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Modern Chinese Real Estate Law: Property Development in an Evolving Legal System (Chapter 1)

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Modern Chinese Real Estate Law: Property Development in an Evolving Legal System (Chapter 1 – Introduction)

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Chapter 1

The Excitement of Modern China

The Excitement of Modern China

China's development during the past quarter-century has been astonishing. Outside observers marvel at China's ability to maintain double-digit economic growth year after year while expressing concern about the West's rising trade imbalance with this important partner.¹ Western consumers enjoy lower and lower prices for Chinese-made goods ranging from T-shirts to iPads, while American manufacturers decry the ability of Chinese factories to underprice their few surviving American competitors. Trading partners welcome China into the World Trade Organization² while wondering what effect that nation's economic expansion will have on the price and availability of critical commodities, particularly oil.³ Meanwhile, China is in the puzzling position of developing raucous free markets while still nominally subscribing to Communist ideology.⁴

1 See, e.g., *Bamboo Capitalism*, THE ECONOMIST, Mar. 12, 2011, at 13 (lead article in issue entitled "Bamboo Capitalism: The Rise of Entrepreneurial China" that contains four stories devoted to China); *How to Make China Even Richer*, THE ECONOMIST, Mar. 25, 2006, at 11 (lead article in issue entitled "Special Issue on China's Reform Tasks: How to Make China Even Richer" that contains eight stories devoted to China); Fareed Zakaria et al., *Does the Future Belong to China?*, NEWSWEEK, May 9, 2005, at 26 (lead article in issue entitled "Special Report: China's Century" that contains nine stories devoted to China).

2 See generally RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW 492–96 (2002) (discussing the immediate effects and the likely future implications of China's accession to the World Trade Organization, along with continuing reasons for concern).

3 See, e.g., Clifford Krauss, *Charting China's Energy Explosion*, N.Y. TIMES "GREEN" BLOG, Nov. 9, 2010, <http://green.blogs.nytimes.com/2010/11/09/charting-chinas-energy-explosion/> ("China's push for rapid economic development will dominate global energy markets and be the single biggest force in spurring higher oil prices and carbon dioxide emissions linked to climate change over the next quarter-century"); Jad Mouawad, *Outlook on the Economy: With Oil Prices Off their Peak, Are Supplies Assured?*, N.Y. TIMES, Dec. 5, 2005, at C10 ("In 2004, global oil consumption rose 3.7 percent, ... a pace that surprised analysts and oil executives. China alone accounted for a third of that growth, its demand for oil up 15 percent."); Keith Bradsher & Christopher Pala, *China Ups the Ante in its Bid for Oil*, N.Y. TIMES, Aug. 23, 2005, at C1 ("One of China's state-owned oil companies may still be smarting from its failure to acquire Unocal this summer. But another Chinese oil giant showed on Monday that this country is still snapping up assets to satisfy its hunger for energy.").

4 See XIANFA [CONSTITUTION] pmbl. (2004) (China) ("The basic task of the nation is to concentrate its efforts on socialist modernization by following the road of Chinese-style socialism.").

Nowhere is this tension more evident than in China's real estate sector. Real estate developers are building award-winning office towers, modern shopping malls, and five-star hotels, and tens of millions of urban families are scraping together the money to buy their own apartments.⁵ These developers have been meeting these residential needs by replacing decaying urban housing stock while also adding new units to house the tens of millions of workers who have migrated from rural areas to cities. The nation has also built or rebuilt its infrastructure, from roads and bridges to subway systems and airports.

Shanghai, China's key financial center located near the mouth of the Yangtze River, is said to be the home to one-fifth of the world's construction cranes, which local residents refer to as China's national bird.⁶ Developers are ordering structural steel at a rate that is causing shortages and price increases around the globe. Shanghai residents speak of little else but their desire to purchase residential apartments as soon as possible, so as not to miss out on a bonanza that may not recur in their lifetimes.⁷ All of this activity is particularly remarkable given that the government is firmly controlled by a single political party that remains Communist at least in name, Communist doctrine continues to prohibit the private ownership of real property, and all land in China thus remains owned by the state or by agricultural collectives. This doctrinal confusion does not seem to be holding back the real estate market, particularly in China's major cities, which have been flourishing for most of the last two decades.

⁵ See, e.g., Yan Song & Chengri Ding, *Conclusion*, in *URBANIZATION IN CHINA: CRITICAL ISSUES IN AN ERA OF RAPID GROWTH* 287, 287 (Yan Song & Chengri Ding eds., 2007) ("China will complete in several decades the urbanization process that took Western developed countries several hundred years."); David Barboza, *China Builds its Dreams, and Some Fear a Bubble*, *N.Y. TIMES*, Oct. 18, 2005, at A1 ("This year alone, Shanghai will complete towers with more space for living and working than there is in all the office buildings in New York City").

⁶ Many observers are particularly struck by this prevalence of construction cranes in Shanghai. See, e.g., PAMELA YATSKO, *NEW SHANGHAI: THE ROCKY REBIRTH OF CHINA'S LEGENDARY CITY* 26 (2001) ("Shanghai embarked in 1992 on what has to be one of the biggest building sprees the world has ever seen. From the top of the Hilton Hotel, which in 1995 was still one of the tallest buildings in the city, the horizon yielded more tower cranes in every direction than the eye could count.").

⁷ The changes in China's real estate markets since the late 1980s are noteworthy. See Li Ling Hin, *Pricing of Land in China's Reforms*, in *THE IMPACT OF CHINA'S ECONOMIC REFORMS UPON LAND, PROPERTY AND CONSTRUCTION* 49, 55 (Jean Jinghan Chen & David Wills eds., 1999) (noting that "[b]efore 1987 the portion of the real estate industry in the GNP of the PRC was only around 3–4 percent, which was substantially lower than most of the East European socialist countries."). Even as early as 1999, the changes were dramatic. "The emergence of real estate markets in China to their current stage of development has been nothing short of astonishing particularly in the absence of any concept of market structure." Keith McKinnell & Anthony Walker, *China's Land Reform and the Establishment of a Property Market: Problems and Prospects*, in *THE IMPACT OF CHINA'S ECONOMIC REFORMS UPON LAND, PROPERTY AND CONSTRUCTION*, *supra*, at 26, 46.

The Dearth of Property Laws in the 1980s and 1990s

Westerners tend to assume that a stable legal system is a precondition to this type of robust development and that property is the “guardian of all other rights.” After all, why would anyone make a substantial investment in Chinese real estate if the nation did not appear to afford legal protection to property rights, did not make clear what an owner’s contractual remedies were, did not have a developed bankruptcy law, and provided a judiciary that was less than transparent?

Nonetheless, while China has adopted numerous written laws and regulations since the 1980s, property law has lagged behind other areas of civil law. The first Chinese law focusing specifically on property rights did not become effective until October 1, 2007, which means that China’s breakneck real estate development during the preceding two decades occurred in a nation with no published law of real estate.⁸ China has only haltingly begun to adhere to international rule-of-law standards.⁹ Moreover, there still is heavy reliance in China on *guanxi*, or personal relationships and connections.¹⁰ Chinese property rights also are limited by communitarian considerations in ways that are unfamiliar and surprising to many Westerners. China had few laws regulating property during this time of extraordinary growth, and property law as it has actually been practiced diverges from these published legal rules. Thus, those who have been buying, selling, and lending against Chinese real estate during this era have been operating in a world of significant legal uncertainty.¹¹

Despite this shortage of laws relating to property, private and public investors have spent hundreds of billions of dollars investing in real estate in a nation that, during most of this period, had no formal property law. Investors purchased and improved assets without knowing just how much legal protection those assets

8 Wuquan Fa [Property Rights Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Mar. 16, 2007, effective Oct. 1, 2007) (China). While the Property Rights Law bears an effective date of 2007, China had previously enacted other laws affecting certain legal rights to property. See *infra* notes 334–42 and accompanying text.

9 See, e.g., PEERENBOOM, *supra* note 2, at 20 (“[T]he notion that the PRC economy will be able to sustain economic growth without further legal reforms that bring the system into greater compliance with the basic requirements of a thin conception of rule of law is doubtful.”).

10 For a more detailed discussion of *guanxi*, see *infra* notes 37–40 and accompanying text.

11 Yan Song, Gerrit Knaap & Chengri Ding, *Housing Policy in the People’s Republic of China: An Historical Review*, in EMERGING LAND AND HOUSING MARKETS IN CHINA 163, 175 (Chengri Ding & Yan Song eds., 2005) (“Progress is impeded by the lack of an appropriate legal framework China’s privatization has emphasized deregulation and decentralization, but a comprehensive legal framework for regulation of economic behavior in the emerging housing market has not yet formed.”); cf. AMY L. SOMMERS & KARA L. PHILLIPS, *REAL PROPERTY IN CHINA: A GUIDE TO FOREIGN INVESTMENT* 35 (suggesting that the ambiguity in China’s legal system has helped to foster innovative practices).

enjoyed, while banks lent money with only imperfect assurance that they would be repaid. How can a huge nation modernize so rapidly and dramatically when its legal system furnishes so much ambiguity? And how can all of this happen in a nation that still purports to subscribe to socialist ideology?

The Goals of this Book

This book offers a detailed account of how the Chinese real estate market actually operates in practice, from both legal and business perspectives. My goals are twofold. First, I seek to establish and describe how the Chinese real estate market, with so few written laws, actually functions. How do real estate professionals operate on such a large scale when they are not sure what the applicable law is or how it will be applied? Second, I aim to address the broader question of how a huge nation can achieve such dramatic levels of economic development so rapidly while its legal system is still so unsettled. In what ways does China force us to reconsider the traditional model of economic growth and expansion, which assumes that legal and institutional development is a prerequisite to economic growth?

In four visits to China since 2003, I have interviewed dozens of Chinese and Western experts who are currently taking part in what can be described without exaggeration as one of the greatest real estate booms in world history.¹² My conversations with these real estate developers, bankers, government officials, judges, practicing lawyers, real estate consultants, economists, real estate agents, law professors, business professors, law students, and recent homebuyers provide critical insights into how a major nation is quickly transforming itself from an economic backwater into a self-styled “socialist market economy.”

Although I also rely on more traditional methods of legal scholarship throughout this book, a straightforward doctrinal approach would be incomplete and misleading. I quickly realized that I could develop an accurate grasp of how China’s real estate market operates in practice only from those who are working in that market. Chinese real estate and business laws are still in an early stage of development, Chinese legal and economic institutions are evolving rapidly, and there is an intensely strong cultural tradition of reliance on personal relationships rather than rule-of-law principles. My goal is to establish how particular aspects of Chinese real estate practice are maturing with what appears to be tremendous success against the backdrop of a young legal system.¹³

12 China’s growth is not restricted to the real estate sector. *See, e.g.*, C. FRED BERGSTEN, BATES GILL, NICHOLAS R. LARDY & DEREK MITCHELL, CHINA: THE BALANCE SHEET—WHAT THE WORLD NEEDS TO KNOW NOW ABOUT THE EMERGING SUPERPOWER 17 (2006) (describing China’s recent revival as “one of the greatest transformations in modern history”).

13 “The economic bird has already escaped from its cage, the economic plan, but the legal bird remains in its own cage, although it is stirring and the dimensions of the cage

Research Methods

This book examines Chinese real estate law as it operates in the field, focusing on both legal and business issues. I first had the opportunity to visit China during the spring of 2003, when I served as a Fulbright Scholar at Shanghai Jiaotong University Law School. Amazed by the staggering amount of real estate development in Shanghai, I became curious as to how China was succeeding in building new structures and rebuilding crumbling infrastructure so quickly in a partial legal vacuum. I had never before seen real estate development on the scale I observed during this initial stay and knew immediately that I wanted to understand how this nation—with a legal system, history, and cultural background so dramatically different from those of the United States and other Western nations—was managing to accomplish a complete rebuilding of its structures and infrastructure so rapidly.

I quickly learned that China's legal system, particularly as it pertained to real property, was both new and rapidly changing. China at that time did not yet have a comprehensive property law on the books. Furthermore, the legal landscape was evolving so rapidly that the few legal resources that did exist became obsolete almost immediately.

In addition, the legal academy in China still was recovering from the excesses of the Cultural Revolution, which left China with a shortage of legal academics. Most of the scholars I met seemed to be interested in other legal disciplines, and the burgeoning property field had barely started to attract academic attention. This means that there are few experts in property law and real estate finance in China even as the nation is grappling with important structural questions about how to harmonize private ownership of property with Communist principles.

Those Chinese citizens who have developed expertise in the emerging legal and business systems of China are more likely to be profiting from it than writing treatises about it. In fact, when I began to meet with real estate experts in China, more than one of my counterparts expressed gratitude that I had undertaken this project and indicated how great a need there is for more written material in this field. Many outstanding scholars write about real estate, or about real estate law, or about recent developments in China, and I have relied on their excellent work throughout this book. But I found few scholars—in China or in the West—who have developed expertise in the combined topic of Chinese real estate law. As a result of this shortage, many of my sources in China were extremely curious to hear what I had learned from others with whom I had already spoken and insistent that I send them copies of my finished work. One real estate developer expressed his frustration that not only are there no useful published sources in the field of Chinese real estate law, there also is no one else conducting research with a goal of creating any such sources.

may be changing.” STANLEY B. LUBMAN, *BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO* 2 (1999).

This scarcity of written information led me to conclude that the best way to comprehend the current real estate climate in China and the massive changes in recent decades is to speak to the professionals who are operating within the country. These are the only people who have the expertise and insight that might be found in the United States in a law school faculty or in a bar association library. I returned to China three more times in the ensuing years with the goal of interviewing as many people as I could who were knowledgeable about Chinese real estate law and business as actually practiced.

During these visits, I interviewed more than fifty experts in the real estate field. Legal experts with whom I spoke included practicing lawyers, law professors, judges, government officials in legal positions, and law students. I also met with non-lawyer business experts such as real estate developers, bankers, consultants focusing on the real estate sector, economists, professors of business, real estate agents, and government officials in non-legal positions. Most of these experts are Chinese—some of whom have studied or lived in the West—with the rest being Westerners currently residing in China. Nearly all of the specialists I met were able to converse in English at some level, but in several cases I made use of a translator, including some meetings with persons who speak reasonably good English but felt more comfortable with a translator present. Many of the people with whom I spoke are recent homebuyers themselves.

The classic example of field research into the development of informal norms is Robert Ellickson's *Order Without Law*.¹⁴ Ellickson observes that "rural residents in [California's] Shasta County were frequently applying informal norms of neighborliness to resolve disputes even when they knew that their norms were inconsistent with the law."¹⁵ He concludes from this that, "[i]n many contexts, law is not central to the maintenance of social order."¹⁶ Following Ellickson's suggestion, I sought out a wide range of viewpoints to the greatest extent possible. "Instead of interviewing many persons who saw the problem from the same perspective, I sought out lesser numbers representing many different perspectives."¹⁷

Finding reliable sources is always a challenge, and this problem is particularly acute in China. As Donald Clarke has observed, "Fieldwork can yield interesting and original results, but unfortunately it typically does not yield representative statistics unless great care is taken in selecting the objects of study."¹⁸ As he explains:

14 ROBERT C. ELICKSON, *ORDER WITHOUT LAW* (1991).

15 *Id.* at viii.

16 *Id.* at 280; see also Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 *STAN. L. REV.* 623, 654–55 (1986) (presenting an earlier version of his field-research results).

17 Ellickson, *supra* note 16, at 655.

18 Donald C. Clarke, *Empirical Research into the Chinese Judicial System*, in *BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW* 164, 180 (Erik G. Jensen & Thomas C. Heller eds., 2003) (citation omitted).

By piecing together information from [a variety of] sources, Chinese and foreign scholars have been able to assemble a picture of certain aspects of the Chinese legal system. That picture is by no means complete. But fleshing it out requires a great deal of thought about what information needs to be gathered and how it can be gathered effectively.¹⁹

At the same time, my selection of experts was far from random: I intentionally attempted to reach specialists in various different real estate sub-fields, I sought out the most knowledgeable authorities I could identify in each of these sub-fields, and some people declined my interview requests. Furthermore, my sample was skewed by the obvious reality that all of my interview subjects were people comfortable meeting with an inquisitive foreigner. Thus, “cooperative people were undoubtedly somewhat overrepresented in the sample.”²⁰

I generally asked my initial questions from a long list I had prepared before my first interview, but this list evolved throughout the months of my field research. In addition, I tailored the questions to the expertise of the particular interviewee, both in my pre-interview preparation and as each interview progressed along its unique trajectory. All interviews were face-to-face, with pre-interview logistics and follow-up discussions typically conducted by telephone, e-mail, or text message. I opted not to record my interviews, out of a belief that this approach might encourage more frankness from my counterparts.

While I do not rely on doctrinal legal sources to the degree that is common in many legal monographs or law review articles, this book is also not a journalistic or anthropological account. To the extent I have been able to identify more traditional doctrinal works, I have consulted and used these sources as a method of corroborating or challenging the information I gleaned from my interviewees. These works include both primary sources, such as the Chinese Constitution and Chinese statutes, and secondary sources, and I cite these works throughout this book. My overall goal was to merge my field work with more traditional research into a coherent and accurate picture of China’s real estate market. Where I have unearthed discrepancies between interviews and published sources, I have so noted. These discrepancies may reflect the fact that the application of published laws in China, as described to me by my counterparts, can vary significantly from the text of those laws.²¹ Or they might merely reveal faulty memories, intentional

19 *Id.* at 167.

20 Ellickson, *supra* note 16, at 655. For an extremely thoughtful discussion of the biases inherent in this type of information-gathering about the Chinese legal system, see Benjamin L. Liebman, *Watchdog or Demagogue? The Media in the Chinese Legal System*, 105 COLUM. L. REV. 1, 11–14 (2005). Liebman observes that personal introductions are critically important when conducting field research in China, a fact that unavoidably leads to biases that can affect research results. *Id.* at 13.

21 Even when written laws apply in China, they are not always readily accessible. See, e.g., PEERENBOOM, *supra* note 2, at 246 (“The lack of centralized records makes it

misinformation, or other inaccuracies on the part of the speaker, the published source, or me.

A newcomer to the law of most Western nations can learn much by reading statutes, cases, treatises, and academic articles. China offers fewer resources of these types, and written sources do not completely capture the current state of the Chinese legal system. Thus, the book that follows necessarily differs from many of the more traditional works that appear in American legal scholarship. This book is not intended to be an authoritative doctrinal treatise on its subject; by necessity, it is impressionistic. It focuses on Shanghai, with secondary emphasis on Beijing, and thus primarily reflects the current state of real estate law and business in these two major cities. A small percentage of the people I met with were not particularly forthcoming, although I nearly always was surprised at how willing these experts were to meet with a total (and foreign) stranger and to discuss often proprietary aspects of their work. Their forthrightness frequently included direct criticism of government policies, a brave act in a nation where such conduct can subject the speaker to government harassment or worse.

My occasional need to use a translator when interviewing my counterparts introduced barriers, though not always the precise ones I had anticipated. The number of Chinese professionals who speak some level of English is growing. Several people suggested to me that China soon will have more English speakers than the United States, although the average level of fluency for these speakers is plainly much lower. However, because real estate markets are inherently so domestic, real estate lawyers have fewer occasions than other professionals to cross paths with foreign business people and lawyers and thus less need to be able to converse in English. My experience suggests that Chinese real estate lawyers and professionals had somewhat lower levels of English proficiency than many other Chinese lawyers and professionals.

Conversely, many educated Chinese who are fluent in English have little familiarity with Western real estate concepts and terminology. This occasionally led to translation barriers of a different sort. Originally, I assumed that speaking through a translator would lead to two primary barriers. First, it would create a leak of information that is transmitted from speaker to translator and then to listener, as any childhood player of "Telephone" would expect. Second, there would be the accompanying delays that tend to stilt conversation and reduce spontaneity and casual interaction. In fact, the main barrier was that my translators were often less familiar with real estate finance concepts than either of the two people for whom they were translating. My real estate counterpart and I frequently had to have side discussions with our common translator to ensure that he or she was properly

difficult to know exactly what rules apply at any given time in any given place.") (footnote omitted). And even when these laws are available, they may be vague, as is often the case in other civil law countries. *Id.* at 251. On the overall growth of law and legislation in China in recent years, see Stanley Lubman, *Looking for Law in China*, 20 COLUM. J. ASIAN L. 1, 6-7 (2006).

comprehending and translating the real estate concepts and terms that the two of us were more familiar with using, albeit in different languages.

Several of the people with whom I spoke requested that I not attribute their comments to them. One person specifically asked me not to take written notes during our conversation, which took place in a public coffee-house; I reconstructed the conversation in my notebook immediately after our meeting concluded. Out of respect for the generosity of my conversation partners, and in recognition of the fact that some of them have strong reasons for not wanting attribution, I have decided to refer to all of my contacts anonymously. In addition, I have occasionally and intentionally been opaque in describing a professional affiliation or a specialty. Although most people I met with expressed no reservations about my identifying them, I do not wish to expose any individual who was kind enough to spend time meeting with me and sharing their expertise to any sort of negative repercussions.

My aim in this book is to provide an up-to-date description of how the actors in the world's most explosive real estate market actually function. China's real estate professionals are still conducting their business in an unruly environment, with the rules evolving as they proceed. That evolution sometimes comes as a response to their prior activities. These professionals cannot fall back on conventional wisdom in a field in which no one has more than a few years of experience, and there are few senior experts who can serve as mentors. They also must conduct business under an authoritarian one-party government that severely limits freedom of expression while attempting to merge free markets and strict government control into a system of "socialism with Chinese characteristics."²² The legal structure is far from transparent, enforcement of the laws that are on the books is inconsistent, corruption by government officials is widespread, and the rule of law is viewed by some as a Western concept that does not dovetail well with Chinese traditions.²³

In short, this is a field survey of how the participants in a major and surging industry operate against a background of significant legal and policy ambiguity. I believe this portrayal to be accurate, but I expect that it is incomplete. I assume

22 See, e.g., McKinnell & Walker, *supra* note 7, at 46–47 (comparing recent changes in Chinese behavior with the stasis in institutional structure, and quoting Deng Xiaoping's comment, "The existing political system has now proved to be a formidable constraint to furthering the course of economic reform."); *infra* notes 46–54 and accompanying text (discussing the evolving language of the Chinese Constitution regarding the role of socialism).

23 See, e.g., LUBMAN, *supra* note 13, at 11 ("The rule of law was alien and unknown [in China] throughout thousands of years of authoritarian rule."). Western observers today generally seem to believe that China is well on the road to accepting at least a thin core of rule-of-law principles. Peerenboom also notes, however, that some scholars, particularly those from the Critical Legal Studies school, believe that Western imposition of rule-of-law concepts on China is a thinly veiled attempt to oppress and inflict injustice. PEERENBOOM, *supra* note 2, at 164. But see ALBERT H.Y. CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 3–4 (3d ed. 2004) (maintaining that similar arguments "can probably be more effectively applied to self-proclaimed Marxist-Leninist states than to the Western states of advanced capitalism.").

that this description soon will become obsolete, and I remind the reader that I am attempting to depict Chinese real estate law and business as it is actually practiced, not as it is officially written.

Roadmap

The overall structure of the book is as follows. Part I of the book, which includes this chapter and Chapter 2, offers introductory material and some background information, along with my preliminary observations and conclusions. Part II, encompassing Chapters 3 through 10, discusses specific sub-topics within Chinese real estate law and practice and examines each of these sub-topics in detail. These chapters are designed to provide a thorough analysis of how Chinese experts have been managing to function so successfully in a nation with a rapidly changing legal system. Part III, which consists of Chapters 11 and 12, shifts the focus considerably, by discussing conventional law and development theory and its application within China. The traditional theory holds, as noted above, that a firmly established legal structure is an essential precondition to significant economic development. These chapters ask how the theory can be reconciled with China's experience during the past quarter-century. Finally, Part IV offers some conclusions.

More specifically, this chapter has provided an introduction to the overall subject of this book. It has attempted to impart a sense of the wonder that a first-time visitor to China is likely to experience today. That visitor may well ask how an ostensibly socialist nation can exhibit so many of the outward characteristics of a Western country with a firmly established, capitalist economic system. This chapter has also described my research methods and why I selected them and concludes here with a roadmap to the rest of the book.

Chapter 2 completes the introductory portion of the book. It provides an extremely brief description of modern Chinese history. It then proceeds to set forth some initial observations, along with my preliminary conclusions. I present these conclusions at the outset, so that the reader can test them throughout the book as I continue to present the evidence I gathered during the course of my field research in the ensuing chapters.

Chapter 3 is the first of the eight chapters in Part II to examine individual components of the Chinese real estate system. This chapter kicks off the discussion by describing and analyzing the Chinese land use right, which is the fundamental building block of the Chinese real property system. The essential difference between Chinese property law and that of Western nations is that private citizens may not own land in China. The new property law officially recognizes the land use right, a device by which private parties may acquire the right to use government-owned land for up to seventy years. The land use right is designed to harmonize the socialist principle of communal land ownership with the reality that much modern Chinese real estate development has been triggered by the profit

motive. Any discussion of modern China's real estate system must begin with the land use right.

Chapter 4 turns to the real estate development entities that have become prevalent in China. Public-private joint ventures have come to play a key role in the Chinese real estate market. The private partner typically provides expertise and capital while the public partner contributes land use rights for desirable land. In this way, government entities enjoy some of the profits from developing valuable real estate while also maintaining control over the use of the land within their jurisdiction. This chapter will discuss the legal foundation for these partnerships by describing and discussing the different legal entities that can own and develop real estate in China. It also will provide contrasts with the parallel business entities prevalent in Western legal systems.

The first question these new businesses are likely to face is selection of a site, which is the subject of Chapter 5. Because China's market in land is controlled so completely by the government, those who wish to develop property cannot simply acquire land and then build on it. Rather, developers must work with government entities that wish to see certain types of development in certain places. This process often requires the developer to compromise with government bodies that have agendas that are unrelated to the success of a particular real estate project. Chapter 3 described the legal significance of the land use right, while Chapter 4 presented the ways in which public and private entities jointly participate in the development process. Chapter 5 continues this discussion by focusing on the issues developers face when they wish to obtain land use rights to desirable sites.

One of the most provocative issues in modern Chinese real estate law is the fate of established residents who presently live on parcels that real estate professionals wish to redevelop. This is the subject of Chapter 6. As desirable downtown land is cleared to make way for upscale residences, hotels, and office buildings, those who reside in the existing tenements are forced to exit and receive only modest stipends in exchange. Left with only small cash awards, these urban dwellers are forced to move to the outskirts of their cities. This process also leads to the destruction of stable, if poor, neighborhoods. The controversial process of demolition and relocation has led to violent public protests in China. Chapter 6 will examine the process as it is supposed to work and the problems and protests to which it has led.

Chapter 7 continues the examination of Chinese real estate law in actual practice by focusing on the lending process. The Chinese banking system, unlike parallel systems in the West, is dominated by state-owned and state-controlled lending institutions. Rather than looking solely at the economics of a proposed project, as shareholders of Western banks demand, these institutions focus as well on the social and political desirability of a potential new development. This can lead to construction of buildings that are politically necessary and socially worthwhile. However, the rental or sales proceeds from these developments may prove inadequate to repay their developers' loans. In short, Chinese banks are instruments of state policy, providing the financial resources needed for development but displaying little concern with the bottom line.

Chapter 8 turns its attention to urban residential units and the process by which buyers acquire them. Demand for these units has been so intense that developers often can sell the units before even breaking ground on construction. These developers are in a position to demand that their buyers pay a significant portion of the purchase price as construction is progressing. This presale structure creates significant problems for buyers and their lenders. A purchaser of a new unit must come up with a large portion of the purchase price before the unit is ready for occupancy, while still having to pay the carrying costs for her current residence. And to the extent this purchaser plans to borrow the acquisition funds, she does not yet own a unit that she can mortgage to her lender. The presale process thus raises important legal and financial questions for all parties involved in the process of urban residential development.

From the residential construction process, Chapter 9 turns to the processes of commercial construction and commercial leasing. This chapter examines the actual construction process in China and discusses differences between Chinese and Western methods. The discussion emphasizes the speed with which Chinese projects can be designed and built and provides contrasts with the corresponding Western approach. The chapter also compares Chinese and Western commercial leases.

Chapter 10 concludes Part II, which is the portion of the book that focuses on different fields within the overall real estate umbrella. It also completes the discussion of construction by turning to infrastructure. The chapter begins by noting once again the hazy line between public and private construction in a nation in which the notion of private property is so new. From there, the chapter turns to the construction of infrastructure. In an effort to modernize rapidly, China has had to renovate and expand its infrastructure to a significant degree. In the last two decades, for example, Shanghai has built a modern airport, a multi-line subway system, bridges and tunnels across the Huangpu River, and numerous double-decker highways. This chapter focuses on the financing of these huge infrastructure projects, including discussion of the “Build–Operate–Transfer” process that is also beginning to be employed in some Western nations.

The next two chapters of the book constitute Part III. These chapters introduce and analyze law and development theory. Chapter 11 begins by examining the traditional theory of law and development. Stated most succinctly, this theory holds that legal and institutional development must precede economic growth. Without stable laws, particularly property and contract laws, investors will not have sufficient confidence to invest, and the economic system will not be in a position to mature. Yet the chapters in Part II consistently highlighted the extent to which China has been able to revitalize its real estate market during the past two decades. This renaissance has occurred despite the absence of a strong real estate law, the scarcity of other important rule-of-law institutions, heavy reliance on personal connections, and considerable corruption.

Chapter 11 examines the theory itself and some of the leading commentary on it. Some of this commentary appears to argue that the type of development

recently observed in China could never happen. The chapter then revisits many of the topics discussed in Part II, as a means of appraising the extent to which recent Chinese economic history seems to contradict the theory's predictions, at least superficially.

Chapter 12 continues the discussion of law and development theory by seeking to harmonize China's recent development with the predictions of the theory. To the extent that the two are not in accord, the chapter seeks possible explanations as to why China seems to disprove the model so far. The theory may be wrong. The theory may be partially correct but in need of refinement. China may, in fact, be behaving as the theory predicts. China may be too different from the Western nations in which the theory developed for the theory to apply well there. China may still have too many of the features of a Communist nation to be a suitable test case for the theory. And most generally of all, the theory is just a theory, and no generalized model such as this can be expected to fit any given nation perfectly.

Part IV, consisting of Chapter 13, offers my concluding thoughts. It summarizes the different ways in which written laws and actual practices have merged to create a particularized Chinese system that has been surprisingly successful so far. It revisits the preliminary conclusions I set forth in Chapter 2 and tests them against the evidence I developed in Part II. And it looks to the future and suggests possible reforms from which China might benefit.