



# LEGAL NEWSLETTER

## JUNE 2023

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## New Regulations on Bank Guarantees in Circular 11/2022/TT-NHNN

*In order to meet the new social demands related to banking guarantee activities, the State Bank of Vietnam issued Circular No. 11/2022/TT-NHNN on September 30, 2022, replacing Circular No. 07/2015/TT-NHNN dated October 3, 2012, and Circular No. 13/2017/TT-NHNN dated September 29, 2017 ("Circular 11/2022"). The new contents of this Circular include:*

### 1. Electronic Bank guarantees in foreign currencies

The provision of bank guarantees in foreign currencies by credit institutions and branches of foreign banks must comply with the scope of foreign exchange activities in the domestic and international markets as stipulated in the operating licenses of each type of credit institution and branch of the foreign bank. When implementing guarantees, credit institutions and branches of foreign banks must comply with the regulations in the Law on Credit Institutions and the guidance of the State Bank of Vietnam on cases where credit is not granted, credit granting restrictions, and credit limits.

A new provision in Circular 11/2022 is that credit institutions and branches of foreign banks can choose to conduct banking guarantee activities through the use of electronic means (electronic guarantee activities). Electronic guarantee activities must ensure security, safety, protection of data messages, and information security in accordance with the provisions of laws on anti-money laundering, electronic transactions, the guidance of the State Bank on risk management in electronic banking activities, and other relevant legal documents.

However, the banking guarantee activities through the use of electronic means **are limited to a maximum commitment value of 4 billion VND for individual customers and 45 billion VND** for organizational customers, except for the following cases:

Customer identification information is authenticated by authorized state agencies or electronically authenticated through organizations providing electronic authentication services in accordance with laws on identification and electronic authentication;

Customers submit electronic guarantee requests through the SWIFT system;

Customer information and guarantee obligations are accurately cross-checked through customs electronic payment gateways or the national bidding network system;

Customers use digital signatures as regulated by law when requesting guarantees or signing guarantee agreements with credit institutions/branches of foreign banks;

Customers are credit institutions or branches of foreign banks.

## New Regulations on Bank Guarantees in Circular 11/2022/TT-NHNN

### 2. Parties may agree on the guaranteed fees

According to the provisions of Circular 11/2022, credit institutions and branches of foreign banks may agree on the guarantee fees for customers and related parties. Accordingly, in the case of counter-guarantees or confirmation of guarantees, the guarantee fees are determined by the parties. In the case of joint guarantees, the participating parties agree on the guarantee fees for each co-guarantor.

In the case of guarantee contracts denominated in foreign currencies, the parties may agree to collect guarantee fees in foreign currencies or convert them into Vietnamese dong at the selling exchange rate of the guarantor at the time of fee collection or notification.

### 3. Guarantees for Off-plan housing

One notable change in Circular 11/2022 is that guarantees for Off-plan housing are now allowed. Only commercial banks with sufficient capacity to perform guarantees can proceed with guaranteeing Off-plan housing. The conditions for commercial banks include:

The content of banking guarantee activities is stipulated in the establishment and operation license or in the document amending or supplementing the establishment and operation license of the commercial bank.

Not being prohibited, restricted, suspended, or temporarily suspended from guaranteeing Off-plan housing.



## New Regulations on Bank Guarantees in Circular 11/2022/TT-NHNN

In addition, project developers for Off-plan housing must meet the following conditions to be considered and granted guarantees by commercial banks:

The developer meets all the requirements stipulated in Article 11 of this Circular (except in cases where commercial banks guarantee the developer based on counter-guarantees).

The project of the developer meets all the conditions of real estate development for Off-plan housing in accordance with the provisions of Article 55 of the Law on Real Estate Business and relevant laws.

Guaranteeing Off-plan housing must be established through a Off-plan property Guarantee Contract. This contract is signed before signing the purchase or lease-purchase agreement for the Off-plan property. After signing the purchase or lease-purchase agreement, the developer must request the commercial bank to issue a letter of guarantee for the buyer.

**Thus,** it can be seen that Circular No. 11/2022 has introduced several positive changes to meet the current needs in banking guarantee activities, including the addition of foreign currency guarantees through electronic means, the ability for parties to agree on guarantee fees and the inclusion of guarantees for Off-plan housing. With these new regulations, banking guarantee activities, in particular, and the societal demand for guarantee services, in general, will be expanded and ensured by necessary legal provisions. This contributes significantly to the development of the economy and the protection of the legitimate rights of entities participating in banking guarantee transactions.

## Some important points in Circular no. 02/2023/TT-BXD guiding certain contents of Construction Contract

On March 3, 2023, the Ministry of Construction issued Circular No. 02/2023/TT-BXD guiding certain contents of construction contracts. This Circular provides detailed guidance on certain aspects of construction contracts; it also announces and instructs the use of sample contracts for construction implementation, consulting, and engineering, procurement, and construction (EPC) contracts. In this article, TNTP will analyze some of the regulations stipulated in the Circular.

### 1. Regulated entities

This Circular applies to entities involved in setting and management of the execution of construction contracts applicable to investment and construction projects funded by public investments and non-public investment state funds, and construction contracts between project enterprises and contractors for performing tasks of contract packages of the public-private partnership (PPP) projects.

### 2. Adjustments to unit prices and prices of construction contracts

Adjustments to unit prices of construction contracts shall comply with the regulations in Article 38 of Decree No. 37/2015/ND-CP which are amended by Clause 14 Article 1 of Decree No. 50/2021/ND-CP.

If adjustments to prices of construction contracts result in adjustments and additions to such contracts, appendices must be signed as the basis for adjusting prices of such contracts. Investors shall be responsible for approving or appealing to approve revised and supplementary estimates according to regulations of law on the management of work construction investment expenses and construction contracts to be the basis for the addition of the signed appendices to such contracts.

Methods for adjusting prices of construction contracts:

Methods for adjusting prices of a construction contract shall comply with the instructions in Appendix I enclosed herewith. The application of methods for adjusting prices must be satisfactory to the nature of works, types of prices of the contract, and currencies and must be agreed upon in the contract.

For time-based consulting contracts (months, weeks, days and hours), adjustments to salary levels for experts shall be made based on the formula for adjusting labour costs specified in section I Appendix I enclosed herewith.

## Some important points in Circular no. 02/2023/TT-BXD guiding certain contents of Construction Contract

### 3. Instructions for using and applying model construction contracts

The model construction contracts enclosed herewith shall be applied to organizations and individuals to refer to and apply in establishing and managing contract performance for construction contract packages, ensuring that the contents of construction contracts meet the regulations in Clause 1 Article 141 of the Law on Construction No. 50/2014/QH13.

The model construction contracts enclosed with this Circular shall be applied to investors and contractors. If the contracting parties are the general contractors or prime contractors, the parties shall study and apply the necessary contents of these model contracts to establish and manage the contract performance.

The model construction contracts enclosed herewith include:

Model consulting contract specified in Appendix II enclosed herewith which is applied to consulting contracts for preparation of feasibility study reports, construction surveys, construction designs and construction supervision

Model performance contract specified in Appendix III enclosed herewith.

Model EPC contract specified in Appendix IV enclosed herewith which is applied to lump-sum contracts. If prices of a contract are based on fixed unit prices, adjusted unit prices or a combination of types of prices of the contract, parties shall, based on regulations of law and this Circular, amend terms of their EPC contract templates for establishing the contract.



## Some important points in Circular no. 02/2023/TT-BXD guiding certain contents of Construction Contract

For simple and small-scale contracts, types of consulting contracts and other combined contracts, parties shall refer to and apply the model construction contracts enclosed with this Circular for adjusting and amending the terms of their contract templates for establishing contracts.

When using the model construction contracts enclosed herewith for dealing and signing construction contracts, specific requirements and conditions of packages, projects and the regulations of Decree No. 37/2015/ND-CP which are amended by Decree No. 50/2021/ND-CP, other regulations of law and the instructions in this Circular shall be based on. For contents of a contract, the following contents must be agreed upon specifically:

Specific regulations on the time limit for payment, the time limit for contract execution, the deadline for response, the expiry date of the contract and similar cases must be agreed upon.

If the contractor is a consortium, the performance guarantee - advance payment guarantee must be agreed upon as prescribed by law.

Specific regulations on types of currencies and forms of payment in the contract must not be contrary to requirements prescribed in bidding documents and regulations of law on foreign exchange.

If the price of the construction contract is based on adjusted unit prices, methods for price adjustments, price data sources and pricing basis must be agreed upon but not be contrary to bidding documents and law on construction contracts.

The contents of the contract shall be adjusted and supplemented accordingly based

**Therefore,** This circular has regulated three contract templates for construction. Individuals and organizations participating in legal relationships related to construction can refer to these templates to adjust, modify, and supplement them according to the actual situation.



## New points of Decree 10/2023/ND-CP

On April 3, 2023, the Government issued Decree 10/2023/ND-CP effective from May 20, 2023 ("Decree 10"). Accordingly, Decree 10 amends and supplements a number of articles of the decrees guiding the implementation of the Land Law. Specifically:

### 1. The highlights of Decree 10

Adding more conditions to allow the change of land use purpose for rice cultivation to implement investment projects.

Amendment on authority to issue Land Use Right Certificate.

A number of provisions in Decrees guiding the Land Law have been repealed.

### 2. Additional conditions for allowing change of land use purpose for rice cultivation to implement investment projects

Accordingly, Decree 10 supplements Article 68a of Decree 43/2014/ND-CP on conditions and criteria for allowing the change of land use purpose for rice cultivation, protection forest land, and special-use forest land for other purposes to implement investment projects, including:

Having an investment project approved for investment policies or granted an investment registration certificate in accordance with the investment law.

In accordance with district-level land use planning, investment projects included in the list of district-level annual land use plans approved in accordance with law.

There is a plan for afforestation or a document to fulfill the responsibility of paying for afforestation in accordance with the provisions of the forestry law in the case of changing the use purpose of protection forest land or special-use forest land to another purpose; have a plan on using the topsoil and a document on fulfillment of the responsibility to pay money for the protection and development of rice land in accordance with the law on cultivation in the case of changing the purpose of using specialized rice-growing land to other purposes.

There is a preliminary environmental impact assessment, environmental impact assessment according to the provisions of the law on environmental protection (if any).

The agency or person competent to appraise and approve the policy of changing the use purpose of protective forest land, special-use forest land, and rice-growing land to other purposes is only responsible for the contents specified in Clause 2 and Clause 3 of this Article; is not responsible for other contents that have been previously appraised, approved, decided or resolved by competent agencies or persons.

## New points of Decree 10/2023/ND-CP

### 3. Amendment of authority to issue land use right certificates

In Clause 5, Article 1 of Decree 10 amending and supplementing Article 37 of Decree 43/2014/ND-CP related to the authority to issue land use right certificates in the case specified in Clause 4, Article 95; Clause 3, Article 105 of the Land Law is as follows:

For localities that have established Land Registration Offices, the issuance of Certificates and certification of changes to the granted Certificates shall be carried out by the following agencies:

- Land Registration Office: For religious organizations and establishments; overseas Vietnamese to implement investment projects; foreign organizations and individuals; foreign-invested enterprises;
- Branch of Land Registration Office or Land Registration Office: For households, individuals, residential communities, overseas Vietnamese are entitled to own houses associated with the land use rights in Vietnam.

Branch of Land Registration Office, Land Registration Office may use their own seal to issue Certificates, certify changes in issued Certificates.

Thus, Decree 10 has amended the authority to issue land use right certificates, confirm changes to the Certificate in the direction of creating convenient conditions for people in carrying out these administrative procedures (made at the Land Registration Office without going to the Department of Natural Resources and Environment).



## New points of Decree 10/2023/ND-CP

### 4. A number of provisions in Decrees guiding the Land Law are rejected

Decree 10 has rejected a number of provisions in Decrees guiding the Land Law as follows:

Regulations in Clauses 4 and 5, Article 5b of Decree 43/2014/ND-CP (added according to the provisions of Clause 6, Article 2 of Decree 01/2017/ND-CP) related to database construction whether land.

Regulations in Clauses 14, 23, 45 and 62 Article 2, Clause 6 Article 3 Decree 01/2017/ND-CP, related to a number of regulations on land collection, land allocation, etc.

Regulations in Clauses 6 and 7, Article 1 of Decree 148/2020/ND-CP regarding plans for land allocation and zoning, etc.

**Thus,** Decree 10 was issued to amend and supplement a number of articles of the decrees guiding the implementation of the land law in order to support and create the best conditions for people in implementing administrative procedures on land as well as making adjustments to make the regulations more strict.

## Limiting disputes arising from drafting of Processing Contract

*In fact, disputes arising from contracts in general, and processing contracts in particular, are becoming increasingly common. Resolving these conflicts and disputes takes a significant amount of time and money. One of the best solutions to limit these disputes is to have clear agreements on the clauses of the contract. Therefore, special attention should be given to drafting processing contracts. In the following article, TNTP will provide readers with the risks to be avoided or mitigated when executing processing contracts.*

### 1. Risks on the subject of the processing contract

Subjects participating in the signing of processing contracts can be individuals or organizations. These subjects need to meet the legal personality and legal capacity under established civil transactions.

Specifically, for commercial processing contracts, the processor shall be a business entity engaged in a suitable business line relevant to the processed products. Individual entities shall meet fully the legal personality and legal capacity. For organizations, the person signing the contract shall be a legal representative or authorized representative.

In practice, there are many cases where processing contract involves organizational entities but are signed by unauthorized representatives, for example, individuals who are not legal representatives or authorized representatives, or individuals who are authorized but exceed the scope of authorization in signing and establishing contracts. Contracts signed by unauthorized individuals may be void. Depending on the specific circumstances, the contract may be entirely or partially void. A void contract will affect the rights and interests of the parties involved.

Therefore, when establishing processing contracts, the parties involved should pay attention to the subjectivity of the signing parties. Accordingly, the parties may request the other party to provide legal documents such as identification cards/passports, business registration certificates, or power of attorney in cases where authorization is required to determine whether the signing representative has the authority to sign the contract or not.



## Limiting disputes arising from drafting of Processing Contract

### 2. Risks due to delivery of processed products not in accordance with the agreed quantity, quality, method, time and place

The processor shall deliver the products to the client in accordance with the agreed quantity, quality, manner, time, and place. The processor is liable for the quality of the products unless the product does not meet the quality requirements due to the raw materials provided by the client or due to inadequate instructions from the client.

In reality, there have been numerous disputes arising out of processors failing to deliver the processed products under the agreed quantity, quality, time, and place. Therefore, in order to limit such risk, the parties should stipulate these aspects in the contract. Meanwhile, the client should include provisions stating that if the processor violates the terms regarding product delivery, such as not meeting the agreed quantity or quality, etc., penalties and compensation for damages will be required, and replacement or return of goods will be arranged for the client.

### 3. Risks due to delay in receiving processed products by the client

According to Article 548 of the Civil Code 2015, if the client is late in accepting the products, he/she shall bear all risks during the period of delayed acceptance, including where the products are processed from the raw materials of the processor unless otherwise agreed.

Where the client is late in accepting the products, the processor may deposit the products at a place of bailment and must notify the client immediately. The obligation to deliver the products shall be fulfilled when the agreed terms are satisfied and the client has been notified. The client must bear all costs incurred for bailment (Article 550 of the Civil Code 2015).

Thus, the law allows the parties to agree on the liability to bear the risk in case the client is late to receive the product. In order to limit future disputes, the parties should specify in the contract the liability of the client in case of delayed acceptance of the processed products.

### 4. Risk of unilateral termination of the contract by one party

The law provides for the parties' right to unilaterally terminate the processing contract as follows:

Unless otherwise agreed or otherwise provided by law, each party has the right to terminate unilaterally the performance of a processing contract if continued performance would not benefit that party but must give reasonable prior notice to the other party.

If the client terminates unilaterally the performance of the contract, the client must pay fees for the work already performed, unless otherwise agreed. If the processor terminates unilaterally the performance of the contract, it shall not be paid fees, unless otherwise agreed.

A party which unilaterally terminates the performance of a contract and thereby causes damage to the other party must compensate.

## Limiting disputes arising from drafting of Processing Contract

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During the performance of the contract, if one party unilaterally terminates the contract without notifying the other party in advance within a reasonable period of time, it will cause damages to the other party. This can lead to disputes over the determination of damages, especially in the case of damages for a third party.

Therefore, the parties should agree in the contract on the cases in which unilateral contract termination is permitted. In case of violation, the breaching party shall bear penalties for the breach and compensate for damages incurred by the aggrieved party.

### 5. Risks due to breach of payment obligations

According to provisions of the Law, the client shall pay fees in full at the time of accepting the products, unless otherwise agreed. If there is no agreement on the rate of fees, the applicable rate shall be the average rate charged for the production of products of the same type at the place of processing at the time of payment.

If the products fail to meet the agreed quality due to the raw materials supplied or the unreasonable instructions provided by the client, the client does not have the right to reduce the fees.

In reality, contract disputes arising from the breach of payment obligations are extremely common. The reason is that the client fails to pay the fees in the correct payment method or payment term, or the client unilaterally reduces the fees of the processor. Therefore, in order to limit such disputes, the parties should agree in the contract on the payment term, payment method, the penalty for violation and compensation for damages caused by the breach of payment obligations, etc.

The payment term can be divided into multiple instalments based on the agreement between the parties. Meanwhile, for each instalment, the parties should specify the payment amount.

Before signing the processing contract, the parties need to estimate the risks when performing this contract, thereby stipulating preventive solutions. The above is the content of the article ***"Limiting disputes arising from drafting of processing contracts"*** that TNTP provides to readers. If you have any further questions, please do not hesitate to contact TNTP for the best support.

*Best regards,*

# LEGAL NEWSLETTER

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