

## **What to Include in a Standard Real Property Transfer Contract?**

### **An Overview of the Legal Risks**

Wu Jiangshui, Zhejiang T&C

The standard real property sales and purchase contract ("Contract"), issued by the Ministry of Construction in 2000, is a template document (No. GF-2000-0171). Based on the dissimilar rules that exist in various jurisdictions throughout China, different provisions have been incorporated in the Contract, giving rise to a plethora of similar but different versions of the Contract. To complicate matters, local authorities frequently require substantive changes to the provisions of the Contract even after the parties have reached agreement and in some regions sales may not begin until after the authorities have approved the Contract.

The provisions of the Contract are divided into a "fixed" part and an "agreed" part. The fixed part of the Contract only requires the parties to fill in the blanks, but it fails to address many important issues. Worse still, in many versions of the Contract the wording and style of the fixed part is often inconsistent with the wording and style of the agreed part.

#### **How to Reflect "Fairness" in the Provisions of the Contract?**

Like other standard contracts, the Contract attempts to be fair to both parties. It is composed of more than 20 provisions and thousands of words, but it still fails to address many issues. Due to differences in the circumstances that underlie various property transactions, as well as the requirements and interests of the parties and their relative positions, the parties need to consider adding various rights and obligations to serve their interests.

Ultimately, the length of any contract depends on the transaction. If a short contract meets the needs of the parties, so much the better. A party that does not exercise those rights that are by law subject to the autonomy of the parties by including express provisions in a contract can end up unnecessarily assuming the risk that a court or arbitral body will fail to protect its rights if a dispute occurs in the future. To make a contract "fair", therefore, each party must be careful to address its needs as permitted by law. Issues expressly stipulated by law and not subject to the autonomy of the parties do not need to be included in the Contract, as they are binding irrespective of whether they are included.

#### **What Functions Must Be Achieved by the Provisions of the Contract?**

As China's economy and its legal profession advances, standard contract templates have become more complex and have developed a different style as compared with just a few years ago. Nevertheless, certain terms and phrases remain unfamiliar to many business people and legal advisors at present.

No matter if the transaction involves a simple job or a complex BOT or FIDIC project, all real property sales and purchase contracts must answer four distinct questions: who is dealing with whom, what is being dealt with, how will the deal proceed and how will disputes be resolved? Some property transaction disputes are caused by a lack of proper attention at the time the parties draft and negotiate their respective contractual rights and obligations.

In real-life transactions, many provisions cannot be expressed in the Contract. While some additional provisions can be included in the agreed part, others can be stipulated only in a supplement to the Contract (if a supplement is permitted in the relevant jurisdiction). A supplement can add detail and clarify the main body of the Contract, as well as restrict the applicability of certain provisions of the Contract. Therefore, a supplement can provide a means

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for resolving certain issues but it also can pose a dangerous trap.

### **How to Arrange the Provisions?**

A good contract is not supposed to simply string together a series of provisions. Once I reviewed a contract that gave every reader a headache. Though it contained over 40 provisions and covered more than 10 pages, related provisions were not grouped together and the contract contained no internal logic. The result was that readers spent more time checking the relationships between the provisions than studying the rights and obligations contemplated in the transaction. This type of contract can easily increase the legal risks of the parties.

The Contract contains over 20 provisions, which, in my opinion, could be divided into several more concentrated sections. These sections would help readers find related provisions and make it more convenient to add related content. Moreover, it also would help the parties analyse the logic behind the provisions to spot missing issues and adopt remedial measures.

In addition, most of the provisions contain headlines, but the last several do not. This makes the Contract look like a semi-finished product. Legal knowledge may not be common to everyone, but defects in form and expression can be identified by everyone. Therefore, the order of the provisions to a real property contract must be properly arranged.

### **Should Defects Be Disclosed in the Contract?**

Real estate transactions are a game between developers and purchasers. Compared with the utterly false advertising seen in the industry a few years ago, the marketing methods that currently are adopted by developers are more advanced. However, it seems that developers' attempts to conceal defects have become the norm in the industry.

The Contract not only is a standard form contract as provided under the Contract Law, but it is a consumer contract, and therefore it also is subject to the *PRC Law on the Protection of Consumer Rights and Interests*. Developers are subject to strict requirements under both laws. Many people assume that contractual rights and obligations are dependent on the parties' agreement. According to the two laws, however, consumers' rights to information and fair exchange and developers' obligations regarding disclosure directly favour purchasers. This is particularly true in regard to a standard form contract, where the purchaser's interpretation often prevails.

For example, on an owner's first day in a new home he or she notices a pump house noisy enough to disturb his or her normal enjoyment of the home. Through litigation, the court holds the developer liable for damages and orders the developer to eliminate the nuisance. Clearly, the failure to disclose defects carries significant legal risks for developers.

Contracts are a blend of rights and obligations determined by the background and conditions to a transaction, with a focus on the parties' need to allocate risk. It is essential to meet these needs by clearly identifying and expressing the rights and obligations of the parties through the provisions of a well structured contract.

*WuJiangshui is a senior associate at T&C Law Firm. Mr. Wu's practice focuses on establishing enterprise legal risk management systems and contract drafting and application. He often provides legal risk assessments for enterprises and drafts model contracts for large scale state-owned enterprises and other companies. Mr. Wu is a prolific author and a member of the Commerce and Corporate Law Committee of the All China Lawyers' Association and an arbitrator with the Hangzhou Arbitration Commission. Mr. Wu can be contacted at [solothinker@163.com](mailto:solothinker@163.com).*

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