Global Corporate Real Estate Guide - China

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# Authors

# Real Estate Law

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

The term “real estate” generally includes the following:

Land use rights (or land ownership in some cases)

Buildings or structures constructed on land

## What laws govern real estate transactions?

Real estate transactions in the People’s Republic of China (PRC) are governed by statutes enacted by national and local governmental authorities. The principal statutes at the national level include the following:

PRC Interim Regulations Concerning Assignment and Transfer of Urban Land Use Right (Revised in 2020)

PRC Urban Real Estate Administration Law (Revised in 2019)

PRC Land Administration Law (Revised in 2019)

Regulations on the Implementation of the PRC Land Administration Law (Revised in 2021)

PRC Civil Code (Enacted in 2020)

Provisions on the Administration of Urban Real Estate Transfer (Revised in 2001)

Administrative Measures for the Sale of Commodity Houses (Enacted in 2001)

Commercial Properties Leasing Measures (Enacted in 2010)

Interim Regulations on Real Estate Registration (Revised in 2019)

Detailed Implementing Rules of the Interim Regulations on Real Estate Registration (Revised in 2019)

While the national statutes set out the general legal framework, local regulations enacted at provincial and municipal levels often provide the detailed legal rules for local real estate transactions. For example, Shanghai has many local regulations, including the following:

Measures of the Shanghai Municipality on the Implementation of PRC Land Administration Law (Revised in 2018)

Measures of Shanghai Municipality on the Grant of Land Use Rights (Revised in 2008)

Measures of Shanghai Municipality on the Transfer of Real Properties (Revised in 2010)

Several Provisions of the Shanghai Municipality Regarding Real Estate Registration (Enacted in 2020)

Shanghai Houses Leasing Regulations (Enacted in 2022)

Shanghai Residential Properties Leasing Administrative Measures (Revised in 2021)

While China is not a “common law/case law jurisdiction,” the PRC Supreme People’s Court and the local courts do issue judicial interpretations to provide guidance on the laws and occasionally refer to precedent court cases when making judgments on real estate transactions.

## What is the land registration system?

China adopts what is basically the “Torrens system” where title to real estate is registered with and certified by the government.

Real estate title registration is achieved by registering the title details at the local real estate registry administered by the government, and the registry issues a title certificate to the registered owner.

The information contained in the title certificate issued and at the local real estate registry should be consistent with each other. However, if there are discrepancies, the information registered at the local real estate registry is conclusive unless there are manifest errors. The owner may sue the government for wrongful registration.

## Which authority manages the registration of titles?

At the national level, the Ministry of Natural Resources generally takes charge of real estate title registrations.

At the local level, real estate title registration for land and buildings has been combined and centralized at one registry in most cities by the end of 2017.

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

The following types of real estate interests and transactions must be registered at the local title registry for them to be fully protected and enforceable against third parties:

Grant (creation) of land use rights by the government

Recognition (creation) of ownership of new buildings by the government

Transfer of land use rights and buildings

Mortgage of land use rights and buildings

A real estate lease is also required to be filed with the designated local authority; however, the lack of filing does not invalidate the duly executed lease.

As for easements, they are not required to be registered. An easement takes effect upon signing of the easement agreement. However, registering an easement will protect the holder of the easement right from bona fide third parties.

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

Depending on the location and the types of real estate interests involved, owners will normally use their “land use right certificates,” “building ownership certificate,” or “real estate title certificate” issued by the local title registry as proof of title.

## Can a title search be conducted online?

Meaningful online title search is not yet available in China. Many cities now have established portals to allow online title searches, but such searches are yet to become a meaningful tool for due diligence purpose as they can reveal very limited information only. According to the Detailed Implementing Rules of the Interim Regulations on Real Estate Registration effective from 1 January 2016 and revised on 24 July 2019, only owners, interested parties in real estate transactions, succession or litigations, persons authorized by the owners or interested parties, and courts, prosecutors, security bureaus, supervisory bureaus or other government authorities carrying on official affairs may conduct title search at the local registry.

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

Since July 2006, foreign companies and individuals are no longer permitted to directly acquire and hold PRC real estate for “investment purposes” (e.g., greenfield development projects and acquisition of buildings for investment holding and/or leasing). Real estate directly acquired by foreign companies and individuals for investment purposes prior to July 2006 are “grandfathered.” Today, foreign companies and individuals must obtain approval from the PRC foreign investment authority to set up a local company to carry out real estate investment.

On the other hand, foreign companies and individuals may still directly acquire PRC real estate for “self-use” or “self-residence” purposes in certain limited circumstances. For example, foreign individuals who work or study in China may purchase buildings for self-use or self-residence based on actual needs. However, some cities currently restrict non-local individuals who do not have local tax and social security registrations from purchasing residential properties.

Foreign companies may purchase a “reasonable quantity” of buildings for self-use for their representative offices or branches in China. Note, however, that foreign companies and individuals from countries without diplomatic relations with China could be restricted from acquiring PRC real estate even for self-use purposes.

## Can the government expropriate real property?

The government is empowered by law to expropriate land and buildings for public interest purposes, but the government must pay compensation to the owners in accordance with the law.

## How can real estate be held?

There is no private “freehold” land ownership in China. All urban land in China is owned by the Chinese government and is commonly referred to as “state-owned land.” All rural and suburban land is owned by rural collectives (i.e., local groups of farmers) and is commonly referred to as “collective land.”

The PRC government is permitted to grant, lease or allocate the right to use state-owned land, but PRC laws prohibit the transfer of ownership of state-owned land. Collective land in China is subject to stringent legal restrictions and investors should exercise caution when dealing with them. Nevertheless, the PRC Land Administration Law was revised on 26 August 2019 to allow rural collectives to grant or lease the right to use collective land for certain specific purposes on a limited basis.

For illustration purposes, an owner of a residential apartment located on a state-owned land in China obtains and holds his property title in the following manner:

The local government arranges a public bidding process to grant the land use rights of a residential site to a real estate developer for a term of 70 years (the maximum permissible land grant term for residential use)

The developer winning the bid signs a land grant contract with the local government and pays a substantial land grant fee to the local government. Effectively, the developer acquires a long-term, transferrable leasehold interest in the land

The developer constructs residential development on the granted land site

The developer sells the residential development on a strata-title basis to different buyers

Each buyer registers his/her real estate title at the local registry and obtains a real estate certificate (or a land use right certificate and a building ownership certificate in transactions closed before 1 March 2015) in respect of the residential property he/she purchased. The buyer will enjoy ownership of the residential property for the remaining term of the 70-year land grant. Under PRC law, the buyer’s title will be automatically renewed at the end of the 70-year initial land grant (although the legal procedures for title renewal have not yet been legislated)

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

The most common structure is for the investors to form a limited liability company in China as a special purpose project company to acquire, develop or operate real estate assets in China. Such project company is an independent legal entity separate from its investors. The project company would be required to have a registered capital, and its investors are obligated to contribute capital in accordance with the law and the company’s articles of association.

If one or more of the investors are foreign investors, the establishment of the project company is no longer subject to the approval of the PRC foreign investment authority. Instead, the established can be registered with the companies registry in a fashion similar to domestically invested companies. The project company will be established as either an “equity joint venture company” or a “wholly foreign-owned company.”

## How are real estate transactions usually funded?

Acquisition of real estate by companies are usually funded by a combination of paid-in (registered) capital, shareholder loans, bank loans and also sale proceeds from the project in some cases. There are corporate, investment and banking rules governing the capitalization and financing for real estate projects.

For real estate development projects without any foreign investors, at least 20–25% of the project investment must be funded by shareholders’ equity; whereas in the case of foreign-invested development projects, at least one third of the project investment must be funded by shareholders’ equity. Local banks are not permitted to provide loans to developers for the payment of land grant fees to the local government. Developers are allowed to “pre-sell” properties and use the pre-sale proceeds collected to fund the development, provided that the relevant government permits (including the pre-sale permit) have been obtained.

Depending on the nature of the property and the circumstances of the buyer concerned, it may be possible for the buyer to fund 50-80% of the purchase price by way of a bank loan.

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

For sale of properties in a development project, the legal documents are usually prepared by the developer and its legal counsel. For other types of transactions, there is no standard practice and the parties are free to negotiate and decide who shall prepare the legal documents.

## 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?

If the property concerned is subject to certain real estate interests which existed prior to the transfer or occupation by the current owner or occupier (e.g., outstanding mortgage or pre-existing easement), the current owner or occupier could be exposed to these claims against the property.

Further, under the specific circumstances specified by the law, the current property owner could be liable for environmental contamination to the property caused by the previous owner.

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

It is possible for the buyer to claim against the seller for breach of statutory implied warranties or express contractual warranties with respect to matters which arose prior to the disposal of the property (e.g., breach of warranties in respect of good title, structural safety and no outstanding payment).

Further, the former owner or occupier is generally liable for environmental contamination committed by it even after he/she has disposed of or left the property.

# Acquisition of Real Property

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

For simple transactions, the parties typically sign a real estate sale and purchase contract, which is submitted to the local registry for title transfer registration. PRC national and local authorities have published model forms of sale and purchase contracts (in Chinese only) for reference by sellers and buyers.

For more complicated transactions, parties may also need to sign the following documents:

Framework or master agreement for the transaction

Release agreement for an existing mortgage

New mortgage agreement

Escrow agreement for down payment and stage payment

Estoppel certificates to be signed by tenants

Sub-deed of mutual covenants

Easement agreements

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

The seller of property is generally deemed by the law to have given warranties to the buyer that the seller has good title to the property being sold and that the property is not subject to adverse encumbrances.

For commercial transactions, the buyers usually will negotiate more extensive representations and warranties from the sellers to cover environmental matters, tenancy, tax, easements and other matters of concern to the buyer.

## When is the sale legally binding?

The general rule is that a sale and purchase contract for real estate will become legally binding upon due execution by the seller and the buyer. PRC law allows the parties to set conditions precedent for transaction closing and title transfer.

## When is title transferred?

Title will only be transferred from the seller to the buyer upon due registration of the transfer at the local registry.

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

A corporate buyer typically pays for the following costs in a sale and purchase of real estate:

Buyer’s agent’s fees

Its own legal costs

Due diligence costs for consultants who have prepared building condition reports, environmental assessments, valuation appraisals and real estate surveys

Due diligence costs for inquiries made to statutory and government bodies

Nominal fees for title registration

Deed tax of 3–5% of the transfer price

Stamp duty of 0.05% of the transfer price

A corporate seller typically pays for the following costs in a sale and purchase of real estate:

Seller’s agent’s fees

Its own legal costs

VAT and surcharge (the VAT rate is 11% of the transfer price with allowance for deduction of input VAT, or (i) if the corporate seller is a small-scale taxpayer, the VAT rate is 5% of the transfer price without deduction of input VAT; or (ii) if the corporate seller is a general taxpayer and the real estate project is an old project with construction permit issued on or before 30 April 2016, the seller can opt to adopt simple method VAT which is 5% of the transfer price without deduction of input VAT, and the surcharge is from 6–12% on payable VAT)

Land appreciation tax (at progressive rates of 30–60% on the taxable gains)

Corporate income tax (25% on net profit)

Stamp duty of 0.05% of the transfer price

# Leases

## What are the usual forms of leases?

Commercial leases

The national and local authorities have published model form contracts (in Chinese only) for real estate leases for reference by landlords and tenants. Generally, the provisions of these model leases are quite simple and fairly balanced between the interests of both landlord and tenant.However, these model leases would not be legally adequate for leasing transactions of substantial value. In a few cities, the parties must use the locally published model leases to satisfy local lease registration requirements, but the parties are permitted to attach a supplemental agreement to these model leases. Depending on local government practice, it will be practically difficult to register warehousing leases and industrial leases in some localities.

The level of detail and sophistication of lease agreements in the Chinese market vary significantly and largely depends on the background of the parties and the nature of the property involved.

Residential leases

The leasing practices for commercial property are basically similar to those for residential properties. Therefore, the foregoing comments regarding commercial leases are also generally true for residential leases. Local citizens usually use the model leases for simple residential leases and they often do not file their leases with the local authorities.

## Are lease provisions regulated or freely negotiable?

Generally speaking, lease provisions are not much regulated and the parties are free to negotiate most of the lease provisions. Nevertheless, lease agreements are subject to certain basic legal rules. For example, national leasing regulations provide that a lease agreement with a term longer than six months must be in written form. A lease with a term longer than six months will not be invalid if it is not in written form, but its term will be changed to indefinite term by operation of law and either party may terminate the lease by reasonable advance notice to the other party.

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

The maximum term for a lease is 20 years. If a lease term exceeds 20 years, the portion of the lease period beyond the initial 20-year period is invalid. When the lease term expires, the parties may renew the lease for another term not exceeding 20 years.

## What are the usual lease terms?

The lease terms vary in practice depending on the type of property involved and general market conditions. Landlords generally have become more flexible and accommodating on lease terms since the outbreak of the COVID-19 pandemic. Nevertheless, the typical lease term for office and retail properties in major cities are as follows:

Office property: three to five years

Retail property: two to five years

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

The national law does not give a tenant a legal right to renew the lease at its expiry, but it gives the tenant a priority right to renew the lease on terms no less favorable than those offered by other potential tenants. If the tenant wants to have an assured right to extend the lease at its expiry, it must negotiate for a renewal right in the lease agreement.

## On what grounds may a lease be terminated?

A landlord may terminate the lease if the tenant breaches any of its basic legal obligations as the tenant. Likewise, the tenant may terminate the lease if the landlord breaches any of its basic legal obligations as the landlord. A summary of the basic legal obligations of landlords and tenants are set out in our response to "What are the basic obligations of landlords and tenants".

The lease agreement may stipulate additional contractual grounds of termination exercisable by the landlord and the tenant.

Further, the lease may be terminated by either the landlord or the tenant if the use of the property is substantially frustrated due to force majeure or government action not caused by the fault of either party.

## Must rents be paid in local currency?

PRC law requires property rent to be denominated and paid in the local currency, renminbi yuan.

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

The parties are free to negotiate the rent payment terms, but monthly or quarterly payment in advance is fairly common.

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

There are no statutory limits on rent increases upon lease expiry. It is fairly common that the parties will negotiate the rent for the extended term by referring to the prevailing market rate for comparable properties. Some substantial leases may provide for an elaborate mechanism or limits for rent review.

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

Under national laws and regulations, landlords have a number of basic legal obligations, including the following:

Ensure that the tenant’s use of the property is not affected by third parties’ claims or actions (except for those which are beyond the control of and not attributable to the landlord’s fault, such as government actions)

Deliver the property to the tenant in the condition required by the lease and maintain the property to a condition fit for the use stipulated in the lease

Not to lease out property which does not meet safety, hygiene or other applicable statutory requirements

Unless the lease provides otherwise, maintain and repair the property

Under national laws and regulations, tenants have a number of basic legal obligations, including the following:

Pay rent in accordance with the lease and the law

Use the property in accordance with the lease provisions

Take proper care and custody of the property

Not to alter the structure of the building

Not to sublet the property without the consent of the landlord unless the lease provides otherwise

Upon the expiration of the lease, return the property to the landlord in the condition stipulated in the lease

It should be noted that local regulations may impose additional obligations on landlords and tenants.

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

Under national laws and regulations, a tenant must obtain the landlord’s prior consent before it may sublet the leased property or assign the lease to a third party. The landlord typically will require the head-tenant to be responsible for any breach committed by the sub-tenant before giving its consent. Many leases allow the tenant to carry out intra-group lease subletting or transfer without being subject to landlord’s consent.

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

Under national laws and regulations, if the leased premises are destroyed or substantially damaged due to force majeure or other reasons not attributable to the landlord or the tenant, either party may terminate the lease.

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

Landlords are usually responsible for insuring the leased premises.

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

Generally, a lease will survive and be binding on the buyer if the owner sells the leased premises.

The law gives the tenant a priority right to acquire the property on terms no less favorable than those offered to the landlord by other potential buyers. However, if the landlord fails to honor this right of the tenant, the tenant can only seek compensation from the landlord but cannot invalidate a completed sale of the property to a third party.

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

It depends on whether the lease was entered into effect prior to the property mortgage. If the property mortgage was registered prior to the lease, then the mortgagee may evict the tenant and carry out an enforcement sale of the property free of the lease. If the property mortgage was registered after the lease, then the mortgagee can only carry out an enforcement sale of the property subject to the lease.

# Planning and Environmental Issues

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

At the national level, the Ministry of Housing and Urban-Rural Development, and to some extent also the Ministry of Natural Resources, has regulatory authority over land development activities in China. The Ministry of Ecology and Environment has regulatory authority over environmental issues relating to land, buildings and construction activities. These national ministries have their own local bureaus in each province and city to exercise their regulatory powers.

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

The principal environmental legislation at the national level are as follows:

The PRC Environmental Protection Law (Revised in 2014)

The PRC Environmental Impact Assessment Law (Revised in 2018)

The PRC Environmental Protection Regulations for Construction Projects (Revised in 2017)

Various national regulations for control of environmental waste disposal

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

Under national laws and regulations, the main permits for development and construction of real estate projects include the following:

Land use right certificate / Real estate title certificate

Project approval or filling with local department of development and reform

Approval or registration of environment impact assessment report

Construction land planning permit

Construction project planning permit

Construction project commencement permit

Under national laws and regulations, the main permit required for occupying real estate is the construction completion inspection and acceptance recordal form (which signifies that the fire safety inspection acceptance and other statutory inspections have also been completed).

## Can an environmental cleanup be required?

Under certain circumstances stipulated by the law, a current owner of land could be required to carry out an environmental cleanup of the land even if the site contamination was not caused by the current owner.

## Are there minimum energy performance requirements for buildings?

There are national and local statutory specifications for energy efficiency for new buildings. Old buildings are usually not covered by these statutory requirements. Use of advanced environmentally friendly construction materials and technologies is encouraged in China.

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

Statutory construction standards in China contain energy conservation and sustainability requirements. Non-compliance with such standards could lead to government sanctions and other legal liabilities. Residential property developers are required to provide home buyers with information relating to the energy consumption levels of the properties.

The Chinese government has introduced a voluntary “green building” rating system. The Chinese government also grants some (albeit not substantial) tax incentives to developers, contractors and suppliers for satisfying the relevant energy conservation standards.

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