

CHINA LEGAL REPORT

AUGUST 2007



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subject	PRC Property Law
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1. Introduction

The Property Law of the People's Republic of China (hereinafter referred to as "Property Law" or "the Law") was promulgated on March 16, 2007, after seven reviews by the Chinese legislature. The Law will come into effect on October 1, 2007.

"Property" as defined in the Property Law is limited to tangible movables and immovables, or res. Under specific circumstances certain rights are also governed by the Property Law and are deemed objects of a property right (mainly: the pledge of rights such as bills, equity interests, receivables, etc.).

Because China has adopted a Civil Law System, the provisions regarding ownership and utilization of properties should be one of the cores of the domestic civil law. However, before the enactment of the Property Law, there lacked a uniformed code which governed these areas in a systematic and complete way. The relevant provisions had been scattered in the General Principles of Civil Law, the Guarantee Law, the Land Administration Law, the Urban Real Property Administration Law, etc. The Property Law therefore intends to become the principle source of answers to legal property matters.

2. Structure of the Property Law

The Property Law is divided into five parts: General Rules, Ownership, Usufructuary Rights, Real Rights for Security and Possession.

2.1. General Rules

This first part deals with principles of fundamental value for the institution, alteration, transfer, extinguishment and the protection of property rights.

Generally speaking, the institution, alteration, transfer and extinguishment of the property rights (hereinafter collectively referred to as the "change of property rights") of movables are subject to and take effect upon the delivery of the property. In contrast, the change of property rights of immovables is subject to registration, unless otherwise provided by law (main exceptions: natural resources owned by the state are not subject to registration, property rights determined by court judgments and the acquisition of property rights out of succession and factual conducts take effects from the time of the judgment, succession or conduct).

2.2. Ownership

The Property Law mentions three types of ownership separately: state ownership, collective ownership and private ownership. Some specific properties can only be owned by the state, like for example urban land, minerals, rivers, maritime areas, etc. Except for the object of ownership, the Property Law provides no differentiated protections to these three different types of ownership (state ownership, collective ownership and private ownership).

The Partitioned Ownership of Building Areas, neighborhood relation, joint ownership and special regulations about the acquisition of ownership are also provided for in this part.

2.3. Usufructuary Rights

Usufructuary Rights govern relations in the utilization of properties. The most important types of Usufructuary Rights are land use rights, water-intaking rights, exploration rights, mining rights, fishery rights, contracted land management rights, and easements. Although the Property Law allows movables and immovables to be objects of Usufructuary Rights, all the explicitly mentioned Usufructuary Rights are to be established on immovable property.

2.4. Property Rights for Security

The Property Law provides three types of Real Rights for Security: mortgage, pledge and lien. The object of mortgage can be either movables or immovables and the institution of a mortgage does not require the delivery of the property. The object of pledge can be either movables or consist of certain types of rights (such as bills, bonds, equity interests, intellectual properties, receivables), and the institution of a pledge is subject to the delivery of the object or the corresponding pledge registration. The object of lien can only be movables, and the possession of the property by the lienor is indispensable for the right.

2.5. Possession

Possession, authorized or unauthorized, is given protection in the Property Law. The possessor is entitled to remedies such as the right to claim the restitution of the property or the elimination of obstacle or danger to the property when his possession of the property is prevented in some way. The possessor has also the right to ask for compensation for damages incurred by this interference.

3. Changes and Alterations caused by the Property Law

This section of the Legal Report will examine the major changes and modifications introduced by the Property Law.

3.1. General Rules

A. The Effects of Registration of Ownership of Immovables

The registration of the ownership of immovables has been attributed such vital importance by the Property Law that a to-be changed right cannot take effect if it is not adequately registered (unless otherwise provided by the law, with the exceptions mainly being state owned natural resources, changes out of succession, court judgment and factual conducts).¹ However, a failure to register will not prejudice the validity of a contract.²

Two new measures have been added to the registration process: the Correction of Registration³ and the Advance Notice Registration⁴. Their respective functions are: rendering remedies in case of a mistaken registration and securing the right of obtaining the ownership by the contracting party of a transaction which has not been realized.

3.2. Ownership

Apart from the above, the New Law also makes progress in other noteworthy aspects, such as the introduction of the bankruptcy custodian system, the strengthening of protection of creditors' interests, etc. For these reasons, the New Law, though not totally free from criticism, demonstrates a relatively high level of legislative technique and caters for the need to further regulate the economic participants, and therefore can be expected to generate great positive impact on China's development.

B. The Introduction of Partitioned Ownership of Building Areas

For tens of years after the foundation of PRC, most urban people had resided in publicly-owned units assigned to them by their employers and there were few regulations governing the relationship between residents of the same building and secondly between residents and the building management. The beginning of 1990's saw the first privately built apartments and houses. Also at the time, the first apartments and houses were being sold

¹ Art. 9, 28, 29, 30, 31 of PRC Property Law.

² Art. 15 of PRC Property Law.

³ Art. 19 of PRC Property Law

⁴ Art. 20 of PRC Property Law

to individuals and private entities. Since then, in the supply of new residences, private apartments gradually outnumbered the assigned public ones. This was mainly due to the state decreasing and finally stopping the practice of assigning subsidized public apartments to employees.

Among other things, this led to a need of a clear and explicit governance of legal matters related with privately-owned apartments within apartment houses. Therefore, the Property Law provides the right of owners' Partitioned Ownership of Building Areas (also named as "Ownership of Apartment House"). Such rights consist of the exclusive ownership of the particular part of a building, the joint ownership of the common part of the building (such as roads and gardens of the block, lifts, etc.), and rights to maintain and manage the building.⁵ The Law also provides that owners may form a General Meeting of Owners or Owner's Committee to manage the building. The decisions of these meetings are binding for the owners.⁶

C. Presumption of Joint Ownership by Shares When an Agreement is Absent

The system of Bona Fide Acquisition refers to the acquisition of ownership by a buyer based on a transaction between the seller who is not entitled to dispose of the property, and the buyer, who is reasonably unaware of this fact, and who has paid a reasonable price for the property.

Before the Property Law was adopted, Chinese laws did not foresee an explicit provision of the Bona Fide Acquisition System, but both legal theory and judicial practices have admitted the system for the acquisition of ownership of movables. Now the Property Law has explicitly expanded the system to immovables.⁷

Another noteworthy provision in the Bona Fide Acquisition System is an exception: The owner of a lost property is entitled to claim the restitution of the property from the possessor within two years after he becomes aware of the possessor.⁸

D. The Expansion of Bona Fide Acquisition Coverage to Immovables

The system of Bona Fide Acquisition refers to the acquisition of ownership by a buyer based on a transaction between the seller who is not entitled to dispose of the property, and the

⁵ Art. 70, 71, 72, 73 of PRC Property Law.

⁶ Art. 75, 76, 78, 83 of PRC Property Law.

⁷ Art. 106 of PRC Property Law.

⁸ Art. 107 of PRC Property Law

buyer, who is reasonably unaware of this fact, and who has paid a reasonable price for the property.

Before the Property Law was adopted, Chinese laws did not foresee an explicit provision of the Bona Fide Acquisition System, but both legal theory and judicial practices have admitted the system for the acquisition of ownership of movables. Now the Property Law has explicitly expanded the system to immovables.⁹

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3.3. Usufructuary Rights

E. New Provisions about LUR's for Construction Purpose

The Property Law explicitly provides that land use rights (hereinafter referred to as "LUR"s) may be established on ground surface, beneath ground or above ground separately, and that newly established LUR shall not prejudice previously established usufructuary rights.¹¹

In contrast to the former provisions, the Property Law regulates public sales, such as tendering and auction, as the only legal way to assign (directly from government) business LURs (e.g. LUR for industrial, commercial, tourist, entertainment or private residence purpose).¹²

The automatic extension of residential LUR is also adopted by the Property Law, while the extension of all other LURs are subject to application to and approval by land authorities.¹³

F. Regulation of Easement

The Property Law for the first time explicitly provides the right of Easement. Easement is a right derived from a contract between right holders of two immovable properties (dominant tenement & servient tenement), where the holder of dominant tenement can utilize the servient tenement to facilitate the use of the dominant tenement.¹⁴ The right usually takes

⁹ Art. 106 of PRC Property Law.

¹⁰ Art. 107 of PRC Property Law

¹¹ Art. 136 of PRC Property Law.

¹² Art. 137 of PRC Property Law.

¹³ Art. 149 of PRC Property Law.

¹⁴ Art. 156 of PRC Property Law.

the form of passage through the servient tenement, to prohibit the owner of the servient tenement to set up buildings, for better ventilation and lighting of the dominant tenement, to prohibit the owner of the servient tenement to make noises, etc. The specific meaning of an Easement Right depends on the specific agreement between the contracting parties.

The Property Law also provides that an Easement is initiated upon the entering into effectiveness of the Easement Contract. However, the right holder of an Easement Right cannot oppose third parties unless the right has been properly registered.¹⁵

3.4. Property Rights for Security

G. The Scope of Mortgage Objects Enlarged

The Property Law provides for a larger scope of assets which can become the object of mortgage. The former provisions only allowed mortgage on “assets allowed to be pledged by law”. The Property Law now allows mortgages on “all assets not forbidden to be pledged by law or administrative regulations adopted by State Council”¹⁶.

In addition, the Law provides Floating Charge as a mean of mortgage. Enterprises, self-employed households and agricultural operators may mortgage movables owned presently or in the future including equipment, raw material and products. The mortgage assets shall be crystallized upon the falling due of the debts, bankruptcy of the mortgagor, other agreed conditions or circumstances where the credit is seriously endangered. Before the crystallization of the mortgaged assets, the mortgagor may both utilize and dispose of them, and the mortgagee may not rely on the floating mortgage to oppose purchasers who have paid reasonable considerations for and who have been delivered the mortgaged asset(s) during the normal operation of the mortgagor. The mortgage shall also be registered with the local administration of industry and commerce to be able to oppose third parties¹⁷.

H. Receivable Become a Possible Object of Pledge

Furthermore, it is now possible under the Property Law to pledge receivables. These pledges are subject to registration with the competent authorities, and the pledge takes effect upon the registration.¹⁸

¹⁵ Art. 158 of PRC Property Law.

¹⁶ Art. 180 of PRC Property Law.

¹⁷ Art. 181, 189, 196 of PRC Property Law.

¹⁸ Art. 228 of PRC Property Law.

I. More Circumstances are Allowed for the Institution of Liens

Under the Property Law, a lien no longer has to be based on a deposit, transportation or work contract. The creditor may retain a legally possessed movable of the debtor if the debtor does not fulfill a due obligation, and is entitled to a preferential repayment of the debt to the extent of the retained movable.¹⁹ Another condition of such retention and lien is that the retained movable and the due obligation shall belong to one identical legal relationship. However, such restriction is not applicable to liens between enterprises.²⁰

3.5. Possession

J. Provisions of Possession as a Fact Protected by Law

Before the promulgation of the Property Law, little protection was offered to a possessor against interferences from third parties when the possessor is not the owner.

Nowadays, the Property Law regards the possession of a property by a possessor itself a protection-worthy fact or status, even if it is not a possession based on legal grounds. In addition, it has been generally accepted that possessions not based on ownership but on contract (such as lease, deposit, transportation, pledge) and based on factual conducts and other legal relationships (such as finding a lost property, voluntary service, possession by guardian, etc.) also requires protection by law. These are the main reason why the legislator has introduced the System of Possession in the Property Law with the following main content:

Possession based on grounds other than ownership, as a fact in stead of as a right, is protected by law. When the possession is prevented in any way or when any damage related to the possessed property is incurred, the possessor is entitled to request restitution of the property, removal of obstacle, elimination of danger and to claim damages. As a relief offered to a factual status, the possessor's right to request restitution of property expires after 1 year counting from the seizure of the property.²¹

Bona fide possessions are differentiated from mal fide possessions: a bona fide possessor is entitled to claim the necessary expenses he has paid for the maintenance of the property;²² a similar right is not available to a mal fide possessor. A mal fide possessor is

¹⁹ Art. 230 of PRC Property Law.

²⁰ Art. 231 of PRC Property Law.

²¹ Art. 245 of PRC Property Law.

²² Art. 243 of PRC Property Law.

further liable to compensate the right holder of the property for damages inflicted to the property during his possession.²³

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²³ Art. 242, 244 of PRC Property Law.