Land Use Rights of Foreigners in China

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Introduction:

The first legal document on land use rights for foreign investors surfaced in the 1979 *The Law of the People's Republic of China ("PRC") on Sino Foreign Equity Joint Venture.*

Art 5 of this legislation provides as follows:

The investment of a Chinese joint venture partner may include the rights to the use of a site provided for the joint venture during the period of its operation. If the rights to the use of the site does not constitute a part of the Chinese partner's investment, the joint venture shall pay the Chinese government a fee for its use.

More than 30 years later, the PRC has a comprehensive system of laws enacted by the People's National Congress, regulations from its State Council, directives and guidelines promulgated by regulatory bodies.

The major legislations are the *Property Law of the PRC, Land Administration Law of the PRC, the Law of the PRC on Urban Real Estate Administration (Urban Real Estate Administration Law), the Law of the PRC on Foreign-funded Enterprises*. Two other legislations pertaining to joint ventures include the *Sino-foreign Equity Joint Venture Law* and the *Sino-foreign Contractual Joint Venture Law*.

To implement these comprehensive legislations, the State Council promulgated a series of administrative regulations. They include regulations governing assignment and transfer of land use rights relating to state-owned land in urban areas, land use rights of sino-foreign equity and contractual joint ventures.

Apart from these two main sources of property law, there are also guidelines and regulations introduced by the major ministries over land use rights and foreign investment. They include the *Provisions on the Administration of Urban Real Estate Transfer* from the Ministry of Housing and Urban-Rural Development. The former Ministry of Foreign Trade and Economic Cooperation issued *the Notice on Enforcement of Several Articles in the Detailed Rules on the Implementation of the Law of the PRC on Sino-foreign Cooperative Joint Ventures*.

Local governments sometimes promulgate their regulations governing land use rights of foreigners. For example, the Beijing Municipality issued its *Administrative Rules of Transfer of Real Estate in Beijing*.

Acquisition of land use rights by foreigners

The laws and regulations pertaining to the acquisition of land use rights are applicable equally to both foreigners and Chinese nationals. Land use rights include the land and the buildings erected on the land. As a prudent measure, foreigners should acquire the land use rights as a prelude to development.

Allocation

Urban lands are owned by the State whilst suburban and rural lands are collectively owned by peasants except otherwise provided for by the State.[1] Land use rights of lands owned by the State can be allocated by the local government above county level subjected to payment of compensation or settlement or even gratis in accordance with the law.

Such land use rights allocated to either Chinese nationals or foreigners have to be used for the development of urban infrastructures, public utility, key energy, transport and water conservancy projects supported by the State and other purposes stipulated by the laws and administrative regulations and guidelines.

[1] Art 47 of the Property Law of the PRC; Art 8 of the Land Administration Law of the PRC

If the purpose of the project presented by the foreigner is in full compliance with the law, the foreign party can apply to the land authority of local government above county level for a grant. Once this is approved, the foreign party will sign a contract with the same department for the land use rights, which will be registered to ensure their validity. Although, the owner of allocated land use rights does not have to pay state land grant fee, he has to make a lump sum payment as development fee plus annual land use fee to the local government.

The land use rights allocated to the foreign or domestic party cannot be the subject of any assignment, lease or mortgage.

Grant

Granting involves the leasing of land use rights of state-owned land to users for a stipulated period upon payment of the state grant fee. Specific ways of such grant involve auction, bidding or direct negotiations between the interested parties.

Such land use rights can be used for the development of commercial, tourist, recreational and high end housing. They can only be granted by auction or bidding. However, if there are no mechanisms or facilities for either auctioning or bidding, then the interested parties can conclude by direct negotiations.

Payment for the land grant must not be lower than the ceiling established by the State. The successful foreign party will sign a contract with the local land authority and pay the consideration for the land use rights. The foreign party will register its land use rights and the Registry will issue a rights certificate to him.

The period of land use rights ranges from 40 years for commercial, tourist and recreational purposes to 50 years for educational, scientific and cultural projects, public health and physical education. The longest period given to residential project is for 70 years. The land use rights will be reverted back to the State upon expiry and without payment of any compensation.[2]

[2] Art.40 and art.41 of the 1990 Interim Regulations of the Assignment and Transfer.

A renewal is possible with the execution of a new contract, registration and payment of fee.[3] For any renewal of an existing period of land use rights, the owner will have to do this at least 1 year prior to expiry. A renewal is always possible unless it is due to public policy or factors. For residential land use rights, the renewal is automatic upon expiry. This is provided explicitly under art. 149 of the Property Law.

The owners of such granted land use rights can always transfer lease or mortgage them.

Contribution of land use rights in joint ventures

The Chinese party in a joint venture with foreigners can use land use rights as part of its capital contribution. The value of its land use rights is based on the price paid for them or the land use fee.

The regulatory bodies for approving the contribution of land use rights of the Chinese party are the local land authority and the local office of State Administration for Industy and Commerce. The land use rights remain with the joint venture entity.

Rent

The foreign invested enterprise can also rent buildings directly from state-owned enterprises ("SOEs"), urban communities, rural enterprises and collective economic organizations. Payment of rent is the only consideration.

Acquisition from collectively-owned land

Such land use rights are collectively owned by members of a collective organization and can only be requisitioned by the State. However, subject to the two thirds majority of its members

[3] Chapter 2, *ibid.*

and with the approval of the county government, there can be a valid contract for the assignment of such land use rights to non-members, nationals or foreigners.

A collective organization with such land use rights can also factor them as its capital contribution in a joint venture with a foreign party subjected to the approval of the local government and payment of the necessary fee to the State.

Transfer of land use rights of foreign invested enterprise ("FIE")

A FIE with ownership of land use rights can also go to the local branch of the National Development and Reform Commission ("NDRC") for an approval of its assignment. Once the threshold investment requirement of 25% by the foreign party in the FIE is satisfied, the NDRC will approve the assignment and issue the land use rights certificate.

When a FIE, such as an EJV, needs to mortgage its land use rights to a third party, such as a financial institution, it has to seek approval from the local office of the land authority plus recording at the SAIC.[4] This requirement is not necessary for land use rights held by Chinese nationals.

Challenges faced by foreign investors in the real estate market in the PRC

The challenges can best be gauged by the following rules, regulations and guidelines in the tabloid format on page 6.

Investment into the real estate sector in PRC has always been under strict supervision even though the measures are prudent in most instances. A property bubble in PRC will affect all sectors of the economy, especially the banking sector and commodities market.

[4] Art 23 of the Rules for the Implementation of the law of the PRC on Foreign-funded enterprises.

The real estate sector attracts the second highest figure of foreign direct investments ("FDI"). It registered around US$43.81bn and is around 12% of the total FDI.

YEAR	DOCUMENT	CONTENTS
2002	The Catalogue for the Guidance of Foreign Investment Industries	Limited the foreign investment in the construction and management of luxury hotels and houses, and exhibition centres.
2004	The Catalogue for the Guidance of Foreign Investment Industries (Amended in 2004)	Restricted the market section for investment, including the development of ordinary houses.
July 2006	Opinions of the Ministry of Construction, the Ministry of Commerce, the National Development and Reform Commission, the People's Bank of China, the State Administration for Industry of Commerce and the State Administration of Foreign Exchange on Regulating the Access to and Administration of Foreign Exchange in Real Estate Market	1. From December 1, 2007, foreign capital is not encouraged for the development of ordinary residence. 2. Limited the foreign capital entering the secondary market of real estate and intermediate agent. 3. Disallowed off-shore companies to buy real estate in PRC.
September 2006	Notice of the State Administration of Foreign Exchange and Ministry of Construction on Regulating the Administration of Foreign Exchange in Real Estate Market	The foreign exchange current account of a real restate development enterprise is not allowed to keep any house purchasing money of any domestic branch or representative office remitted from abroad.
June 2007	Notice of the Ministry of Commerce and the State Administration of Foreign Exchange on Further Strengthening and Regulating the Examination, Approval and Supervision of Foreign Direct Investment in Real Estate Industry	1. Restricted foreign investment in luxury property projects. 2. Restricted the investment under transactions involving substantially the same controller.