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# AN OVERVIEW OF CHINA'S REAL ESTATE LAW

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## INTRODUCTION

The following overview examines the many laws and government agencies that regulate Chinese real estate law. Among the most important concepts in this area is the General Right of Ownership in the People's Republic of China (PRC).

### I. GENERAL RIGHT OF OWNERSHIP IN THE PEOPLE'S REPUBLIC OF CHINA

Under Chinese law, chapter V of the General Principles of Civil Law (GPCL) codifies various civil rights.<sup>1</sup> This chapter is entitled "civil rights" and includes: ownership, inheritance, intellectual property rights, and rights in other types of property.<sup>2</sup> Chinese civil law defines ownership as an owner's right by law to possess, use, benefit from, or dispose of his or her own property.<sup>3</sup> The law recognizes three basic forms of ownership: state, collective, and individual.

#### A. State Ownership

State property is owned by all the people. Article 7 of the 1982 Constitution states: "The state economy is the sector of the socialist economy under the ownership of the whole people; it is the leading force in the national economy. The state ensures the consolidation and growth of the state economy."<sup>4</sup> Included in state

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1. General Principles of Civil Law of the PRC, adopted on Apr. 12, 1986, at the Fourth Session of the Sixth National People's Congress art. 71-83 [hereinafter *General Principles*].

2. *Id.*

3. *Id.* art. 71.

4. See P.R.C. Const. art. 7, reprinted in 1988 CHINA L. FOR. BUS. (CCH Austl.

ownership is urban land, mineral resources, waters, forests, mountains, grasslands, unclaimed land, beaches, and other natural resources that the State owns by law. In addition, the State owns railways, airlines, highways, harbors, banks, postal service, telecommunications, and radio broadcasting.

### *B. Collective Ownership*

Collectively owned property is owned by a group of individuals, usually workers. The collectively owned properties include: (1) land, forests, mountains, grassland, unclaimed land, and beaches that collectives own by law; (2) property of collective economic organizations; and (3) collective-owned buildings, reservoirs, agriculture irrigation facilities, and educational, scientific, cultural, public health, sports facilities and others.<sup>5</sup> Collective and state ownership are "socialist public ownership" and thus distinguishable from private or individual ownership.

### *C. Individual Ownership*

Individual ownership is further divided into ownership of the means of production and the means of life. With regard to individual ownership over the means of production, Article 11 of the 1982 Constitution makes clear that the individual economy of urban and rural working people is a complement to the socialist public economy.<sup>6</sup> The State protects the lawful rights and interests of the individual economy. The ownership of the means of life by the citizen is a legal device used to meet and protect the needs of his material and cultural life, as well as those of his family. The objects of the citizen's means of life include the citizen's lawful income, house, savings, articles used in daily life, cultural relics, books, reference materials and others.<sup>7</sup>

According to Chinese law, property rights related to ownership include: (1) the right enjoyed by an enterprise owned by the whole people to operate and manage its State property;<sup>8</sup> (2) the usage right of State-owned natural resources enjoyed by units with the ownership of the whole people or by collective units;<sup>9</sup> (3) the right of units owned by the whole people, collective units or citizens to exploit mineral resources;<sup>10</sup> (4) the right of citizens or collective units to conduct the business of the forest, mountain,

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Ltd).

5. *General Principles*, *supra* note 1, art. 74.

6. *See* P.R.C. Const., *supra* note 4, art. 11.

7. *Id.* art. 75.

8. *Id.* art. 82.

9. *Id.* art. 81.

10. *Id.*

land, grassland, unclaimed land, beaches, and bodies of waters that the collectives or the whole people own, but they use under contracting agreements;<sup>11</sup> and (5) neighboring rights.<sup>12</sup>

## II. OVERVIEW OF MAJOR LAWS AND REGULATIONS RELEVANT TO REAL ESTATE

The legislation on real estate has received increased attention since 1980. As of 1994, many laws, regulations and ordinances relating to real estate have been promulgated. The main laws are discussed below.

### A. Real Estate Laws

These laws include real estate provisions that the National People's Congress and the Standing Committee of the National People's Congress adopted. For the most part, they adopted these provisions in the following forms: fundamental law, substantive law, and procedural law.

#### 1. Fundamental Laws

The Chinese Constitution, promulgated in 1982 and revised in 1988 and 1993, includes provisions concerning real estate. It is the legislative basis of all laws and regulations on real estate. Article 10 of the Constitution stipulates:

The State owns land in the cities; land in the rural and suburban areas is owned by collectives except those portions which belong to the State according to the law; collectives also own housing sites and privately formed plots of crop land and hilly land. The State may, in the public interest, requisition land for its use in accordance with the law. No organization or individual may appropriate, buy or sell land or otherwise engage in the transfer of land by unlawful means. Land use rights may be transferred according to the law.<sup>13</sup>

In addition, the principal provisions concerning real estate property rights of the State and collectives, personal real estate rights and succession rights, special real estate, and taxation of real estate are stipulated in Articles 12, 13, 22 and 56 of the Constitution, respectively.

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11. *Id.*

12. *Id.* art. 83.

13. *Id.* art. 10.

## 2. Substantive Laws

The following seven laws are all connected with real estate:

(1) The General Principles of Civil Law<sup>14</sup> include provisions on lawful possession, utilization, profit, disposal, and mortgage of real estate;<sup>15</sup> (2) the Laws of Succession<sup>16</sup> outline the succession of real estate in detail;<sup>17</sup> (3) the Marriage Law<sup>18</sup> stipulates the provisions for examination, division, dispossession, and succession of jointly possessed property, including houses owned by the husband and the wife, and family property;<sup>19</sup> (4) the City Planning Law is the first law to outline provisions concerning city planning, city construction, and city administration;<sup>20</sup> (5) the Land Administration Law<sup>21</sup> systematically stipulates the principles of land administration, the utilization and protection of land, the use of land for State construction, the use of land for township (town) and village construction, and legal responsibilities;<sup>22</sup> (6) the Forestry Laws<sup>23</sup> outline the ownership right to mountains and forests in detail;<sup>24</sup> and (7) the Law on Urban Real Estate Administration<sup>25</sup> places Chinese people and foreigners in the same position, sharing the same rights and liabilities. The Law on Urban Real Estate Administration seeks to set requirements in the use of land, development, and transactions in the real estate market. The law also encourages and assists real estate development enterprises to develop and build residential housing, improve relations between different government departments, and improve the effectiveness of their operation.<sup>26</sup>

## 3. Procedural Laws

There are two main procedural laws connected with real

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14. See *General Principles*, *supra* note 1. This law was effective as of January 1, 1983.

15. *Id.*

16. *Id.* These law were effective as of October 1, 1985.

17. COLLECTION OF THE LAWS OF THE PRC 326-29 (Jilin People's Publishing House, 1986) [hereinafter COLLECTION OF THE LAWS].

18. *Id.* This law was effective as of January 1, 1981.

19. *Id.* at 478-80.

20. COLLECTION OF THE LAWS OF THE PRC (Supp.) 190-93 (Jilin People's Publishing House, 1990).

21. *Id.* This law was effective as of January 1, 1987.

22. See *General Principles*, *supra* note 1, at 1872-77.

23. *Id.* These laws were effective as of January 1, 1985.

24. *Id.* at 1016-20.

25. *Id.* Adopted by the Eighth Meeting of the Standing Committee of the Eighth National People's Congress on July 5, 1994.

26. *Gazette of the People's Congress of the PRC*, Aug. 15, 1994, Issue No. 5 at 33-34.

estate disputes. The first is the Civil Procedure Law.<sup>27</sup> Article 34 of this law states that a lawsuit brought on a dispute over real estate shall be under the jurisdiction of the people's court in the location of the real estate. This law states in detail the aim, scope of application, basic principles and trial organization of civil procedure. This law also sets forth important procedural claims and must be complied with when bringing a real estate dispute.<sup>28</sup> The second law is the Administrative Procedure Law.<sup>29</sup> This law specifies the administrative procedure pursuant to which the parties may sue real estate administrative branches.<sup>30</sup>

### *B. Real Estate Regulations Adopted by the State Council*

The State Council has adopted six regulations concerning real estate. The first regulation concerns the Administration of Private Housing in Urban Areas.<sup>31</sup> This regulation is the main regulation concerning the administration of private homes in urban areas owned by individuals. It is divided into six chapters and twenty-eight articles, outlining the registration of ownership, buying and selling, leasing, and supplementary provisions.

Second is the Interim Regulation Concerning Land for Construction by Joint Ventures Using Chinese and Foreign Investment.<sup>32</sup> This regulation states the different specific requests for using land for construction for use by joint ventures using Chinese and foreign investment.

Third is the Provisional Regulation Concerning the Approval on Using Land for State Construction.<sup>33</sup> This regulation has played an active role in the administration of using land for State construction, tightening the approval system and the rational use of land.

Fourth are the Interim Measures for the Administration of Foreign Investment Development and Management of Tracts of Land.<sup>34</sup> This regulation has played an important role in attracting development with foreign investment and management of tracts of land. It has also served to strengthen the construction of public equipment. Further, it has served to improve investment enterprises and enterprises whose products are sold abroad, with

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27. *Id.* This law was effective as of April 9, 1991.

28. *Gazette of the People's Congress of the PRC*, July 10, 1991, Issue No. 3 at 3-46.

29. *Id.* This law was effective as of October 1, 1990.

30. *See General Principles*, *supra* note 1, at 2125-31.

31. *See id.* at 334. This regulation was effective as of December 17, 1983.

32. *See supra* note 17, at 589.

33. Promulgated on November 8, 1988. *Gazette of the State Council of the PRC*, 1982, Issue No. 10 at 14.

34. Promulgated by the State Council on May 19, 1990. *Id.*

a view toward developing overseas sales.

Fifth are the Regulations for the Implementation of the Land Administration Law.<sup>35</sup> This regulation makes the provisions of the Land Administration Law more specific.

Sixth are the Interim Regulations Concerning the Assignment and Transfer of the Right to the Use of the State-owned Land in the Urban Areas.<sup>36</sup> These regulations deal with the assignment and transfer of the right to the use of State-owned land, leasing, mortgage and termination of the right to the use of the land.

In addition, there are three regulations concerning real estate tax: Interim Regulations Concerning Real Estate Tax,<sup>37</sup> Interim Regulations Concerning Cultivated Land Tax,<sup>38</sup> Interim Regulations Concerning Tax Using Urban Land.<sup>39</sup>

*C. Ordinances Concerning Real Estate — The Provisions  
Concerning Real Estate Adopted by the Ministry Committee  
Department Directly Under the State Council*

In recent years the Ministry of Construction<sup>40</sup> has made and promulgated a series of administrative ordinances. These include Provisions Concerning the Administration of Private Houses Owned by Foreigners,<sup>41</sup> Provisions Concerning the Administration of Urban Hazardous Houses in Urban Areas,<sup>42</sup> Provisions Concerning the Administration of Neighboring Houses Owned by Different Persons.<sup>43</sup>

*D. Real Estate Policy*

The Communist Party and the State have adopted many real estate policies. If there are no relevant laws and regulations concerning real estate, these policies become effective. For instance, the General Office of the Central Committee of the Chinese Communist Party and the State Council promulgated the Notice Con-

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35. These regulations were effective February 1, 1991. *China Economic News*, No. 23, June 22, 1992 at 9.

36. Promulgated and effective as of May 19, 1990. See COLLECTION OF THE LAWS OF THE PRC, *supra* note 20 at 355-61.

37. These regulations were effective October 1, 1986. See *General Principles*, *supra* note 1, at 678.

38. *Id.* at 682.

39. These regulations were effective November 1, 1988. *Id.* at 692-94.

40. The original name was the General Bureau of Urban Construction of the State or Ministry of Urban and Rural Construction and Environmental Protection.

41. Promulgated on August 25, 1984. See *General Principles*, *supra* note 1, at 336.

42. Promulgated on November 21, 1989. *Id.* at 203.

43. Promulgated on November 27, 1989. *Id.* at 205.

cerning Hastening the Implementation of the Policy about Private Houses Owned by Overseas on December 24, 1984.<sup>44</sup> They also adopted the Notice on the Preventing Buying, Selling and Leasing Land on November 19, 1983,<sup>45</sup> etc. On December 31, 1991, the leading group on reforming the system of residents' houses under the State Council promulgated the Notice Concerning Promoting Reform of the Residential Housing in Urban Areas.<sup>46</sup> This outlined the policy about the selling, investment, management and ownership of residential housing.

### III. ACQUISITION OF LAND USAGE RIGHTS

While the State and the collectives own the land, companies, enterprises, organizations, and individuals, both within and without the PRC's territory, have the opportunity to obtain land use rights.

#### A. *Traditional Methods Provided by the Early Joint Venture Legislation*

Under the current foreign investment laws and regulations, enterprises with foreign investment, including Chinese-foreign equity joint ventures, Chinese-foreign cooperative ventures, and wholly foreign-owned enterprises established within the territory of China are allowed to acquire land use rights. The system concerning construction land of foreign investment enterprises is set forth in: the Law of the People's Republic of China on Joint Ventures using Chinese and Foreign Investment<sup>47</sup> and its Implementing Regulations;<sup>48</sup> and the Law of the People's Republic of China on Chinese-Foreign Contractual Joint Ventures; in which the basic framework was established;<sup>49</sup> the Law on Wholly Foreign-owned Enterprises<sup>50</sup> and its Implementation Regulation;<sup>51</sup>

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44. *Id.* at 336-37.

45. *Id.*

46. See COLLECTION OF THE LAWS, note 17, at 461.

47. The Law of the PRC on Chinese Foreign Equity Joint Venture, adopted on July 1, 1979 at the second session of the Fifth National People's Congress, and amended pursuant to the Decision on Amendment of the Law of the PRC on Chinese-Foreign Equity Joint Ventures, passed on Apr. 4, 1990 at the Third Session of the Seventh National People's Congress.

48. Regulations for the Implementation of the Laws of the PRC on Chinese-Foreign Joint Ventures, issued by the State Council on September 20, 1983, available in LEXIS, Nexis library, CHINAL file.

49. The Law of the PRC on Chinese-Foreign Contractual Joint Ventures, promulgated on Apr. 13, 1988 by Order No. 4 of the President of the PRC.

50. The Law of the PRC on Wholly Foreign-Owned Enterprises, adopted on Apr. 12, 1986 at the Fourth Session of the Sixth National People's Congress.

51. Rules for the Implementation of the Law of the PRC on Wholly Foreign-Owned Enterprises, approved by the State Council on Oct. 28, 1990 and issued by



the Provisions of the State Council for the Encouragement of Foreign Investment (October 11, 1986),<sup>52</sup> the Notice Concerning Strengthening the Administration of Land for Construction by Enterprises with Foreign Investment,<sup>53</sup> and a series of regional regulations and systems instituted by various provinces, autonomous regions and municipalities directly under the central government. In accordance with these regulations, the administration concerning such land shall implement the open policy, improve the environment for investment, promote the economic and social benefits of land, attract foreign investment and foreign advanced technology, promote economic development, and set up the system of unified administration and utilization with compensation following the Land Administration Law.<sup>54</sup>

### *1. Obtaining Land for Construction by Foreign Investment Enterprises*

Application for this land must comply with the Land Administration Law and other relevant provisions. Applicants must go through the procedure of applying, reporting and approval. Any enterprise with foreign investment which needs to use the land must apply to the land administration department under the municipal or county government where the enterprise is located. The land administration department examines the application in accordance with the rights and procedures set out in the regulations. Choosing an address for items within the city planning district must correspond with the requirements of the city planning. The land shall be allocated after the application has been examined by the land administration department and approved by the people's government at the same level as the department. Then a contract for the utilization of land is signed between the land administration department and the enterprise using the land. The contract states such items as the area, the location, the use to be made of the land, the rights and obligations of the parties, and the penalty provisions for violation of the contract.

If the Chinese party in a joint venture or cooperative enterprise transfers rights to the use of the land to the enterprise with foreign investment as a capital contribution or under cooperative conditions, the enterprise with foreign investment obtains the land use right immediately after the aforesaid enterprise is approved for establishment and has completed business registration.

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the Ministry of Foreign Economic Relations and Trade on Dec. 12, 1990.

52. See *General Principles*, *supra* note 1, at 1230.

53. See *COLLECTION OF THE LAWS*, *supra* note 17, at 532. Promulgated by the State Land Administration Bureau on Oct. 5, 1986.

54. *COLLECTION OF THE LAWS OF THE PRC*, *supra* note 20, arts. 14-19 of the Land Administration Law.

Enterprises with foreign investment shall go through registration procedures and obtain the certificate to use the land obtained by the aforesaid enterprise in accordance with regulations concerning land registration.

### *2. The Use Fees Charged for Land for Construction by Foreign Investment Enterprises*

The people's government for the province, autonomous region or directly administered municipality where the land is located sets the standard land use fees according to the specific circumstances. This means, in principle, that fees for coastal areas are higher than for land of the interior. Fees for bigger cities are higher than fees for smaller cities, and the fees for central areas or prosperous sections in cities are higher than fees for other sections and suburbs. The method of calculating the land use fees shall be in accordance with such factors as the use to be made of the land in question. These include: geographic and environmental conditions, expenses for requisitioning the land, demolishing structures, resettlement arrangements, and the joint venture's requirements with regard to infrastructure. The land use fees for the right to use lands must be paid from the time stated in the contracts.

According to the provisions of the People's Republic of China for the Encouragement of Foreign Investment, the State grants special preferences for land use fees applicable to the export enterprises and technologically advanced enterprises. This does not include those located in busy urban sectors of large cities. Five to twenty Renminbi (RMB)<sup>55</sup> yuan per square meter per year are charged in areas where the development area fee and the land use fee are computed together. Not more than three RMB yuan per square meter per year are charged in site areas where the development fee is computed on a one-time basis, or in areas which are developed by the above-mentioned enterprises themselves. Exemptions for specified periods of time from the fees set forth above may be granted at the discretion of local People's Governments.

### *3. The Period for Use of Land by an Enterprise with Foreign Investment*

The period for land use for construction by the foreign investment enterprise is specified in the contract. If the enterprise stops producing or is dissolved before the time limit for use of land expires or when the time limit has been reached, the enterprise

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55. Renminbi is Chinese currency. Currently, the exchange rate for one United States Dollar = 8.6 RMB.

shall return the right to the use of land, cancel the registration for the use of land, and be forbidden to transfer and mortgage without agreement. If the enterprise with foreign investment needs to extend the period for use of land, it shall reapply to be approved in accordance with specified procedure.

*B. Other Methods Provided by the Urban Land Regulations*

PRC land use rights are undergoing rapid reform. According to the Tentative Regulations on Granting and Assigning Leaseholds in State-owned Urban Land and the Law on Urban Real Estate Administration,<sup>56</sup> all land use rights must initially be granted by the State in its capacity as the land owner; collectively owned land must be converted to State-owned land before land use rights may be granted.<sup>57</sup> A land use grant may be obtained from the government by agreement, bidding or auction. Contractual agreement with the government represents the most common means of acquisition. Bidding resembles a process whereby tenders are made through the public process pursuant to a set of criteria. These tenders are subject to a time limit as well as other conditions. Grant by auction is a competitive bidding session where parties requesting land may call out bids for the lot to be granted. The successful bidder is determined in accordance with the principle that the highest bidder shall be the successful bidder. The land administrative departments of the municipal or county People's Governments and the users of land shall enter into written contracts for the grant of leaseholds. In the event that the government fails to offer the land use right provided in the contract, the land user is entitled to terminate the contract and seek damages. An investor of land must also face the time limit imposed by the contract for the development of the investment proposal itself. A land user who fails to invest and develop the land within the time limit prescribed by the sales contract may have the contract terminated by the government.<sup>58</sup> Chinese legislation also refers to a type of land use right known as allocated land use rights. This refers to land held under the old land administration system which was allocated to land users without compensation or after they paid a development fee.<sup>59</sup> These allocated land use rights may not be transferred, leased, or mortgaged unless the user complies with specific conditions. The requirements pertaining to these conditions were elaborated more

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56. See COLLECTION OF THE LAWS, *supra* note 17.

57. See *id.* art 8 of The Law on Urban Real Estate Administration.

58. *Id.*

59. Arts. 34-40 of The Law of the PRC on Wholly Foreign-Owned Enterprises, *supra* note 50.

extensively under the Tentative Procedure on Administration of Allocated Leaseholds.<sup>60</sup> The allocated land use rights have no time limit unless the law provides otherwise.

#### IV. REAL ESTATE DEVELOPMENT

##### A. Large-tract Development

In order to increase the construction of public works and utilities, improve the investment environment, and promote the establishment of technologically advanced enterprises and export-oriented enterprises with foreign investment, the Chinese government encourages foreign business entities to invest in developing and engage in business on large tracts of land. Large-tract development refers to the activities of carrying out comprehensive development and construction, according to plans, after obtaining a leasehold in State land. Such development shall include leveling the land and constructing public works and utilities such as water supply, roads, communications and telecommunications. After creating conditions for using the land for industrial or other construction in this manner, the developer then either assigns its leasehold and engages in the business of providing public utilities or carries out further construction of structures on the land such as general factory buildings and corresponding facilities for production and living, which will later be assigned or leased.<sup>61</sup> The State Council promulgated the Administration of the Foreign Business Entities Investing in the Development of and Engaging in Business Operations on Large Tracts of Land Procedures in May 1990.<sup>62</sup> In accordance with the Measures, the foreign investor can develop and manage tracts of land in accordance with regulations, within the limits of the specific economic zones, the open coastal cities and the open coastal economic zones. Tract development with investment by enterprises, other economic organizations, or individuals from the regions of Hong Kong, Macau and Taiwan shall be governed with reference to these Measures.<sup>63</sup>

Where foreign business entities invest in large-tract development, a Sino-foreign equity joint venture, a Sino-foreign contractual joint venture, or a wholly foreign-owned enterprise shall be established to carry out development and engage in relevant busi-

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60. The Tentative Procedure on administration of Allocated Leasehold, promulgated by the State Land Administration Bureau on and effective from Mar. 8, 1992, CHINA L. & PRAC., July 19, 1992 at 42.

61. COLLECTION OF THE LAWS, *supra* note 17, art. 2 of the Administration of Foreign Business Entities Investing in the Development of and Engaging in Business Operations on Large Tracts of Land. This was promulgated by the State Council on May 19, 1990 and was effective on the same date.

62. *Id.*

63. *Id.* arts. 17, 18.

ness.<sup>64</sup> Development enterprises shall prepare large-tract development plans or feasibility studies. Such plans or studies shall clearly set out the general goals of the development and construction, the goals for each stage of development and construction, the processes involved in, and requirements for, carrying out development, the plans for utilizing the land after development.<sup>65</sup>

Development enterprises shall acquire leaseholds in State land for the areas they develop. The enterprise shall also enter into contracts with the People's Government of the municipalities and counties where the development areas are located to reasonably determine the boundaries, purposes, duration, grant fee, and other conditions relating to the tract of land.<sup>66</sup> A development enterprise may only assign a leasehold in State land after it has implemented the plan for large-tract development and satisfied the conditions specified in its contract for the grant of a leasehold in State land. If a development enterprise fails to invest in and develop the land in accordance with the contractual conditions it may not assign the leasehold in State land.<sup>67</sup>

#### B. Requirements For Real Estate Development

The vigorous growth and development of the real estate market in China has brought with it some serious problems which the government has sought to regulate. Perhaps the greatest concern is speculation in the property market. In the early 1990s, too many speculative developers were purchasing land, driving up prices, and later selling for a profit without actually developing or improving the land itself. In order to discourage this trend, the Urban Real Estate Law was enacted in 1994.<sup>68</sup> The applicable sections which deal with real estate speculation may be broadly summarized as follows. Those who have obtained the right to use land through assignment for real estate development must develop the land in accordance with the contract. When the development has not started within one year of the date for starting the development as prescribed by the contract, an idle land fee may be collected. When the development has not started within two years of the contract date, the right to the use of the land may be taken back without any compensation. The only exception to this is when delays are caused by *force majeure*, the activities of government or governmental departments, or the necessary preparatory work for starting the development.<sup>69</sup> The second applicable

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64. *Id.* art. 4.

65. *Id.* art. 7.

66. *Id.* art. 5.

67. *Id.* art. 9.

68. See COLLECTION OF THE LAWS, *supra* note 17.

69. See *id.* art. 25 of the Law on Urban Real Estate Administration.

section adopts preferential taxes and other measures to encourage and support real estate development enterprises to develop and build residential buildings.<sup>70</sup> The third relevant section sets forth requirements for establishment of a real estate development enterprise.

The Urban Land Administration Law<sup>71</sup> defines a real estate development enterprise as an enterprise engaged in development and operation of real estate for the purpose of profit. It also sets the following requirements for its establishment: (1) its own name and organization; (2) a fixed site for business operations and necessary equipment; (3) registered capital complying with provisions of the State Council; (4) sufficient professionals and technicians; and (5) other conditions prescribed by the law and administrative decrees.<sup>72</sup>

The law also requires the registration for the establishment of a real estate development enterprise. To establish a real estate enterprise, registration should be made with the Administration for Industry and Commerce (AIC).<sup>73</sup> The AIC handles registration procedures for those who comply with conditions as prescribed by the Law of the People's Republic of China on Urban Real Estate Administration, issues licenses to them and refuses to handle registration procedures of those who do not comply with conditions prescribed by the above law.<sup>74</sup> Those who establish a limited liability company or limited stock company to engage in real estate development and operations shall comply with the relevant provisions of the Corporate Law.<sup>75</sup> A real estate enterprise shall report to the department designated by the People's Government above county level where the registration department is located within one month after obtaining its license.<sup>76</sup> The ratio between the registered capital and the total investment of a real estate enterprise must comply with the relevant State provisions. When a real estate development enterprise develops a real estate project in phases, the amount of investment in each phase shall suit the project scale of that phase in accordance with the provisions of the contract for the assignment of the right to the use of land. Funds shall be applied to construction on schedule.<sup>77</sup>

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70. *Id.* art. 28.

71. *Id.*

72. *Id.* art. 29.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* art. 30.

## V. REAL ESTATE TRANSACTIONS

According to the Urban Real Estate Administration Law,<sup>78</sup> "real estate transaction" refers to a specific legal act. In a real estate transaction, a person that lawfully possesses a leasehold and is the lawful owner of structures on and attachments to the land assigns, leases or mortgages the real property to another party.<sup>79</sup> In order to strengthen the regulation of real estate transactions, China requires transaction price reporting and transaction registration.<sup>80</sup>

### A. Assignment

By legal definition, assignment of real property occurs when a real property holder transfers the real property to another through sale and purchase, exchange, bestowal or other lawful means.<sup>81</sup> Real property that was obtained by means of administrative allocation must be examined and approved by the authorized level of government. One must carry out the procedures for initial grant of the leasehold, and may only assign, lease or mortgage real property after obtaining title to such property.<sup>82</sup>

### B. Mortgage

A real estate mortgage refers to the provision by which a debtor on a property obligation transfers title to the creditor in security for the performance on the obligation. In the absence of the transfer of ownership, a holder of a mortgage is entitled to dispose of the mortgaged real estate according to law and has the priority to be repaid where the debt obligations cannot be performed within the prescribed limit of time.<sup>83</sup> Under the law, land use rights obtained by means of assignment may be mortgaged.<sup>84</sup> In mortgages of land use rights, the house and other structures erected on the land before the mortgage is made shall be mortgaged together.<sup>85</sup> The right to use land without any houses and structures on it—obtained through administrative appropriation—cannot be mortgaged. However, when structures and other fixtures on land are mortgaged, the land necessary for their use shall also be mortgaged, even though the land use right is ob-

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78. *Id.*

79. *Id.* art. 2.

80. *Id.* arts. 32-35.

81. *Id.* art. 36.

82. *Id.* art. 39.

83. *Id.* art. 46.

84. *Id.* art. 47.

85. See *supra* note 35 and accompanying text.

tained by means of administrative allocation.<sup>86</sup> After a mortgage contract is signed, the houses added to the land are not covered by the mortgage contract.<sup>87</sup> In making mortgage transactions, a written mortgage contract must be signed.<sup>88</sup> In addition to national laws, some local mortgage laws exist at the province and regional level.

### C. Lease

Under the laws of the PRC, land users may lease land use rights along with surface structure rights in return for payment, on the condition that they have complied with the investment, development, utilization, and time period requirements.<sup>89</sup> House owners are allowed to lease their house to the lessee for the latter's use, and the lessee must pay the rent for this use.<sup>90</sup> Such leases must be in writing and signed by the lessors and the lessees. Additionally, the lessor must register the lease in accordance with local regulations.<sup>91</sup>

## VI. REAL ESTATE ADMINISTRATION

In China, land or house ownership and entitlement to the legal use of land and its transactions are subject to confirmation, registration, and verification by the local People's Government at the county or higher level. Therefore, it is crucial to check the chain of title in order to ensure that approval was duly obtained, either in the initial acquisition or in the subsequent transfer. This step will minimize the risk of invalidation of the approval documents.

### A. Administrative Bodies

The administrative bodies for real estate regulations are the State Land Administration Bureau, the Real Estate Department of Ministry of Construction, and their local equivalents. The Ministry of Construction is in charge of real estate at the national level. The Ministry of Construction established the Real Estate Administration Department (READ). Under the READ, several different divisions were further established, including the Residential Housing Development Department, the Real Estate Administration Department and Housekeeping Department, and the Office in Charge of the Reform of the Residential Housing System.

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86. See *supra* note 25 and accompanying text.

87. *Id.* art. 51.

88. *Id.* art. 49.

89. *Id.* art. 28.

90. *Id.* art. 52.

91. *Id.* arts. 29, 30, 53.



In order to strengthen national land leadership, the State Land Administration Bureau was established in 1986. This bureau sits directly under the State Council, and is in charge of the unified administration of the land throughout the country. A Land Administration Department was also established under the People's Government of each province, city, and county. The Land Administration Department establishes the original land records through original land investigation, registration, and statistics differentiating land grade. This forms the basis of the whole landed property administration and also the basis of the administration of land records. The Land Administration Department at various levels properly keeps and files the records concerning the land ownership. Land administrators are sent to the township level government by the county government. The Land Administration Departments of local People's Governments at and above the county level are in charge of the unified administration of the land in their respective administrative areas. The People's Government at the township level is in charge of land administration in its own administrative area.

#### *B. Registration of Land Ownership or Land Usage Rights*

Land owned by collectives must be registered and recorded by People's Governments at the county level, which shall, upon verification, issue certificates to affirm the ownership of such land. State-owned land lawfully used by units under ownership by the whole people or under collective ownership or used by individuals shall be registered and recorded by the Land Administration Department of the local government, at or above the county level. The leasehold certificate will be issued by the People's Government at the same level after examination of the Land Administration Departments of local governments at or above the county level. If any change is to be lawfully made in land ownership or in the right to the use of land, the formality of registering such change must be followed and the certificate changed accordingly.

If a user of land needs to change the use of land designated in the contract for the grant of his leasehold, the user must obtain the consent of the grantor and the approval of administrative departments for land and urban planning. Upon such approval, the parties shall enter into a new contract for the grant of a leasehold in accordance with the relevant provisions of this part. The price for the grant shall be readjusted and registration procedures shall be carried out. Upon the expiration of the terms of a leasehold, the right to use the land, the title to the structures on the land, and other fixtures on the land will revert to the State without compensation. The land user shall return the land use certificate and cancel the registration. However, the land user may

apply for renewal upon expiration of the contract. Where such renewal is necessary, the parties must enter into a new contract and the price for the grant of leasehold must be paid and registration formalities shall be carried out.

State-owned land lawfully used by units under ownership by the whole people or under collective ownership or used by individuals must be registered and recorded by local government at or above the county level, which shall, upon verification, issue certificates to affirm their right to use such land. When the land user transfers, leases or mortgages his leasehold, the registration procedures specified must be fulfilled. When transferring, the transferor must submit the certificate evidencing the right to use the land for cancellation of registration. The transferee must hold legal confirmation documents, apply to the Land Administration Department for alteration of registration and obtain the new certificate for the land use. When leasing, the lessor must apply to the Land Administration Department for leasing registration in accordance with the laws and regulations. When mortgaging, the mortgagor must apply to the Land Administration Department for mortgage registration.

### *C. House Property Registration*

After a house has been built on lawfully-obtained development land, work units or individuals shall apply for registration to House Administration Departments of local governments at or above the county level. The house ownership certificate shall be issued by these departments after examination. When a house is assigned, formalities shall be carried out to register the conveyance to the House Administration Departments. Furthermore, homeowners must register to Land Administration Departments of local governments for the change of land use certificates according to altered house ownership certificates. A changed or new land use certificate shall be issued by the Land Administration Departments of People's Governments at the same level after examination. If a land use right or house ownership is obtained through disposal of mortgaged property, the parties shall register the transfer with the relevant department. Where a holder of title to real property mortgages the real property, he shall register the collateral with the departments ordered by local governments at or above the county level.

### *D. The Registration of Private Houses Owned by Foreigners*

In accordance with the provisions concerning the Administra-

tion of Private Houses Owned by Foreigners,<sup>92</sup> the owners of foreigners' private houses within the territory of China must go through the registration procedures for the proprietary rights of houses at the Administrative Departments for Real Estate under the People's Governments in the localities where the houses are located. After the examination and verification are completed, the homeowners may obtain a house owner's certificate. In the event that the ownership of a house is to be transferred, the present state of the house has been changed, or the owner's nationality has been changed, the house owner must go through the registration procedures for the transfer of the ownership. When foreigners' private houses are rented or leased, the relevant lease contracts and the real estate documents must be presented for recordation to the Administrative Departments for Real Estate in the places where houses are located. If the owners of foreigners' private houses are unable personally to go through the registration procedures for the transfer of ownership or for other changes of the houses, they may appoint agents or Chinese attorneys at law to manage affairs concerning their houses. This may be because they are absent from the area where their houses are located or because of other reasons. In addition, they may appoint agents residing in the place where the houses are located to manage houses for them. When both conditions mentioned above occur, the owners of the houses shall personally vest their agents or attorneys with powers of attorney. The certifying document and title deeds to be used in registration procedures for the transfer of ownership or other changes and the appointment of agents shall be notarized.

## VII. REAL ESTATE TAXATION

Owners or user of PRC real estate are subject to various taxes.

### *A. The Administration of House Taxation*

The tax authorities levy the house tax on transfers of houses or house property rights. It is divided into the house property tax and the contract tax according to the different taxation object. The house tax law mainly contains the following: house tax registration, payment registration, tax returns, collection of taxes, tax examination, and legal responsibility.

#### *1. House Property Tax*

The house property tax is imposed on the house in accor-

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92. See COLLECTION OF THE LAWS, *supra* note 17, at 336.

dance with the price or rent of the house. In accordance with the Interim Regulations concerning the House Property Tax, the rate of the house property tax is divided into two rates. The first is 1.2% according to the price of the house property with a reduction. The second is 12% in accordance with the rental price.

## 2. Business Tax

On January 1, 1994, the State Council promulgated a new business tax regulation to replace the earlier draft issued in September, 1984.<sup>93</sup> The regulations also apply to foreign investment enterprises that assign land usage rights or sell immovable property in the PRC. Taxpayers engaged in the transfer of land usage rights and the sale of immovable property are subject to the business tax.<sup>94</sup> The amount of tax payable is calculated according to the amount of business and the specified tax rates.<sup>95</sup> The amount of business will be the full price and all additional charges that are collected by the taxpayer from the assignee or buyer for the assignment of land usage rights or sale of immovable property.<sup>96</sup> Under the regulations, the assignment of land usage rights and the sale of buildings and other attachments to the land will be taxed at a rate of five percent.<sup>97</sup>

## 3. House Property Contract Tax

The tax authorities impose the house property contract tax on the transferee of the house when the property right is transferred through buying, selling, pawning, or exchanging houses. In accordance with the Interim Regulations Concerning Contract Tax,<sup>98</sup> the parties who want to buy, sell, pawn, give or exchange houses must reach an agreement, and the contract tax is paid by the house transferee. The rate of the contract tax is 1.6% of the purchase price to buy and sell houses, 2.6% of the present value to gift houses, 3.3% of the pawning price to pawn houses, and 4.6% of the difference in prices between two exchanging prices if the exchanging prices are different.<sup>99</sup>

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93. See CHINA L. & PRAC., Jan. 31, 1994, at 44-48.

94. *Id.* art. 1.

95. *Id.* art. 4.

96. *Id.* art. 5.

97. See Appendix: Table of Business Tax Items and Rates, Business Tax Regulations.

98. Promulgated by the State Council on April 3, 1950. COLLECTION OF THE LAWS, *supra* note 17, at 620-21.

99. *Id.* art. 5.

### *B. The Land Property Tax Administration*

The tax authorities levy the land property tax on the units and individuals using land. There are two kinds of land property taxes in China at present: the tax for the use of land in urban areas or towns and the tax for possession of cultivated land. The tax authorities levy the tax for the possession of cultivated land on units and individuals who possess cultivated land on which buildings or non-agricultural activities are conducted. In this context, a taxpayer is any unit or individual who possesses cultivated land for the purpose of constructing buildings or for non-agricultural users establishment. The cultivated land mentioned above refers to land used for planting. Any land which has ever been used for planting is regarded as cultivated land. Fisheries, garden plots, vegetable plots or other land for agriculture which is used to construct buildings or for non-agricultural purposes are also treated as cultivated land.

### *C. Gains Derived from Transfer of Real Estate are Subject to Land Value Added Tax*

The Interim Regulations on Land Value Added Tax were promulgated by the State Council on December 13, 1993.<sup>100</sup> The regulations are formulated in order to regulate transaction procedures in the land and real estate markets, adjust rationally the benefits deriving from land value added and safeguard the rights and interests of the states.<sup>101</sup> Both domestic and foreign enterprises or individuals that assign State-owned land usage rights and obtain revenue from such assignment pay the land value added tax.<sup>102</sup> Value added will be the revenue obtained by taxpayers from the assignment of real property minus the deductions set out in Article 6 of these regulations.<sup>103</sup> The revenue obtained will include pecuniary revenue, revenue in kind, and other revenue.<sup>104</sup>

Article 6 stipulates that the following items may be deducted when calculating the value added: (1) the amount expended to obtain the land usage rights; (2) the cost and expenses of land development; (3) the costs and expenses of construction of new buildings and supplementary facilities or the appraised price of the old buildings and structures; (4) taxes in connection with the assignment of real property; and (5) other deductions determined

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100. See CHINA L. & PRAC., *supra* note 100.

101. *Id.* art. 1 of the Interim Regulations on Value Added Tax.

102. *Id.* art. 2.

103. *Id.* art. 3.

104. *Id.* art. 5.

by the Ministry of Finance.<sup>105</sup> Land value added will be taxed at four progressive tax rates: (1) 30% on the portion of the value added that does not exceed 50% of the deductions; (2) 40% on the portion of the value added that exceeds 50% of the amount of the deductions but does not exceed 100% of the amount of the deductions; (3) 50% on the portion of value added that exceeds 100% of the amount of the deductions, but does not exceed 200% of the amount of the deductions; and (4) 60% on the portion of the value added that exceeds 200% of the amount of the deductions.<sup>106</sup>

Article 8 states that land value added will not have to be paid in the following two situations: (1) the taxpayer constructs and sells ordinary standard residential buildings and the value added does not exceed 20% of the amount of the deductions; or (2) the real property is requisitioned or recovered according to law for reasons of State construction.<sup>107</sup>

In the following situations, tax will be calculated according to the appraised value of the real property: (1) if the taxpayer conceals the real property transaction price or reports a false real property transaction price; (2) if the amount of the deductions reported by the taxpayer is untrue; or (3) if the transaction price for the real property assignment is lower than the appraised price of the real property without a legitimate reason.<sup>108</sup> If taxpayers fail to pay land value added tax in accordance with the Regulations, the land administration authorities and real property administration authorities will not carry out the change of title procedures.<sup>109</sup>

#### *D. Income Derived from Real Estate Operations are Subject to Income Tax*

##### *1. Enterprise Income Tax*

Enterprise income tax is the tax imposed on the income derived from production and business operations and other taxable income of Chinese investment enterprises. The current rules and regulations relating domestic enterprise income tax are Provisional Regulations of the PRC on Enterprises Income Tax<sup>110</sup> and Detailed Rules for the Implementation of the Provisional Regulations of the PRC on Enterprises Income Tax.<sup>111</sup>

The current law relating the income tax of foreign investment

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105. *Id.* art. 6.

106. *Id.* art. 7.

107. *Id.* art. 8.

108. *Id.* art. 9.

109. *Id.* art. 12.

110. See SELECTED COLLECTIONS OF NEW ECONOMIC LEGISLATIONS 334-54 (1994).

111. *Id.* at 356-60.

enterprises and foreign enterprises is the Income Tax Law Concerning Foreign Investment Enterprises and Foreign Enterprises,<sup>112</sup> which was adopted at the Fourth Session of the Seventh National People's Congress and became effective on July 1, 1991. In order to carry out this law, the State Council issued the Detailed Rules of the Implementation for the Income Tax Law Concerning Foreign Investment Enterprises and Foreign Enterprises<sup>113</sup> on June 30, 1991; this set of detailed rules became effective on July 1, 1991. The income of domestic or foreign investment or foreign enterprises derived from the real estate operation is subject to the enterprises income tax.

## 2. Individual Income Tax

On October 31, 1993, the National People's Congress amended the PRC Individual Income Tax Law.<sup>114</sup> Individuals who are domiciled in the PRC or have lived there for at least one year must pay individual income tax.<sup>115</sup> Taxable income includes income from the assignment and lease of property.<sup>116</sup> This income is taxable at a rate of twenty percent.<sup>117</sup>

Taxable income on leased property is calculated based on the amount of a single payment minus a deduction of RMB 800 for expenses if the payment does not exceed RMB 4,000, in which case the deduction is twenty percent. Income from the assignment of property is based on the assignment price minus the original value of the property and reasonable expenses.<sup>118</sup>

## E. Property Tax

### 1. House Property Tax

The tax authority imposes the house property tax in accordance with the price or rent of the house. The rate of the house property tax has two parts. The first part is 1.2% of the house price with a reduction. The second part is 12% of the rental.<sup>119</sup>

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112. *Id.* at 549-55.

113. See CHINA L. & PRAC., *supra* note 100, at 23-27.

114. *Id.*

115. *Id.* art. 1 of the Individual Income Tax.

116. *Id.* arts. 2, 5. However, based on the Interim Regulations on Land Value Added Tax, gains generated from property transactions will be subject to capital gains tax at rates ranging from thirty percent to sixty percent. Pursuant to Art. 2 of the land value added tax law, an individual who disposes of real estate property should be subject to the land value added tax. It is not clear how the application of this tax relates to art. 3 of the Individual Income Tax Law.

117. *Id.*

118. *Id.* art. 6.

119. Provisional Regulations Governing the Urban Real Estate Law, promulgated by the State Council on August 8, 1951. See 2 COLLECTIONS OF LAWS AND REG-

## 2. Land Property Tax

The land property tax is levied on units and individuals using land. There are two kinds of land property taxes in China. The first is the tax for the use of land in urban areas or towns. The second is the tax for possession of cultivated land.

The tax authority levies the tax for the use of land in urban areas or towns on units and individuals using land in urban areas and towns. Those who obtain the right to use land without compensation must pay this tax.

The tax authority levies the tax for the possession of cultivated land on units and individuals who possess cultivated land with buildings and non-agricultural activities. Any unit or individual who possesses cultivated land for the purpose of constructing buildings or other non-agricultural uses must pay this tax. Any land which has ever been used for planting is regarded as cultivated land. In addition, fisheries, garden plots, vegetable plots are treated as cultivated land.<sup>120</sup>

## VIII. THE SETTLEMENT OF REAL ESTATE DISPUTES

There are different methods for settling a real estate dispute: consultation, conciliation, administrative mediation, arbitration and litigation. Consultation will occur only if the parties agree to settle the disputes over ownership or use of house property through consultation. The agreement reached after consultation must be voluntary by both parties, in accordance with the provisions of the General Principles of Civil Law of the People's Republic of China;<sup>121</sup> otherwise it may be rescinded. When a dispute arises among the parties for the right to the use of land or land ownership, it can also be settled through consultation. Although the housing or land dispute is settled through consultation between both parties, the parties shall not infringe upon the rights and interests of a third party in order to reach an agreement or to protect their respective interests. Otherwise, the agreement will be rescinded without the protection of law because the agreement is not fair and reasonable.

With conciliation, the parties seek to resolve their house property disputes by agreement through the conciliator, a neutral third party facilitator. These neutral third parties could be the resident committees in cities and towns, and villager committees in villages. These conciliation organizations can only persuade the

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ULATIONS OF THE PRC CONCERNING FOREIGN ECONOMIC AFFAIRS 19-22 (1985).

120. The Interim Regulations on Tax for the Possession of Cultivated Land was issued by the State Council on April 1, 1987.

121. See *General Principles*, *supra* note 1.



parties with housing disputes. They have no power to make a binding decision. In addition, conciliation is not a required legal procedure before a lawsuit can be instituted. The conciliation organ serves as an intermediary between the parties; it improves communication, explores new perspectives, or suggests creative approaches toward settlement which may not have occurred to the parties. If a party refuses to accept the administrative decision, he or she may bring suit in the people's court, otherwise the people's court shall not directly accept the case.

The housing administration department at the county level can make administrative decisions or use arbitration. These are the necessary procedures in some housing disputes prior to commencement of suits. In some areas the administrative decision is a necessary procedure (e.g., in the Beijing municipality); that is, some housing disputes must be submitted for settlement by conciliation to the housing administration department before a lawsuit begins. In other areas, arbitration is the first step used to settle housing disputes, for example in Chungking and Chengdu, with written arbitration regulations provided. A dispute over land ownership or the right to the use of land between State-owned units, between collective-owned units, or between a State-owned unit and a collective unit are submitted for a decision by the people's government above the county level. A dispute concerning the land use rights between individuals, or between individuals and State-owned units or collective-owned units is dealt with by the people's government at the township or county levels. Land disputes having a major impact on the whole country or land disputes between different provinces, autonomous regions or municipalities are handled by the State Council.

The land administration department of the various people's government resolves the disputes by making an administrative decision which, if not challenged, has the force and effect of a judgement. If either party refuses to accept the administrative decision, that party can bring a lawsuit in the people's court where the house is located within fifteen days after the date of receiving the decision statement. If one party refuses to execute the decision, the opposite party may also bring a suit.

In arbitration, the dispute is submitted for a decision by a Real Estate Arbitration Committee established under the Real Estate Administration Department at city, district and county level. The arbitration committee is composed of one Chairman, a maximum of three Vice Chairmen, and a number of commission members. The commission members of the arbitration committee must have legal knowledge and professional knowledge about real estate. Their names shall be submitted to the people's government at the same level for approval and to the higher real estate administration department for record. The arbitration committee

shall send professional arbitrators to handle the real estate disputes, and also employ legal and real estate professionals to act as part-time arbitrators. The arbitration tribunal, composed of two arbitrators and one presiding arbitrator appointed by the arbitration committee, shall handle the real estate dispute. The arbitration tribunal shall adhere to the majority view while appraising the case. A difficult case shall be discussed and decided by the arbitration committee; a simple case can be arbitrated by a single arbitrator appointed by the chairman or vice chairman of the arbitration committee.

If any party refuses to accept an arbitration award, that party may bring a lawsuit in the people's court where the arbitration organ is located. This suit must be brought within fifteen days from receipt of the arbitration award. If the parties do not bring a lawsuit within this limit, the arbitration award becomes legally effective, and the parties should execute the arbitration decision by themselves within the time limit specified. If any party fails to execute, the other party can apply to the people's court where the arbitration organ is located for enforcement of execution.

#### CONCLUSION

This overview of Chinese real estate law serves merely as an introduction to this complicated area. Yet, only with this overall picture in mind can one approach an understanding of any one part in depth. Hopefully, this summary has provided the necessary tools for further investigation into this complex topic.

