

REAL ESTATE M&A

Vietnam



Real Estate M&A

Consulting editors

Matthew P Salerno, Joseph Lanzkron, Jason R Factor

Cleary Gottlieb Steen & Hamilton LLP

Quick reference guide enabling side-by-side comparison of local insights, including into typical structures and processes; legal and regulatory overview, including specific regulations for cross-border combinations and foreign investors; shareholder approval considerations; taxation and acquisition vehicles; take-private transactions; due diligence; typical points of negotiation; remedies for breach of contract; financing; collective investment schemes; and recent trends.

Generated 17 January 2022

The information contained in this report is indicative only. Law Business Research is not responsible for any actions (or lack thereof) taken as a result of relying on or in any way using information contained in this report and in no event shall be liable for any damages resulting from reliance on or use of this information. © Copyright 2006 - 2022 Law Business Research

Table of contents

OVERVIEW

Typical transaction structures – public companies
Typical transaction structures – private companies
Typical transaction process

LAW AND REGULATION

Legislative and regulatory framework
Cross-border combinations and foreign investment
Choice of law and jurisdiction

APPROVAL AND WITHDRAWAL

Public disclosure
Duties towards shareholders
Shareholders' rights
Termination fees
Takeover defences
Notifying shareholders

TAXATION AND ACQUISITION VEHICLES

Typical tax issues and structuring
Mitigating tax risk
Types of acquisition vehicle

TAKE-PRIVATE TRANSACTIONS

Board considerations in take-private transactions
Time frame for take-private transactions

NEGOTIATION

Non-binding agreements
Typical provisions
Stakebuilding
Certainty of closing
Environmental liability
Other typical liability issues
Sellers' representations regarding leases

DUE DILIGENCE

Legal due diligence

Searches

Representation and warranty insurance

Review of business contracts

BREACH OF CONTRACT

Remedies for breach of contract

FINANCING

Market overview

Seller's obligations

Repayment guarantees

Borrower covenants

Typical equity financing provisions

COLLECTIVE INVESTMENT SCHEMES

REITs

Private equity funds

UPDATE AND TRENDS

Key developments of the past year

Contributors

Vietnam



Le Thi Loc

loc.le@ykvnlaw.com

YKVN LLC



Nguyen Ngoc Bich Tram

tram.nguyen@ykvnlaw.com

YKVN LLC



Nguyen Duy Duong

duong.nguyen@ykvnlaw.com

YKVN LLC

OVERVIEW**Typical transaction structures – public companies**

What is the typical structure of a business combination involving a publicly traded real estate-owning entity?

In Vietnam, real estate includes, among other things, land, residential properties (houses, apartments and villas), commercial and office buildings, malls, hotels, factories and workshops; and the scope of real-estate business activities includes, among other things: the development and sale of real estate, and the lease or sublease or granting of a hire purchase of real estate. Real-estate business is a conditional sector under Vietnamese law, and investment in this sector is subject to general restrictions that may affect the potential buyer's selection of combination structure, including the below.

As land is owned by the state, Vietnam-based entities (regardless of if they are local companies or foreign-invested enterprises (FIEs)) cannot own land in Vietnam; instead, they can use land allocated by the state (for residential property development only) or leased from the state or other land users.

Offshore companies are not allowed to directly develop and operate real-estate projects. To do so, they must either (1) set up a Vietnam-based company as its solely owned subsidiary or as its joint venture with a local partner (a kind of FIE), or (2) purchase equity interest or shares in an existing company operating the real-estate projects. By law, FIEs are those companies that have any foreign investor as a shareholder and, when making investment in other companies, certain FIEs (those with more than 50 per cent foreign ownership) will also be treated as foreign investors in terms of foreign investment restrictions and investment procedure.

Vietnamese law treats local companies and FIEs differently in terms of the scope of real-estate business activities. While a local company is not restricted from any real-estate business activities, an FIE can only engage in a restricted scope of activities; in particular, it can (1) lease houses or other construction works from developers for sublease; (2) obtain the land leased from the state for constructing residential house for lease or constructing houses or other construction works for sale, lease or granting a hire purchase; (3) obtain the land allocated from the state for constructing residential houses for sale, lease or granting a hire purchase; (4) purchase the real-estate project from another investor for constructing houses or other construction works for sale, lease or granting a hire purchase. An FIE is not allowed to purchase existing real estate for resale or lease. A combination conducted by a foreign buyer may cause the target to become an FIE and, therefore, will be subject to these restrictions.

Further, business combinations involving a publicly traded real-estate owning entity will also take into account the following Vietnamese regulations:

- Foreign ownership in real-estate public companies is capped by securities regulation at 50 per cent of the company's charter capital.
- Acquisitions of shares in a public company that reach certain shareholding thresholds (eg, 25, 35, 45, 55, 65, 75 or 80 per cent of total outstanding shares (PTO Thresholds)) require investors (including foreign and local investors) to conduct the public tender offer (PTO) procedure including registration with the State Securities Commission of Vietnam (SSC), which can be exempted by shareholders' approval.
- In addition, unless SSC approval for exemption is sought, trading of listed shares is generally required to be conducted through the stock exchange system (ie, the Ho Chi Minh Stock Exchange (HOSE), Hanoi Stock Exchange or Unlisted Public Company Market) and the share price traded on the stock exchange is subject to the applicable trading bands (ie, percentage range for price ceilings and floors). For example, the trading band at HOSE is ± 7 per cent of the reference price.

A potential buyer wishing to control real-estate business in Vietnam may adopt the following typical structures.

Structure 1 (combination of asset and equity deal)

Where the public company directly engages in real-estate business, the public company sets up a new company and then transfers real-estate assets to the new company and the potential buyer will acquire secondary shares in new company from the public company. If the potential buyer is a foreign investor, the new company will become an FIE and have the restricted scope of real-estate business activities as noted above. This structure allows a foreign potential buyer to buy a majority stake in that new company because the new company is a private company (not subject to the 50 per cent foreign ownership limitation like a public company). In addition, this structure is preferred by potential buyers as it can help avoid historical risks and liabilities and the PTO procedure.

Structure 2 (equity deal)

Where the public company engages indirectly in real-estate business through several subsidiaries and it acts as the parent company of a corporate group, the potential buyer can directly acquire a majority stake in the public company. In the case of a foreign potential buyer, prior to the combination, the public company's registered business lines should be reviewed and if any of them is included in the list of business lines with restricted market access, these restricted business lines should be removed to avoid foreign ownership limitation. This structure allows a public company to keep the organisational structure of its corporate group, its licences and its permits. In addition, in this structure, to avoid complexity, the public company will try to seek the shareholders' waiver of the PTO and the SSC's approval for waiver of the trading band.

Structure 3 (asset deal)

The local potential buyer can directly acquire the real-estate assets from the public company as the assets will be directly owned and operated by the local potential buyer. This structure cannot be used in the case of a foreign potential buyer because a subsidiary needs to be set up that is an FIE, which is not allowed to purchase existing real estate for sale or sublease.

Other structures of business combinations such as mergers with public companies are less common.

Law stated - 06 January 2022

Typical transaction structures – private companies

Are there any significant differences if the transaction involves a privately held real estate-owning entity?

Yes. Certain investment restrictions do not apply (eg, PTOs and foreign ownership limitations), so structures for private real-estate companies are simpler. Depending on the scope of operations of the target (eg, development or purchase of real estate for sale) or the status of the real-estate project held by the target, there are several structures.

Structure 1 (combination of asset and equity deal)

If there are several real-estate projects operated by several private real-estate companies that are owned a group of shareholders, and the group of existing shareholders of all private real-estate companies together set up a new holding company (HoldCo) and then transfer all their shares from each private real-estate company to the HoldCo, the potential

buyer will acquire shares in the Holdco from the existing shareholders. Upon completion of the transaction, the potential buyer and existing shareholders will hold shares in the HoldCo and, in turn, the HoldCo will hold 100 per cent of the shares in a private real-estate company. This structure allows the HoldCo to keep its organisational structure after the initial restructuring, and its licenses and permits that have been granted for real-estate projects. In this structure, if there is any new real-estate project, the HoldCo can set up a new company to operate the real estate and the potential buyer receives investment returns from each real-estate company when it is profitable.

Structure 2 (equity deal)

The potential buyer directly acquires shares in the private real-estate company from the existing shareholders. This structure allows keeping the current organisational structure, and the licences and permits that have been granted for real-estate projects.

Structure 3 (asset deal)

The local potential buyer can directly acquire the real-estate assets from the private real-estate companies in order to own and operate the assets directly while not being liable for historical risks and liabilities of the private real-estate companies.

Law stated - 06 January 2022

Typical transaction process

Describe the process by which public and private real estate business combinations are typically initiated, negotiated and completed.

In general, the process in relation to public and private real-estate business combination is the same, except for the completion process. In particular:

- Initiation: the potential buyer will find suitable targets by itself or through a broker.
- Negotiation: the potential buyer will negotiate with the selling shareholders of a private company, but it may be difficult to deal with certain seller shareholders of public companies directly given the PTO requirements. Typically in an equity deal, parties need to agree on the deal structure (eg, restructuring for a new company to hold proposed land and real-estate projects; and upon completion of the due diligence on the target and project, the potential buyer will buy shares in the new company). In addition, parties agree on types of transactional documents that, subject to the asset deal or equity deal, can include: share purchase agreements or share subscription agreements, shareholders' agreements (for private target only), escrow agreements, and asset transfer agreements; and key terms of the transaction such as conditions to close the deal, collateral, covenant, indemnity (including limits and specific indemnity) and, in certain deals, break fees.

We further note that in public real-estate business combinations, parties may also discuss how to cleanse inside information being disclosed (eg, public announcements or market reports).

The process of completion is different for public and private real-estate business combinations.

Public

Depending on its specific details, the combination may require pre-merger filing clearance from the competition authority (ie, the National Competition Commission or the Vietnam Competition and Consumer Protection Authority), approvals from securities regulator, the PTO waiver from shareholders, and disclosure to stock exchange and regulators (eg, major shareholders). A foreign potential buyer needs to obtain a securities trading code and open a trading account as well as an indirect investment capital account (IICA). The securities trading code is used to monitor foreign ownership in a particular stock. The trading account is opened at a securities firm to conduct trades. The IICA is opened at a licensed bank for receiving monies from a potential buyer's offshore bank account for paying the purchase price to a seller and the dividend from the target before remitting the same outside of Vietnam.

Private

Typically, regulatory requirements may include approvals from the authorities to acquire shares or a stake in the private company or to transfer real-estate projects or assets. The target is required to open a direct investment bank account for receiving the purchase price payable by the foreign potential buyer before remitting the same to the onshore seller. Larger deals may additionally require pre-merger filing clearance from the competition authority.

Law stated - 06 January 2022

LAW AND REGULATION

Legislative and regulatory framework

What are some of the primary laws and regulations governing or implicated in real estate business combinations? Are there any specific regulations or laws governing transfers of real estate that would be material in a typical transaction?

In Vietnam, real-estate business combinations are governed by several laws and regulations such as:

- the Law on Enterprises No. 59/2020/QH14 (National Assembly, 17 June 2020) (the Enterprises Law);
- the Law on Investment No. 61/2020/QH14 (National Assembly, 17 June 2020), as amended on 17 November 2020 (the Investment Law);
- the Law on Land No. 45/2013/QH13 (National Assembly, 29 November 2013), as amended on 20 November 2018 (the Land Law);
- the Law on Residential Housing No. 65/2014/QH13 (National Assembly, 25 November 2014), as amended on 13 June 2019, 17 June 2020 and 18 June 2020 (the Law on Residential Housing);
- the Law on Real Estate Business No. 66/2014/QH13 (National Assembly, 25 November 2014), as amended on 17 June 2020 (the Law on Real Estate Business);
- the Law on Tourism No. 09/2017/QH14 (National Assembly, 19 June 2017);
- the Law on Competition No. 23/2018/QH14 (National Assembly, 12 June 2018) (the Competition Law); and
- the Law on Securities No. 54/2019/QH14 (National Assembly, 26 November 2019) (the Securities Law).

These laws and regulations also govern the transfer of real estate (ie, asset deals) in some respects, which will need to be considered for reach agreements on the deal structure of combinations, in particular the:

- Investment Law provides the framework for how foreign and domestic investment are implemented in Vietnam, including market access;
- Enterprises Law provides the framework for how Vietnam-based companies operate;
- Land Law provides the framework for land use rights in Vietnam;

- Law on Real Estate Business provides the framework for real-estate business in Vietnam; and
- Competition Law provides the framework from which to regulate competition, including economic concentrations.

Law stated - 06 January 2022

Cross-border combinations and foreign investment

Are there any specific material regulations or structuring considerations relating to cross-border real estate business combinations or foreign investors acquiring an interest in a real estate business entity?

No, the cross-border real-estate business combination and acquisition of equity interest by a foreign investor in a real-estate business entity are regulated by the same legal framework, such as the: Investment Law, the Enterprises Law, Land Law, Law on Real Estate Business, the Competition Law and the Securities Law.

For acquisition of equity interests in a private company, the required approvals may include:

- the amendment to the in-principle approval of the investment project using land if there is any change in scale or objectives;
- the pre-merger filing clearance (if acquiring 50 per cent or more of the equity interest and the acquisition meets the reportable thresholds);
- the local Department of Planning and Investment's notice on satisfaction of the requirement to acquire shares (also known as the M&A Approval);
- the amendment to the enterprise registration certificate of the target (ie, the incorporation document) in the case of acquisition of primary shares or the target being a limited liability company; and
- the amendment to the investment registration certificate of the investment project of the target (if the target is a foreign-invested enterprise at the time of establishment).

Besides the abovementioned approvals, normally, third-party consent or notice to the third party (including the bank) may be required if the acquisition triggers a change of control provisions in the agreements (eg, the loan agreement and shareholders' agreement).

For a public company, owing to the 50 per cent foreign ownership limit, the foreign potential buyer cannot hold a majority stake in a public company engaging in real-estate business, and it is not typical for the foreign investor to directly acquire at the public company level. Instead, the foreign investor will usually acquire the equity interest in a new company to be set up by the public company after it completes the transfer of real-estate business to this new company.

Law stated - 06 January 2022

Choice of law and jurisdiction

What territory's law typically governs the definitive agreements in the context of real estate business combinations? Which courts typically have subject-matter jurisdiction over a real estate business combination?

According to Investment Law and the Civil Code, the parties to the definitive agreements, with at least one party being a foreign investor or a foreign-invested enterprise treated as a foreign investor, may agree to apply foreign laws or international practice if this agreement does not contravene Vietnamese law and the application of foreign law is

consistent with 'the fundamental principles of Vietnamese laws'. Further, where the object of the contract is an immovable property, the law of the jurisdiction where the immovable property is located shall apply. Thus, in the case of cross-border real-estate business combinations, the parties to the definitive agreements can choose Vietnamese law or foreign law as the governing law, subject to the object of the contract.

Regarding the dispute resolution forums, according to the Civil Procedure Code, a dispute can be settled in a foreign court where the case does not fall within the exclusive jurisdiction of Vietnam (such as disputes relating to real estate in Vietnam). However, the judgment rendered by a foreign court will need to be recognised and allowed to be enforced in Vietnam by a competent Vietnamese court before the actual enforcement if: (1) this judgment has been made by the court of a country that is a party to a relevant international treaty of which Vietnam is a participant or a signatory; (2) this judgment is permitted to be recognised and enforced under Vietnamese law; or (3) this judgment is permitted to be recognised and enforced on a reciprocal basis without the condition that Vietnam and the relevant country are signatories or participants of a relevant international treaty. A judgment rendered by foreign courts will not be recognised and enforced in Vietnam where, among other things, the Vietnamese courts determine that the recognition and enforcement of these judgments in Vietnam are contrary to the fundamental principles of Vietnamese law. Thus, as a matter of practice, the parties to the definitive agreements usually choose arbitration over courts, and so a combination of Vietnamese law and a foreign arbitration centre (eg, the Singapore International Arbitration Centre or the Hong Kong International Arbitration Centre) is more common. However, in real-estate matters, Vietnamese courts, and to some extent Vietnamese arbitration, are the only available dispute resolution forums.

Law stated - 06 January 2022

APPROVAL AND WITHDRAWAL

Public disclosure

What information must be publicly disclosed in a public-company real estate business combination?

Public disclosure in a real-estate business combination will depend on its structure, and there is no difference in disclosure requirements in connection with an all-cash transaction or in connection with a combination that involves consideration in the form of shares. Information disclosed may include the following, among others:

- all shareholder resolutions of a public company are made public, while board resolutions are not made public. Hence, any details of a transaction subject to shareholder approval will be disclosed. This can mean the identity of the buyer and seller, the number of shares, and the price, etc. The transactions that are subject to shareholder approval will depend on the charter, but include secondary share transactions seeking waiver of a public tender offer (PTO), delisting, equity transactions such as merger and share issuance, and significant transactions (eg, transactions worth 10 per cent of total value of assets);
- equity transactions and changes in voting shares (eg, share issuance, share conversion, share redemption and sale of treasury shares);
- an enterprise's reorganisation (full or partial division, consolidation, merger or conversion of enterprise), dissolution or bankruptcy; changes in tax identification numbers, the company's name or seal; relocation; establishment or closure of head office, branches, factories or representative offices; promulgation or revisions to the company's charter; strategies, medium-term development plans and annual business plans of the company;
- corporate approvals for related-party contracts and transactions;
- changes to the foreign ownership limit;
- information of the substantial shareholder or the group of related persons holding at least 5 per cent of the voting shares, and changes of 1 per cent in the voting shares;
- information of the founding shareholders holding restricted shares; and

- information of internal persons and related persons when the public company securities-related transactions amount to at least 50 million Vietnamese dong in a day or at least 200 million Vietnamese dong in a month.

Law stated - 06 January 2022

Duties towards shareholders

Give an overview of the material duties, if any, of the directors and officers of a public company towards shareholders in connection with a real estate business combination. Do controlling shareholders have any similar duties?

The Law on Securities of Vietnam provides the concept of an 'internal person' of a public company, which includes the chair of the board of directors, members of the board of directors, legal representative, general director (CEO), chief financial officer, chief accountant and other managerial positions appointed by the shareholders or the board of directors, members of the board of controllers, head of the board of controllers, the person in charge of corporate governance, and the person in charge of information disclosure.

In a real-estate business combination conducted through the PTO, the board of directors must disclose to the shareholders their assessment and recommendations (including any dissenting opinions) with respect to the PTO and notify the same to the State Securities Commission of Vietnam (SSC). Internal persons and other persons aware of the proposed PTO (including the controlling shareholders) must not take advantage of their knowledge of the tender offer to trade securities or disclose, entice or solicit others to trade securities before the announcement of the PTO.

The Law on Securities No. 54/2019/QH14 also provides the duties of a substantial shareholder (holding at least 5 per cent voting shares), who must not take advantage of their position to influence the rights and benefits of the company or other shareholders and must conduct disclosure in accordance with the law.

Regardless of the governing law for the transaction document, Vietnamese law, as applicable law where the target public company is incorporated, shall apply in relation to the duties of directors and officers and substantial shareholders of a Vietnam-based public company, and this means that the directors and officers must comply with the above duties.

Law stated - 06 January 2022

Shareholders' rights

What rights do shareholders have in a public-company real estate business combination? Can parties structure around shareholder dissent or rejection of a real estate business combination, and what structures are available?

Shareholder approval must be obtained for most forms of business combination (ie, primary share acquisition, significant asset acquisition (normally equal to or more than 35 per cent of the total asset value of the public company) or merger). Acquisition of secondary shares is not required unless the parties want to skip the PTO requirement. Transactions cannot be structured around shareholder dissent.

The voting thresholds in a public company are, for physical meetings, 65 per cent of votes of attending shareholders for special matters and more than 50 per cent of votes of attending shareholders for ordinary matters, and, for collection of written opinions, more than 50 per cent of the votes of all shareholders.

In a PTO, the potential buyer must not unfairly apply treatment among shareholders holding the same class of share and, hence, the price offered to all shareholders will be the same. In addition, the following principles will be applied in determining the shares price:

- in a PTO in cash, the offer price must not be less than the average reference price of the last 60 trading days or less than the highest price of all PTOs;
- during the PTO process, the buyer must not decrease the offer price; the offer price can be increased, but this increase applies to all registered sellers; and
- in a PTO with shares, the share swap ratio must be approved by shareholder resolution of the buyer.

Regardless of the governing law for the transaction document, Vietnamese law still regulates corporate governance of Vietnam-based companies.

Law stated - 06 January 2022

Termination fees

Are termination fees typical in a real estate business combination, and what is their typical size?

No. We see very few public M&A transactions with break-up fees to defray the costs, which typically are in favour of the seller but sometimes can apply for both sides. The size of the termination fee is around 3 to 5 per cent of the transaction value.

Law stated - 06 January 2022

Takeover defences

Are there any methods that targets in a real estate business combination can employ to protect against an unsolicited acquisition? Are there any limitations on these methods?

Protection against unsolicited acquisitions in a real-estate combination may include:

- Acquisitions of shares that reach PTO Thresholds require buyer to conduct PTO procedures (ie, registration of the offer with the SSC), unless a shareholder resolution approves exemption for PTO procedures, among other things. If the PTO results in the buyer and its related persons holding at least 80 per cent of the voting shares, the buyer is required to continue buying the remaining shares held by shareholders within 30 days according to the same terms and conditions of the PTO.
- Mergers need shareholder approval, which requires statutory voting threshold of at least 65 per cent.
- Acquisitions of assets that are worth a significant part of the public company as specified in the charter of the public company (eg, 35 per cent of the total value of the assets) must be approved by shareholders, which requires a statutory voting threshold of at least 65 per cent. Acquisitions of assets that are less significant can be approved by the board of directors of the public company.

Law stated - 06 January 2022

Notifying shareholders

How much advance notice must a public target give its shareholders in connection with approving a real estate business combination, and what factors inform this analysis? How is shareholder approval typically sought in this context?

Acquisitions subject to PTOs require registering the PTO with the SSC and the public company or seeking shareholder

approval for waiver of the PTO. It may take up to 15 days to register the PTO and at least 21 days (unless the charter specifies a longer period) to convene and obtain shareholder approval, but it can easily drag out to three months or more. The regulations specify the minimum time limits.

Mergers and acquisitions of assets subject to shareholder approval may take at least 21 days (unless the charter specifies a longer period) to convene and obtain shareholder approval.

Shareholder approval is typically sought by a collection of votes in writing, owing to the large number of shareholders.

Law stated - 06 January 2022

TAXATION AND ACQUISITION VEHICLES

Typical tax issues and structuring

What are some of the typical tax issues involved in real estate business combinations and to what extent do these typically drive structuring considerations? Are there certain considerations that stem from the tax status of a target?

In equity deals, capital gains tax is imposed on the seller and the rate is different depending on if the seller is a resident or a non-resident (offshore or onshore), the seller is an individual or an institutional organisation and the target entity is a public company or a private company. In general, an individual seller of a public company or a private joint-stock company is subject to a tax rate of 0.1 per cent on sales proceeds; and the corporate seller is subject to tax rate of 20 per cent on net gains (regardless of whether it is a private company or public company). However, if the target is a limited liability company (not a joint-stock company), the Vietnamese individual seller is subject to a tax rate of 20 per cent on net gains. Under Vietnamese tax laws, if both the seller and the buyer are an offshore entity or a foreign individual, the target must declare and pay the tax on behalf of the seller, and the buyer needs to put seller's fulfilment of tax is a condition to close the transaction or a part of consideration payable to the seller will be remitted to the target's bank account for the purpose of tax payment.

In asset deals, the seller will be subject to a 20 per cent corporate income tax imposed on net gains.

Thus, a real-estate business combination is usually structured with the seller being a Vietnamese individual and the target a joint-stock company.

Law stated - 06 January 2022

Mitigating tax risk

What measures are normally taken to mitigate typical tax risks in a real estate business combination?

Any tax issue regarding the transaction should be consulted on with a tax adviser. In general, it depends on whether it is an asset deal or an equity deal. For equity deals, the fulfilment of a tax payment is a condition to close the transaction if the seller is an offshore party or a covenant of the onshore seller to declare and pay tax for the transaction under Vietnamese law. For asset deals, a seller's covenant should be provided in the purchase agreement in relation to the fulfilment of tax obligations relating to the transaction.

Law stated - 06 January 2022

Types of acquisition vehicle

What form of acquisition vehicle is typically used in connection with a real estate business combination, and does the form vary depending on structuring alternatives or structure of the target company?

Vietnamese companies include limited liability companies (LLCs), which can be solely owned or have two to 50 owners, and joint-stock companies (JSCs), which have at least three shareholders with no maximum. The liability of an LLC or a JSC is limited to its registered charter capital (ie, registered equity that is contributed by the shareholders and owners).

As a matter of the practice, the JSC is preferred. The buyer is not liable for any liability of the target if the seller has paid in full its committed equity contribution to the target, unless otherwise agreed by the buyer (eg, granting guarantees).

Law stated - 06 January 2022

TAKE-PRIVATE TRANSACTIONS

Board considerations in take-private transactions

What issues typically face boards of real estate public companies considering a take-private transaction? Do these considerations vary according to the structure of the target?

A take-private transaction of a real-estate public company such as an acquisition will involve the public tender offer (PTO), the delisting of shares (based on the voluntary basis) and rescission of status as a public company (privatisation).

For a PTO, Vietnamese securities law provides the principles to protect the rights of the shareholders, especially the non-substantial shareholders such as the equality of shareholders, the right to sufficient information to access the PTO of all parties, the right to the self-determination of the shareholder and the appointment of a securities company to act as an agent for the purpose of the PTO. The PTO needs to be approved by the State Securities Commission of Vietnam (SSC), and the SSC's approval can be exempted if there is a shareholder approval for waiver of the PTO. For delisting of shares and privatisation, the board of directors needs to obtain (1) the shareholders' approval (ie, by more than 50 per cent of the voting shares held by non-substantial shareholders) and stock exchange approval for this delisting, and (2) the SSC approval for rescission of the status of public company. These shareholder and regulatory approvals are mechanisms to protect and supervise the public companies in the take-private transaction.

Law stated - 06 January 2022

Time frame for take-private transactions

How long do take-private transactions typically take in the context of a public real estate business? What are the major milestones in this process? What factors could expedite or extend the process?

Take-private transactions will typically involve the PTO, delisting of shares on exchanges and privatisation procedures. It is time-consuming to complete these transactions because of to the following:

- For the PTO, the public company must disclose information within three working days upon receipt of the application dossier for the PTO, and within 15 days from proper submission, the SSC shall notify the offeror of the

result of the submission.

- A voluntary delisting can be approved by a shareholder resolution passed by more than 50 per cent of the voting shares held by the non-substantial shareholders. The delisting process can be approved within seven days of the proper submission of the dossier to the stock exchange. The delisting will only be conducted after at least two years from the date of the stock exchange's listing approval.
- The privatisation process takes at least one year because (1) the law allows a period for the company to recover the stability of the company's operations and share prices; and (2) a public company is still subject to higher corporate governance standards than a private company (eg, many disclosure obligations), which ensures transparency and non-substantial shareholder protection. The non-substantial shareholder may need sufficient time to decide their exit from the public company before the company's corporate governance standards are lowered. As the process will be based on the notice and approvals of the SSC, the timeline in practice is time-consuming.

To facilitate the process, the potential buyer may acquire shares up to 24.9 per cent from the open market or via bilateral deals with other substantial shareholders who will buy shares from the non-substantial shareholders for resale to the potential buyer or try to obtain waiver from the shareholders for exemption from the PTO. This acquisition is subject to the trading band unless otherwise approved by the SSC, and, for a foreign investor, the proposed acquisition of the non-substantial shareholders may be restricted if there is no more room for the foreign investor according to the foreign ownership limitation of the public company. As a matter of practice, the non-substantial shareholders would expect an increase of the trading price for the acquisition by the investor, which may cause some reluctance in quickly selling their shares.

Law stated - 06 January 2022

NEGOTIATION

Non-binding agreements

Are non-binding preliminary agreements before the execution of a definitive agreement typical in real estate business combinations, and does this depend on the ownership structure of the target? Can such non-binding agreements be judicially enforced?

In general, non-binding preliminary agreements are rarely utilised in real-estate business combinations of a public company as a result of disclosure obligations but are quite common for private real-estate companies. Similar to other industries, the seller and buyer will enter into a non-binding preliminary agreement (eg, letters of intent and a term sheet) before the execution of a definitive agreement in a real-estate business combination to record the intention of both parties as well as key commercial terms and conditions of the transaction (eg, exclusivity, confidentiality and break fees) and it does not depend on ownership structure of the target.

Regarding enforcement, Vietnamese laws allow individuals and legal entities to establish, perform and terminate their civil rights and obligations on the basis of free and voluntary commitments and agreement, and, therefore, depending on commercial terms agreed by relevant parties, the preliminary agreements can be non-binding or binding against the parties and, in particular, if there is no provision in the preliminary agreement that expressly states that the preliminary agreement or specific clauses under the preliminary agreement are non-binding, the entire preliminary agreement or remaining clauses under the preliminary agreement are deemed binding on the parties and generally upheld by Vietnamese court and arbitration. In practice, for the purpose of securing certain rights of the potential buyer during the due diligences on the target, the buyer usually requires certain specific clauses in the non-binding preliminary agreement together with remedies in the case of breach of this clause (eg, exclusivity period committed by the seller).

Typical provisions

Describe some of the provisions contained in a purchase agreement that are specific to real estate business combinations. Describe any standard provisions that are contained in such agreements.

Purchase agreements in real-estate business combination are substantially similar to the purchase agreements for other industries; however, the purchase agreement in a real-estate transaction includes the following additional representations and warranties (R&Ws), and conditions precedent to close the transaction (CPs), which can be varied subject to the status of the real-estate project and project land:

- R&Ws of seller or target: valid title over the land (including acquisition of land in accordance with applicable law); right to develop the real-estate project (including the compliance with the zoning); paid-up charter capital and satisfaction of owner's equity per total investment capital of the real-estate project; no encumbrances over target's equity interest and properties or land of the real-estate project (especially housing properties); no restriction on the transfer of land or property of the real-estate project as well as equity interest or shares in the target; no outstanding financial obligations to the state or the third party in relation to the project and project land (eg, land use fee, land rental and escrow deposit for performing the investment project); and no outstanding or potential inspection, investigation, litigation or dispute with the competent authorities and the third party in relation to the project and project land;
- CPs: evidence of title over the land (eg, land allocation decision, land lease decision, land lease agreement, certificate of land use rights, house ownership and other assets attached to land); evidence of right to develop the real-estate project (eg, in-principle investment approval, investment registration certificate); documents on zoning and environment (eg, detailed master plans, environmental impact assessment report and environmental protection plan); and pre-merger filing clearance; and
- specific indemnity by the seller in relation to the breach of representations and warranties (R&Ws).

Law stated - 06 January 2022

Stakebuilding

Are there any limitations on a buyer's ability to gradually acquire an interest in a public company in the context of a real estate business combination? Are these limitations typically built into organisational documents or inherent in applicable state or regulatory related regimes?

Like other industries, a buyer's ability to gradually acquire an interest in a public company in the context of a real-estate business combination is limited by (1) public tender offer (PTO) procedures (ie, when the potential buyer reaches PTO Thresholds); (2) pre-merger filing clearance when transaction causes the potential buyer to control the target or one of the trades of the target and reportable thresholds being triggered; and (3) the 50 per cent foreign ownership limit.

Law stated - 06 January 2022

Certainty of closing

Describe some of the key issues that typically arise between a seller and a buyer when negotiating the purchase agreement for a real estate business combination, with an emphasis on building in certainty of closing. How are these issues typically resolved?

Key issues necessary for closing include (1) title over transferred shares; (2) land use rights (eg, land allocation decision, land lease decision, land lease agreement, certificate of land use rights, house ownership and other assets attached to land); (3) the right to develop real-estate projects (eg, in-principle investment approval, the decision on selection of investor and the investment registration certificate); (4) zoning and environment (eg, detailed zoning master plans, the environmental impact assessment report and the environmental protection plan); (5) other necessary licences, permits and approvals of real-estate projects, completion of land clearance and infrastructure; (6) no material adverse change; and (7) other key conditions precedent, covenants, representations and warranties subject to the status of the project and project land.

To resolve these key issues, the relevant purchase agreement may be included the followings:

- longstop date: if any conditions precedent (especially items (2) through (5) above, which are subject to the review and opinions of licensing authorities) cannot be completed by the seller and, consequently, the closing cannot occur by the longstop date, the buyer could have the right to defer the closing to such other date as decided by the buyer, in addition to its right to terminate the purchase agreement; and
- regulatory approval of real-estate project: owing to the ambiguity and complexity of land laws and regulations, certain regulatory approvals for implementing the real-estate project may be missing or issued ultra vires by the competent authority. Parties may need to agree to clarify with the competent authority as a CP or provide specific indemnity for those matters.

Law stated - 06 January 2022

Environmental liability

Who typically bears responsibility for environmental remediation following the closing of a real estate business combination? What contractual provisions regarding environmental liability do parties usually agree?

In an equity deal, the target bears responsibility for environmental remediation that the seller may shoulder if any results from actions and breaches of the law by the target prior to closing. In an asset deal, the allocation of risk will be subject to negotiation by the parties. It is common that the seller will bear the risk of environmental remediation prior to closing and the buyer will bear the risk after closing.

Subject to the type and status of the project, the following contractual provisions regarding environmental liability are agreed in the purchase agreement:

- general R&Ws of the seller that the target or the seller has complied with Vietnamese law in relation to environmental regulations and there are no outstanding administrative sanctions imposed on any violation of the target in relation to environmental requirements; and
- in the case of environmental misrepresentation, the seller shall indemnify the potential buyer.

Law stated - 06 January 2022

Other typical liability issues

What other liability issues are typically major points of negotiation in the context of a real estate business combination?

The parties may negotiate the seller's liability in respect of the following matters:

- the target does not have any social housing obligations (applicable to certain residential housing projects);
- the target has paid in full the land rent or land use fee for project land and there is no additional land rent or land use fee or other financial obligations relating to project land;
- obligations for returning the deposit paid by tenants;
- completion of connecting points (eg, road, electricity and telecommunications) or construction works in accordance with the investment registration certificate and construction permit; and
- limits for a single claim, basket claims, the maximum aggregate liability for all claims and the time limit for making a claim.

Law stated - 06 January 2022

Sellers' representations regarding leases

In the context of a real estate business combination, what are the typical representations and covenants made by a seller regarding existing and new leases?

Existing leases

If the target being leased the land or construction work by the state or other land user, the buyer can request the seller to give the following representations and covenants:

- there is no requirement to obtain consent on change of control from a third party for real-estate business combination;
- the existing terms and conditions of the lease shall continue and the target shall comply with such terms and conditions until the closing or can only be changed on no less favourable terms and conditions, all of which are satisfactory to the buyer; any breach of aforesaid covenants shall subject the seller to indemnity obligations; and
- the buyer shall not be subject to any transfer fees charged by a third party for a real-estate business combination.

If the target is the lessor, the buyer can request the seller to procure the target:

- to not terminate existing lease agreements between the target and the tenants;
- to disclose all deposit, rental and other fees paid by tenants to the target; and
- to pay all financial obligations owed to competent authorities prior to the closing date.

New leases

Typically, to avoid complicating the financials, there may be a pre-closing covenant in the purchase agreement restricting the target (whether as the lessor or lessee) from entering into any new lease except in the ordinary course of business or as approved by the buyer.

Law stated - 06 January 2022

DUE DILIGENCE

Legal due diligence

Describe the legal due diligence required in the context of a real estate business combination and any due diligence specific to a real estate business combination. What specialists are typically involved and at what point in the transaction are the various teams typically brought in?

Typically, the scope of the legal due diligence for a real-estate business combination is similar to others' industries but more focused on the real-estate projects, the land where the real-estate project is located, and related issues such as loans and encumbrances, the environment and litigation. In particular, the legal counsel of the buyer will check the following key issues:

- whether the seller or target has obtained valid title over the land, including the seller's or target's financial capacity to be allocated with or lease the land from the state, and whether the allocation or lease of land from the state is subject to any bidding or auction requirements;
- whether the seller or target has the right to develop the real-estate project (including the compliance with zoning);
- whether the seller or target has completed its financial obligations to the state (eg, land rent or land use fees);
- whether there are any encumbrances on the real properties (especially housing properties), or any restrictions that could affect the transfer or assignment of the real properties; and
- whether there is any dispute about the real properties or inspection or examination of the real-estate project.

In addition to the legal due diligence, the buyer may also engage other advisers to conduct the technical due diligence on the real properties (eg, compliance with the construction permit such as height of the building and other factors within the approved construction permit, or bomb and land mine clearance), and all due diligence works should be completed after execution of the non-disclosure agreement and at the same time as the negotiation process.

Law stated - 06 January 2022

Searches

How are title, lien, bankruptcy, litigation and tax searches typically conducted? On what levels are these searches typically run? What protection from bad title is available to buyers, and does this depend on the nature of the underlying asset?

It depends on the nature of the transaction (either equity or asset deal). For equity deals, encumbrances over the equity interest can be independently checked at the National Registration Agency for Secured Transactions if the relevant parties choose to register the security transaction.

Information on the security transactions over the land and the immovable assets is locally monitored and managed by the relevant Land Registration Office. Vietnam does not have a centralised system from which to conduct a search for this information. In practice, the security transaction over the land and the assets attached to land are generally not searchable by third parties, except for the current land user and other state authorities for their regulatory management purpose.

To ascertain title to the land and assets attached to the land, the buyer, through legal counsel, will need to review the originals of land title documents (especially, the certificate of land use right, ownership of residential houses and assets attached to land). Protection against encumbrance over the equity interest, shares or real estate will be based on representations and warranties (R&Ws) given by the seller and the seller's indemnification obligation; insurance over the bad title is not common in Vietnam.

Law stated - 06 January 2022

Representation and warranty insurance

Do sellers of non-public real estate businesses typically purchase representation and warranty insurance to cover post-closing liability?

Similar to the insurance over bad title, insurance for the seller's R&W is not common in Vietnam.

Law stated - 06 January 2022

Review of business contracts

What are some of the primary agreements that the legal teams customarily review in the context of a real estate business combination, and does the scope vary with the structure of the transaction?

Depending on the nature of the real properties, the material agreements to be reviewed by the legal teams will vary, such as (1) for residential housing development project, the land lease decision and the land lease agreement with the state, or land allocation decision, and if the houses have been sold to the homebuyer, the template sale and purchase agreement (which must be registered with the competent authority); (2) for office or commercial building or industrial properties (eg, warehouses), the land lease decision, the land lease agreement and the template lease agreement with tenants; or (3) for hotels, the land lease decision, the land lease agreement and the hotel management service agreement. In addition, agreements for the restructuring of the target will also need to be reviewed.

Law stated - 06 January 2022

BREACH OF CONTRACT

Remedies for breach of contract

What are the typical remedies for breach of a contract in the context of a real estate business combination, and do they vary with the ownership of target or the structure of the transaction?

The typical remedy for breach of contract is the seller's indemnity for the buyer for its misrepresentation or failure to perform its covenants. In some cases, the buyer can request that the shareholder of the seller act as the sponsor in the definitive agreement and bear the indemnification obligation for the misrepresentation or failure to perform the covenants by the target that is owned by the seller before the business combination.

Law stated - 06 January 2022

FINANCING

Market overview

How does a buyer typically finance real estate business combinations?

The financing for real-estate business combinations depends on various elements, such as the terms and conditions of the current debts, mortgaged assets, and parties' negotiation and consideration; and, most importantly, it depends on banks' consent for the change of control.

In Vietnam, buyers do not typically assume property-level indebtedness of the target or borrow a senior line to repay pre-closing indebtedness of the target. This is because liabilities of the target are separate and independent from its shareholders, and banks operating in Vietnam face several prohibitions and restrictions on extending loans (eg,

prohibition on borrowing purpose to repay bank loans and foreign loans, prudential ratios, limits on loans to restricted entities and persons, and loans to buyers to buy shares that will be used as collateral).

In an asset deal, the repayment of existing loans is usually a condition precedent to business combinations because the assets are mortgaged to the banks and must not be released until these loans are fully repaid. However, the seller and buyer can agree that the repayment of existing loans and acquisition of the property occur at the same time and, in this case, a tripartite agreement between seller, buyer and the bank is likely to take place for the purpose of resolving the repayment of the existing loan and release of mortgaged property used for securing the aforesaid loan or loans .

Law stated - 06 January 2022

Seller's obligations

What are the typical obligations of the seller in the financing?

In asset deals, sellers are responsible for the repayment of debts over the assets to be sold.

In equity deals, as liabilities of the target are separate and independent from its shareholders, sellers do not have the obligation to repay the loans of the target. However, sellers are required to obtain banks' consent for proposed business combinations or the waiver of such consent, according to loan agreements between the target and banks; otherwise, the seller has to support the target to repay the debts for facilitating the business combination.

Law stated - 06 January 2022

Repayment guarantees

What repayment guarantees do lenders typically require in the context of a property-level financing of a real estate business combination? For what purposes are reserves usually required in the context of property-level indebtedness?

Repayment guarantees are subject to the bank's assessment and consideration with respect to the target and the potential buyer. In practice, if the buyer's acquisition is financed with loans, lenders typically require common guarantees, including payment guarantees, mortgages, sponsorship for payment, submission of financial documents and repayment plans for banks' reassessment of payment ability according to its internal policy.

Lenders may require periodic financial reporting and cash reserves for taxes, insurance and repairs by the target to maintain the value of the target and assets serving as collateral.

Law stated - 06 January 2022

Borrower covenants

What covenants do lenders usually insist on in the context of a property-level financing of a real estate business combination?

Lenders usually require (1) affirmative covenants such as maintaining adequate levels of insurance over mortgaged properties, furnishing the lender with audited financial statements of the target, disclosure of material adverse changes regarding the security and business operation, and compliance with relevant laws applicable to the subject matter of the transaction, and (2) negative covenants such as no changes of control and lien limitations.

Law stated - 06 January 2022

Typical equity financing provisions

What equity financing provisions are common in a transaction involving a real estate business that is being taken private? Does it depend on the structure of the buyer?

Depending on the deal structure, the provisions, such as discharge of existing loans or encumbrances on the equity assets, obtaining banks' consent or waiver and discharge of remaining financial obligations, are usually required for closing in financing real-estate business combinations.

Law stated - 06 January 2022

COLLECTIVE INVESTMENT SCHEMES

REITs

Are real estate investment trusts (REITs) that have tax-saving advantages available? Are there particular legal considerations that shape the formation and activities of REITs?

Vietnamese law does not have concepts of 'trust' or 'real-estate investment trust', but it has a similar concept, namely the 'real-estate investment fund': a kind of securities investment fund that primarily invests in real estate and securities of an issuer with at least 65 per cent revenue arising from ownership and trading in real estate. By law, real-estate investment funds are organised and operated in either of the following two forms, which will be established by a fund manager.

Closed fund

This is a public fund whose fund certificates are offered to the public and will not be redeemed at the request of the investors. For establishment, the fund manager will obtain a certificate for establishment registration of closed fund from the State Securities Commission of Vietnam (SSC). By law, in this closed fund, investors are entitled to contribute capital to their real estate, satisfying the conditions required by law, or purchase the fund certificates issued by this closed fund. Real estate to be used for capital contribution into this closed fund must satisfy certain conditions such as: (1) being located in Vietnam and invested for the purpose of lease or operation to earn stable profits; (2) being finished houses or buildings; and (3) for real estate under the construction, its total value must be less than 10 per cent of the total assets of the closed fund.

This closed fund will provide the high dividend pay-out to the investors as 90 per cent of the profits must be declared and distributed to the investors; however, the investors do not make decisions on the investments, which are decided by the fund representative committee.

Public securities investment company

This is a public company engaging in securities investment. For establishment, the fund manager will obtain a license for establishment and operation from the SSC, and an enterprise registration certificate from the provincial Department of Planning and Investment. This company will raise fund by issuance of ordinary shares only and does not have the obligation to redeem the issued ordinary shares. This company will only distribute dividends to its shareholders upon satisfaction of conditions applicable to other normal companies and the following conditions: (1) this distribution must be in accordance with profit distribution plan specified in the charter and the prospectus; and (2) after distribution, the company is still capable to ensure the availability of funds that can be used to pay all debts and other financial

liabilities when due and its net asset value is not less than 50 billion Vietnamese dong.

There is no tax-saving advantage for real-estate investment funds. Investors or shareholders of the real-estate investment funds are subject to the corporate income tax (CIT) and the personal income tax (PIT) like in other Vietnam-based companies; in particular, individual investors or shareholders (onshore and offshore) will be subject to 5 per cent PIT imposed on dividends distributed, and 0.1 per cent PIT will be imposed on sales proceeds; and corporate investors or shareholders (onshore and offshore) will be subject to 20 per cent CIT imposed on net gains but are exempted from CIT for dividends distributed after the real-estate investment funds pay their own CIT.

Law stated - 06 January 2022

Private equity funds

Are there particular legal considerations that shape the formation and activities of real estate-focused private equity funds? Does this vary depending on the target assets or investors?

In Vietnam, real-estate investment funds are organised and operate in the form of closed funds or public securities investment companies, both of which are public. There is no private real-estate focusing fund (ie, member fund) in Vietnam.

Law stated - 06 January 2022

UPDATE AND TRENDS

Key developments of the past year

Are there any other current developments or emerging trends that should be noted?

In terms of changes in law, this past year has seen the Law on Investment No. 61/2020/QH14 take effect, under which new powers are granted to the regulators to regulate nominee transactions as well as national defence issues. The investment registration authority can now petition the competent court to declare void a sham transaction during the project implementation process of the investor and, based on such effective judgment, decide to terminate the investment project that is based on the sham transaction. Acquisitions by foreign investors of companies with real estate will undergo a national defence review before the acquisition can be approved. More scrutiny is expected in the ever-growing real-estate sector in Vietnam.

Additionally, the Prime Minister sent Official Dispatch No. 8857/CD-VPCP dated 3 December 2021 to request the Ministry of Finance to inspect, examine and supervise the private placement of corporate bonds by real-estate companies and related banks. Owing to this new policy, regulation of credit to finance real-estate projects is tightening.

Because of the lengthy of time and stringent procedures, the private combination in the real-estate sector is more common than public combination; and land title documents such as land lease and allocation decisions, land lease agreements and land use right certificates are required for closing of the deal. Further, investigations over the past few years have uncovered improper conduct in the context of bidding and auction requirements and the land clearance and compensation process in the real-estate sector. Hence, buyers are more wary, conducting more comprehensive due diligence rather than merely relying on land use rights certificates; even risk-tolerant buyers have taken more conservative approach in acquisitions, additionally requiring evidence that bidding and auction requirements and the land clearance and compensation process have been properly completed in order to proceed with closing of the deal.

* The authors would like to thank Tran Thien Vu, Nguyen Dinh Thuc, Ha Nguyen Nhat Minh and Pham Anh Tu for their assistance in the writing of this chapter.

Jurisdictions

	India	AZB & Partners
	Japan	TMI Associates
	Nigeria	Olajide Oyewole LLP
	Poland	WKB Wiercinski Kwiecinski Baehr
	Switzerland	MLL Meyerlustenberger Lachenal Froriep Ltd
	United Kingdom	DAC Beachcroft
	USA	Cleary Gottlieb Steen & Hamilton LLP
	Vietnam	YKVN LLC