

New Important Provisions related to Residential Properties in China Civil Code

Description

Foreigners residing in China are bound to find somewhere to live, either rented or owned dwellings. As a cross-border legal service provider at Shanghai Landing Law Offices, we are keeping eyes on relevant latest legislation to update.



Civil Code of the People's Republic of China (hereinafter as **Civil Code**) has officially come into enforcement since Jan 1, 2021, in which some provisions related to housing properties are closely bound up with our life. Here we summarized the main points as below for your reference.

1. The Expiration and Renewal of the Land Rights

The tradable real estate in China mainly includes commercial residential properties, office buildings, shops and other commercial housing estate. The tenure of the land rights of above properties varies from 40 to 70 years.

It is stipulated respectively on the terms of rights to use land for construction of housing units and the others in Article 359 of Civil Code:

"The term of the right to use land for the construction of housing units shall be automatically renewed upon expiration.....The term of the right to use land not for the construction of housing units shall be renewed upon expiration in accordance with the provisions of laws."

Article 359 of China Civil Code

However, the detailed rules about the renewal fees and the procedures to renew the rights are still not clear and looking forward to further regulations and interpretations.

2. The Regulation on Agency Fees

The sale and purchase of secondhand properties is usually completed with the assistance of real estate agencies as the medium party. For the professional service they provide, the expense is pretty high. In practice, there are some approaches for the buyers to save the agency fees, such as contacting the seller personally and changing to a lower-cost agency halfway.

Thus, to protect the transaction order and the agents' legal interest, Article 965 of Civil Code stipulates:

"The entrusting party shall pay remuneration to the medium party if it, after accepting the medium party's service, takes advantage of the opportunity for transaction or medium service provided by the medium party and bypasses the medium party to conclude a contract directly."

Article 965 of China Civil Code

3. The Mortgaged Properties can be Transferred

Previously, all mortgages on properties must be released before title transfer, so often a huge amount of money is needed and many sellers even have to get a bridge loan. But now the high cost and risks are saved in accordance with Section 1 and Section 2 of Article 406 of Civil Code:

"The mortgagor may transfer the mortgaged property during the mortgage term. Where the parties agree otherwise, their agreement shall prevail. Where mortgaged property is transferred, the mortgage rights shall not be affected."

"Where a mortgagor assigns the mortgages property, he shall timely notify the mortgagee. If the mortgagee can prove that the mortgage right may be damaged by the transfer of the mortgaged property, he may require the mortgagor to pay off the debt in advance with the money obtained from such transfer or submit it to a competent authority for safekeeping. The value exceeding the obligee's right shall be attributed to the mortgagor, and the gap shall be paid off by the obligor."

Article 406 of China Civil Code

This is quite good news that even if the property to be transferred is in mortgage, as long as the mortgagor notify the mortgagee in advance and there is no objection, the property can be transferred during the mortgage.

4. New Regulations on Tenancy

Besides, there are some new regulations in Civil Code related to the rights and remedies of the lessees as well:

(1) Houses with the right of residence shall not be leased.

The right of residence is a new civil right stipulated in Civil Code, which authorizes the owner of a residential property to establish a right of residence without changing the property right. Accordingly, Article 369 of Civil Code regulates the conflicts between the right of lessees and the right of residence in details:

"The residence right shall not be transferred or inherited. Residential houses with residence right created shall not be leased unless the parties otherwise agreed."

Article 369 of China Civil Code

Thus, before entering into a tenancy contract, it is suggested for the lessees to check the registration records of the property and to require the lessor not to create any right of residence during the lease term. All these should be written in the contracts as events of default.

(2) If the property is disputed or sealed up, the lessee can terminate the contract.

Previously, many lessees had the experience that the houses they rented were caught in dispute and sealed up which made them could not either live in the house nor terminate the contracts.

Article 724 of Civil Code makes it clear that the lessee may terminate the contract if the property is in dispute, sealed up by the judicial authority or otherwise in trouble:

"The lessee may terminate the contract under any of the following circumstances where the lease item cannot be used due to reasons not attributable to the lessee:

(i) *Where the leased item is legally sealed up or seized by the judicial authority or administrative authority.*

(ii) *There is dispute over the ownership of the leasehold property right.*

(iii) *Where the leased item violates the mandatory provisions of laws and administrative regulations in respect of use conditions.*

Article 724 of China Civil Code

(3) A 6-month objection period is stipulated for the sublease.

In view of the controversy of sublease, Article 718 of Civil Code stipulates:

"Where the lessor knows or should know about the sublease of the lessee but fails to raise any objection within 6 months, it shall be deemed that the lessor agrees to the sublease."

Article 718 of China Civil Code

It regulates the sublease of the lessees to reduce the possible disputes of sublessors by set up a time limitation on the objection by the lessors.

(4) The tenant has the priority of renewing the lease.

To solve the problem of lessees being forced to move out when their contracts expired, Article 734 of Civil Code stipulate:

"Where the lessee continues to use the leased goods after the expiry of the lease period, and the lessor does not raise any objections, the original lease contract shall continue to be valid, but the lease will become a non-fixed term lease."

Article 734 of China Civil Code

Where the term of the lease expires, the lessee of the house shall have the priority to lease the house on the same conditions."

It should be mentioned that there is a premise of "on the same conditions" in the second paragraph, so the priority is given only if the price is same.

(5) The right of first refusal of close relatives is prior to that of tenants.

Before, in accordance with Article 230 of China Contract Law,^[1] where the lessor was to sell a dwelling under a lease, it should give the lessee a notice within a reasonable time limit before the sale, and the lessee had the right of first refusal under the same conditions.

However, Article 726 of Civil Code modifies the right of first refusal in law:

"Where the lessor is to sell a dwelling unit under a lease, it shall give the lessee a notice within a reasonable time limit before the sale, and the lessee has the right of first refusal under the same conditions, except where the co-owners by shares exercise their rights of first refusal or the lessor is to sell the dwelling unit to their close relatives."

Where the lessee does not clearly express to purchase the house within 15 days after the lessor performs the obligation of notice, the lessee shall be deemed to waiver its preemptive right."

Article 726 of China Civil Code

Under the new regulation, where the lessor is to sell a dwelling to his close relatives, the duty of notice is not required and the right of first refusal is cancelled. Beyond that, the right of first refusal where the lessor sells the dwelling to other people is still the same as well as the duty of notice.

What We Propose

Since Civil Code is newly implemented, various problems and disputes may arise from the articles above in practice. It is quite risky for the foreigners who are not familiar with the transaction practice in China real estate market to rent or to transfer their housing estate without professional advice.

We have been helping foreign clients in their real estate transactions in China for more than a decade, contact us through emails or website message if any question, we are happy to help solve your legal

problems in China.

[1] Expired in Jan 1, 2021.

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