Global Corporate Real Estate Guide - Hong Kong

Real Estate Law

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

# 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.

©Copyright © 2024 Baker & McKenzie. All rights reserved. **Ownership**: This documentation and content (Content) is a proprietary resource owned exclusively by Baker McKenzie (meaning Baker & McKenzie International and its member firms). The Content is protected under international copyright conventions. Use of this Content does not of itself create a contractual relationship, nor any attorney/client relationship, between Baker McKenzie and any person. **Non-reliance and exclusion**: All Content is for informational purposes only and may not reflect the most current legal and regulatory developments. All summaries of the laws, regulations and practice are subject to change. The Content is not offered as legal or professional advice for any specific matter. It is not intended to be a substitute for reference to (and compliance with) the detailed provisions of applicable laws, rules, regulations or forms. Legal advice should always be sought before taking any action or refraining from taking any action based on any Content. Baker McKenzie and the editors and the contributing authors do not guarantee the accuracy of the Content and expressly disclaim any and all liability to any person in respect of the consequences of anything done or permitted to be done or omitted to be done wholly or partly in reliance upon the whole or any part of the Content. The Content may contain links to external websites and external websites may link to the Content. Baker McKenzie is not responsible for the content or operation of any such external sites and disclaims all liability, howsoever occurring, in respect of the content or operation of any such external websites. **Attorney Advertising**: This Content may qualify as “Attorney Advertising” requiring notice in some jurisdictions. To the extent that this Content may qualify as Attorney Advertising, PRIOR RESULTS DO NOT GUARANTEE A SIMILAR OUTCOME. **Reproduction**: Reproduction or copying of the Content on this Site without express written authorization is strictly prohibited.