Hong Kong leasehold land tenure and boundary system

Dr. Tang Hong-wai, Conrad
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ABSTRACT

This article gives an introduction to the law and history of the leasehold land tenure in Hong Kong, states its merits and shortcomings as compared to other advanced deeds systems, and illustrates the key parts of the registration documents with particular attention on land boundaries. Recent legislative improvements and further development are discussed.

Keywords: leasehold, land boundary, registration, Demarcation District Survey

1. Leasehold land tenure

Land rights are essentially referred to exclusive sovereign control over land. A freehold land in theory may start from absolute freedom on land. Gradually some rights are taken away and the remaining land rights are described as a bundle of rights. The difference of these rights between the freehold titles registration and the leasehold deeds registration is the duration of land rights. Technically, there is no freehold land in Hong Kong. All land parcels are granted under Crown lease.1) The common leasehold periods were 75 years, 99 years and 999 years. Many land leases were expired in 1973 and 1997, yet they were all renewed without paying premium. After the Hong Kong repatriation in 1997, all granted land rights remain unchanged till 2047.

The English registration system was applied in Hong Kong by 1844; it was then a deeds registration system. The Land Registration Ordinance (1844) is the longest existing local law. The Hong Kong land law has its sources from the English law, the local legislation and case law. For the land in New Territories, Chinese customary law has also its influence on progenitor property inheritance. After 1997, the Basic Law works as constitutional laws in Hong Kong.

Albeit a negative land registration system, the deeds registration system here enables public searching of transaction

* Associate Professor at Department of Land Surveying and Geo-Informatics, The Hong Kong Polytechnic University (E-mail: Conrad.Tang@inet.polyu.edu.hk)
documents. That is the very purpose of the Land Registration Ordinance and it has been successfully done with almost 100% of properties registered in Hong Kong. With minimal checks, a transaction can be easily done with the signing of a contract. The nemo dat rule is the legal principle assigning the legal title chain, which tends to protect an original owner as compared to titles registration which tends to protect a subsequent buyer. In case of disputes, the court relies on the contract law rules under common law for which sometimes definite legal results may not exist.

The success of a land tenure system can be viewed from two aspects—a broader view on the prosperity of the property market which relates to cultural and legal preferences, and a specific view on the efficiency of the system which refers to technological and operation aspects. In the operation aspects, the factors on cost and service, security of titles and updatedness of the land data are important aspects to the successfullness of the system. Thus, it relies little on the choice between titles or deeds registration, or even between common law or civil law. The success of a land tenure system relies primarily on the design and development of appropriate institutions and organizations such that property rights and values are clearly defined and protected under an effective administration.

In this paper three famous deeds registration jurisdictions, the Netherlands, Australia Capital Territory (ACT) and Hong Kong, which enjoy high reputation in international land markets, are mentioned. The Netherlands Cadastre and Land Registry Agency (Kadaster) has continuously strived for automated services. The deeds registration in the Netherlands is underpinned by e-Government operations (Molen, 2007). Electronics conveyancing (Stolk and Lemmen, 2003) and optical character recognition of deeds (Wouters, 2009) are significant improvements and achievements. With these efforts a national database could be implemented and electronic access service is then materialized.

The Land Registry in Hong Kong converted all registered documents into images in the 1990s. Now, using the Integrated Registration Information System (IRIS), land records are accessed on line. A very first step of e-transaction has been implemented. The abstract of details in a deed, which is called a memorial, is now transmitted electronically from solicitor firms. The Land Registry is a Trading Fund Department which means the government department recovers its operation cost from the services. In 2009, the Land Registry had an income of 55 million US dollars versus a cost of 44 million US dollars (LR, 2009).

As the deeds of some over two million of registered properties are still kept in imagery form, the checking and interpretation of the land rights are still in a manual mode. Thus, it is difficult to make certain the land rights, especially in the dilapidated documents deposited long time ago. The difficulty of updatedness of land rights is the major problem facing this deeds registration system. Hong Kong needs to catch up on the service and technological gaps behind the leading Dutch Kadaster.

ACT is mentioned here not because it has deeds registration but it is famous for its coordinate cadastral which is built upon a modern systematic survey network. To this aspect the Hong Kong government has not committed to the suggestion of systematic resurvey in the New Territories (Tang and Lam, 2001). The administration tends to seek for individual solutions for problematic land boundaries.

2. Land leases

The Hong Kong government disposes land using leases. A land lease is a civil contract between the government and an individual, which is signed after the completion of lease conditions and then registered. Nowadays, the registration of the land sale document has replaced the proper granting of land lease. This procedure has been introduced under the Conveyance and Property Ordinance (Cap. 219) in 1984. With the compliance to the conditions listed in the land sale document, the land lease is deemed to be granted. To show that such legal estate has been obtained, Lands Department issues a Certificate of Compliance (CC) to indicate the fulfillment of lease conditions. Nowadays, the issuing of CC and the Occupation Permit by the Buildings Department is the requirement for a land property to assume a legal estate.

Besides the land lease from land auctions, there are various forms of land grant actions such as exchange, tender, surrender and regrant. These land actions come in different document of Conditions (Nissim, 2008).

2.1. The format of a land sale document

The Particulars and Conditions of
Sale, which is a typical land sale document, comprises the Lot Particulars, General Conditions, Special Conditions, Memorandum of Agreement and the attached plan. The Conditions of Sale of the Kowloon Inland Lot 11175 is used for illustration in this paper. First, the Particulars of the Lot outline the basic details of the land which are shown as Figure 1. The lot boundary is delineated as the plan annexed. The plan itself is for identification at a scale of 1:1000 (see Figure 2). Nevertheless, the plan refers to a survey file which contains detailed coordinates of the lot for which the modern survey accuracy is about 2 centimeters.

![Figure 1: a sample of the Particulars of the Lot](image)

Secondly, the General Conditions and Special Conditions are government designed land use controls on each land parcel. General Conditions are common terms for handling lease, rent, payment of premium (land price), breach of conditions, setting-out of the boundary, boundary stones and others. For the surveying services, the government is responsible for the initial setting out of the lot boundary. There were various sets of general conditions for land sale in the New Territories published on gazette in last century. In recent decades, each land sale has its own set of conditions. Special conditions include dimension, area and height controls, engineering specifications, building covenant (time limit of the building development), facilities and utilities, deed of mutual covenant (property management agreement), restriction on sales before completion, various specified land uses, and so on. These are some significant conditions. Together with many specific and minor conditions they form the obligations and rights of each piece of land. Examples are available on the Land Sale column of the Lands Department on website [http://www.landsd.gov.hk/en/landsale/index.htm](http://www.landsd.gov.hk/en/landsale/index.htm).

Two short but significant parts are attached to the end of a land sale document. There is a Memorandum of Agreement which is going to be signed by the Government and the highest bidder to the land. The land sale plan delineates the subject land parcel. See Figure 2. A sample of Memorandum and land sale plan below.

![Figure 2: A sample of Memorandum of Agreement and Land sale plan](image)

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The land sale document is a non-statutory control of property market (Hui and Lo, 2000). The land use and development controls are exercised through the conditions stated in the land sale document. In the 1980’s, the new industrial land use brought challenges on the rural land use control in the New Territories where the legal land uses were supposedly prescribed in the Block Crown Lease. Land owners converted vacant agricultural land into container storage spaces. The government sued the land owners yet the Appeal Court decided that “the use of the land as listed in the schedule to the Crown lease was descriptive only.”7) The case triggers the introduction of statutory control by the Town Planning Ordinance. The legal use of land is now controlled by the Outline Zoning Plan as approved by the Town Planning Board.8)

2.2. Problems in updating the lease

In short, land use rights recorded on lease yesterday may not be appropriate to the needs today and social needs change constantly. There must be a clear record, as convenient and as clear as possible, to reflect the existing land rights in any lease. Some leases are lost or dilapidated in the passing of time. The individual rights recorded in each lease, usually termed in Special Conditions, could be surprising when it was re-discovered and applied. For example, tree protection is now a social preference, yet a row of tress of 80 year old were cut down because a condition of felling trees in a 1920 lease is applied. The lessee has the right to fell trees which obstruct the construction work. Obviously the lease term should mean the situation at the time of development in the 1920’s. Since there is no time limit on the clause, so the developer used it to their advantages.

The deeds register may have served as a good reference to ownership rights, yet such a depository of land right documents is no more an efficient system of keeping land rights readily seen or transparent. Referring to the original deeds and the chain of transaction documents is itself a clumsy way of verifying things. The concept of mirror effect of titles registration has reflected such needs, although no one register could fully reflect all sorts of land rights. Coming into the computer ages, database on land rights are needed. Spatial Data Infrastructure is a land and human related database with the basic information layers as location, land rights, etc. Major land rights like ownership, boundary, zoning, tax and market values should be made available to the general public through the design and establishment of a spatial data infrastructure. This insight has been reflected in Cadastre 2014.9)

2.3. Update rural land leases

The government administration planned to give titles to landowners of the New Territories. The first trial was made by the President of Land Court who proposed a bill entitled “The New Territories Titles Ordinance, 1902.” The discussions amongst the Land Court, Colonial Secretary and the Governor were positive, yet they decided to “study the local customs for a few years before we endeavour to embody them in an ordinance” (CSO, 1902). The plan was dropped after the resignation of the Land Court President Gompertz in 1904.

In the late 1950s to 1960s, with the availability of large scale 1:1200 survey maps, the administration embarked cadastral survey projects such that updated lot boundaries were transferred to the new plans under a new land law. It was again dropped in 1969 without publicized reasons. It is surmised that having seen new satellite town developments in the 1960s with large number of land resumptions, thus it was not worthy to invest much to update old land records. Deeds registration is still running today in Hong Kong.

3. Leasehold land boundary

In Hong Kong, land parcel boundary is a right included in the leasehold land grants. Land boundary is a matter of law, but Hong Kong still has no survey law in land boundary determination. The deeds registration system has served as an official record for all land interests, including land boundary rights. Land parcel boundary is described by words and attached plans in the lease. There is no specification on land parcel boundary in the Land Registration Ordinance. It only mentions that a plan is accepted as a document that could be used in the registration. Under the Land Registration Ordinance, boundary rights have to be traced back to original land grants.

Many old registered documents were erode, unclear, damaged or lost. Sometimes too many but contradicting land boundary description in the original grant documents and subsequent development records were found. They all contribute to uncertain boundary determinations. The local deeds registration works well for the purpose of easy and traceable

9) Cadastre 2010 is developed by Commission 7 of FIG on the trends and development of cadastre.
land transactions, and it is overall less secure than that of titles registration, and rather particularly unreliable in dealing with the land parcel boundary.

3.1. Urban land boundaries

Urban area in Hong Kong includes Hong Kong Island, Kowloon Peninsula and satellite towns in the New Territories. In a metropolitan like Hong Kong, economic urban renewal initiatives tend to prevail over environmental conservative motives. The building renewal rate is roughly about 50 years. A building is the Central District may have re-developed several times and usually there are some survey records during last development. Many early urban land grants were in large rectangular block of land bounded by streets. Hundreds of subdivided lots in various developments and transactions made the subdivided lot boundaries prompt to errors. There was no technical requirement on subdivision and there was no check on the correctness of these subdivision plans before 1996. It is commonly known to land surveyors that there are conflicting survey records for urban area and scarce records for the rural. In short, urban land boundaries are workable, albeit difficult.

Occasionally discrepancies are discovered during the redevelopment process. The Gainlux case

10) HCA No.7476 of 1994 Gainlux Investment Ltd v. Superstand Development Ltd and Bestful development Ltd.

is an example of dimension defects in the original lease which involved expensive land in Central District. Rectification was needed. Lawsuits and negotiation are affordable to land developers and not for small landowners. It is typically termed as caveat emptor that buyer should be aware of any land right discrepancy. Different location, dimension, area between the registered plan and occupation are commonly found in deeds prepared before the Second World War.

3.2. New Territories land boundaries

Whereas Hong Kong Island and Kowloon Peninsula were administered under individual land leases, the New Territories were under Block Crown Leases (BCL). BCL were the results of the adjudication by the Land Court, in which the Survey Department assisted in the systematic survey. There were 477 Demarcation Districts covering 65.65 square miles of agricultural land and house land with about 329,000 lots (Newland, 1904). The cadastral survey was done between 1899 and 1904.

A BCL comprises three parts: Indenture, Schedule and Demarcation District (DD) Sheet. An Indenture is the lease for which the Crown collectively granted the agricultural land and house land to the original land owners under the tenure of the Ching Dynasty. Figure 3 shows the Indenture which was the same in content for all 477 districts. There was only one signature of the then Governor. No grantees were asked to sign on such document. Figure 4 shows the image of a Schedule. In the columns of the Schedule, from left to right, they record the lot numbers in ascending order, the serial number of the Land Court references which have little use now, the area with the least unit of one—one hundredth of an acre,

11) the description of lot (either agricultural or house), name and address of grantee, class of land,

12) rent, and remarks. The area was derived from the DD Sheet. In general, over one-third of the area recorded in Schedules were outside the limit of +/− 0.005 acre and within them one-tenth of the area recorded had errors in multiples of the registered figure (Tang et al., 2003). From the outset of the survey in 1899, the DD Sheets were first drawn in 1:3960. By February 1901 it was discovered that the scale was too small to depict the houses and then changed to the scale of 1:1980.

Figure 3: Indenture of DD 333

The DD Sheets are still now the legal evidence of lot boundaries as it refers to the clause “which said piece or piece of ground is more particularly delineated and described on the plan” in the Indenture. There was no coordinate reference in the DD Sheets. Absolute position referencing is done by means of correlation with the current detailed survey plan.

11) 1 acre equals 4046 square metres; 0.01 ac is about 40 square metres.
12) 1st class agricultural land for 3 dollars of rent per year, 2nd 2 dollars, 3rd 1 dollar.
was intended to achieve two goals: to rectify problematic lot boundaries and to control subdivision survey. The part on boundary rectification by survey was turned down as the government was worried on the financial implication of compensations. The ordinance is thus used to provide registration for authorized land surveyor (ALS), to control the standard of the survey and to maintain the survey records. Accordingly, the Land Registration Ordinance was amended that a subdivision deed must be registered with a Land Boundary Plan (LBP) which is the subdivision plan approved by an ALS. The ordinance has no clause on the effect of the mother lot boundaries. Legally speaking, the mother lot remains as is (not legally determined) while the subdivision line is legally defined by the survey. Nevertheless, the Survey and Mapping Office would treat the LBP as a redefinition of the mother lot boundary plus subdivision lines.

Land Titles Ordinance (Cap. 585)

The Ordinance was passed in the Legislative Council in 2004; however, the law has not yet put into practice. The Hong Kong Institute of Surveyors has a clear stance that the Hong Kong SAR Government should also tackle land boundary problems in the handling of the new titles law. With the support from the administration of the Survey and Mapping Office, there is eventually a clause, Section 94, on the “Determination of Lot Boundaries.” The determination must, however, conform to the original registered area and dimensions. A minor variance will be accepted by the Survey Authority as it is within the survey accuracy. The law is thus only applicable to ‘normal’ lots where the lease plan matches occupation well. A land boundary survey in Hong Kong is still not efficient to solve land boundary discrepancies, at least not with direct legal effect.

3.3. Recent improvements

Land Survey Ordinance (Cap. 473)

The law had been incubated under the Survey and Mapping Office over a decade when it was enacted in 1995. It

13) Section 28(4) Responsibilities of an authorized land surveyor.
The Hong Kong Institute of Surveyors is still seeking land boundary clause amendments to the Land Titles Ordinance. The Law Society presses for an insurance model which covers also frauds in land transaction, for which the government hesitates. Surveyors seek for a few improvements (HKIS, 2010). First, the boundary determination law should not be applied only to titles land (there is an incubation period of 12 years) but to all registered land in Hong Kong. Secondly, the survey plan should be a prima facie evidence of boundary. The rest requests relate to keeping boundary records under Survey Authority and checking of plans before registration. The policy official, Mr Edward To (Acting Deputy Secretary for Development, Planning and Lands), replied to the author as the delegate of the Hong Kong Institute of Surveyors in the Meeting of Joint Subcommittee on Amendments to Land Titles Ordinance (29 April 2010) that these suggestions would be considered in the amendment of Land Survey Ordinance.

4. Remarks

On the whole, the Hong Kong leasehold land tenure is a workable system. It supports quick and reasonably reliable transaction. The attached land boundary system is simple in design but not straightforward to have a definite result. To upgrade and provide secure rights on the extent of a property is certain a government's role and duty. In the coming era of e-government, spatial data infrastructure would necessarily be built on accurate property boundary layer. Otherwise, cost and responsibilities cannot readily be estimated at the land parcel level, and developments are unnecessarily retarded. Opposite voices are always based on the huge cost of survey, which is untrue and there are successful cost-effective cadastral reform examples. We need a willing and able government to take the lead. It sounds difficult, so there are always rooms for improvement.

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