Global Corporate Real Estate Guide - Hong Kong

| Contents |
| --- |
| To generate table of contents, right-click here and select **Update Field.** |

Select a topic from the menu and explore the questions within.

*This chapter was last reviewed in April 2023.*

# Authors

# Real Estate Law

## What is included in the term “real estate”?

The term “real estate” is not defined in any Hong Kong statutes or case law. However, “land” has been defined in various statutes to include the following:

Land covered by water

Things attached to land or permanently fastened to anything attached to land

Intangible rights that might exist over the land

In common law, the ownership of a piece of land includes everything that is above the land (e.g., buildings) and everything beneath the land. It also includes fixtures – things that become so attached to the land or a building as to form part of the land, unless the contrary intention is expressed.

## What laws govern real estate transactions?

Hong Kong real estate transactions are mainly governed by the following:

The Conveyancing and Property Ordinance (Cap. 219), which governs the execution and proof of titles

The Land Registration Ordinance (Cap. 128), which governs the priority of interests in land

Other relevant statutes include the following:

The Landlord and Tenant (Consolidation) Ordinance (Cap. 7)

The Land (Compulsory Sale for Redevelopment) Ordinance (Cap. 545)

The Residential Properties (First-hand Sales) Ordinance (Cap. 621)

Hong Kong is a common law jurisdiction. Therefore, in addition to statutes, decisions by Hong Kong courts represent another major source of law pertaining to real estate transactions.

## What is the land registration system?

Hong Kong adopts a system of registration of instruments (deeds) affecting land, not of registration of title to land. Registration does not guarantee title as Hong Kong does not adopt a Torrens system. Registration gives priority to the person holding a prior registered interest over a subsequently registered interest. An unregistered instrument will lose its priority to subsequent buyers or mortgagees for valuable consideration (provided that the subsequent buyer or mortgagee concerned has carried out registration).

Registration is effected by submitting the instrument concerned to the Land Registry together with a memorial in the prescribed form. The memorial describes the property affected and the nature and object of the instrument. A registration fee is payable (between HKD 210 and HKD 2,000 as of April 2023). The land register will be updated to show the registered instrument, which will then be imaged and returned to the lodging party. The Land Registry pledges to complete the process of registration within 15 working days.

## Which authority manages the registration of titles?

Instruments affecting land are registered with the Land Registry.

## What rights over real property are required to be registered?

Registration is not mandatory in Hong Kong. However, to protect one’s interest in the property, the holder of that interest will almost invariably register the instrument creating or conferring the property interest. Generally, if an instrument is duly presented for registration within one month after the date of its execution, priority will start from the date of its execution. If an instrument is presented for registration more than one month after the date of its execution, priority will start from the date of its registration instead of the date of execution.

Registrable instruments include deeds, conveyances, judgments and other instruments in writing which affect immovable property.

However, the following documents are not registrable:

Floating charges (except upon crystallization)

Unilateral document by a stranger to the title claiming an interest in a property

Building plan without being attached to any instrument

Wills

In addition, short-term leases (i.e., with a term of three years or less) do not have to be registered. Priority will not be affected even if it is not submitted for registration.

## What documents can landowners use to prove ownership over real property?

Normally, land owners will have to produce (i) the land grant and those title documents from the intermediate root document (see paragraph below) to the present if the land grant is more than 15 years; or (ii) the land grant and those title documents from the land grant to the present if the land grant is less than 15 years. An intermediate root document must be an assignment, mortgage or charge dealing with the whole estate.

Land owners have to show an unbroken chain of ownership from the land grant or the intermediate root to the present day and that the ownership is free from any encumbrance. The originals or certified copies of all title documents in the chain must be produced. The original has to be produced if the document relates exclusively to the real estate concerned, and a certified true copy will be acceptable if it relates to the real estate concerned as well as to other properties.

## Can a title search be conducted online?

Online land search can be conducted by using the Integrated Registration Information System (IRIS) Online Services. Land registers and copies or certified true copies of registered land documents are available upon payment of fees (between HKD 10 and HKD 270 as of April 2023). The following information in relation to a particular property can be obtained from a land register:

Property particulars

Owner particulars

Encumbrances

Deeds pending registration

## Can foreigners own real property? Are there nationality restrictions on land ownership?

Generally, foreigners can own immoveable property in Hong Kong and there is no nationality restriction on ownership of immoveable property. However, since 2012, the government has implemented the “Hong Kong Property for Hong Kong People” (HKPHKP) policy which affects selected residential developments in Hong Kong. Under this policy, the government will, at the time of selling selected sites to developers, add land lease conditions restricting the sale of the flats developed at such sites to Hong Kong permanent residents only. Such restriction will apply for 30 years from the date on which the site is granted to the developer. As of April 2023, the HKPHKP policy has only been implemented on 2 residential sites in Kai Tak, Kowloon, Hong Kong.

## Can the government expropriate real property?

The government may resume land pursuant to the Lands Resumption Ordinance (Cap. 124). The Chief Executive in Council is empowered by law to resume land for public purposes, but the government must pay compensation in respect of the resumption. Such compensation shall correspond to the real value of the property concerned at the time and paid without undue delay. If the amount of compensation offered is not accepted, the matter can be referred to the Lands Tribunal for determination.

The Town Planning Ordinance (Cap. 131) and the Urban Renewal Authority Ordinance (Cap. 563) empower relevant public officers or statutory/public authorities to make recommendations to the Chief Executive in Council to exercise the power of resumption. The relevant statute provides that a resumption carried out on the recommendation made under the statute will be deemed to be carried out for a public purpose.

Other statutes, e.g., the Railways Ordinance (Cap. 519), Roads (Works, Use and Compensation) Ordinance (Cap. 370), Land Acquisition (Possessory Title) Ordinance (Cap. 130), Land Drainage Ordinance (Cap. 446) and Mass Transit Railway (Land Resumption and Related Provisions) Ordinance (Cap. 276), empower the resumption of land.

## How can real estate be held?

Under the Basic Law, all land in Hong Kong is state property and the government is responsible for its management, use and development, as well as for its lease or grant to individuals, legal persons or organizations for use and development. Land is usually granted by the government by way of a lease or an agreement for lease in consideration of an upfront land premium. All tenures in Hong Kong are leasehold, except for St. John’s Cathedral, which is held under freehold tenure.

The abovementioned system is essentially a continuation of the system adopted during British rule.

Land was granted for terms of varying duration. Some may run for 999 years, while others may run for 75 years with a right to renew for a further term of 75 years. For land in the New Territories, the lease term could not exceed the term of the lease of the New Territories by China to Britain. As a result, leases that were granted were either 99 years less the last three days from 1 July 1898 (the Crown had a lease reversion of three days), or for 75 years from 1 July 1898, with a right to renew for a further term of 24 years less three days. The New Territories Leases (Extension) Ordinance (Cap. 150) extended leases in the New Territories to 30 June 2047.

After the handover of Hong Kong back to the People’s Republic of China on 1 July 1997, the government has been granting land with terms of 50 years from the date of the land grant.

Subject to the restrictions in the land grant concerned, leasehold interest can be assigned, mortgaged or sublet.

Land parcels are usually granted by public auction (or other competitive processes such as tender) and usually to the bidder who offers the highest land premium or through land exchanges with the government (which will take the form of a surrender of an existing leasehold interest to the government in exchange for the grant by the government of another leasehold interest).

## What are the usual structures used in investing in real estate?

Real properties are usually held in the names of individuals or corporate entities.

Before entering into any transaction, the holding structure should be determined after taking professional advice and considering all pertinent factors including tax and convenience of disposal.

In the purchase of a residential property, it is of utmost importance that the person/entity who will be the buyer is determined before entering into any legally binding agreement. Changing the buyer or the holding entity will attract substantial additional stamp duty (with very limited exceptions to this rule). Acquisition of residential properties by companies and non-Hong Kong permanent residents will attract Buyer’s Stamp Duty (BSD) – for further details, please see section under the heading “What are the costs usually shouldered by the parties?”.

Subject to the above, it is not uncommon for investors of high value real estate to hold real estate in Hong Kong through a holding structure with two layers of companies. The real estate will be held by a Hong Kong-incorporated company. The Hong Kong-incorporated company is usually held by a company incorporated in a tax haven jurisdiction (e.g., the British Virgin Islands).

Such a structure has the following advantages:

If the real estate is sold by means of a sale of shares in the Hong Kong-incorporated company, the transaction will attract stamp duty for an amount equal to 0.26% of the consideration paid or the value of the shares being transferred, whichever is higher. Hong Kong stamp duty is not payable if the sale is effected by means of the sale of shares in the non-Hong Kong company.

If the transaction relates to the sale of the real estate and if the real estate is held by a non-Hong Kong entity, then legal opinions relating to the non-Hong Kong entity and other legal formalities will be required. This will result in longer completion time and extra expenses.

A non-Hong Kong company that is a body corporate and has established a place of business in Hong Kong is required to register with the Companies Registry pursuant to Part 16 of the Companies Ordinance (Cap. 622).

## How are real estate transactions usually funded?

The acquisition of real estate is usually financed by the buyer’s own funds and by bank loans (if the buyer does not have enough funds or if the buyer wishes to have gearing).

## Who usually produces the documentation in real estate transactions?

The first document in the process will normally be a “provisional” or “preliminary” agreement for sale and purchase signed between the seller and the buyer. It is very often the case that the “provisional” or “preliminary” agreement for sale and purchase is signed in the broker’s standard form. Depending on the size of the transaction, it is usual for the parties to engage lawyers only after they have signed a legally binding “provisional” or “preliminary” agreement for sale and purchase.

Normally, the seller’s solicitor will send the draft formal agreement for sale and purchase to the buyer’s solicitor for approval. The terms of the formal agreement may be negotiated between the parties. If a provisional or preliminary agreement for sale and purchase has been signed, the formal agreement for sale and purchase should reflect (and not be inconsistent with) the terms of the provisional or preliminary agreement for sale and purchase. When the terms of the formal agreement for sale and purchase have been agreed, the seller’s solicitor will prepare a clean copy for signing.

In Hong Kong, a developer may sell flats off the plan (i.e., before completion of the construction). In such a case, the buyer will face the risk of the developer defaulting in its construction obligation. To protect buyers, land grants that were issued since the 1960s very often contain restrictions on off-the-plan sales, which cannot be carried out without the government’s consent. This regulatory regime is called the Consent Scheme. For land grants without such restrictions, the Law Society of Hong Kong has put in place a separate regulatory regime called the Non-Consent Scheme.

Under the Consent Scheme, the developer’s solicitor will prepare the formal agreement for sale and purchase in the standard form prescribed by the Director of Lands.

Under the Non-Consent Scheme, if the developer and the buyer are jointly represented by the same law firm in the transaction, the developer’s solicitor is required to prepare the formal agreement for sale and purchase containing mandatory provisions to protect buyers.

Under both the Consent Scheme and the Non-Consent Scheme, the formal agreement for sale and purchase requires sale proceeds to be held by the law firm representing the developer as “stakeholders.” The stakeholders may only release funds first for the payment of construction cost and professional fees and the repayment of bank financing granted for the development project.

The Residential Properties (First-hand Sales) Ordinance (Cap. 621), which regulates every stage of the sale and purchase of first-hand residential properties (including sales brochures, price lists, sales arrangements, show flats, viewing of properties before purchase, mandatory terms in agreements, register of transactions, websites and advertisements), has come into full effect on 29 April 2013. The Sales of First-hand Residential Properties Authority is given the power under the ordinance to administer and implement the same. Subject to certain exemptions, the ordinance applies to any residential property situated in Hong Kong in respect of which neither a preliminary agreement for sale and purchase nor a formal agreement for sale and purchase has ever been entered into, and no assignment has ever been made. All sale and purchase of such first-hand residential properties after 29 April 2013, need to strictly comply with the ordinance. There are different offenses under the ordinance, some of which carry a maximum fine of HKD 5 million and imprisonment for a maximum term of seven years.

The assignment, the instrument by which the formal transfer of title is effected, is usually prepared by the buyer’s solicitor.

## Can an owner or occupier inherit liability for matters relating to the real estate even if they occurred before the real estate was bought or occupied?

An owner or occupier generally does not inherit third party liability relating to the real estate if such liability arises from any matter which occurred before he/she bought or occupied the real estate.

However, in the case of the ownership of a unit in a multiple-ownership building, this principle seems to be distorted somewhat by the Building Management Ordinance (Cap. 344) (BMO). The BMO provides that if a judgment is given against the incorporated owners (i.e., a body with separate legal entity formed under the BMO by incorporating the owners of the building), execution to enforce the judgment may be issued against any owner. An “owner” means an owner for the time being, i.e., someone who is the owner at the time of an application for leave for judgment to be enforced against the owners personally, not someone who was an owner at the time the liability was incurred. Therefore, an owner of a property can be liable for damages arising from an event prior to acquiring ownership in the property if the owners of the multiple-ownership building have been incorporated.

When dealing with ownership of a unit in a multiple-ownership building, the following possibilities should also be noted:

If, before the owner acquires the real estate, the Building Authority (the public authority responsible for building safety) has made an order requiring the owners of a multiple-ownership building to carry out any works to the common parts or any soil retaining or other structure for the maintenance of which the owners are responsible under the land grant, but the manager of the building only makes a demand after the acquisition for contribution of funds to carry out such works, the demand will be made to the owners of the building at the time of the demand, not the owners at the time when the order was made.

If there is a deficit in the management accounts before completion of the acquisition, the building manager may determine to demand the owners of the building to contribute towards the deficit or to increase the management fees. If such demand is made after the completion of the acquisition, the buyer will be responsible, not the previous owner.

A buyer will generally be liable for a continuing breach of the deed of mutual covenant (the document governing the rights and obligations of the owners of a multiple-ownership building vis-à-vis the other owners and the building manager) in respect of his/her unit even if the breach started before he/she becomes the owner.

If unauthorized structures exist in the real estate before the acquisition and the real estate was acquired with the unauthorized structures, it is possible for the Building Authority to issue an order, or the building manager to make a demand, for the demolition of the unauthorized structures after the acquisition. In such a case, the demolition order or the demand by the manager will be issued to the buyer, but not the previous owner, who may have been responsible for the erection of the unauthorized structure.

Moreover, failure to settle land premium payable under the land grant, government rent or any continuing breach of the land grant (even if the payment defaults or breaches occur prior to the current owner purchasing the property) is a breach of a covenant of the land grant and will enable the government, as landlord, to re-enter the property. If the seller assigns the property as beneficial owner, an implied covenant that the premiums and government rent have been paid will be incorporated into the assignment. The buyer, therefore, has a contractual right of action against the seller for damages in respect of the breach of this covenant.

In the Hong Kong legal profession, there are well established practices for making enquiries to ascertain the existence of, and resolving issues which may arise from, the abovementioned matters that may result in post-completion liabilities on the part of the buyer.

## Does a seller or occupier retain any liabilities relating to the real estate after they have disposed of it?

Under the Conveyancing and Property Ordinance, a person is not bound by covenants that relate to and run with the land, including those contained in the deed of mutual covenant and the land grant, after it has ceased to have an interest in the land, except in respect of breaches committed before it ceased to have an interest.

Where the seller assigns the property as beneficial owner, the Conveyancing and Property Ordinance will imply certain covenants relevant to the title into the assignment, including the covenant that the deed of mutual covenant and the land grant have been observed and performed by the seller. The seller is therefore liable for breach of the covenants in the deed of mutual covenant or the land grant with respect to matters which arose prior to the disposal of the property, as well as for breach of other express or implied covenants in the assignment.

# Acquisition of Real Property

## What are the usual documents involved in such transactions?

In most real property transactions not taking the form of a sale and purchase of shares in the property holding company, the parties will first sign a provisional or preliminary sale and purchase agreement. A formal sale and purchase agreement will later be signed by the parties, superseding the terms in the provisional or preliminary sale and purchase agreement. On completion, an assignment will be executed for the formal transfer of the title.

## What are the warranties given by a seller to a buyer?

A formal sale and purchase agreement may contain one or more of the following warranties by the seller to the buyer:

The government has not given any notice or made any order for the resumption of the land concerned

The property is not adversely affected by any easement, right, privilege or liability of which the seller is aware other than those disclosed in the agreement of which the buyer is aware or could have ascertained on reasonable inspection of the property

The seller has not received any notice or order requiring him/her to demolish or reinstate any part of the property

The seller has not received any notice or order requiring him/her as one of the co-owners of a multiple-ownership building to contribute to a specified sum towards the cost of repair of any common part of the building

The exact scope of any particular warranty, and whether any particular warranty is to be given, depends on the negotiation between the seller and the buyer.

Where the seller is expressed to assign the property as beneficial owner, certain covenants are implied into the assignment (and will therefore be given on completion of the purchase), including the following:

The land grant is good, valid and subsisting

The seller has good right and title to assign the property free from encumbrances save as specified in the assignment

The covenants contained in the land grant and any deed of mutual covenant have been observed and performed up to the date of the assignment

After 29 April 2013, all preliminary and formal agreements for sale and purchase of first-hand residential properties must contain certain provisions (including certain warranties to be given by the seller) as required under the Residential Properties (First-hand Sales) Ordinance (Cap. 621). Any person who fails to include the terms required by this ordinance commits an offense and is liable to a maximum fine of HKD 500,000.

## When is the sale legally binding?

In Hong Kong, for real property transactions not taking the form of a sale and purchase of shares in the property holding company, a seller and a buyer will very often sign a provisional or preliminary agreement. A provisional or preliminary agreement usually binds the parties.

Whether or not a provisional or preliminary agreement constitutes a binding agreement depends upon the intention of the parties as evidenced by the wording of the agreement. It will depend on whether the execution of a formal agreement is an essential precondition before the parties will be bound or whether it is simply contemplated that the preliminary agreement, which is already legally binding on the parties, will be superseded by a formal agreement. This is a question of fact and will be determined by the court on a case-by-case basis.

However, the Residential Properties (First-hand Sales) Ordinance (Cap. 621) requires a preliminary agreement for sale and purchase of a first-hand residential property to include a provision that, if a buyer decides to pull out and does not sign the formal agreement for sale and purchase within the prescribed time limit of five working days after the date of the preliminary agreement for sale and purchase, the preliminary agreement will be determined, in which case 5% of the purchase price (being the preliminary deposit) will be forfeited to the seller, and the seller will have no further claim against the buyer.

## When is title transferred?

In real property transactions not taking the form of a sale and purchase of shares in the property holding company, the legal title of the subject property will be transferred from the seller to the buyer upon execution and delivery of the assignment.

## What are the costs usually shouldered by the parties?

Buyers and sellers in general will bear their respective agents’ fees and legal costs.

In addition, the buyer usually bears the following:

Ad Valorem Stamp Duty (AVD), which is payable on the sale and purchase of real estate at the rate of 15% (for residential properties) or at the maximum rate of 4.25% (for non-residential properties) of the stated consideration or the market value of the property (whichever is the higher). There is an exemption for Hong Kong permanent residents buying residential properties but do not own any interest in any residential property in Hong Kong on the date of acquisition, the maximum rate is 4.25% of the stated consideration or the market value of the property (whichever is the higher) in such cases. However, from 12 April 2017 onwards, where such a Hong Kong permanent resident buys more than one residential property under one agreement, the aforesaid exemption will not apply. A non-Hong Kong permanent resident who has entered Hong Kong under designated talent admission schemes implemented by the government, purchased a residential property in Hong Kong on or after 19 October 2022 (which, at the time of purchase, was his/her only residential property (save for replacing property)) and subsequently becomes a Hong Kong permanent resident will be entitled to apply for partial refund of the AVD paid for the above mentioned only residential property if he/she still holds the same on the date of the application for refund – after such refund, the overall stamp duty charged will be on par with that charged on first-time home buyers who are Hong Kong permanent residents (i.e. the overall payable AVD is at the maximum rate of 4.25%) (note: the passing of legislative amendment bill for such partial refund of AVD is pending as of April 2023). The AVD will be payable on the sale and purchase agreement.

Buyer's Stamp Duty (BSD), which applies to the acquisition of residential properties by companies and non-Hong Kong permanent residents, the rate is 15% of the stated consideration or the market value of the property (whichever is the higher) in addition to the AVD and the SSD, if applicable. A non-Hong Kong permanent resident who has entered Hong Kong under designated talent admission schemes implemented by the government, purchased a residential property in Hong Kong on or after 19 October 2022 (which, at the time of purchase, was his/her only residential property (save for replacing property)) and subsequently becomes a Hong Kong permanent resident will be entitled to apply for full refund of BSD paid for the above mentioned only residential property if he/she still holds the same on the date of the application for refund (note: the passing of legislative amendment bill for such full refund of BSD is pending as of April 2023).

Special Stamp Duty (SSD), which is payable if a residential property is sold within three years of acquisition. The SSD has three levels of regressive rates for different holding periods:

20% of the stated consideration or the market value of the property (whichever is the higher) if the residential property has been held for six months or less

15% of the stated consideration or the market value of the property (whichever is the higher) if the residential property has been held for more than six months but for 12 months or less

10% of the stated consideration or the market value of the property (whichever is the higher) if the residential property has been held for more than 12 months but for 36 months or less.

Fees in relation to registering the agreement for sale and purchase and assignment at the Land Registry (between HKD 210 and HKD 450 as of April 2023)

Fees in relation to plans and certified copies of the title deeds (where the transaction is in respect of a property purchased from the developer)

In the case of the first assignment by the developer of a unit in a multiple-ownership building, lump sum payments payable by the first assignee of the unit under the deed of mutual covenant (e.g., advance payment of management fee, management fee deposit, fee for the removal of debris/waste materials resulting from decoration, and fitting out and contribution to sinking fund for the building)

# Leases

## What are the usual forms of leases?

Fixed term and periodic tenancies

Tenancies are either fixed-term tenancies or periodic tenancies.

In a fixed-term tenancy, the term of the tenancy is for a stated period. On expiry of the period, subject to any security of tenure, the tenant must leave. However, domestic leases created before 9 July 2004, and domestic tenancies of certain buildings are subject to separate regulatory regimes.

A periodic tenancy is granted for a certain term (usually a week or a month), which is automatically renewed for a term of the same duration after the expiry of the previous period. A periodic tenancy can be terminated by the landlord or tenant serving on the other a notice of the same duration as the periodic term. The landlord and tenant may expressly agree on the length of the notice period.

A periodic tenancy may be impliedly created. For example, a monthly tenancy may be created where a tenant remains in the premises after the expiry of the fixed-term tenancy and continues to pay the monthly rent.

A domestic tenancy of subdivided unit which exists on or after 22 January 2022 and which the tenant is natural person is subject to a separate protection regime.

Domestic and business tenancies

There is a distinction between domestic tenancies and business tenancies.

The distinction is based on the purposes for which the premises are let. A tenancy under which the premises are let for use as a dwelling is a domestic tenancy. A tenancy under which the premises are let for other kinds of uses is a business tenancy.

The distinction between domestic and business tenancies is relevant as most of the statutory protection given to tenants are given to tenants of domestic tenancies. The importance of the distinction, however, has been substantially diminished in recent years because of the abolition of statutory rent control and tenure protection for a domestic tenancy not involving a subdivided unit.

Public and private sector tenancies

There is essentially no difference between a tenancy granted by or to a public authority and a tenancy granted by or to a private individual or entity. Tenancies granted by the government or certain public authorities are generally not subject to statutory protections to tenants.

## Are lease provisions regulated or freely negotiable?

In general, save for certain protected tenancies, the parties are free to agree on the terms of the lease. However, for a lease to have the sufficient degree of certainty to be legally enforceable, it must contain the parties, the premises, the commencement and duration, and the rent.

In common law, certain obligations are implied into a lease. These obligations, however, may be excluded by an express agreement between the parties. For example, the landlord must give the tenant quiet enjoyment of the premises and must not derogate from his/her grant; and the tenant must pay rent and rates. In domestic tenancies, certain terms are implied by the Landlord and Tenant (Consolidation) Ordinance, such as: (i) the tenant must pay rent on the due date; (ii) the tenant must not cause unnecessary annoyance, inconvenience or disturbance to the landlord or to any other person; (iii) the tenant must not make any structural alterations to the premises without prior written consent of the landlord; and (iv) the tenant must not use the premises for an illegal or immoral purpose.

## Is there a maximum term for leases? Can these be extended?

Real estate in Hong Kong are leaseholds granted by the government. A letting of premises by a “landowner,” who is essentially a tenant of the government under the land grant, is actually a subletting. Under common law, the term of a sublease must end before the expiry of the term of the head lease. If the term of a sublease ends at the same time as the term of the head lease, the purported subletting will be deemed to be an assignment of the head lease.

An option to renew may be granted to the tenant. If an option is granted, it will usually be provided in the lease itself and such lease shall be lodged for land registration for protecting the priority of such option against the subsequent registrable land interest. After completing the land registration process, the registered lease will become a public document. The recent trend is to include the option to renew in a separate memorandum for land registration instead of registering the full lease so as to protect the confidentiality of other commercial terms as contained in such lease.

## What are the usual lease terms?

Subject to the principles regarding subletting mentioned in “Is there a maximum term for leases? Can these be extended?”, the duration of the term is a matter for commercial negotiation. Tenants will usually ask for a longer term where the tenant has to incur substantial expenses in the fitting out and decoration of the premises concerned.

## Are there instances where tenants may demand an extension of the lease?

A tenant may only be entitled to extend the lease if he/she has an option to renew and the option has been properly exercised. Otherwise, a tenant has no right to renew or extend a lease under general law.

## On what grounds may a lease be terminated?

A lease will usually terminate under any of the following circumstances:

The fixed term of a fixed-term tenancy expires

A notice to quit is served in the case of a periodic tenancy

Either the landlord or the tenant exercises any express right of termination in the lease

Either the landlord or the tenant fundamentally breaches the lease

The tenant surrenders the tenancy to the landlord with the landlord's agreement

The provision for re-entry or forfeiture is triggered

For leases of domestic properties created after 9 July 2004, as well as business properties, the parties can freely negotiate and agree between themselves on how the lease will be terminated. However, domestic leases created before 9 July 2004, and domestic leases which exist on or after 22 January 2022 and involve subdivided units and natural persons as tenants, are subject to their respective separate regulatory regimes.

## Must rents be paid in local currency?

Rent is often specified in Hong Kong dollars. Unless specified otherwise in the lease, the tenant has to pay rent in Hong Kong dollars.

## Is rent paid on a monthly basis? Is it required to be paid in advance?

The manner of payment of rent is a matter which the parties are free to agree. Rent is usually paid on a monthly basis.

## How is rent reviewed? Are there limits to the increase in rent?

Leases often contain a rent review clause. Rent review will generally be carried out at contractually specified intervals during the term or towards the end of the term for determining the rent for the renewed term in cases where the tenant exercises its option to renew.

The general purpose of a rent review clause is to ascertain the level of market rent. A rent review clause will usually provide for the new rent to be agreed between the parties, and in the event that the parties fail to reach an agreement, the rent will be determined by an independent valuer (a valuation surveyor, usually) as expert.

## What are the basic obligations of landlords and tenants?

Some basic obligations of a landlord include the following:

Permit the tenant to have quiet possession and enjoyment of the premises during the lease term

Deliver the premises to the tenant in a condition consistent with the agreed handover condition

Pay property tax in respect of the premises

Some basic obligations of a tenant include the following:

Pay rent in accordance with the lease

Pay all rates and outgoings in respect of the premises, except those for which the landlord is liable

Use the premises for permitted use under the lease

Keep and maintain the premises in good clean tenantable and proper repair and condition

Allow the landlord to enter the premises at reasonable times to view the state of repair or to see if repairs need to be carried out

Do not do anything to prejudice the title of the landlord

Return vacant possession of the premises at the end of the lease term in the conditions as when leased to him/her or in such other conditions as the parties may agree in the lease

Indemnify the landlord for the loss or damage caused by defective or damaged condition of the premises or owing to spread of fire or smoke or leakage of liquid

Effect and maintain comprehensive insurance cover in respect of the premises against damage by perils and also public liability insurance cover

## What provisions or restrictions typically apply to the transfer of the lease by the tenant? May a tenant sublet the leased premises?

A leasehold is an interest in land which is freely alienable. The most typical types of transactions relating to a leasehold interest are assignment of the interest and subletting.

Practically speaking, a lease will almost invariably restrict the tenant’s freedom to deal with the leasehold interest, although the extent of such restriction varies from agreement to agreement.

## What happens in the event of destruction of the leased premises?

Usually, a lease will contain an abatement of rent clause, which provides that the rent or a fair proportion thereof shall be suspended from the occurrence of damage or destruction or order until the premises or the building shall again be rendered fit for occupation or accessible, or until the demolition order or closing order is lifted (as the case may be), and in the event that the premises or the building have not been reinstated within a pre-determined period, either party has the right to terminate the lease.

## Who is usually responsible for insuring the leased premises?

There is usually an express provision in a lease which specifies the tenant’s obligations to insure the non-structural interiors of the leased premises and third party liabilities. A typical Hong Kong lease is usually silent on the landlord’s obligations to insure the leased premises. However, the landlord may wish to insure the structure of the leased premises for the landlord’s own benefit.

## Will the lease survive if the owner sells the leased premises?

A lease will generally survive a subsequent sale of the leased premises. However, for leases exceeding three years, section 3(2) of the Land Registration Ordinance requires registration of such leases. All registrable leases which are not registered within one month of its execution may be void against a subsequent bona fide purchaser for valuable consideration of the premises.

## Will the lease survive if the leased premises are foreclosed?

The answer depends on whether the lease was created before or after the mortgage.

Lease created before the mortgage

An existing lease is generally binding on the mortgagee. As such, a sale by the mortgagee will have to be subject to the lease.

Lease created after the mortgage

Normally, the mortgage deed will require the mortgagor to obtain the mortgagee’s consent before creating the lease. In practice, a subsequent lease will not be challenged if the mortgagee’s consent is obtained.

# Planning and Environmental Issues

## Who has authority over land development and environmental regulation?

The zoning of a land parcel is shown in the relevant outline zoning plan (different areas in Hong Kong are governed by different outline zoning plans). The Town Planning Board prepares draft outline zoning plans, which are then submitted to the Chief Executive in Council for approval. The outline zoning plans will show the use of each land parcel, such as residential, commercial, open space or government use. The government cannot approve any building works which is for a use not permitted by the relevant outline zoning plan or modify any land grant so as to permit a use inconsistent with the requirements of the relevant outline zoning plan. Generally speaking, there are two categories of permitted uses in an outline zoning plan: (i) uses which are always permitted; and (ii) uses that have to be permitted by the Town Planning Board under section 16 of the Town Planning Ordinance (Cap. 131).

Applications for re-zoning are to be made to the Town Planning Board.

The conditions of land grants for development are determined by the Lands Department in accordance with the applicable land administration policies of the government and by reference to the applicable outline zoning plan. Such conditions include:

Permitted uses (determined by reference to the applicable outline zoning plan)

Development parameters (also determined by reference to the applicable outline zoning plan but may be more restrictive)

The deadline for the completion of the development

Restrictions on alienation before fulfillment of development conditions

Requirements that deeds of mutual covenant have to be approved by the Lands Department

Public facilities to be provided (whether within or outside the lot boundary)

Parking spaces to be provided

Requirements that the design, disposition and height of the new buildings should be approved by the Lands Department

The Building Authority is responsible for approving building plans from the building safety and other regulatory angles, granting permits to commence building works and inspecting newly completed buildings to ascertain whether the requirements of statutes have been fulfilled.

For certain designated projects such as specified residential developments, roads, waterways and drainage works and certain recreational facilities (such as golf courses and marinas), a developer is required to conduct an environmental impact assessment and to obtain an environmental permit to proceed with the development. The Director of Environmental Protection has the authority to decide whether or not to issue the environmental permit.

Some land grants also impose conditions on the developer to conduct various assessments such as environmental impact assessment, noise impact assessment, sewerage impact assessment and traffic impact assessment, and to implement appropriate measures to the government’s satisfaction to minimize impact on the environment, the community as well as the future occupiers.

## What environmental laws affect the use and occupation of real estate?

The principal environmental statutes are the following:

Environmental Impact Assessment Ordinance (Cap. 499)

Air Pollution Control Ordinance (Cap. 311) (which provides for the control of activities that produce air-borne emissions, such as construction work and activities that involve the use or handling of asbestos)

Waste Disposal Ordinance (Cap. 354)

Water Pollution Control Ordinance (Cap. 358)

Noise Control Ordinance (Cap. 400)

Ozone Layer Protection Ordinance (Cap. 403)

Dumping at Sea Ordinance (Cap. 466)

## What main permits or licenses are required for building or occupying real estate?

The main permits for the development and construction of real estate projects include the following:

Planning permission from the Town Planning Board (if required)

Approval of building plans from the Building Authority

Consent to commence building works issued by the Building Authority

Approvals mentioned in the land grant concerned as requisites to the commencement of building work

Environmental permits for certain designated projects

For occupying real estate, an occupation permit or temporary occupation permit issued under the buildings ordinance is required.

## Can an environmental cleanup be required?

There is no statute in Hong Kong requiring the cleanup of existing contamination. However, the Environmental Impact Assessment Ordinance provides that the Director of Environmental Protection may, with the consent of the Secretary for the Environment, issue an order requiring persons working on a designated project to carry out works to remedy environmental damage identified by the Director. Unlike many other common law jurisdictions, in which the primary responsibility for cleaning up contaminated land falls on the person who caused or permitted the contamination (i.e., the “polluter pays” principle), the ordinance makes the person who wants to develop a contaminated site responsible for any necessary cleanup. This party will not necessarily be the person who has caused or permitted the contamination.

Since land in Hong Kong is held under government leases or subleases, the polluter pays principle may apply, not under statutes, but through the land grant. Land grants may contain clauses that make the land owner liable to the government for the contamination of the land.

Land grants for industrial sites or godowns may also contain a provision that requires the land owner to carry out all necessary works to prevent soil and groundwater contamination from occurring, to conduct soil and groundwater assessment to the satisfaction of the Director of Environmental Protection and to clean up any contamination. If the owner fails to do any of these, the government may carry out the work at the land owner’s expense.

Recent land grants have introduced provisions that require the land owner to indemnify the government against all liabilities arising from any damage or soil and groundwater contamination caused to the land by any use of the lot or any development or redevelopment on the lot carried out by the land owner (the wording of the standard clause only imposes an indemnity but does not refer to a cleanup).

Apart from the express wording of the land grant, there may also be common law doctrines that protect the government (as landlord). One such doctrine is the doctrine of “waste.” A waste is a tort based on the alteration by the tenant of the nature of the land. A tenant who has committed waste is liable to pay damages to the landlord for the diminution in value of the land.

## Are there minimum energy performance requirements for buildings?

To improve building energy efficiency, the government has enacted the Buildings Energy Efficiency Ordinance (Cap. 610), which came into effect on 21 September 2012. Under this ordinance, certain prescribed types of buildings (for example, commercial buildings, hotels and common areas of residential buildings) must comply with the Building Energy Code and/or the Energy Audit Code. Noncompliance is an offence and will subject the offender to fines.

Energy Efficiency Registration Scheme for Buildings is a voluntary scheme launched by the government in October 1998. This scheme promotes the application of Building Energy Codes which outline the energy efficiency requirements. A registration certificate will be issued to a building that meets the required standards. A registered building can use the Scheme’s “Energy Efficient Building Logo” on related documents to publicize the achievement of energy efficiency. However, registration under this voluntary scheme is not regarded as compliance with the Buildings Energy Efficiency Ordinance (Cap. 610).

Some of the recent land grants have also imposed requirements that the new buildings constructed on the land must obtain a green building certification of Provisional Gold Rating or above from the Hong Kong Green Building Council. The rating assessment will take into account the credits under different categories including integrated design and construction management, sustainable sites, materials and waste, energy use, water use, health and wellbeing and innovations and additions.  For new residential developments, information relating to the green building certification as well as the estimated energy performance will also be disclosed in the sales brochure.

## Are there other regulatory measures that aim to improve the sustainability of newly constructed and existing buildings?

The government has adopted the policy of allowing private buildings to increase floor areas (with an overall cap of 10%) to include recreational facilities and green and innovative features such as balconies, utility platforms, wider common corridors and lift lobbies to enhance living environments.

With a view to reduce electricity consumption by air-conditioning, the government has launched a voluntary scheme on fresh water cooling for non-domestic buildings in designated areas. Under the Waterworks Ordinance and Regulations (Cap. 102 and 102A, respectively), one cannot use city mains water for cooling towers without the permission of the Water Supplies Department. Such permission usually will not be granted except for industrial processes or essential purposes. However, owners of non-domestic buildings in the designated areas may now obtain the permission by applying to participate in this scheme.

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