

RECENT DEVELOPMENTS IN REAL ESTATE INVESTMENT IN CHINA

The real estate market in the People's Republic of China ("PRC") is anticipated to be one of the fastest growing industry sectors in the economic transformation of PRC. The real estate market was effectively created in 1988 when an amendment to the Constitution of PRC was made which permitted the limited transfer of land use rights. Recent developments in the regulation of the real estate market in PRC have opened up the market to local and foreign ownership and investment.

THE PRC PROPERTY LAW

The PRC Property Law ("Property Law") was first proposed in 1993 and was passed on 16 March 2007, after seven revisions. The Property Law will become effective from 1 October 2007 and deals with property rights on a wide range of matters. All land in PRC is still owned either by the State or by agricultural collectives and this is reiterated in the Property Law.

Prior to the Property Law, PRC did not have a comprehensive national property law. A series of national laws had been issued over time in relation to particular aspects of property rights including land management but each province and municipality also issued their own laws and regulations at the local level to implement the national laws.

The Property Law grants and protects rights to both immovable property (real estate) and movable property including:

- Rights of private individuals to income, house ownership, chattels, production equipment and raw materials, savings, investments, and other earnings both movable and immovable.
- Extending the rights to grant and take security over property (and priority of interest) including buildings and other structures attached to land, construction land-use rights, production equipment, raw materials, semi-finished products, and finished products and buildings, vessels, aircraft under construction and transport vehicles.
- The government's right to expropriate real property and obligations to pay compensation to the owner (which does not specifically include compensation for loss of profit, relocation costs or for looking for suitable replacement sites).
- Co-ownership by proportion and common ownership of property which is analogous to strata ownership in Australia except that the land is still owned by the State.
- Creation of easement rights which will run with the land.
- Creation of neighborhood rights relating to water, rights of way, utilities, fresh air/light, health and environmental protection, and safety.
- Creation of a registration system for establishing and transferring real property rights.

The Property Law certainly evidences the intention of the PRC to better protect property rights and their burgeoning market. However, there are a number of deficiencies in the Property Law including the rights and obligations regarding common ownership and additional legislation will have to be passed to give certainty to the anticipated growth of this type of development. In addition, the extension of security interests over property will need to be viewed in the context of recent regulatory developments limiting the amount of foreign debt permitted to foreign-invested real estate enterprises (“FIE’s”).

LIMITATION OF FOREIGN DEBT

On 10 July 2007 the State Administration of Foreign Exchange (“SAFE”) of PRC issued circular 130 entitled *Circular of the General Affairs Department of SAFE on the Distribution of the List of the First Group of Foreign Invested Real Estate Projects which the Ministry of Commerce has Approved and Filed*. Circular 130 has not yet been officially approved but has been circulated to branches of the SAFE and the real estate market evidencing the intention of the PRC to further restrict foreign investment in the real estate market.

Circular 130 provides that all foreign-invested real estate enterprises established after 1 June 2007 will not be allowed to have foreign debt which means that all of the FIE’s debt will need to be obtained from local PRC sources.

The FIE’s which were established prior to 1 June 2007 will be permitted to continue to have foreign debt but only to the extent previously approved irrespective of whether it increases its capital after 1 June 2007 as it is not a proportional limitation.

CONCLUSION

The PRC is actively taking steps to allow the development of a sophisticated real estate market within the constraints of its political regime. Caution should be exercised in investing in real estate development in PRC until it is clear that Circular 130 has been approved by SAFE and that regulations are being enforced at the local level including the application of the Property Law given that such regulations have not yet come into force.

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