

- according to law (except determined or confirmed to be collectively-owned according to the law); and
- (iii) forestry, pasture, mountain, waste land, ocean beach land, river beach land or other land which the State has not determined to be collectively-owned land.<sup>11</sup>

## 2.2 Collectively-owned Land (集體土地)

### 2.2.1 Land Reform in Rural Areas

In 1950 immediately after the establishment of the PRC, a so-called land reform movement was conducted throughout mainland China. The Committee of the Central People's Government promulgated the Land Reform Law of the People's Republic of China,<sup>12</sup> providing the principles and implementing rules regarding land reform in the rural areas. The major purpose of the land reform was to confiscate land owned by the so-called 'exploiting class' and distribute it to the poor peasants. According to the Land Reform Law, after the completion of the land reform, land title certificates would be issued by the government and the right of all land owners to freely operate, transfer and lease land would be respected.

By the end of 1952 and the beginning of 1953, land reform was largely completed in most parts of mainland China except those areas inhabited by minority peoples such as Xinjiang and Tibet.<sup>13</sup> Upon completion of the land reform, State ownership and peasants' private ownership of land co-existed for a few years until 1956. In 1956, the First National People's Congress adopted the Model Articles of Association of Advanced Co-operatives of Agricultural Producers,<sup>14</sup> pursuant to which peasants who joined the co-operatives must transfer their major production materials such as privately owned land to the collective ownership of the co-operative.<sup>15</sup> During the nation-wide movement of establishing Advanced Co-operatives of Agricultural Producers which started in 1956, the private land owned by peasants in rural areas was gradually transformed into land collectively-owned by co-operatives. By the end of the 1950s, no privately-owned land existed in the rural areas.

11 Land Administration Implementing Regulations, art 3.

12 Land Reform Law of the People's Republic of China, adopted on 28 June 1950.

13 *The Land System of the People's Republic of China - Land Reform and Grant and Transfer of Land Use Rights* by Nan Lu Ming and Xiao Zhi Yue (中華人民共和國地產法律制度—土地制度改革及土地使用權出讓轉讓) (China Legal System Publishing House, 1991) p 8.

14 Model Articles of Association of Advanced Co-operatives of Agricultural Producers (高級農業生產合作社示範章程) (Model Articles of Association), adopted on 30 June 1956.

15 Model Articles of Association, art 13.

### 2.2.2 Definition of Collectively-owned Land

The Land Administration Law provides that land in rural villages and suburban areas shall belong to collectives, with the exception of land which belongs to the State according to law, and that foundations of houses and the land and mountains reserved for use by individual farmers (自留地、自留山) shall belong to the collectives.<sup>16</sup> Land owned by collectives shall be owned by the farmers in the rural villages and shall be operated and managed by rural collective economic organisations such as rural production co-operatives or committees of villagers.<sup>17</sup>

### 2.2.3 Requisition of Collectively-owned Land for State Construction

Chapter 4 of the Land Administration Law briefly touches upon the requisition of collectively-owned land for State construction projects. The Beijing Land Administration Measures set forth the approval limits, detailed procedures for requisition of collectively-owned land for State construction purpose and the compensation.

#### 2.2.3.1 Approval Limits

If the land to be requisitioned is arable land with an area of 1,000 *mu*<sup>18</sup> or more or non-arable land with an area of 2,000 *mu* or more, the local municipal people's government shall review, verify and submit the requisition to the State Council for approval. The municipal people's government shall have the authority to approve the requisition of arable land with an area of less than 1,000 *mu* or non-arable land with an area of less than 2,000 *mu*. The district or county people's government shall have the authority to approve the requisition of non-arable land with an area of 10 *mu*.<sup>19</sup>

#### 2.2.3.2 Required Application Procedures

The land user shall first file an application, together with the preliminary design, annual construction plan and other relevant documents and the Construction Site Planning Permit (建設用地規劃許可證),<sup>20</sup> with the municipal, district or county land administration bureau depending on the size of the land. If the municipal, district or county people's

16 Land Administration Law, art 6.

17 Land Administration Law, art 8.

18 1 *mu* = 666.7 sq m.

19 Land Administration Law, art 25.

20 For details of the Construction Site Planning Permit, please see Ch 4 of this book.

- government approved the application after a review, the land would be allocated by the land administration department to the applicant without consideration;
- (ii) if the land required was currently being used by another State institution, military unit, school or State-owned enterprise, the State had to obtain the required land by means of a requisition after making proper compensation or placement arrangements for the affected persons or units in a manner similar to that described in Section 2.2.3.3 above. However, the compensation for requisition was determined on the basis of the losses suffered by the previous land users. Article 7 of the Measures for the Requisition of Land for State Construction<sup>39</sup> provides that the compensation fee for the requisition of land shall be estimated and determined by the local government together with the new user and existing users of the land to be requisitioned.

### 3.1.2 Land Used Without Compensation And For Indefinite Term

Once the land was approved for allocation to land users, land users were entitled to use the land without any payment to the State except for the payment of compensation for requisition of the land to its former users in some cases.<sup>40</sup> In addition, when the land was allocated, no definite term on the use of land was stipulated; therefore, the land user could use the land indefinitely until the land was required by the State for a new construction project.

### 3.1.3 No Transfer Allowed

Users of allocated land were prohibited from transferring the right to use the land by way of selling, leasing, mortgaging, donating or exchanging the right. If the land user did not use the land any more, the land must be returned to the State without consideration and could be allocated by the State to another unit in need of land.<sup>41</sup>

39 Measures for the Requisition of Land for State Construction (國家建設征用土地辦法) (Land Requisition Measures), promulgated on 18 October 1957.

40 See the Reply of the Administration Council to the Issue of Collection of Land Use Fee or Rent from State-owned Enterprises, Institutions, Army and Schools for the Occupation and Use of Land in Suburban Areas (政務院關於對國營企業機關、部隊、學校等占用市郊土地征收土地使用費或租金問題的批覆), issued on 24 April 1954. (It states that the land occupied and used by State-owned enterprises shall be regarded as the assets of the said enterprises; no rent or use fees need to be paid to the government. No rent or use fees shall be paid in respect of the land occupied and used by institutions, the army or schools as well.)

41 Land Requisition Measures, art 15.

## 3.2 Compensatory Land Use System (1979–1990)

The first attempt to create a compensatory land use system came on the coat-tails of encouraging foreign investment in the PRC as a result of the adoption of an open door policy by the PRC in 1979.

### 3.2.1 Governing Law

In 1979, the PRC promulgated the landmark Law of the People's Republic of China on Sino-foreign Equity Joint Ventures.<sup>42</sup> The EJV Law provides that 'the investment made by a Chinese partner may include the provision of site use rights to the joint venture enterprise during its period of operation. If site use right does not constitute part of the Chinese partner's investment contribution, the joint venture enterprise shall be required to pay to the PRC government a fee for use of the site.'<sup>43</sup> The imposition of a site use fee on FIEs indicated the end of the era where land was used for free. The Rules for the Implementation of the Law of the People's Republic of China on Sino-foreign Equity Joint Ventures,<sup>44</sup> the Law of the People's Republic of China on Sino-foreign Co-operative Joint Ventures,<sup>45</sup> the Rules for the Implementation of the Law of the People's Republic of China on Sino-foreign Co-operative Joint Ventures,<sup>46</sup> the Law of the People's Republic of China on Wholly Foreign-owned Enterprises,<sup>47</sup> and the Rules for the Implementation of the Law of the People's Republic of China on Wholly-Foreign Owned Enterprises<sup>48</sup> all reflect this new compensatory land use system.

42 Law of the People's Republic of China on Sino-foreign Equity Joint Ventures (中華人民共和國中外合資經營企業法) (EJV Law), adopted on 1 July 1979 and amended on 4 April 1990.

43 EJV Law, art 5.

44 Rules for the Implementation of the Law of the People's Republic of China on Sino-foreign Equity Joint Ventures (EJV Implementing Rules) (中華人民共和國中外合資經營企業法實施條例), effective from 20 September 1983 and amended on 15 January 1986 and 21 December 1987, arts 47–53.

45 Law of the People's Republic of China on Sino-foreign Co-operative Joint Ventures (中華人民共和國中外合作經營企業法) (CJV Law), promulgated on 13 April 1988 and effective from the same date, art 8 (stating that the Chinese party may contribute land use rights or provide land use rights as a condition for co-operation).

46 Rules for the Implementation of the Law of the People's Republic of China on Sino-foreign Co-operative Joint Ventures (CJV Implementing Rules), promulgated on 4 September 1995 and effective from the same date.

47 Law of the People's Republic of China on Wholly Foreign-owned Enterprises (WFOE Law), promulgated on 12 April 1986 and effective from the same date.

48 Rules for the Implementation of the Law of the People's Republic of China on Wholly Foreign-Owned Enterprises (WFOE Implementing Rules), approved on 28 October 1990 and promulgated on 12 December 1990, arts 34–38, and 41. (They state that the land used by WFOEs are to be arranged by the local government at or above county level. The site use fee shall consist of the land use fee and land development fee. The land use fee is payable to the government

*continued on the next page*

### 3.2.1.7 Practice Prior to Amendments to Constitution and Land Administration Law

In fact, even prior to the amendments to the PRC Constitution and the Land Administration Law and the promulgation of the Urban Land Regulations, Shenzhen in 1987 had already taken the initiative to implement the system of transfer of land use right for value and started the most important reform in the land system in urban areas in recent PRC history.<sup>80</sup> On 9 September 1987, the Shenzhen Municipal People's Government granted through negotiation the land use right to a plot of land with the area of 5321.8 square metres to the Shenzhen Industry and Trade Centre of the Import and Export Company of China Airline for a term of 50 years at a price of Rmb1,064,000. This is the first case of a grant of land use right in China.<sup>81</sup> Thereafter, Shanghai, Xiamen, Guangzhou, Tianjin and other cities and areas in China also began the practice of granting land use rights.<sup>82</sup>

The distinction of this reform is primarily to separate the ownership of and right to use State-owned land while adhering to the principle that land in urban areas shall still be vested in the State and the restriction on the leasing of land was lifted. Under this system, the State, being the owner of the land in urban areas, grants the land

80 In the PRC, it is very common that the law-making usually lags behind the actual taking place of commercial transactions. Shenzhen and other cities implemented grant of land use rights at least two to three years before the promulgation of the governing laws and regulations. Another good example is that many well-known Sino-foreign co-operative joint venture hotels were formed before the promulgation of the CJV Law in 1988. The usual pattern is that once the policy is made known, new investment structures or new systems may be put into use. It is explained by some PRC officials that it would take a couple years to learn the experience and then the governing laws or regulations will be drafted and promulgated.

81 *Supra* n 13 at p 34.

82 *Supra* n 13 at pp 34-35. (It stated that on 8 July 1988, the Shanghai government granted through an international bid the land use right to a plot of land with an area of 12,900 sq m, located in the Shanghai Hongqiao Economic and Technological Development Zone, to a Japanese company for a term of 50 years and a consideration of US\$28,050,000. During 1988, the government of Xiamen city of Fujian Province granted a total of 22 plots of land by means of agreement and 6 plots by means of public auction with a total area of 388,442 sq m and received a total premium of Rmb30,346,670, US\$1,951,973 and HK\$4,067,374. In March 1988, the Guangzhou government granted through a public tender a plot of industrial land with an area of 15,953 sq m for a term of 50 years and a consideration of Rmb414,800. On 8 August 1989, the Land Bureau of Tianjin Economic and Technological Development Zone formally entered into an agreement with an American company by which the land use right to a plot of land with the area of 5.3 sq km was granted for the purpose of whole tract land development with a term of 70 years and a land premium of US\$17,230,000.)

use right for value and for a fixed term and the original grantee may in turn transfer the land use right which it has been granted.<sup>83</sup>

## 3.3 New Land Grant System (1990-present)

As discussed above, land used for construction purposes after the promulgation and coming into effect of the Urban Land Regulations should all be obtained by a grant and transfer for value and for a fixed term. However, China is a big country and the investment environment varies from city to city. Undoubtedly, the progress of implementing the new land grant system is slow. It is impractical to change the land use system overnight. In this Section, we will examine (i) how land has been used by FIEs since 1979 and up to 1990; (ii) what if such a land structure continued under the Urban Land Regulations; and (iii) what is the practical way of adapting to the existing situations.

### 3.3.1 Land Use by Manufacturing FIEs Between 1979-1990

As stated above, the Chinese party usually contributes the value of the land use right to the allocated land which it originally possessed as its equity in the joint venture, and the joint venture or its Chinese party is required to pay the land use fee and the land development fee (if any) as the consideration for using the land. In the case of a WFOE, the WFOE will usually apply to obtain the required site for their operations. In both cases, the land is reserved to the FIE during the term of the FIE for their own use for value.

According to the statistics given by the State Land Administration Bureau, the land use fee has been collected in many coastal cities and generated large amount of revenue for the State.<sup>84</sup>

### 3.3.2 Land Use by Manufacturing FIEs post-1990

#### 3.3.2.1 Transferability of Allocated Land Use Right Contributed by Chinese Party

To strictly conform to the Urban Land Regulations, only the land use right obtained by means of a grant ('granted land') may be

83 *Supra* n 13 at p 34.

84 Minutes of Conference Concerning the Administration of Land Use by FIEs (外商投资企业用地管理工作座谈会纪要) (Minutes), issued by the State Land Administration Bureau on 31 December 1990. It was stated that as at the end of 1990, Shanghai collected land use fee in an amount of Rmb10 million per year and Tianjin had collected Rmb20 million over a period of six years.

Previously, one popular way to circumvent the approval limit (and higher approval authority) was to divide the land used for one project into several small pieces with the size of each falling under the approval limit of the local government. This is called 'breaking up the whole into parts' (*hua zheng wei ling*) (化整為零). In January 1990 this persistent problem led the State Land Administration Bureau to file a report to the State Council, proposing measures to end this practice. The State Council then issued the Notice of the State Council Concerning the Report on Approval of Grant of Land Use Rights Beyond the Approval Limits of Local Governments (hereinafter called the 'State Council Notice') and had the Report circulated to all local governments for implementation.<sup>31</sup> The State Council Notice prohibited *hua zheng wei ling* because the approval authority of the local government had effectively been enhanced by this practice.<sup>32</sup> The State Council Notice went on to say that *hua zheng wei ling* had seriously endangered the PRC's social and economic development and the rational use of land resources. The State Council Notice recommended that an investigation be conducted immediately, and suggested that all documents granting land use rights by means of *hua zheng wei ling* be void. In principle, projects under construction on land which was obtained through *hua zheng wei ling* would be ordered to cease construction, and new applications for the grant of land use rights would be submitted for approval in accordance with the regular approval procedures.<sup>33</sup>

## 2.6 Procedures for Land Grant

Grants of State-owned land use rights should follow the procedures as stipulated in the Provisional Regulations Regarding the Administration

a construction project; and (v) the limits of approval authority of the Baoshan District people's Government over land for construction purposes in Changxing and Hengsha Townships may be set forth as in county people's government above.

C. District people's government other than the Baoshan, Minhang and Jiading District people's governments: (i) where farmland requisitioned or used is less than 15 *mu*; (ii) where State-owned land allocated is less than 15 *mu*; (iii) where other land requisitioned or used is less than 30 *mu*; and (iv) where farmland of less than 15 *mu* is requisitioned or used or State-owned land of less than 15 *mu* is allocated at the same time or other land of less than 30 *mu* totalling less than 30 *mu* is requisitioned or used for a construction project.)

31 Notice of the State Council Concerning the Report on Approval of Grant of Land Use Rights Beyond the Approval Limits of Local Governments (關於部份地方政府越權批地情況報告的通知) (State Council Notice), *Guo Fa* (1990) No 8, 19 January 1990.

32 State Council Notice, art 1.

33 State Council Notice, arts 2 and 3.

of Examination and Approval of Granting State-owned Land Use Rights.<sup>34</sup> According to the Land Grant Regulations, the municipal or county land administration bureau prepares the land grant proposals for submission to the people's government at the same level for verification whereupon, the proposal will be submitted to the provincial, autonomous region or municipal people's government for approval.<sup>35</sup> Together with the land grant proposals, the municipal or county land administration bureau will formulate proposals for the requisition, demolition and resettlement compensation program, land use terms and the draft land grant contract for submission to the people's government at the same level for verification.<sup>36</sup> Upon approval by the relevant people's government, the municipal or county land administration bureau will enter into a land grant contract with the grantee. Thereafter, the grantee will complete the land registration formalities and obtain a State-owned Land Use Certificate.<sup>37</sup> The Land Grant Regulations further provide that the following documents must be submitted to the land administration bureau during an application for the grant of land use rights:

1. the application form for the grant of land use rights (出讓國有土地使用權呈報表);
2. the geographical location and planning design of the plot to be granted;
3. the land requisition and demolition, resettlement and compensation program or relevant agreement;
4. the land use conditions;
5. the draft land grant contract;
6. the document or opinion from the people's government or relevant department;
7. the comments of the land administration bureau after a review of the abovementioned document.<sup>38</sup>

In the case of land grant by means of a bilateral agreement or in a large tract development project, the construction project design requirements document (建設項目設計任務書) (or the feasibility study report) and the photocopy of the approval certificate of the enterprise shall also be submitted.<sup>39</sup>

34 Provisional Regulations Regarding the Administration of Examination and Approval of Granting State-owned Land Use Rights (出讓國有土地使用權審批管理暫行規定) (Land Grant Regulations), effective from 29 April 1990.

35 Land Grant Regulations, art 2.

36 Land Grant Regulations, art 6(1).

37 Land Grant Regulations, arts 6(2) and 6(3).

38 Land Grant Regulations, art 7.

39 Id.

### 2.9.3 *Land Valuation*

In Beijing, before the grantor and grantee enter into a land grant contract, they should appoint an appraiser whose qualification has been certified by the municipal land administration bureau to conduct valuations and appraisals of land use rights.<sup>103</sup>

### 2.9.4 *Payment of Land Premium*

#### 2.9.4.1 *Payment Schedule*

According to the Urban Land Regulations, the grantee must pay the full amount of the land premium within 60 days of the signing of the land grant contract.<sup>104</sup> Aside from this general rule, local governments implement different methods of payment. In Shanghai, for example, 10% of the total land premium must be paid within 10 days of the execution of the land grant contract, with the remainder to be paid within 60 days.<sup>105</sup> In Beijing, the grantee is required to pay the grantor 15%–20% of the land price as a deposit, with the remainder to be paid in full within two months after the signing of the land grant contract.<sup>106</sup> In Shenzhen, only 10% of the total land price is paid as a deposit on the date the land grant contract is signed. The balance should be paid in full within 60 days after the land grant contract becomes effective. However, with the consent of the land administration bureau and subject to the provisions of the land grant contract, the grantee may be allowed to pay the balance over a one-year period.<sup>107</sup> In the event of late payment on the part of the grantee, local regulations usually impose a fine or penalty on the defaulting grantee. If the grantee fails to pay the land price within the time frame set forth in the land grant contract, the grantor is entitled to terminate the contract, retain the deposit, and claim for any damage suffered.<sup>108</sup>

#### 2.9.4.2 *Currency*

In Beijing, FIEs which have been granted land use rights must pay the land price in foreign currency.<sup>109</sup> If the FIE obtains the land use right by means of a grant, the land premium is paid in foreign currency

103 Beijing Implementing Measures, art 12.

104 Urban Land Regulations, art 14.

105 See the Shanghai Model Land Grant Contract. (Payment for the related Demolition Contract (eg to resettle the present occupants, demolish the existing structures and install the infrastructure on the land) may be paid in several instalments subject to negotiation by the parties.)

106 Beijing Implementing Measures, arts 15 and 16.

107 Shenzhen Grant Rules, arts 23(iv), 33 and 39.

108 Beijing Implementing Measures, art 16. See also the Guangdong Implementing Measures, art 13.

109 Beijing Reference Land Price Notice, art 3.

in the same proportion of the shareholding of the foreign party, unless otherwise provided by the State.<sup>110</sup> In general, land premiums for buildings intended for overseas sales must be paid in foreign currency.

#### 2.9.4.3 *Land Price Reductions And Exemptions*

If the grant of land use rights is by bilateral agreement, the land grant applicant and the local land administration bureau negotiate and enter into a land grant contract based on the use, location, plot ratio and term of use of the land in question.<sup>111</sup> The land administration bureau may reduce or exempt the land price depending on the situation. For example, if a project is confirmed as a hi-tech industrial project, the price of the land may be reduced 40% to 70% from the regular price.<sup>112</sup>

#### 2.9.5 *Administration of Collection of Land Premium*

Land premiums are paid to the treasury and will be used specifically for the construction of municipal infrastructure facilities and land development.<sup>113</sup> The grantees are required to pay the land premium into a special account in accordance with the time frame stipulated in the land grant contract.<sup>114</sup>

110 Beijing Implementing Measures, art 22.

111 Provisional Regulations of Shenzhen SEZ on Standard Land Prices for the Grant of Land Use Right by Agreement and Reduction and Exemption of Land Use Prices (深圳經濟特區協議出讓土地使用權地價標準及減免土地使用價款的暫行規定) (Shenzhen Standard Land Price Regulations), *Shen Fu* (1988) No 272, art 2 (stating that the prices for granting land use rights through bilateral agreement shall be determined in accordance with the use, location, plot ratio and term of the lots in question, respectively).

112 Shenzhen Standard Land Price Regulations, art 5. See also the Shenzhen Grant Rules, art 38.

113 Notice of Strengthening the Collection and Administration of Land Premiums, promulgated by the Ministry of Finance and the State Land Administration Bureau (關於加強土地使用權出讓金徵收管理的通知) (Land Premium Strengthening Notice) and effective from 26 January 1995, art 1.

114 Land Premium Strengthening Notice, arts 3, 4 and 5. (After entering into the land grant contract, the land administration bureau will complete five copies of the Registration Form for Payment of Land Premiums (繳交國有土地使用權出讓金登記單), with one to be retained by the land department, the second, third and fourth copies sent to the finance department and the fifth copy, which will be treated as the invoice, given to the grantee. The grantee will then pay the land premium to the special account at the time as indicated on the invoice. Upon payment of the land premium in full, the department of finance will issue a special receipt for land premiums and stamp 'Paid' on the fourth and fifth copies mentioned above. The fourth copy will be returned to the land department for filing. The Land Administration Bureau will, on the basis of the fifth copy, stamp 'Paid' on the payment receipt, complete the registration formalities, and issue a Land Use Certificate.)

The contractual CJV, which is similar to a partnership, has no separate independent legal entity. The joint venture partners will merely co-operate for a certain period to achieve a common goal or to undertake a certain project, and will not have limited liability.

Promulgation of the Company Law threw the status of the CJV into upheaval. According to the Company Law,<sup>10</sup> all companies shall mean limited liability companies and companies limited by shares. In practice, however, since contractual CJVs are not necessarily established as independent legal persons and are formed as partnerships, it was unclear whether or not pure contractual CJVs would still be allowed under the Company Law. The Rules for the Implementation of the Law of the People's Republic of China on Sino-foreign Co-operative Joint Ventures<sup>11</sup> clarify this point. The entire Chapter 9 of the Rules regulates pure contractual CJVs.

The majority of CJVs now exists in the form of limited liability CJVs. The limited liability form combines the characteristics of both the contractual CJV and the EJV in that a separate business entity is established and registered, and the parties' liabilities are generally limited to their respective capital contributions. This is the most common vehicle for property development.

CJVs have the following main features which manifest the major differences from EJVs:

- the distribution of profits of a CJV may be agreed at a different ratio to that of the parties' capital contributions;
- the parties' contribution in a CJV need not be valued;
- management rights of a CJV may be delegated to one of the joint venture parties;
- the foreign party to a CJV may recoup its investment during the joint venture term where the fixed assets of the joint venture will, upon expiration of the joint venture term, belong to the PRC joint venture partner without compensation.

### 1.3 Wholly Foreign-owned Enterprises

This form of investment vehicle is used when the foreign investor does not wish to have any PRC input in its investment venture. When

<sup>10</sup> Company Law, arts 2 and 3.

<sup>11</sup> Rules for the Implementation of the Law of the People's Republic of China on Sino-foreign Co-operative Joint Ventures (中華人民共和國中外合作經營企業法實施細則), promulgated on 4 September 1995 and effective from the same date.

approved and established in accordance with PRC law, the Wholly Foreign-owned Enterprise ('WFOE') becomes a 100% wholly-owned subsidiary of the foreign investor. Compared to the number of joint ventures in the PRC, WFOEs represent a very small percentage of direct investments. The relatively small number of these ventures which have been approved, particularly for property development, indicates that approval for this type of investment is rather difficult to obtain.

The establishment and operation of WFOEs are governed by the Law of the PRC on Wholly Foreign-owned Enterprises (the 'WFOE Law') (中華人民共和國外資企業法) which was promulgated on 12 April 1986, and the Rules for the Implementation of the Law of the PRC on Wholly Foreign-Owned Enterprises (the 'WFOE Implementing Rules') (中華人民共和國外資企業法實施細則) which were effected on 12 December 1990.<sup>12</sup> Foreign investors like the WFOEs because of their clear legal framework. In addition, all the profits accrue only to the foreign investor, and there is no need to negotiate with a PRC partner in respect of the scope of operations, number of workers, future expansion and so on. Under the WFOE Law, a foreign company may carry out its own research, decide on its scope of operations and then file an application for the establishment of a WFOE. However, the WFOE Implementing Rules provide a list of industries in which investment through WFOEs is either restricted or prohibited. Real property and leasing are included in the list of restricted industries, together with public utilities, communication and transportation, trust and investment.<sup>13</sup> Real property WFOEs are available in most major investment areas of the PRC except Guangdong Province which does not approve this form of investment vehicle for property development, and in Beijing where it is rare for a real property WFOE to be established. Therefore, in view of the stringent nature of the approval requirements, WFOEs as investment vehicles for real property development are not as viable as EJVs or CJVs.

### 1.4 Sino-foreign Joint Venture Companies Limited by Shares

Companies limited by shares refer to legal entities whose ownership is limited to the amount of its outstanding shares. A company limited

<sup>12</sup> See also the Interpretation of Several Provisions of the Rules for the Implementation of the Law of the PRC on Wholly-owned Foreign Enterprises (關於中華人民共和國外資企業法實施細則若干條款的解釋), promulgated by Ministry of Foreign Economic Relations and Trade ('MOFERT') (now Ministry of Foreign Trade and Economic Co-operation ('MOFTEC')) on 6 December 1991.

<sup>13</sup> WFOE Implementing Rules, art 5.

### 2.6.8 Procedures for Registration of Amendments

The amendments are usually subject to the approval of the approval authority which originally approved the joint venture contract for the establishment of the FIE. Upon receipt of the approval, the FIE shall, within one month, apply for the registration of the amendment(s) with the original registration authority and complete the relevant registration procedures.

In applying for the registration of the amendments, the FIE must submit the following documents:

- the approval documents approving the relevant amendment(s);
- the board resolution adopting the amendment(s) or the minutes of the board meeting at which the relevant amendment(s) were adopted;
- the application form; and
- other relevant documents, such as the tenancy agreement in the event of a change of address.<sup>59</sup>

## 2.7 Administration of Qualification of Real Property FIEs

### 2.7.1 Regulatory Legal Framework

All real property FIEs must be subject to detailed qualification examination and approval.<sup>60</sup> Specialised real property FIEs must apply for a Qualification Certificate in accordance with the Regulations Regarding the Administration of Qualification of Real Property Development Enterprises.<sup>61</sup> The Ministry of Construction and the local department of administration of construction are the government departments in charge of the administration of qualifications of real property development enterprises on the national and local levels respectively.<sup>62</sup>

<sup>59</sup> *Supra* n 42, p 43.

<sup>60</sup> Notice of the State Council Regarding Several Issues Relating to Real Property Business Development (國務院關於發展房地產業若干問題的通知) (國發[1992]61號), issued on 4 November 1992.

<sup>61</sup> Regulations Regarding the Administration of Qualifications of Real Property Development Enterprises (房地產開發企業資質管理規定) (the Qualification Regulations), promulgated by the Ministry of Construction on 16 November 1993 and effective from 1 December 1993, art 3 (stating that there are two categories of property development enterprises: (i) specialised real property development enterprises refer to real property enterprises whose primary business is real property development; and (ii) non-specialised real property development enterprises refer to real property enterprises whose primary business is other lines of business and which are engaged in real property development concurrently).

<sup>62</sup> Qualification Regulations, art 5.

A great majority of real property FIEs are single project companies (see Section 3 below). The Qualification Regulations provide that single project real property companies (including real property FIEs) will not be graded on the basis of their qualification. However, the local department of administration of construction shall approve their capital and staff on the basis of their scale of project.<sup>63</sup>

### 2.7.2 Revocation of Business Licence

If a specialised real property enterprise fails to commence real property development operations within one year after receiving its business licence, its business licence will be revoked.<sup>64</sup>

## 3. SCOPE OF BUSINESS OF REAL PROPERTY FIEs

Generally speaking, real property FIEs may be divided into the following three categories on the basis of the project or projects they undertake:

- **Single-project real property FIEs**  
A great majority of the real property FIEs approved so far are single project companies, that is to say that the real property FIEs are approved for the development of a specific project located on a specific piece or pieces of land. If the foreign investor intends to develop another project, it has to go through the entire procedures again as described above.
- **Multi-project real property FIEs**  
Very few real property FIEs are granted the power to develop more than one project.<sup>65</sup> The important advantage of this type

<sup>63</sup> Qualification Regulations, art 20.

<sup>64</sup> Notice of Ministry of Construction, State Administration for Commerce and Industry, State Bureau of Taxation and State Land Administration Bureau Regarding the Opinion on Handling the Relevant Issues Arising from the Overall Inspection of Real Property Development Organisations (建設部、國家工商行政管理局、國家稅務總局、國家土地管理局關於房地產開發經營機構全面檢查中有關問題處理意見通知) (建房[1993]818號), promulgated on 15 December 1993, art 3.

<sup>65</sup> One example of a real property FIE which is stated as Class I comprehensive development company (綜合開發公司) is Beijing Property Company Limited (北京華遠房地產股份有限公司). Huayuan has been granted the power to develop multi-projects without any limits placed by the Beijing government authorities on the scale or types of land development projects it is permitted to undertake in Beijing. For details of Huayuan, please refer to the prospectus of China Resources Beijing Land Limited, issued on 29 October 1996.

(施工許可證).<sup>44</sup> In addition, no design institute or construction unit may be allowed to undertake the design or construction work. Even if a project's construction work is completed, the construction quality supervision department will not certify its construction quality.<sup>45</sup> The real property FIE may consequently not be able to obtain the title certificate in respect of the project.

## 7. ISSUANCE OF CONSTRUCTION PROJECT PLANNING PERMIT

### 7.1 Importance of Construction Project Planning Permit

The Construction Project Planning Permit is the legal document evidencing that the relevant construction project conforms to the urban planning requirements. The objective of the Construction Project Planning Permit is twofold: one is to show that the relevant construction has been approved and the other is to serve as the legal basis for the urban planning administration personnel to supervise the construction activities.

The Shanghai Urban Regulations clearly state that the Construction Project Planning Permit<sup>46</sup> is required for new construction projects, renovation projects and extension of existing construction projects.<sup>47</sup> The Shanghai Urban Regulations provide that all construction projects must comply with the urban plan and that developers must apply for the Construction Project Planning Permit in accordance with the regulations.<sup>48</sup> The construction unit must, pursuant to the Construction Project Planning Permit, complete the construction work within the boundaries of the construction site and in the vicinity,<sup>49</sup> and carry out the construction work in accordance with the drawings attached to the Construction Project Planning Permit.<sup>50</sup>

44 Prior to the promulgation of the Urban Planning Law, cities in the PRC used different names, such as construction permit (建設許可證), permit for commencement of construction work (施工許可證), licence for commencement of construction work (施工執照).

45 *Shanghai Handbook*, at p 34.

46 Formerly known as the Construction Project Licence (建築工程執照).

47 Shanghai Urban Regulations, art 53 (stating that the Construction Project Planning Permit is also required for the following projects: (i) new or rebuilt transportation construction projects involving roads, highways, bridges, pipes, tunnels or railroads in the cities; (ii) major overhaul projects conducted by culture relic protection units and excellent modern buildings and fitting works involving change of exterior appearances, structures or basic layout; (iii) major overhaul works requiring change of major bearing structures; and (iv) sculptures located along the roads or at a square or squares).

48 Shanghai Urban Regulations, art 32.

49 Shanghai Urban Regulations, art 43.

50 Shanghai Urban Regulations, art 41.

### 7.2 Issuance of Construction Project Planning Permit

The real property FIE should, on the basis of the approved design plan, apply for and obtain the Construction Project Planning Permit by submitting the following documents to the municipal planning bureau:

- (i) the Construction Project Planning Permit Application Form (建設工程規劃許可證申請表);
- (ii) list of drawings, stating the number of surveys and design certificates of the design institute, the total gross floor area (the gross floor area above ground and the area for civil defence) and the estimated total construction cost;
- (iii) three copies of the general layout, showing the location of the project, the area of the construction site, the co-ordinates, adjacent buildings, red lines of the roads, names of the adjacent streets and side streets and the scale;
- (iv) the plane figure, elevation drawings and sectional drawings of each of the floors of the building or buildings to be constructed;
- (v) the basic plane figure and sectional drawings; and
- (vi) the plane figure and sectional drawings of the basement and the plane figure and sectional drawings of the civil defence project, if any.

The local planning bureau in Shanghai is required to complete the review and examination of the application form and the attached documents within 25 working days and issue the Construction Project Planning Permit if the bureau approves the application, and to reply in writing if the bureau rejects the application.<sup>51</sup> The Shanghai Urban Regulations further provide in great detail the planning requirements for construction projects such as: set-back distance;<sup>52</sup> side walks;<sup>53</sup> landscaping; parking space for motor vehicles, non-motor vehicles and public toilets;<sup>54</sup> protection of culture relics;<sup>55</sup> buildings, structures,

51 Shanghai Urban Regulations, art 54.

52 Shanghai Urban Regulations, art 33 (stating that new construction projects, rebuilt buildings and structures (including underground structures) and their auxiliary facilities may not exceed road planning red lines and should have the required set-back distances).

53 Id, stating that where the demolition of the existing buildings within the scope of the planned red lines of the roads has been temporarily suspended as approved by the municipal planning bureau due to their good structure for partial renovation purposes, the ground floor of the buildings that exceeds the red lines shall be made side walks for pedestrians.

54 Shanghai Urban Regulations, art 34, stating that when conducting new construction, renovation or extension works, green areas and parking spaces (garages) for motor vehicles and non-motor vehicles shall be reserved and constructed in accordance with the regulations, and public toilets shall be constructed in accordance

*continued on the next page*



Resettlement may either be permanent or temporary. Permanent resettlement means that the persons who are entitled to resettlement are resettled in some place permanently. Temporary resettlement means that the persons who are entitled to resettlement move to some place for the time being and will move to the new building or buildings to be constructed on the original site or another building on a permanent basis. The Demolition and Removal Regulations and the implementing rules of Beijing and Shanghai provide that the location of resettlement shall be determined in accordance with the requirements of urban development and the nature of the construction work, which should be conducive to the implementation of the urban plan and the redevelopment of old districts in urban areas.<sup>33</sup> The Guangzhou Demolition and Removal Measures provide that the location of resettlement shall be the original location of the property to be demolished unless otherwise required by the needs of the urban plan.<sup>34</sup>

In addition, under the Demolition and Removal Regulations and the Beijing Demolition and Removal Rules the developer has to pay an appropriate sum to assist the Affected Persons if the Affected Persons suffer from economic losses due to the cessation of production or business as a result of the demolition and resettlement.<sup>35</sup> However, again, the calculation of the 'appropriate sum' is not clearly stated.

Article 33 of the Shanghai Demolition and Removal Rules provide for the general principle on calculating the amount of compensation for the demolition of non-residential houses.<sup>36</sup> It does not take into account the economic loss suffered by the Affected Person due to the cessation of production or business as a result of the demolition and resettlement. The amount of compensation awarded thereunder

33 Demolition and Removal Regulations, art 28; Beijing Demolition and Removal Rules, art 25; Shanghai Demolition and Removal Rules.

34 Guangzhou Demolition and Removal Measures, art 38.

35 Demolition and Removal Regulations, art 34; and Beijing Demolition and Removal Rules, art 31 (stating that the specific measures relating to such allowance shall be formulated by the municipal real estate administration bureau and implemented after approval of the same by the municipal people's government).

36 Shanghai Demolition and Removal Rules, art 33. (It states that in demolishing non-residential housing of government departments, the developer shall compensate the following expenses: (i) for demolished houses and their attachments, expenses shall be calculated at the valuation thereof; and for the equipment which cannot be reinstated for use, the expenses shall be calculated at the replacement value in light of the degree of newness thereof; (ii) expenses incurred from requisition or allocation of land with an area of the original size as a result of the removal and demolition; (iii) expenses for moving the equipment calculated in accordance with transport fees of goods and equipment installation fees; (iv) wage subsidy payable to workers laid off which is calculated in accordance with the actual period of cessation of production as a result of the demolition and resettlement of the enterprise; (v) other expenses to be compensated as stipulated by the laws and regulations.)

would usually not be large. However, the Measures for the Compensation for Demolition and Resettlement of Business Premises Used by Individual Industrialists and Merchants<sup>37</sup> promulgated by the Shanghai Municipal People's Government do indicate the most recent government position on compensation to be made to individual industrialists and merchants whose self-owned private houses or leased publicly-owned houses have been used as permanent business premises and which are to be demolished due to urban construction.<sup>38</sup> In principle, the individual industrialists and merchants whose business premises have been demolished shall be compensated with appropriate business premises.<sup>39</sup> If this cannot be done, then a one-time lump sum economic subsidy, together with a residential premise of an area corresponding to the gross floor area of the business premises demolished, may be given to such industrialists or merchants.<sup>40</sup> If the individual industrialist or merchant has been engaged in business activities for more than three years, the one-time lump sum economic subsidy shall be calculated at two times of the aggregated business taxes actually paid during the three years immediately prior to the demolition; and if the industrialist or merchant has been engaged in business activities for less than three years, the one-time lump sum economic subsidy shall be calculated at two times of the aggregate business taxes actually paid.<sup>41</sup>

The Guangzhou Demolition and Removal Measures take into account the factor of location. It is provided that in the event of demolition of industrial and commercial premises which are required to be resettled at a location other than the original location because of the needs of urban plan, the developer shall pay to the Affected Persons an appropriate one-off payment if the location difference affects its revenue.<sup>42</sup>

37 Measures for the Compensation for Demolition and Resettlement of Business Premises Used by Individual Industrialists and Merchants (個體工商戶營業用房拆遷安置補償辦法) (Shanghai Compensation Measures), promulgated on 22 April 1997 and effective from 1 June 1997.

38 Shanghai Compensation Measures, art 2.

39 Shanghai Compensation Measures, art 3. (It states that if the business premises of an industrialist or merchant to be demolished are located on the ground floor and facing the street, it shall be compensated in accordance with the nature of the business and on the basis of the gross floor area of the premises demolished compared with other appropriate business premises located on the ground floor and facing the street or otherwise. If the business premises of an industrialist or merchant to be demolished are neither on the ground floor nor facing the street, it shall be compensated with other appropriate business premises not located on the ground floor nor facing the street in accordance with the gross floor area of the premises demolished.)

40 Id.

41 Shanghai Compensation Measures, art 7 (stating that if the one-time lump sum derived from the first and second paragraphs of this clause is less than 5,000 yuan, 5,000 yuan should be compensated).

42 Guangzhou Demolition and Removal Measures, art 46.

- (iii) Provisional Measures of Shanghai Municipality for the Administration of Inviting Tenders and Submitting Tenders for Construction Work of Construction Projects.<sup>68</sup>

After the promulgation of the MOC Tenders Measures, Guangdong, Guangzhou and Shenzhen Special Economic Zone, one after another, promulgated their own regulations regarding the invitation and submission of tenders for construction work of construction projects.<sup>69</sup>

#### 4.2.2 *Regulatory Mechanism*

##### 4.2.2.1 *Mandatory Award of Contracts by Tender*

The Beijing Tenders Implementing Rules provide that general contractors for new or expansion construction projects, renovation of buildings, municipal infrastructure facilities, hotels, public facilities, interior/exterior refurbishing work and installation of mechanical and electrical equipment must be selected by tender if (i) the construction project has been included in the annual fundamental building construction plan of the municipality; (ii) the gross floor area of the project is more than 2,000 square metres or its investment amount is more than Rmb500,000 *yuan*; and (iii) the project falls under the stipulated quota of the district or county construction committee.<sup>70</sup>

68 Provisional Measures of Shanghai Municipality for the Administration of Inviting Tenders and Submitting Tenders for Construction Work of Construction Projects (上海市建設工程施工招標投標管理暫行辦法) (Shanghai Tenders Measures), promulgated by the Shanghai Municipal People's Government on 17 June 1988 and effective from 1 October 1988.

69 Regulations of Guangdong Province Regarding the Administration of Inviting Tenders and Submitting Tenders for Construction Work of Construction Projects (廣東省建設工程招標投標管理條例) (Guangdong Tenders Regulations), adopted on 15 July 1993 and effective from the same date; Regulations of Shenzhen Special Economic Zone Regarding the Administration of Inviting Tenders and Submitting Tenders for Construction Work of Construction Projects (深圳經濟特區建設工程施工招標投標條例) (Shenzhen Tenders Regulations), promulgated on 17 December 1993 and effective from 1 January 1994; Rules for the Implementation of the Regulations of Guangdong Province Regarding the Administration of Inviting Tenders and Submitting Tenders for Construction Work of Construction Projects (廣東省建設工程招標投標管理條例實施細則) (Guangdong Tenders Implementing Rules), promulgated by the Guangdong People's Government on 1 February 1994 and effective from 1 March 1994; and Measures of the Administration of Guangzhou Municipality for the Implementation of Inviting Tenders and Submitting Tenders for Construction Work of Construction Projects (廣州市建設工程招標投標實施辦法) (Guangzhou Tenders Implementing Measures), promulgated by the Guangzhou Municipal People's Government on 10 June 1995 and effective from the same date.

70 The Beijing Tenders Implementing Rules, art 1 (stating that the general contractors for the aforementioned types of construction projects shall be selected by tender unless otherwise approved by the municipal, district or county construction committee). However, the Rules fail to elaborate on the words 'the project falls under the stipulated quota of the district or county construction committee'.

Unlike Beijing, Shanghai requires almost all construction projects to select their general contractors by tenders.<sup>71</sup> The Guangdong Tenders Regulations provide specifically that in cases of foreign investment projects, the investors shall decide on their own whether they would like to select the general contractors for their project by tender.<sup>72</sup>

##### 4.2.2.2 *Conditions Precedent to Tendering by Invitation*

As to the question of when any of the aforementioned construction projects may proceed with the process of tendering by invitation, the Beijing Tenders Measures shed some light:

- (i) the project must have already obtained the Construction Site Permit (建設用地許可證),<sup>73</sup> and the demolition and resettlement work has been completed, and the connection of infrastructure facilities to and levelling of the site have been done;
- (ii) the necessary municipal infrastructure and public facilities situated outside the boundaries of the site have been ascertained;
- (iii) working drawings of the project have been prepared by a certified design institute; the project's construction budget has already been prepared on the basis of the working drawings or design, and the urban planning administration department has issued the Construction Project Permit (建設工程許可證);<sup>74</sup>
- (iv) funds and major materials required by the project are ready and sufficient to meet the needs of the construction project; and
- (v) the base price of the tender has been determined.<sup>75</sup>

##### 4.2.2.3 *Department in Charge*

Under all of the aforementioned laws and regulations, the government department in charge of the invitation and submission of tenders in Beijing, Shanghai, Guangzhou, Guangdong and Shenzhen respectively

71 Shanghai Tenders Measures, art 2 (stating that all construction projects included in the annual fixed asset investment plan of the municipality shall select their general contractors by tender in accordance with these Measures).

72 Guangdong Tenders Regulations, art 5 (stating that in cases of construction projects with foreign investment, PRC citizens' private investment and donation from overseas and other construction projects, the investors shall decide on their own whether they want to select the general contractor for their respective projects by tender).

73 This is one of the old names for the Construction Site Planning Permit (建設用地規劃許可證).

74 This is one of the old names for the Construction Project Planning Permit (建設工程規劃許可證).

75 Beijing Tenders Measures, art 5.

administration department in the province is to set up construction quality supervision organs.<sup>125</sup> On the other hand, the real property FIE is required to complete the required quality supervision procedures with such quality supervision organ prior to the commencement of construction work.<sup>126</sup>

#### 4.6.2 *Selection of Supervising Unit or Engineer*

The Construction Supervision Regulations provide that the supervising unit shall be selected by tender;<sup>127</sup> whilst the Shenzhen Construction Supervision Regulations do not specify how the supervising engineer or supervising engineer firm is selected.<sup>128</sup>

#### 4.6.3 *Matters Subject to Supervision*

Pursuant to the Construction Supervision Regulations, the objective of construction supervision is to control the investment to be made in the construction projects, the construction period and construction quality, to conduct the administration of construction contracts and to co-ordinate the working relations between the parties involved; whereas under the Shenzhen Construction Supervision Regulations, depending on the different stages of the construction, different matters are subject to construction supervision. For example, when the project is under construction, the supervising unit or supervising engineer is:

- (i) to assist the developer and the main contractor to prepare the report on the commencement of construction work;
- (ii) to confirm the sub-contractor(s) selected by the main contractor;
- (iii) to organise a joint examination of the working drawings;

<sup>125</sup> Guangdong Construction Quality Regulations, art 6.

<sup>126</sup> Guangdong Construction Quality Regulations, art 9 (stating that the developer should also bring the following documents and materials: (i) the approved documents in connection with the construction and report of the construction; (ii) the qualification certificate of the contractor; (iii) the construction site geological survey report and working drawings; and (iv) a photocopy of the construction contract).

<sup>127</sup> Construction Supervision Regulations, art 10.

<sup>128</sup> Shenzhen Construction Supervision Regulations, art 14 (stating that a supervising engineer as appointed by the developer is the professional licensed to engage in construction supervision).

See also art 22. (It states that a supervising engineer firm is the organisation for which the supervising engineer works. There are three types of supervising engineer firms: supervising engineer firm with legal person status; supervising engineer firm in a form of partnership; and individual supervising engineer firm.)

- (iv) to review and examine the construction organisation design, the construction technical program, construction progress, construction quality guarantee mechanism and construction safety guarantee mechanism proposed by the main contractor;
- (v) to ensure the main contractor's strict compliance with the construction contract and the State technical specifications and standard in respect of construction and to co-ordinate the relations between the developer and the main contractor;
- (vi) to review and examine the quality and quantity of the materials, auxiliary and spare parts and equipment provided by the main contractor or the developer;
- (vii) to control the construction progress, quality and investment and to ensure that the main contractor implements construction safety guarantee measures;
- (viii) to organise the inspection and acceptance of the individual engineering projects and hidden projects and to issue construction payment receipts;
- (ix) to be responsible for certification work on the construction site;
- (x) to supervise the specific use of pre-sale proceeds and to inform in writing the supervising organisation of the pre-sale proceeds of the remittance of money to the real property transferor;
- (xi) to supervise the main contractor as to the keeping of contracts, other documents and technical files and materials in good order;
- (xii) to organise the developer and the main contractor to proceed with the preliminary inspection and acceptance upon the completion of the construction work;
- (xiii) to file an application report on the inspection and examination of the completed project; and
- (xiv) to participate in the inspection and examination of the completed project and the review and examination of the final settlement of construction costs and expenses.<sup>129</sup>

#### 4.6.4 *Implementation of Construction Supervision*

The developer and the supervising engineer shall enter into a written supervision contract, setting forth the rights and obligations of the parties.<sup>130</sup> The supervision contract is required to be filed with the municipal construction commission for its record within 15 days after the formal signing.<sup>131</sup>

<sup>129</sup> Shenzhen Construction Supervision Regulations, art 12.

<sup>130</sup> Shenzhen Construction Supervision Regulations, art 43 (stating that the standard contract prepared by the Shenzhen Municipal Construction Commission shall be used).

<sup>131</sup> Id.

promulgated by the Ministry of Construction to further elaborate on the provisions on the transfer of real property contained in the Real Property Law; and the Measures of Shanghai Municipality for Transfer of Real Property.<sup>70</sup>

### 3.1.2 *Title to Buildings and Right to Use the Land Occupied by the Buildings*

Under the existing PRC land system, the title to a building and the right to use the land occupied by the building are inseparable. Therefore, when transferring real property, the title to a building and the right to use the land occupied by the building will be transferred at the same time.<sup>71</sup> When transferring real property, the transferor's rights and interests in and to the roads, green areas, recreational areas, vacant areas, lifts, stairs, verandahs, corridors, terraces or other public facilities in relation to the same plot of land shall be transferred to the transferee simultaneously.<sup>72</sup> If the rights to use parking lots and to advertise are not specifically addressed in the first transfer contract, such rights will be transferred simultaneously. If such rights are specifically addressed in the transfer contract, they will then belong to the first registered owner upon the initial registration with the real property registration authority.<sup>73</sup>

### 3.1.3 *Conditions for Transfer*

The term 'real property' in the Shenzhen Real Property Transfer Regulations refers to the land, and the structures and attachments on such land.<sup>74</sup> The Shenzhen Real Property Transfer Regulations also stipulate that a transfer of real property may be in the form of (i) sale and purchase; (ii) exchange; or (iii) gift.<sup>75</sup> However, in the Real Property Transfer Regulations, a transfer of real property does not include the exchange of real property.<sup>76</sup> In this section, we will focus our discussion on the transfer of real property by sale and purchase, which is the most common form of transfer.

The Real Property Transfer Regulations provide that if the land use right is obtained through the means of a grant, the transfer of real property is subject to the following conditions:

70 Measures of Shanghai Municipality for Transfer of Real Property (上海市房地產轉讓辦法) (Shanghai Real Property Transfer Measures), promulgated on 30 April 1997 and effective from 1 June 1997.

71 Real Property Transfer Regulations, art 5. See also the Guangdong Real Property Transfer Regulations, art 4 and the Shenzhen Real Property Transfer Regulations, art 5.

72 Shenzhen Real Property Transfer Regulations, art 13, para 1.

73 Shenzhen Real Property Transfer Regulations, art 13, para 2.

74 Shenzhen Real Property Transfer Regulations, art 3, para 2.

75 Shenzhen Real Property Transfer Regulations, art 3, para 1.

76 Real Property Transfer Regulations, art 3.

- (i) the land premium has been paid in full in accordance with the land grant contract and a State-owned Land Use Rights Certificate has been obtained; and
- (ii) investment in the development project has been made in accordance with the grant contract: in the case of a project for the construction of buildings, at least 25% of the total investment in the development shall have been made, whereas in the case of the development of a large tract of land, the conditions for the use of the land for industrial or other construction purposes shall have been created.<sup>77</sup>

### 3.1.4 *Procedures for Transfer*

The Real Property Transfer Regulations outline the general procedures for transferring real property as follows:

- (i) the parties enter into a transfer contract in writing;
- (ii) within 30 days after the execution of the transfer contract, the parties will apply to the local real property administration department where the real estate is located for approval of the transfer by presenting the real property title certificate, identification documents of the parties concerned, the transfer contract and other relevant documents. The parties should also report the transfer price to the authority;
- (iii) the real property administration department will examine the documents, and give a written reply within 15 days as to whether it will accept the application;
- (iv) the real property administration department will verify the reported transfer price, and, if necessary, conduct a survey and evaluation of the real property;
- (v) the parties shall pay the relevant taxes and fees according to regulations;
- (vi) the real property administration department then issues the Form of Transfer of Title (過戶單).<sup>78</sup>

### 3.1.5 *Reporting Transfer Price*

China implements a system which requires the final price for the transfer of real property to be reported to the relevant real property administration department. The price reported may not be concealed or inaccurate. Such prices reported are used as a basis for the calculation of the taxes and fees payable to the government in connection with the transfer. If the transfer price concluded is obviously lower than

77 Real Property Transfer Regulations, art 10. See also the Real Property Law, art 38.

78 Real Property Transfer Regulations, art 7.

administration department or the land administration department.<sup>58</sup> The following documents must be submitted when completing the mortgage registration:

- (i) the mortgage contract;
- (ii) the land grant contract or the land transfer contract;
- (iii) the identification or certificate of the parties to the mortgage;
- (iv) the State-owned Land Use Certificate and the real property certificate. If the real property is owned jointly, a Real Property Joint Ownership Certificate and a certificate showing that other co-owners have given their consent to the mortgage are also required.<sup>59</sup>

In the event a pre-sold property is mortgaged, the legally valid pre-sale contract must also be submitted.<sup>60</sup>

### 2.7.3.5 Shenzhen

Shenzhen has the most comprehensive regulations on real property registration, including mortgage registration.<sup>61</sup> In registering real property mortgages, the following documents must be submitted:

- (i) the application for real property mortgage registration;
- (ii) the real property certificate;
- (iii) the identification card; and
- (iv) the mortgage contract.<sup>62</sup>

In registering a mortgage contract in connection with the rights under a pre-sale contract, the relevant pre-sale contract, instead of the real property certificate referred to in item (ii) above, should be submitted.

The registration authority will stamp a special mortgage chop on the real property certificate and make a mortgage note on the Real Property Registry.<sup>63</sup> Such notation should include the mortgagee, the area of the mortgaged property, the amount of mortgage, the term of the mortgage, etc.<sup>64</sup> In mortgaging pre-sold property, the registration authority will stamp the special mortgage chop on the pre-sale contract.<sup>65</sup>

58 BJ-1994 Measures, art 17.

59 BJ-1994 Measures, art 18.

60 Id.

61 Regulations of Shenzhen Special Economic Zone Regarding Real Property Registration (深圳經濟特區房地產登記條例), adopted by the Standing Committee of the 1st Session of the People's Congress of Shenzhen Municipality on 26 December 1992 and effective from 1 July 1993 (SZ-1993 Regulations).

62 SZ-1993 Regulations, art 41.

63 SZ-1993 Regulations, art 43.

64 Id.

65 Id.

The registration fee shall be calculated on the basis of the value of the property stated in the mortgaged contract. If the value of the mortgaged property is below Rmb10 million (inclusive), the registration fee shall be 0.02% of the value; if the value of the mortgaged property is over Rmb10 million, the registration fee shall be 0.01% of the value. The maximum registration fee shall be Rmb1,000 and the minimum fee shall be Rmb20.<sup>66</sup>

## 2.8 Notarisation and Legalisation

In addition to registration, mortgage contracts are sometimes required to be notarised and legalised before they become effective. Shanghai has the most detailed regulations governing this area. Pursuant to SH-1995 Measures, mortgage contracts of which one party is an individual citizen or mortgage contracts between citizens must be notarised by a notary office at the place where the contract is executed or where the mortgaged property is located.<sup>67</sup> Mortgage contracts involving legal persons or organisations must be notarised only if they are signed outside of the PRC.<sup>68</sup> If such a mortgage contract is signed in Hong Kong, Macao or Taiwan, it is required to be notarised by a local notary office appointed by the Ministry of Justice of the PRC; whereas if it is signed abroad, it is then required to be first notarised by a local notary office in the country where the contract is executed, and legalised by the PRC Embassy (or consulate) or Commercial Representative Office located in that country.<sup>69</sup>

A mortgage signed abroad will come into effect on the date of legalisation. If such mortgage is signed in Hong Kong, Macao or Taiwan, it will come into effect on the date of notarisation; otherwise it will come into effect on the date of execution.<sup>70</sup>

Guangzhou also requires mortgage contracts signed in Hong Kong, Macao or Taiwan or other places abroad to be witnessed (見証) or legalised in accordance with the law.<sup>71</sup>

## 2.9 Valuation of Mortgaged Property

When a mortgage is created, the mortgaged real property should be valued and the value of the real property will be stated in the mortgage

66 Opinion on Charges of Registration of Real Property Mortgage Loan and Auction of Real Property (關於房地產抵押貸款登記、拍賣等收費標準的意見), date unknown, para 1.

67 SH-1995 Measures, art 21.

68 Id.

69 SH-1995 Measures, art 21.

70 SH-1995 Measures, art 22.

71 GZ-1996 Regulations, art 12.

### 7.1 Building Lease Certificate

Under the Leasing Measures, the Building Lease Certificate is evidence of the legality and validity of the lease. It follows that a lease is not valid unless and until an application for a Building Lease Certificate is approved and the Building Lease Certificate is issued.<sup>22</sup> Where a building is let for production and/or business activities, the Building Lease Certificate is evidence of the legality of the business on the premises. Where premises are let for the purposes of residence, the Building Lease Certificate may be one of the certificates used by the relevant authorities in carrying out household registration.<sup>23</sup> A Building Lease Certificate is issued after an application for approval of the lease of a building successfully passes examination by the real property administration department of the people's government of the municipality or county.<sup>24</sup>

### 7.2 Building Lease Permit

As aforesaid, Shenzhen requires a leasing permit before premises may be let out.<sup>25</sup> All companies and individuals must apply at the relevant district department in charge of real property administration for a Building Lease Permit. The lessor shall submit a leasing application letter, a real property ownership certificate of the property or other documents proving his title to the property, and documents proving the identity or legal qualification of the lessor.<sup>26</sup> After the department in charge has examined the lessor's qualifications, it shall sign and issue a Building Lease Permit to the lessor. The supervising authority shall examine the Permit annually.<sup>27</sup> According to the Shenzhen Regulations, leasing of the premises without the Permit is an illegal act. Although not expressly stated as such, the Shenzhen Regulations do seem to imply that any lease agreement signed under such circumstances is invalid. Under Article 6 of the Shenzhen Regulations, buildings without a Building Lease Permit shall not be let, and under Article 29 of the Shenzhen Implementing Rules, if a Building Lease Permit is cancelled (which leads to the termination of the lease), the lessor is liable to pay for any loss suffered by the lessee.

Pursuant to the Shenzhen Regulations, lessees who are natural persons must have identification cards or the Shenzhen Special Economic

22 Leasing Measures, art 17. See also the Guangzhou Measures, art 10.

23 Leasing Measures, art 17.

24 Leasing Measures, art 16.

25 Shenzhen Regulations, art 6.

26 Detailed Rules for the Implementation of the Regulations of the Shenzhen Special Economic Zone for the Leasing of Property (深圳經濟特區房屋租賃條例實施細則) (Shenzhen Implementing Rules), promulgated on and effective from 11 August 1993, art 7.

27 Shenzhen Implementing Rules, art 9.

Zone Temporary Residence Certificates.<sup>28</sup> If the lessees are from outside the Shenzhen Special Economic Zone, they are required to have residence papers issued by the Shenzhen Municipal Public Security Bureau. If the lessees are corporations or units, they are required to have Business Licences issued by the Shenzhen Municipal Administration of Industry and Commerce.<sup>29</sup>

## 8. TITLE SEARCH

It goes without saying that a lessee's interest will hinge on the lessor's title to the leased property and therefore it is important to check the lessor's title. Depending on its bargaining power vis-à-vis the lessor, the lessee should ask for adequate representations and warranties from the lessor in the lease such as a warranty that all the property rights, consents, permits and approvals which are necessary for the lease have been duly obtained and will remain valid and effective during the term of the lease.

### 8.1 Title Certificate

In general, uncompleted buildings (樓花) may not be let, since leasing may not be carried out without obtaining the real property ownership certificate which will only be issued after the building is completed and has passed the inspection of the government authorities. Moreover, the Leasing Measures state that premises may not be leased out if no title certificates (房產證) have been obtained.<sup>30</sup>

The municipal regulations are generally in conformity. The Provisional Measures of Beijing Municipality for the Registration of Titles of the Buildings in Urban Areas (the 'Beijing Title Registration Measures')<sup>31</sup> provide that a building for which the title registration has not been completed and the title certificate has not been obtained may not be leased.<sup>32</sup> However, the Beijing Title Registration Measures are applicable to existing residential buildings, and may not apply strictly to buildings developed and constructed by property developers. For buildings developed and constructed by property developers, other factors such as the promotion of economic benefits should be taken into account.

28 Shenzhen Regulations, art 38.

29 Shenzhen Regulations, art 38.

30 Leasing Measures, art 6(1).

31 Provisional Measures of Beijing Municipality for the Registration of Titles of the Buildings in Urban Areas (北京市城鎮房屋所有權登記暫行辦法) (Beijing Title Registration Measures) promulgated on 18 March 1988 and effective from the same date.

32 Beijing Title Registration Measures, art 5.

### 3.4.3.1 Permissible Structure

In Shanghai, foreign investors are allowed to form WFOE property management companies; whereas in Beijing, due to policy reasons, only joint venture property management companies are permitted to be formed. Guangzhou allows all three forms of property management companies: WFOEs, EJV's and CJV's.<sup>44</sup>

### 3.4.3.2 Qualification Requirements

To establish a property management company in Beijing, the following requirements must be met:

- (i) it must have a name and a permanent office premise;
- (ii) it must have a management structure and staff with sufficient numbers of management and technical personnel commensurate with its operation scale;
- (iii) it must have the required registered capital;
- (iv) it must have established rules and regulations regarding maintenance, services and management.<sup>45</sup>

In Shanghai, different grades of property management companies are required to meet different sets of requirements, including the property managed in terms of square metres, the types of property managed, the experience of the professional managers, the number of professional managers, the term of operation, and the amount of registered capital.<sup>46</sup>

44 Guangzhou Property Management Industry Regulations, art 2 (stating that management companies shall include WFOEs, EJV's and enterprises which engage in property management as a sideline business).

45 Beijing Property Management Company Regulations, art 4.

46 Shanghai Property Management Qualification Measures, art 6. (It states that property management companies are classified into three categories in accordance with qualifications. A Grade I property management enterprise shall meet the following requirements: (i) the property it manages shall be more than 500,000 sq m or the foreign investment property it manages shall be more than 200,000 sq m; (ii) it shall manage at least three types of property or two types of foreign investment property ('types of property' mean multi-storey buildings, high-risers, apartments, villas, commercial/residential buildings, office buildings, shopping arcades, factory buildings, etc); (iii) the property it manages shall include at least two excellent small districts or buildings and 50% or above of the property it manages is up to standard; (iv) the manager or the first deputy manager shall have three or more years of experience in property management; (v) it shall have ten or more middle-ranking management personnel specialising in economics or engineering; (vi) it shall have three or more years of operation term; and (vii) it shall have a registered capital of Rmb1,000,000 or more. A Grade II property management shall meet the following requirements: (i) the property it manages shall in general be in the range of 200,000 to 500,000 sq m or the foreign investment property it manages shall be in the range of 50,000 to 200,000 sq m; (ii) it shall manage at least two types of property or

*continued on the next page*

Guangzhou adopts a very similar method of administration.<sup>47</sup>

### 3.4.3.3 Regulatory Supervision

In Shanghai, an application for the determination of the qualification of WFOE, EJV or CJV property management companies must be filed with and examined and approved by the municipal housing and land administration bureau.<sup>48</sup> For this purpose, the applicants are required to submit its business licence, articles of association, the management contract and its management personnel's certificate.<sup>49</sup>

Beijing, Guangzhou and Shanghai each implements a system whereby the qualification of property management companies will be reviewed from time to time. In Beijing and Guangzhou, the review is conducted on an annual basis;<sup>50</sup> whereas in Shanghai, the review is carried out every two years.<sup>51</sup>

foreign investment property; (iii) the property it manages shall include at least one excellent small district or building and 30% or above of the property it manages is up to standard; (iv) it shall have six or more middle-ranking management personnel specialising in economics or engineering; (v) it shall have two or more years of operation term; and (vii) it shall have a registered capital of Rmb500,000 or more.) A Grade III property management shall meet the following requirements: (i) the property it manages shall in general be in the range of 30,000 to 200,000 sq m or the foreign investment property it manages shall be in the range of 10,000 to 50,000 sq m; (ii) it shall have three or more middle ranking technical personnel; and (iii) it shall have a registered capital of Rmb100,000 or more.)

47 Guangzhou Property Management Industry Regulations, art 4. (It states that property management companies are divided into three categories. Grades I, II and III property management companies must have ten, six and three or more professionally trained property managers respectively.)

See also art 5 (stating that 'professionally trained property managers' refer to management personnel with preliminary qualifications in the field of architecture, municipal civil engineering, landscaping, water and electricity, and finance, which are approved by the department in charge of construction on the national, provincial or municipal level).

48 Shanghai Property Management Qualification Measures, art 10.

49 Shanghai Property Management Qualification Measures, art 11 (stating that a property management company that is applying for the determination of its qualification grade must submit the following documents or materials: (i) the Enterprise Legal Person Business Licence issued by the administration authority for industry and commerce; (ii) the appointment letter of the manager of the company; (iii) the certificate or proof of the qualification of its middle-ranking or above personnel; (iv) the relevant application form; (v) the articles of association and management contract entered into by the company; and (vi) other required materials).

50 Beijing Property Management Companies Regulations, art 7. See also the Guangzhou Property Management Industry Regulations, art 6.

51 Shanghai Property Management Qualification Measures, art 12, stating that the approved qualification grade is valid for two years. The approval authority will review and confirm the qualification grade two years later.