

Reflections on Chinese apartment ownership law (part 1)*

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1 Introduction

Pissler studied law at the Maximilian University of Würzburg and law and sinology at the University of Hamburg. He conducted language studies and research at the Sino-German Institute for Legal Studies at the University of Nanjing from 1996 to 2002. In 2002 he was appointed as Senior Research Fellow for China at the Max Planck Institute for Comparative and International Law in Hamburg. He is a member of the advisory board of the *Zeitschrift für Chinesisches Recht* (which contains annual bibliographies of Western-language works on Chinese law compiled by him since 2003) and *Schriften zum Chinesischen Recht* since 2008. Besides three major works on Chinese law, he contributed several shorter pieces to collections, commentaries, handbooks, encyclopaediae and Chinese legal journals. He has translated several important decisions of the Chinese supreme people's court.

Pissler's interest in apartment ownership (sectional titles) was instigated when he became the owner of an apartment in Hamburg in 2008. This inspired him to gather the most important Chinese legislation on apartment ownership, translate the material into German and thereafter compose the book with an invaluable translation.¹ The book is thus one of the most important Western-language works on Chinese condominium law. Other major contributions are the doctoral thesis of Chen,² an essay by Van der Merwe in a book edited by Chen and Van Rhee,³ a doctoral thesis by Wang in 2011⁴ and an article by Chen and Kielsingard.⁵

The most important legislation translated and analysed by Pissler is the Chinese Property Code promulgated in 2007. This seminal legislation, which contained only fourteen provisions on condominium law,⁶ was fleshed out by two important judicial interpretations of the Property Code by the Chinese supreme people's court,⁷ namely the Interpretation on Apartment Ownership and the Interpretation on Property Services.

* Based on Pissler *Wohnungseigentum in China: Darstellungen und Rechtsgrundlagen* (2012).

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¹ 83-207 at the end of Pissler *Wohnungseigentum in China: Darstellung und Rechtsgrundlagen* (2012).

² Chen *The Making of Chinese Condominium Law. A Comparative Perspective with American and South African Condominium Law* (2010).

³ See Van der Merwe "Comparative assessment of the provisions of the new Chinese property code on condominiums" in Chen and Van Rhee *Towards a Chinese Civil Code* (2012) 177-207.

⁴ See Wang *The Chinese Real Estate Industry with Focus on the Role of the Developer in the Development, Sale and Initial Management of Condominium Schemes* (2011 thesis University of Aberdeen).

⁵ Chen and Kielsingard "Evolving property rights in China: patterns and dynamics of condominium governance" 2013 *Chinese Journal of Comparative Law* 1-22.

⁶ §§ 70-83.

⁷ The supreme people's court's aim is to interpret legislation so as to ensure uniform judicial pronouncements by the lower courts. Sometimes the interpretation can go beyond the four corners of the law concerned and thus acquire a quasi-normative character.

Significant subordinate legislation considered by Pissler are the Property Management Regulations of 2003, as amended in 2007; the Manual of Instructions on general meetings and owners' committees of the PRC Ministry for Residential Buildings, Urban and Rural Development of 2009; the General and Special Method for Managing Reserve Funds of the Ministry of Construction and Finance of 2007 and the Method for the Certification of Managing Agents of 2004 as amended in 2007.⁸ Pissler points out that the terminology used in these sources is not always uniform and that several contradictions exist.⁹ I have already mentioned that excellent German translations of all these legislative instruments are available as an appendix to Pissler's book.

2 Statistics

Condominium law affects a broad section of the Chinese population. In 2009 China's property market bypassed that of the United States as the world's largest real estate market. In 2010 roughly about 85% of the Chinese population resided in condominium units or private houses, and 900 million square metres of residential space were added to urban and rural areas. Due to the constant increase in the prices of residential property, the Chinese government introduced measures to prevent so-called real estate bubble bursting. This included stricter requirements for loans and a greater taxation of real estate.¹⁰

Pissler reports that 18.13% of all court proceedings in the Haidian City District of Beijing in 2006 related to disputes concerning agreements entered into with managers (service providers) and that most of the judicial proceedings instituted in the people's courts in Beijing concerned actions instituted by managers for non-payment of fees.¹¹ This gives an indication of the problems afflicting the industry.

3 Basic concepts

3.1 Threefold legal relationship

The Chinese Property Code¹² adopted a threefold legal relationship as the basis for Chinese condominiums. This was taken from Japanese and Taiwanese models. This threefold relationship or *Trinität* developed by the father of the German *Wohnungseigentumsgesetz*, Bärmann, also forms the basis of the South African sectional ownership concept.¹³ It involves individual ownership of a unit in a subdivided building, a co-ownership share in the common property and membership in the management body of the scheme. The three aspects are inextricably linked, and on transfer of an individual unit, the co-ownership share and the management right are deemed to be transferred simultaneously.¹⁴

Until 1988 Chinese law recognised only state ownership of urban land and collective ownership of rural land. A rapidly expanding population caused citizens to flock to the cities, and the government was put under pressure to provide housing to the new city dwellers. The Chinese government therefore amended the constitution

⁸ For exact details on the location of these sources, see Pissler (n 1) 1-2.

⁹ Pissler (n 1) 75-76.

¹⁰ Pissler (n 1) 3.

¹¹ Pissler (n 1) 3-4 n 21 and 22.

¹² § 70.

¹³ See Van der Merwe *Sectional Titles* in Van der Merwe and Sonnekus *Sectional Title, Share Blocks and Time-sharing* (service issue 17, 2013) 2-3.

¹⁴ See Pissler (n 1) 4 and 16.

to create a revolutionary new form of private transferable land-use right based on a new economic policy aimed at creating wealth through housing.¹⁵ Thus the proportionate co-ownership share owned by Chinese condominium owners is a share in the land-use rights pertaining to the land within the scheme. This is recognised in some of the legislative instruments which define common parts as jointly used systems, facilities and installations.¹⁶ Another difference is that the developer is allowed to reserve parking spaces and recreational facilities, such as swimming pools,¹⁷ with the result that these facilities contrary to most other jurisdictions are not part of the common property shared by Chinese unit owners. According to some commentators the same applies to the installations for the supply of electricity, water, heating, gas, cable television or the internet. These commentators contend that such installations are not part of the common property but remain the property of service and maintenance firms providing the services.¹⁸

Finally, we shall see that Chinese law does not expressly incorporate all unit owners into a corporate management body but concentrates on the general meeting as the legislative management organ. At the general meeting not only owners but also prospective owners of units are allowed to participate in the decision-making process.

3.2 Individual units and common parts

The Property Code § 70 provides that an owner has *individual ownership* of a residential or commercial unit and over other *parts of the building which he/she occupies exclusively*. Each unit owner also enjoys co-ownership and the right of joint management over the common parts of the scheme.¹⁹ Pissler points out that the term “immovable property” is used for the combined ownership of individual units and a co-ownership share in the common property.²⁰

In terms of Interpretation on Apartment Ownership²¹ individual units and individually designated parking spaces and commercial stands must be clearly detached and separated from the rest of the building; capable of being used separately and exclusively; and capable of being registered as the individual property of a person. Under the same Interpretation, balconies and patios may form part of an individual unit if they are accessible from the unit and indicated as part of the unit on the condominium plan. This is subject to the condition that the plans are attached to the contracts of sale for a particular unit.²²

The Property Code does list certain items as common property, namely non-public roads; non-public undeveloped land surrounding the building; other open spaces and jointly used installations and service rooms; roads and spaces allocated as parking spaces; sewerage; and lifts and geysers.²³

The Interpretation on Apartment Ownership²⁴ also contains a list of “mandatory” and “permissive” common property. Mandatory common property comprises the

¹⁵ See Chen and Kielsingard (n 5) 4.

¹⁶ See Pissler (n 1) 5. For more details on “common parts”, see Van der Merwe (n 3) 181-182.

¹⁷ See Pissler (n 1) 76 who notes that this causes problems with regard to the voting rights of developers and means that the developer must receive information about defects in the building.

¹⁸ See Pissler (n 1) 16 and 76.

¹⁹ For more details about the requirements of units in exclusive ownership, see Van der Merwe (n 3) 180-181.

²⁰ See Pissler (n 1) 5.

²¹ § 2.2.

²² § 2.

²³ §§73, 74.3 and 79.2.

²⁴ § 3.1.1 and 2.

constructive parts of the building such as the foundations, load-bearing components, the roof and the external walls; parts granting public access to the rest of the scheme such as corridors, staircases and entrance halls; and service installations, facilities and equipment including central heating plants, exit routes and rooms housing equipment. Permissive common property comprises items agreed by the parties to be considered part of the common property. For example, this may include installations which are not subject to individual ownership or public use or management by the relevant urban authority.²⁵

The Interpretation on Apartment Ownership provides that the unit owners may jointly use the land surrounding the building with the exception of the land comprising public roads or green areas.²⁶

I have already mentioned that Chinese law allows developers to reserve certain recreation facilities subject to reaching an alternative agreement. Some commentators take the view that service installations remain the property of the service and maintenance firms. The above two instances highlight the trade-off between classical property concepts (such as accession of buildings to land and the rule that land and service installations always forms part of the common property in the scheme) with the Chinese principle that the land belongs to the state²⁷ and that service installations inside the scheme may belong to outsiders.

3.3 Exclusive use areas

Neither the Property Code, the interpretations of the supreme people's court nor any other legislative instrument expressly recognise that *exclusive use rights* may be acquired with regard to specific parts of the common property.²⁸ On the face of it, therefore, the Chinese system is denied a fairly useful mechanism adopted in other jurisdictions for the creation of parking spaces, kitchen gardens, store rooms or balconies, amongst others. This type of right has been recognised in South African, German and most European and Anglo-American apartment ownership legislation.²⁹ Although it is questionable how the concept of rights of exclusive use of the common property can be reconciled with the *numerus clausus* of real rights adopted in the Chinese Property Code,³⁰ Pissler notes that Chinese legal literature accepts that exclusive use rights can be established by agreement with the developer, in favour of individual owners or third parties. Furthermore, according to Pissler the institution plays a great role in practice.³¹

3.4 Classification of parking spaces

The classification of parking spaces is heavily disputed in Chinese condominium literature. Some commentators classify them as part of the common property flowing from the fact that unit owners own the common property in undivided shares. Others contend that parking spaces belong to the developer and can be transferred by agreement to specific owners. A third opinion is that parking spaces

²⁵ Pissler (n 1) 15.

²⁶ § 3 par 2.

²⁷ The residents of scheme buildings only have a land use right with regard to the land surrounding the buildings.

²⁸ Pissler (n 1) 6 and 76.

²⁹ See in general Van der Merwe "Apartment ownership" in Drobnig and Zweigert (eds) *VI International Encyclopedia of Comparative Law* (1994) 53-55.

³⁰ § 5.

³¹ See Pissler (n 1) 6 n 49 and 76.

(and in particular underground spaces) belong to the state by virtue of the fact that the state created underground bunkers for the protection of the Chinese population in times of war.³²

The legislature eventually decided that the most equitable solution was to leave the allocation of parking spaces to privity of contract between the developer and the owners. This is subject to the principle that the available parking spaces and garages must primarily satisfy the needs of the owners³³ before being sold to third parties. The SC Interpretation on Apartment Ownership provides that the allocations must be proportionate to the number of parking spaces indicated on the condominium plan and the total number of units in the scheme (for example one parking space per unit).³⁴

The Property Code assumes that the parking spaces delineated on the condominium plan belong to the developer, who may by way of sale, donation, lease or other form agreed upon, allocate these spaces to unit owners. The code also assumes that parking spaces on common roads and public places within the scheme are jointly owned by the owners within the scheme.³⁵ The Interpretation on Apartment Ownership explains that this principle applies only to parking spaces that are created on the common property after the buildings have been built and the condominium plan spaces have been allocated.³⁶ It is not clear how the use of these spaces is allocated, but, once allocated, the owners' committee is obliged to inform the owners accordingly.

Since the allocation of parking spaces causes serious disruptions in apartment ownership schemes, it is recommended that the haphazard Chinese provisions should be amended by making use of the concept of exclusive use areas clearly indicated on condominium plans. It should also be made clear that parking spaces on the common property should be free for all owners on a "first come, first served" basis.

3.5 Unit owner and master of a unit

Although the judicial concept "unit owner" is acknowledged, it is common practice to describe unit owners as the "masters of the units". This is apparently based on the idea that the "masters of units" acquire not only ownership of the individual units but also a co-ownership share in the common parts. Although the Management Regulations³⁷ restrict the term "master of a unit" to unit owners,³⁸ we shall see that the concept of a "unit owner" is further complicated by the fact that certain non-registered residents are considered to be "unit owners" for certain purposes.³⁹

4 *The acquisition of ownership in a unit*

In terms of the Property Code, individual ownership in an apartment or a commercial unit can be established by registration in the land register or by another manner allowed by law.⁴⁰ Such other manners include a court order, succession, donation and by virtue of construction of a building.⁴¹

³² See Law on the Peoples Protection of the Airspace of 29 Oct 1996.

³³ Property Code § 74.1.

³⁴ § 5.1 and 2. The ratio is usually indicated on the building permit.

³⁵ Property Code § 74.2 and 3.

³⁶ § 6.

³⁷ § 6.1.

³⁸ See Pissler (n 1) 6-7.

³⁹ See below.

⁴⁰ § 9.1.

⁴¹ See SPC Interpretation on Apartment Ownership § 1.1; Property Code §§ 29 and 30.

The court is very pragmatic about the acquisition of ownership in condominium units. Accepting that the registration process is lengthy and expensive and is often not completed, the court resolves the conflict between the legislative requirement of acquisition of ownership by registration and the need to allow prospective owners in factual possession of units to have membership rights.⁴² While this makes the general meeting more democratic and fortifies the notion of self-government, it naturally engenders disputes between owners and developers as to the extent to which unregistered owners can exercise “ownership” rights.⁴³

This exception allowing non-owners to participate in ownership entitlements is limited to first-time purchasers, and can be traced back to the phased development of the Chinese real property market. Until 1978 the state was the sole investor in the construction of housing. With the development of the capital market industry, the so-called “housing commodification” trend caused apartment units to be sold at low prices to tenants, who were then granted the capacity of “owners” even before registration of their title.⁴⁴ The commentaries show that these entitlements fall short of full ownership.⁴⁵

5 *Community of owners*

5.1 Rights of owners

The Property Code endows unit owners with the usual entitlements of ownership, namely to possess, use, draw the profits of and to dispose of their individualised part of the building,⁴⁶ but without endangering the stability of the building or infringing on the rights of the owners of other units.⁴⁷

In addition, the Real Estate Management Regulations⁴⁸ contain a non-exhaustive list of owners’ rights, which are normally assumed in other apartment ownership statutes. These include the right to receive the real estate services agreed upon; to request the discussion and deliberation of certain matters in general meetings; to vote in general meetings; to elect members and to be eligible for election as members of the owners’ committee; to supervise the owners’ committee and managers (service providers); to monitor the proportionate use of common installations and facilities and to supervise the expenditure from the reserve fund. As part of their right of supervision,⁴⁹ the Interpretation on Apartment Ownership⁵⁰ confers the right to request the people’s court for the following information: details of common expenditure and the collection of contributions; management agreements; procedural rules for general meetings; the resolutions and minutes of the general and owners’ meeting; the management contract; and the allocation of parking places (including the schedule for the use of parking spaces) on the common property.

⁴² § 1.2.

⁴³ See Pissler (n 1) 12 and 76.

⁴⁴ See Pissler (n 1) n 100; Hsu, Berry and Chen “Housing reform in China: policy functions as law” 2010 *Real Estate Law Journal* 44 ff.

⁴⁵ Pissler (n 1) 13. This means that first purchasers have the right to be part of the general meeting and stand for and elect members of the owners’ executive committee. Pissler (n 1) 13 notes that this exception is also contained in the Manual of Instructions § 13.2 but is not limited to first purchasers.

⁴⁶ Property Code § 39 repeated in § 71.1.

⁴⁷ Property Code § 71.2.

⁴⁸ § 6.2.

⁴⁹ See Property Code § 82.

⁵⁰ 13.

The Property Code grants owners the right to institute court proceedings if their legal interests are infringed.⁵¹ This is normally subsidiary to an action granted to the general meeting and the owners' committee.⁵²

5.2 Duties of owners

The Property Code⁵³ obliges unit owners to comply with legislation, management rules and management agreements. It is left to the Real Estate Management Regulations⁵⁴ to enumerate certain specific duties, including the following: to abide by the management agreements and procedural rules for general meetings; to comply with the property management rules of the local district pertaining to public order and the protection of the environment and health in the use of facilities and installations; to implement the resolutions of the general meeting and the owners' committee; to abide by the state rules pertaining to reserve funds; and to timeously pay the charges for real estate services.

An owner cannot simply pass common expenses on to his tenant. The developer is liable to pay the fees in respect of units not yet transferred to purchasers.⁵⁵ The owners' committee must first notify a defaulting owner to pay the arrears within a fixed period; if unsuccessful, the manager (service providing firm) may start court proceedings.⁵⁶ In common with many other condominium statutes, an owner cannot escape his responsibilities by abandoning his right to use the common property.⁵⁷

5.3 Use of common property

Interestingly, the Interpretation on Apartment Ownership allows individual owners to make full use of common property such as roofs or external walls that are attached to their units, if the use is personal and not for profit and corresponds to the reasonable needs of the unit owner.⁵⁸ An example would be the use of the roof for erecting a satellite dish for TV reception.

The Interpretation,⁵⁹ however, does not allow use of the common property that contravenes the provisions of any legislation, legal norms, management agreements or general meeting resolutions⁶⁰ and results in the infringement of the lawful interests of other owners. Nevertheless, the court may declare a resolution that infringes an owner's legitimate interests, for example, a prohibition against using the roof for erecting a satellite dish, invalid.⁶¹

In the event of the unauthorised utilisation, disposal or alteration of parts of the common property, the Interpretation on Apartment Ownership allows unit owners to institute proceedings against the developer or other wrongdoers. The potential remedies include termination of the interference, the restoration of the previous condition, a confirmation of the illegality of the activity or compensation for damages suffered. In the case of unauthorised commercial use of the common property, the

⁵¹ § 83.2.2.

⁵² In terms of § 83.1.1. See Pissler (n 1) 20-21.

⁵³ § 83.1.

⁵⁴ § 7.

⁵⁵ Real Estate Management Regulations § 42.1 and 2.

⁵⁶ § 67.

⁵⁷ Property Code § 72.1.

⁵⁸ § 4.

⁵⁹ § 4.2.

⁶⁰ Property Code § 78.1.

⁶¹ § 78.2.

profits of the undertaking (less any reasonable expenses), must be paid into the reserve fund or used for another purpose as resolved by the general meeting.⁶² The same applies in the event of unauthorised utilisation, disposal or alteration of the common property in commercial schemes, unless consent for the activity concerned was obtained from the owners, the general meeting and the manager and the formalities required by the general meeting were complied with.⁶³

The Real Estate Management Regulations permit a change in the use of common rooms (for example, management offices) with the approval of the general meeting.⁶⁴ Under § 50 the change in use of common sporting and cultural facilities (such as primary schools within a large scheme) are only allowed under certain strict conditions.⁶⁵ This can be traced back to the fact that primary schools and clinics within a particular group of apartment buildings were made available to the members of work units within a housing estate. Once converted into a condominium these facilities were still open to the use of unit owners without being expressly designated as parts of the common property.⁶⁶

The Real Estate Management Regulations finally addressed the widespread developer practice of disposing of parts of the common property to management firms or other third parties before the first general meeting, or refusing to recognise certain parts of the scheme as part of the common property. For example, it is no longer possible for developers to sell parts of the external walls or the roof of the building for advertisement purposes.⁶⁷

5.4 Conversion of residential units into commercial spaces

The Property Code provides that the conversion of residential units into commercial units may not conflict with legislation, legal norms and management agreements, and may only be effected with the consent of all materially affected owners⁶⁸ who can prove that the value of their units or their quality of life could be affected adversely by the conversion.⁶⁹ If the conversion is effected without their consent, they may seek and can claim for damages.⁷⁰

5.5 Works on the common property

The Real Estate Management Regulations⁷¹ allow owners and managers to undertake excavations on roads and other common property in the following circumstances: if they only have a time-limited interest in the property concerned, if it is necessary for the proper maintenance of the building or it is in the public interest; and the approval of the owners' committee has been obtained. A period must be fixed for restoration of the land to its previous condition after completion of the works.⁷²

Utility providers that have completed maintenance works in relation to the respective installations are obliged to reinstate the affected property to its former

⁶² SC Interpretation on Apartment Ownership § 14.2.

⁶³ Real Estate Management Regulations § 55.

⁶⁴ § 38. See Pissler (n 1) 24-25.

⁶⁵ Real Estate Management Regulations § 50.2.

⁶⁶ See Pissler (n 1) 24-25 and 77.

⁶⁷ §§ 27 and 58.

⁶⁸ § 77.

⁶⁹ SC Interpretation on Apartment Ownership §§ 10 and 11.

⁷⁰ § 10 par 1; Pissler (n 1) 25-26 and 77-78.

⁷¹ §§ 51-53.

⁷² § 51.

condition without delay. There is no express requirement to obtain consent for such works.⁷³

Residential owners must inform the manager if they intend to decorate or extend their units. Managers must then explain which works are forbidden and any rules that must be observed.⁷⁴ Pissler suggests that the purpose of this provision is to prevent works that could adversely affect the interests of other owners or the public interest. For example such adverse effect may include excessive noise or damage to the constructive parts of the building.⁷⁵

5.6 Profits, liabilities and expenses

The Property Code allocates expenses and profits between owners on the basis of an agreement between the owners, or failing agreement in accordance with the size of an individual unit in proportion to the aggregate size of all the individual units in the building.⁷⁶ The Manual of Instructions provides that expenses pertaining to the general meeting and the owners' committee may be allocated in the above manner, or may be paid out of the income generated by the commercial use of common parts. Such income and expenses must be regularly announced in the district of the property management authority. The expenses are also supervised by the owners.⁷⁷ The generation and expenditure of such income is a frequent source of dispute.⁷⁸

Interestingly, the Real Estate Management Regulations provide that the local service providers and not the owners are liable for the maintenance, repair and operation of the pipes, ducts, equipment and installations for the provision of water, electricity, gas, heating, telecommunication or cable television.⁷⁹

5.7 Maintenance reserve fund

The Property Code provides that the owners may resolve to establish a reserve fund for the maintenance and repair of the building, lifts, water reservoirs and other commonly used facilities. The fund must be established for residential buildings with commonly used systems, facilities and installations and for non-residential buildings in mixed-use condominiums or non-residential building structurally connected to residential buildings.⁸⁰ The owners jointly own the fund and must be kept informed about the establishment and utilisation of the fund.⁸¹

Contributions to the reserve fund are determined by reference to the size of a particular unit in relation to the aggregate size of all the units in the condominium.⁸² The proportionate share of the first payment must cover between 5 and 8% of the local repair costs for the building and installations as determined by the relevant local building authority on and above county level.⁸³ This must be paid when the purchaser moves into the unit. A failure to pay prevents the developer from

⁷³ § 52.2.

⁷⁴ § 53.

⁷⁵ 27.

⁷⁶ Property Code § 80.

⁷⁷ § 42.

⁷⁸ Pissler (n 1) 28.

⁷⁹ § 52. See also General Reserve Fund Method § 25.2.

⁸⁰ General Reserve Fund Method § 6.

⁸¹ § 79.

⁸² §§ 20 and 21. The fact that the developer is responsible for charges with regard to unsold units is an incentive for developers to sell units as fast as possible. See Pissler (n 1) 81.

⁸³ General Reserve Fund Method § 7.

transferring the unit.⁸⁴ Further payments into the reserve fund must be made after a 30% reduction of the fund approved by a two-thirds majority resolution in number and share value determined according to the size of a particular unit.⁸⁵

Before the first general meeting the relevant local state department must open a special account for the maintenance fund at one of a number of designated commercial banks. After the first general meeting, the owners can apply for the transfer of the fund to a further special account opened on behalf of the general meeting.⁸⁶ The reserve fund accounts must be examined at least once a year by the owners' committee and the local authority concerned and certain particulars of the account must then be disclosed to the owners. A similar disclosure duty rests upon the bank towards the owners' committee and the local authority.⁸⁷

The reserve fund must be used only for the maintenance, repair, renovation and alteration of the common parts after the developer's warranty period for defects has expired. Even advance funding to cure a defect during this period is not permitted.⁸⁸ The fund must be utilised according to the principles of expediency, swiftness, transparency and fairness.⁸⁹ Direct payments of funds to the maintenance contractor must be authorised by the owners' committee or the local authority concerned.⁹⁰

The sums in the fund may be invested in government bonds on the primary market and must be kept until they become due. This investment requires the consent of the general meeting, and, if not yet established, the approval of two-thirds of the owners in number and share value. Reserve funds may not be used for certain forms of investment or as security for loans.⁹¹

In emergencies, the owners' committee or the local authority concerned may authorise funds to finance emergency measures to prevent serious damage to the condominium. In the case of delay, the relevant local authority may take the required measures and recover the expenses from the reserve fund.⁹² In the event that hidden dangers threaten the security of the condominium building and installations, the public interest or the lawful interests of other persons, an obligation is placed on owners, users and maintenance contractors to immediately put into operation measures for the maintenance, repair and efficient operation of the property concerned. If immediate measures are not taken by or at the behest of the owners, the relevant maintenance contractor may undertake the required measures and recover the expenses from the responsible persons.⁹³

The provisions pertaining to the reserve fund assume that the Chinese system does not envisage that residential buildings will last longer than the 70 years for which the land use rights for the condominium are granted. Unlike in other jurisdictions, the owners cannot therefore accumulate a reserve fund over time to raise funds to renovate substantial parts of the building such as the roof and windows.⁹⁴

⁸⁴ §§ 12 and 13.

⁸⁵ General Reserve Fund Method § 17.2 read with Property Code § 76.1.5 and § 76.2.

⁸⁶ §§ 10 and 15.

⁸⁷ §§ 30 and 31.

⁸⁸ § 18 read with § 25.1.

⁸⁹ § 19.

⁹⁰ §§ 22 and 23.

⁹¹ § 26.1, 2, 3 and 5.

⁹² § 24.

⁹³ § 56.

⁹⁴ Pissler (n 1) 81.

6 Management structure

6.1 General

Chinese law does not draw a clear distinction between the respective roles of individual owners, the community of owners and the general meeting in the management of the scheme.⁹⁵ Thus it is not clear whether the community of owners or the general meeting can instigate a change in the manner in which public buildings and commonly used facilities are utilised.⁹⁶ Similarly, it is uncertain whether the individual owners, the general meeting or the community of owners may institute judicial proceedings for wrongful damage to condominium property.⁹⁷ Again, we shall see that both the community of owners and the general meeting may adopt resolutions, but it is uncertain whether the resolutions of the former have the same significance as the latter.⁹⁸

6.2 Owners' executive committee and general meeting

Although Chinese law does not formally incorporate all unit owners into a management association, it recognises the same management organs as the South African legislature, namely the owners' general meeting as legislative organ of the community of owners and the owners' executive committee⁹⁹ as executive organ. However, while the Property Code instructs local authorities to encourage owners to form a general meeting and to elect an owners' committee, the formation of these management organs is not obligatory but optional. This contrasts to the position in other jurisdictions, including South Africa and Germany.¹⁰⁰ The Property Code expressly provides that the owners have the right to manage the condominium themselves.¹⁰¹

Pissler points out that the owners' executive board must not be equated with the German advisory council of owners (*Verwaltungsbeirat*), which is not an executive organ but merely advises and supervises the professional manager (*Verwalter*), who is the executive organ in German apartment ownership schemes.¹⁰² By contrast, the Chinese owners' executive committee, as the executive organ, must implement the resolutions of the general meeting and perform most of the other functions performed by a professional manager in Germany. In this regard the Chinese owners' executive board bears a close resemblance to the South African board of trustees.

The question of whether the general meeting and the owners' committee have legal personality remains unresolved. The lower people's courts have heard several cases in which the committee acted as plaintiff or defendant and some cases where the courts proceeded on the basis that the general meeting has *locus standi*. This is implicitly confirmed by the Interpretation on Apartment Ownership.¹⁰³ In terms of the Chinese Law on Civil Procedure¹⁰⁴ the owners can also institute court proceedings, either individually or as a group if their interests are infringed.¹⁰⁵

⁹⁵ Pissler (n 1) 77.

⁹⁶ Pissler (n 1) 24-25.

⁹⁷ Property Code § 83.2; Pissler (n 1) 20.

⁹⁸ Property Code § 76 .1; Pissler (n 1) 43, 77 and 79.

⁹⁹ Cf the South African board of trustees.

¹⁰⁰ § 75.1 and 2.

¹⁰¹ § 70.

¹⁰² See Pissler (n 1) 8.

¹⁰³ § 15.

¹⁰⁴ § 54.

¹⁰⁵ See Pissler (n 1) 8-9 and 76.

6.3 Manager (service provider) and developer

The Property Code provides that the owners must either manage the building and appurtenant installations themselves or appoint a manager (usually a management firm) to manage the scheme.¹⁰⁶ Self-management is encountered only in small schemes.¹⁰⁷ The Chinese manager is designated a “service provider” in order to remove the stigma typically associated with management firms. This bad reputation can be put down to historical instances of managers who abused their management powers. The role of the Chinese manager is very similar to that of the South African managing agent,¹⁰⁸ which is appointed by the general meeting under a contract of services.

Under Chinese law the developer (usually a limited liability company) puts in place the infrastructure and erects and divides the condominium building into apartment ownership units.¹⁰⁹ Typically, the developer cooperates with the local government authority responsible for the land use rights which belong to the central government. The commercial profits of the undertaking are shared between the developer and the state. Statistics show that the relationship between the Chinese developer and a management firm is very close. During the years 2006-2007, 70% of management firms employed in condominium schemes were subsidiaries of or otherwise affiliated to the developer. A subsidiary of the developer is usually appointed as the first manager of a scheme, and the resulting conflict of interests is regulated by several measures.¹¹⁰

Owners must conclude a management agreement,¹¹¹ which covers the following matters: it regulates the use and management of the property; protects owners’ interests; stipulates the obligations of the owners and their liability for breach of the management agreement; and regulates the creation, management and utilisation of a reserve fund, commercial enterprises on the common property and performance of the right of self-management.¹¹² Matters which affect the use of individual units (for example, the lease of units) or the freedom of individual owners (for example, a curfew preventing owners returning home after 11.00 pm), may not be included in the management agreement. The agreement, however, may prohibit the conversion of residential units into commercial units.¹¹³

The Real Estate Management Regulations require that the developer must prepare a provisional management agreement before the sale of the units to prospective purchasers. The agreement need not contain all of the above terms but may not infringe upon the legal interests of the purchasers.¹¹⁴ The developer is obliged to

¹⁰⁶ Property Code § 81. Pissler (n 1) 10 n 84 records that 50% of schemes in Shanghai and the provinces of Guangdong, Shandong and Liaoning are managed by outside management firms. In Shenzhen outside management amounts to 90%, consisting of more than 20 000 management firms employing more than 2.3 million persons.

¹⁰⁷ Pissler (n 1) 29-30.

¹⁰⁸ For the South African managing agent see Chen and Van der Merwe “Reflections on the role of the managing agent in South African and Chinese sectional title (condominium) legislation” 2009 *TSAR* 22-38.

¹⁰⁹ See Pissler (n 1) 10 n 85.

¹¹⁰ See Pissler (n 1) 10.

¹¹¹ Property Code § 76.1.2; Real Estate Management Regulations § 6.2.3. The agreement binds all owners: Property Code § 83.1; Real Estate Management Regulations § 7.1.

¹¹² Real Estate Management Regulations § 17; Manual of Instructions § 18.

¹¹³ Pissler (n 1) 31.

¹¹⁴ Real Estate Management Regulations § 22.

explain the terms of the agreement to prospective purchasers, and the latter must give a written undertaking that they will abide by its terms.¹¹⁵

7 General meeting

7.1 Introduction

From a German perspective it is surprising that the existence of a general meeting is not obligatory but *may* in terms of the Property Code be established by the owners.¹¹⁶ The general meeting (in its role as legislative organ) therefore does not come into existence automatically when the community of owners comes into being. It is possible that the building and property management institutions promoted this idea on the ground that their interest could be served best in a community of owners in which the owners are not represented directly. Due to the fact that the owners had little interest in establishing a general meeting, the Chinese government tried to solve the problem by facilitating its establishment prior to the sale of units and by permitting the owners themselves to undertake the functions of the general meeting.¹¹⁷

7.2 Preparation of the first general meeting

The Real Estate Management Regulations do make the establishment of a general meeting obligatory and place the onus on the relevant local authority to ensure that the owners establish the general meeting as legislative organ of the community.¹¹⁸ The Manual of Instructions provides that the developer must prepare the first general meeting when more than 50% of the total space in the building has been transferred to purchasers and must immediately hand over the required documents to the relevant local authority. The local authority must then within 60 days of receipt of a written application from the owners establish a group of persons to prepare the first general meeting. The group consists of representatives of the owners, the developer, the relevant local government street committee and the relevant condominium residents' committee. The total number of members of the preparation group must be an odd number (to avoid deadlock) and the owners must be represented by not less than half of the representatives. The chairperson of the group must be a representative from the relevant street committee or residents' committee.¹¹⁹ The owners' representatives must be chosen by the relevant street or residents' committee on the recommendation of the owners. If the owners are not satisfied with the composition of the preparation group, the issue must be resolved by negotiation with the relevant street or residents' committee. The owners themselves are thus denied the opportunity to raise the matter in court.¹²⁰

The preparatory group must confirm the number, identity and size of all the owners' units and specify the time, place, form and content of the first general meeting. It must further prepare a draft of the management agreement, the procedural rules of the meeting, legal rules pertaining to resolutions at the first meeting, and the method of nominating candidates for and the election of members of the owners' committee.

¹¹⁵ § 23.

¹¹⁶ § 79.1.

¹¹⁷ See Pissler (n 1) 78.

¹¹⁸ § 10. Pissler (n 1) 39 shows that this contradiction is well-nigh impossible to explain. Even the regulations do not require a general meeting in the case of relatively small schemes: § 10.2.

¹¹⁹ §§ 8-10.

¹²⁰ § 11. See also Pissler (n 1) 78.

This information must be displayed on notice boards at least fifteen days before the date scheduled for the meeting, and any questions must be answered by the preparatory group.¹²¹ The group must complete these actions within 90 days after its appointment and organise the first sitting of the general meeting.¹²²

7.3 Establishment

The general meeting is established once the management agreement is concluded, the procedural rules for the general meeting are approved and an owners' committee is elected at the first general meeting.¹²³ The general meeting consists of all the owners and purchasers who have entered into possession of their units. The function of the general meeting is to represent and protect the lawful management interests of its members and fulfil its obligations under the regulations.¹²⁴

7.4 Agenda of the general meeting

The establishment of the general meeting is contingent on the adoption of procedural rules. In terms of the Manual of Instructions the procedural rules must regulate the following matters: the designation of the general meeting and the management area over which it has jurisdiction; the functions and procedural rules of the owners' committee; the form, time and method by which the meeting must be convened; the voting rights of the owners; representation of owners by proxies; procedures for the adoption of resolutions; the terms of appointment of members of the owners' committee (for example the number on the committee and their period of office); the procedure by which additional members are elected; the manner in which expenses pertaining to the general meeting and owners' committee are collected and discharged; and rules with regard to the official seal of the general meeting and the owners' committee.¹²⁵ The practice text-books contain examples of these procedural rules.

7.5 Meetings

The Real Estate Management Regulations make provision for ordinary and special general meetings to be convened by the owners' committee. Ordinary meetings are convened in accordance with procedural rules.¹²⁶ Special general meetings must be convened when requested by at least 20% of the owners.¹²⁷ The Manual of Instructions also makes provision for emergency meetings when urgent matters must be attended to swiftly. The management agreement or the procedural rules may provide for further situation in which a special general meeting will take place. Finally, a special general meeting can be called when the term of more than half of the original members of the owners' committee is terminated before expiration of their term of office.¹²⁸ In the event that the owners' committee does not organise a special general meeting, if required to do so, the local government street authority may fix a period for convening the meeting. After expiry of the period set by the

¹²¹ § 12.

¹²² § 15.

¹²³ Real Estate Management Regulations § 8.

¹²⁴ § 15.2.

¹²⁵ § 19.

¹²⁶ §§ 13.1 and 2.1 and 21.2.

¹²⁷ § 13.2.

¹²⁸ § 21.3 and 46.3.

street authority, the residents' committee must organise the meeting under the guidance and control of the street authority.¹²⁹

All owners must be notified of meetings at least fifteen days prior to the meeting.¹³⁰ Generally the notice should specify the place, date and agenda of the meeting. However, the regulations are silent about the consequences for failing to do this.

A quorum consists of more than half of the members in number and value – value being allotted in accordance with the co-ownership shares within the building.¹³¹ The binding force of this quorum, however, appears questionable, since it is not clear what the legal consequences are if the meeting is not quorate.¹³²

Owners need not attend meetings in person, and may authorise proxies to represent them at general meetings.¹³³ Interestingly, the manual provides that in relatively large condominiums, the residents of a wing or storey may elect a representative to participate in the meeting. In such a case the voting procedure and the manner in which resolutions are adopted must be regulated in the procedural rules.¹³⁴ The manual also allows the owners to delegate their authority by written mandate to other specific owners to manage the scheme for a fixed period of time.¹³⁵ Although further particulars about the scope of such mandate can be gathered from the procedural rules, it is unclear whether further general meetings need to be held.¹³⁶

The Real Estate Management Regulations provide that a meeting can take the form of collective discussions or the collection of written decisions.¹³⁷ This indicates that no great importance is attached to active debates at general meetings.¹³⁸ If the meeting consists of the collection of written opinions, the Manual of Instructions requires that the document containing the motion must be delivered to every owner or posted on the notice board of the condominium. The document must be signed personally by every owner who votes in favour of the motion.¹³⁹

7.6 Resolutions

Under the Property Code the following matters may be put to vote at a general meeting: the addition or amendment of procedural rules pertaining to general meetings and the management agreement; the election and replacement of members of the owners' committee; the appointment and dismissal of managers; the collection of funds for the maintenance reserve fund and the utilisation of the fund; alterations and improvements to the building and related facilities; and other important matters pertaining to the common property and the management of the scheme. These resolutions require a majority of 50% in number and share value except for matters pertaining to the reserve fund and alterations and improvements of the building which require a majority of two-thirds of the owners in number and share value.¹⁴⁰

The Interpretation of 2009 explains that "other important matters" may include a change in the manner of use of the common property; the use of the common

¹²⁹ Manual of Instructions § 51. See Pissler (n 1) 41 and 78.

¹³⁰ Real Estate Management Regulations § 14.1.

¹³¹ Real Estate Management Regulations § 12.1.

¹³² See Pissler (n 1) 41 and 79.

¹³³ § 12 par 2 and Manual of Instructions § 26 par 1; Pissler (n 1) 42 and 79.

¹³⁴ § 27.

¹³⁵ § 28.

¹³⁶ Pissler (n 1) 42-43 and 79.

¹³⁷ § 12.1.

¹³⁸ Pissler (n 1) 79.

¹³⁹ § 22.2.

¹⁴⁰ § 76.1 and 2. Under § 78 resolutions are binding on the owners.

property for commercial purposes; the disposal of common property; and matters on which the owners are required to decide upon by law or in terms of the management agreement.¹⁴¹ The Manual of Instructions includes measures aimed at ensuring an adequate standard of management services and the collection of contributions to pay for these services. The division or utilisation of the income generated by the commercial use of the common property is also dealt with.¹⁴² A simple majority resolution is required for these matters.¹⁴³

The question as to whether the vote of abstainers is taken into account is regulated in the management agreement or the procedural rules.¹⁴⁴

The owners' committee must take minutes of the general meeting¹⁴⁵ and retain them in safe custody.¹⁴⁶ Resolutions adopted at the meeting must immediately be made public in written form and displayed within the condominium.¹⁴⁷ The Property Code provides that resolutions of the general meeting are binding.¹⁴⁸

7.7 Calculation of votes

The SC Interpretation of 2009 stipulates that votes by share value are calculated in proportion to the size of each unit as registered in the land register; the size of unregistered units as measured by the relevant building authority, and if not yet measured, by its provisional size as indicated in the contract of sale. The total size of the building is the aggregate sum of all the individual units.¹⁴⁹

Under the Interpretation the number of owners is determined according to the number of units in the building. Owners have one vote per unit. Units not sold or sold but not transferred by the developer and more than one unit bought by the same purchaser are afforded the status of one unit.¹⁵⁰ Co-owners must specify which person can exercise the vote of a unit and legal representatives must exercise the vote of owners like infants who do not have legal capacity.¹⁵¹

The Manual of Instructions provides that the procedural management rules must, if necessary, specify whether particular areas such as parking spaces or business stands are considered units for the calculation of the total number of owners.¹⁵²

7.8 Challenge of resolutions

Owners are entitled to go to court to seek annulment of resolutions which infringe upon their lawful interests,¹⁵³ or in the event that a resolution contravenes the procedural rules¹⁵⁴ (on the basis that the resolution breaches the quorum requirement).¹⁵⁵ Any owner can challenge a resolution within a year from the day he or she knew or

¹⁴¹ § 7.

¹⁴² § 17.

¹⁴³ § 29.

¹⁴⁴ Manual of Instructions § 26.2.

¹⁴⁵ Real Estate Management Regulations § 14.3.

¹⁴⁶ Manual of Instructions § 30.1.

¹⁴⁷ § 30.2.

¹⁴⁸ § 78.

¹⁴⁹ § 8.

¹⁵⁰ § 9.

¹⁵¹ Manual of Instructions § 25.3.

¹⁵² § 25.1.

¹⁵³ Property Code § 78.2.

¹⁵⁴ § 12.

¹⁵⁵ See Pissler (n 1) 46.

ought to have known about the resolution.¹⁵⁶ In this way the legislation also protects owners who bought units for investment purposes without actually moving into their units.¹⁵⁷ Importantly, the relevant local authority is also entitled to annul unlawful resolutions,¹⁵⁸ thereby avoiding any potential “floodgates” issues and helping to prevent excessive money wasted in courts.

Legal uncertainty exists with regard to the non-time-limited right of the owners to challenge resolutions¹⁵⁹ and on the generally non-time-limited capacity of the responsible executive organ to annul resolutions.¹⁶⁰

7.9 Judicial proceedings

The general meeting and the owners’ committee are entitled in terms of the Property Code, the management agreement and the procedural rules to institute court proceedings for an injunction and damages against a number of crimes. These include intentional deposit of waste; excessive noise and littering; the unlawful keeping of pets; illegal constructions; unlawful obstacles in corridors; refusal to pay property charges and any other activity which may infringe upon the interests of others.¹⁶¹ The Interpretation adds the following unlawful acts against statutes, legal norms, central state standards, the management agreement, and valid resolutions of the general meeting or the owners’ committee: damage to the structure of the building; damage to or illegal utilisation of electricity, gas or fire-fighting facilities; the storage of dangerous or combustible matter which can endanger the security of the building or impede the ordinary use of the building; unlawful activities which destroy or alter the surface of the external walls; damage to the building by paint or other graffiti; decorative and enlargement activities undertaken against legal norms; unlawful building extensions and modifications; and unlawful occupation of public corridors, roads and spaces or other parts of the common property.¹⁶² These court proceedings are not limited to the general meeting, but may in appropriate circumstances be instituted by individual owners, occupiers of a unit, managers and the developer.¹⁶³

The manual finally provides that the general meeting may suspend the right of individual owners to participate in the management of the scheme and voting at general meetings if they refuse to pay management charges, contribute to the maintenance reserve fund or undertake other activities which infringe upon the common legal interests of owners.¹⁶⁴

[to be concluded]

¹⁵⁶ Interpretation § 12

¹⁵⁷ Pissler (n 1) 46-47.

¹⁵⁸ Pissler (n 1) 47.

¹⁵⁹ Pissler (n 1) 46.

¹⁶⁰ Pissler (n 1) 67-68 80.

¹⁶¹ Property Code § 83.2.1.

¹⁶² § 15. See also Manual of Instructions § 5.

¹⁶³ Interpretation § 15.

¹⁶⁴ § 20.