



THE NEW PRC PROPERTY LAW

The PRC Property Law (“Property Law” or “Law”) was first proposed in 1993 and was finally passed on March 16, 2007, after seven revisions. The Law will become effective from October 1, 2007. There are five chapters and 247 articles, covering ownership rights, the ownership registration system, condominium rights, neighborhood rights, land-contracting and -managing rights, construction land-use rights, homestead land-use rights, easement and security interests, and mortgage rights.

According to Article 1, the Property Law has been formulated in accordance with the PRC Constitution in order to identify the ownership of property, protect the property rights of owners, safeguard the economic order of the socialist market, and maintain the fundamental economic system of the State.

APPLICATION OF THE PROPERTY LAW

The Property Law will apply to any civil relationships arising from ownership and use of property, which

includes both immovable and movable property. The property rights addressed under the Law include three types:

1. **Ownership:** The State, agricultural collectives, corporations, and individuals are entitled to possess, use, benefit from, and dispose of their real property and chattels pursuant to the law.
2. **Usufructuary right:** The right to possess, use, and benefit from the real property or chattels owned by others as stipulated by law. There are four types of usufructuary rights provided for in the Property Law: land-contracting and -managing rights, construction land-use rights, homestead land-use rights, and easements.
3. **Security interests:** The right of a creditor to be repaid with priority from secured properties provided by the debtor or by a third party or properties under legal possession of the creditor in case the debtor fails to repay his debts, including the right of mortgage, right of pledge, and right of lien.

EQUAL PROTECTION OF ALL TYPES OF OWNERS

One of the most controversial issues during the revisions of the draft Property Law was whether or not to protect private ownership along with State ownership. It is encouraging, therefore, that the Property Law for the first time expressly provides that the State recognizes and protects the legal position and development rights of all market participants equally. According to some scholars, it is inappropriate in a socialist system for the Law to constrain the rights of the State as against private rights. This debate raged for a considerable period of time and effectively delayed the enactment of the Law for a year. Notwithstanding the ideological debate, it is now clear that the property rights of the State, agricultural collectives, corporations, and individuals are all equally protected under the Law.

OWNERSHIP OF LAND AND LAND-USE RIGHTS

As a consequence of amendments to the PRC Constitution in 1982 and the promulgation of the PRC Land Administration Law, all land in China is owned either by the State or by agricultural collectives. This is reiterated in the Property Law.

The concept of providing for a “nonownership” interest in land that is restricted as to use is one that has deep historical roots in China. In general, land-use rights in China include two types: State-owned land-use rights (either by allocation or by grant) and agricultural collective–owned land-use rights. Under the Property Law, residential construction land-use rights, which in cities must be granted State-owned land-use rights (otherwise, procedures for converting allocated land-use rights for agricultural collective–owned land into granted land-use rights will be triggered and land premiums must be paid accordingly), will automatically renew on expiry. However, the Property Law leaves open the issue of land premiums for such renewals.

The marketability of agricultural collective–owned land is highly restricted in China. As mentioned above, agricultural collective–owned land generally still needs to be converted

into granted land-use rights before any construction and development can take place on such land. Further, land used for industrial or commercial purposes or land used for tourism, entertainment commercial premises, or land with two or more prospective users must be granted by tendering, auction, or other public competitive methods, such as listing at property-rights exchange centers.

EXPROPRIATION OF PROPERTIES

The Property Law deals with the grounds for expropriation of real property owned by agricultural collectives and individuals as well as the question of compensation for such expropriation.

Expropriation and the “Public Interest.” Agricultural collective–owned land, premises, and other real property owned by corporations or individuals may be expropriated only where it is in the public interest as stipulated by law. This is a somewhat vague and undefined concept and leaves considerable room for the discretion of the authorities, which is less than desirable.

Compensation. In the event of expropriation of agricultural collective–owned land, the owners are entitled to land compensation fees, settlement allowances or subsidies, compensation fees for land fixtures and growing crops, etc. Further, farmers whose land is expropriated are entitled to social security fees and the assurance of a place to live, and their legal rights must be protected.

In the event of expropriation of premises and other real property owned by corporations or individuals, compensation for demolition and resettlement must be paid as stipulated by law to protect the legal rights of the expropriated person. Further, where residential premises of individuals are expropriated, suitable alternative accommodation is to be secured, such that the living conditions of such individuals are ensured. Unfortunately, there is no reference to compensation for loss of profit, relocation expenses, or the increased costs of locating a replacement land site.

REGISTRATION OF PROPERTY RIGHTS

Effectiveness of Registration. The Property Law introduces a uniform registration system for real property and expressly stipulates that the creation, alteration, transfer, or termination of real property rights (other than State ownership of natural resources) must be registered; otherwise, such rights will have no legal effect. The registration certificate provides evidence of ownership rights, although in the event of any inconsistency between the certificate and the registration records held at the relevant registry, it is the records that will prevail.

Pre-Registration for Housing or Other Real Property. The Property Law also introduces a pre-registration system, under which parties to a sale and purchase contract for a house or other real property may apply for pre-registration to protect their future property rights. Once the pre-registration is completed, any sale or dispossession of the property will be of no effect without the consent of the registered purchaser.

CONDOMINIUM RIGHTS

People in China have had shared occupancy interests in buildings for some time. The Property Law now recognizes private ownership of residential or commercial premises. It is also expressly stipulated in the Property Law that common property areas (such as roads, landscape areas, car parks, and other public places and public facilities inside the construction zone) will be co-owned and jointly managed by all private owners of a building.

The question that arises is, what are “common areas”? Article 73 specifies that roads, green spaces, and recreational facilities are owned in common, but what about the other buildings in a development? Certainly the building housing the owner’s unit is commonly owned with the other unit owners. But do all owners own an undivided interest in all the buildings in a development? Or does each owner in a building share ownership of that building and the land beneath it and share with all other owners in the development ownership of the rest of the common areas?

Notwithstanding these questions, it is clear that any control rights that exist over the common elements are to be exercised by the owners’ committee, and the Property Law sets out some rules for the owners’ committee. Unfortunately, more is left unsaid than said; for example, nothing is said about how often the committee will meet, and there is no minimum number of committee members specified. Nevertheless, the new Law is quite clear that, as between the management company, the developer, and the owners, it is the owners who are truly in charge of the management and maintenance of their buildings.

NEIGHBORHOOD RIGHTS AND EASEMENTS

The Property Law identifies six categories of neighborhood rights: water rights, rights of way, utility service rights, fresh air/light rights, health and environmental protection rights, and safety rights.

Before the promulgation of the Property Law, there was no statutory concept of “easement” under PRC law. Easements can be differentiated from neighborhood rights, which have been recognized by the General Principles of the Civil Law and are reiterated in the Property Law.

The new concept of easement recognized by the Property Law provides that easements may be created by a contract in writing between the owners or users of a dominant tenement and the owners or users of a servient tenement. Easements will become effective upon the execution of an easement contract, and importantly, easements are recognized as a species of ownership in real estate and are registerable. This means that they will run with the land.

SECURITY RIGHTS

Application of Laws. When the Property Law comes into effect, it will be the third law regulating security interests in China, along with the General Principles of the Civil Law and the Security Law. Although the Property Law expressly states

that in cases of conflict between the Security Law and the Property Law, the latter will prevail, there is no such provision concerning the application of the General Principles of the Civil Law in the event of conflict with the Property Law. We consider, however, that in most cases the more recent and more specific provisions will prevail.

Mortgage. The range of properties that can be mortgaged is extensively broadened by the Property Law to include:

- Buildings and other structures attached to land.
- Construction land-use rights.
- Contracting and managing rights of barren land acquired by way of tendering, auction, public negotiation, etc.
- Production equipment, raw materials, semi-finished products, and finished products.
- Buildings, vessels, and aircraft under construction.
- Transportation vehicles.
- Other properties the mortgaging of which is not otherwise prohibited.

Accordingly, property (either immovable or movable) may be mortgaged by written mortgage contracts unless otherwise prohibited by law and administrative regulation. Mortgage of construction in progress is now clearly recognized, and floating charges over inventory and equipment can now be registered as collateral for loans.

Pledge and Lien. Under current laws and regulations, a pledge can be made over movable property or negotiable instruments, securities, or intellectual property rights. The Property Law generally recognizes pledges over all movable property except where prohibited by law and administrative regulation. Pledges over movable property become effective upon delivery of such movable property. However, the Property

Law specifically stipulates that pledges over drafts, checks, promissory notes, bonds, deposit slips, warehouse receipts, and bills of lading shall become effective upon delivery of corresponding rights certificates. In cases where there are no rights certificates available, such pledges shall become effective upon registration with the appropriate authorities.

CONCLUSION

The Property Law demonstrates the determination of the Chinese government to better protect property rights and China's prosperous market. However, the effectiveness of the Law remains to be seen. The Law attempts to strike a balance in protecting the legal rights of farmers, developers, financiers, and investors in the real estate market, and in doing so perhaps does not go as far as it could. Clearly there will need to be further legislation and administrative regulation to clarify and expand areas that are not clear, and it will be interesting to see how the concepts enshrined in the new Law are interpreted at the local level, where most problems arise.

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