refining their land policies and has issued directives to tackle practical issues.

## System of Registration

After the genocide regime which destroyed most of Cambodia's infrastructure and legal framework, the first positive sign in relation to real estate rights came in 1992 following the passing of the 1992 Land Law which formalised the rights to private properties by first vesting in Cambodian nationals the rights to own and transfer land. In 2001, the new Land Law ("**2001 Land Law**")<sup>2</sup> was passed to introduce and recognise various private land rights of individuals, including ownership right and surety. More importantly, this put in place a framework through which land can be recognised and registered at the national level.

The Cambodian Government continued to improve land tenure through the passing of the Sub-Decrees Nos. 46<sup>3</sup> and 48<sup>4</sup> in 2002. These Sub-Decrees introduced two forms of land registration programmes: systematic and sporadic land registrations. The former refers to a government land registration project whereby the whole district or commune is demarcated for land ownership rights in government-designated areas. The latter refers to the registration of land in areas not yet declared as designated areas.

Despite such development, Cambodia still does not have a uniform land title registration system, prompting the implementation of a multi-tiered system. This refers to a dual land tenure system containing both "hard" and "soft" land titles.

## Applicable Law

The main legislations which govern real estate transactions in Cambodia are the 2001 Land Law, the Civil Code of Cambodia,<sup>5</sup> and the 2011 Law on the Implementation of the Civil Code.<sup>6</sup> These constitute the primary framework applicable in Cambodia.

## Land and Title Classifications

As introduced in the 2001 Land Law, there are three main categories of land under the land classification systems

<sup>5</sup> Royal Kram No.NS.RK.1207.030 Promulgating Civil Code dated 8 December 2007.

<sup>6</sup> Royal Kram No.NS.RK.0511.007 Promulgating Law on Implementation of the Civil Code dated 31 May 2011.

in Cambodia, namely private land, public state land, and private state land.

Private land refers to property which is legally owned or possessed either by individual(s), private legal entity(ies) or jointly by individual and legal entity(ies).<sup>7</sup>

Public state land comprises all properties which are of public value, including but not limited to land of natural origin (e.g. rivers, lakes, and mountains), properties specially developed and available for public use, as well as protected areas.<sup>8</sup>

Private state land refers to other types of properties owned by the state but without any public value. Private state land can be sold or leased/conceded through long-term leases or land concessions for either economic or social purposes.

Private ownership can be procured through one of three forms of Cambodian land title: Soft Title, Hard Title and Private Ownership in Co-owned Buildings (also known as Strata Title).

#### (i) **Soft Title**

Soft Titles, also known as "Possessory Titles", are recognised at the local authorities level – Sangkat (Khum/Commune) and/or Khan (District/Srok) levels. They evidence the right over "possession" of the land as opposed to a legal "ownership" status. Until recently, this was the most common title in existence in Cambodia.

#### (ii) **Hard Title**

Hard titles indicate the most secured form of ownership rights. They are not only recognised at the local authorities levels, but also registered at the national ministerial level. The certificates of hard titles are issued by the relevant municipal or provincial cadastral office of MLMUPC.

It should also be noted that there are several forms of hard title. The latest most recognised and secured form is the Land Management and Administration Project ("**LMAP**") title. The LMAP title is a titling system introduced in 2002 by the World Bank with a goal of improving land tenure security through the usage of GPS

coordinates for all land plots in Cambodia. For landowners who possess a LMAP title, it signifies that their plots of land have been clearly measured and demarcated by the relevant cadastral officials.

#### (iii) **Ownership in Co-Owned Building**

This is the newest form of ownership applicable to a private area in a co-owned building. Under this, foreigners are also legally allowed to own a property, provided always that such property is located on the first floor (as opposed to the ground floor) and above. It is more commonly known as "Strata Title" and has recently been practically extended to commercial buildings and in particular shared office complexes.

### **Tenure and Ownership**

The tenure of land in Cambodia is classified into two main categories: freehold and leasehold.

Cambodia recognises the private freehold or ownership right of a person who possesses Cambodian nationality, including any legal entity duly registered in Cambodia that is majority-owned by individual(s) of Cambodian nationality (e.g. 51% of the share capital of the legal entity is held by Cambodian national(s)).

Foreigners based in Cambodia are also vested with rights of ownership over certain properties.<sup>9</sup> However, such rights are restricted to buildings that have obtained a strata title (available only to newly completed apartment buildings). Foreigners can acquire a private unit of a co-owned building, that is on the first floor and above, subject to a maximum limit on foreign ownership allocation of 70% of the units in any one co-owned building.

Cambodia is rich in land for potential investment and development. Nearly all investments in Cambodia involve immovable property of some sort. For foreigners who wish to explore effective ways of controlling land in Cambodia for personal or business use, one method is the acquisition of long-term leasehold rights, also known as perpetual leasehold rights, from either a private owner or a government entity. A lease is considered a perpetual lease if its term is at least 15 years. A perpetual lease can have a maximum term of 50 years and is renewable.

<sup>7</sup> Article 10 of the 2011 Land Law.

<sup>8</sup> Article 15 of the 2011 Land Law; Article 4 of the Sub-Decree No. 118 on State Land Management dated 2005.

<sup>9</sup> Royal Kram No.NS.RK.0510.006 promulgating Law on Providing Foreign Ownership on Private Ownership in Co-Owned Building date 28 May 2010 ("**2010 Law on Foreign Ownership**").

## Legal Framework for Land Concessions

Only private state lands can be subject to concession. A land concession introduces a grant of rights over an area of land for a specific purpose and function, including agribusiness and redistribution of land to the landless.<sup>10</sup>

The 2001 Land Law introduces several types of concessions.<sup>11</sup> However, the two main types of concessions typically granted by the government are social concession and economic concession.

A social land concession is only granted to Cambodian citizens to enable them to build residential construction and/or to cultivate land belonging to the state for their subsistence.

On the other hand, what proves to be more attractive to investors has been the economic land concession ("ELC"). An ELC allows the investor/concessionaire to clear the land for industrial or agricultural exploitation. A Sub-Decree on Economic Land Concessions was adopted on 16 December 2015 to establish the criteria for and procedures to obtain an ELC. The maximum legal duration of an ELC lease was 99 years,<sup>12</sup> but this was later reduced to 50 years.<sup>13</sup>

## Types of Property

### (i) Residential

Investors looking at Cambodia should note that there are various types of residential property in Cambodia which are subject to different regulations. Residential property can be classified into two categories: public and private.

Public residential property refers to the property granted to Cambodian families under the social land concession scheme. All other residential property is private residential property.

There are also many types of private residential property. In 2010, the government allowed foreigners to own a private unit in a co-owned building.<sup>14</sup> In 2011, the government further regulated the management of "Borey",

which is the Cambodian equivalent of a compound or gated community comprising flat houses and villas.<sup>15</sup>

### (ii) Commercial

Commercial property is property used for any purpose that is not residential or industrial. Common examples would include offices, malls, commercial buildings, the hotel component of a development project, and so on.

### (iii) Industrial

Industrial property in Cambodia refers to industrial exploitation areas as determined by the government. Industrial property can be located in industrial parks, special economic zones ("SEZs"), or export processing zones.

The Cambodian government has established a number of SEZs under the framework stipulated under a Sub-Decree on SEZ. All SEZs must be approved for establishment by the Council for the Development of Cambodia ("CDC").

## Investment through a Share/Asset Purchase

Cambodia has clocked some of the fastest economic growth in Southeast Asia, recording an average GDP growth of 7% per year since 2010. A 2015 article by the World Bank found that Cambodia's rate of urban spatial expansion averaged a staggering 4.3% a year.<sup>16</sup> That being said, much like the rest of the world, the COVID-19 pandemic has hit the economic growth hard. According to the World Bank report, the impact of the pandemic has seen Cambodia's economy contract by 2% in 2020 according to the World Bank. However, the Cambodian economy is projected to bounce back and grow by 4% in 2021 according to the same study.<sup>17</sup>

Investments usually take the forms of sale and purchase of shares or assets, or the establishment of a new structure or joint venture. Notable points for a potential investor or buyer would be share/asset transfer fees, stamp duties, and other relevant taxes and processing costs involved.

<sup>10</sup> Article 49, 50 of the 2001 Land Law.

<sup>11</sup> Article 50 of the 2001 Land Law.

<sup>12</sup> Article 61 of the 2001 Land Law.

<sup>13</sup> Order No. 01BB on the Measures Strengthening and Increasing the Effectiveness of the Management of Economic Land Concessions dated 2012.

<sup>14</sup> 2010 Law on Foreign Ownership.

<sup>15</sup> Sub-Decree No. 39 on the Management of Borey dated 10 March 2011.

<sup>16</sup> World Bank article titled "[Urban Expansion in Cambodia](#)" (26 January 2015).

<sup>17</sup> World Bank article titled "[Cambodian Economy Hit Hard By Pandemic But Projected to Recover in 2021](#)" (15 December 2020).



## Investing in Cambodia

Investors should also be aware of certain issues that may arise, such as restrictions on foreign land ownership, land disputes due to title overlap or boundary disputes, the existence of encumbrances attached to the property, or the shares of companies holding the property.

In addition, investors should be wary of the potential loss of the Cambodian nationality of the land-holding company after a share acquisition by the foreign investor. They should also be sure to make due payment of stamp duty for property transfers, failure of which may lead to serious tax implications post-acquisition when the same property is set for disposal.

### (i) Title Transfer

Transfers of ownership title or possessory right are only effective after the registration of such transfers is completed and recorded at the relevant cadastral office in the case of ownership title (hard title), and at the Sangkat and Khan offices where the property is located in the case of possessory right (soft title).

### (ii) Tax

#### *Stamp Duty*

A transfer of ownership title or possessory right over an immovable property is subject to stamp duty on property transfer at the rate of 4% of the purchase price or the official threshold value, whichever is higher, to the General Department of Taxation of Cambodia ("**GDT**"). Under the tax regulations, it is the purchaser's or transferee's obligation to pay stamp duty. However, practically, parties may agree otherwise in the sale and purchase agreement.

For the transfer of part or all of the shares in a company owning real estate, stamp duty of 0.1% of the value of the shares will be levied.

The Cambodian government in 2017 introduced a regulation to provide exemption and reduction of stamp duty in the case of: (i) the transfer of immovable property amongst immediate family members; or (ii) the transfer of shares listed on the Cambodia Securities Exchange ("**CSX**").<sup>18</sup>

<sup>18</sup> Prakas (Declaration) on the Collection of Stamp Duty No. 507 MEF.PrK dated 26 April 2017 issued by the Ministry of Economy and Finance.

#### *Value-Added Tax*

A sale of property is subject to value-added tax at the rate of 10% if the seller is a tax-registered entity. However, sale and purchase of land is not subject to value-added tax, regardless of the tax status of the seller. Hence, for property comprising both building structures and land, only the portion attributable to the building structure is subject to value-added tax.

#### *Property Tax*

If the value of the property exceeds KHR 100 million (US\$24,570), property tax is payable by the owner of the property at an annual rate of 0.1% of the market value of the property.

#### *Tax on Profit*

All revenue obtained from a sale of immovable property is considered to be taxable income, which is subject to a 20% tax on profit.

#### *Withholding Tax*

A withholding tax of 14% applies to non-Cambodian citizens or companies who are not tax resident in Cambodia and who have received benefit from rental income. For resident taxpayers, tax at the rate of 10% of the rental income will be levied.

#### *Capital Gain Tax*

The capital gain tax is levied at a fixed rate of 20% of the gain made from the sale of a capital asset.<sup>19</sup> The implementation of the collection of capital gain tax is delayed until 1 January 2022 as confirmed by the GDT on 22 October 2020 in Notification No. 24094.

### (iii) Financing

The supervisory body and regulator who monitors the activities and operations of financial institutions is the National Bank of Cambodia ("**NBC**").

Both debt and equity financing are common and widespread for real estate and project developments in Cambodia. For debt financing, shareholders' loans,

<sup>19</sup> Prakas (Declaration) No. 346/20 MEF.PrK on Capital Gain Tax dated 1 April 2020 issued by the Ministry of Economy and Finance.

onshore and offshore financing are all allowable as long as the remittance of the amount is done through an authorised intermediary recognised by the NBC.

Equity financing can be done through either private or public offers, provided always that the consent and approval of the Securities and Exchange Regulator of Cambodia ("**SERC**") is procured. Corporate bond issuance has become more popular amongst overseas institutional investors.

### Conclusion

It appears that the growth in the real estate sector in Cambodia has been nothing short of phenomenal, with skylines now transformed by high-rise apartments and commercial buildings. At the same time, the government has been very supportive of foreign direct investments, and investors are encouraged by the long-term sustained rates of growth, political stability and the prospects of the frontier economy of Cambodia.

### Our Deals

- Acted for and advised Infunde Development, a Singapore-based investment and development firm, in relation to its property acquisition for a mango processing facility in Cambodia.
- Acted for and advised Agile Group Holdings Limited, a Hong Kong-listed company principally engaged in property development, in relation to its joint venture on a 44-storey property development project in Cambodia.
- Assisted a Cambodian wholly-owned subsidiary of HLH Group Limited (publicly listed on the Singapore Stock Exchange) in conducting legal due diligence, as well as liaising and coordinating with land officials to conduct a land survey on the property for its intended mixed real estate development near beachfront area in the central area of Preah Sihanouk Province, Cambodia.
- Advised on the acquisition of economic land concessions for multi-million-dollar agro-industrial projects in Cambodia for various companies, including Golden Land Berhad, FELCRA Berhad, Sumifru Corporation and other foreign-based investment.
- Co-acted for and advised Donaco International Limited (publicly listed in the Australian Stock Exchange) in property due diligence over an area of approximately 30 hectares located next to the Cambodian-Thai border as part of its contemplated US\$360 million acquisition of a Thai casino.
- Acting for and advising Provident Capital in relation to the large-scale due diligence and acquisition of the BTS tower infrastructure from one of the mobile and telecommunication leaders in Cambodia.
- Acted for and advised a Hong Kong-listed casino company, Macau Legend Development, from the Cambodian law perspective in relation to its proposed acquisition of approximately 1,200 ha of land for the development of an integrated resort and casino in Cambodia via a US\$90 million acquisition of the entire stake in a Cambodian firm.
- Acted for and advised the Cambodian National Petroleum Authority (the Royal Government of Cambodia) on its negotiation of a master BOOT concession agreement with Cambodia's largest conglomerate covering five major oil and energy-related facilities.
- Acted for and advising for a Hong Kong-listed company in its proposed US\$178 million acquisition of a special economic zone in Cambodia.
- Assisted and advised TA Corporation Ltd as part of Tiong Aik Construction Pte. Ltd in its multi-million dollar real estate development project in Phnom Penh, the Gateway, and with the preparation of the standard Sale and Purchase Agreement and other relevant transaction documents of the project.
- Acted for and advised Teho International Inc Ltd. (publicly listed on the Singapore Stock Exchange) in its multi-million dollar joint venture with a local partner in a real estate development and investment project.

# CHINA

**The real estate industry in China has had a profound impact on the country's economy since the reform of the housing system started in 1998 as it is closely associated with the livelihood of Chinese citizens. Past market turbulence has led to a tightening of policies and regulations on inbound foreign investment that have gradually loosened again since mid-2014. Given high property prices in the first-tier cities (Beijing, Shanghai, Guangzhou and Shenzhen) and some "second-tier" or "third-tier" cities, the Chinese government has implemented various measures to impose requirements for bidding for land and sale of real properties and regulate financing by real estate companies.**



Notwithstanding the recent requirements and measures implemented by the Chinese government, investors may still find opportunities in cities that are still developing. Separately, investment in China for nursing homes and other palliative care treatment centres is gaining traction in light of the aging and greying population.

Cities in China are typically classified into four different tiers according to their GDP, administrative level, and population. The real estate landscapes vary across cities of different tiers, leading to the application of different local policies. This chapter mainly focuses on policies and regulations at the national level. As this guide covers laws and regulations that differ across localities, China or PRC in this chapter refers to the People's Republic of China (excluding the Hong Kong Special Administrative Region, Macau Special Administrative Region, and Taiwan).

## System of Registration

China employs the land and property registration system. According to the Civil Code of the PRC, the establishment, alteration, transfer, or elimination of the Land Use Rights or title to property shall become effective only after registration with competent government authorities according to law, failing which it will have no effect except where otherwise prescribed by law. After registration, a certificate will be issued to the owner of the Land Use Rights or owner of the property as proof of the title.

Before 2014, the real estate registration system in China was a decentralised system. Different types of real estate had to be registered with different government authorities, and was governed by complicated and even conflicting regulations. This changed in 2014, when the Interim Regulation on Real Estate Registration was promulgated. Since then, real estate authorities across the nation have been working to establish a unified registration system. The end goal is the consolidation of all registers of land, property, forests, farmland, grassland, construction, Land Use Rights, water use rights, easements, and mortgages,<sup>20</sup> so as to streamline the registration process and reduce individuals' or enterprises' time costs.

Once a transfer of land or property has been registered with the relevant governmental authority, it will issue a real estate registration certificate. If there is any inconsistency between the information set out in the certificate and the one recorded in the real property register, the information in the register will generally

<sup>20</sup> Articles 4 and 5 of the Interim Regulation on Real Estate.

prevail, unless there is evidence to prove that the information recorded in the register is wrong.<sup>21</sup>

### Applicable Law

The real estate legal system in China is mainly based on principles and provisions under the laws and regulations set out below, and includes legislation regulating Land Use Rights on the one hand, and legislation regulating ownership of buildings and structures on the other. In addition, the Chinese government has also issued a series of rules and regulations specifically governing foreign investment in China's real estate market.

#### (i) Laws and Regulations Applicable to Both Land and Buildings

- The PRC Constitution Law (2018 Amendment) (中华人民共和国宪法);
- The Civil Code of the PRC (2020) (中华人民共和国民法典), the second part of which (Rights *in Rem*) has established a framework of property rights protection, including protection for real estate;
- The Urban Real Estate Administration Law (2019 Amendment) (中华人民共和国城市房地产管理法), a comprehensive piece of legislation dealing with real estate development and transaction; and
- The Interim Regulation on Real Estate Registration (2019 Amendment) (不动产登记暂行条例), which is the legal basis for establishing a unified, nationwide real property registration system.

#### (ii) Laws and Regulations applicable to Land

- The Land Administration Law (2019 Amendment) (中华人民共和国土地管理法), which is the fundamental law governing land matters in the PRC ("**Land Administration Law**");
- The Interim Regulations Concerning the Assignment and Transfer of the Right to the Use of the State-owned Land in the Urban Areas

(2020 Amendment) (中华人民共和国城镇国有土地使用权出让和转让暂行条例), governing the use of state-owned land in urban areas, as well as the development and utilisation and management of the land; and

- The Land Registration Measures (土地登记规则).

#### (iii) Laws and Regulations Governing Foreign Investment in Real Estate Industry

- The PRC Foreign Investment Law (中华人民共和国外商投资法) and its implementation rules. They came into effect on 1 January 2020 and serve as basic laws for foreign investment in China, replacing the previous three laws governing foreign-invested enterprises in China, namely the Law on Sino-foreign Equity Joint Ventures, the Law on Wholly Foreign-owned Enterprise, and the Law on Sino-foreign Contractual Joint Ventures;
- The Negative List for Foreign Investment (which may be revised from time to time) which is applicable outside of the free trade zones in China, and the Negative List for Foreign Investment applicable in the free trade zones in China (which may be revised from time to time) (collectively referred to as the "**Negative Lists**").
- The Opinions on Regulating and Administering Foreign Capital Access to Real Estate in China (2006) (关于规范房地产市场外资准入和管理的意见) ("**Circular No. 171**");
- The Circular on Further Strengthening and Regulating the Examination, Approval and Supervision of Foreign Direct Investment in Real Estate Industry (2007) (关于进一步加强、规范外商直接投资房地产业审批和监管的通知) ("**Circular No. 50**"); and
- The Circular on Adjusting the Policies on the Market Access and Administration of Foreign Investment in the Real Estate Market (2015) (关

<sup>21</sup> Article 217 of the Civil Code of the PRC.

于调整房地产市场外资准入和管理有关政策的通  
 知) ("**Circular No. 122**").

## Tenure and Ownership of Land

Land in China can be generally classified into two main categories: land in urban areas which is owned by the State; and land in rural and suburban areas which is owned by rural collective economic organisations ("**Collectives**").<sup>22</sup> Under this classification, individuals and companies cannot have freehold title to the land. Instead, they can only acquire land use rights of the land for a certain period ("**Land Use Rights**").

China has applied a strict dual land market system with respect to rural and urban land for decades ("**Dual Land Market System**") until recent years. Under the Dual Land Market System, any unit or individual who needs land for commercial or residential construction purposes shall apply for Land Use Rights of state-owned land. However, they may not do so for collectively-owned land, as it is reserved for farming or construction of residences for farmers, or construction of township and village enterprises, public facilities, and public welfare undertakings of villages and towns after approval. All collectively-owned land that will be used for commercial purposes must be requisitioned and transferred to become State-owned land in accordance with law first.

In 2015, China introduced the rural land reform pilot programme, with the intention to push forward with rural land reform by establishing a unified land market between rural and urban areas instead of the Dual Land Market System. In 2019, after analysing and refining the successful experience of the rural land reform pilot programme, the Land Administration Law was amended to permit collectively-owned rural land for operation to be sold or leased directly to enterprises or individuals without the need to convert the land to urban construction land first, provided that:<sup>23</sup>

- (i) the use of the collectively-owned rural land is industrial, commercial and other for-profit purpose as determined in the comprehensive plan for land utilisation and the urban-rural plan. It is noteworthy that the collectively-owned residential land is excluded from the direct sale and lease mechanism;

- (ii) the collectively-owned rural land has been legally registered; and
- (iii) a democratic voting procedure is required. According to the Land Administration Law, the sale and lease, amongst others, of collectively-owned rural operation land shall be subject to the consent of over two-thirds of the members or over two-thirds of villagers' representatives at the village council of the members of the collective economic organisation.

## Land Use Rights

Generally, Land Use Rights can be either granted or allocated by the government to the Land Use Right owners, depending on the purposes of use.

### (i) **Granted Land (出让土地)**

A person who has been granted a Land Use Right is entitled to use the land for a certain period of time after paying the relevant land premium for use of the land to the government authorities.

**Acquisition Method.** The Urban Real Estate Administration Law specifies that Land Use Rights may be granted through auction, bidding, or agreement between the parties concerned. The Civil Code of the PRC further requires that if the land is used for purposes of industry, business, entertainment or commercial residential buildings, etc., or if there are two or more intended users, the land shall be transferred by means of auction, bid invitation, or any other public bidding method.

**Written Form.** Regardless of whether the granted Land Use Right is acquired by auction, bidding, or agreement, it shall be documented by a written land grant contract to be entered into by and between the buyer and the local land authority (or an entity authorised by the local land authority), in which the parties agree on the proposed use of the land, duration of the Land Use Right, land premium, restrictions on the development and transfer, etc.

**Maximum Term of Land Use Right.** As land is zoned for different uses, the maximum initial term of the Land Use Right is linked to the proposed use of the land. For example:

<sup>22</sup> Article 10 of the Constitution Law and Article 249 of the Civil Code of the PRC.

<sup>23</sup> Article 63 of the Land Administration Law.

- 70 years for residential use;
- 50 years for industrial use;
- 50 years for the use of education, science, culture, public health and physical education;
- 40 years for commercial, tourist and recreational use; and
- 50 years for comprehensive use or other purposes.

**Expiration of the Use Term.** A Land Use Right owner who seeks an extension of the use term must make the relevant application at least one year before the expiration of the term. The application shall be approved unless the land needs to be taken back out of public interest. Once approved, the Land Use Right owner has to re-sign the land grant contract and pay the land premium for the extension.<sup>24</sup> Note however that according to Article 359 of the Civil Code of the PRC, the Land Use Right for residential land shall be automatically renewed upon expiration, and the payment, reduction or exemption of the renewal fees are to follow the provisions of the statutes and administrative regulations, which indicates that renewal of the Land Use Right is not completely free or unconditional. However, the detailed rules about the renewal fees and renewal procedures are still not clear. Based on our current observations, the practice on this varies from city to city. A nation-wide regulation in this respect is expected for further clarification.

**Transfer of the Land Use Right.** The granted Land Use Right may be transferred, leased, or pledged. However, such transfer, leasing, and pledge shall be subject to statutory requirements and the restrictions on the use, grant period, etc. provided in the original land grant contract. According to the Urban Real Estate Administration Law, the following conditions shall be fulfilled in order to transfer the granted Land Use Right:

- (i) The land premium has been paid in full and the certificate of the Land Use Right has been obtained;
- (ii) The land must be used for the purpose agreed in the land grant contract, and if the land is agreed to be used for housing construction, 25 percent of the project must be accomplished before the transfer.

In addition to the statutory requirements for a transfer of the granted Land Use Right, it is noteworthy that the Land Grant Contract generally has more stringent requirements, depending on local practice. For example, the Land Grant Contract in Shanghai in recent years often requires that the successful bidder who acquires the land shall not change its contribution ratio, shareholding structure, and actual controller without prior consent of the competent land authority.

(ii) **Allocated Land (划拨土地)**

The allocation of the Land Use Right refers to the act of the people's government at or above the county level, with approval according to law, to deliver the piece of land to the Land Use Right owner for use without requiring the Land Use Right owner to pay the land premium. However, the Land Use Right owner may or may not be required to pay compensation, resettlement, and other fees. In most cases, a Land Use Right obtained through allocation in accordance with this law has no time limit.

Only the following land can be allocated to Land Use Right owners:

- land used by government authorities; or
- land used for certain purposes stipulated under the law, e.g. for military use, for construction of urban infrastructure and public utility and for building energy, communications, and water conservancy and other infrastructure projects supported by the State; or
- other land as provided for by the law and administration regulations.

An allocated Land Use Right cannot be transferred to any third party unless: (a) the competent government authority has approved the transfer; and (b) the Land Use Right owner has paid the land grant premium to the land authority to convert an allocated Land Use Right to a granted Land Use Right.

The costs of obtaining land through allocation may be low, but the government authorities may also take back the allocated Land Use Right without compensation based on the needs of urban construction and development and the requirements of urban planning, although there may be

<sup>24</sup> Article 22 of the Urban Real Estate Administration Law.

compensation for buildings and fixtures on the land in light of the actual circumstances.<sup>25</sup>

### **Zoning / Permitted Use of Land**

China adopts highly rigid rules and administrative control over the use and zoning of the land. All Land Use Right owners must utilise land strictly in compliance with the use indicated in the land grant contract and other relevant documents.

To change the land use of a parcel of land, the owner must submit an application to and negotiate with the local land and planning authority. Subject to the urban or city overall development plan, the local land and planning authority has the discretion to approve the change of use after internal consultation with other government authorities. If approved, the owners are generally required to pay an additional land premium to the local land and resources authorities.

### **Title to Property**

The Civil Code of the PRC has confirmed that private entities and individuals will have an absolute ownership right to buildings and fixtures on land (including the rights to possess, use, seek profits from and dispose of the real property according to law), although not the land on which the buildings and fixtures are situated. In other words, the ownership right in the buildings/fixtures is absolute, but it is still subject to the restrictions and limitations on time and permitted use of the land on which the buildings and fixtures sit.

The Land Use Right will be transferred or mortgaged automatically along with the transfer or mortgage of the buildings and other attachments built on the land and vice versa.<sup>26</sup>

### **Investing in China**

#### **(i) Purchasing Property for Self-Use**

According to Circular No. 171 and Circular No. 122, branch offices or representative offices (except for enterprises approved to engage in real estate business) which are formed within China by overseas institutions

<sup>25</sup> Article 47 of the Interim Regulations Concerning the Assignment and Transfer of the Right to the Use of the State-owned Land in the Urban Areas.

<sup>26</sup> Article 32 of the Urban Real Estate Administration Law; Article 397 of the Civil Code of the PRC.

<sup>27</sup> According to the Catalogue for Guiding Industry Restructuring (2019 Version) (产业结构调整指导目录) which equally applies to both foreign

and overseas individuals who work or study in China may purchase commercial housing units for their own use according to their actual needs. For cities implementing house purchase quota policies, the purchase of housing units by overseas individuals shall comply with local policies.

Therefore, an overseas institution without any branch, sub-branch or representative office in China or a foreigner who does not work or study in China may not purchase any commercial house.

#### **(ii) Foreign Investment in Real Estate Industry (Not-for-Self-Use)**

##### ***No Prior Approval is Required***

According to the Foreign Investment Law, China adopts a regulatory regime of "national treatment" plus "negative list" in market access for foreign investment. Under the regime of the "negative list", foreign investors shall be treated equally as domestic investors when they invest into businesses which are not restricted or prohibited by the Negative Lists from foreign investment. That is to say, foreign investors shall comply with relevant restrictions in the sectors prohibited or restricted for foreign investment on the Negative Lists, while for the foreign investments in other sectors which are not on the Negative Lists, foreign investors shall comply with, to the same extent, restrictions which apply to domestic companies.

Real estate related industries are not included on the Negative Lists, which is also not a prohibited or restricted sector for domestic companies (except for the construction and operation of large theme parks, and construction of golf courses and villas).<sup>27</sup> Therefore, no prior approval is required for foreign investors who intend to invest in the Chinese real estate market, unless investment involves the construction and operation of large theme parks, or the construction of golf courses and villas.

investors and domestic investors, urban recreation and assembly plaza projects with land area exceeding the required standard, villa-type real estate development projects and golf course projects are restricted sectors for investment.

### Other Restrictions

Although the Negative Lists have removed restrictions on foreign investments in the real estate market, there are still some requirements and restrictions that foreign investors must comply with, such as those set out below.

### Commercial Presence Principle

According to the "principle of commercial presence" as required under Circular No. 171 issued in 2006 and its supplementary rules, foreign investors who intend to purchase not-for-self-use property within the PRC must form a foreign-invested real estate enterprise ("**FIREE**") before carrying out business activities within its business scope.<sup>28</sup>

A FIREE can be structured as a wholly foreign-owned enterprise or a Sino-foreign joint venture company, subject to the investor's commercial strategies and business needs.

No foreign-invested company other than a FIREE may use its foreign exchange capital to invest in real estate.

### Single Project Principle

According to Circular No. 50, to apply for the establishment of a real estate company, the applicant shall first obtain the Land Use Right, the ownership of real estate buildings, or have signed an agreement for the appointment and transfer/purchase of the Land Use Right or house property right with the land administration department and the land developer/real estate building owner.

A FIREE is required to undertake a "single project" within its business scope, and if it intends to carry out a new project development or operation, it shall expand/amend its business scope to add in the new project.

### Investment through a Share / Asset Purchase

Like in other jurisdictions, investments in Chinese real estate can be done either through share acquisition or asset acquisition. Some decision-making factors include tax considerations and whether the buyer wants to "cherry-pick" the assets that it wants and leave out the

assets and liabilities that it does not. The following is a summary of the tax burden of each party under asset acquisition and shares acquisition:

	Tax Payer	Shares Acquisition	Asset Acquisition
Value-added Tax	Seller		√
Enterprise Income Tax	Seller	√	√
Stamp Duty	Both parties	√	√
Land Value-added Tax	Seller		√
Deed Tax	Buyer		√

Land Value-added Tax applies to the sale of land rather than sale of equity interest in a target company. However, if the main assets of the target company are Land Use Rights and buildings and fixtures on the land, the tax authorities may deem that the share acquisition is actually a sale of land. In such a case the seller may be obliged to assume the Land Value-added Tax as well, subject to the practice of the local tax authorities in each city.

As can be seen from the above table, in contrast to the heavy tax burden of an asset sale, the sale of equity is only subject to stamp duty and enterprise income tax. If the foreign investor purchases equity interests in an offshore entity which indirectly owns the project in China through a PRC company, the transaction may not be subject to Chinese taxes. This is provided that the offshore entity is not deemed to be resident in China for tax purposes, and the transaction structure is not considered as solely transferring the shares indirectly in the underlying Chinese company that lacks reasonable commercial purpose.<sup>29</sup>

### Financing Investments

Since 2007, the regulatory authorities have imposed restrictions on the financing of FIREEs, attempting to force foreign investors to use lower leverage of capital.

<sup>28</sup> Article 1(1) of Circular No. 171.

<sup>29</sup> Announcement on Several Issues concerning the Enterprise Income Tax on Income from the Indirect Transfer of Assets by Non-Resident Enterprises (关于非居民企业间接转让财产企业所得税若干问题的公告);

Announcement on Issues concerning the Withholding of Enterprise Income Tax at Source on Non-Resident Enterprises (关于非居民企业所得稅源泉扣繳有关问题的公告).



### **Domestic Loan**

According to Circular No. 171 and Circular No. 122, a FIREE shall not obtain any domestic loans unless both of the following conditions have been satisfied: (i) the certificate of state-owned land has been obtained; and (ii) the project development capital has exceeded 35% of the total project investment amount.

### **Foreign Debt**

In China, the foreign debt of companies is supervised and regulated by Chinese government authorities through both registration administration and quota administration. However, in terms of borrowing foreign debts, a FIREE is under stricter control and restrictions than other foreign-invested companies.

According to the Measures for Administration of Foreign Debt Registration (外债登记管理办法), a FIREE incorporated after 1 June 2007 is not allowed to incur any foreign debt. For a FIREE incorporated before 1 June 2007, it can incur foreign debts after all the following conditions have been satisfied: (i) the amount of the company's foreign debt shall not exceed the difference between the company's total investment and registered capital; and (ii) if the company has any project under construction, the company shall have obtained the certificate of Land Use Rights and the project development capital has exceeded 35% of the total project investment amount.

Following the foreign debt reform in 2017, foreign-invested companies in China can choose to use the "macro-prudential mode" to determine its foreign debt quota through a formula, which currently equals twice the net assets.<sup>30</sup> However, the new foreign debt regulation expressly states that the aforesaid reform will not apply to real estate companies.

### **Conclusion**

From the Negative Lists to the Foreign Investment Law taking effective on 1 January 2020, the Chinese government has showed its will and determination to further open up the market and ease market access for foreign investors. At the same time, the Chinese government has also implemented various measures to curb real property speculation. Thus, foreign investors

should remain prudent and take cognisance of the various rules and regulations governing the real estate industry and special rules applicable to foreign-invested real estate companies. In addition, due to the ongoing rural land reform and the Foreign Investment Law, it is likely that there will be more legal and regulatory changes to come. Foreign investors should keep themselves up-to-date on the latest legal developments relating to the real estate industry in China.

### **Our Deals**

- Advised a Singaporean sovereign wealth fund, GIC Pte Ltd, in respect of a joint venture with CapitaLand into the tallest twin towers in Shanghai for a total investment amount of RMB 12.8 billion, which was one of the two largest deals made by foreign investors in the year of 2018.
- Advised a foreign investor to jointly bid for and acquire a mixed-use plot in Pudong, Shanghai with Kerry Properties Limited for RMB 6.014 billion.
- Advised a foreign investor in its disposal of 50% equity interest in a project company for a total amount of RMB 2.8 billion. The project company holds a shopping mall in Shanghai.
- Advised a Singapore sovereign wealth fund to establish a rental apartment platform in China with Nova Property Investment Co., a leading Chinese property investment and asset management firm. The platform has RMB 4.3 billion in initial funds.
- Acted for an international consortium in connection with the construction, development, management and operation of a 70 square kilometers industrial township in Suzhou, China.
- Acted for a Singaporean real estate financial investor in its joint investment with Beijing Capital Land in a long-term lease apartment project in Shanghai.
- Acted for a Singaporean sovereign wealth fund in its investment in, or disposal of, various real estate projects in different cities of China.

<sup>30</sup> The foreign debt quota may vary from time to time due to "cross-border financing leverage ratio" and "macro-prudential regulation parameters" as determined by authorities from time to time. For

information, the "macro-prudential regulation parameters" was adjusted from 1 to 1.25 from 11 March 2020 and was adjusted from 1.25 back to 1 since 7 January 2021.

- Acted for Macquarie MEAG Prime Real Estate Investment Trust in its RMB 350 million acquisition of a retail mall in Chengdu, China.
- Acted for a Singaporean-owned foreign invested enterprise in Shanghai in its disposal of land and buildings in a bonded zone to a Singapore-listed company.
- Acted for Ascott Serviced Residence (China) Fund in its RMB 367 million acquisition of a Chengdu serviced apartments real property from Shui On China Central Properties Limited, which is a wholly-owned subsidiary of Shui On Construction and Materials Limited (listed on the Hong Kong Exchange).
- Acted for a Singaporean bank in its RMB 2 billion acquisition of real property in Shanghai, which property is used as its regional headquarter in China.

# INDONESIA

**Indonesia's legal land framework is considered complex by most investors, with different types of ownership documents that provide different rights to the land title holder. This is further complicated by the abundance of non-registered lands, triggering complicated and in-depth processes to verify the accuracy of ownership rights.**

Our dedicated team of lawyers will help steer you past pitfalls by bringing their experience and professionalism to your real estate transactions. We act for both local and foreign parties in relation to all sectors of the market, public or private, and involving either residential, commercial, or industrial properties.



## System of Registration

### Replacing the Colonial Land Tenure System

Indonesia's land legal system is complex with a rich pedigree. Unlike the more uniform legal frameworks of land law in other jurisdictions, which generally prescribe only two types of land titles (freehold and leasehold), Indonesia's land law is intricate in comparison.

The main land legislation in Indonesia is Law No. 5 of 1960 on Basic Provisions of Agrarian Principles ("**1960 Agrarian Law**"), which was enacted to repeal and replace the previous colonial land tenure system. The 1960 Agrarian Law recognises the following types of land title: freehold, leasehold, right to cultivate, right to build, and right to use the land. Other than the 1960 Agrarian Law, in 2020, the Indonesia Government enacted Law No. 11 of 2020 on Job Creation ("**Omnibus Law**") which also impacts real estate/property matters, including land law.

Indonesian law prohibits foreign individuals and corporations from owning freehold title. Nonetheless, foreign individuals and corporations are allowed, with certain restrictions, to acquire rights over land. For example, certain rules apply to ownership of landed houses and apartments by foreign individuals residing in Indonesia, e.g. the rules on minimum price and the amount of land or number of apartment units which can be owned by foreign individuals and corporations.

### Applicable Law

Beside the 1960 Agrarian Law, Omnibus Law, and regulations to implement them, the other legislative instruments governing real estate in Indonesia include the Government Regulation No. 18 of 2021 on Rights to Manage, Land Title, Apartment Units and Land Registration, and the Government Regulation No. 24 of 1997 on Land Registration which is the most recent piece of legislation pertaining to property.

Further specific provisions regarding housing and apartments can be found in Law No. 1 of 2011 on Housing and Settlement Areas, alongside the Government Regulation No. 12 of 2021 on Housings and Residential Area, as well as Law No. 20 of 2011 on Apartments and the Government Regulation No. 13 of 2021 on Apartments.

The Indonesia Government has enacted a regulation to regulate abandoned lands and abandoned areas, through Government Regulation No. 21 of 2021 on Abandoned Land.

## Tenure and Ownership

In the common meaning of the term "land ownership", only Indonesian citizens can hold freehold title. As for foreign investors, the most relevant types of land ownership for foreign investors through foreign-invested Indonesian companies are the right to build, the right to use, and the right to cultivate. A foreign company established outside Indonesia can also obtain the right to use provided that such foreign company has its representative office in Indonesia.

Each of the land title has a different tenure, save for freehold title which is valid indefinitely. The tenure can be extended and further renewed. Upon the expiration of such tenure, the said land will become State Land and the former holder of the land title is given priority as to the right to apply for a new land title, provided that the following conditions, among other things, are in place:

- (a) the land plot is still utilised in accordance with the conditions, nature, and allotment of the land;
- (b) the applicant is still qualified to obtain the said land title (i.e. person/Indonesian legal entity for right to build and person/Indonesian legal entity/foreign legal entity with a representative in Indonesia for right to use);
- (c) the land is utilised in accordance with the applicable detailed spatial plan; and
- (d) the land is not utilised and/or planned to be utilised for public interest.

## Types of Land Ownership Title

### (i) Freehold (*Hak Milik*)

A freehold title is essentially an ownership right over a plot of land that is hereditary in nature. It is the highest land title that may only be held by Indonesian citizens. Transfer of freehold land is restricted only to Indonesian citizens.

Despite this, in practice, foreign individuals and corporations may buy freehold land from Indonesian citizens by converting the freehold title into a suitable

land title for foreign individuals and corporations (namely, the right to build, right to use, or right to cultivate as further elaborated below).

Alternatively, the aforementioned right to build, right to use, or right to cultivate may be granted on top of a freehold land. However, such an arrangement is less favoured as the freehold title holder has priority over the land.

### (ii) Right to Build (*Hak Guna Bangunan*)

A right to build is given to construct or own a building on a land.

The types of land over which a right to build can be granted are as follows:

- (a) state land;
- (b) land with a right to manage; and
- (c) freehold land owned by an Indonesian citizen.

This title may be held by Indonesian citizens or corporations, including foreign-invested Indonesian companies established under the laws of the Republic of Indonesia and domiciled in Indonesia.

A right to build is valid for maximum 30 years, which tenure can be extended for a maximum of 20 years at the request of the right to build holder. The extended tenure may be renewed for a maximum of 30 years upon its expiry. Tenure expiration will cause the ex-right to build title holder vacating the land (including from any construction thereon).

A right to build may be used as security for loan with a mortgage and may be transferred to other parties through a sale and purchase, private exchange agreement, capital participation, grant, or inheritance.

For residential purposes, foreign individuals can own: (a) landed houses under a right to use and (b) apartments units provided that the apartments are built on a land with a right to build or right to use. The laws and regulations impose certain limitations, such as on price, types of property to own, and the required immigration documents (which include visas, passports, or residence permits) in accordance with immigration laws.

**(iii) Right to Cultivate (*Hak Guna Usaha*)**

A right to cultivate is given to cultivate land for livestock, fishery, agricultural, and plantation businesses.

The types of land over which a right to cultivate can be granted are as follows:

- (a) state land; and
- (b) land with a right to manage.

This land title can be owned by Indonesian citizens and corporations (including foreign-invested Indonesian companies).

A right to cultivate is valid for a maximum of 35 years, which tenure can be extended for a maximum of 25 years. The extended tenure can be renewed for a maximum of 35 years upon its expiry.

Similar to a right to build, a right to cultivate may be secured for loan with a mortgage, and may be transferred to other parties through a sale and purchase, private exchange agreement, capital participation, grant, or inheritance.

**(iv) Right to Use (*Hak Pakai*)**

A right to use is granted to the right holders to utilise the lands.

The types of land over which a right to use can be granted are as follows:

- (i) state land;
- (ii) land with a right to manage (this will be elaborated upon in greater depth below); and
- (iii) freehold land.

A right to use may be issued with a definite tenure or indefinite tenure, as follows:

**(a) *Right to use issued with a definite tenure***

This can be granted to: (1) Indonesian citizens and foreign individuals; (2) Indonesian corporations that are domiciled in Indonesia, including foreign-invested Indonesian companies; (3) foreign companies established outside Indonesia having its representative office in Indonesia; (4) religious and social bodies; and (v) foreign individuals.

A right to use is valid for a maximum of 30 years, which tenure can be extended for a maximum of 20 years. The extended tenure may be renewed for a maximum of 30 years upon its expiry.

Similar to a right to build, a right to use may be used as security for loan with a mortgage, and may be transferred to other parties through a sale and purchase, private exchange agreement, capital participation, grant, or inheritance.

For residential purposes, the Omnibus Law has introduced a new provision where foreign individuals can own landed houses under a right to use and apartments built under a right to use subject to the fulfillment of certain requirements, e.g. possession of immigration documents (which include visas, passports, or residence permits under immigration laws). However, as verbally confirmed by the Ministry of Agrarian and the Local Land Office, in practice, this new provision has yet to be implemented.

There are also certain qualifications on the price and types of property that can be owned by foreign individuals.

**(b) *Right to use issued with indefinite tenure (so long it is still utilised)***

This can be granted to: (1) the central government; (2) regional governments; (3) village governments; and (4) representatives of foreign countries and international agencies.

This indefinite right to use cannot be transferred to any other parties and cannot be used as security for a loan with a mortgage.

**(v) Right to Manage (*Hak Pengelolaan*)**

A right to manage is a right of the State to manage the land. As part of the implementation of such authority, the State can delegate the right to manage to another party. A right to manage is available only for: (a) government agencies; (b) regional governments; (c) state-owned companies; (d) regional government-owned companies; (e) land bank; and (f) legal entities appointed by the central government.

The right to build, right to cultivate, and right to use can be given on a land with right to manage.

## Investment through a Share/Asset Purchase

Investments are commonly carried out in Indonesia through the establishment of a foreign-invested Indonesian company or by purchasing shares in an existing Indonesian company.

Some notable points for consideration would be the taxes that must be paid on land and property transactions. These points will be elaborated below.

## Investing in Indonesia

Similar to other jurisdictions, capital gains, including those from property, are taxable in Indonesia.

### (i) Capacity

Potential foreign investors/buyers must firstly ensure that the target land is suitable for ownership by foreign individuals or foreign companies.

### (ii) Tax

#### *Land and Building Rights Acquisition Duty*

Any property transaction will give rise to land and building rights acquisition duty (*bea perolehan hak atas tanah dan bangunan*, locally known as BPHTB) that must be paid by the buyer.

The applicable rate of BPHTB is 5% of the acquisition value of the land title, which in most cases is higher than the market or transaction value or the sale value of the land that is determined by the local government.

Payment of BPHTB by the buyer is typically required for land transactions which will be finalised by the local land office. A land deed official is prohibited from signing a land transferring rights deed until the BPHTB for the property transaction has been paid for.

#### *Income Tax*

Land and building transactions will also give rise to income tax payable by the seller. In general, the rate of income tax for the seller in any property transaction is set at 2.5% of the gross value of the

property transaction as determined by and paid to the central government.

Similar to BPHTB, payment of income tax for a property transaction by the seller is required in order for the property transaction to be finalised by the local land office. A land deed official is prohibited from signing the land transferring rights deed until the income tax for the property transaction has been paid.

#### *Land and Building Tax*

Land and building tax is a form of tax chargeable on any type of property (with strict exemptions for public property), which is applied and enforced annually by regional governments on the relevant land and building owner. The rate of the land and building tax varies between regional governments, but the mandated maximum rate is 0.3% of the sale value of the land as determined by the regional government.

## Conclusion

While investors remain keen on making Indonesia their investment destination, they should remain prudent and keep themselves up-to-date with the latest property-related legal developments in Indonesia, especially since the enactment of the Omnibus Law and its implementing regulations. The enactment of the Omnibus Law is a breakthrough in improving the ease of doing business and simplifying investments in Indonesia, specifically for foreign investors.

For now, it is advisable for businesses to familiarise themselves with the new norms and changes under the Omnibus Law.

## Our Deals

- Provided legal advice to PT Bank Mandiri (Persero) Tbk and conducted due diligence of 14 immovable assets in the form of lands for a proposed asset optimisation program.
- Provided legal advice to PT Semen Indonesia (Persero) Tbk and conducted due diligence for the provision of land measuring 510 Ha, which will be used to construct a cement factory in Rembang.
- Provided legal advice, conducted due diligence, and represented PT Pertamina (Persero) for the

- proposed asset optimisation plan to develop a super toll office building in Jakarta.
- Provided legal advice and conducted due diligence on behalf of PT Pelabuhan Indonesia (Persero) and its subsidiary in relation to a proposal to acquire lands measuring 4.9 Ha for the purpose of developing its property business in Labuan Bajo.
  - Represented PT Mitrasraya Adhijasa, a subsidiary of PT Asuransi Jiwasraya, in the negotiation of its BOT agreement for the development of an office building in Kuningan, Central Jakarta.
  - Represented Country Garden Holdings Co., Ltd in conducting due diligence processes and establishing joint ventures with local partners in relation to hotel development in Bali and real estate development in Jakarta.
  - Advised Banyan Tree Hotels & Resorts on the proposed sale and marketing of apartments in a major Banyan Tree hotel and apartment complex development on Bintan island, an Indonesian holiday destination popular with Singaporeans.
  - Represented Anshan Iron & Steel Group Corporation in conducting due diligence and acquiring lands measuring 39,000 sqm in Gresik and 146,202 sqm in Lamongan, both located in East Java.
  - Assisted Regus Plc in reviewing lease agreements for several Regus centres in Indonesia.
  - Represented NWP Retail, a major retail company in Indonesia, in acquiring several malls and hotels in various cities in Indonesia, including Jakarta, Binjai, Yogyakarta, Solo, and Palu.
  - Advised and represented K2ID, a foreign investment company engaged in data centre business, in conducting due diligence and acquiring lands measuring approximately 16 Ha to be used for the construction of a data centre in the industrial zones in Bekasi City and Karawang District.
  - Advised PT Lotte Chemical Indonesia on the acquisition of a 34 Ha plot of land for the development of a new ethylene petrochemical plant in Cilegon, West Java.
  - Advised on the land acquisition process and land due diligence in respect of 55 Ha of land to be acquired from PT Krakatau Steel (Persero) Tbk. for the construction of a new cracker plant at the Cilegon industrial zone in Banten Province.
  - Advised PT Japfa Comfeed Indonesia Tbk in relation to land procurement for public interest.
  - Assisted PT Mass Rapid Transit (MRT) Jakarta in reviewing, negotiating and finalising the EPC Contract Package 107 for Railway Systems and Trackwork MRT Jakarta. We also advised PT MRT Jakarta in connection with legal issues that arose during the contract clarification stage. The contract was worth approximately US\$220 million.
  - Represented China Fortune Land Development (CFLD) in the acquisition of 2,600 hectares of land for a development of residential, office and commercial purpose.

## LAO PDR

**Laos is generally considered to be small in terms of population, but its population is disproportionate when one considers the sheer amount of land. This, coupled with the abundance of natural resources, has attracted many investors from developing countries such as China, Vietnam, and Korea to invest in Laos. Laos is slowly but surely breaking out of its developing-nation status and the government has taken steps to achieve this.**



Real estate in Laos has always been a preferred choice for those who wish to create long-term wealth. However, there is still a level of difficulty for foreigners who wish to invest in Laos as the regulations could be complicated and convoluted to the layman. The government is

working tirelessly to amend the related laws and regulations in order to provide ample facilities to support such investment.

### System of Registration

On August 12, 2020, the amended Law on Land No. 70/NA dated 21 June 2019 ("**Land Law 2019**") was published in the Official Gazette of the Lao Ministry of Justice, replacing the previous amendment of Land Law 2003. The Land Law 2019 introduces significant changes to the country's current real estate regulatory framework and provides legal means to boost investment in and development of the country's real estate sector.

The Land Registration System comprises:

- Land record registration;
- Land title registration;
- Registration of activities related to land use rights; and
- Registration of changes of land use rights.<sup>31</sup>

### Land Record Registration

The District Office of the Natural Resources and Environment coordinates with village administrative authorities to establish land records for each land category in order to monitor the activities and changes of land use purposes, and to be used as basic information for land title registration and for payment of land use fees in accordance with laws.<sup>32</sup>

### Land Title Registration

Land title registration involves the following processes:

- The District Office of Natural Resources and Environment, in conjunction with relevant village authorities, conducts adjudication and data collection on how the land use right has been acquired, and takes a measurement survey of the parcel in presence of the owners of the adjacent land parcels or their delegated representatives who also certify the survey. The land parcel survey plan and land file for each parcel are created thereafter

<sup>31</sup> Article 92 (New) of the Land Law 2019.

<sup>32</sup> Article 93 (New) of the Land Law 2019.



for land title registration. All these steps must be completed within 15 days.

- The District Office of Natural Resources and Environment issues a public announcement in the media and posts the announcement at the village authority office where the land is located for public review and possible objection. The notification period is 30 days from the day the notification is issued.
- If there are no objection or the objection has been addressed, the competent District Office of Natural Resources and Environment shall issue land titles within five working days.
- Where there is an objection, conflict or pending issues about the land parcel, the issue shall be settled in accordance with laws before the District Office of Natural Resources and Environment issues the land title registration for that land parcel.

After the completion of land title registration for each parcel of land, a report must be submitted to the district administrative authorities and the Provincial Department of Natural Resources and Environment.<sup>33</sup>

### **Registration of Activities of Land Use Rights**

The registration of activities of land use rights shall be undertaken at the District Office of Natural Resources and Environment where the land is located in the presence of the contractual parties and land officers.

Where a land title is used as collateral with one mortgagee, following the mortgage registration, the owner of the land use right shall give the original land title to the mortgagee to keep. Where a land title is used as collateral with many mortgagees, following each mortgage registration, the original land title will be kept with one of the mortgagees according to the agreement amongst the mortgagees.

The District Office of Natural Resources and Environment shall proceed with the registration of the activities of land use rights within three working days from the day the application is received and issue a certification to the mortgagee and the mortgagor,

acknowledging that the land title is used as security for a loan according to the contract.

In the case of a direct objection by the stakeholder or the grantees of land use rights, the registration of activities of land use rights shall be suspended until the issue is settled according to laws.<sup>34</sup>

### **Registration of Activities of Land Use Rights**

The registration of changes of land use rights shall be undertaken at the District Office of Natural Resource and Environment in the presence of contractual parties and land officers in the case of a sale, use of the land use right as shares, handover or bestowal of land use rights, or exchange of land use rights.

The District Office of Natural Resource and Environment shall proceed with the registration of the changes of land use rights within five working days from the day that the application is received from the land use right owner.

In the case of a direct objection by the stakeholder or the grantees of the land use rights, the registration of changes of land use rights shall be suspended until the issue is settled according to laws.<sup>35</sup>

### **Registration of Land for Condominium Construction**

Individuals or legal entities wishing to build condominiums shall request for an authorisation to operate a condominium business at the one stop investment service office as defined in the Law on Investment Promotion; apply for a construction permit from the Public Works and Transport sector; and request for registration of land for condominium construction at the Provincial Department of Natural Resources and Environment.<sup>36</sup>

The Provincial Department of Natural Resources and Environment considers registering condominium construction land for the legal entity within ten working days after the application is received. Where the land is being leased from the State, individual or legal entity, it shall be registered for the condominium construction, but the name of the land use right owner must remain on the land title of the lessor.<sup>37</sup>

<sup>33</sup> Article 101 (Amended) of the Land Law 2019.

<sup>34</sup> Article 104 (Amended) of the Land Law 2019.

<sup>35</sup> Article 105 (Amended) of the Land Law 2019.

<sup>36</sup> Article 106 (New) of the Land Law 2019.

<sup>37</sup> Article 108 (New) of the Land Law 2019.

It remains to be seen if the land registration system will shift to an electronic system with the pending amendments to the Land Law 2019. Land revenue shall be collected by using modern technology to ensure transparency, efficiency, and accuracy. The land revenue shall be handed to the national budget as defined in relevant laws.<sup>38</sup> Tax on land, if applicable, may be paid through the bank system (refer to the Additional Instruction on Notification or Taxable Land through Bank System No. 3909 dated 4 December 2018).

### Applicable Law

The main pieces of legislation governing real estate transactions in Laos are:

- Land Law 2019;
- Law on Investment Promotion No. 14/NA dated 17 November 2016 ("**Law on Investment Promotion 2016**"); and
- the 'Law on Income Tax (Amendment) No. 67/NA', dated 18 June 2019 ("**Income Tax Law 2019**").

### Tenure and Ownership

The State represents the ownership holder and manages lands in a centralised and uniform manner across the country with land allocation plans, land use planning, and land development. Aliens, stateless persons, foreign individuals, and foreign nationals of Lao ancestry have rights to lease, receive a concession of State land or purchase allocated State land use rights with a determined timeframe and to lease the land of Lao citizens. Their organisations that have been established with the authorisation of the State have the right only to lease or receive concession of State land and lease land of Lao citizens as stipulated under Article 3 of the Land Law 2019.

An individual or organisation may acquire land use rights through one of four methods: (i) allocation by the State; (ii) transfer; (iii) inheritance; or (iv) sale of allocated State land use rights with a determined timeframe as prescribed in Article 123 of the Land Law 2019.<sup>39</sup>

"Land Use Rights" is a term of art and consists of the following five rights: (i) right to protect land; (ii) right to

use land; (iii) right of usufruct, which is the right to collect income or usufruct from the land; (iv) right to transfer the Land Use Right; and (v) the "right relating to inheritance of the land use right", which is the right to have one's land use rights pass to one's successors upon one's death.<sup>40</sup>

Only Laotian citizens are entitled to the right to acquire land and the right to hold Land Use Rights above. However, aliens, stateless persons, foreigners, foreign nationals of Lao ancestry and their organisations who receive authorisation from the State to legally reside, invest or operate business in Lao PDR are granted the right to use land through lease or concession of State lands, and purchase of the allocated State land use right with a determined timeframe. In addition, aliens, stateless persons, and their organisations who receive authorisation from the State to permanently and legally reside in Lao PDR are granted the right to use land through lease of land use rights from Lao individuals, legal entities and organisations of Lao citizens.<sup>41</sup>

The maximum period for such leases from Lao citizens, including legal entities or organisations of Lao citizens, is for a period not exceeding 30 years with an option of renewal as agreed by the contractual parties, subject to approval of the provincial administrative authorities based upon the proposal from the Provincial Department of Natural Resources and Environment.<sup>42</sup>

The maximum period for such leases or concession of State lands shall not exceed 50 years and may be extended upon the decision of the Government or the National Assembly or Provincial People's Assemblies based on the evaluation of the project activities or operations and the decision of the Government or provincial administrative authorities.<sup>43</sup>

The maximum period for such leases of State lands by embassies or international organisations, based on mutual agreement, shall not exceed 90 years with an option of renewal subject to approval of the Ministry of Natural Resources and Environment and relevant provincial administrative authorities based upon the proposal from the Ministry of Foreign Affairs.<sup>44</sup>

The maximum period for such sale of allocated State land use right with a determined timeframe for development of new cities, construction of

<sup>38</sup> Article 114 (3) (New) of the Land Law 2019.

<sup>39</sup> Article 114 (3) (New) of the Land Law 2019.

<sup>40</sup> Article 126 (Amended) of the Land Law 2019.

<sup>41</sup> Article 131 (New) of the Land Law 2019.

<sup>42</sup> Article 117 (Amended) of the Land Law 2019.

<sup>43</sup> Article 120 (1) (Amended) of the Land Law 2019.

<sup>44</sup> Article 120 (2) (Amended) of the Land Law 2019.

condominiums, apartments, and housing development shall not exceed 50 years with an option of renewal based on the agreement of the relevant State agency.<sup>45</sup>

### **Ownership in Condominiums**

Further to restructuring the concept of land use right of foreign entities, the Land Law 2019 also introduces a number of provisions for condominiums. The development of a condominium project is open to both domestic and foreign entities in Lao PDR. The Land Law 2019 requires that a condominium developer secures a condominium business operation licence according to the applicable Law on Investment Promotion 2016 and construction permit from public works and transport sector.<sup>46</sup> Lands for the development of condominiums shall also be registered with the provincial natural resource and environment department.<sup>47</sup>

With regard to the purchase of units in a condominium, the Land Law 2019 permits aliens, stateless persons and foreigners to do so.<sup>48</sup> Nevertheless, it is important to note that unlike Lao buyers who may hold a common land use right in condominium land, foreign suite owners only have ownership rights in the suite. The part of their land use right still belongs to the condominium developer.

The acquisition of land use rights through the purchase of apartments in condominiums is provided under Article 132 (Amended) of the Land Law 2019. Buyers of apartments in condominiums who hold Lao nationality have the land use right on the land at the ratio of the apartment's area per square meter in the condominium construction land that was identified in the economic-technical feasibility study of the condominium, and has the ownership of the apartment according to the contract.

Aliens, stateless persons, foreigners and foreign nationals of Lao ancestry who buy apartments in condominiums have only long-term ownership of the apartments with the same term as the lifespan of the building. The land use right on the land on which the condominium is built still belongs to the legal entity that owns the land use right.

Where it is a State land, the buyers of apartments in condominiums (whether they are Lao citizens, aliens, stateless persons, foreigners, or foreign nationals of Lao

ancestry) have the right to collectively use the State land only.

The owners of the apartments shall register their ownership with the Natural Resources and Environment department.

### **Types of Property**

There are eight types of land in Laos: agricultural land; forest land; water area land; industrial land; communication land; cultural land; land for national defence and security; and construction land.

#### **(i) Agricultural Land**

Agricultural land is land which is determined to be used for cultivation, animal husbandry, fishery, irrigation, and agricultural research and experiment.<sup>49</sup> The Ministry of Agriculture and Forestry manages agricultural land and oversees the management, protection, development, and use of this category of land.

#### **(ii) Forest Land**

Forest land consists of land that is (a) covered by forest; and (b) not covered by forest, but determined by the State to be forest land, including water catchment areas within forest land as prescribed in the Law on Forestry.<sup>50</sup> The Ministry of Agriculture and Forestry also manages this category of land.

#### **(iii) Water Area Land**

Water area land refers to submerged land or land located around wetlands within other land categories such as swamps, ponds, lakes, saturated grass lands, water spring lands, land at water edges, land in the middle of waters, newly-formed land, land formed when water recedes, land converted by a change or diversion of waterways, natural or manmade water storage or waterways, both permanent or temporary.<sup>51</sup> The Ministry of Agriculture and Forestry manages this category of land.

<sup>45</sup> Article 123 (Amended) of the Land Law 2019.

<sup>46</sup> Article 106 (1) (New) of the Land Law 2019.

<sup>47</sup> Article 108 (2) (New) of the Land Law 2019.

<sup>48</sup> Article 132 (New) of the Land Law 2019.

<sup>49</sup> Article 32 (Amended) of the Land Law 2019.

<sup>50</sup> Article 39 (Amended) of the Land Law 2019.

<sup>51</sup> Article 45 (Amended) of the Land Law 2019.

(iv) **Industrial Land**

Industrial land refers to land which is determined to be the location of industrial zones, industrial estates, energy, mining, Special Economic Zones, and other lands that are used for industrial purposes.<sup>52</sup> The Ministry of Industry and Commerce, the Ministry of Energy and Mines, and the Ministry of Planning and Investment manage this category of land.<sup>53</sup>

(v) **Communication Land**

Communication land refers to land which is used as public roads, public road delimitation areas, earth and gravel ditches, drainage channels, bridge sites, airports and runways, cargo and passenger transport terminals, tunnels, railways, warehouses, logistics sites, transportation storehouses, telecommunication infrastructure sites, and other land used for communication purposes.<sup>54</sup> The Ministry of Communication, Transport, Post and Construction is charged with managing communication land.

(vi) **Cultural Land**

Cultural land refers to the locations of cultural heritages and is related to historical traces, artefact sites, heritage sites, traditional objects, archaeological sites, memorials, temples, religious sites, and cultural buildings, including cultural sites and other places which are classified by the State as cultural land.<sup>55</sup> The Ministry of Information and Culture is charged with managing cultural land.

(vii) **Land for National Defence and Security**

National defence and security land refers to land used for national defence and security work such as military camps.<sup>56</sup> The Ministry of National Defence and the Ministry of Public Security are charged with managing land for national defence and security.

(viii) **Construction Land**

Construction land is land used for the development of new towns, construction of residential places, offices, premises of organisations, public facilities, trade, service facilities, and other constructions in allocated zones and

in consistency with the urban plan as prescribed by the laws.<sup>57</sup> Construction land is managed by the Ministry of Public Works and Transport.

**Investment through a Share / Asset Purchase**

Profit from the sale or transfer of shares of individuals and legal entities is deemed taxable income as follows:<sup>58</sup>

- The tax rate payable for income from selling or transferring shares of individuals and legal entities is 2% of the actual selling price;
- The tax rate payable for income from selling or transferring of land use rights, house, building or land with building/s is 2% of the actual selling price.<sup>59</sup>

**Investing in Laos**

Laos has recently promulgated the Law on Investment Promotion 2016 in order to encourage a favourable investment climate. It aims to enable investors to conduct their business operations in a convenient, expeditious, transparent, fair, and lawful manner.<sup>60</sup>

**Categories of investments in Laos**

Investments in Laos may be broadly divided into two categories:<sup>61</sup>

(i) **General business (two types)<sup>62</sup>**

- **Activities that are on the Controlled Business List**

The Controlled Business List includes those businesses that relate to national security, public order, national fine tradition, or may have socio-environmental impact. For businesses in this category, an investment licence may only be obtained after screening by the relevant sector authorities.

<sup>52</sup> Article 50 (Amended) of the Land Law 2019.

<sup>53</sup> Article 52 (Amended) of the Land Law 2019.

<sup>54</sup> Article 56 (Amended) of the Land Law 2019.

<sup>55</sup> Article 62 (Amended) of the Land Law 2019.

<sup>56</sup> Article 68 (Amended) of the Land Law 2019.

<sup>57</sup> Article 70 (Amended) of the Land Law 2019.

<sup>58</sup> Article 38(5) (11) of the Income Tax Law 2019.

<sup>59</sup> Article 39 (2) of the Income Tax Law 2019.

<sup>60</sup> Article 2 (Amended) of the Law on Investment Promotion 2016.

<sup>61</sup> Article 32 (Amended) of the Law on Investment Promotion 2016.

<sup>62</sup> Article 33 (Amended) of the Law on Investment Promotion 2016.

The Government will determine the activities on the Controlled Business List from time to time.<sup>63</sup>

Some examples of controlled businesses, according to the Decree on the List of Controlled Business and Concession Activities in Laos, No. 3 dated 10 January 2019, are those pertaining to insurance, legal work (such as law firms), accounting, and auditing.

- **Activities that are not in the Controlled Business List**

General businesses may file for enterprise registration, and are authorised to operate under the Enterprise Law and relevant regulations without the need to seek authority approval.<sup>64</sup>

There is no limit to the term of investment in a general business, except where the relevant sector authority has issued regulations stipulating such limitations.<sup>65</sup>

A foreign investor should consider the Business Activities List for Foreign Investors, the Business Activities Reserved List for Lao Nationals and the Controlled Business List. Each of these is issued by the related government body.

(ii) **Concession investment**

A concession business is one where the investor is authorised by the Government to develop and operate a business. Such a business would typically involve concession of land, development of special economic zones, or the development of zones for: industrial processing for export, mining, electric energy development, aviation, or telecommunication. The Government will determine the list of concession businesses from time to time.<sup>66</sup>

The following should be noted:

- The term of investment in concession businesses shall not exceed 50 years;
- Under the Land Law 2019, the maximum period of land lease or grant of concession from the State to

individuals, legal entities or domestic and foreign organisations shall not exceed 50 years; and

- The maximum period of land lease or concession by the State to foreign individuals who invest in Laos shall not exceed 50 years.

However, all of these periods may be extended on a case-by-case basis upon review by the relevant authorities.

**Capacity**

Under the Land Law 2019, foreigners are now permitted to purchase from the Government of the Lao PDR a limited ownership of land use rights over state land for a period of up to 50 years, which period is extendable ("**Temporary Ownership**"). Temporary Ownership is permitted only for the specific purpose of the development of condominiums, apartment buildings, or other residential or commercial complexes.

Temporary Ownership means that foreign developers will no longer have access to land only through concessions and leases. In addition, they will have the legal right to transfer, mortgage, or bequeath their rights over the land and the buildings on it, albeit only for the remaining term of the Temporary Ownership. More importantly, they will have the right to sell or transfer ownership rights in the individual units of a building to potential buyers (both Lao citizens and foreigners).

The provisions under the Land Law 2019 are aimed at allowing private developers to use state land to develop state-of-the-art condominiums and commercial buildings and sell or lease the individual units. There is a restriction under the Land Law 2019 that foreigners cannot purchase limited ownership rights over private land from a Lao national.

In addition to permission of Temporary Ownership, foreign individuals and legal entities have the capacity to lease (from the State or from a Laotian citizen) or to receive a concession of land from the State for a period in accordance with the stipulations of Land law 2019.

Article 121 (Amended) of the Land Law 2019 is instructive: The lessee or concessionaire has the following rights:

<sup>63</sup> Article 34 (New) of the Law on Investment Promotion 2016.

<sup>64</sup> Article 35 (New) of the Law on Investment Promotion 2016.

<sup>65</sup> Article 40 of the Law on Investment Promotion 2016.

<sup>66</sup> Article 41 (Amended) of the Law on Investment Promotion 2016.

- use land; to own the property including buildings, premises and other structures on the land that is the subject of the lease or concession; and to transfer the property to Lao nationals or foreigners in accordance with the laws and regulations;
- use assets related to the land lease or concession as collateral with a domestic bank or financial institution, if approved by the Government or the provincial administrative authority within its jurisdiction, in accordance with the provisions of the finance sector, with the exception of a lease of land from Laotian citizens;
- use assets related to land lease or concessions as collateral with foreign banks or financial institutions if approved by the Government based on the proposal of the Ministry of Finance, with the exception of a lease of land from Laotian citizens;
- sub-lease land use rights with consent from the lessor, noting the sub-lease term must not extend beyond the term of the head lease;
- transfer the lease or concession rights to other individuals, partly or totally, within the remaining terms of the agreement and in accordance with the contract and laws;
- receive incentives according to the investment promotion policy as prescribed in the Investment Promotion Law and other relevant laws;
- enjoy exemption from the land use fee;
- pass on the inheritance of the land lease or concession agreement according to the contract terms and the laws;
- use the lease or concession agreement as contribution to share capital with another person, subject to approval from the relevant government authorities; and
- exercise other rights as prescribed in the laws.

## Tax

Income from rent of property such as land, houses, buildings, vehicles, machinery or other property is subject to a tax of 10%.<sup>67</sup> Apart from this, land transactions are subject to fees and service charges as follows:

- Registration of land lease agreements: 0.2% of rental fee;
- Registration for the transfer of lease agreements: 30,000 LAK;
- Registration to allow sub-lease by others: 30,000 LAK;<sup>68</sup> and
- Issuance of a licence for state land lease or concession: 50,000 LAK/licence.<sup>69</sup>

## Conclusion

Foreign investors looking to invest are advised to be aware of the restrictions and permissions relating to the purchase and usage of land in Laos. However, the government has begun to codify laws to encourage investment. Investors should keep an eye on this dynamic and evolving investment landscape.

Despite maintaining the traditional conservative approach in permitting foreign land acquisition, the Land Law 2019 demonstrates an attempt to remove barriers imposed on foreigners and their entities. Nevertheless, when reviewing the revised principles or provisions, there are still certain aspects that require further clarification. This is due to the fact that the development of the construction project, such as condominiums or apartments, needs a relatively large amount of capital, and a foreign entity is in a better position than a foreign individual to fund such project.

Additionally, the Land Law 2019 does not discuss the right of a foreign condominium suite owner in the event that the term of land use right of the developer has been terminated or the condominium land is otherwise transferred.

<sup>67</sup> Article 39 (4) of the Income Tax Law 2019.

<sup>68</sup> Article 79 (2), (8 and (9) of the Executive Decree of The President of The Lao People's Democratic Republic on Fees and Services Charges (Amended 2012) No. 3 dated 26 December 2012.

<sup>69</sup> Article 80 (2) of the Executive Decree of The President of The Lao People's Democratic Republic on Fees and Services Charges (Amended 2012) No. 3 dated 26 December 2012.

Overall, the Land Law 2019 is a welcome change as it allows for more foreign investment in the real estate sector, albeit with restrictions.

### Our Deals

- Advised the Export-Import Bank of China on the mortgage of land use rights to secure a US\$358 million loan facility repayment obligation under the Facility Agreement entered into by the Export-Import Bank of China as the lender and Nam Tha 1 Lao Power Co., Ltd. as the borrower for the Nam Tha 1 Hydropower Project.
- Advised the Joint Stock Commercial Bank for Investment and Development of Vietnam ("**BIDV**") on a cross-border transaction where BIDV provided a loan facility of up to US\$30 million to Hoang Anh Gia Lai Group for the development of sugarcane plantation and rubber plantation in Laos. The loan facility was secured by the mortgage of land use right over the agricultural land.
- Advised the Export-Import Bank of China on the mortgage of land use rights to secure US\$64.95 million loan facility repayment obligation under the Facility Agreement entered into by the Export-Import Bank of China as the lender and Nam Mang 1 Power Co., Ltd. as the borrower for the development Nam Mang 1 Hydropower Project.

# MALAYSIA

Malaysia remains a favourite location for real estate investors within Asia because of its competitive property prices. With its low threshold requirements and relaxed foreign ownership requirements, Malaysia offers one of the cheapest property prices in Asia where foreign investors can get better returns. It is of particular note that foreigners are allowed to own landed property, which makes it one of the most attractive destinations for foreign property buyers.



Malaysia's real estate market is typically stable, making it an appealing opportunity for buyers and renters alike.

## System of Registration

The land registration system in Malaysia is the Torrens system, which is based on the concept of indefeasibility of title. Under the Torrens system, it is the act of registration that confers title to or interest in land. Once the title or interest is registered, the title or interest cannot be challenged or set aside except in the case of fraud, misrepresentation, forgery, or where title or interest was unlawfully acquired.<sup>70</sup>

## Applicable Law

The main land law in Peninsular Malaysia is the National Land Code (Revised 2020) (Act 828) ("**NLC**"). Sabah and Sarawak have their own set of laws, namely the Sabah Land Ordinance (Chapter 68) and the Sarawak Land Code (Chapter 81) respectively.

Other relevant laws include the Housing Development (Control and Licensing) Act 1966, Strata Titles Act 1985, Strata Management Act 2013, Real Property Gains Tax Act 1976, Stamp Act 1949, Land Acquisition Act 1960 ("**LAA**"), Town and Country Planning Act 1976 ("**TCPA**") and Local Government Act 1976.

## Tenure and Ownership

The NLC recognises two types of land ownership, namely land held in perpetuity (freehold land) and land held for a term of years (leasehold land).

Freehold land may be held indefinitely by a proprietor. However, this right is not absolute as the State Authority can still acquire the land under the LAA subject to compensation.<sup>71</sup> Leasehold land is land owned by the State Authority, but an individual who has acquired a leasehold title to the land may occupy it for any period not exceeding 99 years.<sup>72</sup> Upon expiry of the lease, the land reverts to the State Authority unless it is renewed.

It should be noted that the State Authority is responsible for the planning of the development and use of all lands and buildings within the area of every local authority in the State.<sup>73</sup> The State Authority is empowered under the NLC to impose such conditions (both express and implied) and restrictions in interest (i.e. the land cannot be sold,

<sup>70</sup> Section 340(2) of the National Land Code 1965.

<sup>71</sup> Section 9A of the LAA.

<sup>72</sup> Section 76(a) of the NLC.

<sup>73</sup> Section 3 of the TCPA.



transferred, charged, or leased without the written consent of the relevant state authority) as it deems fit in respect of a plot of alienated land.

Express conditions are those specifically endorsed or expressed on the land title, while implied conditions refer to the category of use endorsed on the land title, i.e. whether for building, agriculture or industrial. Breach of any of these conditions, if not remedied in time, can result in forfeiture.

## Types of Property

### (i) Residential

Residential properties include residential houses, condominiums, serviced apartments, apartments, and townhouses.

### (ii) Commercial

Commercial properties comprise shop offices, shop houses, office buildings, retail stores, and shopping centres.

### (iii) Industrial

Industrial properties are typically buildings used for manufacturing or warehousing purposes, and include factories, workshops, and industrial buildings.

## Foreign Investment in Real Property in Malaysia

Malaysia continues to attract interest from foreign investors, especially in the real estate sector. Some guidelines for foreign investors who are interested in investing in real estate in Malaysia are set out below.

### (i) Capacity, Conditions, and Restrictions

A foreign interest<sup>74</sup> is allowed to purchase all types of properties in Malaysia except for the following:

- (a) properties valued at less than MYR1 million per unit;
- (b) residential units under the category of low and low-medium cost;
- (c) properties built on Malay reserved land; and
- (d) properties allocated to Bumiputera interest<sup>75</sup> in any property development project as determined by the State Authority.<sup>76</sup>

Acquisition by a foreign interest of a residential unit valued at MYR1 million and above does not require the approval of the Economic Planning Unit of the Prime Minister's Department ("**EPU**"), but would instead fall within the purview of the State Authority and hence be subjected to the approval of the relevant State Authority.<sup>77</sup>

The EPU Guideline exempts certain transactions from the requirement of EPU approval. These transactions include, amongst others, the acquisition of a residential unit under the "Malaysia My Second Home" Programme, as well as the acquisition of industrial land by a manufacturing company. However the NLC provides that foreign interests may only acquire properties with the approval of the State Authority.<sup>78</sup>

Land matters fall within the jurisdiction of the respective state governments, and as such each state authority has the discretion to vary the EPU Guideline based on location, type, minimum purchase price, and applicable fees and levy imposed on the property.

### (ii) Real Property Gains Tax

With effect from 1 January 2019, the real property gains tax ("**RPGT**") rates for the disposal of real property by non-citizens and non-Permanent Residents are as follows:

<sup>74</sup> Under the Guideline on the Acquisition of Properties issued by the Economic Planning Unit of the Prime Minister's Department ("**EPU Guideline**"), foreign interest means any interest that is held by: (a) an individual who is not a Malaysian citizen; and/or (b) an individual who is a Permanent Resident; and/or (c) a foreign company or institution; and/or a local company or local institution whereby the parties as stated in item (a) and/or (b) and/or (c) hold more than 50% of the voting rights in that local company or local institution.

<sup>75</sup> Under the EPU Guideline, "Bumiputera interest" means any interest, associated group of interests, or parties acting in concert which is held by: (a) a Bumiputera individual; and/or (b) a Bumiputera institution and trust agency; and/or (c) a local company or local institution whereby the parties as stated in item (a) and/or (b) hold more than 50% of the voting rights in that local company or local institution.

<sup>76</sup> Paragraph 10 of the EPU Guideline.

<sup>77</sup> Paragraph 2.3 of the EPU Guideline.

<sup>78</sup> Section 433B of the NLC.

Categories of Disposal	RPGT Rates
Disposal within five years	30%
Disposal in the sixth year or thereafter	10%

### (iii) Financing

Bank Negara Malaysia ("**BNM**") is the Central Bank of Malaysia established to, among other things, regulate the banking and financial services industry and ensure the stability of the country's financial system. Pursuant to the Foreign Exchange Notices ("**FE Notices**")<sup>79</sup> issued by BNM on 15 April 2021, a non-resident<sup>80</sup> investor is allowed to borrow in Ringgit from a resident<sup>81</sup> in any amount to finance Real Sector Activity<sup>82</sup> in Malaysia. This includes the construction or purchase of a residential or commercial property, excluding purchase of land which will not be utilised for construction or production of goods or services. However, it may not be as easy for investors to apply for financing of real property in Malaysia as compared to other countries.

### Structuring Investment

Investments in real property may take various forms, the most common being the purchase of real property directly from the developer or the seller. Investors typically enter into prescribed or private sale and purchase agreements with the developer or seller to purchase the real property at the contracted price.

Alternatively, where the real property is substantial such as an entire building or a large development, an investor may consider acquiring the shares in the company which owns the identified real property. The stamp duty payable in respect of the instrument of transfer of shares is 0.3% of the higher of (i) the consideration paid in respect of the sale of the shares and (ii) the value of shares as at the

date of the transfer. Such stamp duty can be significantly lower than the stamp duty payable in respect of a direct transfer of real property to the investor.

Previously, under the Goods and Services Tax ("**GST**") regime, commercial properties were subject to 6% GST. However, this has since been abolished with the re-introduction of the Sales and Services Tax ("**SST**"). Notwithstanding the above, investors should be aware of other taxes which may be applicable when investing in real property in Malaysia. A brief overview of these notable taxes is set out in the following sections.

## Tax

### (i) Stamp Duty

Stamp duty is payable by the purchaser in respect of the acquisition of all real property in Malaysia, and such stamp duty is payable on the instrument to effect a transfer of land. We set out below the stamp duty rates in respect of the purchase of real property:

Consideration or adjudicated Value	Scale of fees
First MYR 100,000	1%
Next MYR 400,000	2%
Next MYR 500,000	3%
On any amount in excess of MYR 1,000,000	4%

### (ii) Real Property Gains Tax ("**RPGT**")

RPGT is a capital gains tax chargeable on profits made from the disposal of real property (defined as any land situated in Malaysia and any interest or other right over such land) or disposal of shares in a real property company.<sup>83</sup>

With effect from 1 January 2019, the RPGT rates are as follows:

corporate incorporated or established, or registered with or approved by any authority, in Malaysia; (d) an unincorporated body registered with or approved by any authority in Malaysia; or (e) the Government or any State Government.

<sup>82</sup> "Real Sector Activity" is defined in the FE Notices to also include an activity relating to the production or consumption of goods or services, excluding (i) activity in the financial services sector, whether Islamic or otherwise; (ii) purchase of securities or Islamic securities; or (iii) the purchase of financial instrument or Islamic financial instrument.

<sup>83</sup> A real property company is a controlled company holding real property or shares in another real property company or both of which the defined value is not less than 75% of the value of the company's total tangible assets.

<sup>79</sup> Paragraph 14 Part D Notice 2 of the FE Notices.

<sup>80</sup> "Non-Resident" is defined in the FE Notices as: (a) any person other than a resident; (b) an overseas branch, a subsidiary, regional office, sales office or representative office of a resident company; (c) Embassies, Consulates, High Commissions, supranational or international organisations; or (d) a Malaysian citizen who has obtained permanent resident status of a country or territory outside Malaysia and is residing outside Malaysia. For the avoidance of doubt, this includes Malaysian Embassies, Consulates and High Commissions.

<sup>81</sup> "Resident" is defined in the FE Notices as: (a) a citizen of Malaysia, excluding a citizen who has obtained permanent resident status in a country or a territory outside Malaysia and is residing outside Malaysia; (b) a non-citizen of Malaysia who has obtained permanent resident status in Malaysia and is ordinarily residing in Malaysia; (c) a body

Categories of Disposal	RPGT Rates		
	Companies	Individual (Citizen & Permanent Resident)	Individual (Non-citizen & Non-Permanent Resident)
Disposal within three years	30%	30%	30%
Disposal in the 4 <sup>th</sup> year	20%	20%	30%
Disposal in the 5 <sup>th</sup> year	15%	15%	30%
Disposal in the 6 <sup>th</sup> year or thereafter	10%	5%	10%

## Conclusion

The value-driven real estate market with continuable growth potential has made Malaysia an attractive property investment destination and option for investors. However, investors should take cognisance of the various changes introduced or to be introduced by the government from time to time in respect of the real estate industry in Malaysia.

## Our Deals

- Acted for an investee company in a lease involving 40 acres of land in Johor for the development and construction of a satellite waste management centre.
- Advised a mid-sized local property developer on the development of a commercial and retail development in Kuala Lumpur. The legal work for the development includes advice rendered on the acquisition, amalgamation, and subdivision of land for the development; establishment of subsidiaries; licensing and regulatory aspects; project management; financing; sale and purchase of office suites; leases and tenancies of anchor tenants; retail tenancies; franchising; property management; supply of goods, services, and utilities services; licensing of trademarks; corporate governance; and rendering general corporate advice.
- Advised on the sale of a high-value plot of land located in Kuala Lumpur's Golden Triangle to a subsidiary of a foreign-based property group specialising in project management and construction and real estate investment and development.
- Representing and advising a property development company listed on the Main Market of the London Stock Exchange and its subsidiary on one of the first of its kind grand-scale en-bloc sale in Malaysia, assisting in paving the way for more successful en-bloc sales in Malaysia.
- Advising a subsidiary of one of the world's largest residential property developers and listed on the Shenzhen stock exchange, in relation to its proposed redevelopment and upgrading of a government-owned building within the vicinity of the Bukit Nanas forest reserve just outside Kuala Lumpur's Golden Triangle, marking the developer's first mixed development in Malaysia and building a strong bilateral relationship between both countries.
- Advised one of the fastest growing international women's fashion & apparel brands in Asia in relation to their business space across various locations in Malaysia, marking the client's next phase of brick and mortar stores set to launch and open its doors to Malaysian consumers in mid-2020.
- Advising on the development and lease of built-to-suit industrial facilities for conducting maintenance, repair and operations business and activities, component manufacturing, and aviation-related logistics in line with the development of the Subang Aerotech Park into an aerospace and aviation hub.
- Advising the subsidiary of a large infrastructure conglomerate listed on the Malaysian Stock Exchange on the entire transaction (from inception to closing) in relation to the proposed incorporation of a new company in Malaysia for the purpose of establishing and operating a bilingual international school in Malaysia.
- Represented an Islamic Bank with regard to their sale of several high-rise luxurious service residences to both locals and foreigners.

# MYANMAR

**Real estate in Myanmar has always been a crucial natural resource with potential to be capitalised for long-term development of the country.**

At the same time, immovable property is one of the areas in which foreign ownership and participation have been largely restricted as a matter of governmental policy. Our lawyers can assist with navigating Myanmar's complex land system, both from the perspective of novel legal issues and practical considerations on the ground.



## System of Registration

There is no formal system of registration of land ownership in Myanmar, as opposed to that in neighbouring countries such as Singapore. Proof of a private entity's proprietary interest is typically in the form of land grants or title deeds which are issued by the relevant regulatory authorities (as further discussed below).

## Applicable Law

There are a number of pieces of legislation governing the real estate in Myanmar, depending on the nature and usage of the relevant land. Key pieces of legislation discussed in this Update include the following:

- Myanmar Constitution 2008 ("**2008 Constitution**");
- Condominium Law 2016 ("**Condo Law**");
- Farmland Law 2012 ("**Farmland Law**");
- Vacant Land, Fallow Land and Virgin Land Management Law 2012;
- Transfer of Property Act 1882;
- Transfer of Immovable Property Restriction Act 1987 ("**TIPRA**");
- Special Economic Zone Law 2014 ("**SEZ Law**");
- Myanmar Investment Law 2016 ("**MIL**"); and
- Land Acquisition Act 1894.

## Regulatory Authorities

While there is no single regulatory authority which manages all land situated in Myanmar, land plots within the major cities (such as Yangon, Mandalay and Nay Pyi Taw) typically fall under the purview of the relevant local Development Committees<sup>84</sup> in practice, unless expressly exempted by the relevant statutory instruments. For instance, the Yangon City Development Committee is not the regulatory body in respect of farmlands, vacant land, and tax-exempted monastery land within the Yangon Region.<sup>85</sup>

<sup>84</sup> In places outside of these three major cities, the relevant regulatory authorities are the General Administration Department, Department of Agricultural Land Management and Statistics, or the State or Region

Committees formed under a specific legislation, depending on the type of land (e.g. farmland) and the location of the land (e.g. village land).

<sup>85</sup> Paragraph 3 of the Yangon City Development Committee Land Policy 2001.

On 30 August 2019, the Office of the President of Myanmar issued the Directive No. 2/2019 ("**LPB Directive**"), which set out how the Land and Property Bank ("**LPB**") would be established. Having been passed before the COVID-19 pandemic spread to Myanmar and the subsequent military coup on 1 February 2021, the LPB Directive has not yet come into effect as at the time of writing. Once established, the LPB is intended to serve as an interactive online database that can be readily accessed by investors to obtain information on state-owned land, buildings, premises, apartments, shops, residential rooms, factories, workshops and warehouses, as well as private land. The Ministry of Investment and Foreign Economic Relations is primarily responsible for the establishment of the LPB.

### Tenure and Ownership of Land

Pursuant to the 2008 Constitution, the Government of Myanmar is the ultimate owner of all land in Myanmar.<sup>86</sup> While this is the legal position, this is not always the case in practice, as there are instances of private ownership of land.

It is also worth highlighting that during the subsistence of a Buddhist marriage recognised in Myanmar, neither the husband nor the wife has a legal right to mortgage or sell the entire joint property acquired by either of them, whether before or during the marriage, except with the consent of the other party or as the agent of the other party.<sup>87</sup>

Tenure of the different types of land is discussed in more detail under the section on "Types of Land".

### Types of Land

There are several different types of land in Myanmar, including freehold land, grant land, farmland, and vacant, fallow and virgin land.

#### (i) Freehold land

Freehold land can only be held by citizens of Myanmar. The owner of freehold land is not required to pay land revenue for such land. Freehold land is evidenced by way of title deed and is transferable to other citizens of Myanmar only. It is generally held in perpetuity subject to

the avenues of acquisition by the Government of Myanmar for a public purpose under the Land Acquisition Act 1894<sup>88</sup> or under the State Public Housing Rehabilitation and Urban and Rural Development Board Act 1951.<sup>89</sup>

However, freehold land is not typically utilised in relation to foreign investments, as it is comparatively rare in practice.

#### (ii) Grant land

Land grants are typically made by the Government of Myanmar to citizens of Myanmar or "local companies" on terms stipulated therein (including the amount of fees or rent payable by the land grant holder to the Government of Myanmar). In practice, grant land is widely situated across different cities and towns in Myanmar, but is rarely found in villages.

Land grants are in effect a grant of proprietary interest from the Government of Myanmar to the land grant holder on a long-term basis, which may range from 10 years to 90 years. Extensions can be granted upon application, although there is no set practice in respect of the maximum number of times an extension can be granted (if at all), or the maximum period of extension.

The land grant holder is allowed to transfer, sub-lease, mortgage, or sell his interest in the grant land to other citizens of Myanmar or "local companies", subject to the terms and conditions within the land grant. Typically, the land grant holder may then lease the grant land to a "foreign company" either on a yearly basis, or on a long-term basis in accordance with an approval from the Myanmar Investment Commission ("**MIC**") under the MIL or its predecessor legislation.

#### (iii) Farmland

Farmland refers to paddy land, upland, silty land, hill-side cultivation land, perennial crops land, nipa palm land, garden land or horticulture land and alluvial land, but excluding any residential dwellings, religious buildings and premises and public-owned land which is not used for agricultural purposes.<sup>90</sup>

<sup>86</sup> Article 37 of the 2008 Constitution.

<sup>87</sup> *Ma Ohn Kyi vs. Daw Hnin Nwe* 1953 B.L.R. (H.C.) 322.

<sup>88</sup> Section 4 of the Land Acquisition Act 1894.

<sup>89</sup> Section 19 of the State Public Housing Rehabilitation and Urban and Rural Development Board Act 1951.

<sup>90</sup> Section 3(a) of the Farmland Law 2012, as amended by the Law Amending the Farmland Law 2020.

Acquisition of farmland for developmental projects remains a sensitive issue in Myanmar to date. Although the Farmland Law prescribes the types of compensation payable to the displaced farms in connection with acquisition of farmlands, there are growing concerns that the law in its current state is unable to adequately protect the full spectrum of land-related rights of ordinary citizens, in particular farmers who are in the lower economic stratum.

**(iv) Vacant, fallow and virgin land**

Vacant land or fallow land refers to land specifically reserved by the State for agriculture or livestock breeding business which was but is no longer leased.<sup>91</sup> On the other hand, virgin land includes valid land and wild forest land on which no cultivation has been undertaken at all.<sup>92</sup>

Investors of foreign investments which have been approved in accordance with the MIL may apply to the Central Committee for the Management of Vacant, Fallow and Virgin Lands for a permit granting the right to cultivate or utilise vacant, fallow or virgin land for purposes of agriculture, livestock breeding, mineral production or other lawful businesses permitted by the Government of Myanmar ("**VFVL Permit**"). The issuance of the VFVL Permit is subject to fulfilment of certain prescribed criteria, including approval of the relevant Ministry (e.g. Ministry of Natural Resources and Environmental Conservation for mineral production).

**Common Forms of Investment**

Investments relating to immovable property in Myanmar typically take the following forms: (i) land grant; (ii) long-term lease agreement; or (iii) Build-Operate-Transfer ("**BOT**") agreement.

Some notable points for consideration from the perspective of bankability of the relevant development projects would be whether proprietary interest is conferred, the term of lease, and the ability to confer proprietary interests to end-customers. These points are elaborated upon in turn below.

While grant land confers on the land grant holder a proprietary interest as close to ownership interest as possible, a long-term lease is likely to be vulnerable to termination or cancellation of the head lease (including the land grant). On the other hand, a BOT agreement

confers on the concessionaire a contractual right to use the relevant land for a particular purpose (usually for public benefit). Upon expiry or termination of the BOT agreement, the relevant land, including any buildings/constructions thereon, has to be transferred back to the Government of Myanmar and/or the BOT-issuing governmental authority.

A land grant may be issued for a period ranging from 10 years to 90 years. However, the term of the lease agreement or the BOT agreement is necessarily limited by the permissible lease period under the MIL or the SEZ Law (i.e. a maximum of 50+10+10 years, or a maximum of 50+25 years respectively).

In housing and infrastructure development projects, it is crucial for the developer to be able to assure its end-customers (e.g. purchasers of apartment units) that they will be issued with the relevant proprietary interest (e.g. land grant, title certificate, etc.). Accordingly, such developers typically enter into either a head lease agreement or a development rights agreement with the relevant government authority. This subjects the relevant government authority to an obligation to issue or procure the issuance of land grants or title certificates to the persons nominated by the developer.

**Foreign Ownership Restrictions**

Pursuant to the TIPRA, foreign individuals and foreign companies are prohibited from owning or entering into a lease of more than one year of any immovable property, subject to certain exceptions.<sup>93</sup>

Under the newly enacted Myanmar Companies Law 2017 ("**MCL**"), a "foreign company" is defined as a company in which an overseas corporation and/or any foreign person has an ownership interest of more than 35%.<sup>94</sup> As such, foreign investors can acquire an indirect minority interest in immovable property situated in Myanmar by way of an investment of up to 35% in a "local company".

One exception from the lease restriction is provided in the MIL, which allows a "foreign company" that has obtained approval from MIC to enter into a lease of land for up to 50 years, subject to two further extensions of 10 years each upon MIC's approval.<sup>95</sup>

<sup>91</sup> Section 2(e) of the Vacant, Fallow and Virgin Land Management Law 2012, as amended in 2018 ("**VFVL Law**").

<sup>92</sup> Section 2(f) of the VFVL Law.

<sup>93</sup> Sections 3 and 5 of the TIPRA.

<sup>94</sup> Section 1(c)(xiv) of the MCL.

<sup>95</sup> Sections 50(b) and 50(c) of the MIL.

Similarly, the SEZ Law allows a "foreign company" which has obtained approval from the Management Committee of the relevant Special Economic Zone<sup>96</sup> ("**SEZ MC**") to enter into a lease of land for up to 50 years, subject to a further extension of 25 years with the SEZ MC's approval.<sup>97</sup>

Another exception is found in the Condo Law and its implementing rules, the Condominium Rules 2017 ("**Condo Rules**"), which permit a foreign individual or foreign company to hold proprietary interest in a unit (regardless of which floor the unit is located on) in a condominium for as long as the tenure of the condominium remains valid, provided that the condominium is registered in accordance with the Condo Law.<sup>98</sup> This is subject to the condominium developer's ability to sell up to a maximum of 40% of the total floor area of the condominium to foreigners.<sup>99</sup> In the event that a foreigner wishes to obtain a Condominium Development Permit (defined below), the developer will be required to appoint a Myanmar national or local company as the joint developer, with the approval of the relevant Administrative Committee.<sup>100</sup> More is elaborated in the following section on "Condominiums".

## Condominiums

Condominium developers are required to obtain a general licence to undertake business as a developer ("**Business Licence**") and a specific permit to undertake the development of a specific condominium ("**Condominium Development Permit**"), which are both issued by the Administrative Committee in the relevant State or Region.<sup>101</sup>

The Condo Law also prescribes certain requirements in respect of the land over which the condominium is to be developed, including a minimum area of at least 20,000 square feet.<sup>102</sup> In addition, a condominium is required to consist of more than six floors.<sup>103</sup> The land and the condominium must also be registered in accordance with the Condo Law.<sup>104</sup>

<sup>96</sup> There are currently 3 Special Economic Zones ("**SEZs**") in Myanmar, namely: (i) Thilawa SEZ in Yangon Region; (ii) Kyauk Phyu SEZ in Rakhine State; and (iii) Dawei SEZ in Tahnintharyi Region.

<sup>97</sup> Section 79 of the SEZ Law.

<sup>98</sup> Section 26 of the Condo Law.

<sup>99</sup> Section 15(b) of the Law; Rule 34 of the Condo Rules.

<sup>100</sup> The Administrative Committee is formed in respect of each State or Region pursuant to the Condo Law, as promulgated by the Ministry of Construction. Each Administrative Committee is chaired by a Minister who is tasked by the relevant State or Regional Government.

## Investing in Myanmar

Generally, investors should be familiar with the foreign exchange regulations in Myanmar. In particular, a prior written approval by the Central Bank of Myanmar is required for all offshore loans, including loans by foreign shareholders.

In addition, investors should be generally cognisant of the tax regime in Myanmar. We set out below a high-level overview of some of the relevant heads of taxation and the latest legal developments which may be applicable in infrastructure or development projects.

### (i) Stamp Duty and Registration

In Myanmar, the sale and purchase of immovable property attracts stamp duty of 2% of the value of the property or the consideration, whichever is higher.<sup>105</sup> On the other hand, a long-term lease (including sublease) of immovable property beyond 3 years is subject to stamp duty of 2% of the average annual rent reserved.<sup>106</sup>

As such, it may be more tax-efficient to novate the existing lease agreement, which will attract stamp duty of 2% of the consideration for the novation,<sup>107</sup> where such consideration is lower than the consideration for purchase or average annual rent reserved for the relevant property.

In addition, an agreement for sale of immovable property for a consideration in excess of MMK 100,000 (approximately US\$65)<sup>108</sup> or for a lease of immovable property exceeding one year<sup>109</sup> is required to be registered at the relevant Township Registration of Deeds Office, for such agreement to take effect.

### (ii) Capital Gains Tax

In Myanmar, capital gains tax is levied on gains from the sale, exchange, or transfer of capital assets (including land) if the total value of the assets sold, exchanged, or transferred during the year is more than MMK 10 million.<sup>110</sup> It is typically assessed in Myanmar kyat or in

<sup>101</sup> Chapters 3 and 4 of the Condo Rules.

<sup>102</sup> Section 10(d) of the Condo Law.

<sup>103</sup> Section 2(a) of the Condo Law.

<sup>104</sup> Chapter 5 of the Condo Law.

<sup>105</sup> Item 31 of Schedule I to the Myanmar Stamp Duty Act.

<sup>106</sup> Item 35(a)(iii) of Schedule I to the Myanmar Stamp Duty Act.

<sup>107</sup> Item 63 of Schedule I to the Myanmar Stamp Duty Act.

<sup>108</sup> Section 16(b) of the Registration of Agreements Law 2018.

<sup>109</sup> Section 16(d) of the Registration of Agreements Law 2018.

<sup>110</sup> Section 28 of the Union Taxation Law 2020.

the foreign currency in which the transaction was conducted.

In relation to the oil and gas exploration sector, capital gains tax is assessed on a graduated basis, ranging from 40% to 50%. In all other sectors, capital gains tax is set at 10% of the relevant gains.<sup>111</sup>

### (iii) Commercial Tax

Commercial tax of 5% is generally imposed on the sales proceeds from goods produced and sold, as well as services rendered within Myanmar, unless the relevant goods or services fall within any of the exempted categories.<sup>112</sup>

### (iv) Property Tax

Property taxes are imposed by the relevant local development committees on immovable property situated within the relevant area. For instance, immovable property situated within the Yangon Region is subject to several categories of property tax, including the following:

- (a) general tax up to 8% of the annual value of the property;
- (b) lighting tax up to 5% of the annual value of the property; and
- (c) conservancy tax up to 8.5% of the annual value of the property.

In this regard, "annual value" refers to the gross annual rent for which the relevant land and building may be expected to be leased on an unfurnished basis, as periodically determined by the Yangon City Development Committee (or the relevant local development committee).

### (v) Resolution Committee for the Settlement of Investors' Damage

The MIC issued the Notification No. 9/2020 dated 7 April 2020 ("**MIC Notification 9/2020**") for the establishment of the Resolution Committee for the Resolution of Investors' Grievances ("**Resolution Committee**"). The MIC Notification 9/2020 was aimed at providing a framework to resolve any grievances suffered by the investors in relation to the implementation of their investments or their business operations (which could potentially include investments relating to real estate in Myanmar), including

instances of non-compliance by the Government with the investment guarantees provided to the investors, and wrongful decisions by the governmental departments or governmental organisations in relation to the investments. The Resolution Committee has not been established yet as at the time of writing.

## Conclusion

All in all, as the economy of Myanmar develops, the real estate sector is poised to grow, particularly in first tier cities of Yangon and Mandalay. As such, investors would do well to be kept abreast of the relevant legal developments, the tax regime, and the practice on the ground which govern their ability to undertake these investments.

## Our Deals

- Advised the Yangon Regional Government on its potential joint venture with Amata to develop a mixed-use industrial park.
- Acted for a Myanmar conglomerate in a mixed-use development project in Yangon.
- Advised a listed Chinese company in relation to the regulatory issues surrounding the use of the Swiss Challenge Model, the first of its kind in Myanmar, in connection with the development of the New Yangon City.
- Assisted in the structuring of the developer and management companies collaborating in a major commercial cum residential development, as well as with the preparation of documentation relating to sale of the units of the development.
- Advised an international developer on the refurbishment of the Yangon Secretariat, one of the largest colonial buildings in Southeast Asia.
- Advised a consortium of Japanese investors on a mixed-use real estate development project in Yangon, Myanmar.
- Advised Yangon Metropolitan Development Co., Ltd, a public company in which the Yangon Regional Government holds a majority equity interest, on its potential joint venture with Berjaya Land Berhad, a

<sup>111</sup> Section 13 of the Income Tax Law; Section 27(a) of the Union Taxation Law 2020.

<sup>112</sup> Union Taxation Law 2020.



major conglomerate of Malaysia for the development of public housing and commercial projects within Yangon.

- Advised the consortium led by Min Dhama Company Limited on its successful bid in relation to the project for refurbishment of the Yangon Central Railway Station.
- Acted for CITIC in its successful bid to develop the Kyauk Phyu Economic Zone in Myanmar.
- Advised Shwe Taung Group on negotiations with the Ministry of Construction on the smart city development project in Dagon Township, Yangon, Myanmar.
- Advised a Chinese consortium on a deep sea port and industrial park project in Rakhine State, Myanmar.
- Advised a Myanmar company on the development of a deep sea port in Mon State, Myanmar.

# PHILIPPINES

**Philippines is considered one of the fastest-growing economies in the Southeast Asia region. Although it registered a negative 9.5% growth rate in 2020, the Philippines' GDP is projected to grow at 4.5% in 2021 and 5.5% in 2022, on par with the projected growth rate of the Southeast Asia region.**



As the country recovers from the effects of the COVID-19 pandemic, the Philippines's real estate industry anticipates steady recovery as demand begins to improve in key sectors, such as industrial & logistics, office, residential, REITs, and data centres, amongst others.<sup>113</sup>

## System of Registration

Prior to 1978, the system of land registration in the Philippines was governed by three different systems, namely the system under the Spanish Mortgage Law, the Torrens system, and the system of recording for unregistered lands.

Under the Torrens system of registration, registration is not compulsory for the transfer of legal title but serves as a prudent measure to protect landowners from fraudulent claims, as well as to inform third persons of the burdens and incidents affecting a particular property.<sup>114</sup> Nevertheless, registration is recommended as registered land cannot be acquired by acquisitive prescription nor by adverse possession.<sup>115</sup> Moreover, every conveyance of property would require registration as notice to the world whereby third persons are presumed to have examined every instrument of record affecting the title.<sup>116</sup> More pertinently, the lapse of one year from the issuance of a decree of registration of a title conclusively grants title to the registered landowner,<sup>117</sup> making the title indefeasible.<sup>118</sup>

## Applicable Law

To simplify and streamline land registration proceedings, the Philippine government consolidated all pre-existing laws on property registration into a single piece of legislation: Presidential Decree No. 1529, otherwise known as the Property Registration Decree.<sup>119</sup> The Property Registration Decree effectively brought a number of lands in the Philippines under the Torrens system managed by the Land Registration Authority, whereby a land title becomes the basis of future transactions affecting the property described therein.<sup>120</sup>

<sup>113</sup> Business Mirror article titled "[Modest rebound seen for real-estate market in PHL](#)" (24 February 2021).

<sup>114</sup> Sections 51, 54 of the Property Registration Decree.

<sup>115</sup> *Ibid*, Sections 46, 47.

<sup>116</sup> *Ibid*, Section 52.

<sup>117</sup> *Ibid*, Section 31.

<sup>118</sup> *Ibid*, Section 32.

<sup>119</sup> As amended by Republic Act No. 6732 (An Act Allowing Administrative Reconstitution of Original Copies of Certificates of Titles Lost or Destroyed Due to Fire, Flood And Other Force Majeure, Amending For The Purpose Section One Hundred Ten Of Presidential Decree Numbered Fifteen Twenty-Nine And Section Five Of Republic

Act Numbered Twenty-Six), Executive Order No. 292 (Instituting The 'Administrative Code of 1987), Batas Pambansa Blg. 594 (An Act Limiting the Collection Of Contributions To The Assurance Fund Only Upon The Entry Of A Certificate Of Title In The Name Of The Registered Owner And Upon The Original Registration On The Certificate Of Title Of A Building Or Other Permanent Improvements On A Registered Land, Amending For The Purpose Certain Sections Of The Property Registration Decree), and Executive Order No. 649 (Reorganizing The Land Registration Commission Into The National Land Titles And Deeds Registration Administration And Regionalizing The Offices Of The Registrars Therein).

<sup>120</sup> Section 53 of the Property Registration Decree.

## Tenure and Ownership

The real estate industry is highly regulated in the Philippines. Ownership of private lands in the Philippines is reserved for Philippine citizens and corporations that are considered Philippine nationals.<sup>121</sup> This restriction is reflected in the 1987 Philippine Constitution as well as the Eleventh Regular Foreign Investment Negative List ("**FINL**").<sup>122</sup>

However, subject to the provisions of R.A. No. 4726 or the Philippine Condominium Act ("**Condominium Act**"), foreign nationals and foreign companies may own condominium units in condominium projects registered with the Philippine Housing and Land Use Regulatory Board.<sup>123</sup> Likewise, foreign nationals and foreign companies may also lease land, the terms of which are also regulated by law. As a rule, leasing of private land by foreign companies is allowed for a period of 25 years and renewable for another 25 years. However, the Philippine Investors' Lease Act allows for a maximum lease term of 50 years renewable for another 25 years, and the lease must be registered with the Philippine Department of Trade and Industry.

Transacting in real estate is primarily governed by the Civil Code of the Philippines (Republic Act No. 386) ("**Civil Code**"), where real estate<sup>124</sup> is captured under the greater concept of real property. The Civil Code provides for the nature of and general principles for obligations and contracts involving real property, such as sales and donations.

However, the public policy considerations surrounding real estate have resulted in the enactment of laws that are intended to ensure that the transactions affecting ownership and transfer of real estate are exclusive to Philippine nationals, such as the FINL, Commonwealth Act No. 108 (or the Anti-Dummy Law), and the Condominium Act.

<sup>121</sup> Article XII, Sections 2, 3 and 7 of the 1987 Philippine Constitution. As a general rule, only Filipino citizens and corporations or partnerships at least 60% of which equity must be owned by Filipinos are entitled to acquire land in the Philippines.

<sup>122</sup> The FINL was promulgated recently through Executive Order No. 65 pursuant to the Republic Act No. 7042 (Foreign Investments Act of 1991). The 11<sup>th</sup> FINL limits foreign equity ownership of private land to 40% consistent with Article XII, Sections 2, 3 and 7 of the 1987 Philippine Constitution.

<sup>123</sup> See also the FINL.

<sup>124</sup> In the Philippines, the term "real estate" encompasses the land and all those items which are attached to the land, including all the additions

## Types of Property

Under Philippine law, land, buildings, and other improvements are classified according to their actual use or the purpose for which the property is principally or predominantly utilised by the person in possession thereof.<sup>125</sup> If the properties are used for more than one purpose, they are classified on the basis of their principal or predominant use for taxation purposes.<sup>126</sup>

Residential and commercial properties and areas are designated as such by the Local Government Units through zoning ordinances. The distinction between the different classifications is also relevant for purposes of taxation, as commercial areas are generally assessed and taxed at higher values than residential areas.

### Residential

Residential land is land principally used for purposes of habitation.<sup>127</sup> Buildings and improvements constructed or made for the principal purposes of habitation are considered residential properties.<sup>128</sup>

### Commercial

Commercial land is land principally used for profit and is not classified as agricultural, industrial, mineral, timber, or residential land.<sup>129</sup> Buildings and improvements constructed or made for the principal purposes for profit are considered commercial property.<sup>130</sup>

### Industrial

Industrial land is land principally used for industrial activity as capital investment and is not classified as agricultural, commercial, timber, mineral or residential land.<sup>131</sup> Buildings and improvements constructed or made for the principal purposes of industrial activities are considered industrial property.<sup>132</sup>

or improvements on, above, or below the ground. See Section 3(c) of the Republic Act No. 9646.

<sup>125</sup> Section 217 of the Republic Act No. 7160 Local Government Code ("**Local Government Code**").

<sup>126</sup> Section 6(A)(2)(a)(1) of the Bureau of Local Government and Finance Manual on Real Property Appraisal and Assessment Operations.

<sup>127</sup> Section 199(u) of the Local Government Code.

<sup>128</sup> *Ibid*, Sections 199(u) and 217.

<sup>129</sup> *Ibid*, Section 199(i).

<sup>130</sup> *Ibid*, Sections 199(i) and 217.

<sup>131</sup> *Ibid*, Section 199(n).

<sup>132</sup> *Ibid*, Sections 199(n) and 217.

## Investing in Philippines

From 2010 to 2018, the Philippines experienced a house price boom, with prices of real estate in Makati, the central business district of Metro Manila, rising by 125% (77% inflation-adjusted).<sup>133</sup> While the pandemic has slowed down the economy, there are bright spots in the Philippine economy that will favourably impact the real estate industry in the Philippines. The Philippine peso has continuously strengthened, gaining approximately 12.7% against the U.S. dollar, from an exchange rate of Php 53.986 = US\$1 in September 2018 to PHP 47.901 = US\$1 in May 2021.<sup>134</sup> As one of the world's largest remittance recipients, with 10.2 million Philippine Overseas Foreign Workers (OFWs) living and working in 210 countries and territories worldwide, the Philippines continues to receive cash remittances, e.g., US\$29.9 billion (or about 8.3% of GDP) in 2020.<sup>135</sup> Approximately 60% of remittances go directly or indirectly to the real estate sector, according to the World Bank, particularly, the low-end to mid-range residential property market, housing projects and mid-scale subdivisions in regions near Metro Manila, such as Cavite, Batangas, and Laguna Provinces. Amidst the purchasing power generated from remittances, the country has a housing shortage of about 4 million units, according to the Subdivision and Housing Developers Association (SHDA). Moreover, gross rental yields in Metro Manila remain good, ranging from 7.01% on the very smallest condominium units of 45 sqm to 7.16% on 80 sqm condominiums, although these yields are before taxes and other expenses.<sup>136</sup>

Amidst the effects of the pandemic, relatively stricter regulations persist in the Philippines. The 1987 Philippine Constitution expressly limits the ownership of private lands to individuals, corporations, or associations who are qualified to acquire and hold public domain land, i.e. Philippine citizens and Philippine corporations. For corporations, the FINL limits foreign equity to 40%. The Condominium Act likewise restricts foreign ownership to an aggregate of up to 40% ownership in the land and only for specific areas in a building.

Non-compliance with the nationality requirements exposes the officers of corporations that engage in industries and activities restricted to Philippine citizens

(such as the ownership of land) to the risk of being penalised and imprisoned under the Anti-Dummy Law.

### (i) Structuring Investments

Foreign individuals and entities can employ a variety of ways to invest in Philippine real estate, a few of which are discussed below.

First, foreign nationals and foreign companies may acquire a minority interest (capped at 40%) in a domestic corporation, which can own private property. The Supreme Court of the Philippines is cognisant of the schemes used by corporations to evade the nationality requirements, such as corporate layering and use of dummies. It has thus previously looked into these schemes, particularly when there is doubt as to the actual ownership of the domestic corporation.<sup>137</sup> Any corporation violating any of the provisions of the Anti-Dummy Law (as discussed above) shall, upon proper court proceedings, be dissolved.<sup>138</sup> Any person who knowingly aids, assists, or abets in the planning, consummation, or perpetration of any of the acts that constitute violations of the Anti-Dummy Law shall be punished by imprisonment.<sup>139</sup> The president, managers or persons in charge of corporations, associations, or partnerships that commit such violations shall be criminally liable, and any person, corporation, or association shall, in addition to the penalty imposed herein, forfeit such right, franchise, privilege, and the property or business enjoyed or acquired in violation of the Anti-Dummy Law.

Second, foreign individuals can invest in infrastructure or property development. The foreign corporation can lease land where infrastructure or buildings may be developed and operated by foreigners unless the specific operations are subject to industry-specific foreign ownership restrictions. Generally, foreigners may have 100% interest in buildings and other forms of real property other than land.

Third, foreign individuals and foreign corporations can purchase or lease condominium units, whether residential or commercial, owned by condominium corporations that are, in turn, mandated to observe the required foreign equity limit of 40%.

<sup>133</sup> GlobalPropertyGuide article titled "[The Philippines' housing market is in free-fall, amidst a struggling economy](#)" (5 July 2021).

<sup>134</sup> *Ibid.*

<sup>135</sup> *Ibid.*

<sup>136</sup> *Ibid.*

<sup>137</sup> *Roy III v. Herbosa*, GR No. 207246, April 18, 2017; *Narra Nickel Mining and Development Corp. v. Redmont Consolidated Mines Corp.*, G.R. No. 195580, January 28, 2015, 748 SCRA 455, 478 (2015).

<sup>138</sup> Section 3 of the Commonwealth Act No. 108, as amended.

<sup>139</sup> *Ibid.*, Section 2-A.

## (ii) Taxation

In addition to the costs of acquiring or leasing real estate, an investor should consider the taxes levied on certain properties or transactions before entering into contracts for the purchase, sale or lease of these properties. The taxes usually associated with transactions in real estate are as follows:

### **Capital gains tax**

Capital gains tax ("**CGT**") is generally levied by the national government on the sale, exchange, or other disposition of real property classified as capital assets and located within the Philippines. This tax covers both land and improvements made on land. CGT exists to allow the Philippine government to tax the gains that the seller or owner of the real property will realise from the transaction.

A 6% CGT is applied to the gross selling price of the real property or its fair market value, whichever is higher.

### **Income tax, value added tax, and percentage tax**

Income tax, value added tax ("**VAT**"), and percentage tax are levied on real property that is held as an ordinary asset, i.e., held by a seller in the ordinary course of trade or business or a seller involved in the real estate business.<sup>140</sup>

Income tax is levied on the income realised from the sale, lease, or other disposition of property, while VAT is a consumption tax imposed on the sale, barter, exchange or lease of goods and properties at every stage of the distribution process.<sup>141</sup> Income tax is taxed at a graduated rate as applied to the income from the transaction, while VAT is taxed at a rate of 12% of the gross selling price.

Generally, any person whose sales or receipts are exempt from the payment of value-added tax and who is not a VAT-registered person shall pay a tax equivalent to 3% of his gross quarterly sales or receipts.<sup>142</sup> Sale or lease of goods or properties, the gross annual sales and/or receipts that do not exceed the amount of PhP 3 billion is exempt from VAT.<sup>143</sup>

<sup>140</sup> Sections 106 and 116 of the Republic Act No. 8424 (National Internal Revenue Code).

<sup>141</sup> Section 4-105-2 of the Revenue Regulation No. 16-2005.

<sup>142</sup> Section 116 of the Republic Act No. 8424 (National Internal Revenue Code).

### **Real property tax**

Real property tax ("**RPT**") is a tax levied by the Local Government Units on the ownership or use of real property.

Real property is taxed at a rate of 1% or 2% of the current fair market value of the property, depending on where it is located. Additionally, the Local Government Units can levy a special education fund at 1% of the assessed value of the real property.

It is vital to pay RPT, which attaches to the property. Failure to do so will lead to enforcement actions by the Local Government Units. For the collection of the basic real property tax, the local government unit concerned may avail themselves of the remedies by administrative action through levy on real property or by judicial action.<sup>144</sup>

### **Documentary stamp tax**

Documentary stamp tax ("**DST**") is a tax on documents, instruments, loan agreements, and papers evidencing the acceptance, assignment, sale, or transfer of an obligation, right, or property thereto.<sup>145</sup> In transactions involving real property, DST is usually levied on contracts of sale or lease.

For contracts of sale, the DST is PhP 15 per PhP 1,000 or fractional part thereof in excess of PhP 1,000.

For contracts of lease, the DST is PhP 6 for the first PhP 2,000, and an additional PhP 2 for every PhP 1,000 or fractional part thereof in excess of PhP 2,000.

### **Transfer taxes**

Since gratuitous transfers of real property are not subject to CGT, DST, or income tax, transfer taxes are imposed by the national government on the privilege of being able to choose to whom property is transferred. This measure is intended to safeguard against parties hiding commercial transactions behind gratuitous transfers to escape taxation. Under Philippine law, there are two kinds of transfer taxes, namely estate tax and donor's tax. Estate tax is levied on the privilege of transferring

<sup>143</sup> *Ibid*, Section 109(CC).

<sup>144</sup> Section 256 of the Republic Act No. 7160 (Local Government Act of 1991).

<sup>145</sup> Section 173 of the Republic Act No. 8424 (National Internal Revenue Code).

property gratuitously upon the death of the owner. Under the Republic Act No. 10963, or the Tax Reform for Acceleration and Inclusion Act ("**TRAIN Law**"), the estate tax is at a flat rate of 6%, while donor's tax is levied on the privilege of transferring property gratuitously during the lifetime of the owner. Under the TRAIN Law, donor's tax is also at a single rate of 6%.

## Conclusion

As the country recovers from the effects of the pandemic, the real estate industry is well-positioned to address the demands of economic recovery. Against the massive infrastructure projects of the government, which were continued in full swing during the pandemic, the country's 110-million strong population of young, highly literate, and dynamic consumers, and its 2.2 million overseas Filipino workers, provide a stable and robust market with strong medium and long term prospects. As the country finds itself in the cusp of full recovery, investors must find the opportune time to make investments right before the boom.

## Our Deals

- Assisted the country's top real estate developer in acquiring several parcels of land, which are separately owned by various sellers. The acquired lots will be developed for residential or mixed-use real estate project.
- Advised a potential foreign investor regarding the structure for development of a potential township project.
- Advised a top real estate company regarding agrarian laws in relation to the potential acquisition of raw land for a potential development project.
- Conducted due diligence on several parcels of land as potential acquisition targets for the real estate units of various conglomerates.
- Advised a Filipino conglomerate in relation to a potential acquisition (with a Japanese joint venture partner) of a property for a residential/mixed use development in Laguna.
- Revised a deed of restrictions for a condotel project in Boracay.
- Drafted a joint venture agreement relating to the potential development of a beachfront property.
- Represented a chain of F&B outlets in negotiating an agreement with a nationwide operator of malls that grants rights of first refusal for the lease of commercial spaces for F&B outlets in the mall operator's malls across the country.
- Represented a high net worth individual in relation to the acquisition of penthouse units in a high-end condominium development in Makati City, Philippines.
- Advised buyers of lots in residential subdivisions in relation to disputes before the Housing and Land Use Regulatory Board.
- Assisted one of the country's top real estate developers in the merger of two publicly listed subsidiaries with an asset value of over PhP 25 billion.
- On multiple occasions, conducted due diligence on several parcels for one of the country's top power generation groups in connection with its planned acquisition of these parcels of land as sites for the construction of its power plants.
- Assisted a foreign property owner in selling a condotel at the heart of the Makati Central Business District.
- Conducted title checks and tracebacks for individual and bulk purchasers of various real estate properties, including condominium units, vacant lots, and industrial properties. Served as counsel for an operator of shared office spaces in relation to leasing units in multiple locations all over the country.

# SINGAPORE

**Real estate in Singapore has always been a preferred choice for long-term investments due to the city-state's regional hub status and stable growth prospects. With land being a scarce asset, Singapore has become one of the most expensive countries in the world to own real property.**

With the real estate industry so intertwined with the lives of the people, it is very closely monitored by the government and has been subject to many revisions in legislation and public policy.



## System of Registration

Prior to 1956, the system of Land Registration in Singapore was under the Registration of Deeds Act, a model of the common law ("**Deeds System**") where legal title in land was transferred when a deed is signed, sealed and delivered. Under the Deeds System, registration of legal title was not compulsory and was for the purpose of establishing priority and admissibility. Under this system, every conveyance of property would require a laborious (and repetitive) physical investigation of the deed which would have to be scrutinised to inspect the "good root" of title.

The passing of the Land Titles Act in 1993 effectively brought most of the land in Singapore under the Torrens system managed by the Singapore Land Authority, which enforced a structure of compulsory registration to pass title.<sup>146</sup> The Land Titles (Torrens) system comprised a definitive land register that is available online. This essentially dealt away with the arduous task of a physical title investigation under the Deeds System. More pertinently, every successful registration of a title would conclusively grant good title to the registered proprietor, creating an "indefeasibility of title".

## Applicable Law

The main legislations which govern real estate transactions in Singapore are the Land Titles Act ("**LTA**"), Land Titles (Strata) Act ("**LTSA**"), Conveyancing and Law of Property Act ("**CLPA**"), Planning Act, Housing and Development Act, Housing Developers (Control and Licensing) Act, Residential Property Act, Building Maintenance and Strata Management Act and the Executive Condominium Housing Scheme Act.

## Tenure and Ownership

The tenure of land in Singapore may be broadly classified into three main categories: estate in fee simple (or freehold which can be held forever), estate in perpetuity (which is also a freehold tenure but is derived from statute and subject to terms under the State Lands Act) and leasehold estates (e.g. 30-year, 99-year or 999-year leasehold estates).

Given the scarcity of land and an ever-increasing population, most properties in Singapore enjoy a leasehold of 99 years. This implies that the estate

<sup>146</sup> The project to convert all land to the Torrens System was completed on 31 December 2002, although it should be noted that there are still pockets of land held under the old common law system which are not

intended to be compulsorily converted to the Torrens System (Tan Sook Yee's Principles of Singapore Land Law, 4th Edition 2019 at 13.6).

would revert to the State at the expiry of its tenure without compensation. This serves to renew real estate resources and to maintain a modern civilisation. Irrespective of the type of estate held, it is noteworthy that all land may be acquired by the State under various statutes including the Land Acquisition Act ("**LAA**") under which compensation which is determined by the government. The matters to be considered in determining the quantum of compensation is set out in section 33 of the LAA.<sup>147</sup> Further, any development of land is subject to planning controls under the Planning Act.

It is also noteworthy that, unique to Singapore, a majority<sup>148</sup> of owners in a strata-titled development may compel a collective sale on the remaining minority who do not wish to do so under the growing "en-bloc" phenomenon pursuant to Part VA of the LTSA.

It would appear then that while ownership of land in Singapore is highly sought after, it may not necessarily be an unencumbered prerogative on its own, nor as perpetual a matter as it seems.

## Types of Property

### (i) Residential

Investors looking at Singapore should note that residential properties are classified under two categories: public and private properties. Public housing, also known as Housing and Development Board ("**HDB**") flats, are subsidised properties built by the government of Singapore. 80% of the residents in Singapore reside in HDB flats,<sup>149</sup> which are cheaper alternatives to private housing. Eligible households may also qualify for various schemes and grants from the government to finance the purchase of such flats. Various eligibility conditions apply when purchasing a new HDB flat, but, notably, a foreigner will generally not be eligible to purchase a HDB flat.

### (ii) Commercial

Commercial properties are any properties used for anything other than for a residential or industrial purpose. Common examples would include office buildings, retail spaces, co-working spaces etc.

<sup>147</sup> Section 34 of the LAA sets out the matters to be disregarded in determining the quantum of compensation.

### (iii) Industrial

Industrial properties in Singapore are generally managed and administered by the JTC Corporation ("**JTC**"). Industrial properties can be directly allocated by JTC to industrialists in Singapore (by application), by way of tender, or purchased by way of private treaty from an existing industrialist. Developers with a track record or licensed trusts/investment funds (such as real estate investment trusts ("**REITs**")) may also qualify for the Third-Party Facility Provider Scheme and participate in the development of industrial land, which would eventually be leased out to industrialists.

For a direct allocation of land to an industrialist, JTC typically requires that a minimum investment criterion be met, and the development be completed within a prescribed time period, before the lease over the JTC land is issued to the industrialist. For a private treaty purchase, JTC's prevailing policies for its consent to the transfer or assignment of the property will also apply. Such policies include a prohibition period against the sale or transfer of the property for a period of at least five to 10 years, depending on the remaining lease tenure.

Compliance with JTC's other prevailing policies are required in the operation of JTC properties. Examples would include the requirement to apply for subletting approvals (for end-user lessees), or for a minimum anchor subletting quantum (for third-party facility providers).

One of the policy intents of recent times is that land allocated for industrial use should not be for speculative purposes. Seller's Stamp Duty will also apply to industrial land in Singapore (see sub-section (ii) below under the section on *Investing In Singapore*).

## Investment through an Asset Purchase

Investments are commonly done in Singapore through the sale and purchase of an asset, which is the traditional form of acquisition where the purchaser buys the real estate asset from the vendor at a determined price.

Buyer's Stamp Duty ("**BSD**") is payable generally for all kinds of properties. For residential properties, in addition to BSD, purchasers and vendors may also be liable to

<sup>148</sup> Where a property is 10 years or older, a "majority" would be 80% of the subsidiary proprietors of the lots with not less than 80% of the share values and not less than 80% of the total area of all the lots.

<sup>149</sup> [HDB Key Statistics FY2019/2020](#).



bear Additional Buyer's Stamp Duty (depending on the profile of the buyer) and Seller's Stamp Duty ("**SSD**") (depending on the holding period of the property) respectively. Vendors may also be liable to bear SSD for industrial properties.

Beyond these stamp duties, purchasers may be liable to bear Goods and Service Tax ("**GST**") for non-residential properties.

These will be elaborated on in greater depth in the sections below.

### **Charges on Increase in Value of Land**

#### *Existing regime – Development Charge and Differential Premium*

Currently, purchasers who acquire leasehold properties governed by State Leases (i.e. those issued by the government) and who wish to enhance the value of the land (for example, re-development with an intensification of the land) might also be liable to pay a differential premium ("**DP**")<sup>150</sup>. In such a case, the purchaser must apply to SLA for the lifting of any title restrictions in the State Lease and must pay the DP before commencing development works. DP serves to remove the original "title restriction" for the approved use and/or intensity of the land and its computation is based on a Development Charge ("**DC**")<sup>151</sup> table of rates.

Where the tenure of the land is leasehold, the DC rates will be adjusted to reflect the remaining tenure of the land using the Leasehold Table. However, in suitable cases where the State Title contains special restrictions, the DP payable may be determined using other methods and the resultant amount could be higher than the rate determined by the DC table. Where the use stipulated in the title restriction does not fit into any of the Use Groups in the DC Table, the DP payable will be determined by the Chief Valuer on a case-by-case basis.

Where planning permission is granted for properties which are not subject to DP, the Urban Redevelopment

Authority may impose DC or, for permissions which are limited in time, a temporary development levy.

On 10 May 2021, the Land Betterment Charge Bill was passed in Parliament to provide for the imposition of a tax (called a Land Betterment Charge or "**LBC**") on the increase in the value of land resulting from a chargeable consent given in relation to land. The Land Betterment Charge Act 2021 was gazetted on 8 June 2021 but has yet to come into force as at the date of publication of this Guide. It will come into operation on a date gazetted by the Minister for Law. The LBC will replace the DC, DP, and temporary development levy and would be payable to a single entity, consolidating these charges and taxes under SLA. The principles for computing LBC and the proposed rates of charging remain largely unchanged from the current regime.<sup>152</sup>

### **Investment through a Share Purchase**

Where the real property involved is substantial (e.g. an entire building), it is increasingly common for the sale and purchase to be by way of the disposition of the shares in a Special Purpose Vehicle ("**SPV**") which was previously incorporated solely to hold the property. The stamp duty payable on the instrument of transfer of the sale of the shares is 0.2% of the higher of (i) the consideration attributed to the sale of the shares; or (ii) the net asset value attributable to the sale of the shares.

In some circumstances, purchasers may also be liable to pay Additional Conveyance Duties. This will be elaborated on in greater depth in the sections below.

### **Investing in Singapore**

In considering whether to invest in real property in Singapore, investors should be cognisant of certain statutory restrictions and tax regiments that may apply to them before they decide to commit. We set out in broad strokes the salient ones in the sections below.

<sup>150</sup> Refer to information on "Lease Management" available on SLA's website, [here](#).

<sup>151</sup> It is noteworthy that where the tenure of the land is leasehold, the DP rates will be adjusted to reflect the remaining tenure of the land using the Leasehold Table. For details, refer to SLA's Differential Premium System, link [here](#). However, in suitable cases where the State Title contains special restrictions, the DP payable is likely to be

determined using other methods and the resultant amount could be higher than the rate determined in the DC table.

<sup>152</sup> For details on this new LBC framework, refer to our Client Update titled "Land Betterment Charge Bill Introduced to replace Development Charge and Differential Premium", available [here](#).

## (i) Capacity

There are no restrictions for foreign individuals or entities to purchase *commercial* or *industrial* properties in Singapore. However, foreigners will need to apply to the government for approval to purchase certain types of residential properties<sup>153</sup> pursuant to the Residential Property Act ("RPA")<sup>154</sup>.

Some of these restricted residential properties include vacant residential land, terrace or semi-detached houses, bungalows, and strata landed houses (which are not within an approved condominium development under the Planning Act).

## (ii) Tax

### Buyer's Stamp Duty

Buyer's Stamp Duty ("BSD") is payable on the purchase of all real property in Singapore, and is computed on the purchase price as stated in the document to be stamped or market value of the property (whichever is the higher amount).

The current BSD rates are as follows:

Purchase price/market value (whichever is higher)	New BSD Rates <sup>a</sup>	
	For residential component	For non-residential component
First S\$180,000	1%	1%
Next S\$180,000	2%	2%
Next S\$640,000	3%	3%
Exceeding S\$1,000,000	4%	

<sup>a</sup>BSD is to be rounded down to the nearest dollar

### Additional Buyer's Stamp Duty

The Additional Buyer's Stamp Duty ("ABSD") was introduced on 7 December 2011, to be paid by certain groups of people who acquire residential properties on or after 8 December 2011, as part of a slew of property cooling measures at that time. ABSD rates were revised

<sup>153</sup> A foreign person means any person who is not a Singapore Citizen, Singapore company, Singapore limited liability partnership or Singapore Society. It is noteworthy that under this definition, a foreign company or a foreign society that is incorporated outside Singapore or though incorporated in Singapore, has directors or members who are not

and announced on 11 January 2013 for the purchase of property on or after 12 January 2013. Whether ABSD is payable and the rate of ABSD depends on the profile of the buyer – whether the buyer is an individual or non-individual, his residency status, and the count of residential properties owned by him. The ABSD rates are to be applied to the actual price paid or the market value of the property, whichever is higher, and it is to be paid on top of the BSD.

As property prices had increased sharply by 9.1% in 2017,<sup>155</sup> the government announced a further increase in ABSD rates for most purchasers except Singapore Citizens ("SC") and Singapore Permanent Residents ("SPR") buying their first residential property on 5 July 2018.

The revised ABSD rates are set out below:

Profile of buyer	Previous ABSD Rates (between 12 January 2013 to 5 July 2018)	Revised ABSD Rates (options issued on or after 6 July 2018)
SC buying 1 <sup>st</sup> residential property	Not applicable	Not applicable
SC buying 2 <sup>nd</sup> residential property	7%	12%
SC buying 3 <sup>rd</sup> and subsequent residential property	10%	15%
SPR buying 1 <sup>st</sup> residential property	5%	5%
SPR buying 2 <sup>nd</sup> and subsequent residential property	10%	15%
Foreigners (FR) buying any residential property	15%	20%
Entities buying any residential property	15%	25% (may be remitted for housing developers (licensed and unlicensed), subject to conditions) Additional 5% for housing developers (licensed and unlicensed) (cannot be remitted)

Nationals and permanent residents of Iceland, Liechtenstein, Norway, and Switzerland, as well as nationals of the United States of America, shall be accorded the same stamp duty treatment as Singapore citizens under the respective Free Trade Agreements signed with these countries.

Housing developers will be able to obtain remission on 25% of the ABSD if they are in the business of construction and sale of housing units, and if they are able to sell all units in the new development built within three years (for unlicensed developers building four or less units) or five

Singapore citizens would also be considered a foreign person for the purposes of this definition.

<sup>154</sup> Chapter 274.

<sup>155</sup> MAS media release titled ["Raising Additional Buyer's Stamp Duty Rates and Tightening Loan-to-Value Limits to Promote a Stable and Sustainable Property Market"](#) (6 July 2018).

years (for licensed developers building five or more units). Additional Conveyance Duties for acquisition of shares in residential property-holding entities has also been correspondingly increased such that the same rate of duty as ABSD applies.

### *Seller Stamp Duty*

The Government re-introduced the Seller's Stamp Duty ("**SSD**") on short-term transactions for residential properties in February 2010 to curb short term speculative behaviour in the residential property market. SSD is payable by sellers on residential property purchased on or after 20 February 2010 and sold within a certain duration.

There were several rounds of revision in the SSD rate. Currently, sellers would pay 12% for properties sold in the first year of their purchase, 8% for those sold within the second year of purchase, and 4% for those sold in the third year.

SSD for industrial properties was also imposed on 11 January 2013 for industrial properties which are acquired on and after 12 January 2013 and disposed of within three years. For those selling industrial properties in the first year, they would pay 15%, properties held between one to two years – 10%, and properties held between two to three years – 5%. Industrial Properties held for more than three years would not incur SSD. Payment of SSD is exempted if it is a sale by the housing developer or an industrial property developer, when selling their units.

### *Goods and Services Tax (GST)*

GST is payable for, *inter alia*, the sale and lease of non-residential properties and the supply of movable furniture and fittings (when a residential property is furnished).<sup>156</sup> Where the contract is silent on the payment of GST and the contract is subject to the Law Society's Conditions of Sale 1999, 2012, or 2020, the liability to pay GST is on the purchaser.

Presently, GST is at 7% of the consideration but this shall be raised to 9% sometime between 2022 to 2025.<sup>157</sup>

<sup>156</sup> Information concerning GST on sale and lease of real estate is available on IRAS website [here](#).

<sup>157</sup> [Singapore Budget Speech 2021](#), announced by Deputy Prime Minister, Mr Heng Swee Keat on 16 February 2021.

In an asset or share purchase, there is a possibility where GST can be exempted. GST can be exempted when a sale of assets or shares is treated as an out of scope supply if the sale qualifies as a transfer of business as a going concern, provided it fulfils the conditions<sup>158</sup> issued by the Inland Revenue Authority of Singapore ("**IRAS**"). This is where the vendor represents to IRAS that the purchaser would use the property to carry on the same kind of business as that carried out by the Vendor, and hence IRAS should treat it as an "excluded" GST transaction. It should be noted that where the quantum of the sale consideration is large and the GST amount is significant, it is advisable to seek a ruling from the Comptroller of Goods and Service Tax to confirm the GST treatment of the sale.

### *Property Tax*

This tax is payable by the registered proprietor of the property, and is determined based on the annual value of the property as registered with the local tax authority, IRAS.

### *Withholding Tax*

For non-SC and companies who are not tax residents in Singapore and who have been assessed as "property traders", withholding tax of 15% of the entire sale price will have to be paid. If the buyer is unsure whether the seller is considered a "property trader", the buyer (or his solicitor) may wish to ask for a letter of confirmation from the seller stating that he or the company has not been treated as a property trader for Singapore income tax purposes.<sup>159</sup>

### *Additional Conveyance Duties*

For investors looking at a share sale or a purchase of a company, Additional Conveyance Duties ("**ACD**") shall also be levied on qualifying acquisitions and disposals of equity interests in property-holding entities whose primary tangible assets are Singapore residential properties. Such entities shall have at least 50% of its total tangible assets comprising prescribed immovable properties<sup>160</sup> in Singapore. The purpose is to address the stamp duty rate differential between direct acquisition or

<sup>158</sup> For more information, refer to the [IRAS e-Tax Guide](#) for more information.

<sup>159</sup> Information concerning "Payments For The Purchase Of Real Property From Non-Resident Property Traders" is available on the IRAS website [here](#).

<sup>160</sup> Section 5, Stamp Duties (Section 23) Order 2017.

disposal of residential properties and indirect acquisition or disposal of residential properties via an entity.<sup>161</sup>

Under the ACD provisions, a qualifying acquisition or a disposal of equity interest in a property-holding entity will be treated as a transfer of interest *in addition* to the share transfer duty which may apply on the acquisition or disposal of equity interest in the company.

There is also the possibility of additional conveyance duties being levied on purchasers and vendors. This very much turns on whether or not the target company and its subsidiaries have substantial residential property holdings, and if so, whether the purchaser or vendor is a significant owner (i.e. holding directly or indirectly more than 50% equity interest or voting power in the target property holding entity).<sup>162</sup>

### *Financing*

The activities and operations of financial institutions granting banking and/or credit facilities for property financing are closely monitored and regulated by the Monetary Authority of Singapore ("**MAS**") which act in a supervisory capacity and also as a banker and financial advisor to the government.

Due consideration should be given, in particular, to MAS Notices 632 and 645. The former regulates the loan quantum that can be granted to a borrower for the purchase of residential properties in Singapore or where the credit facility is secured by residential property, while the latter governs the assessment of a borrower's ability to repay the loan. MAS Notice 645 is a far-reaching set of guidelines which seeks to regulate all loans taken in Singapore for properties in Singapore and even outside Singapore. In a nutshell, financial institutions have to take into account the Total Debt Servicing Ratio ("**TDSR**") of a borrower. MAS Notice 645 applies to indirect and part share purchases of properties as well (e.g. the purchase of shares in an SPV that holds the property). The general rule of thumb is that the total debt obligations of a borrower cannot exceed 60% of its gross monthly income. Property loans granted in excess of the TDSR threshold of 60% should only be granted on an exceptional basis and financial institutions should clearly document the basis for granting property loans in excess of this 60% threshold.

## **Conclusion**

The real estate industry in Singapore is a dynamic and constantly rejuvenating scene in light of the insatiable demand for real property. At the same time, investors would do well to keep abreast of the legal developments, tax regimes, and statutory guidelines which govern their ability to finance these investments and their tax liabilities.

## **Our Deals**

- Acted for OUE Hospitality REIT Management Pte. Ltd. and OUE Hospitality Trust Management Pte. Ltd. on the proposed merger of OUE Commercial Real Estate Investment Trust and OUE Hospitality Trust by way of a trust scheme of arrangement ("**Proposed Merger**") in compliance with the Singapore Code on Take-overs and Mergers. The Proposed Merger was the largest merger between two real estate investment trusts/stapled trusts in Singapore. Following the completion of the Proposed Merger, the enlarged REIT became one of the largest diversified Singapore-listed REITs, with an overall asset size of approximately S\$6.8 billion. Rajah & Tann Singapore LLP advised the Managers of OUE Hospitality Trust on all aspects of the Proposed Merger, including the takeover, regulatory, financing and real estate aspects of the transaction.
- Acted in the acquisition of 3, 5 and 7 Fraser Street comprising of "Duo Tower" and "Duo Galleria" and "Andaz Singapore" for the aggregate sum of S\$2.54 billion from the wholly-owned subsidiaries of M+S Pte Ltd. Rajah & Tann Singapore LLP acted for Gaw Capital Partners in the S\$1.6 billion acquisition by a consortium, comprising Gaw Capital Partners and Allianz Real Estate, of the entire issued and paid-up share capital from Ophir-Rochor Commercial Pte. Ltd. and the financing of approximately S\$945 million syndicated green loan financing for the acquisition, and acted for Hoi Hup Realty Pte. Ltd in the S\$475 million acquisition (the highest total price achieved for a standalone hotel transaction in Singapore) of the entire issued and paid-up share capital of Ophir-Rochor Hotel Pte. Ltd. holding "Andaz Singapore" for which a S\$332.5 million green club loan was obtained.

<sup>161</sup> [IRAS e-Tax Guide - Stamp Duty: Additional Conveyance Duties on Property Holding Entities \(Third Edition\).](#)

<sup>162</sup> *Ibid.*

- Advised social media giant Facebook on its S\$1.4 billion first-in-Asia data centre in Singapore. The landmark Singapore data centre is located in Tanjong Kling (formerly known as Data Center Park) and will be an 11-storey, 1.8 million square feet facility estimated to start operations in 2022 and is completely powered by renewable energy and the new StatePoint Liquid Cooling System, which minimises power and water consumption. The negotiations involved Jurong Town Corporation, Public Utilities Board, Info-communications Media Development Authority, and the Economic Development Board.
- Acted for Golden Compass (BVI) Ltd. in the S\$1.025 billion acquisition of the entire issued and paid-up share capital of Oxley Beryl Pte. Ltd., the registered proprietor of the property situated at 30 Raffles Place, Singapore and known as "Chevron House".
- Acted for Carmel Development Pte. Ltd., a joint venture between Hong Leong Holdings Limited, Hong Realty (Private) Limited and Guocoland Limited, in the S\$980 million acquisition of all the strata lots and common property comprised in the 290-unit freehold residential development known as Pacific Mansions in River Valley, Singapore. This acquisition of Pacific Mansions is the highest transacted collective sale in more than a decade and is the second-highest transacted collective sale in Singapore.
- Acted for Viva Industrial Trust Management and Viva Industrial Business Trust on the proposed S\$936.7 million merger of ESR-REIT and Viva Industrial Trust, by way of a trust scheme of arrangement with a combined S\$3 billion in assets. The proposed merger, a first in Singapore between two REITs, created Singapore's fourth largest industrial REIT. The real estate portfolios of ESR-REIT and Viva Industrial Trust cover properties, predominantly for business parks and other industrial uses. In connection with the merger, the firm also acted for Viva Investment Management on the proposed sale of shares in Viva Industrial Trust Management to ESR Funds Management.
- Acted as counsel for CWT Pte. Limited. (a wholly-owned subsidiary of Chinese conglomerate HNA Group) and its related companies (collectively, "CWT") in the sale of five logistics properties in Singapore for an estimated sale price of S\$730 million to Mapletree Logistics Trust. The sale price excludes the estimated upfront land premium for the balance lease terms payable by Mapletree Logistics Trust to Jurong Town Corporation of S\$48.3 million. Upon completion of the sale, CWT will leaseback the properties from Mapletree Logistics Trust.
- Acted for CapitaLand / CRL Realty Pte Ltd in the S\$728 million purchase of all the strata lots and common property in the residential development known as Pearl Bank Apartments, situated at 1 and 1A Pearl Bank, Singapore, through a private treaty collective sale. The site also obtained a top up of a fresh 99-year leasehold interest.
- Acted in the S\$610 million collective sale of all the strata lots and common property in the residential developments known as Goodluck Garden, Singapore. The development is acquired by Qingjian Perennial (Bukit Timah) Pte. Ltd. – a joint venture between Perennial Real Estate Holdings and Qingjian Group. Goodluck Garden is a freehold residential development and has a total site area of 33,457.2 square metres and comprises 210 units.
- Acted for data centre start-up AirTrunk in the Singapore real estate aspects of its S\$450 million debt and equity financing and acquisition of land to build its first state-of-the-art facility, which will be the largest carrier neutral 60+ megawatt (MW) hyperscale data centre in Singapore.
- Acted for Boustead Industrial Fund Management (as fund manager) in Boustead Industrial Fund's ("BIF") acquisition of a portfolio of real estate assets and interests comprising investments in business parks, logistics, and industrial properties. BIF has an investment mandate to acquire, invest in, and manage certain real estate investments, and is sponsored by Boustead Projects Limited ("BPL"). The transaction involved BIF acquiring 10 properties and BPL's interest in certain entities which hold a total of three properties for a consideration of S\$422.4 million from BPL and its subsidiaries, joint ventures, and associated companies. The properties are situated at Changi North Way, Boon Keng Road, and Seletar Aerospace Heights, amongst others, and they have an aggregate net lettable area of 1,748,105 square feet, and a committed average occupancy rate of 99%.

- Acted for the purchaser in the acquisition of the property situated at 21 Choa Chu Kang North 6, Singapore 689578 and known as "YewTee Point" from HSBC Institutional Trust Services (Singapore) Limited (in its capacity as trustee of Frasers Centrepoint Trust) for a sale price of S\$220 million.
- Acting for Lucas Real Estate Singapore in the ongoing sale of the balance 30-year leasehold interest in 1 Fusionopolis View Singapore 138577 together with the iconic Sandcrawler building erected on it for S\$175.8 million. The Sandcrawler in the one-north district is modelled after the fictional vehicle featured in the Star Wars franchise and was opened in 2013 with George Lucas and Prime Minister Lee Hsien Loong in attendance.
- The acquisition of the entire issued and paid-up share capital in a special purpose vehicle which holds a high specification light industrial building known as Admirax for an estimated consideration of S\$142 million. The industrial building, known as Admirax, is situated on a site with a 60-year leasehold tenure.

# THAILAND

*Thailand's real estate marketing has been struggling during this COVID-19 outbreak. While developers wait for an end to the COVID-19 outbreak, some believe that the pandemic may bring opportunities to foreigners to invest.*

The Thai Government has recently announced an opportunity for foreigners to own up to 70 – 80% of the total area of all condominium units (as opposed to 49%) and to enter a long-term lease of residential property up to 90 years (as opposed to 60 years).



Due to the nation's thriving hospitality sector and its status as a regional business and tourism hub, Thailand continues to be a popular choice for real estate investment.

## System of Registration

Under Thai law, transfers in ownership of land (or land and building) ("**Immovable Property**") must be registered in writing with a competent official at the local Land Office which has jurisdiction over the relevant Immovable Property, failing which the transfer of ownership over such Immovable Property will be void or incomplete (as the case may be).<sup>163</sup>

Similarly, a lease with a tenure of more than three years is also required to be registered at the local Land Office, otherwise such lease will be enforceable only for three years.<sup>164</sup>

To proceed with registration, parties to such transactions must submit an application and the requisite documents and pay the applicable government taxes and fees (discussed in detail below under the section on "Tax" to the competent Land Office.

The location for registration of such transfers or lease transaction is the local Land Office having authority in the area where the Immovable Property is located. For Immovable Properties located in Bangkok, the registration location is the relevant district Land Office.

## Applicable Law

Land laws in Thailand include, among others, the Civil and Commercial Code, the Land Code 1954, Land Allocation 2000, the Condominium Act 1979, the Rental of Immovable Property for Commerce and Industry Act 1999, the Eastern Special Development Zone Act 2018, and the Building Control Act 1979.

## Tenure and Ownership

### Ownership

Under Thai law, land ownership is evidenced by a land title deed or *Chanote* issued for ownership of land plots under the Land Code 1954. For condominium units, the ownership is evidenced by the condominium unit title deed issued under the Condominium Act 1979. Land title deeds and condominium unit title deeds specify details

<sup>163</sup> Sections 456 and 1299 of the Civil and Commercial Code.

<sup>164</sup> Section 538 of the Civil and Commercial Code.

such as the ownership, boundaries, area measurements, and encumbrances of a particular land plot or condominium unit. In practice, an original copy of a land title deed or condominium unit title deed is kept at the relevant Land Office where the title transfer was registered, and the other copy is kept with the registered owner of the property.

Aside from the land title deed and the condominium unit title deed, which are indefeasible evidence of land and condominium unit ownership, there are also three basic rights of possession which are evidenced by a Confirmed Certificate of Use (*Nor Sor Saam Gor*), Certificate of Use (*Nor Sor Saam*), and Certificate of Possession (*Sor Kor Neung*).

## Lease

### *Lease for Residential Purpose*

Under Thai law, a lease is a contractual right. Generally, the maximum lease term of a residential property, as prescribed under the Civil and Commercial Code, is 30 years with an additional renewal lease term of up to 30 years. This must be registered as stated above under the section on "System of Registration".

### *Lease for Commercial and Industrial Purposes*

Under the Rental of Immovable Property for Commerce and Industry Act 1999, leases of an Immovable Property for commercial or industrial purposes can be for a term of more than 30 years but not exceeding 50 years, with an additional renewal lease term of up to 50 years. Similar to the above, leases for commercial or industrial purposes (of any duration) are also required to be registered at the competent Land Office, otherwise they will be void.

Therefore, it is commercially more advantageous to lease commercial or industrial properties, as compared to leasing residential properties.

Commercial and industrial properties may be leased up to a maximum of 100 years,<sup>165</sup> while residential properties may be leased up to a maximum of only 60 years. In addition, the Rental of Immovable Property for Commerce and Industry Act 1999 requires that the lessor of an Immovable Property to be leased for commercial or

<sup>165</sup> Sections 3 and 4 of the Rental of Immovable Property for Commerce and Industry Act 1999.

<sup>166</sup> Section 5 of the Rental of Immovable Property for Commerce and Industry Act 1999.

industrial purposes be the sole owner of such Immovable Property.<sup>166</sup> Unlike residential leases, leases for commercial or industrial purposes can be mortgaged to secure loans.<sup>167</sup>

### *Lease of Properties in the Eastern Economic Corridor (EEC)*

It is noteworthy that the Eastern Special Development Zone Act 2018 ("**EEC Act**") has been enacted for systematic development of the areas in the east of Thailand. In this respect, the provinces of Chachoengsao, Chonburi, and Rayong (and including any other areas as prescribed by the royal decree) are designated as the eastern special development zone.

The EEC Act prescribes special measures to facilitate and promote investments of operators inside the special economic promotional zone (as designated by the policy committee under the EEC Act within the eastern special development zone). Under the EEC Act, the maximum lease term for Immovable Properties in the special economic promotional zone is 50 years with an additional renewal lease term of up to 49 years. Similar to leases outside the special economic promotional zone, a lease of more than three years must be registered at the competent Land Office, failing which the lease will be enforceable only for three years.

## Types of Property

### (i) Residential

Residential properties in Thailand comprise mainly of houses and condominiums. Matters relating to housing estates, and condominiums are mainly governed by the Land Allocation Act 2000 and the Condominium Act 1979 respectively.

### (ii) Commercial

Commercial properties in Thailand are used for commercial intents and purposes, e.g. as an office building, department store, grocery store, retail shop, etc.

<sup>167</sup> Section 6 of the Rental of Immovable Property for Commerce and Industry Act 1999.



**(iii) Industrial**

Foreigners looking to invest in industrial properties should note that, due to restrictions on land ownership by foreigners, foreigners may only be able to own properties in Thailand if they successfully obtain permission to do so under the Investment Promotion Act 1977, the Industrial Estate Authority of Thailand Act 1979, or the EEC Act, as the case may be.

**Investment in Thailand**

**(i) Restrictions and Exemptions**

In principle, foreigners are prohibited from owning land under Thai law. However, one may be exempted from the restriction on foreign land ownership under certain conditions as prescribed under Thai laws.

*Land Code*

Any foreigner who brings money to invest in the amount specified in the ministerial regulation, which must not be less than THB 40 million, will be eligible to acquire land in Thailand of up to one rai (1,600 sqm) for residential purpose, if such foreigner has obtained an approval from the Minister of Interior and such acquisition of land is in accordance with the rules, procedures, and conditions prescribed in the ministerial regulation, which include, among others, the following conditions:<sup>168</sup>

- The type of business invested by the foreigner is beneficial to the economic and social development of Thailand, or the business purpose must be eligible to obtain the investment promotion certificate under Thailand's investment promotion law;
- The investment period must not be less than three years; and
- The location of land permitted for acquisition must be located in Bangkok, Pattaya, or in an area prescribed as a residential area under Thailand's city planning law.

*Investment Promotion Act 1977*

A promoted person (as defined in the Investment Promotion Act 1977) is permitted to own land required for the promoted activity in such size as the Board of Investment of Thailand deems appropriate, even though it may exceed the limit prescribed under other laws.<sup>169</sup>

*Industrial Estate Authority of Thailand Act 1979*

Industrial operators and commercial operators (as defined in the Industrial Estate Authority of Thailand Act 1979) may be permitted to own land in an industrial estate or in a free operation zone, for the operation of their business in the amount of area as the Board of Industrial Estate Authority of Thailand deems appropriate, even though such amount of area may exceed the limit prescribed under other laws.<sup>170</sup>

*EEC Act*

Foreign companies operating businesses in the special economic promotional zone shall be entitled to own land for the operation of the businesses that have been permitted under the EEC Act.<sup>171</sup>

*Condominium Act 1979*

Foreigners are entitled to acquire condominium units in Thailand so long as at least 51% of the total area of all condominium units in the building is owned by Thais.<sup>172</sup>

Foreign individuals who are eligible to own condominium units are:

- Foreign individuals who have obtained residence permits in accordance with Thai immigration laws;<sup>173</sup>
- Foreign individuals who have been permitted to enter Thailand under Thai investment promotion laws;<sup>174</sup> or
- Foreign individuals who have brought foreign currencies into Thailand to fund the purchase of the condominium unit(s), or who have withdrawn funds from a Thai Baht bank account of a non-resident, or

<sup>168</sup> Section 96 *bis* of the Land Code 1954.

<sup>169</sup> Section 27 of the Investment Promotion Act 1977.

<sup>170</sup> Section 44 of the Industrial Estate Authority of Thailand Act 1979.

<sup>171</sup> Section 49 of the EEC Act.

<sup>172</sup> Section 19 *bis* of the Condominium Act 1979.

<sup>173</sup> Section 19 (1) of the Condominium Act 1979.

<sup>174</sup> Section 19 (2) of the Condominium Act 1979.

who have withdrawn funds from a foreign currency bank account.<sup>175</sup>

Foreign legal entities who are eligible to own condominium units are:

- Foreign legal entities under Sections 97 and 98 of the Land Code that have registered as a legal entity under Thai law;<sup>176</sup>
- Legal entities prescribed as foreigners under the Announcement of the Revolutionary Council No. 281, and have obtained an investment promotion certificate under Thai investment promotion laws;<sup>177</sup> or
- Foreign legal entities that have brought foreign currencies into Thailand to fund the purchase of the condominium unit(s), or who have withdrawn funds from a Thai Baht bank account of a non-resident, or who have withdrawn funds from a foreign currency bank account.<sup>178</sup>

## (ii) Tax

The sale, lease, ownership, possession or usage of Immovable Properties are subject to taxes and government fees.

### **Sale of Immovable Properties**

#### *Transfer Fee*

A transfer fee will be charged at a rate equivalent to 2% of the officially appraised value of the Immovable Property (and *not* the contracted sale price). The transfer fee may be borne equally by the seller and the buyer as mutually agreed by both parties.

#### *Income Tax*

Income tax is payable (as withholding tax) in the following cases:

- where the seller is a legal entity – the withholding tax will be calculated at the amount equivalent to 1% of the officially appraised value or the contracted

sale price of the Immovable Property, whichever is higher;<sup>179</sup> and

- where the seller is an individual – the withholding tax for the sale of the Immovable Property acquired other than by way of inheritance or gift will range from 5% to 35%, based on the officially appraised value (regardless of whether the contracted sale price is higher), after deduction for expense.<sup>180</sup> Basically, income tax deduction for expense is allowed based on the number of years in possession at the rate prescribed by a royal decree. The calculation method is as follows:
  - (i) the officially appraised value of the Immovable Property is deducted by a specific amount of expense based on the number of years in possession and the resulting amount is then divided by the number of years. See table below; and

Years of Possession	Income Tax Deduction for Expense (Percentage of the Officially Appraised Value)
one year	92%
two years	84%
three years	77%
four years	71%
five years	65%
six years	60%
seven years	55%
eight years and over	50%

- (ii) the amount resulting from sub-section (i) above is calculated on this income gain in accordance with the Personal Income Tax Rates and is then multiplied by the number of years in possession. See table below.

Income Amount (THB)	Personal Income Tax Rates
1 – 150,000	Exempted but 5% will be withheld for withholding tax purpose)
150,001 – 300,000	5%
300,001 – 500,000	10%
500,001 – 750,000	15%
750,001 – 1,000,000	20%
1,000,001 – 2,000,000	25%
2,000,001 – 5,000,000	30%
More than 5,000,000	35%

However, the withholding tax payable must not exceed 20% of the selling price (i.e. the officially appraised value of the property).

Withholding tax payable in respect of a non-resident individual seller is normally a final tax. However, a resident individual seller can choose either to: (i) pay the

<sup>175</sup> Section 19 (5) of the Condominium Act 1979.

<sup>176</sup> Section 19 (3) of the Condominium Act 1979.

<sup>177</sup> Section 19 (4) of the Condominium Act 1979.

<sup>178</sup> Section 19 (5) of the Condominium Act 1979.

<sup>179</sup> Section 69 Ter of the Revenue Code.

<sup>180</sup> Section 48 (4) of the Revenue Code.

withholding tax as a final tax at the time of transfer at the competent Land Office in accordance with the methods specified above; or (ii) file an annual personal income tax return by declaring the actual income obtained from the sale of the property in order to obtain a refund of any overpaid tax (if any).

### *Specific Business Tax*

Specific Business Tax is payable by companies and individuals holding the Immovable Property for less than five years for the sale of an Immovable Property in a commercial or profitable manner under certain conditions as prescribed by a royal decree.<sup>181</sup> It is charged at a total amount equivalent to 3.3% of the officially appraised value or the contracted sale price, whichever is higher.<sup>182</sup>

An individual will be exempted from specific business tax under certain circumstances, including if the property has been used as the principal place of residence of the seller, whose name must have been on the household registration certificate for at least 1 year.<sup>183</sup>

### *Stamp Duty*

Stamp duty is charged at the equivalent of 0.5% of the officially appraised value or the contracted sale price (whichever is higher), and is only payable where Specific Business Tax is not applicable.

In general, stamp duties will apply if the property has not been transferred within the last five years. If it has, Specific Business Tax will apply.

Thai law requires that stamp duty be borne by the seller; however, in practice, this can be mutually agreed otherwise by both the seller and the purchaser.

### ***Lease of Immovable Properties***

#### *Lease Registration Fee*

For leases that are registered, there is a registration fee of 1% of the total rental value throughout the registered lease term.

Registration fees may be borne equally by the lessor and the lessee, subject to mutual agreement of both parties.

### *Stamp Duty*

Stamp duty is payable on the equivalent of 0.1% of the total rental value throughout the lease term.

Thai law requires that stamp duty be borne by the lessor but, in practice, this can be mutually agreed otherwise by the lessor and lessee.

### ***Holding ownership, possessory, or usage rights over Immovable Properties***

#### *Land and Building Tax*

The new Land and Building Tax Act was enacted in 2019 to reform the system of tax collection on land and building (including condominium units) in Thailand. The new tax schemes have been implemented since 1 January 2020. The tax rates vary depending on the usage of land and building.

The maximum tax rates<sup>184</sup> for each type of usage are as follows:

Usage of land and building	Maximum Tax Rate on the land and building
Agricultural	0.15%
Residential	0.3%
Others	1.2%
Unused or vacant land	1.2%

The tax rate will be increased by 0.3% every year (starting from the fourth year) for the land and building which are unused or vacant for three consecutive years until the maximum tax rate reaches 3%.<sup>185</sup>

However, the Land and Building Tax Act 2019 provides tax exemptions under certain circumstances. For example, any individual who is an owner of land and building which are used for agricultural or residential purpose (for a residential purpose, the owner's name must be registered in a household registration book) is entitled to obtain an exemption on the value of the land and building as appraised by the Treasury Department, the Ministry of Finance, in the amount not exceeding THB

<sup>181</sup> Section 91/2 (6) of the Revenue Code, and Royal Decree Nos. 240, 247 and 342.

<sup>182</sup> Clause 6 paragraph 3 of the Order of the Revenue Department No. Por. 82/2542.

<sup>183</sup> Clause 4 (3)(a) of the Order of the Revenue Department No. Por. 82/2542.

<sup>184</sup> Section 37 of the Land and Building Tax Act 2019.

<sup>185</sup> Section 43 of the Land and Building Tax Act 2019.

50 million.<sup>186</sup> If the owner owns only the building (whose name is registered in a household registration book on 1 January of that year) but not the land, such owner is entitled to obtain an exemption on the value of the building as appraised by the Treasury Department, the Ministry of Finance, in the amount not exceeding THB 10 million.<sup>187</sup>

## Conclusion

With the extension of mass transit lines currently under construction in Bangkok, these new infrastructure developments will improve access to and from inner city areas and link midtown areas. In light of this, the real estate industry in Thailand appears to be on an incline.

## Our Deals

- Represented an investor to acquire a new hotel in Pattaya, Chonburi Province, Thailand.
- Represented a state enterprise bank in financing of acquisitions of hotels in Phuket Province and Samui Island, Surat Thani Province.
- Represented a subsidiary of an industrial estate in a joint venture with a Japanese investor to construct a six-star hotel in the industrial estate area.
- Represented a Thai company in acquiring a hotel in the central Bangkok area.
- Represented a government bank in financing of a hospital construction in the central Bangkok area.
- Represented various lessees in reviewing office lease/service agreements in office buildings in central Bangkok area.
- Represented a lessee in reviewing factory lease/service agreements in an industrial park in Ayutthaya province.

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<sup>186</sup> Section 40 paragraph 1 and Section 41 paragraph 1 of the Land and Building Tax Act 2019.

<sup>187</sup> Section 41 paragraph 2 of the Land and Building Tax Act 2019.

# VIETNAM

**Vietnam has emerged as an attractive destination for foreign investors looking to enter the real estate market. Driven by a fast-growing economy, a high rate of urbanisation, and an ever-expanding middle-class, cities like Hanoi, Da Nang, and Ho Chi Minh City have become dynamic and lucrative metropolises.**

For those willing to take on the risks, the Vietnamese market offers substantial rewards and great potential over the coming decades.



## System of Registration

The registration of land use rights ("**LUR**") in Vietnam is executed in compliance with the Law on Land No. 45/2013/QH13 dated 29 November 2013 ("**LL 2013**"). Accordingly, land registration is compulsory for land users and people who are allocated land for management. At the request of the owner, the registration of ownership of houses and other land-attached assets is correspondingly conducted.<sup>188</sup>

It should be noted that the registration of land, houses, and other land-attached assets includes the first registration and change of registration which are conducted at the land registration organisation (normally Land Registration Offices) under the land administration agency.<sup>189</sup>

If they so request and are eligible pursuant to the law, land users and owners of land-attached assets are recorded in the cadastral book and granted a Certificate of Land Use Right and Ownership of House and Other Assets Attached to Land (or what is simply known as the Land Use Rights Certificate ("**LURC**") or "**Sổ Đỏ/Hồng**", meaning "Red/Pink Book" in Vietnamese).

The LURC governs the use and purpose of the land. This would include whether the land is used for residential, commercial, construction, or agricultural use. Land users are required to comply strictly with the denoted land use or risk having their LURC revoked (and consequentially, their use of the land). In the event of a change of registration, land users are granted a LURC, or have the change certified in the granted LURC.

## Applicable Law

The main legislation which governs real estate transactions in Vietnam are as follows:

- the Law on Real Estate Business No. 66/2014/QH13 dated 25 November 2014 ("**LREB 2014**");
- the Law on Housing No. 65/2014/QH13 dated 25 November 2014;
- LL 2013;
- the Law on Construction No. 50/2014/QH13 dated 18 June 2014, as amended by Law on Amendments

<sup>188</sup> Article 95.1 of the LL 2013.

<sup>189</sup> Article 95.2 of the LL 2013.

to Law on Construction No.62/2020/QH14 dated 17 June 2020; and

- the Law on Investment No. 61/2020/QH14 dated 17 June 2020.

Other authoritative sources would include subsidiary legislations, decrees, and circulars clarifying or detailing the abovementioned legislation.

Under these laws, the State agencies responsible for managing and monitoring land use, real estate businesses, and construction in Vietnam would include the Ministry of Natural Resources and Environment, the Ministry of Construction, and provincial-level People's Committees.

## Tenure and Ownership

All land in Vietnam is theoretically the property of and owned by the people as represented and uniformly managed by the State. This means no person or company can own land on an indefeasible freehold basis. Instead, what landowners own is the *right* to use the land – whether allocated by or leased from the State for a definite or indefinite period of time.

In Vietnam, there are two broad categories of ownership (which would include quasi-ownership) and interests relating to real property, as follows:

- LUR that relates to land and entitles the rights-holder to exclusively use and deal with the land in a specified manner.
- Ownership of the assets attached to the land (e.g. owning the building rather than the land). This implies that the owner does not own the land itself, but rather the buildings and the other structures attached to the land.

In general, a land user can secure land from the State through the following two forms: (i) an allocation, with or without payment of a land use fee for a definite or indefinite term; or (ii) through a lease with payment of an annual fee or a lump-sum payment for the whole of the lease term.

Accordingly, foreign-owned entities may obtain LURs by several means, including:

- Leasing the land directly from the State, with payment of rent on an annual basis or entirely up-front as a lump sum;
- Being allocated the land from the State, with payment of a land use fee;
- Receiving the land as capital contribution by a Vietnamese party, if foreign-owned entities are engaged in a joint venture with such party;
- Sub-leasing the land from the developer of an industrial park; or
- Acquiring a part or whole of a project that is attached to the land from other investors.

Notably, LURs in the form of allocated land can be allotted for a fixed term or an indefinite term. However, holding LURs in the form of allocated land is technically not equivalent to freehold ownership as the Constitution specifies that all land in Vietnam is owned by all of the people of Vietnam and is administered by the State on behalf of the people.<sup>190</sup>

In the meantime, State leased land is generally leased to the Vietnamese LUR holder for a term of between 50 and 70 years,<sup>191</sup> with such lease terms renewable only at the discretion of the Department of Natural Resources and Environment or other relevant government authorities.

As a general rule, foreign-owned companies (whether fully or partially foreign-owned) are not granted LURs in the form of allocated land (except in the event that the land is to be used for residential housing projects for sale and/or lease),<sup>192</sup> but are granted LURs in the form of State-leased land or land subleased from the licensed infrastructure developers.

## Investing in Vietnam

Recent news reports have shown that in the first five months of 2021, real estate has become the second-largest market sector, and there has been an increased amount of foreign direct investment flowing to the property sector. This indicates greater investor expectations for the real estate market.

<sup>190</sup> Article 53 of the Constitution of the Socialist Republic of Vietnam dated 28 November 2013.

<sup>191</sup> Article 126 of the LL 2013.

<sup>192</sup> Article 55.3 of the LL 2013.

Legally, as of 1 July 2015 when the LREB 2014 came into force, foreign investors are allowed to conduct the following investment activities:

- Rent houses and constructed facilities for subleasing purposes;
- Build houses on land which is leased by the State to lease and build houses or constructions other than houses on such land for sale, for lease, or for lease purchase;
- Receive the entirety or a part of a real estate project from investors to build buildings on it for sale, for lease, or for lease purchase;
- Build houses on land which is allocated by the State for sale, for lease, or for lease purchase; and

Build buildings for proper land use on land which is leased out or transferred in industrial parks, industrial complexes, export-processing zones, hi-tech zones, or economic zones for trading. One of the most common queries from foreign entities and individuals (collectively, referred to as "**foreigners**") when coming to Vietnam is how to own houses for their own use or reinvestment. Legally speaking, foreigners are only allowed to acquire houses, including apartments and detached houses, of commercial housing construction projects, *except* in areas utilised for national defence and security purposes.<sup>193</sup>

Further, foreigners may only purchase properties from owners of housing construction projects or from other foreigners.<sup>194</sup> In other words, foreigners may not purchase a house directly from a Vietnamese individual or organisation who is not the owner of the housing development project.

After acquiring properties in Vietnam, foreigners are required to apply for a LURC. The LURC sets out the term and land use purpose. A LURC may be used only for the specific purpose for which it was granted. Non-compliance with the permitted use as specified in a LURC may result in the withdrawal of LURs by the State.

Some notable points for consideration would be stamp duties, notarisations fees, real property taxes, corporate

income tax and personal income tax. These will be elaborated in greater depth in the sections below.

## **Taxation**

### **(i) Notarisation Fee and Stamp Duty**

In Vietnam, most real property documents and transactions are required to be notarised by a licensed public notary officer. The notarisation fee is determined in accordance with the value of the transaction.

Accordingly, for a real estate conveyance, the maximum notarisation fee is VND 70 million (approximately US\$3,290) per transaction. For a lease of real estate, the maximum notarisation fee is VND 8 million (approximately US\$376) per transaction.<sup>195</sup>

Vietnamese law does not strictly require which contractual party shall pay such notarisation fee. In practice, therefore, either the buyer/lessee or the seller/lessor, pursuant to contract agreements, may incur the notarisation fee.

Land and houses that are subject to LUR registration are subject to a stamp duty. The applicable stamp duty rate for land and houses is 0.5% of the value of such land and houses.<sup>196</sup> Normally, transferees who transferred the LUR will pay a stamp duty upon registration of the LUR with the competent authorities. However, parties may agree that transferors are to incur such duty.

### **(ii) Real Property Tax**

Foreign investors may pay land rental and land use fees for LUR. The range of rates is wide depending on the location, infrastructure, and the industrial sector in which the business is operating.

In addition, owners of houses and apartments have to pay land tax under the Law on Non-Agricultural Land Use. The tax is based on the specific land area used based on the prescribed price per square metre at progressive tax rates ranging from 0.03% to 0.15%.<sup>197</sup>

<sup>193</sup> Article 75.1 of the Decree 99/2015/ND-CP.

<sup>194</sup> Article 76.2 of the Decree 99/2015/ND-CP.

<sup>195</sup> Article 4.2(b) of the Circular 257/2016/TT-BTC.

<sup>196</sup> Article 7.1 of the Decree 140/2016/ND-CP.

<sup>197</sup> Article 7.1 of the Law on Non-Agricultural Land Use Tax 2010.

(iii) **Corporate Income Tax and Personal Income Tax**

Investors who make any capital gain upon a conveyance of LUR or house ownership are required to pay corporate income tax or personal income tax, depending on whether investors are corporations or individuals.

Specifically, the tax rate imposed on corporate investors is generally 20%,<sup>198</sup> whereas personal income gained from real property conveyance is levied with a tax rate of 2%.<sup>199</sup>

**Conclusion**

In a nutshell, Vietnam has recently witnessed a burgeoning growth in the real estate industry, yielding an insatiable demand for real property. For better integration into this market, investors should be cognisant of the legal framework, the tax regimes, and the guidelines which govern investments and tax liabilities.

**Our Deals**

- Advised Keppel Land Corporation on various ongoing property developments in Vietnam
- Assisted Chiaphua Group, a well-known Hong Kong corporation, on its development of the Masteri Parkland real estate project
- Advised Mapletree on various ongoing property developments in Vietnam, such as Mapletree Business City in Binh Duong province, or VivoCity in District 7, Ho Chi Minh city, or mPlaza Saigon in District 1, Ho Chi Minh city
- Assisted Nam Long JSC in terms of cooperation for Nam Long's strategic joint venture with Hankyu Realty and Nishi Nippon Railroad for the implementation of the Kikyo Residence real estate project, with an investment capital of VND630 billion.
- Advised Savills on a retainer basis for various real estate matters, including in assisting its foreign clients in the acquisition of real property
- Advised Kajima Corporation on acquiring Indochina Riverside Towers in Da Nang, Vietnam, one of the city's most prominent mixed-use developments

- Advised Oxley Holdings on transactional and regulatory aspects of the acquisition of a Vietnamese company licensed to develop a 200ha greenfield mixed-use residential and commercial project in Ho Chi Minh City
- Assisted the garments arm of the Far Eastern Group in its approximately US \$1 billion expansion in the garments industry in southern Vietnam, including in land procurement for its manufacturing megaproject in industrial parks
- Advised China Fortune Land Development in its proposed new city township project in Vietnam and in establishing an operational office in Vietnam
- Acted for Country Garden in establishing sales operations in Vietnam and advising on various investment matters
- Assisted Boustead on various real estate operational and investment matters in Vietnam
- Acted for Lotte Group in the development of Lotte Centre in Hanoi, including in all material licensing phases in connection with the construction and development
- Acted for Soilbuild on matters in connection with its partnership with CT Group for the development of residential projects in Vietnam
- Acted as local counsel for NakedHub's joint venture with Gaw Capital for the rollout of its branded co-working space business in Vietnam and subsequent US \$400 million global sale to WeWork
- Advised a number of clients in acquiring land in industrial zones for investment projects in Vietnam

<sup>198</sup> Article 1.6 of the Amended Law on Corporate Income Tax 2013.

<sup>199</sup> Article 2.7 of the Law on Amendments to Tax Laws 2014.



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