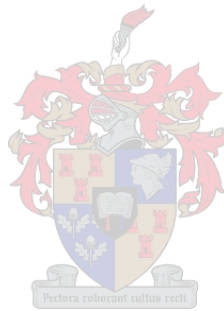


**A UNIFORM CONDOMINIUM STATUTE FOR  
CHINA BASED ON A COMPARATIVE STUDY OF  
THE SOUTH AFRICAN SECTIONAL TITLES ACT  
AND AMERICAN UNIFORM COMMON  
INTEREST OWNERSHIP ACT**

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Dissertation presented for the Degree of Doctor of Law  
at Stellenbosch University

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December 2008

## **Declaration**

By submitting this dissertation electronically, I declare that the entirety of the work contained therein is my own, original work, that I am the owner of the copyright thereof (unless to the extent explicitly otherwise stated) and that I have not previously in its entirety or in part submitted it for obtaining any qualification.

**Date:** 1 September 2008

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philosopher said: “there are talents and people who can identify talents in this world. But it is often the case that there are many talents while very few of them can be identified by more talented judges.” (世有伯乐，然后有千里马。千里马常有，而伯乐不常有) Although I cannot exaggerate myself to be a talent, Professor Masson surely belongs to the rare cohort of talent-connoisseurs.

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## Summary

The objective of this study is to examine the significance of introducing and strengthening apartment ownership in China. The research aims to explore and scrutinize various apartment ownership options from selected jurisdictions in order to provide a framework for similar legislation in China. Hence, the research seeks to provide a legislative framework for a uniform condominium statute by closely examining the South African Sectional Titles Act and the American Uniform Common Interest Ownership Act. This comparative study will help to establish a uniform condominium statute suitable to the Chinese national character and compatible with the pace of the country's economic development.

The thesis is organized into seven chapters. The first chapter explains the research topic, theoretical basis of the thesis, and research methodology. Moreover, in this chapter the historical background and status quo of Chinese condominium institution are also illustrated.

Following this introduction, Chapter Two explores the theoretical structure of condominium ownership. It depicts the legislative innovation arising from its *sui generis* features and explains the objects of condominium ownership on the basis of its unique definition.

In Chapter Three, a wide spectrum of provisions is identified pertaining to the creation of condominium in China with reference to South African and American acts. Specifically, it observes the requirements for land intended for subdivision and the buildings that comprise a condominium project. It is highlighted that a condominium's constitutive document is unregulated in China. Moreover, the characteristic Chinese land registration procedure is also presented.

Chapter Four demonstrates the significance of the participation quota and analyzes the advantages and disadvantages of different participation quota calculating methods. Chapter Five emphasizes that inherent in the condominium living is the

interdependence of interests among unit owners. Consequently, this chapter focuses on condominium owners' use and enjoyment of their apartments and the common property.

Chapter Six elaborates on condominium management. This chapter examines the management body, the general meeting, the executive council and the managing agent. It concludes that having a well-structured management body is essential since a condominium community cannot function efficiently without a management association to represent all of the owners and to handle day-to-day operations.

The last chapter concludes that China needs to enact a uniform condominium to protect private interests within the condominium context.

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# CHAPTER 1

## INTRODUCTION

### 1 1 THE NEED FOR A UNIFORM CONDOMINIUM STATUTE IN CHINA

China has a unique political and economic system meshing Marxism and a market economy. The country currently finds itself in the midst of an all-encompassing and in-depth economic and political reform. Many observers believe that China's legal reform is downright sluggish.<sup>1</sup> In fact, the current Chinese legal system is not reconcilable with its fast-growing economy. A powerful economy can only be achieved with a corresponding impartial and efficient legal system.<sup>2</sup> Hence, expediting legislative development and reform is necessary and the prospects for such reform appear promising.

The clear definition of property rights is already a legislative concern in China, because the property system is being transformed by both the state's commitment and Parliament's activities.<sup>3</sup> Nevertheless, China is still in the shadows, for it has no

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1 See Liang Huixing *Struggle for a Chinese Civil Code* 10-15 (Chinese version); Lubman *Bird in a Cage, Legal Reform in China after Mao* 22-30; Peerenboom *China's Long March towards Rule of Law* 144-169; Zhou Yongkun "Ten Dilemmas of the Modernity of Chinese Law" 2006 (6) *Legal Science Monthly* 77. (Chinese version)

2 Oi & Walder "Property Rights in the Chinese Economy: Contours of the Process of Change" in Oi & Walder (eds) *Property Rights and Economic Reform in China* 1-3.

3 The Working Report of the 16th CCP National People's Congress has indicated the state's commitment, as a matter of policy, to the formalization of property rights through special laws, see Report to the 16th National Congress of the Chinese Communist Party titled "Build a Well-off Society in an All-round Way and Create New Situations in Building Socialism with Chinese Characteristics". Online: [http://english.people.com.cn/200211/18/eng20021118\\_106983.shtml](http://english.people.com.cn/200211/18/eng20021118_106983.shtml). [2008.2.20]. Additionally,

uniform condominium act in spite of a fast-growing real estate market and the increasingly popularity of condominiums. Even though apartments are the dominant form of housing in China today, it is still largely unregulated. Hence it is increasingly becoming a source of disputes in China. As a matter of necessity, therefore, apartment ownership should be improved and strengthened.

The question that lies at the heart of this research relates to the apartment ownership structure most suitable for an emerging Chinese private property market. The research is based on the supposition that there is a dire need for a uniform set of rules governing apartment ownership in China, particularly in view of recent economic developments. The purpose of the study is to provide a starting point to introduce, strengthen and increase apartment ownership in China. The main objective of the research is to scrutinize apartment ownership options from selected jurisdictions in order to provide a framework for similar legislation in China. Hence, the research seeks to provide an exemplary foundation for a uniform condominium statute by closely examining the South African *Sectional Titles Act* and the American *Uniform Common Interest Ownership Act*. This comparative study will help to establish a uniform condominium statute suitable to the Chinese national character and compatible with the pace of the country's economic development.

## **1 2 BACKGROUND INFORMATION**

The concept known in different jurisdictions as condominium, apartment ownership, strata titles or sectional titles, is a unique legal institution with three components, namely: (1) individual ownership of an apartment, (2) joint ownership of the common property and (3) membership in an incorporated or unincorporated owners' association.<sup>4</sup> Condominium law encompasses both the law of property and the law of

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the constitutional amendments of March 2004 elevate private property rights to a level deserving better protection. See n 30 *infra*.

<sup>4</sup> Van der Merwe *Apartment Ownership* 23.

associations.

Apartment ownership is a legal phenomenon with a long history dating to the ancient Oriental legal systems in existence more than a thousand years before the Christian era.<sup>5</sup> Surprisingly, even though it is the main representative of the oriental legal system, today China has no specific uniform condominium act. This is particularly surprising in light of the country's booming economy and flourishing real estate development market. A brief survey of the historical reasons and current legal and economic conditions may provide some insights.

## 1 2 1 Historical Background

The Chinese *Civil Code* (1929-1931) recognized the concept of condominium in two relevant articles.<sup>6</sup> While article 799 dealt in principle with the cost of maintenance and repairs, article 800 drew on customary Chinese law and stated that an apartment owner had no exclusive use right of the main gate or entrance of his/her multi-unit building belonging to all the owners unless local customs or specific agreements allowed the owner to do so.<sup>7</sup> The earlier Chinese condominium legislation seems to have adopted a minimalist approach and left much of the regulation of life in a condominium complex to the owners themselves. This corresponds with articles 234 and 235 of the Japanese *Civil Code* and is somewhat like an older version of article 664 of the French *Civil Code*.<sup>8</sup> Although these provisions are unsophisticated and inchoate, they are significant

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5 Pappulias "Zur Geschichte der Superficies und des Stockwerkeigentums" 1906 (27) *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte Romanistische Abteilung* 363-364.

6 The Chinese *Civil Code* (1929-1931) is still applicable in Taiwan despite numerous amendments since its enactment. See Wang Zhenmin "The Roman Law Tradition and Its Future Development in China" 2006 (1) *Frontier Law China* 76.

7 Wang Tez-chien *Law of Things: Part 1 General Principles and Ownership* 238-240. (Chinese version)

8 Art 664 of *Code Napoléon* (older version) provides as follows: "Lorsque les différents étages d'une maison appartiennent à divers propriétaires, si les titres de propriété ne règlent pas le mode de réparations et reconstructions elles doivent être faites ainsi qu'il suit: Les gros murs et le toit sont à la charge de tous les propriétaires, chacun en proportion de la valeur de l'étage qui lui appartient. Le

in introducing and stimulating the concept of modern apartment ownership by clarifying the rights and duties of apartment owners in respect of the common property.

Since the People's Republic of China (PRC) was founded in 1949, social, political and economic conditions have been substantially altered. The law in general and property law in particular have been repealed without being replaced.<sup>9</sup> All land is owned by either the state in urban areas or is owned collectively in rural areas.<sup>10</sup> Until 1988, the fundamental rule pertaining to all land in China was that there were no individual rights in land and no private ownership of land.<sup>11</sup> The burden of government to provide enough housing for its citizens was seriously challenged by gradual urbanization and an exploding population.<sup>12</sup> To release the tremendous financial burden imposed on the government to supply housing, in 1988 China embarked on a new economic policy based on the advance of wealth through realizing housing marketization.<sup>13</sup> With this new economic policy, China amended its Constitution in order to recognize privately owned transferable land use rights.<sup>14</sup> This constitutional amendment was far-reaching since it allowed the creation and extensive use of a new

---

propriétaire du premier étage fait l'escalier qui y conduit; le propriétaire du second étage fait, à partir du premier, l'escalier qui conduit chez lui, et ainsi de suite." See also Cao Jie Law of Things in Chinese Civil Law 60; Chen Huabin Study on Modern Condominium Ownership 57-58. (Chinese version)

9 Wang Zhenmin "The Roman Law Tradition and Its Future Development in China" 73-76.

10 Randolph & Lou *Chinese Real Estate Law* 3-10.

11 Ho & Lin "Emerging Land Markets in Rural and Urban China: Policies and Practices" 2003 *The China Quarterly* 681-682; Wang & Murie "The Process of Commercialisation of Urban Housing in China" 1996 (33) *Urban Studies* 971-989; Wang Xiaoli *Land Law* 22. (Chinese version)

12 Kremzner "Managing Urban Land in China: The Emerging Legal Framework and Its Role in Development" 1998 (7) *Pac Rim L & Pol'y J* 611-622.

13 In 1988 the State Council embarked on a staged housing reform by adopting a Scheme of National Housing Reform in Urban Areas. This stimulated the government's initial efforts and provided a ten-year blueprint to expedite the commercialization of residential property and reduce state subsidies of housing. See further, Lee "From Welfare Housing to Home Ownership: The Dilemma of China's Housing Reform" 2000 (15) *Housing Studies* 66.

14 The commercialization of land-use rights was first tried in Shenzhen on 9 September 1987 and was formally adopted when Article 10 of the *Constitution* was amended on 12 April 1988 to permit the assignment of the right to use land. See further Ho & Lin "Emerging Land Markets in Rural and Urban China: Policies and Practices" 2003 *The China Quarterly* 686.



form of land-use right.<sup>15</sup> The recognition of this land-use right generated a building construction boom and an unprecedented level of commercial dealings in real estate and housing particularly in the condominium industry.<sup>16</sup>

However, while the state-owned land is beginning to be commercially transferable, the predominance of public housing was still characterized as a form of socialist well-being. Hence, China's lawmakers seldom paid attention to condominium legislation in that period.<sup>17</sup> Then in 1994, the State Council adopted a groundbreaking housing reform policy nationwide by issuing the *Decision on Furthering Housing Reform in Urban Areas*.<sup>18</sup> The privatization and commercialization of the housing market has helped to relieve the government of the responsibilities for maintaining and managing buildings that were originally built to accommodate state employees as one of their major social benefits.<sup>19</sup> However, housing privatization usually proceeded without a proper legislative and institutional framework and therefore created many difficulties.<sup>20</sup>

## 1 2 2 Current Situation

It is clear that the non-market/welfare housing era in China is coming to an end. However, government-driven conversions to condominium buildings have been

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15 The amended *Constitution* of 1988 states: "the right to use land may be transferred according to law." Soon thereafter, article 2 of the *Land Administration Law* was revised stipulating that "the right to use State owned or collectively owned land may be assigned pursuant to the law."

16 Selden & Lu "The Reform of Landownership and the Political Economy of Contemporary China" in Selden (ed) *The Political Economy of Chinese Development* 187-205.

17 Xia Shansheng *Property Management Law* 8. (Chinese version)

18 The *Decision on Furthering Housing Reform in Urban Areas of 1994*, issued by the State Council.

19 Lee "From Welfare Housing to Home Ownership: The Dilemma of China's Housing Reform" 61-76.

20 Chen Limei "Management of Sold Public Housing in Urban China: A Case Study of Railway New Estate, Shanghai" paper presented at the ENHR conference "Housing in an Expanding Europe: Theory, Policy, Participation and Implementation" Ljubljana, Slovenia 2 -5 July 2006.

fraught with problems.<sup>21</sup> Chinese lawmakers were not much concerned about the property management issues until 1998 when a departmental rule was issued pertaining to management of privatized public housing.<sup>22</sup> By now, every province in China and most cities have their own incomplete condominium regulations. While this absence of a uniform statute has created a great amount of flexibility, it has also led to divergent and inconsistent local standards and in some cases a flaunting of the law that has dramatically slowed the pace of legal reform.<sup>23</sup> A related issue is that local and provincial authorities seem only to be concerned about economic viability and real estate development.<sup>24</sup> These authorities pay little or no attention to reforming and updating their condominium regulations, and instead they often circumvent national planning and land administration laws in order to stimulate the local real estate market.<sup>25</sup> For instance, some local governments indulge the developers by permitting them to sell roof-gardens to top floor unit buyers as annexes where there

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21 Zhou Wenguo & Han Guobo “Problems and Counter-measures in Current Development of Chinese Property Management” 2004 (6) *Construction Management Modernization* 56. (Chinese version)

22 The *Measures on Management of Maintenance Fund for Fixtures and Fittings in Housing Common Areas of 1998*, issued jointly by the Ministry of Construction and the Ministry of Finance of PRC.

23 Chinese local authorities often creatively interpret the economic policies of the central government in order to improve their own districts’ economic development. This results in a phenomenon that different areas have a relatively different interpretation of central policies. Inconsistent and divergent local rules put Chinese legal reform at peril. This can be called “local protectionism”. See Zhu Suli “‘Federalism’ in Contemporary China—A Reflection on the Allocation of Power between Central and Local Government” 2003 (7) *Singapore Journal of International and Comparative Law* 1-14.

24 Yi Xianrong “The Developers and Local Governments Jointly Stimulate the High Price of Real Estate in China” Xinhua News online: <http://news.xinhuanet.com/house/2005-12/27/> [2007.12.18]; Jia Hao & Lin Zhimin *Changing Central-local Relations in China: Reform and State Capacity* 30-37. (Chinese version)

25 Ho “Who Owns China’s Land? Policies, Property Rights and Deliberate Institutional Ambiguity” 2001 *The China Quarterly* 403-404. In this article, Ho cogently enquired who represents the state in light of confrontation between different state institutions on ownership disputes; see also Huang Mei & He Fenglun “Be Cautious! Local Governments’ Circumvention Response to the Central Government’s New Controlling Policy on Real Estate Market” Xinhua News online: [http://news.xinhuanet.com/house/2006-08/22/content\\_4990916.htm](http://news.xinhuanet.com/house/2006-08/22/content_4990916.htm) [2007.10.28]. (Chinese version)

are no pertinent local provisions.<sup>26</sup> Consequently, local condominium rules have lagged despite a booming market and flourishing housing schemes.<sup>27</sup>

Nevertheless, the most recent constitutional amendments of March 2004 protect private property on an equal legal footing with state-owned property.<sup>28</sup> This symbolic milestone is a constitutional signpost for the promulgation of special laws relating to property, including a uniform condominium statute.<sup>29</sup> Particularly noteworthy is that the newly enacted Property Code is another catalyst for the formalization of condominium law. It sets up a separate chapter on condominium ownership.<sup>30</sup> Hence, the hypothesis of this research is that China needs a uniform Condominium Act to keep pace with a booming economy and flourishing real estate market.

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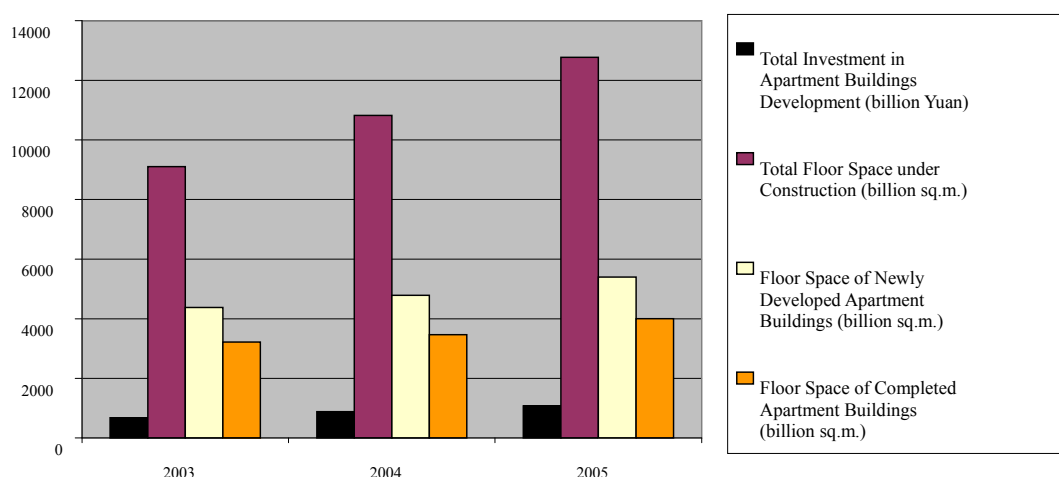
26 Liu Kai “Entitlement of Common Property of Condominiums” 2007 (167) *Law Science Magazine* 127. (Chinese version)

27 Chen Su “Study on Condominium Ownership” 1990 (5) *Legal Studies* 47; Duan Qiwu “The Study of Apartment Ownership” in Liang Huixing (ed) *Essays on Civil Law* 223. (Chinese version)

28 Liu Baoyü “Combination of The Categorization of Ownership and The Principle of Equal Protection—A Basic Thought on Framework of Ownership Chapter of Proposed Property Code” 2005 (23) *Wuhan University Law Review* 97. Wang Liming “The Constitution and the Protection of Private Property” 2004 (25) *Law Science Magazine* 9-12. (Chinese version)

29 Miao Lianying “Safeguarding Constitutionalism in a Harmonious Society” 2006 (24) *Wuhan University Law Review* 10. (Chinese version)

30 The long-awaited *Chinese Property Code* has been passed by the National People’s Congress on 16 March 2007. The main purpose of the property code is to define and specify property rights in detail and to improve the protection of private property rights. The final text of the property code consists of 5 sections, 19 chapters and totals 247 articles. See Chen Lei “The New Chinese Property Code: A Giant Step Forward?” 2007 (11) *Electronic Journal of Comparative Law*. Online: <http://www.ejcl.org/112/abs112-2.html>.



(Note: (1) Yuan: Chinese currency, also CNY.; (2) sq.m. means square meter)<sup>31</sup>

The above chart demonstrates that quite recently, the yearly growth of condominiums’ development in China is soaring, which renders condominiums the main type of tenure in China’s urban areas.<sup>32</sup> Since the latest statistics for years 2006 and 2007 are not yet published, the chart only provides data available from 2002 to 2005. The chart also indicates that one of the most striking hallmarks of China’s economic development is the vast number of residential condominiums throughout the country.

## 1 3 THEORETICAL BASIS OF THE RESEARCH

It is widely believed that well-functioning legal institutions and a government bound by the rule of law are important to economic and political development.<sup>33</sup>

31 Source from: *Chinese Centaline Property Red Book 10*. (Chinese version) On February 29, 2008 the Yuan traded at 7.105 yuan per U.S. dollar. See [www.xe.com](http://www.xe.com).

32 Wang & Murie *Housing Policy and Practice in China* 86-98.

33 There is abundant literature on property right formalization and the causal relationship between legal formalization and economic development. The following literature deals with the legal, economic, anthropological, and sociological perspectives; Demsetz “Toward a Theory of Property Rights” 1967 (62) *American Economic Review* 347-359; Diermeyer, Ericson, Frye & Lewis “Credible Commitment and Property Rights: the Role of Strategic Interaction between Political and Economic Actors” in Weimer (ed) *The Political Economy of Property Rights: Institutional Change and Credibility in the*

Consequently, practitioners in the development field have turned increasing attention to reforms intended to improve legal institutions. The best-known relationship between legal institutions and development is Max Weber's theory. He demonstrated that "the universal predominance of the market consociation requires... a legal system, the functioning of which is calculable in accordance with national rules".<sup>34</sup> Trubek, one of the Law and Development movement's torch bearers advanced the view that the modern legal system, including contract and private property rights, can promote the development of markets, and hence economic growth.<sup>35</sup> North also asserts that an efficient judicial system has been the crucial underpinning of successful modern economic growth.<sup>36</sup>

The legal deficiency in China, in particular the lack of sufficient legal institutions, hampers sustained economic development and potential political reform. This is underscored by De Soto's work: based on the amalgamation of development theory, western property law and institutional economics theory, De Soto pointed out that developing countries should set up an equitable and accessible institutional system in order to achieve economic development.<sup>37</sup> In making this point, he maintained that the fundamental obstruction to economic growth in developing countries is the lack of a uniform law which would allow such assets to function as capital, i.e., the lack of a

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*Reform of Centrally Planned Economies* 19-21; Hann "The Embeddedness of Property" in Hann (ed) *Property Relations: Renewing the Anthropological Tradition* 18; Murrell "Can Neoclassical Economics Underpin the Reform of Centrally Planned Economies?" 1991 (5) *Journal of Economic Perspectives* 59-76; Wolf "Institutions and Economic Development" 1955 (45) *American Economic Review* 867-883.

34 Weber *The Protestant Ethic and the Spirit of Capitalism* translated by Talcott 22-28.

35 Trubek "Toward a Social Theory of Law: An Essay on the Study of Law and Development" 1972 (82) *Yale L J* 46.

36 North *Institutions, Institutional Change and Economic Performance* 35.

37 De Soto *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* 163. De Soto argues that "[w]ithout an integrated formal property system, a modern market economy is inconceivable." He also maintains that the formalized property system should be made accessible to all, thus restricting and diminishing adverse influences of the "extralegal sectors".

“unified property system”.<sup>38</sup> He continues to claim that the solution to incomplete property systems is to incorporate those property systems which already exist in the informal sectors into the official one, to create a “unified property system”.<sup>39</sup> The simplest but the most efficient way is by legislation. Without a well-functioning property law, the society cannot accomplish any kind of development in a sustainable manner. In the wake of this theory, it is necessary to facilitate the development of new types of property rights in China. This theory underlines that today, legislators, legal practitioners and condominium owners need more than governmental policies and a mish-mash of divergent local norms. They need legal certainty provided by a uniform set of laws.

Kennedy, complementing De Soto’s approach, cautiously suggested that the revived law and development theory should focus attention on economic assumptions and political choices embedded in policy-making.<sup>40</sup> The traditional assumption leaching the political intervention from the development process must be avoided.<sup>41</sup> With the emergence of a market economy, China, a Communist state, increasingly recognizes individual interests in immovable property. On the basis of what Kennedy pointed out, China must tone down public power and distribute more private interests, wealth and status to people. From the Chinese government’s perspective, respecting property rights, emphasizing that policy decisions must be accounted for and maintaining state intervention for good governance are indispensable for sustainable development.<sup>42</sup> In the light of both De Soto’s theory and Kennedy’s critique, one can conclude that legislation is a precisely reliable tool for distributing power to individuals and thus an

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38 De Soto *The Mystery of Capital* 61-66. De Soto cogently pointed out that capital is not created by money, but “by people whose property system helps them to cooperate and think about how they can get the assets they accumulate to deploy additional production.”

39 De Soto *The Mystery of Capital* 52-54.

40 Kennedy “Laws and Developments” in Hatchard & Perry-Kessaris (eds) *Law and Development: Facing Complexity in the 21st Century* 17-19.

41 Kennedy “Laws and Developments” 20-25.

42 Seidman & Seidman *State Law in the Development Process* 5-22.

efficient resolution to the problem of a lack of legal institutions, which cannot be left to good conscience, informal rules or traditional civil customs.<sup>43</sup> As far as the institution of condominium is concerned, without a specialized and uniform condominium act there is the risk that private property rights will be disregarded.<sup>44</sup> Moreover, apartment ownership is thwarted by inconsistent provincial, municipal and local norms, which now awkwardly twist and hinder the Chinese condominium system.<sup>45</sup> A set of rules recognizing and defining the rights of individual apartment owners in a commonly owned building along with enforcement mechanisms and supporting organizations is vital, therefore, for sustainable growth of the market economy in general and the Chinese real estate market in particular.

The way to achieve sustainable development, which was for a long time an essential epistemological component of the theory of law and development, retains its importance. Recognizing that institutional law is central to development, this study will not merely explore the options that enhance the protection of private property, but also promote wider access to homeownership in China.

## **1 4 RESEARCH METHODOLOGY**

This study proposes to identify unexpected sources of risk for condominium owners in China. In addition, the study will present means of reducing these risks for future Chinese condominium legislation by making legal comparisons of apartment ownership legislation in some jurisdictions and identifying elements which most

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43 Keith *China's Struggle for the Rule of Law* 137-141; Ostrom *Governing the Commons: The Evolution of Institutions for Collective Action* 15-20; Clarke "Economic Development and the Rights Hypothesis: The China Problem" 2003 (51) *Am J Comp L* 111.

44 Wang Xiaoxia "The Intensifying Condominium Disputes Call For Institutional Revolution" *China Economic Times* 2005. 11.23. (Chinese version)

45 For an insightful comment on conflicts and incompatibilities between local rules in Chinese law, see Dicks "Compartmentalized and Judicial Restraint: An Inductive View of Some Jurisdictional Barriers to Reform" in Lubman (ed) *China's Legal Reforms* 90; Cui Jianyuan *Research on Chinese Real Estate Law* 45. (Chinese version)

favorably might be translated into Chinese law.

In this thesis, the *Uniform Common Interest Ownership Act* of the United States of America (hereafter the UCIOA) and the *Sectional Titles Act* of South Africa (hereafter the STA) are the chosen comparative entities for the potential Chinese condominium legislation.<sup>46</sup> There are several reasons for this choice. While the Chinese condominium system is relatively youthful, its American counterpart appears to have reached a comfortable middle age. Despite apparent differences in the two, such as those between Chinese socialist property values and American capitalist values, the primary reason why it is worthwhile to make a comparison is that in both China and the United States provincial and state governments respectively have different norms regarding condominium schemes.<sup>47</sup> Moreover, China is experiencing rapid urbanization that has the condominium system standing out, the same forces that at one time occurred in the United States. Finally, there are similarities between the two countries relating to the land use system which is inextricably linked with condominium schemes. As Randolph shows, the fixed use of land in China often is no more specific than the zoning classifications that limit the use of property in many parts of America.<sup>48</sup>

Moreover, it is worthwhile to make a comparison between the Chinese regulation of condominiums and the South African *Sectional Title Act*. Although there are

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46 United States: the *Uniform Common Interest Ownership Act of 1982* (as amended in 1994); South Africa: the *Sectional Titles Act 95 of 1986*.

47 As of this writing, the *Uniform Condominium Act* (UCA), the predecessor of the *Uniform Common Interest Ownership Act* (UCIOA) has been adopted by the states of Maine, Minnesota, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, Pennsylvania, Rhode Island, Texas, Virginia, Washington, Alaska. The UCIOA has been adopted by states of Colorado, Connecticut, Minnesota, Nevada, Vermont, and West Virginia. Indiana and New Jersey are considering adoption in 2008. Thus over a third of the states have become subject to one or another version of the UCIOA. Resource from online: [http://www.nccusl.org/Update/uniformact\\_factsheets/](http://www.nccusl.org/Update/uniformact_factsheets/) [2008. 1.15].

48 Randolph "Thoughts on Chinese Real Estate Law: Integrating Private Property into a Socialist Governmental Structure" online: <http://lawweb.usc.edu/faculty/workshops/documents/Randolph.pdf> [2007.5.15].



differences between China and South Africa, the two countries display a number of similarities. Both countries have an emerging economy with the price of housing having risen substantially and rapidly. In addition, both countries are experiencing growing urbanization and both have formulated social public housing policies enabling low-income and average-income people to buy their own houses.<sup>49</sup> The enactment of a uniform condominium statute in China can accommodate the rising need for home-ownership caused by growing urbanization.

The *Sectional Titles Act* of South Africa is indirectly derived from the American *Uniform Common Interest Ownership Act*.<sup>50</sup> The South African context is therefore interesting in this comparison, because it illustrates the manner in which foreign legal rules were and can be translated into a different political and economic setting, and the adaptations that such a translation necessitates to the legal rules of the original jurisdiction. This facilitates a simultaneous comparison of the needs of the three jurisdictions that should show what works best. Further, on this point, the South African statute is well developed having been amended several times. Presently, a third generation of sectional titles act is thought to be necessary and therefore appears to be imminent. It therefore represents a good example of the manner in which new legal principles may be introduced, amended and adjusted in the housing context to suit particular circumstances and developments within an emerging market economy.

In summary, a comparative approach is worth pursuing because it has the potential to inform both Chinese legal researchers and lawmakers on the empirical legislative information that derived from the historical, geographical, social, cultural and political

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49 In South Africa it is called social housing policy. See Maree “Sectional titles in the New Urban South Africa: Vista or Spectacle?” 2002 (Jan/Feb) *De Rebus* 34. In China, it is called “Economical but Functional Housing” policy, better understood in Chinese as the “Anju” project. This project aims to provide more affordable urban housing, to push forward the Housing Reform policy, and to solve the difficulties for families which had inadequate living spaces, i.e. each person has a living space of less than 8 square meters in average by the end of the 20th century.

50 Van der Merwe “The Sectional Titles Act in the Light of the Uniform Condominium Act” 1987 (20) *CILSA* 2-3.

contexts of the United States and South Africa. Moreover, the value of comparative study also lies in the role of “undercutting the taken for granted”.<sup>51</sup> This means quite often, researchers in a single country believe that the nature of the institution or the ways in which national policies are made, is the natural way to organize. A comparative perspective can shed a light on the origin and objective of particular legislation and therefore confront and challenge the parochial assumptions. If the view is taken that law is introduced in order to resolve disputes and sustain economic development, learning from the successes and failures of others will be a worthwhile contribution to legislative formalization. Nevertheless, comparison is not an end but a means, perhaps just an initial step of providing insights.<sup>52</sup> Knowledge can be only gained if the relevant factors are properly identified. Comparative research itself does not “resolve the problem of possible intervention from other than these identified variables.”<sup>53</sup> That said, a significant point is that China, like any other country, has its own unique and special national characters. State land ownership and the very special Chinese culture needs to be heeded in this comparative study. Therefore, sensitivity to cultural and historical context cannot be downplayed.<sup>54</sup> However, it is noteworthy that Chinese culture should not be exaggerated in undertaking a legal comparison to formalize Chinese condominium law since otherwise it could defeat the purpose of the comparison and trigger a refusal to borrow ideas.

## **1 5 THE STRUCTURE AND CONTENT OF THESIS**

The thesis is organized into seven chapters. The first chapter is a building block providing the thesis’s research topic, theoretical basis, and research methodology.

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51 Dickens, Duncan, Goodwin & Fray *Housing, States and Localities* 29.

52 Ruskola “Legal Orientalism” 2002 (101) *Mich L Rev* 180-185.

53 Lundquist *Housing Policy and Equality: A Comparative Study of Tenure Conversions and Their Effects* 21.

54 Potter “Legal Reform in China: Institutions, Culture, and Selective Adaptation” 2004 (29) *Law & Soc Inquiry* 465-495.

Moreover, in this chapter the historical background, *status quo* and future outlook of the Chinese condominium institution are also illustrated. The theme is clear: a uniform condominium statute is badly needed in China.

Following this introduction bringing forward a legislative task for Chinese condominiums, Chapter Two explores the theoretical structure of condominium ownership. It depicts the legislative innovation arising from its *sui generis* features and explains the objects of condominium ownership on the basis of its unique definition. In Chapter Three, a wide spectrum of regulations is identified pertaining to the creation of condominium developments in China. Specifically, it observes the requirements for land intended for subdivision and the buildings that comprise a condominium project. The fact that a condominium's constitutive document is unregulated in China is highlighted. Moreover, the characteristic Chinese land registration procedure is also presented.

Chapter Four demonstrates the significance of the participation quota and analyzes the advantages and disadvantages of different participation quota calculating methods. The starting point of Chapter Five is the remark that inherent in condominium living is the interdependence of interests among unit owners. Subsequently, this chapter focuses on condominium owners' use and enjoyment of their apartments and the common property.

Chapter Six elaborates on condominium management. This chapter is quite practical by respectively examining the management body, the general meeting, the executive council and the managing agent. It concludes that having a well-structured management body is essential since a condominium community cannot function efficiently without a management association to represent all of the owners and to handle day-to-day operations. The conclusion in the last chapter is that it is imperative and necessary for China to enact a uniform condominium statute in the near future.

# CHAPTER 2

## LEGAL STRUCTURE OF CONDOMINIUM OWNERSHIP

### 2 1 INTRODUCTION

This chapter examines the theoretical structure of the condominium. By laying out its features and characteristics, some of the major and correlated elements which help to shape the legal structure of the condominium are described and analyzed. Hence, the legislative innovation arising from its *sui generis* features are dealt with in more detail. Therefore, it is relevant to explain the objects of condominium ownership on the basis of its unique definition.

Condominium, the term popularly applied in North America, particularly in the United States, may easily be confused with *communio* which according to its original Latin meaning, means joint dominion or co-ownership.<sup>1</sup> It is not a very accurate term considering the complexities of this form of ownership. It gives the impression that the condominium as a legal institution emphasizes co-ownership. Therefore, this term downplays individual ownership of the apartment that necessarily deserves particular attention.<sup>2</sup> Sectional title, used in South Africa, is also not appropriate since literally it emphasizes individual property intended for exclusive use. Although understandable to lay people, it does not encompass the entire multi-faceted legal structure of

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1 Garner *Black's Law Dictionary* 314; Van der Merwe *Sectional Titles* 1-28; Pittman "Land without Earth—the Condominium" 1962 (15) *U Fla L Rev* 203.

2 However, this term is already widely used and undoubtedly will remain as the single word describing this new form of property ownership. Thus, this thesis will employ the term Condominium for its

condominium ownership.<sup>3</sup> Apartment ownership would seem to be more appropriate given that it is a sound compromise between the term “condominium” and the term “sectional title”. However, the condominium schemes are utilized not only for residential use but also for industrial, professional and commercial purposes.<sup>4</sup> On the one hand, the fragmented nomenclature of the term underlies the difficulty to conceptualize this institution but on the other hand illustrates its key characteristics and multi-functions.

While different terms for the same institution are preferred in different jurisdictions,<sup>5</sup> the well-received tenet is that under both the United States’ *Uniform Common Interest Ownership Act* (UCIOA) and South African *Sectional Titles Act* (STA), the concept of condominium comprises three elements, namely individual unit ownership, joint ownership of the common property and membership in an incorporated or unincorporated owners’ association.<sup>6</sup>

## **2 2 A TRIPARTITE CONCEPT OF CONDOMINIUM**

### **2 2 1 Definition**

Variously described as the individual ownership of a cubicle of air space,<sup>7</sup> a single

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conciseness.

3 Van der Merwe *Sectional Titles* 1-28.

4 Van der Merwe *Apartment Ownership* 20.

5 In the United States it is known as a condominium; under the law of England and Wales it is called commonhold; in Singapore, it is established as strata titles; in South Africa, it is called sectional titles; in civil law jurisdictions such as Germany, it is established as *Wohnungseigentum* and in Japan it is referred to as divided ownership of buildings.

6 Rohan “The ‘Model Condominium Code’—A Blueprint for Modernizing Condominium Legislation” 1978 (78) *Colum L Rev* 587; Van der Merwe *Apartment Ownership* 23.

7 Ball “Division into Horizontal Strata of the Land-space above the Surface” 1930 (39) *Yale L J* 617; Thompson “The Condominium as a Subdivision” 1963 (14) *Hastings L J* 302-304; Becker “Subdividing the Air” *Lawyers Title News* (April 1969) 5; Riselli “Air Space Utilization toward a Super-environment Symposium: the Environment and the Law” 1971 (5) *Suffolk U L Rev* 1020.

unit in a multi-unit building,<sup>8</sup> a blend of private and communal housing,<sup>9</sup> or of a planned unit development,<sup>10</sup> the condominium is basically the ownership of a part of a building.<sup>11</sup> Condominium ownership refers to the title of a specific part or parts of a building or buildings. It consists of the individual freehold ownership of units and the undivided interest of the common property as well as membership in the owners' association consisting of all the unit owners, an association that manages and administers the property.<sup>12</sup>

The condominium regime is divided into either a unitary system or a dualistic system. For the unitary system, only one kind of ownership is recognized, namely a modified form of co-ownership. Each co-owner is entitled to use and enjoy a specified part of the building, the unit or the section. The exclusivity of an individual right for a specified unit acquired by each condominium owner is merely regarded as an ancillary, carved out of the co-ownership of the land and the buildings.<sup>13</sup> An individual title to a unit would be a burden on the co-ownership of the other co-owners. This "all-inclusive" co-ownership includes the right to have the sole use of a certain part of the building and therefore every unit owner is co-owner of the entire condominium building or buildings. The unitary systems have been adopted mainly in legal systems which still adhere to the maxim *superficies solo cedit*.<sup>14</sup> The Swiss and Dutch systems of condominium ownership are the prime examples of the unitary system.<sup>15</sup>

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8 Di Lorenzo *New York Condominium and Cooperative Law* 2.

9 Schreiber "The Lateral Housing Development: Condominium or Home Owners Association?" 1969 (117) *U Pa L Rev* 1104.

10 Krasnowiecki "Planned Unit Development: A Challenge to Established Theory and Practice of Land Use Control" 1965 (114) *U Pa L Rev* 47.

11 Pike "The Condominium as a Mortgage Investment" 1963 (14) *Hastings L J* 282.

12 Van der Merwe *Apartment Ownership* 23; Kerr "Condominium Statutory Implementation" 1963 (38) *St John's L Rev* 1.

13 Switzerland: *CC* art 712 (a); Netherlands: New Dutch *CC* art 5:106 (3).

14 Van der Merwe *Apartment Ownership* 24.

15 Van der Merwe *Sectional Titles* 2-11.

The dualistic system, on the other hand, recognizes two types of ownership, namely individual ownership and joint ownership. A condominium regime involves a mingling of these two distinct forms of real property. Under the dualistic system, the individual ownership of a unit is given primary attention. The dualistic system has gained ground world-wide and has been applied in many countries including both common-law and civil-law jurisdictions.<sup>16</sup> Both the UCIOA of the United States and the STA of South Africa have adopted the dualistic system.<sup>17</sup>

UCIOA § 1-103 (8) reads:

“Condominium means a common interest community in which portions of the real estate are designated for separate ownership and the remainder of the real estate is designated for common ownership solely by the owners of those portions. A common interest community is not a condominium unless the undivided interests in the common elements are vested in the unit owners.”

STA section 2 (a) reads:

“A building or buildings comprised in a scheme and the land on which such building or buildings is or are situated, may be divided into sections and common property in accordance with the provisions of this Act: Provided that where a scheme comprises more than one building, any such building may be so divided into a single section and common property.”

From the above two statutory definitions, it is clear that under a dualistic system of apartment ownership, two autonomous species of rights, namely individual ownership of an apartment and common ownership of the land and common parts of the building,

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16 Portugal, as an example of civil law countries, see art 1414 & 1420 of *Portuguese CC of 1966*; Singapore, as an example of common law countries, see section 3 & 13 of the *Land Titles (Strata) Act 41 of 1967* (as amended in 1999).

17 UCIOA § 1-103 (8); STA s 2 (a).

are combined to form a completely new type of composite ownership.<sup>18</sup>

Condominium, although presently the subject of ongoing legislation reform in both the United States and South Africa,<sup>19</sup> remains a novel and largely unformulated property institution in China. The recently enacted *Chinese Property Code* formally accepted the idea of a dualistic system of condominium ownership that has been vigorously advocated by academic scholars<sup>20</sup> and implicitly adopted in practice.<sup>21</sup> However, prior to the *Property Code*, the Chinese legal framework did not acknowledge a formal condominium concept.

Condominium is regulated indirectly and awkwardly by a plethora of statutes,<sup>22</sup>

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18 Van der Merwe *Apartment Ownership* 24.

19 In the United States, the first generation of condominium statutes modeled on the Puerto Rico apartment ownership statute have mushroomed in 1960s, especially boomed by the legislation of *National Housing Act* empowering the Federal Housing Administration to insure mortgages on condominiums. The second generation condominium statutes with more detail on such issues as consumer protection and developer's right for staged development have been enacted in late 1970s. The prime examples are the *Uniform Condominium Act of 1977* and the *Uniform Common Interest Ownership Act of 1982*. In the hope of bringing uniformity to the law, used the National Conference of Commissioners on Uniform State Laws (NCCUSL) as a vehicle to propose a model condominium law, the *Uniform Condominium Act (UCA) of 1977* (as amended in 1980). On the basis of the UCA, the *Uniform Common Interest Ownership Act (UCIOA)* extends the same provisions to cooperatives and planned communities. Thereafter, the NCCUSL substantially amended the 1982 version of the UCIOA in 1994. For South Africa, the first generation *Sectional Titles Act* was enacted in 1971 and was subsequently superseded by the second generation *Sectional Titles Act 95 of 1986*. Thereafter, the second generation Act was also amended in a number of times, among others, *Sectional Titles Amendment Act 63 of 1991*, *Sectional Titles Amendment Act 7 of 1992*, *Sectional Titles Amendment Act 15 of 1993*, *Sectional Titles Amendment Act 29 of 2003*, *Sectional Titles Amendment Act 7 of 2005*, and *Sectional Titles Amendment Act 6 of 2006*.

20 Chen Huabin *Study on Modern Condominium Ownership* 80; Chen Lei "The New Chinese Property Code: A Giant Step Forward?" 2007 (11) *Electronic Journal of Comparative Law*, online: <http://www.ejcl.org/112/art112-2.pdf> [10 January 2008].

21 Wang Liming and Liang Huixing, leaders of the *Chinese Property Code* draft groups, both incorporated condominium provisions on the basis of problematic practices in their proposed property code drafts.

22 Among others, the *General Principles of the Civil Law of the PRC of 1986*, *Law of Contracts of the PRC of 1999*. In terms of Chinese legislative ranking, statutes are legislated by the National People's Congress (NPC), the supreme legislative body in China. The statutes are ranked as the highest legislative documents after the Constitution and are applied and enforced nationwide.



central governmental (State Council) regulations,<sup>23</sup> ministerial and departmental circulars<sup>24</sup> and scattered local norms.<sup>25</sup> Statutes pertaining to condominium ownership include, among others, the *Urban Real Estate Administration Law of the PRC of 1994* and the *Land Administration Law of the PRC (Amendment) of 1999*. One ministerial circular that mistakenly referred to condominiums is *Measures Governing the Management of Urban Adjacent Housing of the PRC*.<sup>26</sup> Many scholars point out that this departmental circular is very outdated and rudimentary and did not cover many crucial aspects of condominium such as the condominium creation, the condominium management structure, the by-laws of management body, and the owner's exclusive use right over certain common property.<sup>27</sup> Only on June 8, 2003 the State Council enacted the first national level regulation about condominium ownership management.<sup>28</sup> However, this regulation was heavily criticized immediately after its promulgation. The main criticism is that its provisions are

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23 For example, the *Interim Regulations for Granting and Transfer of Land Use Right on State Owned Urban Land in Cities and Towns of 1990* by the State Council and the *Regulations on the Administration of Urban Private-owned Buildings of 1982* by the State Council. The regulations issued by the State Council are administrative orders in nature which rank lower than the statutes. But they are also applied nationwide.

24 For example, the *Measures Governing the Registration of Titles in Urban Buildings of 1997* issued by the Ministry of Construction. The ministerial and departmental circulars are administrative orders but are ranked lower to the State Council's regulations. However, they are applied nationwide.

25 For example, the *Procedures and Related Taxes and Fees Concerning Real Estate Development and Operation in the City of Beijing of 1995* issued by the Beijing Municipality; the *Shanghai Municipality Real Property Mortgage Measures of 1994* issued by the Shanghai municipality; and the *Rules on Condominium Management of Guangdong Province of 1998* issued by the Guangdong Provincial People's Congress. The local rules in China are the statutory documents with the lowest authority. They are only applied locally at the place where they are enacted.

26 The *Measures Governing the Management of Urban Adjacent Housing of 1989* issued by the Ministry of Construction (as amended on 15 August 2001).

27 Chen Huabin *Study on Modern Condominium Ownership* 306; Jin Jian *Housing Law of China* 138. (Chinese version)

28 See the *Property Management Regulation of 2003* (as amended on 26 August 2007) issued by the State Council.

skeletal and provide little detail about day-to-day management practices.<sup>29</sup> Another criticism is that the regulation pays considerable attention to its administrative nature and says little about the proprietary aspect of condominium management such as the entitlement of parking lots.<sup>30</sup> It is apparent that provisions that indirectly or partially deal with condominiums are rudimentary and incomplete.<sup>31</sup> Most of the regulations that are partially concerned with the condominium are provisions that focus on the management of condominium buildings.<sup>32</sup> There are barely any provisions at national or local level, which deal with other important pillars of condominium law, such as the detailed rights and obligations of condominium owners and sanctions for non-compliance.<sup>33</sup>

This *lacuna* in the legal framework has caused legal uncertainty as regards the development of condominiums. It is unacceptable that such outdated and unsystematic provisions designed for the old planned economy are still in force. Some scholars argue that, based on the general principles contained in the new *Property Code*, a special condominium statute should be enacted to better protect the private apartment owners' interests in view of changing social and economic conditions.<sup>34</sup> It is certainly possible that a special condominium statute can be fleshed out on the basis of formalizing the dualistic nature of the condominium system, such as is found in the UCA in the United States and the STA in South Africa.

## **2 2 2 Key Features**

The uniqueness of condominium can be observed through its main features. The most

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29 Gao Fuping & Huang Wushuang *Property Entitlement & Property Management* 28-29. (Chinese version)

30 Hu Zhigang *New Discourse on Real Property* 236. (Chinese version)

31 See n 30 *supra*.

32 See n 29 *supra*.

33 Xia Shansheng *Property Management Law* 17-18.

34 Hu Zhigang *New Discourse on Real Property* 234; Randolph & Lou *Chinese Real Estate Law* 48-49.

striking feature of condominium as a legal entity is that composite condominium ownership is a new “three-dimensional” concept.<sup>35</sup> A condominium property scheme involves the division of a real property parcel into “unit” and “common property”. The units are then individually acquired by separate owners who also obtain an undivided interest in the common property. A condominium parcel comprises a unit coupled with an undivided share in the common elements. The third important aspect of condominium is that an owner of a unit automatically becomes a member of the management structure of the condominium. Hence, a purchaser of a condominium does not only obtain exclusive individual ownership of a unit but the purchaser also acquires joint ownership in the common property and gains membership of the owners’ association. This three-dimensional character of condominium has been recognized explicitly in article 70 of the new *Chinese Property Code*:

“The owner has exclusive ownership with regard to his or her individual apartment and unit for commercial or another use, joint ownership with regard to the common property as all portions of the project other than the apartment, and is entitled to manage and maintain the common property.”

Secondly, the three components are so inextricably linked to each other that they form a “threefold unity”.<sup>36</sup> None of these components can be disposed of separately. The undivided interest in the common property is appurtenant to a particular unit. The interest cannot be separated from or alienated independently of the unit. It can only be alienated, burdened or disposed of as a whole entity.<sup>37</sup> Because of the threefold unity,

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35 Van der Merwe *Sectional Titles* 2-10; Badenhorst, Pienaar & Mostert *Silberberg and Schoeman’s The Law of Property* 415.

36 Bärmann *Kommentar mit Wohnungseigentumsgesetz* 152; Van der Merwe *Apartment Ownership* 23.

37 STA s 16 (3) & s 36 (2); UCIOA §1-105 (b) (1) & § 2-107 (f).

the three components have a reciprocal influence on each other.<sup>38</sup> When an individual interest in a unit is changed due to reconstruction or extension, the undivided interest in the common property of a condominium also changes accordingly.

Thirdly, condominium owners' rights and duties are multiple and complex. As the threefold unity theory implies, the condominium owner not only is entitled to use and enjoy the exclusive interest in his/her unit but also bears many duties and obligations imposed on the owner since each and every owner shares in the collective interest of the common property. The owners also have the right to take part in the operation and management of the whole condominium community, attending the meetings of the owners' association, and the duties of abiding by the by-laws of the association and paying dues to keep the common property in good repair and the association running well. Compared with the owners of traditional freestanding houses, the rights and obligations of condominium owners are multiple and therefore more complicated. Thus, it is safe to say that condominium ownership is an example of the recent trend in property theory that considers ownership to be defined as much by the responsibilities it creates as by the rights it bestows.<sup>39</sup>

Fourthly, condominium ownership straddles and encompasses the law of property and the law of associations.<sup>40</sup> Not only does the owner have a property interest in his or her unit and in the common property, but also automatically joins a condominium owners' association to deal with the administration of maintenance and management of the common areas of the building.

Finally, the exclusive ownership of individual property is accorded primacy over the other two components.<sup>41</sup> In other words, individual ownership of a unit is the most important element of the new composite ownership. Although the rights and duties of unit owners are multi-faceted in the light of the threefold unity theory,

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38 Van der Merwe *Apartment Ownership* 23.

39 Van der Merwe "Is Sectional Ownership True Ownership?" 1992 *Stell L R* 131-136.

40 Van der Merwe & Butler *Sectional Titles, Share Blocks and Time-sharing* 25.

41 Van der Merwe *Sectional Titles* 2-9.

individual ownership is central in determining rights and obligations of owners. Without certainty of individual ownership of a unit, the share value/participation quota of the common property cannot be decided and the membership of the association cannot be obtained. It is illogical to assume that condominium ownership is genuine without the centrality and emphasis on individual ownership. Accordingly, individual ownership can be thought of as the nucleus of the three components.

### **2 2 3 Condominium in Comparison with Leases and Cooperatives**

Condominium ownership is genuine ownership rather than something nebulous.<sup>42</sup> Unlike a leasehold or cooperative or share-blocks scheme, condominium owners are always in control of their own destiny despite numerous restrictions imposed on the title.

There are many advantages of a condominium structure as compared with other types of housing, including leases and cooperatives. Buying a condominium as opposed to renting a flat is often considered to be a wise decision to hedge against inflation. Another disadvantage of the lease is that the tenant's right of use and enjoyment of an apartment is subject to the strict rules and terms imposed by the landlord. Moreover, a rental often can be variable and uncertain.<sup>43</sup> Another advantage of condominium ownership is that an owner is assured of the benefits of fee simple ownership for his or her heirs.<sup>44</sup> In comparing condominium ownership with cooperatives<sup>45</sup> or share blocks, condominium owners acquire a real right to an

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42 De Wet & Tatham "Die Wet op Deeltitels" 1972 *De Rebus* 205 quoted from Badenhorst, Pienaar & Mostert 415; Markle "The Condominium As Homestead Property" 1963 (14) *Hastings L J* 320-326.

43 Van der Merwe *Apartment Ownership* 192; Fetherstonhaugh, Sefton & Peters *Commonhold* 8-12.

44 Cribbet "Condominium: Home Ownership for Megalopolis?" 1963 (61) *Mich L Rev* 1237; Notes "Cooperative Apartment Housing" 1948 (61) *Harv L Rev* 1407; Van der Merwe *Apartment Ownership* 182-183.

45 UCIOA § 1-103 (10) "Cooperative" means a common interest community in which the real estate is owned by an association, each of whose members is entitled by virtue of his ownership interest in the association to exclusive possession of a unit. A share block, an equivalent of cooperative in South

apartment whereas the shareholders of a cooperative only have a personal right, a “stock interest”.<sup>46</sup> Even more importantly, it is more difficult to obtain a mortgage loan from financial institutions for a stock interest in a cooperative than it is to obtain a mortgage loan to purchase a condominium. Financial institutions are less than enthusiastic to provide financing on the basis of a share certificate offered as security. Quite simply, it is much easier for a would-be condominium purchaser to obtain a loan, since a condominium development has a genuine fee simple title for each and every one of its apartments.<sup>47</sup>

## **2 4 THE OBJECTS OF CONDOMINIUM OWNERSHIP**

### **2 4 1 Introduction**

Both the STA and the UCIOA have designed and brought forward a new composite entity, namely condominium ownership. Condominium ownership involves a combination of two distinct forms of real property interest: individual ownership and undivided joint ownership. A clear distinction between the property subject to individual ownership and the common property is needed because firstly, a condominium owner has an exclusive freehold ownership with regard to his/her unit, whereas the right to use and enjoy the property held in common must be reasonable and is subject to restrictions.<sup>48</sup> Secondly, the clear demarcation between the

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African law, consists of a block of shares in a limited liability company granting the shareholder a personal right to occupy a particular part of a building owned or leased by the company. See s 1 of the *Share Blocks Control Act 59 of 1980 s v* “share block scheme”.

46 Freedman & Alter *The Law of Condominia and Property Owners' Associations* 22.

47 Kane “The Financing of Cooperatives and Condominiums: A Retrospective” 1999 (73) *St John's L Rev* 116-117; Berger “Condominium: Shelter on a Statutory Foundation” 1963 (63) *Colum L Rev* 997-1001.

48 Van der Merwe “A Comparative Study of the Distribution of Ownership Rights in Property in an Apartment or Condominium Scheme in Common Law, Civil Law and Mixed Law Systems” 2002 (31) *Ga J Int'l & Comp L* 101-102.

individual unit and the common property is necessary to determine the owner's rights and obligations with regard to the common property. When property is identified as common property, the responsibility for its maintenance and management must be borne by the management body. The responsibility and cost of maintaining an apartment rests with the owner.<sup>49</sup> When a construction defect arises, the responsibility of repairing and maintaining such part depends on whether it has occurred on the common property or not. Thirdly, the floor area of an apartment can be principally used to determine the participation quota of the unit owner as is the case in South Africa and China.<sup>50</sup> In order to ascertain the precise floor area of each apartment, it is crucial to know whether certain parts of a property belong to a particular apartment or to the property held in common by all owners. Fourthly, when an apartment owner procures individual insurance for his/her apartment, it is important to determine what is covered by the insurance.<sup>51</sup>

In view of the above, it is imperative that people have a proper understanding of condominium ownership. Although the primary emphasis of this section falls on an exposition and analysis of the conceptual side of condominium ownership, practical questions are also considered. Therefore, this section examines the definition and legal nature of the unit and the common property. It also singles out the designation of parking space, a dispute-prone aspect of the condominium project, as a practical example to illustrate the manner in which the unit and the common property are properly defined and differentiated.

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49 Christudason "Common Property in Strata Titled Developments in Singapore: Common Misconceptions" 2004 (22) *Property Management* 27; Van der Merwe *Sectional Titles* 3-4.

50 See STA s 32(2); art 76 (2) of the *Chinese Property Code of 2007*; art 10 (2) of the *Property Management Regulation of 2003*.

51 Van der Merwe *Sectional Titles* 3-5.

## **2 4 2 Unit**

### **2 4 2 1 Statutory Definition**

In both the American and South African contexts, the “unit” is statutorily defined. In the UCIOA, the statutory definition of a unit reads:

“unit means a physical portion of the condominium designated for separate ownership or occupancy, the boundaries of which are described pursuant to section 2-105(a)(5).”<sup>52</sup>

The South African STA formally distinguishes “section” from “unit”. Under the STA, “section” means “a section shown on a sectional plan”. Essentially, this refers to the apartment itself. “Unit” means a section together with its undivided share in common property.<sup>53</sup> To avoid confusion and in the interest of simplicity, the term “unit” is used in this thesis in place of “section” except where the context demands otherwise. Although neither the American nor South African statutes provide a detailed definition of a unit, a condominium unit can be defined in the light of other statutory provisions as the part of real property which forms a clearly demarcated part of a building that is described in the declaration or sectional plan as well as in other building registration documents.<sup>54</sup>

### **2 4 2 2 Boundaries**

Since the UCIOA defines the common property in an exclusive way, namely the portions of a condominium scheme other than the units, it contains more details on the

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52 UCIOA § 1-103 (31). Moreover, section 2-105(a) (5) requires that the boundaries of each unit created by the declaration be identified.

53 STA s 1 (1) s v “section” read with s 5 and r 5 of the *Sectional Titles Regulations*.

54 The condominium project document is referred to a declaration in the UCIOA while it is called a sectional plan in the STA.



boundaries and components of a unit.<sup>55</sup> This Act provides a great deal of freedom and discretion for developers to ascertain the boundaries of a unit in project documents, namely the declaration, by-laws, and plats and plans.<sup>56</sup> Normally, two main alternatives can be adopted by developers, either the planes of the inner surfaces of the unfinished walls, ceilings and floors or the median line of the walls, ceilings and floors of an apartment.<sup>57</sup> UCIOA section 2-102 (1) implies that if the declaration does not provide otherwise, the planes of the inner surfaces of the unfinished walls, ceilings and floors should be considered to be the boundaries of an apartment.<sup>58</sup> The provision of this section can be varied, to the extent that the declarant wishes to modify the details for a particular condominium. As such, under UCIOA, a unit is usually regarded as an area or space enclosed by the boundaries together with all material parts in the area or space.<sup>59</sup> In addition, although the developer has complete freedom to incorporate any part of the building as part of a unit, UCIOA ensures that certain indispensable parts of the project should not be designated as parts of a unit, such as a chute, a flue, wire, a conduit, a bearing wall, and a bearing column.<sup>60</sup> If any portion of such item serves only that unit, it is a limited common element allocated solely to that unit; if any portion thereof serves more than one unit or any portion of the common elements it is part of the common elements.<sup>61</sup> Moreover, if indicated on the

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55 UCIOA § 1-103 (4).

56 UCIOA § 2-102 .

57 Van der Merwe *Apartment Ownership* 48.

58 UCIOA § 2-102 (1) regulates that “[i]f walls, floors or ceilings are designated as boundaries of a unit, all lath, furring, wallboard, plasterboard, plaster, paneling, tiles, wallpaper, paint, finished flooring, and any other materials constituting any part of the finished surfaces thereof are a part of the unit, and all other portions of the walls, floors, or ceilings are a part of the common elements.”

59 UCIOA § 2-102 (3) stipulates that “subject to the provisions of paragraph (2), all spaces, interior partitions, and other fixtures and improvements within the boundaries of a unit are a part of the unit.”

60 UCIOA § 2-102 (2).

61 UCIOA § 2-102 (2) comment 2 states that the rationale for inserting this provision is to alleviate disputes in condominium administration with respect to liability for repair of pipes and other components of the building which unit owners may expect the association to pay for and which the association may wish to have repaired by unit owners.

project document, the unit may comprise two or more areas of the condominium land scheme which need not be contiguous.<sup>62</sup> Under UCIOA, unit boundaries need not correspond to physical boundaries. Units may thus be created where no physical boundaries exist so long as the survey plans show the location of boundary lines.<sup>63</sup>

Under South African legislation, each section must be defined on a plan to be approved by the surveyor-general in relation to a scheme for the purpose of registration, namely the sectional plan.<sup>64</sup> The boundary floors, walls and ceilings of each section must be shown and each section must be distinguished by a separate number on the sectional plan.<sup>65</sup> The sectional plan must also demarcate the floor area of each section to the median line of its boundary walls.<sup>66</sup> The common boundary between any two sections or between a section and the common property shall be the median line of the dividing floor, wall or ceiling, as the case may be.<sup>67</sup> As in the UCIOA, a unit can include parts of the building or buildings which are not contiguous to the main component of the section.<sup>68</sup> The STA provides that a section can consist of the main set of rooms, together with certain contiguous parts like a balcony and also non-contiguous parts like a storage room in the basement of the building.<sup>69</sup> Accordingly, in South Africa, the boundaries of a section are identified by physical features, such as walls, ceilings and floors shown on the sectional plan rather than by the airspace enclosed by such boundaries.<sup>70</sup>

In China, while there is no special condominium statute, there are fragmented administrative and departmental rules which are related to certain features of

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62 UCIOA § 2-109 (b) (9) regulates “[e]ach plat must show...the distance between non-contiguous parcels of real estate comprising the condominium.”

63 UCIOA § 2-109.

64 STA s 1 (1) *s v* “section plan”.

65 STA s 5 (3) (d) and s 5 (5).

66 STA s 5 (3) (e).

67 STA s 5 (4).

68 Van der Merwe *Sectional Titles* 3-9.

69 STA s 5 (6).

70 Van der Merwe *Sectional Titles* 3-6.

condominium ownership.<sup>71</sup> One departmental rule, namely the *Provisional Measures on Calculation of Floor Areas and Allocation of Common Property of Commercial Housing*, provides that a unit consists of three elements: cubic space, floor area of unit walls, and balcony floor area.<sup>72</sup> It further explains that there are two categories for unit walls. One is the interior wall within the boundaries of a unit which is for the unit owner's exclusive use and does not function as the bearing wall. The other is called a boundary wall which includes the common wall between adjacent units as well as the boundary wall between a unit and the common property. The common property includes staircases, corridors, and the outer wall. Whether a boundary wall is between units or between a unit and the common property or an outer wall, half of its projected floor space is counted as a part of the unit's floor area.<sup>73</sup> Another departmental rule stipulates that only half of the projected floor space of a balcony, whether enclosed or open, is counted as a part of the floor area of a unit.<sup>74</sup> This provision can be compared to the South African Act that states an adjoining balcony, terraced veranda, atrium or projection can be counted as a part of a unit if it is shown as a part of the section on the sectional plan.<sup>75</sup> It can be inferred that in China, the horizontal boundaries of an apartment are the surface of the unfinished drop ceiling and the unfinished concrete floor slab while the vertical boundaries are the planes formed by the median lines of the boundary walls.

To summarize, the Chinese provisions on unit boundaries are different from but still make use of some of the concepts of the American and South African models. The

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71 Chen & Mostert "The Unavoidable Necessity of Formalizing Condominium Ownership in China: A Pilot Study" 2007 (2) *Asian Journal of Comparative Law* 71.

72 Art 6 of the *Provisional Measures on Calculation of Floor Areas and Allocation of Common Property of Commercial Housing*, issued by the Ministry of Construction on 8 September 1995.

73 Art 7 of the *Provisional Measures on Calculation of Floor Areas and Allocation of Common Property of Commercial Housing*, issued by the Ministry of Construction on 8 September 1995.

74 S 3.0.18 of the *Measures Governing the Calculation of Floor Areas of Construction Buildings*, issued by the Ministry of Construction on 15 April 2005.

75 STA s 5 (5) (b).

UCIOA is flexible about unit boundaries. There are two options unless the declaration makes an alternative arrangement. Boundaries are made up either of the inner surface of floors, ceilings and walls or the median line of unfinished floors, ceilings and walls of an apartment.<sup>76</sup> The UCIOA does not use the distinction between the vertical boundaries and horizontal boundaries unless the declaration provides otherwise. As for the vertical boundaries of a unit, the Chinese provisions have the same regulations as the STA's: the median lines of the boundary walls are the dividing lines of the unit. However China has adopted a different measure than South Africa on the horizontal boundaries of a unit. The horizontal boundaries of an apartment in China are the surface of the unfinished drop ceiling and the unfinished concrete floor slab. Still, the Chinese approach is not immune from criticism. When the boundaries of an apartment are the median line of the boundary walls between adjacent units, such walls become co-owned property only for two neighboring unit owners. This leads to the odd situation that it is the apartment owners rather than the management body who are responsible for repairs and maintenance of the walls. The question arises as to whether or not it makes a difference if the dividing walls are also the structural walls. This is quite often the case on a building plan. Even if it is not a bearing wall, when inspecting, renewing, or repairing water pipes, electric wires, TV cables and ducts which are for common use in such walls, it would be troublesome and not practical to require each unit owner to allow for this kind of "common use" work in their "unit". According to other departmental rules, however, such pipes, wires, cables and ducts for common use are classified as common property, and the responsibility is vested in the management body for their repair and maintenance.<sup>77</sup> Some argue that

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<sup>76</sup> Van der Merwe *Apartment Ownership* 48.

<sup>77</sup> Both art 4 (3) of the *Interim Measures Governing Maintenance and Management of the Post-privatized Public Housing* issued by the Ministry of Construction on 15 June 1992 and art 3 (2) of the *Measures on Management of Maintenance Fund for Fixtures and Fittings in Housing Common Areas* issued by the Ministry of Construction and Ministry of Finance stipulate that water pipes, heating pipes, electricity wires and the like are fixtures for common use and therefore common property.

co-ownership between owners of adjoining boundary walls based on median line division simplifies the demarcation between individual property and common property.<sup>78</sup> However, serious errors will be made with oversimplification. Although the abovementioned departmental rules provide a useful reference to establish the boundaries of an apartment unit, they are outdated and needs to be redesigned and formalized. They were designed to implement the housing privatization policy in the 1990s and do not provide explicit and systematic provisions.<sup>79</sup> Different departmental rules causing legal uncertainty and inconsistency render it necessary to clarify the legal nature of unit boundaries.<sup>80</sup>

#### **2 4 2 3 Legal Nature**

In summary, a unit consists of the space enclosed by the boundary surveyed and listed on the project document, declaration or sectional plan. All fittings and fixtures installed within the boundary are for the exclusive use of the unit. The unit may include an adjoining porch, balcony or projection and a non-contiguous parcel of the building such as a parking space and underground storage room or garage. After examining the UCIOA and the STA provisions, one can conclude that a unit has two basic elements. First, a unit is a part of the property intended for any type of independent use. Second, a unit needs structural and mechanical independence recorded or registered on a declaration or a sectional plan.

Four very different theories deal with a unit's boundaries. The first theory, the air space theory, maintains that the boundaries of a unit are the inner surfaces of the walls,

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78 Gao Fuping & Huang Wushuang *New Discourse on Real Estate Law* 66.

79 For example, the *Measures Governing the Management of Urban Adjacent Housing of 1989* (as amended in 2001) issued by the Ministry of Construction. See n 27 *supra*.

80 The inconsistency can be seen in art 9 of the *Measures Governing the Management of Urban Adjacent Housing of 1989* (as amended in 2001). It provides that a type of co-ownership is presumed to exist between adjacent owners of the non-bearing boundary walls. This provision is inconsistent with the provisions presented in n 77 *supra*.

ceilings and floors, which defines a unit as an enclosed air space.<sup>81</sup> This theory is outdated and problematic in practice. With this theory the unit owner cannot construct a niche or even hammer a nail on any boundary wall nor can he tile or pitch the floor in his own apartment. The second theory, the median line theory, maintains that the unit's boundaries should be the median lines of walls, ceilings and floors, as stipulated in South Africa.<sup>82</sup> The median line theory is also problematic as the status of service items such as wires and a pipe supplying all individual units is difficult to pinpoint.<sup>83</sup> The third one, the unfinished surface theory, holds that materials constituting any part of the finished surface of walls, ceilings and floors such as lath, paneling, tiles, wallpaper and paint as well as other fixtures and improvements and interior partitions outside of the unfinished surface, amount to a part of the unit.<sup>84</sup> This theory seems to rectify the difficulties caused by the air space theory since the unit owner can change certain things on the painted surfaces of walls, ceilings, and floors. However, the pitfall of this theory is that it is difficult to reconcile people's activities with the common business practice which regards the median line as dividing lines of the property.<sup>85</sup> This is striking when it contradicts the departmental rule which explicitly states that the unit should include the half floor area of the boundary walls. The fourth one is the one implicitly adopted in China. It utilizes both the median line theory along with the unfinished surface theory. This means that the unit boundaries are the

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81 See n 7 *supra*.

82 Van der Merwe *Sectional Titles* 3-7.

83 The STA partially resolves this problem by introducing implied reciprocal servitudes of lateral and subjacent support. These servitudes imply that service items are part of the common property. Therefore, the owners are granted the right, to be exercised by the body corporate, to entry every section from time to time during reasonable hours in order to maintain or repair any part of the building, or any pipes, wires, cables or ducts therein, or for making emergency repairs inside the section which are necessary to prevent damage to the common property or any other section. For more detail see Van der Merwe *Sectional Titles* 8-9 & 8-10 and n 94 *infra*.

84 See n 58 *supra*.

85 Gao Fuping & Huang Wushuang *Property Entitlement & Property Management* 42.

unfinished surfaces of floors and ceilings and the median line between walls. This theory is eclectic rather than innovative since it is based on the former three theories.

In view of the growing importance of condominiums in the Far East, an additional new theory has been developed. It holds that the boundaries of a unit can be perceived differently in practice contingent on whether the demarcation is subject to the internal administration of the condominium or external affairs.<sup>86</sup> The unfinished surface theory applies when the internal affairs, its management and maintenance is the governing factor. Consequently, common walls are regarded as common property and therefore management and maintenance is the responsibility of the management body. When reselling, insurance and tax-paying of a unit are involved, condominium external affairs, the boundaries are set as the unfinished surfaces of floors and ceilings and the median line between walls. In essence, with title registration, a unit encompasses half the floor space of the dividing walls provided the walls are not bearing walls. This echoes the median line theory. Only with day-to-day management decisions the common boundary walls are maintained and managed by the management body not adjacent owners.<sup>87</sup> Such kinds of regulations can be written into the by-laws or even the subdivision plan. This common sense way of dealing with a thorny issue has recently been vigorously supported by scholars in China, Taiwan and Japan.<sup>88</sup> While this new approach is easily operational in everyday practice it differs little from a proprietary right perspective.

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86 Chen Huabin *Study on Modern Condominium Ownership* 106-107.

87 In South Africa, Van der Merwe argues that the duty to maintain the features lending structural support should be placed on individual unit owners by virtue of the prescribed management rule 70. See Van der Merwe *Sectional Titles* 8-11. However, Maree disagrees this by arguing that it is equitable that the maintenance duty of the “quasi-common property” rests with the body corporate rather than unit owners. See Maree “Quasi-common Property in Sectional Title Schemes” 2006 (10 2) *Lexisnexis Butterworths Property Law Digest* 12-13. It seems that this disagreement can be reconciled by this new approach.

88 Wen Fengwen “On the Individual Property of the Condominium” 1991 (42 7) *The Law Monthly* 16-20; Wang Tez-chien *Law of Things* 251-252. (Chinese version)

## 2 4 3 Common Property

### 2 4 3 1 Statutory Definition

Both the UCIOA and STA employ an exclusive approach to statutorily define the common property. They define common property as all parts or portions of a condominium project other than the apartments (units).<sup>89</sup> Under the UCIOA, common elements mean all portions of the common interest community other than the units. It also includes any other interests in real estate that benefit the unit owners and which are subject to the declaration. The 1994 amendments to the UCIOA provide that (1) common element(s) may include easements, including easements for the benefit of unit owners, and (2) real estate that may be owned or leased by the association and not subject to the declaration.<sup>90</sup> The STA also adopts the exclusive technique by providing that common property comprises: (1) the land included in the scheme; (2) all parts of the building or buildings not included in a section; and (3) the added land where the scheme has been extended under section 26.<sup>91</sup>

Another alternative for defining the common property is to follow the inclusive approach that is found in most European legislation by providing a detailed list of common property components.<sup>92</sup> The first generation United States' condominium statutes based on the *Model Statute of the Federal Housing Administration* followed the inclusive approach by providing a list of such components.<sup>93</sup> The disadvantages of the inclusive approach are that compliance with the statutory definition may impose limitations on architectural design and can make the boundaries between units

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89 UCIOA § 1-103 (4); STA s 1 (1) s v “common property”.

90 The prefatory note 1 of the UCIOA.

91 STA s 1 (1) s v “common property”. S 26 deals with the extension of a condominium scheme by the addition of land to the common property. The aim of the addition is primarily to provide additional amenities and facilities to the members of the scheme.

92 Art 1117 of Italian CC and art 577 (11) of Belgian CC.

93 § 2 of the *Model Statute for Creation of Apartment Ownership of the Federal Housing Administration of 1962* (Form 3285).



and common property vague.<sup>94</sup> In addition, as modern architectural design and technology develops, it is questionable whether the inclusive approach can include an exhaustive list of the common property components.

The rigidity of the inclusive approach is not suitable for China with its fast-developing condominium industry. The simpler and logical exclusive approach should therefore be adopted.<sup>95</sup> However, a future Chinese statute should enumerate the principal common property components along with an exclusive definition.<sup>96</sup> This needs to be done all the while being acutely aware of the criticisms leveled against the inclusive approach for its failure to specify the components that make up the common elements.<sup>97</sup> Since condominium law is still a novelty in China, this will help many apartment owners to be well aware of the demarcation between the unit and the common property. A yet to be written Chinese statute may provide that common property be defined as all the parts of the condominium project other than the parts registered as units. Unless otherwise described in a project plan, the common property includes the land, building foundations, outer walls, columns, beams, roofs, staircases, corridors, entrances and exits of the building, central and appurtenant installations for services such as power, light, gas, hot and cold water, heating, air-conditioning, internet broadband, and the fixtures, the assets for property management by a

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94 Van der Merwe *Sectional Titles* 3-11.

95 Van der Merwe points out that the possible objection to an exclusive approach is that certain parts of the building for common interest, such as plumbing ducts and ventilation shafts, could not be included in the common property on the basis of the median line boundary theory. He suggests resolving this problem with implied reciprocal servitudes. See Van der Merwe *Sectional Titles* 3-11. In China, as explained above, such kind of problems could be resolved by putting into practice the new “internal and external affairs” theory.

96 UCIOA contains a special supplementary provision: § 2-102 (1) “[e]xcept as provided by the declaration: if walls, floors or ceilings are designated as boundaries of a unit, all lath, furring, wallboard, plasterboard, plaster, paneling, tiles, wallpaper, paint, finished flooring, and any other materials constituting any part of the finished surfaces thereof are a part of the unit, and all other portions of the walls, floors, or ceilings are a part of the common elements.”

97 Rohan & Reskin *Condominium Law and Practice: Forms* 45-11.

management body.<sup>98</sup> Hence, a balance is struck between the flexibility and discretion a developer would like to have in designating common property with the statutory certainty as to what exactly constitutes common property. If neither the statute nor the subdivision plan is perfectly clear as to whether a particular property is part of the common property or part of a unit, this can easily become a question for the courts.<sup>99</sup>

### **2 4 3 2 Categories of Common Property**

The unit owners obtain an undivided interest in the common elements. This interest is defined as an undivided share in the common property apportioned to a unit in accordance with the unit's quota.<sup>100</sup> Particularly important is that the common property cannot be dealt with separately from the unit that is attached to it.<sup>101</sup> If a building or any part of a building including the parcel of land upon which it is situated has not been identified on a declaration or subdivision plan as being a part of a unit, it is common property. Common property can be categorized into three types: mandatory and permissive common property, general and limited common property, and the common property for a multi-building scheme and the common property for a single building.

#### **2 4 3 2 1 Mandatory and Permissive Common property**

Some civil law statutes distinguish between mandatory common property and permissive common property on the basis of whether the nature of common areas is

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98 Art 20 of the *Shanghai Property Management Regulation of 2004* enacted by the Standing Committee of Shanghai People's Congress on 19 August 2004. It provides a list of fixtures or assets as common property for the purpose of property management. It includes: (1) rooms for property management; (2) rooms for a porter, security guard, telephone, vestibules and corridors; (3) garage designated by the project plan for non-motorized vehicles; (4) green spaces, roads and grounds (5) other common parts of the condominium declared as such by the developer in a deed of sale or other written agreement; (6) other common property designated by statutes.

99 Rohan & Reskin *Condominium Law and Practice: Forms* 45-12.

100 STA s 1 (1) *s v* "unit" and UCIOA § 1-103 (2).

independent structurally or their use is independent of the use made of the condominium unit.<sup>102</sup> The common areas can thus never be a component of a particular unit but are necessary for a building's structural existence and stability. These areas are regarded as mandatory common property, the land, foundations, pillars, staircases and building exits and entrances. On the other hand, the common areas that may be designated as components of a unit are defined as permissive common property. They include gardens, outdoor parking spaces, garages, and rooms used by security guards and porters. However, since both the UCIOA and the STA allow developers a great deal of discretion to designate most components of common property as part of a unit in the declaration or sectional plan, these statutes do not make use of the division between mandatory and permissive common property. For China, there are also no provisions on a division between mandatory and permissible common property.<sup>103</sup> However, as a civil-law influenced country, such a distinction is still helpful. Specifically, the common areas discussed earlier that are specially delineated by statute can be considered as mandatory common property while any other common areas designated by the developer or the by-laws in the project document are permissive common property.

#### **2 4 3 2 2 General and Limited Common Property**

Although a condominium's common property is jointly owned by all the unit owners, portions of it may have been designated for the use of less than all of the owners. Common property that is limited in this way is referred to as limited common property as opposed to general common property which all the unit owners can use. Examples include balconies, parking spaces and roof gardens allocated for the exclusive use of one owner. Although the limited common property does not

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101 See n 37 *supra*.

102 See art 5 (2) of *Gesetz über das Wohnungseigentum und das Dauerwohnrecht of 1951*, Germany; art 4 (1) of the *Japanese Condominium Act of 1962*.

103 Gao Fuping & Huang Wushuang *Property Entitlement & Property Management* 64.

necessarily alter the participation quota, one function of the employment of limited common property is to achieve a more equitable division of maintenance costs for the actual users.<sup>104</sup>

The UCIOA contains two special provisions on limited common property.<sup>105</sup> The first is that any portion of a chute, flue, duct, wire, conduit, bearing wall, bearing column, or any other fixture which lies partially within and partially outside the designated boundaries of a unit and serves only that unit is limited common property allocated solely to that unit. Any portion of the above that serves more than one unit or any portion of the common property is a part of the common property. In addition, any shutters, awnings, window boxes, doorsteps, stoops, porches, balconies, patios, and exterior doors and windows or other fixtures designed to serve a single unit, but located outside the unit's boundaries, is limited common property allocated exclusively to that unit.

The STA makes no distinction between limited common property and general common property since the term limited common property is not mentioned in the Act. However, the term exclusive use area is analogous to limited common property under the UCIOA. An exclusive use area is a part or parts of the common property designated for the exclusive use by the owner or owners of one or more sections.<sup>106</sup> Although it is argued that an exclusive use area differs from a limited common property on technical grounds,<sup>107</sup> both of them share the same legal nature and characteristics. That is, they are not part of units and reserved for the use and

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104 Van der Merwe & Butler *Sectional Titles, Share Blocks and Time-sharing* 51; Rosenstein "Inadequacies of Current Condominium Legislation—A Critical Look at the Pennsylvania Unit Property Act" 1974 (47) *Temp L Q* 655-696.

105 UCIOA § 2-102 (2) & (4).

106 STA s 1 (1) *s v* "exclusive use area".

107 Van der Merwe argues that limited common property in some foreign statutes is distinguished from exclusive use areas in South African context mainly because it is set aside for the use and enjoyment of two or more of the unit owners while the exclusive use areas may be reserved for only one or more unit owners. See Van der Merwe *Sectional Titles* 3-14.

enjoyment of less than all the unit owners. The *Sectional Titles Act of 1971* did not provide for the concept of exclusive use areas but the *Sectional Titles Act of 1986* provides the stringent rules for the registration of exclusive use areas.<sup>108</sup> China should make provisions about exclusive use areas to tackle one of the vexing areas of dispute in condominium management.

The main difference between the South African exclusive use area and the United States limited common property is in the way it is created. Under the UCIOA, limited common property can only be created by a declaration or the two special provisions mentioned above.<sup>109</sup> The use of common elements may also be subject to restricted use on the basis of association assignments without them becoming limited common elements.<sup>110</sup> In other words, an association's designation is not regarded as creating a limited common element. In the STA, an exclusive use area can either be an independent real right by registration<sup>111</sup> or a mere personal right that is included in the rules of sectional title scheme.<sup>112</sup> As independent real rights, exclusive use areas can either be created by the developer when the sectional plan is registered<sup>113</sup> or they can be created by a unanimous resolution of a body corporate.<sup>114</sup> This type of exclusive use areas is also called genuine exclusive use areas.<sup>115</sup> Unlike genuine exclusive use areas, the non-genuine areas of exclusive use are created by special rules of the sectional title scheme. A non-genuine right of exclusive use is not a real right and thus is incapable of being mortgaged as a loan security. This non-genuine

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108 Van der Merwe "The Establishment of Exclusive Use Areas in terms of the Sectional Titles Act by means of Management Rules" 1997 (60) *THRHR* 365-367.

109 UCIOA §1-103 (19).

110 Rohan & Reskin *Condominium Law and Practice: Forms* 45-13.

111 STA s 27 (1).

112 STA s 27 A.

113 STA s 27 (1) (a) & s 27 (1A).

114 STA s 27 (2) & (3).

115 Mostert "The Regulation of Exclusive Use Areas in terms of the Sectional Titles Act 95 of 1986: An Evaluation of the Existing Position and Suggested Alternatives" 1997 (3) *Stell L R* 326-330. See also *Body Corporate of the Solidatus Scheme No SS23/90 v De Waal* [1997] 3 All SA 91 (T) 95h-j.

exclusive use right is simply a contractual right enforceable only between the sectional owners concerned and the body corporate.<sup>116</sup>

The Chinese condominium statute should follow South African experience in such a way that exclusive use areas can be created by the developer in the project document or by with the unanimous consent of the management body. To ease the practical problems of dealing with the distinction between genuine and non-genuine exclusive use areas, the Chinese statute should regard the right of exclusive use as a real right. Then whether it is created by the project document or by the unanimous resolution of the management body, the right is registered in the deed registry. For exclusive use areas the developer creates on the project document, this real right on the exclusive use areas can be registered together with a unit's registration. When the management body creates exclusive use areas, the real right can subsequently be recorded on the previously issued certificate of unit title. It is not necessary to have a separate certificate for a real right for exclusive use areas. In China it is highly unlikely that a management body would be able to create exclusive use areas by amending the project document since most Chinese condominium schemes encompass many units and a large number of unit owners. It is difficult to achieve unanimity on exclusive use area issues. Nonetheless, the most popular method in China to create exclusive use areas is for the management body by a special resolution to grant unit owners an exclusive use right for a limited term. An example might be a unit owner having an exclusive use right to a garden patch for ten years or as long as the person is a member of the management body.

Whether this granted exclusive use right is a real right or a personal right needs further analysis. First, a closer examination shows that whether the right is assignable does not always fit perfectly with proprietary status. On the one hand, some real rights are not assignable, such as rights of way, which are attached to specific land and cannot be alienated separately from the land. On the other hand, that a right can be

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116 Van der Merwe *Sectional Titles* 11-24.

assigned does not mean that it is proprietary.<sup>117</sup> Although it is exceptional for personal rights to bind third parties on account of the privity principle, it is common for the benefit of such rights to be assigned to third parties who are then able to sue to enforce them.<sup>118</sup> For instance, A contracts with B to provide watering services for B's garden for ten years and then A could assign the benefit of this contract to C, so that C could sue B to enforce the contract. In this scenario, it does not give C a proprietary right in B's garden. Therefore the assignability of a benefit cannot be used to prove that a right is proprietary or not. Secondly, unlike the exclusive use areas created by a project document or a management body's unanimous resolution, most exclusive limited term use areas created by a management body depend largely on convenience and an owner's personal reputation. The exclusive use right for a limited term is understandably granted to a "good neighbor" owner. Thirdly, the alienation of condominium units more frequently occurs in China than in the United States or South Africa. This is because the condominium is the predominant housing in China and people have few other housing options. When a well-off family wants to improve their housing, they purchase a larger and more luxurious condominium rather than purchasing a house or duplex which are available in the United States and South Africa. The social mobility within condominiums means the members of the management body may change quite often, especially in a large multi-building condominium complex. Against this background, it is more appropriate to treat the exclusive use areas for a limited duration created by a special resolution by the management body as a personal or contractual right.

In summary, for China it is proposed that limited common property means common property designated for the specific use by the owners of one or more units. This limited common property can be designated either in the project document or by a management body's unanimous resolution filed at the deed registry office. In addition,

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117 Smith *Property Law* 13.

118 See n 117 *supra*.

the management body has the power to enter into a limited term exclusive use arrangement for the common property with the owners. Such a granted right is not regarded as a real right but a personal right.

### **2 4 3 2 3 Common Property for a Multi-building Scheme and Common Property for a Single Building**

There is another legal distinction between the common property for a multi-building condominium and the common property for a single condominium building. This is because in China it is common to have a condominium scheme comprising many high-rise buildings. In other words, there is a general management body for a multi-building condominium scheme developed by a single developer and usually operated and administered by a single managing agent.<sup>119</sup> Here, the common property for the whole block refers to common elements designed for all the high-rise buildings such as their boundary fences and the main gate as well as the central service installations such as power, light, gas, air-conditioning, reservoirs, water tanks and pumps. The common property for a single building is easily understood under the conventional “one building one condominium” model popularly adopted in South Africa and the United States. It refers to the common elements designed solely for a specific building’s use, such as its elevator, the staircase and the roof of the building. In practice, it is very contentious to distinguish the two in order to clearly demarcate the common expenses for different buildings and different unit owners.<sup>120</sup> But it is necessary since unit owners' contributions should be limited to expenses associated with the operation and maintenance of the condominium in which they have an ownership interest. Thus, to ascertain the equitable common expenses of a multi-building condominium the subdivision plan must be drafted carefully, otherwise

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119 Art 9 of the *Property Management Regulation of 2003* issued by the State Council provides that one property managing area should establish one management body.

120 Hu Zhigang *New Discourse on Real Property* 238.



many disputes will arise.

A multi-building condominium scheme consists of a number of adjoining but separately constituted condominiums. The multi-building condominium is usually created to limit the size of the common estate in order to better use scarce land resources. As explained above, some common elements are designed for whole block use and some common elements only for single building use. Although neither the UCIOA nor the STA provide direct references, a Chinese condominium statute should contain provisions on the management of common property in a multi-building condominium. One option is for each condominium building in a block to be operated by a separate management body, or one association should operate all of the condominiums.<sup>121</sup> However, it is more effective to establish a two-tier management system to administer the management and maintenance of common property in a multi-building scheme or a mixed-use condominium scheme.<sup>122</sup> A two-tier management body has a main or master management body at the first-tier and one or more subsidiary management bodies at the second-tier. Every two-tier management body has at least one subsidiary management body representing the interest of a particular group of owners having a common interest, such as a group living in the same building. The two-tier management body system will be discussed in greater detail in Chapter Six.

## **2 4 4 Parking Space**

Parking space is a key issue for condominium developers and unit owners. It is a vexing issue in practice.<sup>123</sup> It is singled out here because it exemplifies the impact of the definition and delimitation of core elements of condominium ownership. Parking

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121 Poliakoff *Florida Condominium Law and Practice* § 11.7.

122 Gao Fuping & Huang Wushuang *Property Entitlement & Property Management* 67.

123 The issue of parking spaces is currently the subject of extensive debate in condominium practice and therefore was a very debatable issue when the draft of the *Chinese Property Code* was under deliberation. See Chen & Mostert “Formalizing Condominium Ownership in China” 68.

space can be designated in many ways, either as a component of a unit, as common property, as exclusive use areas, or merely by license.

In principle, condominium ownership includes such joint interest areas as parking spaces. Regardless of the method, initial parking decisions are made by the developer. Once a management body is established, it may be given the power to designate parking spaces.<sup>124</sup> Usually the developers meet the parking need of the unit owners by designating parking lots on the subdivision plan.<sup>125</sup> Ideally, the developer should designate at least one parking space for each unit. But in day to day practice, the location, use, and purpose of a particular scheme may render parking less urgent or even impossible. When condominiums are located in a congested city centers with excellent public transport, or where zoning by-laws do not permit a parking space for each unit owner, alternative arrangements are made.<sup>126</sup> Now parking spaces in China usually are bought or rented from developers.<sup>127</sup> Parking space costs may then burden the condominium owner, depending on the area in which the condominium is situated and the availability of parking. The parking spaces issue has led to many disputes in China between real estate developers and condominium owners.<sup>128</sup> This is mainly because the Chinese developers are not liable to draw up a constitutive project document to designate the parking space.

Problems with the allocation of parking spaces are common in undeveloped condominium law. In South Africa, for instance, the first generation condominium legislation, the *Sectional Titles Act 95 of 1971*, did not regulate parking spaces or

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124 Freedman & Alter *The Law of Condominia and Property Owners' Associations* 118.

125 Art 74 (1) of the *Chinese Property Code of 2007*; STA s 25 (2) (a) (v); UCIOA § 2-109 (b) (10) and § 2-102 (2) & (4).

126 Chen & Mostert "Formalizing Condominium Ownership in China" 68.

127 Art 74 (2) of the *Chinese Property Code of 2007* stipulates that parking spaces located in the planned condominium scheme can be settled by agreement in ways of separate purchase or inclusion of apartment sale or lease.

128 Wang Liming "Ownership of Garages in the Property Code and Its Relevant Problems" 2006 (5) *Modern Law Science* 76. (Chinese version)

other common areas maintained by the developer. This resulted in malpractices by unscrupulous developers, such as selling or letting parking spaces to outside persons.<sup>129</sup> This seriously impaired the functioning of sectional title schemes, since harmony within the sectional title communities was jeopardized. It is clear that many of these problems could have been avoided had there been legislative provisions to deal with the issue of parking. The situation was rectified in the second round of legislation with the *Sectional Titles Act 95 of 1986* which has since been revised several times by means of legislative amendment. Now the South African sectional title law no longer permits developers or any sectional owners to alienate exclusive use areas such as parking spaces to outsiders.<sup>130</sup>

Even though regulating parking is contingent upon the many factors and therefore needs to be flexible, there are ways to draft provisions that ensure fair dealing with condominium parking space. In the simplest case, one in which there are sufficient parking spaces, the developer can set up parking spaces as individual units or as common property for exclusive use by some or all of the owners. Otherwise, parking spaces can be in an area of the common property, meaning the management body retains the right to specify which unit owners can park on which part of the common property. Large mixed-use condominiums without sufficient parking spaces for either each residential condominium owner or a commercial unit owner are more complex. In this case parking spaces can be structured around "parking licenses". This means that the residential unit owners use the parking spaces overnight whereas the commercial owners can use them during the day.<sup>131</sup> Where parking space is inadequate, such as in congested urban areas, the situation is problematic unless good public transport renders parking less important.<sup>132</sup>

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129 Xu Shanghao & Wang Yangguang "On the Ownership of Condominium Parking Space" 2007 (1) *Legal Forum* 26. (Chinese version)

130 STA s 27 (1) (a), (3) & (4) (a).

131 Baker *Condominium Law in Ontario: A Practical Guide* 96.

132 Chen & Mostert "Formalizing Condominium Ownership in China" 69.

In summary, the prospective Chinese condominium statute should require disclosure of all relevant information including parking space designation to prospective buyers in the public statement provided by developers. The existing practice under which developers make unconscionable profit by selling off or leasing the parking spaces should be strictly forbidden. The reason for this is obvious. Parking space is located either on the ground in the scheme, or at underground level of the building or at the roof level of the building. Regardless of where the parking space is situated, it falls within the scope of the land or building in the scheme. The land or the land use right in Chinese context is classified as common property. Therefore, the developer cannot charge the unit owners extra money for parking space since it is either part of common property or as part of individual unit, as the case may be.

# CHAPTER 3

## CREATION

### 3 1 INTRODUCTION

This chapter is concerned with the requirements for land intended for subdivision and the buildings that comprise a condominium project. Both the UCIOA and the STA require formal project documents and registration (recordation) for the creation of a condominium.<sup>1</sup> The creation of a condominium in China falls within a variety of statutes and regulations, *inter alia* the *Law of Urban Real Estate Development Administration*, the *Regulation Governing Real Estate Development and Operation in Urban Areas*, and the *Building Construction Law*.<sup>2</sup> Like South Africa, the development of a condominium project in China is very similar to subdividing a piece of land for a freestanding townhouse.<sup>3</sup> Generally, the relevant provisions for the creation of condominium buildings in China are similar to provisions in the UCIOA and the STA in many respects. But there is one major difference: there is no counterpart in Chinese law to a constitutive document for the creation of a condominium, namely, a declaration or a sectional plan. All of this will be explained in more detail.

Moreover, it is necessary to discuss the relevant Chinese law on the subdivision of

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1 Van der Merwe “The Sectional Titles Act in the Light of the Uniform Condominium Act” 1987 (20) *CILSA* 8-9.

2 The *Law of Urban Real Estate Development Administration of the PRC of 1994* (as amended in August 2007) issued by the National People’s Congress of PRC; the *Regulation Governing Real Estate Development and Operation in Urban Areas of 1998* issued by the State Council; the *Building Construction Law of 1997* issued by the National People’s Congress of PRC.

3 Van der Merwe *Sectional Titles* 6-3.

land because it is unique in light of public landownership. Therefore this chapter refers to the UCIOA and the STA to explain the steps and the process to be followed from land subdivision to the final registration of a condominium title.

## **3 2 LAND SUBDIVISION**

### **3 2 1 Condominium Feasibility Plan**

In China, the initial step for a developer to create a condominium is to draft a condominium feasibility plan. This plan comprises three components, namely, a market demand study, a building techniques study, and a financing study.<sup>4</sup>

Basically, the feasibility plan includes 1) title pages, which means the name of the project, the location plan, and the site plan; 2) a market potential analysis; 3) an estimate of the building materials to be used and the qualifications of the prospective builders; 4) a floor area plan of the proposed development, the development's proposed capitalization and the relevant building parameters; 5) the start and finish construction schedule; 6) an estimate of the project's operating budget; 7) a financial assessment, which includes the net income from the sale of apartments, the tax to be levied and the potential profit; 8) a risk analysis, such as the possible change in statutes and relevant policies, market demand risk, and the changeable price of building materials; 9) a national economic evaluation; and 10) a conclusion.<sup>5</sup>

The local land authority examines the project's feasibility plan, together with the land-use right application.<sup>6</sup> After obtaining the preliminary approval, the feasibility plan becomes the project plan. Then the developer proceeds to seek final approval

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4 Gao Fuping & Huang Wushuang *New Discourse on Real Estate Law* 176.

5 See n 4 *supra*.

6 Art 4, 5 & 7 of the *Measures Governing the Preliminary Approval of Land Use for Construction Projects of 2001* (as amended in 2004) issued by the Ministry of Land and Resources and art 4 of the *Measures on Examination and Approval of Land Use for Construction Purpose of 1999* by the Ministry of Land and Resources.

from the local planning authority and the local housing authority or local construction commission.<sup>7</sup> The feasibility plan's final approval largely depends on whether the proposed plan is in accordance with the comprehensive land-use planning,<sup>8</sup> annual national land-use planning for construction purposes,<sup>9</sup> urban zoning planning, and annual real estate development planning.<sup>10</sup> A feasibility plan dealing with large and/or important projects needs to be approved by the relevant Development and Reform Commission. The Development and Reform Commission Agency is in charge of regulating operation of the macro-economy and guiding the economic reform in China.

### **3 2 2 Obtaining a Land-use Right**

After a condominium feasibility plan is approved by the relevant authorities, the developer should acquire a land-use right on the land on which the condominium building or buildings are to be erected.<sup>11</sup>

The UCIOA expressly provides that the condominium project can be developed not only on land held in fee simple but on certain forms of leasehold land.<sup>12</sup> At common

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7 Art 12 of the *Regulation Governing Real Estate Development and Operation in Urban Areas of 1998*.

8 Chapter 3 of the *Land Administration Law of the PRC of 1986* (as amended in 1998) requires every local government at the city or county level to prepare a comprehensive land-use plan; also see art 3 of the *Law of Urban Planning of 1989*. The main objective of planning and land-use control is to ensure that land as a limited resource, is put to the best use for the public good.

9 See the *Provisions on Management of Annual Land-use Plan of 1999* issued by the Ministry of Land and Resources. This is to ensure that construction sites are located in the planned areas to protect arable land from being exploited for urbanization.

10 Art 10 of the *Regulation Governing Real Estate Development and Operation in Urban Areas of 1998*.

11 Gao Fuping & Huang Wushuang *New Discourse on Real Estate Law* 179; Randolph & Lou *Chinese Real Estate Law* 141.

12 UCIOA § 2-106. In addition, § 1-103 (26) states that "real estate means any leasehold or other estate or interest in, over, or under land, including structures, fixtures, and other improvements and interests ..."

law the freehold or fee simple absolute in possession means an estate of intrinsically unlimited duration which connotes the virtual reality.<sup>13</sup> The leasehold means a right of exclusive possession of land for a period of pre-arranged duration conferred by the lessor (or landlord) on the lessee (or tenant).<sup>14</sup> However, the STA provides that a sectional title scheme can be developed only on land that is registered in the name of the developer.<sup>15</sup> The development of sectional title schemes on leasehold land is not allowed.<sup>16</sup> In order to create a condominium project in China, the developer needs to acquire a land-use right rather than landownership on account of the public landownership issue. Chinese law differs from South Africa with its Roman-Dutch law tradition<sup>17</sup> since it considers a building as immovable property that is independent of land.<sup>18</sup> The *Constitution* provides that a person or a legal entity is allowed to use state-owned land for a period of time, usually on payment of rent or hire charges.<sup>19</sup> Once the transfer of land-use rights was recognized, China developed rules on leasing, mortgaging, selling, and inheriting land.<sup>20</sup> According to current land law, a “granted land-use right” is given for a period of 70 years for residential housing in urban areas.<sup>21</sup> The new *Property Code* provides that the urban building land-use right can be obtained by government allocation or in the market by a granting contract.<sup>22</sup> The granted land-use right certificate is obtained by registering the granted

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13 Gray & Gray *Land Law* 144.

14 Gray & Gray *Land Law* 156.

15 STA s 1 (1) s v “developer”.

16 Van der Merwe *Sectional Titles* 3-31.

17 In South African law, immovable is land and everything that is attached to land by natural or artificial means (“aard- of nagel-vast”). See Badenhorst, Pienaar & Mostert *Silberberg & Schoeman’s The Law of Property* 147.

18 Note that Chinese property law has a tradition of separating landownership and buildings. See Riasanovsky *The Modern Civil Law of China* 75-80.

19 Art 10 of the *Chinese Constitution of 1982* (as amended in 1988, 1993, 1999 and 2004).

20 Randolph “Joint Congressional Executive Committee on the China Property Rights Roundtable” available online at <http://www.cecc.gov/pages/roundtables/020303/randolph.php> [15.10.2007]

21 Art 12 of the *Law of Land Administration of the PRC of 1986* (as amended in 1998).

22 Art 137 of the *Chinese Property Code of 2007*.



land-use contract at the local land administration agency.<sup>23</sup> The land-use right is similar to the long-term ground lease that is common in America to develop commercial sites and the long lease system in South Africa.<sup>24</sup> But the main difference is that the Chinese right is obtained from the government rather than from a private owner. Before the enactment of the *Property Code*, Chinese law did not provide whether the holder of land-use rights must pay increased charges based on the value of the land at the time of renewal, or whether the renewed term would be at least as long as the original term. To reduce uncertainty and risk, the *Property Code* now ensures that the state confirms a holder's right of automatic renewal without charge for private ownership of residential buildings,<sup>25</sup> except when it is in the public interest to reclaim the land.<sup>26</sup> This is welcome to boost the condominium construction industry.

Both the STA and UCIOA allow the condominium project to be developed on separate plots of contiguous or even non-contiguous land.<sup>27</sup> In South Africa, if a scheme is to be developed on two or more pieces of land, the developer must apply for a certificate of consolidated title in favour of the same developer before registration of the sectional plan if the pieces are not already notarially tied.<sup>28</sup> However, the Chinese law contains no explicit provisions as to whether condominium buildings can be developed on separate plots of land or whether these plots must first be consolidated. Statutorily, a real estate development based on a land-use right must conform to the contract granting land-use right.<sup>29</sup> It would seem that as long as a

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23 Art 27 & 29 of the *Measures on Land Registration of 2007* issued by the Ministry of Land and Resources; art 15 of the *Law of Urban Real Estate Development Administration of 1994* (as amended in August 2007).

24 Randolph & Lou *Chinese Real Estate Law* 125-126; Badenhorst, Pienaar & Mostert *Silberberg & Schoeman's The Law of Property* 430.

25 Art 149 of the *Chinese Property Code of 2007*.

26 Art 148 of the *Chinese Property Code of 2007*.

27 UCIOA § 2-109 (b) (9); STA S 5 (6).

28 STA s 4 (2); also see Van der Merwe *Sectional Titles* 3-29.

29 Art 26 of the *Law of Urban Real Estate Development Administration of 1994* and art 15 of the

granting contract does not provide otherwise, it would be possible to develop a condominium project on separate parcels of land. However, a condominium project can only be established when two or more such contiguous pieces of land are registered in the name of one person. This is because the granted land-use right severely restricts its use and the period for such use.<sup>30</sup> A land-use right for a different parcel of land may have both a different use and different terms. Therefore, it is not feasible to develop a condominium project on separate parcels of land with different uses or with different terms. In short, if a condominium project comprises more than one parcel of land with different uses, such parcels must be consolidated by registration at a land-administration authority.

### **3 3 APPROVAL BY PUBLIC AUTHORITY**

In general, a developer must ensure that project plans are not in conflict with any applicable planning statutes and must obtain a building permit. Both the STA and the UCIOA expressly require the relevant public authority to approve a condominium scheme.<sup>31</sup> Chinese law is not an exception. However, since these administrative interventions are primarily regulated outside of a condominium statute, they are only briefly explained.

Upon obtaining a land-use right certificate, the developer first receives a Real Estate Development Project Manual and is then required to record the major development updates at the real estate authority from time to time.<sup>32</sup> If the condominium project requires the demolition and redevelopment of an older residential area, the developer needs to apply for a Housing Demolition and Removal

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*Regulation Governing Real Estate Development and Operation in Urban Areas of 1998.*

30 Art 12 of the *Law on Urban Real Estate Development Administration of 1994* (as amended in August 2007).

31 STA s 4; UCIOA § 1-106.

32 Art 19 of the *Regulation Governing Real Estate Development and Operation in Urban Areas of 1998.*

Permit from the local real estate authority.<sup>33</sup> This is to ensure the developer is legally entitled to deal with every homestead concerning their compensation for having their dwelling demolished and having to move. Subsequently, two permits need to be obtained from the local planning authority in order to commence construction. But to obtain these permits the proposed condominium project cannot contravene any local real estate development plans, zoning ordinances, land-use by-laws, or any previous permits issued for the scheme.<sup>34</sup> The Land Use Planning Permit allows the developer to initiate a plat of the project survey<sup>35</sup> while the Building Permit allows the developers to commence construction by contracting and sub-contracting with the builders.<sup>36</sup> It is notable that the Chinese law gives preferential treatment to developers to encourage residential condominium developments. This includes: first, granting a tax deduction or even an exemption for a housing development project; second, providing a low interest loan for the project; and third, granting a land-use right at a lower price than for ordinary land-use transfers.<sup>37</sup>

### **3 4 BUILDING**

Although the physical quality and types of buildings are specifically regulated in building and planning legislation, both UCIOA and STA contain building provisions. UCIOA prohibits local lawmakers from discriminating against condominiums by means of a discriminatory building code.<sup>38</sup> For example, if a building code requirement imposing a minimum fire-wall rating between apartments does not prevent a rental apartment building from being built, this act would override any

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33 Art 7 of *Measures Governing Demolition and Redevelopment of Urban Housing of 2001* issued by the State Council.

34 Art 25 of the *Law of Urban Real Estate Development Administration of 1994*.

35 Gao Fuping & Huang Wushuang *New Discourse on Real Estate Law* 180.

36 Art 7 of the *Building Construction Law of 1997*.

37 Art 29 of the *Law of Urban Real Estate Development Administration of 1994*.

38 UCIOA § 1-106 (a).

requirement imposing a higher fire wall rating between apartments merely because the same building was a condominium.<sup>39</sup> In addition, the UCIOA defines “real estate” to include “parcels with or without upper or lower boundaries, and spaces that may be filled with air or water.”<sup>40</sup> This allows trailer park projects, mooring sites at marinas and airspace pockets to be organized as a condominium.<sup>41</sup> These are examples of bare land condominium schemes without buildings. The South African Act does not allow the creation of bare land condominiums.<sup>42</sup> The Chinese statute should follow the South African model and prohibit bare land condominium schemes because of the scarcity of urban land in China.

Furthermore, the South African statute provides expressly that sectional title buildings must be of a permanent nature.<sup>43</sup> Thus temporary structures such as caravans, carports, and a mobile timber house not affixed to the ground, and prefabricated buildings cannot become a condominium scheme since they do not comply with the statute.<sup>44</sup> However, the STA does allow a scheme to include one or more buildings.<sup>45</sup> Although UCIOA does not provide direct reference to a multi-building project, the provisions for a master association imply that it is possible to allow more than one building in a scheme.<sup>46</sup> In China, since it is popular to develop multi-building schemes, the statute should allow a condominium complex to encompass more than one building.

Finally, most state rental buildings in China were sold to private citizens under the

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39 UCIOA § 1-106 comment 2.

40 UCIOA § 1-103 (26).

41 Van der Merwe *Apartment Ownership* 31.

42 Van der Merwe & Rossouw “Dockominiums or Sectionalized Mooring Spaces in terms of the Sectional Titles Act” 1994 *TSAR* 72.

43 STA s 1 (1) *s v* “buildings”.

44 Van der Merwe *Sectional Titles* 3-32.

45 STA s 4 (2).

46 UCIOA § 2-120; also see Lundquist “Mixed Use Condominiums under the Minnesota Uniform Condominium Act” 1984 (10) *Wm Mitchell L Rev* 97-114.

housing privatization policy in the 1990's.<sup>47</sup> However, with this policy, some of the units in a building could be sold to private individuals while the remaining units could remain under state ownership. The question is whether such a partial private-owned building is subject to apartment ownership. In America, although various condominium schemes can be organized into a master or umbrella association which provides management services or has decision-making functions,<sup>48</sup> condominium schemes under UCIOA, in principle, must be subject in their entirety to the condominium regime.<sup>49</sup> Having only some units subject to the condominium regime can bring intractable management and maintenance difficulties. Chinese local governments need to avoid allowing partial-building privatization to take place. A better solution is to disallow a partial condominium scheme in any building in China.

## **3 5 CREATION AND REGISTRATION**

### **3 5 1 UCIOA**

#### **3 5 1 1 Creation**

Like any other freehold estate, UCIOA requires registration of the declaration and accompanying project documents for the creation of a condominium scheme.<sup>50</sup> Under UCIOA three basic documents are involved in the creation of a condominium, namely, a declaration or a master deed,<sup>51</sup> a set of by-laws and an individual unit deed.

The declaration must be recorded in the name of the owners' association and in the

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47 Randolph "Ownership with Chinese Characteristics: Private Property Rights and Land Reform in the PRC", online: <http://www.cecc.gov/pages/roundtables/020303/andolph.php> [15 January 2008].

48 UCIOA § 2-120 (a) & (b).

49 Van der Merwe *Apartment Ownership* 31.

50 UCIOA § 2-101 (a).

51 The term "master deed" is not often used but it is descriptive of the document's effect. This document serves as a form of basic conveyance. See Johnson "Condominium: The Theory and North Dakota Practice" 1967 (44) *N D L Rev* 347.

name of each person executing the declaration.<sup>52</sup> The declaration is the governing or constitutive document of the condominium development.<sup>53</sup> The condominium scheme is created by registration of the declaration. Provisions in the declaration have been described in American cases as being similar to a “covenant running with the land”.<sup>54</sup> The declaration statement circumscribes and defines the limits of absolute ownership which a purchaser obtains on purchasing a unit. The declaration defines the very nature of the condominium and must include: the name of the condominium project, the name of the county in which it is situated, the legal description of the real estate included in the project, a statement on the maximum number of units to be created, a description of the boundaries of each unit, a description of any limited common elements and any real estate which may be allocated subsequently as limited common elements. The declaration also includes a description of any development rights reserved by the declarant along with their conditions or limitations, a statement regulating the boundaries of different parcels of real estate and the exercise of a development right in the case of a phased development, a statement about allocating the proportions of the common interests, restrictions on partitioning the condominium project and the alienation of the units. Finally there needs to be a record of the easements and licenses reserved in the declaration.<sup>55</sup> The declaration may contain any other matters the declarant considers appropriate, including any restrictions on a unit’s usage or the number of persons or other factors involved in who may occupy the units.<sup>56</sup> UCIOA also has a special requirement when the condominium is on leasehold property. For example, if the expiration of a lease terminates or reduces the size of the

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52 UCIOA § 2-101(a). This includes the name of the lessor if the condominium is on leased property. See UCIOA § 1-103 comment 13 and § 2-106.

53 UCIOA § 1-103 (13) holds that declaration means any instrument, however denominated, that creates a common interest community, including its amendments.

54 UCIOA § 1-103 comment 14. For more detail on the law governing the running of covenants with freehold land, see Gray & Gray *Land Law* 423-426.

55 UCIOA § 2-105 (a).

56 UCIOA § 2-105 (b).

condominium scheme, the landlord must sign the declaration.<sup>57</sup> Moreover, a unit owner's leasehold interest in a condominium is not affected by failure of other unit owners to pay rent or fulfill any other covenant.<sup>58</sup>

Plats and plans are part of the declaration and must be filed for registration.<sup>59</sup> Essentially, the plats refer to a land and apartment survey of the entire condominium project. The plans are a boundary survey of each unit.<sup>60</sup> The plats and plans are used along with the declaration to clearly determine the boundaries of the units. They are also employed to determine the respective duties and responsibilities of the condominium association and the unit owner on maintenance and repair issues.

The second basic document needed to create a condominium is the by-laws of the condominium association. These by-laws are subordinate to the declaration.<sup>61</sup> In fact, UCIOA does not require the recordation of the by-laws and therefore they may be unrecorded.<sup>62</sup> Nevertheless, UCIOA requires six indispensable components for a condominium association's by-laws. They are 1) the number of members of the executive board and the titles of the association's officers; (2) the election by the executive board of a president, treasurer, secretary, and any other officers of the association that the by-laws specify; (3) the qualifications, powers and duties, terms of office, and methods of electing and removing executive board members and offices and filling vacancies; (4) which, if any, of its powers the executive board or officers may delegate to other persons or to a managing agent; (5) which of its officers may

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57 UCIOA § 2-106 (a).

58 UCIOA § 2-106 (b).

59 UCIOA § 2-109 (a).

60 UCIOA § 2-109 comment 2. It states that under this Act, it is important to recognize that a "plat" need not mean a "survey" of the project's entire land area at the time the initial plat is recorded. However, as the development proceeds, amendments to the plat are made so the plat eventually becomes a survey of the whole project.

61 UCIOA § 2 -103 (c) provides that in the event of a conflict between the provisions of the declaration and the by-laws, the declaration prevails except to the extent the declaration is inconsistent with this Act.

62 UCIOA § 3-106 comment 1.

prepare, execute, certify, and record amendments to the declaration on the association's behalf; and (6) a method for amending the by-laws.<sup>63</sup> Subject to the provisions of the declaration, the by-laws may provide for other matters the association deems necessary and appropriate.<sup>64</sup>

The third basic document is the individual unit deed. It must generally be tendered together with the declaration at the land registry for recordation.<sup>65</sup> The deed usually contains a description of the land, the unit's description as presented in the declaration, a statement on use restrictions, and the unit entitlement or the portion of undivided interest in the common elements of each unit.<sup>66</sup> UCIOA contains no detailed provisions about the requirements necessary for a title deed since the *Model Statute of the Federal Housing Administration* adequately addressed this issue.<sup>67</sup>

### **3 5 1 2 Recordation**

UCIOA was not designed to provide a uniform registration procedure.<sup>68</sup> Rather, it leaves room for each state to accommodate its own state administrative procedural act.<sup>69</sup> According to UCIOA, the registration of a condominium development is only required for a residential scheme since commercial and industrial common interest communities are exempt from registration.<sup>70</sup> Hence, the registration of a residential condominium is done as long as the administrative agency, usually the Land Registrar, is satisfied with the documents submitted.<sup>71</sup> However, fees and taxes are usually

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63 UCIOA § 3-106 (a).

64 UCIOA § 3-106 (b).

65 Van der Merwe *Apartment Ownership* 38.

66 Johnson "Condominium: The Theory and North Dakota Practice" 349.

67 The *Model Statute for Creation of Apartment Ownership of the Federal Housing Administration of the United States of 1962* (Form 3285) § 12.

68 In fact, the UCIOA Section 5 "Administration and Registration of Common Interest Communities" is an optional clause.

69 UCIOA § 5-101 comment 3.

70 UCIOA § 5-102 comment 1.

71 UCIOA § 5-104 (a) (2).



required when lodging an application for registration.<sup>72</sup> UCIOA does not let a declaration, or its amendment, be recorded unless all of the buildings' structural components and mechanical systems are substantially completed in accordance with the plans.<sup>73</sup>

## **3 5 2 STA**

### **3 5 2 1 Creation**

In South Africa, the developer must first ensure that his proposed project complies with the statutory requirements pertaining to land and buildings.<sup>74</sup> Next, the developer should contemplate the financing of the proposed scheme and whether it is feasible to develop the project in phases.<sup>75</sup> Then the developer invites an architect or a land surveyor to prepare a draft sectional plan. This plan is drawn up in conformity with the requirements of section 5 of the STA.<sup>76</sup> Since a sectional title certificate is issued on the basis of the registered sectional plan, this plan has to be prepared as accurately as possible.<sup>77</sup> Although there is no need for a local authority to approve a sectional title scheme, the local authority can still be called upon to condone certain planning and building infringements.<sup>78</sup> If it is found that there are inconsistencies or irregularities in the draft plan with relevant town planning schemes and building by-laws, the developer must lodge an application to the local authority for a waiver.<sup>79</sup> The local authority has the authority to condone non-compliance by issuing a

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72 UCIOA § 5-103 (a); Van der Merwe *Apartment Ownership* 39.

73 UCIOA § 2-101 (b).

74 Van der Merwe *Sectional Titles* 6-6.

75 Van der Merwe "The South African Sectional Titles Act Compared with the Singapore Land Titles (Strata) Act" 1999 (3) *Singapore Journal of International & Comparative Law* 136.

76 STA s 5.

77 Van der Merwe *Sectional Titles* 5-5.

78 STA s 4 (5) (b).

79 Van der Merwe *Sectional Titles* 6-5.

certificate of condonation to the developer.<sup>80</sup> Once the legal requirements have been complied with or non-compliances have been waived by the local authority, the draft sectional plan is then submitted to the Surveyor-General for approval.<sup>81</sup> The *Sectional Titles Amendment Act of 1997* streamlines the process of establishing a sectional title scheme in order to save administrative costs and to avoid red tape.<sup>82</sup> The role played by the local authority in establishing a sectional title scheme is therefore reduced.<sup>83</sup>

A sectional plan is neither an architectural masterpiece nor as detailed as a building plan.<sup>84</sup> Instead, it resembles a general plan of a township. Usually, a draft sectional plan contains five basic components, namely, a title page; the block plan or site plan,<sup>85</sup> the floor plan or section plan,<sup>86</sup> the cross-section plan,<sup>87</sup> and the participation quota schedule.<sup>88</sup> The sectional plan demarcates the boundaries of units, the common property and any exclusive use area. It shows the floor areas of a section by laying out both its vertical and horizontal boundaries.<sup>89</sup> In addition, it identifies which part of

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80 STA s 4 (5).

81 STA s 4 (1).

82 The *Sectional Titles Amendment Act 44 of 1997* s 2 & s 3; see Van der Merwe *Sectional Titles* 6-3.

83 It is suggested by some that the role of local authorities as custodians of the public interests should have been enhanced rather than diminished. See Cowen "From Sectional to Airspace Title" (1985) *Acta Juridica* 333; Van der Merwe *Sectional Titles* 6-15. However, this issue is debatable since one can argue that saving administrative costs and avoiding red tape are certainly in the public interest.

84 Van der Merwe *Sectional Titles* 5-9.

85 The block plan is designed to show ground level details of the land and buildings included in the scheme. The content of the block plan has to comply with the *Sectional Titles Regulations* r 5 (2) (b) which supplements STA s 5 (3) (a).

86 The floor plan indicates how the floors of the building(s) included in the scheme are divided into sections and common property and exclusive use areas. This is subject to r 5 (2) (c) of the *Sectional Titles Regulations* which supplements STA s 5 (3) (c) & (d).

87 The cross-section plan is designed to illustrate precisely the boundaries between sections and boundaries between sections and the common property. With the new amended *Sectional Titles Regulations*, it is no longer necessary to have a cross-section plan in every sectional plan. Only when ambiguity arises about the boundaries, is a cross-section plan required. This is subject to r 5 (3) of the *Sectional Titles Regulations*.

88 The *Sectional Titles Regulations* r 5 (2).

89 The *Sectional Titles Regulations* r 5 (2) (c) (i).

the building is common property.<sup>90</sup> More importantly, the sectional plan provides the participation quota of each section that was filed with and accepted by the Surveyor-General.<sup>91</sup>

Besides the sectional plan, the rules of the scheme under the STA, which are equivalent to the by-laws under the UCIOA, are very important for creating the sectional titles scheme. Under the STA, a distinction is made between registered rights and conditions imposed by the developer and the rules governing the management of the scheme and the conduct of the owners in the scheme.<sup>92</sup> The conditions imposed by the developer have to be certified by a conveyancer and filed on a schedule with the sectional plan.<sup>93</sup> By contrast, a conveyancer must certify whether the model rules of Annexure 8 and 9 of the *Sectional Titles Regulations* will apply to the scheme or whether the developer has amended or replaced some of these rules. After registration these rules are filed in the deeds office.<sup>94</sup> Annexures 8 and 9 contains two types of model rules, namely, Management Rules and Conduct Rules. Management Rules deal primarily with the administration and management of the scheme while Conduct Rules regulate a sectional owner's use and enjoyment of his or her section and common property.<sup>95</sup> These model rules apply by default when developers do not file their own set of rules.

### **3 5 2 2 Registration**

Once the Surveyor-General approves a draft sectional plan, it forms the legal foundation of the sectional title scheme and becomes a sectional plan. Thereafter, the developer submits the sectional plan to the Deeds Registry for the opening of a

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90 The *Sectional Titles Regulations* r 5 (2) (c) (ii).

91 The *Sectional Titles Regulations* r 5 (2) (e) (2) read with STA s 5 (3) (g).

92 Van der Merwe *Sectional Titles* 13-3.

93 STA s 11 (3) (b).

94 STA s 11 (3) (e).

95 STA s 1 (1) *s v* "rules" read with s 35 (2).

sectional title register and to register the sectional plan.<sup>96</sup> When a sectional plan is registered for a building or buildings, the land is subject to the provisions of the STA.<sup>97</sup> The developer is no longer the owner of the land and the building or buildings, but the owner of all the individual units.<sup>98</sup> In addition, upon registration, the schedules of servitudes and conditions imposed by the developer and certified by the conveyancer become a part of the sectional title deed.<sup>99</sup> This shows that upon registration, the servitudes and conditions shown on the sectional plan have become registered real rights. Another effect of registration is that any mortgage bond, lease, other real right or condition registered against or affecting the land shown on the sectional plan, is converted into a bond, lease, other real right or condition registered against or affecting the sections and common property shown on the sectional plan.<sup>100</sup>

Once the sectional plan is registered, the Deeds Registry issues the developer with a certificate of a registered sectional title for each section and its undivided share in the common property, subject to any mortgage bond registered against the land's title deed.<sup>101</sup> Moreover, the Deeds Registry issues a certificate of a real right for any reservation made by the developer in a phased development scheme<sup>102</sup> and a certificate of a real right for a right of exclusive use subject to any mortgage bond registered against the land's title deed.<sup>103</sup> Under the STA, a sectional title register operates like a conventional township register.<sup>104</sup>

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96 STA s 11 (1) and Form B in Annexure 1 of the *Sectional Titles Regulations*.

97 STA s 13 (1).

98 Van der Merwe *Sectional Titles* 6-25; see also *Eden Villiage (Meadowbrook) (Pty) Ltd v Edwards* 1995 4 SA 31 (A) at 41G. In this case, it was held that the units are registrable from the date of the opening of a sectional title register, and thus can be transferred.

99 STA s 13 (2).

100 STA s 13 (3).

101 STA s 12 (1) (d).

102 STA s 12 (1) (e).

103 STA s (1) (f).

104 Van der Merwe *Sectional Titles* 6-26.

### 3 5 3 Registration in China

Prior to commencing construction, the developer must register the land-use right at the relevant land administration agency where a subdivision plan is needed. The subdivision plan provides particulars of the scheme, including its name, the location of the building, the number of units, and whether it is intended for residential or non-residential use. It also identifies the building and shows how it is divided into individual units and the common property.<sup>105</sup> The subdivision plan must be drawn up and presented for examination by the local construction authority for approval with its official stamp.<sup>106</sup> The mandatory recording of the subdivision plan precedes the registration of the scheme.<sup>107</sup> It must precisely set out the units and common property and accurately demarcate each of the areas where the buildings are to be located. Chinese law attempts to ensure that the buildings be constructed exactly in accordance with the subdivision plan.<sup>108</sup>

Unlike UCIOA and STA, both of which require the declarant/developer to register or record a declaration or sectional plan, the condominium in China occurs automatically without a duly registered constitutive document. Apartment ownership in China is created as soon as an apartment in a building is acquired from a developer by registering a contract of sale. The subdivision plan is a part of the project documents but by nature it is only a building plan. It is not a registered constitutive document. It is just recorded for the purpose of obtaining the Building Permit.<sup>109</sup> Another major difference between the subdivision plan in China and the sectional

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105 S 2.1 & 2.2 of the *Detailed Rules on Designing Building Plan of 2003* issued by the Ministry of Construction.

106 Art 13 of the *Measures Governing the Examination and Administration on Building Plan Designs of Housing Buildings and Municipal Basic Infrastructure of 2004* issued by the Ministry of Construction.

107 Art 11 (2) of the *Provisions on Construction Quality Administration of 2000* issued by the State Council.

108 Art 16 & 29 of the *Provisions on Construction Quality Administration of 2000*.

plan or declaration is that the subdivision plan does not dictate a participation quota for each unit. A Chinese unit owner's title in a unit is indissolubly bound with an undivided share in the common property.<sup>110</sup> This is often referred to as a participation quota. The basis of the allocation of the participation quota is absent in the subdivision plan. This allocation of participation quota is not at the discretion of the developer. There is a default rule in regulating the pre-allocated share that is found in the *Provisional Measures on Calculation of Floor Areas and Allocation of Common Property of Commercial Housing*.<sup>111</sup> However, this administrative rule only denotes the owner's share interest in the common property. It is silent on other important issues such as the calculation of owners' contributions to common expenses and owners' voting rights.

Consequently, the creation and registration of a condominium scheme in China can be described as a "contract approach". From acquiring a land-use right to the final registration of the individual unit's title, many different contracts are involved. In order to obtain the deed title for an individual unit, the contract of sale, a kind of contract with real effect,<sup>112</sup> must be registered.<sup>113</sup> Chinese law provides that the unit's ownership is not effective without registration. The certificate of registration is

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109 Art 8 of the *Building Construction Law of 1997*.

110 Art 70 of *Chinese Property Code of 2007*.

111 The *Provisional Measures on Calculation of Floor Areas and Allocation of Common Property of Commercial Housing* issued by the Ministry of Construction on 08 September 1995. On the basis of this provision, many local governments issue local rules providing the detail on the calculation of common property, among others, the *Rule on Calculation of Floor Areas and Allocation of Common Property of Housing in Hunan Province*, issued by the Department of Construction on 10 November 2004; the *Rule on Calculation of Floor Areas and Allocation of Common Property of Housing in Shanghai*, issued by the Land Resources and Housing Administration Bureau of Shanghai on 2 April 2003. The method on how to calculate the common property is discussed in Chapter 4 Participation Quota.

112 Liang Huixing *Commentary on Chinese Property Law Draft 113* (Chinese version); Gao Fuping & Huang Wushuang *New Discourse on Real Estate Law* 75.

113 Art 17 of the *Measures Governing Urban Housing Entitlement Registration of 1997* (as amended on 15 August 2001) issued by the Ministry of Construction.

the only legal evidence of ownership. The Chinese registration regulation purports to promote security of titles. This is analogous to relevant German law.<sup>114</sup> However, a major difference with the German procedure is that any contract during the condominium creation and registration process in China does not require the notary's involvement. Simply put, in China there is not a notarial deed containing the division of the building into apartments. In addition, Chinese law requires that initial registration of new buildings must begin within three months after completion of construction.<sup>115</sup> The registration of transaction contracts or deeds of sale of individual units can only occur after the developer's initial registration of the whole scheme is completed.<sup>116</sup>

The basic principle is that the registration of a unit title deed marks the end of the creation process. It is notable that the owner has to register with two different authorities in order to obtain two different entitlement certificates, namely, a certificate of housing ownership with a housing authority and a certificate for a land-use right with the state land administration authority.<sup>117</sup> This can cause a problem when a unit owner registers apartment ownership but fails to register concurrently an interest in the land-use right for the land on which the building is situated.<sup>118</sup> Although some major cities such as Shanghai, Shenzhen, and Beijing have consolidated the two separate registrations into a single certificate,<sup>119</sup> most Chinese cities still employ the dual registration system.

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114 Smith "Apartment Ownership—German Style" 2007 (May/June) *Conveyancer and Property Lawyer* 205-206; Van der Merwe "The South African Sectional Titles Act and the *Wohnungseigentumsgesetz*" 1974 (7) *CILSA* 165-167.

115 S 16 (1) of the *Measures Governing Urban Housing Entitlement Registration of 1997*.

116 Art 38 (2) of the *Law of Urban Real Estate Development Administration of 1994*.

117 Chen Lei "The New Chinese Property Code: A Giant Step Forward?" 2007 (11) *Electronic Journal of Comparative Law*, online: <http://www.ejcl.org/112/art112-2.pdf> [10 January 2008].

118 Randolph & Lou *Chinese Real Estate Law* 170.

119 For those cities that implement the single registration certificates, the example is art 17 of *Shanghai Real Estate Registration Rule of 31 October 2002* (as amended on 14 April 2004); also see Randolph & Lou *Chinese Real Estate Law* 170.

## 3 6 COMPARATIVE ANALYSIS OF ISSUES RELATED TO CONDOMINIUM CREATION

### 3 6 1 Declarant/ Developer

The UCIOA uses the term declarant in three contexts. If a condominium has already been established, the UCIOA uses declarant as any person who executes a declaration, or any person who has succeeded in gaining special declarant rights.<sup>120</sup> If a condominium is not yet established, a declarant is any person who disposes or offers to dispose of a unit which has not previously been disposed of.<sup>121</sup> If a trustee of a land trust executes a declaration the beneficiary of the trust is a declarant.<sup>122</sup> The UCIOA excludes a declarant from holding an interest in real estate solely as security for an obligation. These would-be holders of pre-existing liens and in the case of a leasehold condominium, a ground lessor, possess no special declarant rights and are not an affiliate of a declarant.<sup>123</sup> The definition also excludes someone whose real estate interest will not be conveyed to the unit owners, such as a real estate broker.<sup>124</sup> Similarly, unit owners reselling their units are not considered to be declarants because their units have been previously disposed of when originally conveyed.<sup>125</sup> UCIOA also employs the terms “affiliate of a declarant” and “special declarant rights”. The affiliate of a declarant is any person who controls, is controlled by, or is under common control with a declarant.<sup>126</sup> Basically, the affiliate of a declarant is the

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120 UCIOA § 1-103 (12).

121 See n 120 *supra*.

122 Cohen, Goldberg & Mulvaney “Condominium Law: A Comparison of the Uniform Act with the Illinois Act” 1980 (14) *J Marshall L Rev* 393.

123 UCIOA § 1-103 comment 13.

124 See n 123 *supra*.

125 UCIOA § 1-103 (12) (i).

126 UCIOA § 1-103 (1) states that a person “controls” a declarant if the person (i) is a general partner, officer, director, or employer of the declarant, (ii) directly or indirectly or acting in concert with one or more other persons, or through one or more subsidiaries, owns, controls, holds with power to vote, or



declarant's employer or partner, or person who controls with votes, and/or finances, or own a number of a declarant's shares. With this definition, an association may, in some instances, be a declarant.<sup>127</sup> Special declarant rights are rights reserved for the benefit of a declarant<sup>128</sup> and his/her transferees or successors.<sup>129</sup> Any person who possesses a special declarant right is a "declarant".<sup>130</sup> The concept of special declarant rights triggers an obligation on those who possess such rights. By interlocking definitions of "declarant", "special declarant rights", and "affiliates of a declarant" the courts are freed under certain conditions from having to identify responsibilities, duties, and obligations of unit owners. As an example, the court is absolved of responsibility if a unit owner asserts that he/ she is entitled to relief against a declarant or certain defined affiliates or successors of the declarant under the UCIOA, or under constituent documents which create the condominium.<sup>131</sup>

The STA uses the term developer instead of declarant. A developer is defined as "a person who is the registered land owner of land situated within the area of jurisdiction of a local authority, on which is situated or to be erected a building or buildings which he or she has divided or proposes to divide into two or more sections in terms of a

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holds proxies representing, more than 20 per cent of the voting interest in the declarant, (iii) controls in any manner the election of a majority of the directors of the declarant, or (iv) has contributed more than 20 per cent of the capital of the declarant.

127 UCIOA § 1-103 comment 2.

128 The following are examples of some special declarant rights: to (i) "complete improvements indicated on plats and plans filed with the declaration; (ii) exercise any development right; (iii) maintain sales offices, management offices, signs advertising the condominium community, and models; (iv) use easements through the common elements for the purpose of making improvements within the condominium community or within real estate which may be added to the condominium community; (v) make the condominium community subject to a master association; (vi) merge or consolidate a condominium community with another condominium community of the same form of ownership; or (vii) appoint or remove any officer of the association or any master association or any executive board member during any period of declarant control." see UCIOA § 1-103 (29).

129 UCIOA § 3-104.

130 UCIOA § 1-103 comment 24.

131 Cohen, Goldberg & Mulvaney "Condominium Law: A Comparison of the Uniform Act with the Illinois Act" 394.

scheme.” It further includes the holder of a right to extend an existing scheme as well as the successor-in-title of the latter.<sup>132</sup> Thus the developer must first be the registered owner of the land on which the proposed project is to be built. Neither perpetual quitrent nor a 99-year lease nor any other limited real right other than land ownership enables a person to qualify as a developer.<sup>133</sup> Second, the term “developer” also includes an agent of the developer, or a successor-in-title of the developer, or any other person acting on a developer’s behalf. This provision is analogous to what is found in the UCIOA. Third, a *body corporate* can qualify as a developer when a building is deemed to be destroyed and a unanimous resolution to reconstruct has been adopted by the body corporate.<sup>134</sup> The South African Act does not specifically define the “affiliate of a declarant” or “special declarant rights” but incorporates both terms into one streamlined definition of “developer”.

The Chinese condominium statute needs to follow the South African approach. First, the concept of developer is already widely used in the Chinese real estate profession. The term declarant is a somewhat unusual concept that does not easily fit into the Chinese legal language system. Second, the definition of declarant is not very appropriate since the creation of a condominium in China does not require the registration of a constitutive document, i.e. a declaration or sectional plan. Therefore, it is illogical to use the term declarant without also using the term declaration. Third, as long as a developer’s affiliates or a developer’s special rights are clearly spelled out in the statute, as is the case in the STA, there is no need to have two more separate definitions to complicate the statute.

### **3 6 2 The Constitutive Document**

The UCIOA and the STA lay out the requirements for the establishment of a

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132 STA s 1 (1) *s v* “developer”.

133 Van der Merwe *Sectional Titles* 3-19.

134 STA s 48 (1) (b).

condominium. Both Acts provide that a declarant/developer must register or record a declaration or sectional plan to establish a condominium.<sup>135</sup> Under the UCIOA, upon recording the declaration, a property is subject to the Act, with all units owned in fee simple. Consequently, they may be conveyed, leased, mortgaged, or otherwise dealt with in the same manner as other real property.<sup>136</sup>

The declaration or sectional plan is described as a governing document that is quite important. It is the foundation and the charter of all rights, privileges and obligations of each owner for each unit.<sup>137</sup> Any person taking title does so subject to its terms. Unlike a condominium's by-laws or rules, which may be made and changed by a resolution of the unit owners, the declaration can only be changed under very limited circumstances set out in the Act.<sup>138</sup> Under the UCIOA, with certain exceptions, a residential common interest community may only amend the declaration by at least a two-thirds vote.<sup>139</sup> Under the STA, the Surveyor-General must initiate any amendment to a registered sectional plan and must also approve and review the governing document.<sup>140</sup> The body corporate may recover the costs incurred from the pertinent developer, land surveyor or architect as a result of an alteration or amendment to a sectional plan.<sup>141</sup>

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135 See n 50 and n 76 *supra*.

136 Laundry "Two Aspects of the Illinois Condominium Property Act – the Condominium Survey and Full Disclosure Provisions" 1974 (7) *J Marshall J Prac & Proc* 239.

137 Rohan & Reskin *Condominium Law and Practice: Forms* 3-5.

138 See UCIOA § 2-117; STA s 14.

139 UCIOA § 2-117 (a). The exceptions include: (1) reallocation of interests occur automatically in the case of eminent domain; (2) certain unit boundary changes can occur upon the consent of the affected owners; (3) no amendment may create or increase special declarant rights, increase the number of units, or the allocated interests of a unit, in the absence of unanimous consent of the unit owners; (4) the time limit specified in the declaration for reserved development rights may be extended by 80% of the vote including 80 per cent of the votes allocated to units not owned by the declarant; (5) an amendment to the declaration prohibiting or materially restricting the permitted use or behavior in a unit or other qualifications of persons who may occupy the unit, requires 80% approval; (6) communities that are not residential may require a lower percentage to amend the declaration.

140 STA s 14 (1).

141 STA s 14 (2).

As explained earlier, the subdivision plan in China is a very different kind of document. It is similar to the UCIOA's survey plat customarily referred to as a vertical survey, which includes a survey of both the land and all of the building units constructed on it. Chinese law does not require the developer to formalize a constitutive project document containing much the same information which the UCIOA and the STA require in a declaration or sectional plan. Before construction begins, the developer prepares a subdivision plan in order to obtain the Building Permit.<sup>142</sup>

Being non-governing, the subdivision plan amendment is solely at the discretion of the pertinent public authority. If the plan's amendment is not approved by the pertinent public authority, the developer cannot obtain a "Completed Building Inspection Certificate" after its completion.<sup>143</sup> Without this certificate, the developer is not entitled to transfer the units to future purchasers at the land register.<sup>144</sup>

If a case involving a subdivision plan amendment is presented to a court in China, there would be an easy and uncomplicated decision if the court relied on the developer's statement that there was an error. In Chinese law a public authority must first approve such a developer's statement. If the court finds that an amendment is not approved and recorded by the public authority, although the amendment is necessary to correct an error, presumably, it is unlikely the court would issue an order to correct the error.

To summarize, a condominium development in China is very much government supervised. Many different kinds of public authorities are actively involved in the process of creation and registration. But is this all-encompassing involvement a good thing for the condominium movement? The answer is that it is quite clear that the

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142 See n 109 *supra*.

143 Art 18 (1) of the *Regulation Governing Real Estate Development and Operation in Urban Areas of 1998*.

144 Art 17 (1) of the *Regulation Governing Real Estate Development and Operation in Urban Areas of 1998*.

future condominium statute in China should reduce the government's administrative activism. A fundamental characteristic of condominium creation under both the UCIOA and STA is a full and adequate disclosure to purchasers.<sup>145</sup> This provides a viable alternative to governmental supervision and involvement. There are three basic advantages to this approach. First, the government can save administrative costs and improve efficiency by reducing unnecessary red tape and bureaucracy. However, this does not necessarily mean that the local governments are uninvolved in condominium creation. On the contrary, the local governments are still the protector of the public interest and guardians accountable for taxpayers' money. In areas such as planning, construction defects, and the developer's liability to manage before the first general meeting of the management body, the local government's role should be enhanced rather than diminished. Second, the developers are granted greater freedoms to create condominium schemes to meet fast-changing market conditions. Third, developers are bound by representations and statements made in the constitutive document and are held to statutory limitations and standards to protect consumers. Accordingly, one can argue that the Chinese condominium statute should borrow the constitutive document approach from the South African and UCIOA experiences. The developers are required to prepare a constitutive document, a condominium plan, rather than a simple subdivision plan and then submit it to the Deeds Registry for registration. This could require major statutory surgery since all of the relevant statutory documents would also need to be changed. But it is worthwhile since the absence of a constitutive document is the root cause for many subsequent problems with management and administration practices. Without the registration of a constitutive document, the time of creation of the management body and whether it is a new legal entity are open to question. Although the new *Chinese Property Code* implicitly allows a condominium community to be sued,<sup>146</sup> the community has no authority to prevent unit owners

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145 See n 137 *supra*.

146 Art 78 (2) of the *Chinese Property Code of 2007* states that where the decision made by the community general meeting or the executive committee infringe the unit owners' interests, the affected

from suing each other for violation of condominium rules. As a consequence, unit owners are not dependent on the management board to protect their rights and thus cause many unnecessary disputes and lawsuits. In the long run, a constitutive project document is indispensable for the creation of condominiums.

### **3 6 3 Pre-sale of Apartment**

Under the UCIOA, a declaration may not be registered unless all the condominium buildings' structural components and mechanical systems are substantially completed in accordance with the plans.<sup>147</sup> It is sometimes argued that laws requiring substantial completion of a building prior to a declaration's recordation complicate condominium financing.<sup>148</sup> While this requirement has merit, it is often criticized when lenders are involved in the total financing of a building. In order to define and protect lenders' property rights in case of foreclosure, mortgage liens must be in place prior to the commencement of construction. Institutional lenders want this protection early in a condominium's planning process. In the United States, the institutional banks make construction loans to developers although they impose rigid pre-sale conditions to the loans.<sup>149</sup> These loans would be paid off with sales proceeds when the condominium units are sold.<sup>150</sup> To boost sales a developer may misinform and intentionally confuse the purchaser by for example underestimating the monthly contributions and costs.<sup>151</sup> Oftentimes, a developer may insert a provision on the declaration prohibiting pets, but

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owner may request the court to cancel such decision.

147 See n 73 *supra*.

148 Burton "Reflections on the Minnesota Uniform Condominium Act" 1984 (10) *Wm Mitchell L Rev* 7.

149 It was not uncommon in most construction loans for lenders to require that the developer pre-sell fifty to seventy-five per cent of the residential units before the lender would fund the first dollar of the construction loan. See Kane "The Financing of Cooperatives and Condominiums: A Retrospective" 1999 (73) *St John's L Rev* 108.

150 Rohan *Real Estate Financing* (1998) § 15.09[4] [a].

151 Blackburn & Melia "Ohio Condominium Law Reform: A Comparative Critique" 1978 (29) *Case W Res L Rev* 152.

during the marketing phase, if the project is slow in selling, it is not uncommon for sale agents to stop asking whether or not a potential buyer has a pet.<sup>152</sup> Particularly important is that failure by a purchaser to obtain information about any recorded restrictions, even with a statutorily mandated disclosure, does not invalidate the restrictions.<sup>153</sup> Thus, prospective purchasers may be misled about the nature of the interest they are buying. For this reason, the UCIOA provides that any declarant or dealer who offers a unit to a purchaser is required to prepare and deliver a public offering statement.<sup>154</sup> The preparer of the public offering statement is liable for any misrepresentations and material omissions in it. The caveat to this is that a person who delivers a prepared public offering statement is responsible for deficiencies and errors only to the extent that he or she reasonably should have known of them.<sup>155</sup> This disclosure provision requires the declarant to provide a prospective purchaser with a written statement with information that is both comprehensive and as accurate as possible.<sup>156</sup> The Act further provides purchasers with cancellation rights and imposes civil penalties upon declarants who do not comply with public offering statement requirements of the Act.<sup>157</sup> Finally, the UCIOA provides that a deposit made in connection with the purchase or reservation of a unit from a prospective purchaser must be placed in escrow.<sup>158</sup> Whether the escrow agent must deposit the funds in an insured institution, or in a particular type of account, depends on the state law or the parties' agreement.<sup>159</sup>

Under the South African Act, the provision that a land surveyor or architect

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152 Rohan & Reskin *Condominium Law and Practice: Forms* 44-16; *Chateau Village North Condominium Association v Jordan* 643 P2d 791 (Colorado Court of Appeal 1982).

153 *Hidden Harbor Estates Inc v Basso* 393 So 2d 637 (Florida 4th District Court of Appeal 1981).

154 UCIOA § 4-102 (a) & (c).

155 UCIOA § 4-102 comment.

156 UCIOA § 4-103.

157 UCIOA § 4-108.

158 UCIOA § 4-110.

159 UCIOA § 4-110 comment 2.

prepares the draft sectional plan from actual measurements implies that the building(s) must be substantially completed before the application for the unit's registration can be made.<sup>160</sup> But this does not mean that the building must be ready to be occupied<sup>161</sup> nor does it mean that developers are prevented from pre-selling units before a proposed scheme's sectional title register has been opened or even before the building has been erected.<sup>162</sup> Additionally, the *Sectional Titles Amendment Act of 1997* repealed section 9 of the older Act which prohibited a developer from pre-selling units in a building constructed before 25 February 1981. Hence, the pre-sale of units became possible in South Africa. However, South African law is very pro-purchaser and prevents financial malpractices by developers. This is seen in an examination of section 26 of the *Alienation of Land Act*.<sup>163</sup> This section prohibits a developer from receiving any portion of the purchase price of a pre-sold unit before a sectional title register is opened for it. Should a developer encounter financial problems and be unable to complete the project, purchasers run no risk of losing their deposit or purchase price.<sup>164</sup> If the developer or any subsequent seller or the sales agent becomes insolvent before the unit becomes registrable, the amount held in trust for the benefit of the seller immediately becomes payable to the purchaser by the attorney, estate agent, or relevant financial institution.<sup>165</sup> The same protection is provided to the installment sale purchaser of a unit.<sup>166</sup> When a unit in a proposed building is sold, disclosure is required, which means the building to be erected needs to be adequately described in the sales contract. The description should include a copy of the part of

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160 See Van der Merwe "The Sectional Titles Act in the Light of the Uniform Condominium Act" 10.

161 Van der Merwe *Sectional Titles* 5-7.

162 Van der Merwe "The South African Sectional Titles Act Compared with the Singapore Land Titles (Strata) Act" 137.

163 The *Alienation of Land Act 68 of 1981* (as amended by s 12 of Act 51 of 1983).

164 Van der Merwe *Sectional Titles* 7-4.

165 The *Alienation of Land Act* s 26 (4).

166 Van der Merwe *Sectional Titles* 7-5.



the draft sectional plan on which the unit is demarcated.<sup>167</sup> If such a plan is unavailable, a three-dimensional description and complete particulars about the height, floor space and external features need to be disclosed.<sup>168</sup> In some instances, a developer is allowed even to pre-sell off the building plans.<sup>169</sup> Moreover, in order to tackle a developer's unreasonable delay in completing a building, the purchaser should be granted an additional statutory right of cancellation if the building is not ready for occupation as promised or if the register is not opened within a prescribed period of time.<sup>170</sup>

Since there is no requirement for opening a register for a constitutive document such as a declaration or sectional plan, Chinese law allows the sale of apartments before the buildings are substantially completed.<sup>171</sup> In other words, the substantial completion of construction is not a prerequisite for being able to sell individual units. In the case of a presale of an apartment, the developer must first apply at the pertinent public authority for an Apartment Pre-sale Permit to sell proposed apartments.<sup>172</sup> After obtaining the Permit, a contract of sale between the developer and the purchaser can be concluded on the basis of the subdivision plan before the construction is completed.<sup>173</sup> The Chinese procedures ensure as much as possible that the state examines the developer's ability to complete a pre-sold building and that the sales contract can be enforced administratively.<sup>174</sup> But legal problems arise during the transitional period between the signing of a contract and the completion of

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167 *Richtown Development v Dusterwald* 1981 3 SA 691 (W).

168 *Botes v Toti Development Co* 1978 1 SA 205 (T).

169 *Forsyth v Josi* 1982 2 SA 164 (N).

170 Van der Merwe *Sectional Titles* 7-13.

171 Art 45 of *Law of Urban Real Estate Development Administration of 1994*.

172 Art 24 of the *Regulation Governing Real Estate Development and Operation in Urban Areas of 1998*.

173 Art 28 of the *Regulation Governing Real Estate Development and Operation in Urban Areas of 1998*.

174 Fu Qilin *Study on Pre-sale of Urban Commercial Housing* 30-42 (Chinese version); Gao Fuping & Huang Wushuang *New Discourse on Real Estate Law* 262.

construction. These problems first include whether what apartment purchasers are presented with in the registered pre-sale contract corresponds to factual reality. For example, there may be a misunderstanding or miscommunication over the numbering of units among the subcontractors. Consequently, some of the building's units inadvertently may have been numbered differently or incorrectly from the numbering of the parking units. Second, there may be confusion over when management rules are applicable to purchasers as well as when the initial general meeting of the management body is to be held.

Furthermore, there is often confusion over whether or not the purchasers become members of the condominium management body before the completion of construction. Finally, there is an issue as to when the obligations of the developer are transferred to the purchasers. Besides the abovementioned management issues, the developer's liability for structural defects in this transitional period can also become an issue.<sup>175</sup> Typical Chinese purchasers are unsophisticated about the many complicated rules, not to mention that there is not a special condominium statute in place. Consequently they are unaware of the potential for abuse by the developer. For instance, some developers attempt to use the purchasers' money deposits towards construction costs. Another example is that the purchasers may be unaware that the developer has made a "sweetheart contract" with a managing agent who is a close associate, before unit owners move in. Two main approaches can be borrowed from the UCIOA and the South African legislative experience to deal with all these potential problems. First, developers should be required to provide full disclosure about each and every individual unit. As explained above, Chinese law does not require the registration of a condominium plan. But this does not affect the implementation of a full disclosure principle. Before applying for the Apartment Pre-sale Certificate, the developer could be made to present a disclosure statement like the UCIOA one with accurate and detailed information about the units for

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175 Van der Merwe *Apartment Ownership* 42.

prospective purchasers. Since any change in the provisions of the disclosure statement must be disclosed to prospective purchasers, this enables them to rescind their purchase agreement. Consequently, the developer must carefully plan the provisions of the disclosure statement and to be on the safe side, make it a part of the sales contract. For instance, the designation of a parking space would be clearly described in this disclosure statement. South African law provides a very good disclosure model with all the necessary detail. For example, it provides a three-dimensional description and all of the particulars about height, floor space and external features.<sup>176</sup> The Chinese statute should adopt this approach.

Moreover, the future statute must flesh out the relevant consumer protection provisions. It is quite common for condominium purchasers who have signed contracts for unfinished units to lose their deposits simply because there is no requirement that the developers hold them in escrow. Following the UCIOA approach, any prospective purchaser who puts down a deposit or pays part of the unit purchasing price must be protected. The developer is required to put the deposit in escrow rather than to hold it in his or her own account. Although Chinese law does hold that when a purchaser pays a deposit with a pre-sales contract it should be used exclusively for building construction,<sup>177</sup> Chinese law specifies neither how the money is to be withdrawn, nor the malpractice penalty a developer incurs when playing loose with the law. In practice, Chinese developers commonly withdraw the pre-sale money to finance a construction project.<sup>178</sup> In China it is estimated that proceeds of apartment pre-sales account for 50% of the total construction costs.<sup>179</sup> If a developer does not comply with the disclosure statement, Chinese law necessarily should grant the purchaser the right of cancellation and require the developer to pay damages as well as a hefty penalty. The reason to have sharp teeth in place for a developer's breach of

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176 See n 167, 168 & 169 *supra*.

177 Art 45 (3) of *Law of Urban Real Estate Development Administration of 1994*.

178 Gao Fuping & Huang Wushuang *New Discourse on Real Estate Law* 266.

179 Fu Qilin *Study on Pre-sale of Urban Commercial Housing* 41.

a disclosure statement is that in China the pre-sale practice was designed to ensure a project's success, but now a developer's financing is fraught with difficulties.

The Chinese private real estate market has been booming in the light of land scarcity and growing urbanization as well as the realization that now individuals can own real property. Consequently, real estate prices have been rising dramatically. Having pre-sold almost all of the units in a project, developers find that they could sell at an even higher price than the pre-sold price once a building is completed. Thus, some dishonest developers intentionally breach the pre-sale contract and only return the amount received and only a smidgen of money for damages by using the contract law. They know that their newly raised price can easily cover the amount they have paid out. To counter this devious practice by some developers, the new *Property Code* makes provision for the notice registration system with regard to the pre-sale contract.<sup>180</sup> A notice registration is registered to secure a claim for the establishment or the transfer of the property or any real right in real estate before the certificate of deeds is issued. However, the protection provided by the notice registration system is time-limited. The *Property Code* holds that upon the notice registration, if a purchaser fails to apply for the registration of the deed title within three months from the date on which the building is completed for registration, the provisional notice registration lapses and becomes invalid.<sup>181</sup> In brief, the purchaser can obtain a documented protection from the land register before the building is completed. Although the new *Property Code* provides an effective legal weapon for this developer's practice, a compulsory consumer protection clause still needs to be drawn up for the future condominium statute that is almost certainly to be drafted. Developers know exactly when the sale contract becomes registrable for it can only be done after obtaining a Completed Building Inspection Certificate. If a developer does not intend to notify the purchasers about registration, the three months registration requirement soon lapses.

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180 Art 20 (1) of the *Chinese Property Code of 2007*.

181 Art 20 (2) of the *Chinese Property Code of 2007*.

Hence, based on the UCIOA and South African experiences, the Chinese statute should give purchasers the power to effectively tackle the developers' malpractices. A purchaser using an installment plan also needs to be entitled to such protection.

# CHAPTER 4

## PARTICIPATION QUOTA

### 4 1 INTRODUCTION

Apartment ownership is a threefold unity. It links individual unit ownership with joint ownership of the common property and with membership in a management body. Each apartment owner owns a share in the common property. This requires the apartment owners to share rights and responsibilities with other owners and to participate in collective decision-making.<sup>1</sup> For this a formula is designed as a participation quota to allocate the common rights and obligations among the apartment owners. Under the UCIOA, the declaration describes the participation quota designed as share value as a fraction or percentage of undivided interests in the condominium common elements and in the association's common expenses. As well, the participation quota gives each and every owner a portion of the votes in the condominium association.<sup>2</sup> Under the STA, the participation quota is first of all a percentage of a sectional owner's share in the common property. But it also determines an owner's weighted say in the condominium management and the basis for each unit owner's contribution for common expenses for the management and maintenance of the common property.<sup>3</sup>

An equitable and well thought-out formula is crucial to ensure the success of a condominium scheme. From the apartment owners' side, before purchasing a unit, the buyer should carefully examine the participation quota. Not only does it dictate the

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1 Van der Merwe *Apartment Ownership* 57.

2 UCIOA § 2-107 (a) (i).

3 STA s 1 (1) *s v* "participation quota" read with s 32 & s 37 (1) (b).

share of ownership in the common property, but it determines on a proportional basis the monthly contribution to the property maintenance. In addition, the weight of voting rights at meetings may also be determined on the basis of a quota. Hence, the allocation of rights and obligations by way of the participation quota needs to be addressed in the Chinese condominium statute.

This chapter demonstrates the significance of the participation quota and analyzes the advantages and disadvantages of different methods for calculating the participation quota. Finally a comparative evaluation is made for the makers of a Chinese condominium statute.

## **4 2 SIGNIFICANCE OF THE PARTICIPATION QUOTA**

Both the UCIOA and the STA allocate an apartment owner's interest in the following matters in accordance with a participation quota: (1) the share of ownership in the common property; (2) the proportional contribution to the common expenses and the share of any common profits; and (3) the value of a condominium owner's vote.<sup>4</sup> The UCIOA also provides that the participation quota plays a significant role should the condominium be terminated.<sup>5</sup> Moreover, the participation quota is significant in the distribution of compensation received in the event that the property is expropriated or in the division of insurance money should the building be destroyed.<sup>6</sup> In brief, the participation quota arises whenever the allocation of rights to and responsibilities for the common property is involved.

### **4 2 1 Shares in the Common Property and Rights on Termination**

Condominium ownership includes an exclusive individual ownership of the unit and an undivided interest in the common property. All apartment owners are entitled to

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4 UCIOA § 2-107 and STA s 32 (3).

5 UCIOA § 2-118 (a).

use the common property. It is therefore imperative to regulate the allocation of the interests in the condominium's common property during the life of the project and on its termination.

Under the UCIOA, the goal to allocate the interests in the common property is not only to establish a clear, easily determinable and constant ownership share, but also to ensure the value of the apartment owners' interests in the common property if the owner's unit is sold or the condominium complex is terminated.<sup>7</sup> Particularly important is that the declarant has unfettered discretion in choosing a basis for allocating the interests in the common property.<sup>8</sup> Thus, a share of ownership in common property may be allocated equally among all units, or in proportion to the relative size of each unit, or on the basis of any other formula the declarant may select. So an allocation may be on any basis the declarant chooses, and none of the allocations need to be tied to any other allocation.<sup>9</sup> Should units be added or withdrawn from the condominium development, the declaration must state the formulas to be used to reallocate the interests among all units.<sup>10</sup> When a condominium unit is taken or partially taken by eminent domain, the UCIOA provides for a recalculation of the allocated interests of all units. Moreover, the interest of the condominium unit that has been taken out by eminent domain is automatically reallocated to the remaining units.<sup>11</sup>

The UCIOA also recognizes that the original allocation of quotas may on termination bear little resemblance to the actual value of the apartments since some of

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6 UCIOA § 1-107 and STA s 48.

7 Judy & Wittie "Uniform Condominium Act: Selected Key Issues" 1978 (13) *Real Prop Prob & Tr J* 449; Note "Common Rights and Obligations among Unit Owners under the Minnesota Uniform Condominium Act" 1984 (10) *Wm Mitchell L Rev* 174.

8 Judy & Wittie "Uniform Condominium Act: Selected Key Issues" 444.

9 UCIOA § 2-107 Comment 2.

10 UCIOA § 2-107 (c).

11 UCIOA § 1-107 (a).



them may have been substantially remodeled and upgraded.<sup>12</sup> Consequently, the UCIOA requires when a condominium project is terminated, co-ownership shares by tenants in common in the project must be allocated<sup>13</sup> and sale proceeds of the project distributed according to the fair market value of all units.<sup>14</sup> The UCIOA uses different measures to separate the rights of unit owners upon termination from the allocation of shares in the common property.<sup>15</sup>

The South African *Sectional Title Act* makes it explicit that the participation quota of a section determines the section's undivided share in the common property.<sup>16</sup> In the old 1971 *Sectional Titles Act* the participation quota was solely based on the floor area of a section in proportion to the aggregate floor areas of all the sections in a scheme.<sup>17</sup> The old Act had a very rigid allocation provision, namely, a single basis for allocating all the interests including share in the common property, contribution to common expenses and sectional owner voting rights in the body corporate.<sup>18</sup> It has sometimes been argued that this allocation has little significance to an owner's use and enjoyment of the common property.<sup>19</sup> This is because any owner may use and enjoy the common property reasonably to the extent of not interfering with lawful rights of the other owners.<sup>20</sup> The 1986 Sectional Titles Act draws a distinction between residential and non-residential schemes in calculating the participation quota. The 1986 Act retains the allocation based on the floor areas of a development only for residential schemes<sup>21</sup> and leaves the calculation of quotas for non-residential schemes

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12 Van der Merwe *Apartment Ownership* 66.

13 UCIOA § 2-118 (f).

14 UCIOA § 2-118 (j).

15 Rohan "Condominium Housing: A Purchaser's Perspective" 1965 (17) *Stan L Rev* 845.

16 STA s 32 (3) (b).

17 S 24 (2) (b) of the *Sectional Titles Act 66 of 1971*.

18 Paddock *Sectional Title Survival Manual* 44; Van der Merwe "The Allocation of Quotas in a Sectional-Title Scheme" 1987 (104) *SALJ* 75.

19 Van der Merwe *Sectional Titles* 4-9.

20 STA s 44 (1) (d).

21 STA s 32 (1).

to the developers.<sup>22</sup> It is worth noting that the allocation based on floor area is very relevant when distributing profits from common property transactions such as when the roof of a building is leased for advertising use.<sup>23</sup> This participation quota also determines a sectional owner's share in the land if a whole sectional title scheme is dissolved.<sup>24</sup> It also determines an owner's share in the compensation paid by an expropriating authority,<sup>25</sup> the insurance money paid out when a building is destroyed and any surplus funds left when a scheme is terminated.<sup>26</sup>

Without a special Chinese condominium statute, allocating interests in common property is determined by a departmental rule, namely the *Provisional Measures on Calculation of Floor Areas and Allocation of Common Property of Commercial Housing*.<sup>27</sup> Developers have no say on the issue of common property under this legal mechanism. Nonetheless, this allocation method was designed for the Housing Privatization policy in the 1990s to foster the selling of former public apartments to individuals. It was for this reason that no thought was given to the allocation of shares in the common property as might be done in a condominium statute.<sup>28</sup> This allocation method is neither well thought-out nor meets the needs of condominium owners. Therefore, when drafting a Chinese statute, thought should be given to following the UCIOA approach by separating the rights of unit owners upon termination from the allocation of shares in the common property.

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22 STA s 32 (2).

23 See n 19 *supra*.

24 Van der Merwe *Sectional Titles* 4-10.

25 STA s 19 (2).

26 STA s 48.

27 The *Provisional Measures on Calculation of Floor Areas and Allocation of Common Property of Commercial Housing*, issued by the Ministry of Construction on 8 September 1995.

28 Wei Yaorong "The Discussion on the System of Condominium Ownership" 2007 (1) *Modern Property Management* 32-37. (Chinese version)

## **4 2 2 Contribution to Common Expenses and Share in the Common Profits**

The most important function of the participation quota is the allocation of owners' contributions to the maintenance and administration of the condominium and the right to share in common profits as well as the responsibility to assume a proportional share of the management body's debts.<sup>29</sup> Thus a prospective purchaser should pay particular attention to a development's common expenses. It affects the amount a unit owner is required to pay for sound maintenance and administration of the condominium. Financially, the entitlement to an undivided share in the common property and voting rights are less significant than contributions to common expenses and sharing in the common profits. Some unit owners rarely attend the general meetings and seldom authorize their voting rights by proxy. This is particularly true in China. Hence, a fair and equitable allocation of common expenses and a share of the common profits are sensitive and need to be carefully designed.

Here it is necessary to clarify common expenses. Under the UCIOA, common expenses mean an association's expenditures, and its financial liabilities together with any allocations to reserves.<sup>30</sup> Each condominium owner pays a monthly or yearly contribution to maintain the common property and to keep the management body functioning. Common expenses are divided into two types, maintenance fees and administrative charges. Maintenance fees relate to maintenance expenses and are the principal sources of the management body's maintenance fund. Maintenance fees mainly, but not exclusively include repairs and renovation to the land and common parts of the building as well as to common installations and fixtures; common property maintenance such as a swimming pool cleaning fee; insurance premiums;

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<sup>29</sup> Van der Merwe "The Allocation of Quotas in a Sectional-title Scheme" 81.

<sup>30</sup> UCIOA § 1-103 (5).

snow removal, and grass trimming.<sup>31</sup> Condominium administrative charges refer to such costs as the salary of the manager and members of management body's executive council, the cost of convening the general meetings, the cost of employing a managing agent, utility fees and taxes and miscellaneous public authority fees.<sup>32</sup>

The United States UCIOA has an open-ended allocation provision for contributions to common expenses and sharing common profits. Under the UCIOA, the declaration lays out the proportional formula for allocation of common expenses for the condominium units.<sup>33</sup> This gives the declarant discretion in choosing a basis for the allocation of common expenses.<sup>34</sup> The UCIOA expressly states that a declarant may allocate common expense contributions on a different basis than that used for a share in the common property.<sup>35</sup> Moreover, the developer can employ more than one formula to allocate common expenses.<sup>36</sup> For example, the share in the cost of the maintenance of entrances, lobbies and garden areas may be based on the floor area of each apartment whereas the cost of recreational facilities such as a swimming pool on the number of occupants and the cost of electricity and water may have separate meter readings.<sup>37</sup> The factors that can be considered by a declarant in choosing a basis for allocating common expenses are far more numerous and complex than those involved in allocating interests in the common property. Additionally, the UCIOA does not provide for allocating common profits apart from common expenses.<sup>38</sup> This is implied in Section 3-114, which states that surplus funds remaining after payment of

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31 Van der Merwe *Apartment Ownership* 64.

32 Van der Merwe *Sectional Titles* 4-10; Van der Merwe divides the common expenses into three types, namely, maintenance charges, administration charges and additional charges. Additional charges include such common services as heating, lifts, the swimming pool, electricity, water and garbage collection.

33 UCIOA § 2-107 (a) (i).

34 Judy & Wittie "Uniform Condominium Act: Selected Key Issues" 455.

35 UCIOA § 2-107 (d) (i).

36 UCIOA § 2-107 comment 5.

37 Van der Merwe *Apartment Ownership* 67.

38 Judy & Wittie "Uniform Condominium Act: Selected Key Issues" 456.

common expenses and reserves must be paid to unit owners in proportion to their common expenses liability as allocated in the declaration or credited to them to set off their future contributions to common expenses.<sup>39</sup> Moreover, the UCIOA states that in a mixed-use condominium consisting of both residential and commercial units, commercial unit owners pay a larger share than their proportion of the total units for matters concerning ratification of the common expense budget.<sup>40</sup>

In the old South African *Sectional Titles Act*, a sectional owner's contribution to common expenses was calculated on the same basis as the share in the common property interests.<sup>41</sup> That is to say the contribution to common expenses was related to a section's floor area. The new *Sectional Titles Act* gives similar freedom as the UCIOA to the South African developers.<sup>42</sup> According to Section 32 (4) of the Act, a developer may ask when registering a sectional title to use a different basis for the purpose of determining the amount of money necessary for common expenses by way of submitting a special rule.<sup>43</sup> However, the developer is forbidden to modify the calculation of the floor area for residential schemes since an owner's common property is pre-determined by the Act.<sup>44</sup> There is some argument as to whether more than one basis may be chosen to determine a particular interest.<sup>45</sup> As an example, can one choose more methods to determine the contribution to common expenses? Moreover, the *Sectional Titles Act* does not specify how to distribute the common profits<sup>46</sup> but does discuss the allocation of expropriation's compensation.<sup>47</sup> Section 19 (2) provides that compensation money be paid to the owners in accordance with

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39 UCIOA § 3-114.

40 UCIOA § 2-107 comment 7.

41 Van der Merwe *Sectional Titles* 4-12.

42 Van der Merwe *Sectional Titles* 4-13.

43 STA s 32 (4).

44 Van der Merwe "The Allocation of Quotas in a Sectional-title Scheme" 16.

45 See n 41 *supra*.

46 Van der Merwe and Butler *Sectional Titles, Share Blocks and Time-sharing* 260.

47 STA s 19 (2).

their participation quotas after they have received written notice of the distribution.

Profits can occur in many instances during the life of a sectional titles scheme, such as the proceeds from renting a roof space for an advertisement board or following the unanimous resolution of the management body to sell some part of the common property. However, the model Management Rules affixed to the *Sectional Titles Act* anticipated such issues by providing that a body corporate of a scheme could not distribute capital profits it might make to any sectional owners, unless the building was destroyed or was deemed to be destroyed.<sup>48</sup> This South African approach on the distribution of profits is unclear as to whether expenses and profits are calculated on the same basis nor does it specify whether profits are credited to a maintenance fund or reserve fund for future use.

In China, the utility fees, including charges for electricity, water, central heating and internet use do not fall within common expenses. Separate meters have been installed to determine the actual use of water and electricity.<sup>49</sup> Internet usage is charged separately by a telecommunication company at a flat rate.<sup>50</sup> In another instance, the most popular way to measure the central heating system is on the basis of the floor area of each unit.<sup>51</sup> Central heating fees are charged at a square meter rate. Therefore, the frequency of use of common facilities can be easily ascertained and not fall within common expenses. The managing agent, however, can collect utilities fees from unit owners without service charges.<sup>52</sup> In addition, the UCIOA approach to allocate common expenses and profits on the same basis is appropriate and equitable.

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48 Annexure 8 r 45 (2) of the *Sectional Titles Regulations*.

49 Art 45 (1) of the *Property Management Regulation of 2003* (as amended in 2007) issued by the State Council; art 40 of the *Measures to Enforce "Property Management Regulation" of Weihai Municipality* issued by the Standing Committee of People's Congress of Weihai City on 15 February 2007.

50 Art 17 of the *Measures Governing the Property Management Fee's Collection of 2003* issued jointly by the State Development and Reform Commission and the Ministry of Construction on 13 November 2003.

51 Xia Shansheng *Property Management Law* 303-304.

52 Art 45(2) of the *Property Management Regulation of 2003* (as amended in 2007).

This needs to be adopted in a future Chinese statute. A Chinese condominium statute could further provide that any common profits either be paid to the unit owners directly or credited to a maintenance fund or reserve fund for future spending in proportion to their common expenses. If unit owners remain in a condominium development for a long term, there is no significant difference between obtaining a proportion of common profits directly and crediting it to offset future contributions. However, the increasing social mobility in China as well as within the condominium market has led to more and more condominium owners selling their apartments and terminating their membership of the management body. When this occurs, there is no need to credit their proportion of common profits for future spending. This is especially necessary since Chinese law does not allow excess contributions to be refunded when unit owners sell their apartments.<sup>53</sup> Therefore, unit owners leaving the condominium complex should be paid their share of common profits immediately.

In summary, when drafting a Chinese condominium statute, a well-planned method to calculate the contributions to common expenses first should accurately reflect a common property's utility.<sup>54</sup> Second, it should appear equitable. Although absolute equity cannot be achieved, this means that at least unit owners are confident that it is fairly equitable and accept it.<sup>55</sup> Third, the formula should be clear and easy to apply. This means that the formula needs to be uncomplicated and easily applicable.<sup>56</sup> This requires an objective and easily definable formula.<sup>57</sup> Therefore, one cannot overemphasize the equity of the formula. A balance needs to be struck between formula and application. Fourth, the formula should be cost-saving. This means that it needs to avoid either periodic recalculation or the need to employ outside services to

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53 Art 13 of the *Measures on Management of Maintenance Fund for Fixtures and Fittings of Apartment Common Areas of 1998*, issued jointly by the Ministry of Construction and Ministry of Finance on 16 December 1998.

54 Van der Merwe *Sectional Titles* 4-21.

55 Judy & Wittie "Uniform Condominium Act: Selected Key Issues" 461.

56 Van der Merwe *Sectional Titles* 4-22.

57 Judy & Wittie "Uniform Condominium Act: Selected Key Issues" 462.

work it out. It cannot be forgotten that the fundamental task of designing an appropriate formula is to allocate contributions to common expenses. Any formula that causes an undue financial burden for unit owners is untenable and unacceptable.

### **4 2 3 Voting Rights**

Under the UCIOA, voting rights are not necessarily related to each apartment's quota.<sup>58</sup> The declaration may provide: (1) that unit owners be given different allocations of votes on particular matters specified in the declaration; (2) for cumulative voting only to elect members of the executive board; and (3) for class voting on issues affecting a class if necessary to protect its interests.<sup>59</sup> There may be certain instances in which class voting in the association would be desirable. For example, in a mixed-use planned community or condominium consisting of both residential and commercial units, the residential or commercial unit owners could constitute a special class giving a special voice on certain issues. However, the UCIOA states that apartments owned by a developer do not constitute a class.<sup>60</sup> Moreover, the developer is barred from utilizing cumulative or class voting to evade and avoid any limitations imposed on developers.<sup>61</sup> The UCIOA permits declarants to allocate votes in the unit owners' association equally or in proportion based on common expenses liability or based on common property interests.<sup>62</sup> In the "first generation" condominium statutes in the United States, the usual rule is that a single vote is allocated to each unit, and that there is a single vote for all matters on which there is voting. The UCIOA recognizes that the increasingly complex nature of some

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58 Van der Merwe *Apartment Ownership* 67.

59 UCIOA § 2-107 (d).

60 See n 59 *supra*.

61 UCIOA § 2-107 comment 7 & 8; Reichman "Residential Private Governments—An Introductory Survey" 1976 (43) *U Chi L Rev* 253.

62 Judy & Wittie "Uniform Condominium Act: Selected Key Issues" 465.



projects requires different allocations on certain issues.<sup>63</sup> For example, in a mixed-use condominium consisting of both residential and commercial units, the declaration may provide that each unit owner has an equal vote for the election of the executive board. However, on budget matters dealing with common expenses, the commercial unit owners who pay a much larger share than their proportion of the total units might have their votes increased so that they eventually might exceed the number of residential owner votes.<sup>64</sup>

The *Sectional Titles Act* has also adopted a hybrid system for the allocation of voting rights.<sup>65</sup> The allocation of voting rights determines the role played by a sectional owner in the administration of a sectional title scheme. At general meetings voting on a resolution is carried out with a show of hands unless a person entitled to vote at the meeting demands that a poll be held.<sup>66</sup> On a show of hands the owners or their proxy have one vote for each section owned.<sup>67</sup> However, weighted voting rights based on a quota can be reintroduced at any general meeting by a demand for a poll.<sup>68</sup> Therefore, the voting right of owners is based on either equality or a quota allotted by the developer. One might argue that weighted voting militates not only against the goal of establishing an efficient method for counting votes, but also against the democratic and social interest in preserving a harmonious community of unit owners.<sup>69</sup> It has been also suggested that the South African *Sectional Titles Act* should recognize that different allocations of votes are a function of the nature of the issues.<sup>70</sup> For example, the weighted voting allocated on the basis of a section's floor area is useful to vote on an issue such as the budget for a maintenance fund. However, most

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63 UCIOA § 2-107 comment 7.

64 See n 39 *supra*.

65 See n 21 *supra*.

66 Annexure 8 r 60 (1).

67 Annexure 8 r 62.

68 Annexure 8 r 63.

69 Van der Merwe "The Allocation of Quotas in a Sectional-title Scheme" 86.

70 Van der Merwe *Sectional Titles* 4-19.

issues can best be decided on the basis of one vote per apartment.

For a Chinese statute, voting rights are not necessarily related to a quota determining either a share in the common property or contributions to common expenses. In deciding an appropriate method for voting rights, there are three goals. First, the voting method should be efficient, clear and easy to conduct.<sup>71</sup> Second, minority interests, those whose views are marginalized in the democratic process, must be protected.<sup>72</sup> Third, the condominium owners should perceive the method as being seen as equitable.<sup>73</sup>

### 4 3 CALCULATING FORMULAS

Various methods can be employed to calculate a participation quota.<sup>74</sup> They include: (1) equality; (2) unit floor area; (3) par value<sup>75</sup> or (4) market value.<sup>76</sup> In addition, there are instances when developers are allowed to take into account such factors as the intensity of usage and the number of occupants in an apartment. However, in most cases the four methods mentioned above are the most widely used in the United States and South Africa. These are methods analyzed and discussed in order to provide a useful reference for a Chinese condominium statute.

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71 Chen & Mostert “The Unavoidable Necessity of Formalizing Condominium Ownership in China: A Pilot Study” 2007 (2) *Asian Journal of Comparative Law* 86; Judy & Wittie “Uniform Condominium Act: Selected Key Issues” 466;

72 Ellickson “Cities and Homeowner’s Associations” 1982 (130) *U Pa L Rev* 1519; Sterk “Minority Protection in Residential Private Governments” 1997 (77) *B U L Rev* 273.

73 Judy & Wittie “Uniform Condominium Act: Selected Key Issues” 466; Van der Merwe *Sectional Titles* 4-18.

74 Benjamin, Rorke & Walwyn *The Sectional Titles Act 1971* (1974) 8-9; Cowen “Questions and Answers on Sectional Titles” 1974 (6) *Planning and Building Developments* 44; Van der Merwe “The Allocation of Quotas in A Sectional-title Scheme” 73-75.

75 Par value refers to a calculation based on unit size and all other relevant features such as location, designated use, interior and exterior design, proximity to facilities, interior decorations and fittings, and the availability of parking space.

76 Judy & Wittie “Uniform Condominium Act: Selected Key Issues” 441.

### 4 3 1 Equality

An equality formula is a method to allocate each unit a share equally, regardless of the floor area or location, use and value of the unit. Each owner has one vote in the management body, has an equal share of the common property, is given an equal amount of the common profits and every owner makes the same payment for common expenses. This is the simplest formula. A few older United States statutes adopted this formula by providing that the apartment owners own the common areas as equal share tenants in common unless the condominium documents state otherwise.<sup>77</sup> Although this formula simplifies the calculation and is easy to conduct, the formula only works when the units are substantially similar in use, size and value.<sup>78</sup> Otherwise, it will not fairly reflect a proper apportionment of each and every unit's value. The equality approach unsatisfactorily preserves the proportionate unit owners' interests. Therefore, the equality formula is not suitable to determine a unit's share in the common property or to determine contributions to common expenses and gains from common profits. However, for voting rights, the equality approach can be employed in a future Chinese statute.<sup>79</sup>

A comparative examination of laws shows that there are two main voting methods adopted by most condominium statutes. Decisions are made either on the basis of "one unit one vote" or on the basis of a participation quota for each unit. Both methods have advantages and disadvantages. The "one unit one vote" rule is democratic and easy to conduct and control, but it does not always achieve an equitable representation of the various stakeholders' property interests.<sup>80</sup> A weighted

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77 The first generation California statute, for instance, gave the unit owners equal rights in the common elements and they share equally in making contributions to common expenses, unless there was an agreement to the contrary. See Gregory "The California Condominium Bill" 1963 (14) *Hastings L J* 201; Van der Merwe *Apartment Ownership* 59.

78 Van der Merwe *Sectional Titles* 4-3.

79 See n 98 *infra*.

80 Van der Merwe *Sectional Titles* 4-18 & 4-19.

vote rule is more equitable and fairer in terms of each owner's property interests, provided that the standard used to determine the respective owners' participation quota is equitable.<sup>81</sup> Functionally, it appears that a vote based on a participation quota is usually the better mechanism for decision-making by the condominium management body.<sup>82</sup>

One can argue that it is unfair that the owner of a larger apartment has the same vote as an owner of a small-sized one, since the value of each unit is different.<sup>83</sup> However, under the UCIOA, voting rights are allocated on different bases not necessarily related to the quota of each unit.<sup>84</sup> In South Africa, it has been argued that the "one unit one vote system" should be adopted as the basic rule for allocating voting rights in residential schemes.<sup>85</sup> In China, the dictates of local authorities and socio-cultural values might render "one unit one vote" the better option.<sup>86</sup> The reasons are threefold. First, very often the public sector in some municipalities still retains ownership of the larger sized condominiums.<sup>87</sup> Here the state may opt for private ownership if the participation-quota voting system is employed. In order to level the playing field between the public sector and private owners and to ensure absolute equality of owners' rights and obligations as well as to protect private interests, the "one unit one vote" approach is the better option. Second, in order to protect minority owners' vital interests, to provide a larger voice in votes may be a right choice.<sup>88</sup> If voting rights are allocated on the basis of a unit's floor area, the

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81 Chen & Mostert "Formalizing Condominium Ownership in China" 85; Judy & Wittie "Uniform Condominium Act: Selected Key Issues" 472.

82 Khublall *Strata Titles* 208.

83 Chen & Mostert "Formalizing Condominium Ownership in China" 86.

84 UCIOA § 2-107.

85 See n 69 *supra*.

86 Gao Fuping & Huang Wushuang *Property Entitlement & Property Management* 96.

87 This is especially true in old welfare condominium buildings where some small-sized condominium units are privately commercialized by virtue of the Housing Reform Policy and other units remain social housing, i.e. the residents pay a relatively low rent to the local government.

88 Judy & Wittie "Uniform Condominium Act: Selected Key Issues" 466-469.

owners of larger units can cast a majority of the votes to protect their particular interests.<sup>89</sup> When the richer owners of larger and more valuable apartments desire to convert a piece of grassland into a tennis court, the owners of the smaller units may find it financially burdensome to contribute to the maintenance of the tennis court. One Chinese local property management rule meets such a concern by providing that a single owner cannot hold more than 30% of the total voting quota at the first general meeting regardless of the floor area size of his or her property.<sup>90</sup> This is a well-conceived provision to cap the voting right of a single owner. Doing this may avoid an abusive developer or investor-owners who buy many units but who do not have a genuine and long-term management stake in the community. However, this local norm does not mention whether capping votes applies to subsequent annual general meetings. Perhaps capping should apply subsequently during the life of the project. Third, since private condominium ownership is still a novel idea for many apartment owners, there is still a great deal of misunderstanding. Management skills that are required are much ignored. At this point in the development of Chinese condominium law, it might be advisable to implement a voting procedure that can be carried out and enforced with relative ease.<sup>91</sup>

However, some hyper-egalitarian commentators prefer a conventional liberal democracy in the condominium world. This means that voting by unit owners is based on the principle of one resident, one vote.<sup>92</sup> This approach is derived from the private government theory.<sup>93</sup> Since the condominium community is regarded somewhat as a private government, every occupant, whether owner or not, should have one vote in much the same way a citizen has a vote in a national or local election.<sup>94</sup> A voting

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89 Judy & Wittie "Uniform Condominium Act: Selected Key Issues" 467.

90 Art 9 of the *Shanghai Property Management Regulation of 2004*.

91 See n 81 *supra*.

92 Walter "Condominium Government: How Should the Laws Be Changed?" 1975 (4) *Real Estate L J* 145.

93 Liebmann *The Little Platoons: Sub-local Governments in Modern History* 382-383.

94 Mckenzie *Privatopia: Homeowner Associations and the Rise of Residential Private*

right based on property ownership is described as a “plutocracy”, a regime inherently offensive in a liberal democracy.<sup>95</sup> However, in view of the ownership interests involved in a condominium community, a truly democratic formula based on a one resident, one vote rule is unacceptable.<sup>96</sup> More importantly, some Chinese local norms have already embraced the idea that one unit, one vote is suitable for residential apartments whereas for non-residential condominiums the floor area formula should determine the weight of each and every vote.<sup>97</sup> Accordingly, the “one unit one vote” rule is preferable in China, provided that non-residential projects and residential projects very diverse in size are able to adopt alternative and innovative participation quotas.<sup>98</sup>

For a mixed development with commercial property owners and residential property owners, the pitfalls of the “one unit one vote” rule are obvious, especially if the owners contributing more financially do not have more say in management and financial issues. The voting right should mirror the value of the property as well as the maintenance costs and therefore a vote by participation quota should apply. Fortunately, in China the vast majority of condominium developments are exclusive residential ones; second, in a large number of these residential condominium developments, the difference in size and value within one condominium building is small. This is especially true in former welfare housing that was provided by working units before the implementation of the housing privatization policy. Thus, in order to encourage unwary and untrained owners to become involved in the management issues, at this point, the principle of one unit one vote would be more workable.<sup>99</sup>

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95 Frug “Cities and Homeowners Associations: A Reply” 1982 (130) *U Pa L Rev* 1592-1596.

96 Ellickson “Cities and Homeowner’s Associations” 1547-1554; Foldvary *Public Goods and Private Communities: the Market Provision of Social Services* 25-43;

97 Art 9 of the *Shanghai Property Management Regulation of 2004*; art 10 of the *Measures to Enforce ‘Property Management Regulation’ of Weihai Municipality of 2007*.

98 Chen & Mostert “Formalizing Condominium Ownership in China” 85-86.

99 It is notable that the provision as to the adoption of voting rights can be conceived and settled

However, when framing a uniform condominium statute, alternative voting procedures still need to be provided for condominium complexes that have dramatically different sizes or mixed-use condominiums where commercial and residential interests have to be balanced.

### **4 3 2 Floor Area**

The floor area formula is employed by the *Sectional Titles Act* to determine the participation quotas of the sections in a residential scheme.<sup>100</sup> Under this formula in the STA, the participation quota is calculated on the basis of a unit's size rounded to the nearest square meter in proportion to the aggregate size of all the sections. The result is expressed as a percentage expressed to four decimal places.<sup>101</sup> If, for example, the total floor area of all the sections is 1000 square meters, and the floor area of one section is 111 square meters, the participation quota of the section is 0.1110. The UCIOA gives developers a great deal of freedom to choose the basis for the participation quota.<sup>102</sup> It does not require that the declarant's formula be justified, but it does require that the formula be explained.<sup>103</sup> The sole restriction on the formulas to be used is that they neither favour units owned by a declarant nor ones owned by a declarant's affiliate.<sup>104</sup>

At first glance it seems that basing a formula on floor area may be more equitable for allocating shares for the common property than basing a formula on a simple equality rule. However, there are still many difficulties that arise in deciding how the size of a unit should be calculated. First, the floor area formula takes into account not only a condominium's enclosed parts but also includes the floor area of a contiguous

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differently in the declaration or sectional plan by developers under different circumstances.

100 See n 21 *supra*.

101 STA s 32 (1).

102 UCIOA § 2-107 (a).

103 UCIOA § 2-107 comment 2 par 2.

104 UCIOA § 2-107 (b).

balcony and/or such non-contiguous parts as a garage or storeroom. The problem arises when only some units have additions where others do not. Units with additions will have quite large participation quotas. This is inequitable since a unit's value does not always increase proportionally with the increase in the floor area of its additional amenities.<sup>105</sup> In brief, additional space in a unit's main part may be more valuable than a balcony or a storeroom of similar size. For this reason, a more equitable solution might be to count only a percentage, perhaps half of the floor area of balconies and storerooms in calculating the participation quota.<sup>106</sup> In China, half of the floor area of the balcony or storeroom is currently counted into a unit's floor area.<sup>107</sup> However, a problem still persists when a developer sells a parking space to the units separately. Some unit owners have purchased their parking space while others have not.<sup>108</sup> Then the unit owners with a parking space will have a larger participation quota. Another criticism leveled against the floor area formula is that it does not reflect the cubic space of the unit. This is to say that only the floor area of a unit is taken into account with no consideration given to the volume of air space within the unit's boundaries. For example, in mixed-use developments, the cubic space of the shops is often larger than an apartment with the same floor area. Even in exclusive residential condominiums, the cubic space of a top-floor penthouse unit is larger than the cubic space of a unit with the same floor area but a low ceiling. An example is a high-rise building containing eight floors of equal floor footage and having four units per floor, except the top floor, where there is a single penthouse unit.

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105 Van der Merwe *Sectional Titles* 4-11.

106 Van der Merwe "The South African Sectional Titles Act and Israeli Condominium Legislation" 1981 *CILSA* 144.

107 § 3.0.18 of the *Measures Governing the Calculation of Floor Areas of Construction Buildings*, issued by the Ministry of Construction on 15 April 2005.

108 According to the Chinese departmental rule, the parking space purchased from developers is regarded as part of the individual property and not counted into the common property for the purpose of calculating a unit owner's interest in the common property. See art 9 of the *Provisional Measures on Calculation of Floor Areas and Allocation of Common Property of Commercial Housing of 1995*.



On the basis of the floor area formula, an equal share of the common expenses is allocated to all the units, including the penthouse unit that is three times the cubic size of the other units on the lower floors. With this allocation, the penthouse unit pays a 1/29 share of all the common expenses. This appears to be inequitable since the floor area formula allocates only 1/3 of the cost for the penthouse unit despite its larger volume size. Therefore, it can be argued that when calculating a participation quota based on a unit's size, not only the floor area, but also cubic space should be taken into account. Thirdly, the most significant criticism against employing a floor area formula is its inability to account for other factors. No account is taken of whether the same-sized apartment faces a factory or the sea or whether the same-sized unit is a warehouse or a ground floor storage room.<sup>109</sup> Same-sized apartments may differ greatly in different locations. Finally, a major objection to a single method based on a unit's floor area is that it is inflexible and rigid.<sup>110</sup> This is because not only do different types of development need different approaches to obtain an equitable allocation of participation quotas, but three divergent and unrelated interests, namely, the share of the common property, the contributions to common expenses and voting rights, also need different formulas to take various factors into account.<sup>111</sup>

The relative floor area formula is mechanical. Nonetheless, despite the foregoing criticisms, the formula has advantages. First, it provides certainty and clarity being simple and easy to apply. In addition, the floor area formula does not need a periodic reappraisal of the participation quota as is the case with the value-based quota. Moreover, it somewhat approximates the relative value of the units. At the same time it avoids the complications arising from a value-based approach such as a periodic

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109 Isakow "Legislation: Some Comments on the Sectional Titles Act 66 of 1971" 1972 (89) *SALJ* 126.

110 Van der Merwe *Sectional Titles* 4-12.

111 Risk "Condominiums and Canada" 1968 (18) *University of Toronto Law Journal* 26; Schreiber "The Lateral Housing Development: Condominium or Home Owners Association" 1969 (117) *U Pa L Rev* 1145.

reappraisal. Finally, the floor area approach has been used in China in residential condominium developments for years. At the maturation stage of condominium development, the floor area approach should be retained in order not to confuse apartment owners with any other complicated methods.

It may seem that a unit owner's proportional ownership in the common property is insignificant given that the amount of common property ownership does not imply a greater or lesser use of the common property. Irrespective of the quota allocated in the common property, the owner of each unit is entitled to use all of the common property provided that the use is reasonable and does not interfere with other's right to use.<sup>112</sup> However, when the cost of a share of common property is broken out and itemized when a purchaser is buying an apartment, then the method the quota is arrived at becomes both relevant and important.

In China, the purchase price of an apartment is based on square meters. The floor area of an apartment that is for sale includes the enclosed unit's floor area and its share of the floor area in the common property.<sup>113</sup> The share floor area in the common property is calculated on the basis of a coefficient. The coefficient is calculated by dividing the common property floor areas by the aggregate of all individual units' floor areas.<sup>114</sup> Then the share of the common property floor area for each unit can be calculated in a way that the individual unit's floor area times the uniform coefficient.<sup>115</sup> This method was designed to implement the housing reform policy for the former welfare housing. These condominiums have a common feature, namely the floor area of the common property is usually smaller than the aggregate floor area of all the individual units. However, in the case of a large modern and/or luxurious

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112 Judy & Wittie "Uniform Condominium Act: Selected Key Issues" 448.

113 Art 5 of the *Provisional Measures on Calculation of Floor Areas and Allocation of Common Property of Commercial Housing of 1995*.

114 Art 10 of the *Provisional Measures on Calculation of Floor Areas and Allocation of Common Property of Commercial Housing of 1995*.

115 Art 11 of the *Provisional Measures on Calculation of Floor Areas and Allocation of Common Property of Commercial Housing of 1995*.

condominium development with the floor area of the common property larger than of all units combined, the coefficient is not a fraction. This leads to an odd consequence that the share of the floor area in the common property allocated to each unit will be larger than the units themselves. Therefore, the method to calculate a unit's share in the common property in China needs to be reframed. Following the South African approach, the quota needs to be calculated by dividing the unit's floor area in proportion to the aggregate size of all the units rather than the whole development's floor area.

The floor area approach may also be used to determine an owner's cost for common expenses. However, this approach is open to serious criticism. The contributions should be a function of the benefit the unit owner derived from each amenity as well as the use of it.<sup>116</sup> This is particularly true with a swimming pool. Unit owners not using a swimming pool may feel they are maltreated since they still contribute for the cost of its maintenance. Another example is requiring a childless couple to pay for the maintenance of a children crèche on the basis of their unit's floor area.<sup>117</sup> And there is dilemma for ground floor unit owners having to pay for elevator maintenance. One argument is that the costs for common expenses should directly reflect and relate to the degree to which each unit utilizes a common facility.<sup>118</sup> However, it is extremely difficult to calculate individual unit costs on the basis of actual use because numerous and complex factors need to be taken into account. The major ones are a unit's location and the number of its occupants. Obviously, a unit with five children uses a crèche more than a family with one child. Nonetheless, these problems can be alleviated by limiting usage and charging fees for extra use. For example, a management body could regulate the reasonable use of a swimming pool by restricting each unit's use to five times a day with the pool manager carefully

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116 Khublall *Strata Titles* 204.

117 See n 111 *supra*.

118 Judy & Wittie "Uniform Condominium Act: Selected Key Issues" 457.

checking usage. Units using the swimming pool more than five times a day would have an additional charge imposed. But units using the pool less than five times a day do not need to pay charges.

However, this cannot exonerate these unit owners from paying costs for the maintenance of the pool. To effectively carry out such a policy three elements are involved. First, the management body would need to determine the daily cost of maintaining the pool. Second, the management body would need to work out carefully the minimum number of periods of use that would be acceptable to the largest number of unit owners. Third, a managing agent would need to be employed to enforce the policy. For a small self-managed condominium without a professional managing agent, this policy would be unworkable.

The new *Chinese Property Code* provides that contributions for common expenses should be determined by the unit's floor area in proportion to the aggregate floor areas of the whole building provided there is not an agreement to the contrary.<sup>119</sup> Therefore, unless the developer proposes an alternative quota, the floor area approach to determine an owner's cost for common expenses is the one that has now gained acceptance in China.

### **4 3 3 Par Value**

Par value is a value-based calculation that takes into account unit size and such factors as location, designated use, interior and exterior design, proximity to facilities, interior decorations and fittings, and the availability of parking space.<sup>120</sup> The par value is a percentage computed by taking as a basis the value of a particular apartment in relation to the value of the whole development. The most popular basis to determine a condominium's value is to compare it to the aggregate value of all the units in a

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119 Art 80 of the *Chinese Property Code of 2007*.

120 Badenhorst, Pienaar & Mostert *Silberberg and Schoeman's The Law of Property* 460.

project.<sup>121</sup> Although relative value can be calculated in various ways, for example on the basis of a unit's purchase price or the market value of each unit, it is generally acknowledged that par value is the most satisfactory basis.<sup>122</sup> It is argued that the par value approach affords a more equitable basis since it resembles an owner's investment more closely.<sup>123</sup>

Some older statutes of the United States follow Section 6 (a) of the Model Statute of 1962 of the Federal Housing Administration by stating that each apartment owner is entitled to an undivided interest in the common areas and facilities by taking the value of an apartment in relation to the value of the whole condominium property.<sup>124</sup> For South Africa, the Memorandum to the *Sectional Titles Act of 1986* mentions that the developer should utilize par value or a similar criterion to determine the participation quota for non-residential sectional title schemes or to amend each sectional owner's proportion for common expenses. However, this has not been finally written into the *Sectional Titles Act*. By leaving the allocation of quotas to the discretion of the developer, it was assumed that the developer would apply the par value formula for non-residential schemes.<sup>125</sup>

However, the par value formula is not without problems. First, this formula cannot provide an objective barometer. When various factors are taken into account for allocating quotas on the basis of par value, developers are not bound by objective criteria. This could lead to an inaccurate or even more inequitable allocation of interests than when the floor area is employed. It is open to question whether a developer is able to offer an equitable quota that can be accepted by all unit owners. Second, when applying the par value formula, it is usually fixed before the

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121 Van der Merwe *Apartment Ownership* 58-61.

122 Schreiber "The Lateral Housing Development: Condominium or Home Owners Association" 1104; Van der Merwe *Sectional Titles* 4-4.

123 See n 122 *supra*.

124 Van der Merwe *Apartment Ownership* 60.

125 Van der Merwe *Sectional Titles* 4-17.

condominium is registered or a public statement is provided.<sup>126</sup> Moreover, the par value formula can only be changed at a general meeting by unanimous resolution.<sup>127</sup> In fact an apartment's par value fluctuates with time and should not be artificially fixed. For this reason a par value formula should be periodically reappraised. Otherwise, it cannot take into account future changes in the units' capital values.

In summary, by using the par value formula, two irreconcilable assumptions have to be reconciled. The first requires that all the interests initially be allocated on a fixed value basis. And the second requires an apartment's real value to reflect the owners' investment. Since reconciliation is impossible, the par value approach is not suitable for residential condominiums in China. However, this would not rule out the possibility for a developer to use a par value formula before conveying a unit to a buyer in a non-residential scheme.

#### **4 3 4 Market Value**

Market value is the amount a unit would be worth if sold on the market at any given time.<sup>128</sup> Therefore, an apartment's market value fluctuates with time. If a participation quota is based on a unit's market value, obviously the quota will vary over time. Thus the market value approach is unlikely to be a better measure than unit size or par value.<sup>129</sup> Allowing variations in quotas can be financially burdensome and changeable.

When a condominium owner has significantly improved and renovated the interior of a unit, from the real estate investment aspect, it would seem unfair that the unit owner's share in the common property remains unchanged.<sup>130</sup> After a condominium is registered, in most cases the owner begins a process of investing in upgrading and

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126 Judy & Wittie "Uniform Condominium Act: Selected Key Issues" 441.

127 Van der Merwe *Sectional Titles* 4-4.

128 Judy & Wittie "Uniform Condominium Act: Selected Key Issues" 441.

129 Judy & Wittie "Uniform Condominium Act: Selected Key Issues" 460.

130 Van der Merwe *Sectional Titles* 4-16.

improving the unit's interior and fixtures that result in the unit increasing in value. Therefore, it is essential that the unit purchaser receives an increasing undivided fractional interest in the project approximating the value of the person's investment.<sup>131</sup> Without this, if the property should be resold, destroyed, expropriated, or terminated by the management body's unanimous resolution, the owner would receive less than he/she had invested. It almost always is the case that apartment improvements and fixtures generate disputes when there is an apartment resale or when the building is destroyed as improvements increase the apartment's value.<sup>132</sup>

The UCIOA deals with the issue outlined above with a provision that the share of a unit owner's interest on termination of the scheme is determined by dividing the fair market value of the owner's unit and its allocated interests by the total fair market values of all the units.<sup>133</sup> One or more independent appraisers selected by the unit owner's association determine the fair market value immediately before the termination.<sup>134</sup> However, the fair market value rule only applies in case of voluntary termination by the unit owners. When a unit or part of the common property has been destroyed, an appraisal of the interests of all the unit owners is impossible. The UCIOA provides an alternative to the fair market value rule in case of condominium termination. If a fair market value appraisal of condominium units prior to termination cannot be made, any unit's appropriate share in the overall proceeds will revert to the interest in the common elements allocated to each unit.<sup>135</sup> The UCIOA approach needs to be borrowed for a Chinese condominium statute to have a more equitable formula. This is because when condominium owners voluntarily decide to sell, the appraisal is necessary. In this case, the appraisal would not be considered as a

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131 Rohan "Condominiums and the Consumer: A Checklist for Counseling the Unit Purchaser" 1974 (48) *St John's L Rev* 1041.

132 Rohan "Condominiums and the Consumer" 1042.

133 UCIOA § 2-118 (j) (1).

134 Judy & Wittie "Uniform Condominium Act: Selected Key Issues" 446; Van der Merwe "The Allocation of Quotas in A Sectional Title Scheme" 80.

135 UCIOA § 2-118 (j) (2).

financial burden since unit owners have a high hope to receive a good return for the investment by collective sale.

#### **4 4 AMENDMENT OF PARTICIPATION QUOTA**

Amendment of a participation quota is allowed either when a quota has been mistakenly determined, or when the physical structure of a building is altered causing the quota to be incorrect. In the latter case the building could be enlarged, it could be somewhat damaged or an apartment could be altered in such a way that a part of it becomes a part of the common property.

The STA allows either the developer initially or the body corporate subsequently to amend consequences of the participation quota.<sup>136</sup> When a developer submits an application to open a sectional title register, the developer may include special rules allowing for the modification of an owner's vote, or an owner's contributions to common expenses or allow for the unpaid debt of the body corporate to be modified.<sup>137</sup> The body corporate may subsequently adopt a similar amendment by special resolution provided that the owners who would be adversely affected by the resolution have given their written consent.<sup>138</sup> However, the body corporate cannot do this until at least 30 per cent of a project's units have been sold to persons other than the developer.<sup>139</sup>

Under the UCIOA, if units are added to or withdrawn from the condominium building, the declaration must specify the formulas to reallocate the interests among all the condominiums after the addition or withdrawal.<sup>140</sup> The purpose of this is to disclose advance information to condominium purchasers in the first phase of an

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136 Van der Merwe *Sectional Titles* 4-10 (1).

137 STA s 32 (4).

138 Van der Merwe "The South African Sectional Titles Act Compared with the Singapore Land Titles (Strata) Act" 149.

139 See n 136 *supra*.

140 UCIOA § 2-107 (c).



expandable condominium project.<sup>141</sup> More importantly, the UCIOA provides that in general, no amendment can change the allocated interests of a unit without the unanimous consent of the units' owners.<sup>142</sup>

A participation quota's amendment requirement under the UCIOA is stricter than the STA. Under the STA, a special resolution can effect the modification of the consequences of quotas while the UCIOA requires the unanimous consent of all the unit owners. Quite simply, the UCIOA regards the participation quota as a permanent interest inherent in an apartment and in principle unalterable.<sup>143</sup>

For China, since the participation quota not only plays a propriety role but also a social and economic role within a condominium community, a Chinese condominium statute should contain strict requirements on amending a participation quota. In addition, if an independent authority is created which examines the proposed participation quota, the likelihood of an incorrect amendment being passed is greatly diminished. When the physical structure of a building is altered or damaged, the participation quota has to be modified. If this situation should occur, it would be best that only a special resolution be passed. When a building is physically altered or damaged, getting unanimous consent can be quite difficult if not actually impossible. Furthermore, it is advised that an independent authority be involved in designing the new quota to ensure equity. If there is an objection against a new quota determined by the independent authority, the dissenting owners should resort to the court, asking for a review of the quota's legitimacy.

## **4 5 COMPARATIVE EVALUATION: QUOTA IN DISCRETION OF DEVELOPER**

The UCIOA allows a declarant in the declaration maximum freedom to allocate rights

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141 UCIOA § 2-107 comment 6.

142 UCIOA § 2-117 (d).

143 Rohan & Reskin *Condominium Law and Practice: Forms* 45-14.

and obligations amongst apartment owners.<sup>144</sup> The UCIOA does not require that formulas used by the declarant be justified, but it does require that the formulas be explained.<sup>145</sup> The sole restriction on using the formulas is that they may not favor units owned by the declarant. Thus, the American developer can allocate quotas equally, on relative size or value, a combination of these or on any other basis.<sup>146</sup> All the developer needs to do is to indicate his or her choice on the declaration and explain the chosen formula.

The South African STA, however, does not grant the developers as much freedom to allocate interests as does the UCIOA. Rather, the STA distinguishes residential schemes and non-residential schemes. For residential schemes, the statutory basis of allocation is prescribed, namely, relative floor area. However, for non-residential sectional titles schemes, a developer has unfettered discretion to determine the participation quota of units in non-residential schemes.<sup>147</sup>

To sum up, the liberal approach adopted by the UCIOA is not suitable for a Chinese condominium statute. First, without an independent oversight authority, a developer's discretion is prone to abuse. Second, not every Chinese developer is capable of and experienced enough to determine an equitable quota at the present time. Third, most of the residential condominiums in China are former welfare housing and apartments of very similar size in a single project.<sup>148</sup> This makes the developer's discretion to determine the participation quotas unnecessary. Fourth, the floor area formula now being used in residential condominiums is generally accepted by Chinese apartment owners.<sup>149</sup> Fifth, article 80 of the *Chinese Property Code* provides that the apartment

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144 See n 102 *supra*.

145 UCIOA § 2-107 comment 2 par 2.

146 Van der Merwe *Apartment Ownership* 60.

147 See n 22 *supra*.

148 See n 83 *supra*.

149 Art 11 of the *Measures on Management of Maintenance Fund for Fixtures and Fittings of Apartment Common Areas of 1998* states that the initial maintenance fund is levied on the basis of an apartment's selling price. According to art 5 of this departmental rule, the unit purchaser should pay

owners' quota that deals with common expenses liability and share in common profits can be decided by agreement. If an agreement cannot be reached, the quota is calculated on the basis of the floor area of an individual apartment as a proportion of the floor area of the whole building.<sup>150</sup> This provision seems to indicate that the floor area formula has gained in popularity but it suffers from a fault. The method should be corrected so that a unit's floor area is compared in relation to the aggregate floor area of all the units rather than that of the whole building. Developers should not enjoy unfettered freedom when developing residential condominiums in China. For residential condominiums, the floor area formula should be kept. In brief, it would be wise for Chinese lawmakers to take into account the above-mentioned factors when framing a future Chinese condominium statute.

Consequently, it is more suitable for a Chinese condominium statute to adopt the South African approach by distinguishing between exclusive residential condominiums and non-residential or mixed-use condominiums. The developer's discretion is useful and necessary in non-residential or mixed-use condominiums. Unlike exclusive residential condominiums, the mixed-use condominiums vary from each other greatly. Some mixed-use projects may be comprised of residential apartments for half of the floor area and shops for the other half whereas another scheme may allocate 30% of the floor areas for offices and the other 70% for apartments. Hence, it is difficult if not impossible to stipulate a uniform yardstick for calculating the participation quota for non-residential and mixed-use condominiums. In fact, the *Chinese Property Code* provision leaves the door open for a developer to determine the participation quota. This is apparent in the provision that only when there is no agreement on quotas, the floor area formula applies.<sup>151</sup> This means that when there is an agreement on the quota, the agreement controls. The agreement in

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2-3% of the selling price extra as the maintenance fund. But when the initial maintenance fund is used up, the floor area formula will apply to collect contributions to common expenses from owners.

150 Art 80 of the *Chinese Property Code of 2007*.

151 See n 150 *supra*.

this provision refers to the contract of sale which is drafted by the developers. This implies that the developer has the freedom to designate participation quotas subject to the consensus of all the purchasers. Moreover, since Chinese law does not expressly mention a participation quota for non-residential or mixed-use condominiums, one could argue that it is the developer's duty to deliberate on and prepare a participation quota plan for such scheme.<sup>152</sup> Therefore, the Chinese condominium statute needs to give developers the discretion to design an equitable quota for non-residential and mixed-use condominiums. However, it is only sensible to set up an independent agency to examine the equity and efficiency of quotas that a developer proposes as is done in New Zealand and Singapore.<sup>153</sup> The rationale for this is to ensure that developers are neither derelict in their duties nor incapable of carrying them out. Accordingly, with this suggestion, the developer needs to not only explain the proposed quotas but also justify them before an independent authority's scrutiny.

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152 Van der Merwe argues that it is a dereliction of duty by developers not to conceive a deliberate participation quota. See Van der Merwe *Sectional Titles* 4-6.

153 According to s 6 (1) of the New Zealand's *Unit Titles Act 1972*, the Valuer-General or a registered real estate valuer has to assign a unit entitlement before a unit plan can be deposited for registration. In Singapore, according to S 11 of the *Land Titles (Strata) Act*, to determine the participation quota of each unit, the developer should submit a proposal to the Commissioner of Buildings for acceptance.

# CHAPTER 5

## RIGHTS AND OBLIGATIONS OF UNIT OWNERS

### 5 1 INTRODUCTION

Inherent in the condominium concept is the interdependence of interests among unit owners.<sup>1</sup> Each condominium owner must give up a certain degree of freedom which the person otherwise enjoys in a freestanding property.<sup>2</sup> Unit owners need to comply with restrictions imposed by legal principles of neighbor law, statutory provisions, the declaration and any by-laws or rules set by the management body.<sup>3</sup> Although such restrictions possibly could be “unduly intrusive and detrimental to” unit owners’ free use of their property, they promote a harmonious living environment and ensure that unit owners respect each other’s rights.<sup>4</sup> Accordingly, a major issue is how to balance the protection of individual rights with the collective needs of the condominium community.<sup>5</sup> For this reason it is essential that the condominium owner’s rights and obligations must be addressed when drafting a uniform Chinese condominium statute.

This chapter focuses on condominium owners’ use and enjoyment of their apartments and the common property employing a general UCIOA and STA framework. By analyzing the validity and enforcement of these restrictions, it is

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1 Di Lorenzo *The Law of Condominiums and Cooperatives* 6-2.

2 *Nahrstedt v Lakeside Village Condominium Ass’n, Inc* 8 Cal 4th 361, 33 Cal Rptr 2d 63, 878 P2d 1282.

3 Van der Merwe *Apartment Ownership* 72-81.

4 Rohan & Reskin *Condominium Law and Practice: Forms* 44-7.

5 Seigler “Condominium Transfer Fees Revisited” Nov 7, 2001 *New York Law Journal*. Online:

possible to provide suggestions on the rights and obligations of condominium owners for a Chinese condominium statute. Condominium owner's rights are divided into two types, namely, owners' rights relating to their units and their rights relating to the common property. In return for these rights, a unit owner has the obligation to comply with statutory documents, the declaration, the by-laws and management body resolutions that deal with the individual unit and the common property.

## **5 2 OWNERS' RIGHTS AND OBLIGATIONS IN OWNING A CONDOMINIUM UNIT**

### **5 2 1 Rights Regarding A Unit**

A condominium owner has extensive power over his or her unit.<sup>6</sup> Theoretically, ownership entails mainly but not exclusively, a right to possess, a right to use and enjoy, a right to enjoy his or her condominium unit, a right to exclude others from using and enjoying the unit, a right to transfer ownership of the unit to others, and to grant lesser rights for it to others.<sup>7</sup> It seems that a condominium owner may use and deal with his or her apartment freely. Without an express provision governing the rights of a unit owner, both the UCIOA and the STA maintain implicitly that a unit owner has a freehold ownership and exclusive possession of his/her unit with extensive powers of use and enjoyment.<sup>8</sup> However, since all units are structurally interdependent, an owner can use and enjoy the condominium unit only on the condition that the owner does not infringe other unit owners' rights. Both the UCIOA and the STA restrict the powers of a unit owner by the statutory provisions, the declaration or the sectional plan, and the condominium association's by-laws or rules.

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<http://www.stroock.com/SiteFiles/Pub243.pdf> [2008.03.15].

<sup>6</sup> Van der Merwe *Sectional Titles* 8-3.

<sup>7</sup> Badenhorst, Pienaar & Mostert *Silberberg and Schoeman's The Law of Property* 3.

<sup>8</sup> Rohan & Reskin *Condominium Law and Practice: Forms* 5-6; Van der Merwe *Sectional Titles* 8-4.

Similarly, the *Chinese Property Code* expressly states that an owner is entitled to have the rights to possess, use, enjoy and dispose of the individual unit. When exercising these rights, an owner may not jeopardize the structural integrity of the building or harm the lawful rights of other owners.<sup>9</sup> Condominium ownership is best understood from an examination of the restrictions imposed on an owner.

## **5 2 2 Restrictions on a Unit**

### **5 2 2 1 Restrictions by General Principles**

A condominium owner's use and enjoyment of a unit is curtailed by the other owners' rights since everyone lives in close proximity and uses facilities in common.<sup>10</sup> The unit owners' obligations and responsibilities emanate from these restrictions. Since China is without a special condominium statute, condominium owners' rights and obligations are guided by principles of neighbour law and public policy.<sup>11</sup> A condominium owner, in the interest of being a good neighbor, is not entitled to exercise rights in a way that would inconvenience other owners or in a way that abuse others' rights.<sup>12</sup> For example, an owner cannot use a unit in an unreasonable way that would endanger the building's structural stability.<sup>13</sup> The exercise of an owner's rights must be compatible with the collective interests of all of the neighboring owners to ensure a harmonious community.<sup>14</sup> Under the STA, the common law of nuisance

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9 Art 71 of the *Chinese Property Code of 2007*.

10 Van der Merwe *Sectional Titles* 8-5.

11 Art 5 of the *Measures Governing the Management of Urban Adjacent Housing of 1989* (as amended in 2001); Gao Fuping & Huang Wushuang *Property Entitlement & Property Management* 275-276.

12 Van der Merwe *Apartment Ownership* 72.

13 Art 12 of the *Measures Governing the Management of Urban Adjacent Housing of 1989*; see also Chen & Mostert "Formalizing Condominium Ownership in China" 78. In this article, a case scenario about breaking down a bearing wall inside an apartment by a unit owner is discussed.

14 Yang Lixin *Study on Co-ownership* 386. (Chinese version)

applies to all condominium owners.<sup>15</sup> An injured party can either obtain an interdict to stop the nuisance or make a claim for damages.<sup>16</sup> In the interest of public policy, an owner cannot use a condominium unit for immoral purposes such as running a house of prostitution or human trafficking. Neither can an owner use a condominium in such a way that the public health would be endangered. China's general principles of neighbor law and public policy impose restrictions very similar to the ones regulated under the UCIOA and the STA by their provisions, the declarations, and by-laws or rules governing a condominium complex. These are examined in detail in the following sections.

### **5 2 2 2 Statutory Obligations**

Both the UCIOA and STA contain provisions that lay out condominium owners' obligations and restrictions for their individual condominium. Under the UCIOA, the statutory restrictions on an owner's use and enjoyment of his/her condominium are: (1) an owner is responsible for maintaining and repairing the individual unit; (2) a unit owner must allow the unit owners' association reasonable access to the unit in order to maintain, repair and replace the common areas and facilities and for emergency repairs necessary to prevent damage to the common property or to another unit;<sup>17</sup> and (3) a unit owner may improve or alter a unit provided that it does not impair the structural integrity or mechanical systems or lessen the support of any portion of the common property.<sup>18</sup>

Under the STA, an owner has the following obligations: (1) during reasonable hours a unit owner has to allow a person authorized by the body corporate by a

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15 The nuisance rule is expressly incorporated in the Sectional Titles Act. See n 22 *infra*; also see Van der Merwe "The South African Sectional Titles Act Compared with the Singapore Land Titles (Strata) Act" 151.

16 Van der Merwe "Sectional Titles" *LAWSA* XXVII [First Reissue 2001] par 110.

17 UCIOA § 3-107 (a).

18 UCIOA § 2-111 (1).



written notice to enter and inspect his/her unit or exclusive use area in order to maintain, repair or renew pipes, wires, cables and ducts in the unit or those being used in connection with other units or common property;<sup>19</sup> (2) a unit owner has to do any work to the unit that a public or local authority orders and has to pay the requisite charges, expenses and assessments;<sup>20</sup> (3) a unit owner has to repair and maintain the unit and keep it in a state of good repair;<sup>21</sup> (4) a unit owner is not permitted to use the unit or permit it to be used to cause a nuisance to other unit owners or occupiers;<sup>22</sup> (5) an owner is not allowed, except with the written consent of all the owners, to use the unit for a purpose other than that shown on the registered sectional plan.<sup>23</sup>

Both the UCIOA and the STA have basic restrictions which condominium owners are to follow: (1) a condominium unit has to be maintained and kept in a reasonable state of repair by its owner; (2) a unit's owner has to give reasonable access to the management body to protect and maintain the condominium's common interests; and (3) a unit owner cannot impair the structural integrity of the condominium building.

The STA also incorporates the law of nuisance into the Act. The prevention of nuisance stems from the principles of neighbour law that one should use one's own property without injuring or damaging others.<sup>24</sup> The additional duty imposed on the owners is extended to include visitors, other apartment occupants, and lessees. Occupants and visitors also have to comply with rules of the condominium scheme. This is found in a clause that states "a sectional owner shall not permit the section to be used" in such a way as to cause a nuisance to any of the unit's occupants.<sup>25</sup> Furthermore, the STA ensures that an owner uses his/her unit in accordance with the sectional plan. In China, it is not uncommon for some apartment owners to convert

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19 STA s 44 (1) (a).

20 STA s 44 (1) (b).

21 STA s 44 (1) (c).

22 STA s 44 (1) (e).

23 STA s 44 (1) (g).

24 Milton "Nuisance" *LAWSA IXX* [First Reissue] par 188; Van der Merwe *Sectional Titles* 8-8.

25 See n 22 *supra*, read with r 10 of Annexure 9 of the *Sectional Titles Regulations*.

their units designated for residential purposes into business offices.<sup>26</sup> Another example is a night club with late hour activities or a late night restaurant that is open on the lower floors of a residential condominium, and all of which seriously annoy the residential owners.<sup>27</sup>

Moreover, the STA in several places implies a legal servitude with condominium ownership. One is called a reciprocal servitude for lateral and subjacent structural support<sup>28</sup> and the other is a reciprocal servitude for the passage of such services as water and sewerage through pipes, wires, cables and ducts.<sup>29</sup> Thus, owners altering or improving their condominium units should ensure that they do not physically weaken a building's load bearing walls, ceilings and floors so as not to put their neighbors at risk. Finally, the STA stipulates that a unit owner is responsible for paying the fees and expenses charged by public authorities.<sup>30</sup> This restriction is analogous to the restriction that applies to conventional land ownership.<sup>31</sup>

It is clear that the STA statutory provisions on the use restrictions of a unit are more detailed than the UCIOA. It would seem a future Chinese condominium statute should adopt an equally detailed approach. However, there is one STA technical issue that would not be suitable in China. Requiring a condominium management body to give prior notice before sending an employee to enter an owner's unit is a sensible provision. However, in China, requiring a management body or its executive council always to give written notice before entering a unit is, in practice, much too rigid. In practice, a management body can authorize reasonable access by notifying a unit

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26 Wei Yaorong "The Discussion on the System of Condominium Ownership" 2007 (1) *Modern Property Management* 22; Li Xiandong *The Legal Guide for Resolving the Disputes Resulted from Property Management* 144. (Chinese version)

27 Li Xiandong *The Legal Guide for Resolving the Disputes Resulted from Property Management* 50-52.

28 STA s 28 (1) (a) (i).

29 STA s 28 (1) (a) (ii) and (b) (ii).

30 STA s 44 (1) (b).

31 Van der Merwe *Sectional Titles* 8-7.

owner in advance employing a notice board or by telephone. As long as the unit owner and the management body can arrange a mutually convenient time for access, a written notice requirement would be redundant. Moreover, since many Chinese condominium projects comprise several buildings, a written notice requirement would unnecessarily increase the workload of a management body.

### **5 2 2 3 Restrictions in Condominium Documents**

In the United States, initially a declaration is essentially a covenant between unit owners and the developer and then later it is a covenant between unit owners and the condominium association.<sup>32</sup> Restrictions in this document are considered covenants running with the land.<sup>33</sup> The covenants bind not only the current unit owners but also any successors.<sup>34</sup> Therefore, upon acquiring title to a condominium, unit owners create a contractual relationship among themselves concerning their rights and obligations.<sup>35</sup> The covenants and the conditions not only are binding on the unit owner and the management body, but bind all subsequent unit owners.<sup>36</sup>

Under the UCIOA, a declaration should contain restrictions on the transfer of a condominium unit from one person to another since imposing these restrictions exceeds the powers of the executive boards.<sup>37</sup> In addition, the declaration may contain restrictions on a unit's sale price, or on the amount a unit owner receives at the time of sale, on condemnation, or on the amount of a unit or the condominium

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32 Poliakoff *Law of Condominium Operations* § 15.31.

33 Brower "Communities within the Community: Consent, Constitutionalism, and Other Features of Legal Theory in Residential Associations" 1992 (7) *J Land Use & Envtl L* 215; Reichman "Residential Private Governments: An Introductory Survey" 1976 (43) *U Chi L Rev* 279; Rohan & Reskin *Condominium Law and Practice: Forms* 44-10 & 44-11.

34 Natelson "Consent, Coercion, and 'Reasonableness' in Private Law: The Special Case of the Property Owners Association" 1990 (51) *Ohio St L J* 47; Van der Merwe *Sectional Titles* 13-7.

35 Fennell "Contracting Communities" 2004 *U Ill L Rev* 835-836.

36 Rohan & Reskin *Condominium Law and Practice: Forms* 44-11.

37 UCIOA § 2-105 (a) (12).

community's casualty loss, or on termination of the condominium project.<sup>38</sup> The declaration may also deal with any other matter a declarant considers appropriate including restrictions on a unit's use or the number or other qualifications of persons who may occupy a condominium unit.<sup>39</sup>

The 1994 UCIOA amendments describe the use and occupancy restrictions that must appear in the declaration as well as the procedures that must be used to change use and occupancy restrictions.<sup>40</sup> The amendments expressly state that leasing restrictions must appear in the declaration.<sup>41</sup> In addition, a new distinction is made between a use restriction and an occupancy restriction. This distinction emphasizes that occupancy focuses on an individual's characteristics while use focuses on the purposes of a space.<sup>42</sup> The more important are use restrictions which have to be stated in the declaration. Occupancy restrictions are less rigorous and fall under the jurisdiction of the executive board which determines such things as the maximum number of occupants allowed in a unit and whether there can be pets or not.<sup>43</sup> Prior to these amendments, occupancy restrictions had to be made in the declaration but now the amended UCIOA requires only that alienation conveyance restrictions, including those applying to a lease, must be in the declaration. Everything else is permissive. More importantly, once the declaration is recorded, use restrictions are presumed to be valid.<sup>44</sup> Quite simply, American courts assume that a purchaser has full knowledge about any use restrictions contained in the recorded declaration when acquiring title.<sup>45</sup>

Under the UCIOA, an association's by-laws can include any other matter the unit

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38 See n 37 *supra*.

39 UCIOA § 2-105 (b).

40 UCIOA § 2-105 comment 13 para 2.

41 UCIOA § 2-105 comment 13 para 3.

42 UCIOA § 2-105 comment 13 para 6.

43 UCIOA prefatory note 3.

44 Rohan & Reskin *Condominium Law and Practice: Forms 44-11 & 44-12*.

45 Grippando "Condominium Rulemaking-Presumptions, Burdens, and Abuses: A Call for Substantive Judicial Review in Florida" 1982 (34) *U Fla L Rev* 219.

owners' association believes is necessary and appropriate.<sup>46</sup> The caveat is that by-laws and rules cannot exceed the association's authority.<sup>47</sup> The association can adopt rules to prevent any behavior that violates the declaration or adversely affects the use and enjoyment of other units or the common property.<sup>48</sup> Since the association's by-laws can be unrecorded under the UCIOA, they can only deal with matters concerning the internal operations of the association and housekeeping matters.<sup>49</sup>

In South Africa, an owner's use and enjoyment of a condominium unit is limited by the existing servitudes, as well as by additional real rights and restrictive conditions filed in the sectional plan.<sup>50</sup> Apart from this, more detailed restrictions and obligations are further contained in the rules of the scheme. A close examination finds that the STA rules of the scheme differ from the UCIOA by-laws. First, rules of a scheme need to be lodged with the deeds office while by-laws do not need to be recorded. The STA rules of the scheme are in a certificate prepared by a conveyancer that is needed to open a sectional title register. This certificate is lodged together with the sectional plan for registration.<sup>51</sup> Second, the STA rules of the scheme contained in Annexures 8 and 9 of the *Sectional Titles Regulations* are in a prescribed form. In other words, the "default" is a model set of provisions for a sectional title scheme although a developer may substitute or amend these rules to fit a particular sectional title development. The rules regulate the control, management, administration, use and enjoyment of the units and common property when any person other than the developer becomes the owner of a unit.<sup>52</sup> Model management rules are found in Annexure 8 of the Regulation and include the following restrictions: 1) an owner shall

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46 UCIOA § 3-106 (b).

47 UCIOA § 3-102 (a).

48 UCIOA § 3-102 (c) (1) & (2).

49 UCIOA § 3-106 comment 1.

50 STA s 11 (3) (b).

51 STA s 11 (3) (e).

52 STA s 1 (1) *s v* "rules" read with s 35 (1) & s 36 (1).

not use his or her section, exclusive use area or any part of the common property, or permit it to be used to damage the reputation of the building;<sup>53</sup> 2) an owner shall not breach any law, by-law, ordinance, proclamation or statutory regulation, or the conditions of any licence relating to the scheme's living, or running a business in the building, or breach the conditions of title regarding his or her section, any other section, exclusive use area, or any other exclusive use area;<sup>54</sup> 3) an owner shall not make alterations which are likely to endanger the building's stability or influence the use and enjoyment of other sections, the common property or any exclusive use area;<sup>55</sup> 4) an owner is not allowed to do anything to his or her section or exclusive use area which is likely to impair the building's harmonious appearance.<sup>56</sup>

Apart from the restrictions in the model management rules, the model conduct rules in Annexure 9 further curtail an owner's use and enjoyment of his or her section: 1) an owner or occupier of a unit shall not, without the consent in writing of the trustees, keep any animal, reptile or bird in a unit;<sup>57</sup> 2) an owner or occupier of a unit shall maintain a receptacle for refuse in a hygienic and dry condition within his unit;<sup>58</sup> 3) an owner or occupier of a unit used for residential purposes shall not place or do anything on any part of the common property, including balconies, patios, steps, and gardens which, in the discretion of the trustees, is aesthetically displeasing or undesirable when viewed from the outside of the unit;<sup>59</sup> 4) no owner or occupier of a unit, without the written consent of the trustees shall place any sign, notice, billboard or advertisement of any kind whatsoever on any part of his or her residential unit so as to be visible from outside the unit;<sup>60</sup> 5) an owner or occupier shall not store any

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53 Annexure 8 r 68 (1) (i).

54 Annexure 8 r 68 (1) (ii).

55 Annexure 8 r 68 (1) (iii).

56 Annexure 8 r 68 (1) (iv).

57 Annexure 9 r 1 (1).

58 Annexure 9 r 2 (1) (a).

59 Annexure 9 r 5.

60 Annexure 9 r 6.

inflammable material or do or permit or allow any other dangerous act in his or her unit;<sup>61</sup> 6) an owner is obliged to eradicate pests in his or her unit.<sup>62</sup>

Practical experience under the UCIOA and the STA demonstrates that some rules are particularly contentious. One instance is whether there should be an absolute prohibition of pets. Two contrasting cases in the United States and South Africa illustrate how the courts in different jurisdictions have dealt with a pet restriction. This examination is worthwhile to put the pet issue in perspective for a Chinese statute. The South African case of *Body Corporate of the Laguna Ridge Scheme v Dorse* dealt with an unreasonable application of a pet restriction rule of a sectional title scheme.<sup>63</sup> Under the model rules, the trustees, who correspond to the executive board members under the UCIOA, had the discretion to decide whether pets could be kept in the units or on the common property.<sup>64</sup> They denied permission to an older lady to keep a dog in her apartment on the grounds of public policy and the fear of creating a precedent.<sup>65</sup> The court held that precedent was not a relevant consideration but rather keeping an animal had to be considered on its own merits, so a decision had to be based on the facts and circumstances relevant to that case.<sup>66</sup> The pet restriction was designed to avoid creating a nuisance for the other inhabitants. In this case, the respondent's dog could never be a nuisance as it did not bark and was not allowed to run on the common property.<sup>67</sup> The court emphasized that the trustees' conduct ignored the relevant circumstances pertaining to the particular dog and finally found it proper to substitute the trustee's decision with its own and ordered that the lady be allowed to keep her dog in her apartment.<sup>68</sup>

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61 Annexure 9 r 9.

62 Annexure 9 r 11.

63 See *Body Corporate of the Laguna Ridge Scheme v Dorse No 152/1987 1999 2 SA 512 (D)*.

64 Van der Merwe *Sectional Titles* 13-8.

65 See n 63 *supra*.

66 See n 63 *supra* at 520 F-H and 520 H-I.

67 See n 63 *supra* at 521 F and 522 A-C.

68 See n 63 *supra* at 523 E-G.

In the American case of *Nahrstedt v Lakeside Village Condo Association*,<sup>69</sup> a woman purchased a unit in a large condominium complex with more than 530 units. When she moved into her condominium, she brought along three cats she considered to be her family. Shortly after she moved in, an association board member spotted one of her cats sunning in her window. Then the association sent a letter to the woman demanding that she remove the cats. When she refused, the owners' association fined her, stating that she violated the pet restriction set forth in the declaration. She refused to pay and filed a suit alleging that the restriction was unreasonable because her cats were always indoors, were "noiseless" and created no nuisance.<sup>70</sup> The association did not agree and maintained that the pet restriction was enforceable because it furthered the "collective health, happiness and peace of mind of those living in the complex."<sup>71</sup> The trial court supported the association and dismissed the suit. The court of appeal reversed the trial court and concluded that a test of reasonableness depended on the facts of each case.<sup>72</sup> The court then ruled that the cats did not interfere with the peaceful enjoyment of other owners, so the restriction was unreasonable. However, the dissenting justice criticized the case-by-case assessment and argued that it conflicted with the legislative intent to make covenants, conditions and restrictions "presumptively enforceable".<sup>73</sup> On review, the California Supreme Court rejected the court of appeal's decision and held that the restrictions were valid and could not be challenged.<sup>74</sup> The Supreme Court ruled that the covenants, conditions and restrictions are enforced in the context of equitable servitude law.<sup>75</sup> Under the law of equitable servitude a restriction is upheld unless it violates public policy, "bears no relationship to the protection, preservation, operation or purpose of the land in question, or its

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69 *Nahrstedt v Lakeside Village Condo Ass'n* 878 P 2d 1275, 1278 (Cal 1994).

70 See n 69 *supra*.

71 See n 69 *supra*.

72 Arabian "Condos, Cats, and CC & Rs: Invasion of the Castle Common" 1995 (23) *Pepp L Rev* 3.

73 See n 69 *supra*.

74 See n 69 *supra* at 1275.

75 See n 69 *supra* at 1288.



harmful effects on land use are so disproportionate to its benefits for the homeowners that it should not be enforced.”<sup>76</sup> Hence, the covenants, conditions and restrictions of the owners’ association were upheld and the woman had to remove her cats.

From the above discussion it is clear the South African court has adopted a case-by-case approach while the American court first applied and eventually discarded it. Note that the American case dealt with a pet restriction set forth on a recorded declaration while the South African case dealt with a restriction in the rules of a scheme. The American case affirmed the validity of the restrictions on the recorded declaration, but at the same time questioned whether a case-by-case approach could be applied to examine the by-laws restrictions. One dissenting Justice of the California Supreme Court in *Nahrstedt* argued for a case-by-case analysis and commented that the majority decision sacrificed freedom and self-determination for “the tyranny of the commonality.”<sup>77</sup> In his view, the case-by-case approach is more equitable since the court can take into account different circumstances in different cases.<sup>78</sup> However, it is argued that a case-by-case approach may lead to excessive litigation.<sup>79</sup> Here Chinese courts need to be cautious. For a Chinese statute, recorded restrictions would be presumed to be valid. In other words, as long as a pet restriction is recorded and is disclosed clearly in advance to prospective buyers, whether set forth on the declaration or on the recorded model rules, it is to be enforced by the courts consistently.

Since condominiums are the predominant housing in China, an absolute prohibition of pets is inappropriate and unreasonable and it only should be employed on the rarest occasions. Otherwise, it would be draconian to forbid people from having pets in their apartments. Therefore, unit owners should be entitled to have a reasonable number of

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76 See n 69 *supra* at 1289.

77 See n 69 *supra* at 1297.

78 See n 72 *supra* at 5-9.

79 Fowler “Review of Selected 2002 California Legislation: Property: What is Reasonable?” 2003 (34) *McGeorge L Rev* 513.

pets unless a non-pet restriction is disclosed to unit purchasers. Surely, such a disclosure of the non-pet restriction affects a condominium's marketability. Generally, express language in the governing document a unit purchaser relies on as pre-existing rules would provide good evidence of an understanding that the association would not later enact restrictions inconsistent with those rules.<sup>80</sup> To summarize, without a non-pet prohibition in the disclosure, a management body is not allowed to rule or resolve that apartment owners be prohibited from having pets.

The maximum number of pets should be regulated by a condominium association's house rules. House rules may for example, limit the number of pets that can be kept; require pets to be leashed on common property; limit the kind of pets that can be kept such as no dogs over 50 kilograms; require pets to be registered with the public authority and the association's executive council; prohibit keeping pets for commercial purposes; require an owner to remove a pet when other owners reasonably complain of the nuisance or inconvenience, and finally require owners to remove any solid pet waste immediately.

#### **5 2 2 4 Restriction on Alienation**

Both the UCIOA and the STA recognize that making separate transactions with apartments only or separating apartments from their appurtenant share of the common property, would jeopardise the condominium scheme.<sup>81</sup> Chinese law has adopted the same point of view on indivisibility. If a condominium owner transfers an apartment to another, the apartment owner's share in the common property is simultaneously and automatically transferred as well.<sup>82</sup>

Restrictions on the sale and transfer of property require that the association approves a prospective buyer of a unit and, if the association disapproves it is

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80 Sterk "Minority Protection in Residential Private Governments" 1997 (77) *B U L Rev* 338.

81 Rohan & Reskin *Condominium Law and Practice: Forms 9-14.2*; STA s 16 (3).

82 Art 72 (2) of the *Chinese Property Code of 2007*.

responsible to provide an alternative purchaser. In effect, the association has a right of first refusal or what is called a legal pre-emptive right.<sup>83</sup> In the United States and South Africa, there is never an absolute prohibition on a condominium owner selling or transferring his or her unit since that would be totally incompatible with the concept of property ownership.<sup>84</sup>

In the United States, it is generally acknowledged that only unreasonable restraints on the sale of property are invalid.<sup>85</sup> An association's most common sales restrictions are screening rights and an association's right of first refusal.<sup>86</sup> Under the UCIOA, condominium sales restraints can only be in the declaration.<sup>87</sup> Although it may seem controversial whether or not a right of first refusal violates the rule against perpetuities,<sup>88</sup> it is generally agreed that such rights merely require that a property be offered to a would-be purchaser, but do not bind the unit owner to sell at a predetermined price.<sup>89</sup> This would be a reasonable restraint and not violate the rule against perpetuities.<sup>90</sup> Therefore, it has been accepted that when there is a transfer of condominium units reasonable restrictions are necessary both for the condominium complex operations and for the protection of the condominium owners.<sup>91</sup> There are

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83 Schiller "Limitations on the Enforceability of Condominium Rules" 1993 (22) *Stetson L Rev* 1157.

84 Rohan & Reskin *Condominium Law and Practice: Forms* 44-34.1; Van der Merwe *Sectional Titles* 10-16.

85 Van der Merwe *Apartment Ownership* 86; Browder "Restraints on the Alienation of Condominium Units" 1970 *U Ill L F* 231.

86 Rubens "Right of First Refusal and Waiver of the Right of Judicial Partition" 1962 (14) *Hastings L J* 256-257; Stern "Condominiums and the Right of First Refusal" 1974 (48) *St John's L Rev* 1147.

87 UCIOA § 2-105 (a) (12).

88 The rule against perpetuities is a rule in property law prohibiting a grant of an estate unless the interest vests, if at all, no later than 21 years after the death of some person alive when the interest was created. See Garner *Black's Law Dictionary* 1331.

89 UCIOA § 2-103 comment 1.

90 Berger "Condominium – Shelter on a Statutory Foundation" 1963 (63) *Colum L Rev* 1017; Kenin "Condominium – A Survey of Legal Problems and Proposed Legislation" 1962 (17) *U Miami L Rev* 145-187; Powell & Rohan *Powell on Real Property* par 632.5 [8] [b].

91 Kim "Involuntary Sale: Banishing an Owner from the Condominium Community" 1998 (31) *J Marshall L Rev* 429-430; Mckenzie "Reinventing Common Interest Developments: Reflections on a

three principal reasons for this restriction. First, since unit owners are financially interdependent for common expenses, excluding people who might be economically unreliable would reduce this risk.<sup>92</sup> Unit owners desire to ensure that a proposed buyer is financially reliable and responsible. Second, from the management's perspective, harmony is promoted in the community since there is the creation of interdependence on the part of unit owners. An owner is usually required to give timely notice to the management body by serving it with the copy of a *bona fide* offer.<sup>93</sup> Third, owners in the condominium complex want to ensure that a prospective purchaser is of acceptable character since all owners share the common facilities.<sup>94</sup>

Under the STA, an owner's right to sell his/her unit is restricted by two sections. First, the Registrar is prohibited from registering a transfer of a unit unless the conveyancer's certificate shows that all monies due to the body corporate by the person making the transfer have been paid.<sup>95</sup> Since the body corporate and the owners have significant economic interests at stake, having such a restriction is not incompatible with condominium ownership.<sup>96</sup> The Registrar is also prohibited from registering a transfer of a unit if a developer has failed to disclose in the deed of sale that he or she has a reserved right for phased development.<sup>97</sup> Second, an owner is required by statute to notify the body corporate of any change of ownership of his or her unit.<sup>98</sup> Still, if an owner is negligent and does not notify the administration, this does not make the sale invalid. The body corporate can investigate the identity of the

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Policy Role for the Judiciary" 1998 (31) *J Marshall L Rev* 408.

92 Di Lorenzo *The Law of Condominiums and Cooperatives* 6-25; Van der Merwe *Apartment Ownership* 87.

93 Ross "Condominiums and Pre-emptive Options – The Right of First Refusal" 1967 (18) *Hastings L J* 585-612.

94 Di Lorenzo *The Law of Condominiums and Cooperatives* 6-26.

95 STA s 15 B (3) (a) (i) (aa).

96 Van der Merwe *Sectional Titles* 10-14 (2).

97 STA s 15B (3) (a) (ii).

98 STA s 44 (1) (f).

purchaser from the deeds register.<sup>99</sup> Apart from the above two sections of the STA, a final restriction on selling a unit is contained in the *Sectional Titles Regulations*. The regulation states that if there are members of an association whose constitution restricts sales, then a restriction may be put into a schedule with the sectional plan that restricts the transfer of a unit unless the association gives its consent.<sup>100</sup> Where the consent of an association is required for transfer of a unit in the scheme, such consent must be lodged with the deed of transfer. The South African Act does not provide a right of pre-emption or right of first refusal that restricts the sale of a unit. However, it is suggested that the management rules can grant a right of pre-emption to the trustees or body corporate requiring the prospective seller to offer the unit first to these parties.<sup>101</sup>

In China, apartment owners are free to dispose of their apartments along with the share in the common property.<sup>102</sup> The South African approach is much less rigid than the UCIOA one. Therefore, it would seem to be advisable to borrow the South African approach for a Chinese statute. There are frequent condominium transactions in China because of the increasing social mobility. If transfer restrictions are draconian, there are five unfavorable consequences. First, unit owners lose the incentive to maintain and improve their units if they lack marketability arising from the restrictions on sales. Second, from an economic perspective, the whole property market will rapidly narrow since the vast majority of Chinese people live in condominiums. Third, both social mobility and urbanization will be severely impaired if there are few if any options to purchase property. Fourth, the institutional lenders will also be hampered if judicial sale by lenders foreclosing is subject to such rigid restrictions as association screening rights and association rights of first refusal. Fifth, with fewer transactions, the market value of the condominium will fall and eventually condominium housing could lose

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99 Van der Merwe *Sectional Titles* 10-15.

100 The *Sectional Titles Regulations* r 30 (2), read with r 16(3) and STA s 11 (3) (b).

101 Van der Merwe *Sectional Titles* 10-12.

102 Chen Huabin *Study on Modern Condominium Ownership* 109.

its popularity. Overall, the justification for not imposing rigid restrictions on the sale of a condominium is greater than the arguments against it. The general rule is that there should be no unreasonable restraints on the sale of property for restraints can hinder the free use and development of property.<sup>103</sup> Therefore, the UCIOA type of restrictions would not be workable in China.

Nonetheless, some restrictions on the sale of a unit under the STA are well-conceived and reasonable and need to be borrowed when drafting a Chinese condominium statute. According to the STA, the registrar is not allowed to register a unit's transfer unless there is a conveyance's certificate to the effect that the body corporate has confirmed that all monies due to it have been paid.<sup>104</sup> However, unlike the STA, the UCIOA provides that a purchaser is not liable for an unpaid assessment or fee greater than the amount in the association's certificate.<sup>105</sup> In other words, if a purchaser receives a resale certificate failing to state the proper amount of the previous owner's unpaid assessments, the purchaser is not liable for anything greater than that disclosed in the resale certificate.<sup>106</sup> The owners' association is prohibited from later collecting a purchased unit's undisclosed assessments from the purchaser. However, if the owners' association discloses the unpaid assessments prior to the issue of a resale certificate, the new purchaser is liable for the outstanding amount. Impliedly, the UCIOA holds the seller and the buyer both jointly and severally liable for a sold unit's debts. Here the Chinese law is silent, so presumably, a unit purchaser is not liable for previously accrued debts before moving in. One way of viewing these restrictions is that the ones set by the STA are procedural restrictions while those set by the UCIOA are substantial restrictions. Therefore, it would seem best to incorporate the relevant South African provisions into a Chinese condominium statute.

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103 Kerr "Condominium – Statutory Implementation" 1963 (38) *St John L Rev* 32.

104 See n 95 *supra*.

105 UCIOA § 4-109 (c).

106 UCIOA § 4-109 comment 3.

## 5 2 2 5 Restrictions on Lease

Apart from sale restrictions, condominium associations also would like to impose restrictions on unit owners leasing their units. Such a restriction is popular in the United States.<sup>107</sup> Proponents of leasing restrictions maintain that condominiums are inherently different from other types of residence.<sup>108</sup> One American court's justification for a leasing restriction is that it achieves a community goal that outweighs the social value of giving a unit owner an unqualified right to lease his or her unit.<sup>109</sup> Others argue that only the resident owners have a real stake in the community for lessees neither care about the community interests, nor take the community's rules and by-laws seriously.<sup>110</sup> This has led to the belief that the close nature of condominium living is such that "individuals ought not to be permitted to disrupt the integrity of the common scheme" by being allowed to do what they want with their property.<sup>111</sup> Nevertheless, under the 1994 UCIOA amendments, a leasing restriction is not unlimited, for it has to appear in a declaration.<sup>112</sup> This of course validates leasing restrictions.<sup>113</sup>

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107 Rosenberry "Home Businesses, Llamas and Aluminum Siding: Trends in Covenant Enforcement" 1998 (31) *J Marshall L Rev* 461-465; Rohan & Reskin *Condominium Law and Practice: Forms* 44-36.2.

108 Grassmick "Minding the Neighbor's Business: Just How Far can Condominium Owners' Associations Go in Deciding Who can Move into the Building?" 2002 *U Ill L Rev* 185.

109 *Hidden Harbour Estates Inc v Norman* 309 So 2d 181-2 72 A L R 3d 305 (Fla 4th Dist Ct App 1975).

110 Sterk "Minority Protection in Residential Private Governments" 1997 (77) *B U L Rev* 322. In this article, Sterk argues that "residents have a long-term financial stake in the community, they are likely to work harder at maintaining their units and common areas, which will result in higher long-term market value for all units...Resident owners may value the sense of community that comes with a stable neighborhood and may fear that renters – especially short-term renters – will interfere with that sense of community."

111 *Sterling Village Condo Inc v Breitenbach* 251 So 2d 685, 688 (Fla Dist Ct App 1971).

112 UCIOA § 2-105 (a) (12).

113 See n 41 *supra*.

Under the STA, a sectional owner may register a notarial lease of his/her unit.<sup>114</sup> The registrar then registers a notarial cancellation or modification of a lease by an endorsement on the owner's sectional title deed.<sup>115</sup> A notarial sub-lease, modification of a sub-lease and a cancellation of the lease are registered by endorsing the lease.<sup>116</sup> Therefore, unlike the UCIOA, the STA allows the sectional owners to lease their sections. However, sectional owners do not have unlimited discretion on leasing their units for rules of the sectional title scheme may greatly restrict their ability to do so.<sup>117</sup> The caveat to this is that since leasing restrictions limit an owner's economic well-being, only reasonable restrictions on unit leasing are valid. But there is an escape hatch here, for an absolute prohibition on leasing is valid if there are very special circumstances.<sup>118</sup> It is suggested that valid STA restrictions on leasing include not allowing the lease of units in a residential project for less than one year.<sup>119</sup>

In China, most condominium owners view leasing restrictions as a direct attack on condominium ownership. This point of view is so prevalent that there is not even academic literature on this issue in the country. Therefore, a future Chinese condominium statute must handle this issue cautiously. Perhaps if a leasing restriction is necessary it could be disclosed in a constitutive document or a sales disclosure statement. In most instances a management body should not be permitted to impose restrictions on leasing. With a tight rental property market in China, a restrictive rental policy for condominiums could come under attack. Already many former public rental buildings have been converted to condominiums under the housing reform policy, which substantially reduced rentals. In addition, the flexibility of condominium

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114 STA s 15B (1) (b) & (d).

115 STA s 15B (1) (b).

116 See n 115 *supra*.

117 Van der Merwe *Sectional Titles* 10-19. The model rules do not provide general restrictions on leasing of units, however they do state that all tenants of units as well as other persons granted rights of occupancy are obliged to comply with conduct rules. See Annexure 9 r 10.

118 Van der Mewer *Sectional Titles* 10-19.

119 See n 118 *supra*.



owners being able to lease their units may help them to weather a financial crisis, a job change, a long-term stay abroad, or a health problem. Harsh restrictions on leasing are impractical. On the one hand, from the viewpoint of real estate investment, the rental received from leasing units can be used to pay down a mortgage. Someone may purchase two apartments in a condominium project, one of which is being paid for with a mortgage. The owner may live in one apartment and rent the other to pay the mortgage with the rental. This kind of thoughtful investment should not be blocked with rigid leasing restrictions. On the other hand, unit tenants often are apathetic about engaging the community management and do not respect by-laws or rules. But this phenomenon should not be used to justify leasing restrictions. Rather, by statute tenants should be involved in management.<sup>120</sup> In any future Chinese condominium statute it should be very explicit that tenants must comply with all the rules and resolutions made by the management body. In return, any tenant with a lease for more than three years should have a right to attend management meetings. In addition, a tenant with an owner's letter of attorney can have full voting rights.

Nonetheless, this does not mean that leasing restrictions have no place whatsoever in China. Reasonable limitations on leasing may be adopted by house rules such as the minimum term of the lease and the owner's duty to notify the leasing to the management body. However, frequent shifts in leasing restriction policy should be avoided since this would generate disputes between owners and adversely affect the condominium market.<sup>121</sup> In summary, unit leasing restrictions should be regarded as a minor issue in terms of China's housing policy.

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120 Smith "The Purity of Commonholds" 2004 (May/June) *Conveyancer and Property Lawyer* 207. Smith maintains that the problems with let units can be mitigated by the "tightening up of the management powers of the commonhold association over tenants".

121 Shifrin "No-leasing Restrictions on Condominium Owners: the Legal Landscape" 2006 (94) *Ill B J* 81.

## 5 2 2 6 Alterations of Units

Both the UCIOA and STA allow owners to make alterations to the interior of their units. Under the UCIOA, the unit owner can alter the interior provided that what has been done does not endanger the building's structural integrity or mechanical systems.<sup>122</sup> Under the STA, owners can alter their units as long as the alterations do not impair the building's structural integrity or others' use and enjoyment of their sections, the common property or any exclusive use area.<sup>123</sup> Chinese law also allows owners to alter a unit's interior provided that the owner notifies the managing agent and the alterations do not affect the building's architectural appearance, stability or its structural integrity or damage other owners.<sup>124</sup>

Second, under the UCIOA a unit owner is not allowed to change the appearance of the common elements, or a unit's exterior appearance or any other part of the condominium without permission of the association.<sup>125</sup> The STA requires that a sectional owner must not act in such a way as to interfere unreasonably with the use and enjoyment by other owners or other people lawfully on the premises.<sup>126</sup> It would be unacceptable for a sectional owner unilaterally to effect alterations to the exterior of his or her unit without the trustees' permission.<sup>127</sup> The Management Rules also prohibit an owner from doing anything to his/her section or exclusive use area which is likely to mar the harmonious appearance of the building.<sup>128</sup> One Chinese departmental rule requires a unit owner to gain approval from the local planning authority and obtain the unanimous approval of all of the owners to change the

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122 UCIOA § 2-111 (1).

123 Annexure 8 r 68 (1) (iii).

124 Art 53 of the *Property Management Regulation of 2003* (as amended in 2007); art 29 of the *Shanghai Property Management Regulation of 2004*. It is inappropriate to ask the unit owners to notify the managing agent instead of the management body.

125 UCIOA § 2-111 (2).

126 STA s 44 (1) (d).

127 Van der Merwe & Butler *Sectional Titles, Share Blocks, and Time-sharing* 150-151.

128 Annexure 8 r 68 (1) (iv).

exterior structure or the appearance of a building's common property.<sup>129</sup> However, the Chinese law does not require a unit owner to obtain permission from the management body to change a unit's exterior appearance or the exclusive use areas. This would seem to be an obvious setback. To remedy this, a future Chinese condominium statute should prohibit a unit owner from changing the appearance of the common property, the exterior structure, a unit's appearance, or the exclusive use areas without permission of the management body.

Third, subject to a declaration provision, the UCIOA permits an owner of two adjoining units to remove, or alter the partition between the two or create apertures, even if the partition is a common element, if doing so the owner does not adversely affect the building's structural integrity or mechanical systems.<sup>130</sup> This provision deals in a unique manner to create access between adjoining units owned by the same person.<sup>131</sup> Nevertheless, while the two adjoining units may be used as one, they legally do not become a single unit.<sup>132</sup> This is important when considering participation quota issues.<sup>133</sup> The subsection provides a specific rule permitting a door, stairwell, or removal of a partition wall between units as long as structural integrity is not impaired.<sup>134</sup> Removal of partitions or creation of apertures is not an alteration of boundaries, but would be an exception to the basic rule.<sup>135</sup>

In South Africa, the removal of an intervening partition between two units is subject to a consolidation provision that comes into play when two or more sections are registered in an owner's name.<sup>136</sup> According to the STA, the owner asks the land

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129 Art 8 of the *Measures Governing the Management of Urban Adjacent Housing of 1989*.

130 UCIOA § 2-111 (3).

131 UCIOA § 2-111 comment 2.

132 UCIOA § 2-111 comment 4. See Garfinkel "The Uniform Condominium Act" 1982 (28) *The Practical Lawyer* 51-52.

133 Rosenberry & Sproul "A Comparison of California Common Interest Development Law and the Uniform Common Interest Ownership Act" 1998 (38) *Santa Clara L Rev* 1047.

134 UCIOA § 2-111 (3) and comment 2.

135 UCIOA § 2-111 comment 4.

136 See Van der Merwe *Sectional Titles* 8-12.

surveyor or architect involved to submit a draft sectional plan of consolidation that has the consent of the trustees of the body corporate to the Surveyor-General for approval.<sup>137</sup> In addition, a schedule needs to accompany the draft sectional plan. This should state the participation quota of the new section created, being the aggregate of the quotas of the sections that are to be consolidated.<sup>138</sup> In contrast, the UCIOA is silent on the consolidation of units.<sup>139</sup>

When Chinese legislators are ready to deal with a condominium statute they should adopt the UCIOA approach on removing a partition between two adjoining units owned by one person. The UCIOA allows a partition to be removed but it does not by statute consolidate the two properties into one. This is sensible because it takes into account the participation quota allocating the owner's contributions. When the participation quota is calculated solely on the floor area basis, combining two separate quotas for a new consolidated unit is feasible. But when the participation quota is calculated employing other formulas, such as par value or market value, working out the quota of the new consolidated unit cannot simply be decided as the aggregate of two separate unit quotas. In other words, the par value or market value of the new unit created is not necessarily the same as the aggregate value of two adjoining ones. The downside of following the STA on consolidation with a participation quota for the new unit being merely the aggregate quotas of the two adjoining units is that it is much too problematic. This is particularly true with commercial and business condominiums. The UCIOA approach is easy to work out and with the retention of the participation quota certainly will have few problems. Any proposed Chinese statute should adopt this approach.

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137 STA s 21 (1).

138 STA s 21 (2) (c).

139 Van der Merwe *Apartment Ownership* 88.

## 5 2 2 7 Evaluation

In view of the numerous restrictions imposed on the owners of condominium units, one may question whether apartment ownership is a genuine ownership of property. This question is answered with reference to the characteristic features of apartment ownership, namely that the units are not structurally separated but rather structurally interdependent.<sup>140</sup> Basic to condominium living is that individuals must not be permitted to disrupt the integrity of the overall condominium development with the unbridled use of their own property. Restricting the use and enjoyment of every individual unit effectively protects all of the owners' common interests. In other words, the restrictions are justified because every unit owner benefits in the long run, both financially by increasing the condominium's market value and by preserving a stable and orderly community.<sup>141</sup> Therefore, condominium ownership still remains a genuine ownership despite a number of restrictions.<sup>142</sup> This perception is widely held in China.<sup>143</sup>

Second, the comparative survey of the use restrictions on individual units under the UCIOA and the STA indicates that there is a hierarchy among condominium documents. Use restrictions emanate from several sources: the general principle, the declaration or sectional plan, by-laws of the association or the rules of the sectional titles scheme. In America, the Restatement of Property declares all servitudes are

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140 Van der Merwe *Apartment Ownership* 78.

141 Some legal academics argue that condominium communities are intrinsically coercive in nature. The owners are deprived of a choice because of the dearth of desirable housing alternatives in a tight market. See Note "The Rule of Law in Residential Associations" 1985 (99) *Harv L Rev* 481-482; Alexander "Freedom, Coercion and the Law of Servitudes" (1988) 73 *Cornell L Rev* 900-902; However, others argue that an owner's decision to join an association is as voluntary as a human decision can be. See for example, Ellickson "Cities and Homeowners Association" 1982 (130) *U Pa L Rev* 1523.

142 Van der Merwe *Sectional Titles* 8-15, 8-16 & 8-17.

143 See art 70 of the *Chinese Property Code of 2007*; Chen Huabin *Study on Modern Condominium Ownership* 91; Jin Jian *Housing Law of China* 138; Gao Fuping & Huang Wushuang *Property Entitlement & Property Management* 31; Hu Zhigang *New Discourse on Real Property* 236. Xia Shansheng *Property Management Law* 89-90.

valid unless they contravene constitutional or statutory rights or violate public policy.<sup>144</sup> Apart from the general law, the dominant condominium document is the declaration. The declaration usually over-rides any conflicting provision in the condominium by-laws unless it is inconsistent with the UCIOA.<sup>145</sup> In South Africa, neither a management rule nor a conduct rule may contradict any provision of the STA.<sup>146</sup> Moreover, developers are entitled to substitute, add to, amend or repeal any model management or conduct rule. However, when a developer establishes a new rule, it cannot be inconsistent with the provisions of the Act.<sup>147</sup> Quite simply, the Act is predominant and its provisions prevail over any conflicting provision in either the management or conduct rules. Particularly important is that conduct rules are always subordinate to management rules.<sup>148</sup> Therefore, statutory restrictions predominate over restrictions set by the declaration or sectional plan, which in turn predominate over any conflicting provision in the condominium's by-laws and rules. This hierarchy is of importance in resolving conflicts among the different documents.<sup>149</sup> Therefore, when a Chinese condominium statute is drafted it would be worthwhile for the legal theoreticians to borrow this hierarchy.

Third, in the United States, the courts have made a distinction between restrictions in the recorded declaration and owners' association rules. The courts favor restrictions contained in a recorded declaration over those that a condominium association has established with its members' vote.<sup>150</sup> Recorded rules and covenants are presumed to be valid and may have a certain degree of unreasonableness and still be able to withstand a court attack. That is unless the rule is shown to be clearly ambiguous,

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144 See the American Law Institute *United States Restatement (Third) of Property: Servitudes* § 3.1 (1990).

145 UCIOA § 2-103 (c).

146 Paddock *Sectional Title Survival Manual* 59.

147 STA s 35 (1).

148 STA s 35 (2) (b).

149 Rohan & Reskin *Condominium Law and Practice: Forms 7-10 & 7-11*.

150 Rohan & Reskin *Condominium Law and Practice: Forms 44-12*.

arbitrary or unreasonable in its application, impinges on public policy or abrogates a fundamental constitutional right.<sup>151</sup> Therefore, it is worthwhile to state the more onerous restrictions in the declaration, presuming of course that they are valid. In South Africa, the difference between restrictive conditions and covenants endorsed on the sectional plan and rules of the scheme is less significant, or at least not as significant as in the United States. The main reason is that the rules of the scheme are lodged together with the sectional plan, both of which are read by the prospective purchasers in advance.<sup>152</sup> Thus prospective buyers have disclosure of rules of the scheme just as they do with the restrictive conditions expressed in the sectional plan. China would be well advised to follow the South African approach and register the condominium model rules together with a constitutive document. At present China has no such constitutive document as a declaration or sectional plan. With the real estate market is falling, the country is in urgent need of a registration document and model rules, particularly when there are sure to be high-level discussions on framing a uniform condominium statute. When registering the constitutive document and the rules, the prospective buyers will clearly know their rights and obligations in a condominium community situation. Since rules lie at the very heart of an efficient condominium project from its establishment onwards, they need to be unambiguous and detailed enough for unit buyers to avoid uncertainty and disputes at a later stage.

The UCIOA approach is largely association-oriented since it regards the adoption and the amendment of by-laws as integral to the internal governance of the unit owners' association. The by-laws do not have to be recorded. Consequently, the unit owners' association, described as a residential private government, has full and some might say almost unlimited jurisdiction to deal with condominium community

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151 Kress "Beyond Nahrstedt: Reviewing Restrictions Governing Life in a Property Owner Association" 1995 (42) *UCLA L Rev* 861; See also *Schmidt v Sherrill* 442 So. 2d 963, 965 (Fla Dist Ct App 1983) (describes a declaration of a condominium as "the condominium's constitution").

152 See n 51 *supra*.

matters.<sup>153</sup> An advantage is that a unit owners' association is able to make by-laws tailored to a development's special character.<sup>154</sup> However, a disadvantage of this approach is that legal challenges to the by-laws are often made and cause unnecessary and expensive lawsuits. There are such challenges against parking restrictions,<sup>155</sup> pets,<sup>156</sup> and the minimum age of occupants.<sup>157</sup> Sometime the by-laws of a unit owners' association are challenged on the ground that they are inconsistent with other Acts or statutory provisions, notably the *Fair Housing Act*.<sup>158</sup> The 1994 UCIOA amendment heeded this concern and attempted to minimize unnecessary lawsuits brought to contest the validity of the by-laws. The amendment states that use and leasing restrictions should be exclusively written into the recorded declaration.<sup>159</sup> These two types of restrictions are now upheld by the courts. For these reasons a proposed Chinese condominium statute should have a provision to register the rules. Careful advance planning can ward off costly litigation and needless worries for condominium owners at a later stage.<sup>160</sup>

Fourth, the UCIOA and the STA have very different approaches for regulating restrictions. Under the UCIOA, restrictions are largely described in the declaration since there is the presumption that they are valid and enforceable. The unit owners'

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153 Note "The Rule of Law in Residential Associations" 1985 (99) *Harv L Rev* 472.

154 Van der Merwe *Sectional Titles* 13-15.

155 For example, *Bernardo Villas Management Corp Number Two v Black* 190 Cal App 3d 153, 235 Cal Rptr 509 (1987); *Barclay Square Condominium Owner' Association v Grenier* 153 NH 514, 899 A 2d 991 (2006).

156 For example, *Nahrstedt v Lakeside Village Condominium Association* 8 Cal 4th 361, 33 Cal Rptr 2d 63 878 P 2d 1275 (1994); *Sulaney Towers Maintenance Corp v O' Brey* 46 Md App 464, 418 A 2d 1233 (1980).

157 For example, *Hill v Fontaine Condominium Association Inc* 255 Ga 24, 334 S E 2 d 690 (1985); *Shadow Lake Village Condominium Association Inc v Zampella* 238 NJ Super 132 569 A 2d 288 (1990).

158 Napolitano "The Fair Housing Act Amendments and Age Restrictive Covenants in Condominiums and Cooperatives" 1999 (73) *St John's L Rev* 290-293.

159 UCIOA § 2-105 comment 10.

160 Van der Merwe *Sectional Titles* 13-11.



association stipulates other restrictions with by-laws. However, association by-laws and rules must be within the association's authority and reasonably promote unit owners' "health, happiness and peace of mind".<sup>161</sup> In contrast, the STA has more detailed restrictions that are found in the model rules rather than in the sectional plan that corresponds to the UCIOA's declaration. The UCIOA does not have a model set of rules but requires that by-laws deal with certain issues not included in the declaration.<sup>162</sup> In South Africa, the model rules in the *Sectional Titles Regulations* are considered to be of major importance. Not only must the model rules be lodged at the deeds office but also all the subsequent amendments have to be so lodged in order to be enforceable.<sup>163</sup> Specifically, the management rules under Annexure 8 can only be amended by a unanimous resolution while the conduct rules under Annexure 9 require only a special resolution to be amended.<sup>164</sup>

A Chinese condominium statute needs to have model rules with more detail. First, the vast majority of Chinese apartment owners are not very knowledgeable about the internal governance of a condominium. In addition, the management body is not usually very well experienced or capable in making rules. With model rules, apartment owners are provided a safety net that enables them to become acquainted with their rights and obligations. Furthermore, most Chinese condominium projects are conversions from former public housing and therefore are structurally homogenous.<sup>165</sup> The uniform guidelines provided by the model rules simplify the rulemaking process. Moreover, the model rules statutorily present the rights and obligations of apartment owners. Since most condominium developments in China are

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161 Kress "Beyond Nahrstedt: Reviewing Restrictions Governing Life in a Property Owner Association" 862; Rohan & Reskin *Condominium Law and Practice: Forms* 44-21.

162 UCIOA § 3-106 (b).

163 STA s 35 (5) (a) & (c). It is notable that prior to the *Sectional Titles Amendment Act of 1997*, it was unclear at what point such subsequent amendments of the rules became effective. See *Kennaway (Pty) Ltd v Controlling Body*, *Kennaway Court* 1988 2 SA 479 (E).

164 STA s 35 (2) (a) & (b).

165 Xia Shansheng *Property Management Law* 8.

multi-building projects, the time between the settlement of the first owner and the convening of the first general meeting can be quite long.<sup>166</sup> Consequently, the developer prepares provisional rules for the project<sup>167</sup> and subsequently, the first general meeting establishes the project's formal rules.<sup>168</sup> The certainty and predictability of model rules streamline this process and diminish developers' possible abuse of their rulemaking power. Finally, the setting of model rules is in tune with the legislative philosophy and practice in China. In 2004, the Ministry of Construction issued the *Provisional Model Rules of the Unit Owners* to provide guidance for developers nationwide.<sup>169</sup> Although such model provisional rules have no legal binding force,<sup>170</sup> it shows that a set of model rules would fit into the Chinese legislative environment and is likely to be accepted by the public.

However, the model rules' approach is not without shortcomings. It can be argued that no uniform set of rules fits all projects. Rules should be tailored to the special features of each project: an exclusive residential project, a non-residential one or a mixed-use one all differ, condominium size and location differ, and their use for special classes of people differs.<sup>171</sup> Nonetheless, this concern about a uniform set of rules is substantially alleviated if developers have the freedom to substitute, add to, and amend a set of model rules early on and then later a general meeting of the condominium association can amend the model rules by unanimous or special resolutions.

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166 In order to better protect apartment owners' interests, some Chinese local norms set a timetable for the first general meeting. For instance, the Shanghai local rule stipulates that the first general meeting must be convened either when half of the floor areas of a project's units are sold and settled by the unit owners or two years after the first owner moves in. See art 7 of the *Shanghai Property Management Regulation of 2004*.

167 Art 22 of the *Property Management Regulation of 2003* (as amended in 2007).

168 Art 76 (1) of the *Chinese Property Code of 2007*.

169 The *Provisional Model Rules of the Unit Owners* issued by the Ministry of Construction on 6 September 2004.

170 The supplementary explanation of the *Provisional Model Rules of the Unit Owners of 2004*.

171 Rohan & Reskin *Condominium Law and Practice: Forms* 44-34.

Two additional suggestions could help to individualize the rules so as to take into consideration the special characteristics of particular developments. First, the amendment registration process needs to be simplified. Since the model rules are registered at the deeds registry, it is only logical to require the registration of the amendments to the model rules. But the registration of the amendments needs to be made easier. For example, a form could be provided to every condominium management body detailing the entire registration process. The management body should know that the registry officers are not required to examine any of the amendments but only need to record them. Second, the use and enjoyment of individual units can be regulated in greater detail in the house rules. Very simply, the creation of house rules and their amendments do not need to be registered or recorded.<sup>172</sup> House rules are entirely at the discretion of the management body. Detailed restrictions and trivial matters should be left to the house rules. Therefore, the management body can tailor its special needs in the house rules. In summary, it is quite clear that China needs to adopt a model rules approach.

Fifth, both the UCIOA and the STA provide that all restrictions must be reasonable.<sup>173</sup> Surprisingly, the UCIOA does not have a set of standards that can be used as a benchmark to review the reasonableness of restrictions.<sup>174</sup> The UCIOA does give a unit owners' association the power to adopt and amend by-laws and rules.<sup>175</sup> However, this power to adopt and amend by-laws and rules is not qualified,<sup>176</sup> so this is left to other areas of law, including the general law of servitudes.<sup>177</sup> However, this is not a problem for the bulk of American case law develops a "reasonableness"

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172 Van der Merwe *Sectional Titles* 13-31.

173 STA s 35 (3); UCIOA § 3-102 (d).

174 Franzese "Common Interest Communities: Standards of Review and Review of Standards" 2000 (3) *Wash U J L & Pol'y* 674.

175 See general UCIOA § 3-102.

176 Schiller "Limitations on the Enforceability of Condominium Rules" 1139.

177 French "The Constitution of a Private Residential Government should Include a Bill of Rights" 1992 (27) *Wake Forest L Rev* 345-347.

standard that courts use to review the rulemaking efforts of a unit owners' association.<sup>178</sup> This means that if a restriction is reasonable as opposed to arbitrary or capricious, it will stand, otherwise it will be invalidated.<sup>179</sup> In South Africa, it has been argued that some of the wording in the rules of schemes such as “reputation of the building” and “harmonious appearance of the building” are somewhat vague and not easy to define.<sup>180</sup> As a result, this gives the body corporate the discretion to interpret the rules as strictly as they were intended to be.<sup>181</sup> The keyword here is “reasonable”. This is a “most ubiquitous” term<sup>182</sup> and tends to be interpreted with a wide discretion. Under the STA, the court is obliged to interpret model rules in a way that “promotes the spirit, purpose, and object of the Bill of Rights”.<sup>183</sup> When applying this abstract concept, the courts need to balance the individual rights enshrined in the constitution with the collective interest of the condominium community. In China, the conflict between private autonomy and the condominium community's public values is subject to the jurisdiction of the courts which use a reasonableness test to determine whether restrictions are justified or not.

## **5 3 COMMON PROPERTY RIGHTS AND OBLIGATIONS**

### **5 3 1 Rights Regarding the Common Property**

The UCIOA and the STA as well as the *Chinese Property Code* stipulate that condominium owners own the common property in undivided shares.<sup>184</sup> The undivided shares in common property are in accordance with their participation quota.

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178 See more detail at Rohan & Reskin *Condominium Law and Practice: Forms* 44-84.25.

179 *Hidden Harbour Estates Inc v Norman* 309 So.2d 180 (Fla. 4th DCA1975).

180 Van der Merwe *Sectional Titles* 8-13.

181 Van der Merwe *Sectional Titles* 13-31.

182 Ellickson “Cities and Homeowners Association” 1982 (130) *U Pa L Rev* 1530.

183 STA s 39 (2).

184 UCIOA § 1-103 (4); STA s 2(c); art 70 of the *Chinese Property Code of 2007*.

However, it would be unrealistic and would contravene the fundamental feature of apartment ownership to divide the use and enjoyment of the land and other common property according to the quotas.<sup>185</sup> Each owner is thus entitled to substantially the same rights of use and enjoyment of the common property, irrespective of a unit's size or its value. A higher participation quota of a unit does not confer the owner greater rights of use and enjoyment.<sup>186</sup> There is an important general principle which has been adopted in the UCIOA, the STA and the *Chinese Property Code*. That is, an owner may freely use and enjoy the common property as long as his or her use and enjoyment do not unreasonably interfere with the concurrent rights of other owners and occupiers. A unit owner may use exclusively a part of the common property as a limited common property. But this power is hedged by restrictions, thus ensuring that all the other owners agree. These restrictions reflect the fundamental purpose of the condominium concept, namely to enhance congeniality among unit owners.<sup>187</sup> Thus, an owner needs to tolerate other owners' conduct that is deemed permissible on the common property.

UCIOA rules and guidelines have their origin in the *United States Federal Housing Administration Model Statute*. This 1962 legislation allowed each apartment owner in a condominium complex to use the condominium common areas and facilities as long as the owner did not hinder or encroach upon the lawful rights of the other apartment owners.<sup>188</sup> The STA rule is virtually the same: an owner can use and enjoy the common property but the person cannot unreasonably interfere with its use by other owners or others lawfully on the premises.<sup>189</sup> A Chinese departmental rule varies little from the above two for it stipulates that an owner can use the common property but on the condition that the person does not encroach on the lawful rights of other

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185 Van der Merwe *Apartment Ownership* 78.

186 Van der Merwe *Sectional Titles* 8-17.

187 Poliakoff *Law of Condominium Operations* § 15.19.

188 § 6 (d) of the *Federal Housing Administration Model Statute of 1962*.

189 STA s 44 (1) (d).

owners.<sup>190</sup> The *Chinese Property Code* goes a bit further stating that an apartment owner cannot abandon a share in the common property to exonerate him/her from fulfilling common property obligations.<sup>191</sup>

## **5 3 2 Common Property Obligations**

### **5 3 2 1 General Principles**

In South Africa, the abuse of rights doctrine and neighbor law principles play an important role in determining an owner's power to use and enjoy a condominium's common property. The general principles of neighbor law are, first, an owner is not allowed to prevent other owners and other lawful occupiers from using the common property.<sup>192</sup> For example, a ground floor unit owner cannot block a stairway preventing upper floor unit residents from using it.<sup>193</sup> Second, an owner may not take over a part of the common property permanently for personal use.<sup>194</sup> However, under the UCIOA, the unit owners under certain circumstances have the right to alter their units by appropriating portions of the common area.<sup>195</sup> This provision would not be suitable for inclusion in a future Chinese condominium statute for this could potentially devalue a development through piecemeal appropriation of the common area. It would be more preferable for Chinese owners to use the exclusive use area approach instead when altering their units. Third, an owner cannot use the common property in such a way that other owners' lawful interests are infringed upon.<sup>196</sup> For example, a unit owner cannot change the interior layout of his or her apartment by tearing out one or more bearing walls. Since a bearing wall supports the entire

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190 Art 6 of the *Measures Governing the Management of Urban Adjacent Housing of 1989*.

191 Art 72 (1) of the *Chinese Property Code of 2007*.

192 Gray & Gray *Land Law* 441-442; Van der Merwe *Apartment Ownership* 79.

193 Gao Fuping & Huang Wushuang *Property Entitlement & Property Management* 281-283.

194 See art 6 of the *Measures Governing the Management of Urban Adjacent Housing of 1989*.

195 UCIOA § 2-112.

196 Art 6 (2) of the *Measures Governing the Management of Urban Adjacent Housing of 1989*.

building, it is a part of the common property. Fourth, no owner can use common property for an abnormal purpose or in an unusual way.<sup>197</sup> Quite simply, use of the common property needs to conform to its intended purpose.<sup>198</sup> For example, using the yard for soccer matches or the stairway as a slide for children would constitute an abnormal use of the common property.

A pertinent issue is whether the installation of a radio or television antenna on a building's roof amounts to a reasonable use of the common property. This is important for wireless TV that requires an antenna or satellite dish. In the United States, some local governments and unit owners' associations have either prohibited satellite dishes or approved them with very strict limitations.<sup>199</sup> Their justification is that the installation of a satellite dish breaches the harmonious appearance of a building. This was an issue that soon involved the American federal government's Federal Communications Commission (FCC). The Commission was concerned that condominium associations' restrictions and local rules prevented unit owners from watching a variety of television programs. Therefore the FCC issued a rule to eliminate excessive restrictions on antenna use and placement.<sup>200</sup> However, the rule was neither well-received by many local governments nor by many condominium associations and so there are still disputes about these restrictions.<sup>201</sup> In South Africa, the STA does not specifically refer to the satellite television issue. However, it is implicitly addressed by the management rule referring to common property improvement.<sup>202</sup> One idea that has been discussed is for the body corporate to install a central satellite receiver to avoid having the building look like a satellite station. But this solution creates another problem for some unit owners have no interest in the

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197 Van der Merwe *Sectional Titles* 8-18; Xia Shansheng *Property Management Law* 90-91

198 Gao Fuping & Huang Wushuang *Property Entitlement & Property Management* 97.

199 Rohan & Reskin *Condominium Law and Practice: Forms* 46-22.

200 The *Federal Communications Commission Over-the-air Reception Devices Rule 47 § 1.4000 (1996)*, quoted from Rohan & Reskin *Condominium Law and Practice: Forms* 46-21.

201 Rohan & Reskin *Condominium Law and Practice: Forms* 46-22.1.

202 Annexure 8 r 33.

installation of a satellite antenna and do not want to contribute funds for its cost. Although in China satellite TV is not as popular as in the United States and South Africa, it would be sensible for the Chinese lawmakers to deal with this issue. Perhaps legislation could be brought forward to regulate a central satellite receiver for the whole complex so that it would be set up either on the building's roof or on other common property the management body might designate. The installation cost of a central satellite receiver is borne by the satellite TV service provider. The service provider should demarcate a "delineation point" at the central satellite receiver. From this point to an apartment, the cable or wire could be categorized as a "home run cable" denoting that the management body is responsible for the cable's maintenance and repair. When a cable enters an apartment it could be categorized as a "home cable", denoting that the apartment owner is responsible for its maintenance and repair. This regulatory mechanism has several advantages. First, owners who do not want to use satellite TV do not need to pay for its installation. Only those using the service would pay a monthly utility charge. Second, responsibility for maintenance and repair would be made jointly by the apartment owner, the management body and the service provider. Third, this kind of system is designed to promote competition between service providers and enhance the unit owners' taste. The service provider is responsible for installing a central satellite receiver. Although the Chinese satellite TV service market is in an early growth stage, it still needs to be regulated.

### **5 3 2 2 Statutory Provisions**

Unit owners' first statutory obligation is to contribute to the condominium association's expenses. An apartment owner is obliged to contribute funds for the management and maintenance of the common property.<sup>203</sup> In addition, the UCIOA expressly states that an apartment owner may not change the appearance of common

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203 UCIOA § 3-102 (2); STA s 37 (1).



elements or the building's exterior without the permission of the management body.<sup>204</sup> This statutory provision is the foundation of neighbor law. In South Africa, the STA extensively regulates the owners' occupation and use of common property. Apart from the foregoing obligations, it also deals with the sale and lease of common property,<sup>205</sup> extension of the condominium complex and its units,<sup>206</sup> and the establishment of exclusive use areas.<sup>207</sup> In China, it could be argued that unit owners should respect the use for which the common property is designed and intended.<sup>208</sup> For example, one should not dry laundry in a parking space or throw rubbish down a stairwell. When the *Property Code* was being drawn up, one of the drafts provided that without a management body's resolution, the structure, color, use of the building's exterior walls, roof garden, and air-raid shelter cannot be changed.<sup>209</sup> Unfortunately, this provision does not appear in the finished *Property Code*.

### **5 3 2 3 Declaration and By-law Provisions**

In step with its policy on unit restrictions, the UCIOA does not provide detailed restrictions on common property use. It only states that a declaration and by-laws have to contain provisions as to how the common property is to be used.<sup>210</sup> The UCIOA purpose for this is to provide flexibility to meet individual state regulations and the particularities of each unit owners' association. American states that then adopt the UCIOA are able to flesh out the details on restrictions for common property use. Under the STA, apart from the restrictions based on the general principles of neighbor law, an apartment owner's use of common property is further restricted by

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204 UCIOA § 2-111 (2).

205 STA s 17.

206 STA s 24 (3) and s 26 (1).

207 STA s 27 and s 27 A.

208 Chen Huabin *Study on Modern Condominium Ownership* 144.

209 Art 94 of the Chinese draft property code by Liang Huixing's group. See Liang Huixing *The Chinese Property Code Draft* 282. (Chinese version)

210 UCIOA § 2-105 (b) and § 3-106 (b).

servitudes, other real rights and restrictive conditions registered in the sectional plan.<sup>211</sup> An example here is the pipe servitude for an electric cable that benefits one owner but runs through the common wall of the scheme. More importantly and of greater significance, an owner's right of use and enjoyment of common property is spelled out extensively in the condominium's rules. Annexures 8 and 9 contain the following regulations:

- (1) An owner shall not use any part of the common property, or permit it to be used, in a manner or for a purpose to injure the reputation of the building.<sup>212</sup>
- (2) An owner shall not contravene, or permit the contravention, of any law, by-law, ordinance, proclamation or statutory regulation, or the conditions of any license, relating to or affecting the occupation of the common property.<sup>213</sup>
- (3) An owner or occupier shall not, without the consent in writing of the trustees, keep any animal, reptile or bird on the common property.<sup>214</sup>
- (4) An owner or occupier shall maintain a receptacle for refuse in a hygienic and dry condition on such part of the common property authorized by the trustees in writing.<sup>215</sup>
- (5) No owner or occupier shall park or stand any vehicle upon the common property, or permit or allow any vehicle to be parked or stood upon the common property without the consent of the trustees in writing.<sup>216</sup>
- (6) An owner or occupier shall not mark, paint, drive nails or screws or the like into, or otherwise damage, or alter any part of the common property without first obtaining the written consent of the trustees.<sup>217</sup>
- (7) An owner shall not install any locking device, safety gate, burglar bars or other safety

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211 STA s 11 (3) (b).

212 Annexure 8 r 68 (1) (i).

213 Annexure 8 r 68 (1) (ii).

214 Annexure 9 r 1 (1).

215 Annexure 9 r 2 (1) (a).

216 Annexure 9 r 3 (1).

217 Annexure 9 r 4 (1).

device for the protection of his section; or any screen or other device to prevent the entry of animals or insects without the trustees having first approved in writing.<sup>218</sup>

- (8) An owner shall not place or do anything on any part of the common property, including balconies, patios, steps, and gardens which, in the discretion of the trustees, is aesthetically displeasing or undesirable when viewed from the outside of the section.<sup>219</sup>
- (9) An owner shall not place any sign, notice, billboard or advertisement of any kind whatsoever on any part of the common property, without the written consent of the trustees first having being obtained.<sup>220</sup>
- (10) An owner or occupier shall not deposit, throw any rubbish, including dirt, cigarette butts, food scraps or any other litter whatsoever on the common property.<sup>221</sup>
- (11) An owner or occupier shall not, without the consent in writing of the trustees, erect his own washing lines, nor hang any washing or laundry or any other items on any part of the building or the common property so as to be visible from outside the buildings or from any other sections.<sup>222</sup>
- (12) An owner or occupier shall not store any material, nor do any other dangerous act on the common property which will or may increase the rate of the premium payable by the body corporate on any insurance policy.<sup>223</sup>

Shown above is the STA's model set of rules with a very specific list of owner's rights and obligations on the use and enjoyment of the common property. All of the obligations in the South African model rules are useful and could be adopted in a Chinese condominium statute. Particularly important for any future Chinese statute is the last obligation in the South African model rules enumerated above. It should lay

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218 Annexure 9 r 4 (2).

219 Annexure 9 r 5.

220 Annexure 9 r 6.

221 Annexure 9 r 7.

222 Annexure 9 r 8.

223 Annexure 9 r 9.

out and emphasize that those flammable chemicals, liquids, gases and other hazardous materials should not be stored on the common property without the permission of the management body or its executive council. Moreover, a Chinese statute needs to emphasize that a condominium owner must ensure that his or her family, co-owners, tenants, and visitors comply with the common property rules and do not disturb other residents in the development. Furthermore, in China, a uniform rule is not practical that prevents an owner from installing a locking device, burglar bars or other devices to protect the apartment. For the condominium community that has hired a guard service such a rule should certainly apply. However, for small self-managed condominiums restricting anti-burglar devices is inappropriate since unit owners have to take responsibility for their own safety.

There is yet another issue that has the potential to be contentious with owners and tenants' use of common property. It is the use of the exterior wall when installing an outlet of an air conditioner. In theory, the exterior wall is a part of the common property, so an individual unit owner cannot drill a hole to install an outlet for an air conditioner. However, this is not a rigid rule or otherwise it would prevent people from using an air conditioner during a hot summer. This issue is particularly significant in south China where an air conditioner is indispensable. A sensible solution is needed: one that would have a condominium association making a house rule designating an outlet location for an air conditioner so that the noise does not interfere with neighboring owners. Moreover, it should harmonize with the exterior appearance of the buildings.

#### **5 3 2 4 Alienation and Lease of Common Property**

Allowing the transaction or lease of a portion of the common property provides a condominium project with financial flexibility. Condominium owners may want to sell or lease a portion of the unused or seldom used common property to subsidize the cost of a condominium project's repairs and maintenance. Moreover, in growing

urban areas there is an increasing scarcity of land, so the alienation and/or leasing of a portion of the condominium's common property may help to make better use of the land and ever so briefly slow the eating away of urban open space.

The UCIOA permits the management body to sell or transfer portions of the common property with the approval of 80 per cent of the non-declarant unit owners.<sup>224</sup> Some years after a condominium community comes into being, the unit owners may decide to rid themselves of a portion of a barely used open space which has been reserved as a common area.<sup>225</sup> Apart from the 80 per cent majority requirement, the owners to whom limited common elements are allocated must approve or then convey the agreed upon limited common area.<sup>226</sup>

Under the STA section 17, sectional owners may, by unanimous resolution, direct the body corporate on their behalf to sell or let by notarial lease any part of the common property.<sup>227</sup> But the STA also provides a unanimous resolution loophole. The common property can be sold or leased if at least 80% of the members are reckoned in number and value present or represented by proxy at a general meeting and agree to do so.<sup>228</sup> But even here there are still restrictions. Section 18 of the STA triggers sections 56 and 57 of the *Deeds Registries Act* to apply if there is the transfer of any mortgaged common property.<sup>229</sup> What this means is that if the property is mortgaged, the common property cannot be transferred unless the bondholder cancels or discharges the debt obligation<sup>230</sup> or if the bondholder agrees to allow the buyer to assume the bond debt obligation.<sup>231</sup>

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224 UCIOA § 3-112 (a).

225 UCIOA § 3-112 comment 1.

226 See n 225 *supra*.

227 STA s 17 (1) reads with s 25. See also *Body Corporate of Brenton Park Building No 44/1987 v Brenton Park CC* 1998 1 SA 441 (C).

228 STA s 1 (1) *s v* "unanimous resolution".

229 STA s 18.

230 *The Deed Registries Act 47 of 1937* s 56.

231 *The Deed Registries Act* s 57.

The STA distinguishes three different common property transactions. They are: 1) selling or leasing a portion of the common property which contains no sections, 2) selling a portion of the common property which contains a section or part of a section, and 3) selling all of the common property land.<sup>232</sup> In all three cases the procedures for transferring the registration are technically different.<sup>233</sup>

Chinese law, including the new *Property Code*, does not contain express provisions on the selling or leasing of common property. But Chinese law permits the management body to “make commercial use of parts of the common property with the consent of the relevant condominium owners.” Then the “proceeds of the commercial use are used as a maintenance fund for all the owners.”<sup>234</sup> This implies that the management body can at least lease parts of a condominium’s common property to subsidize the maintenance and repair costs of the common property.<sup>235</sup> Since the apartment owners are the joint owners of the common property, it is appropriate for the management body to transfer or lease the common property. In China it is common for unit owners to lease a billboard on a condominium building’s roof for commercial advertisement as well as small retail stores on the ground floor. This provides a steady income for maintenance and repair purposes. But Chinese law does not address whether condominium owners can either unanimously or by special resolution authorize a management body to sell or lease common property. This is an issue that needs to be addressed in future condominium legislation.

### **5 3 2 5 Alterations and Improvements of Common Property**

The UCIOA leaves the question of making alterations on the common property to the

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232 STA s 17 (4).

233 STA s 17 (4 A) & (4 B).

234 Art 55 of the *Property Management Regulation of 2003* (as amended in 2007); read with art 7 of the *Measures Governing the Management of Urban Adjacent Housing of 1989*.

235 Gao Fuping & Huang Wushuang *Property Entitlement & Property Management* 84-85; Van der Merwe *Sectional Titles* 11-4.

association by-laws or to property owners making their own *ad hoc* decisions.<sup>236</sup> The unit owners' association has power to raise money for common property improvements. It needs to be noted that the UCIOA allows a declarant to make improvements at a later stage as long as a general description of all improvements is made within the reserved development right.<sup>237</sup> However, these improvements need to be compatible with the architectural style and quality of construction presented in the public offering statement.<sup>238</sup> The UCIOA also allows unit owners to alter their units, but it has to be in such a way that it will fit in with the condominium's common elements and there cannot be any prohibition against doing so.<sup>239</sup> To trigger the appropriation of common elements, a unit owner must apply to the association for an amendment to the declaration. The amendment must be approved by at least 67% of the non-declarant voters in an association election.<sup>240</sup>

In South Africa, an owner is not allowed to make alterations likely to impair the stability of a building or the use and enjoyment of the common property.<sup>241</sup> However, neither the 1971 nor the 1986 *Sectional Titles Act* discusses improvements to the common property.<sup>242</sup> Rather, the issue is dealt with in the model rules of the scheme. Under the model conduct rules, the minor alteration of the common property can be effected with the written consent of the trustees.<sup>243</sup> However, neither the STA nor the model rules have explicit provisions on making major alterations to common property. Therefore it is clear that for major common property alterations, the trustees' consent is insufficient and more stringent requirements are needed.

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236 Van der Merwe *Apartment Ownership* 97.

237 UCIOA § 4-104 (8).

238 UCIOA § 4-104 (6).

239 UCIOA § 2-112; Rosenberry & Sproul "A Comparison of California Common Interest Development Law and the Uniform Common Interest Ownership Act" 1049.

240 UCIOA § 2-112 (b).

241 Annexure 8 r 68 (1) (iii).

242 Van der Merwe *Sectional Titles* 11-34.

243 Annexure 9 r 4.

The model management rules make a distinction between luxurious and non-luxurious improvements.<sup>244</sup> Luxurious improvements are made with the unanimous resolution of the body corporate.<sup>245</sup> Non-luxurious improvements are made by the trustees giving written notice to all the owners on an improvement's desirability, its cost, how it is to be financed, and the effect it would have on monthly contributions.<sup>246</sup> However, the model rules do not provide a straightforward guideline as to what constitutes a luxurious improvement.<sup>247</sup> But its definition is important since there are two very different requirements and procedures for luxurious improvements and non-luxurious improvements. One is simple and the other is more demanding.<sup>248</sup>

In order to better understand this issue, the position of dissenting minorities in the context of a common property improvement plan needs to be discussed. It is not uncommon to have a minority of unit owners' dissent on improving the common property. Particularly in a large condominium development, disagreement arises over almost any improvement plan with the owners split over cost, architectural style and emotional attachment or distaste for the existing form.<sup>249</sup> This problem is common in China since many Chinese condominium complexes are large and have many unit owners. The more unit owners, the more likely a disagreement will arise. One way to make improvements is to obtain unanimous consent of all unit owners to make improvements.<sup>250</sup> An owner, who has not consented to an improvement plan, is neither entitled to any of the benefits flowing from the improvement nor has to

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244 Annexure 8 r 33.

245 Annexure 8 r 33 (1).

246 Annexure 8 r 33 (2) (a).

247 See more detail about the criticisms leveled against the improvements provisions in Van der Merwe *Sectional Titles* 11-35.

248 See more detail at Annexure 8 r 33 (2).

249 Van der Merwe *Sectional Titles* 11-36.

250 Art 22 (1) of the *Gesetz ueber das Wohnunseigentum und das Dauerwohnrecht of 1951* and s 58 of the *Israeli Land Law of 1969*.



contribute to the improvement expenses.<sup>251</sup> This method has its limitations. Oftentimes it is impossible to determine whether an improvement's opponents are enjoying the improvement while not paying for it. For example, the market value of each unit may be significantly increased if the whole condominium complex is substantially improved.

Other statutes allow improvements by a majority vote and protect minority interests by compelling the management body to purchase the dissenting owner's unit at market value.<sup>252</sup> This method also has a downside. On the one hand, dissenting minority owners are in effect forced to sell their units simply because they do not agree with a common property improvement plan. On the other hand, a financial burden is imposed on the management body to purchase the dissenters' units. This method would not be suitable for a Chinese condominium statute. The most practical solution to this problem is found in the *Massachusetts Condominium Act*. Under this Act, if more than half but less than 75% of the condominium owners consent to a proposed improvement, only owners who consent are responsible for improvement costs.<sup>253</sup> If more than 75% of the condominium owners agree, all of the owners share the cost.<sup>254</sup> In addition, this Act provides that if the improvement cost exceeds 10% of the condominium's value, it is considered to constitute an extraordinary expenditure. As a consequence, the unit owners' association can be compelled by a court order to purchase any dissenting owners' units at fair market value.<sup>255</sup> This arrangement balances an owners' natural desire to increase his or her condominium unit's value with protecting the interests of a dissenting minority. The Act also makes a distinction between simple majority consent and the consent of a substantial majority.

The above arrangement provides a useful reference for a future Chinese statute.

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251 Art 16 (3) of the *Gesetz ueber das Wohnunseigentum und das Dauerwohnrecht of 1951*.

252 Rohan & Reskin *Condominium Law and Practice: Forms* 45-16.12.

253 *Massachusetts Condominium Act* § 18 (a).

254 *Massachusetts Condominium Act* § 18 (b).

255 See n 254 *supra*.

However, a future Chinese statute should state clearly that a resolution on common property improvement be passed by all of the condominium's owners rather than just those present at an association meeting. This protects any dissenting owners who are not present at the meeting. In addition, it was noted above that if improvement costs exceeded 10% of a condominium's value, it was deemed an extraordinary expenditure. For Chinese condominium owners this would be much too high. They would be much more comfortable with a figure of 5% of the unit's market value. Furthermore, since most Chinese condominium complexes are multi-building projects, stipulating that the management body would have to purchase up to 25% of the dissenting owners' units would be a financial disaster. The reason is that a heavy financial burden is shifted to the shoulders of the consenting owners who have to buy out the units of the dissenting owners. Perhaps for China a more palatable formula would be when between 71% and 89% of all of the owners agree, the improvement costs are borne by only those in favor. If 90% or more of all owners approve to make an improvement, then all owners need to bear the cost according to the participation quota allocated to each unit. The formula would only apply if the improvement expenditures worked out to be more than 5% of a unit's market value for individual owners. If the cost should be less than 5%, and 70% of all of the owners' approved of the plan then every owner would be required to contribute. Finally, when more than 90% of all of the owners agree to an improvement plan, everyone would be required to share in the plan's cost. By employing such a formula a management body would not be compelled to buy a dissenting owner's unit at a fair market price. This not only avoids an unnecessary burden on the management body but also protect individual's right to housing.

### **5 3 2 6 Evaluation**

First, any proposed Chinese condominium statute needs to adopt the South African model rules approach on the use of common property even though it is rudimentary. The South African model rules need to be substantially supplemented by the

developer at the initial stage and by the body corporate at a later stage.<sup>256</sup> This is because the South African model rules only provide a short list of examples of unreasonable common property use. There are many other unreasonable uses of common property that are unmentioned, such as ensuring children do not damage common property or create a nuisance by the noise they make when playing on the common property. Also there is the issue as to whether firearms should be prohibited as well as whether it is necessary to have an area to hang clothes so they will not be seen from outside the building. And finally a very basic issue as to how much owners need to be dressed or how little they need to be undressed to be considered modest and allowed to use the common property area. If there is to be a Chinese condominium statute, it should include quite detailed model rules that spell out owners' rights and responsibilities when using the common property. The more detailed the rules, the less disputes will arise later. However, even a preventative set of model rules cannot anticipate every day-to-day problem and be tailored to every need a project might have. Perhaps in China it would be wise to introduce house rules to cover the finer details at a later stage as is the position in South Africa.<sup>257</sup> Moreover, the general principles of neighbour law which have been applied in China need to be formalized in the model rules. For example, unit owners presently can neither change the structure or the color of their exterior walls, nor interfere with other owners making lawful use of the common property.

Second, both the UCIOA and the STA provide that the association by-laws or rules of the scheme bind not only unit owners but also their tenants.<sup>258</sup> This approach should be adopted in a future Chinese condominium statute. The leasing of units should be allowed and only be restricted in special circumstances. This may well lead to having more tenants than owner residents in a condominium community. In China,

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256 Van der Merwe *Sectional Titles* 8-21.

257 See n 256 *supra*.

258 UCIOA § 3-102 (d); STA s 35(4) read with Annexure 8 r 68 and Annexure 9 r 10 of the *Sectional Titles Regulations*.

disruptive tenants are already a headache for an association's administration.<sup>259</sup> The association needs to be granted the power to extend model rules and house rules to the tenants.<sup>260</sup> Following one of the UCIOA provisions, associations may levy fines against tenants.<sup>261</sup> However, a tenant's obligation to abide by a condominium's rules does not automatically give them voting rights.<sup>262</sup> The UCIOA states that if a declaration permits, tenants may vote on certain matters in order to integrate them into the day-to-day management of the condominium.<sup>263</sup> This is recognition of the importance of involving tenants in management and voting at meetings. However, the STA has no explicit provision on whether tenants have voting rights at meetings. But tenants can act as proxies with a vote under their owners' authority at a general meeting.<sup>264</sup> If there is to be special condominium legislation in China, tenants should be allowed to vote at meetings with a unit owner's power of attorney.<sup>265</sup> Although neither the UCIOA nor the STA specifically address visitors' behavior, in China model rules should require that unit owners be responsible for the behavior of their visitors to ensure peace is not disturbed in the condominium community.

It is not only model rules that are needed, for in China it would be worthwhile also to have a set of house rules to give the management body much greater discretion, as well as to be able to fine tune overall condominium complex policies.

Finally, cooperation is vital for sound management of a condominium scheme. Although apartments are the most common form of housing in China, the idea that a

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259 Gao Fuping & Huang Wushuang *Property Entitlement & Property Management* 112.

260 Chen Huabin *Study on Modern Condominium Ownership* 227.

261 UCIOA § 3-102 (d) (2).

262 Gao Fuping & Huang Wushuang *Property Entitlement & Property Management* 113.

263 UCIOA § 3-110 (c).

264 Annexure 8 r 67 (3) provides that a proxy need not be an owner, but it shall not be the managing agent or any of his or her employees, or an employee of the body corporate. Van der Merwe asserts that in practice lessees are most likely choices for appointment as proxies. See Van der Merwe *Sectional Titles* 14-53.

265 It should be noted that the Chinese tenants usually refer to those who sign a short-term lease contract, such as for only one year or even six months.

condominium is also private property is still a relatively novel concept. It is necessary to raise awareness among Chinese condominium owners of the importance and scope of this legal concept. This helps owners to understand their rights and obligations better. Therefore they are almost certain to enhance the efficient condominium management of the common property with their participation and cooperation.

# CHAPTER 6

## MANAGEMENT

### 6 1 INTRODUCTION

Condominium ownership consists of three components, namely individual unit ownership, common ownership of the land and common parts of a building, and membership in a management body. Common ownership of common property gives rise to a need for a collective decision-making mechanism.<sup>1</sup> In order to safeguard the common interests, a new organization responsible for the administration of a development's management and maintenance needs to be established. Creating a management body is essential since a condominium community cannot function efficiently without a management association to represent all of the owners and to handle day-to-day operations. Without such a management body, management disputes surely will arise among unit owners. Effective management of a condominium community is vitally important to the condominium owners and the financial institutions with an interest in the development to ensure the venture's durability. Worldwide, most condominium statutes create at least two administrative bodies, namely a general assembly of condominium owners to make management decisions and an executive council to carry them out.<sup>2</sup>

In China, there has been a dramatic increase in litigation in the condominium sector since the implementation of the housing reform policy.<sup>3</sup> The increase in lawsuits has

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1 Rohan & Reskin *Condominium Law and Practice: Forms* 45-9.

2 Van der Merwe *Apartment Ownership* 141.

3 Hu Zhigang *New Discourse on Real Property* 236; Xia Shansheng *Property Management Law* 14-21.

heightened the need for a special condominium statute. Lawyers, association executive council members, and most importantly, unit owners have been left behind as regards their knowledge of the complexity and sophistication of condominium association law. It was only in 2003 that condominium stakeholders were provided with an authoritative but sketchy regulation, the *Property Management Regulation*.<sup>4</sup>

This chapter, in four sections, critically evaluates the Chinese statutory documents dealing with condominium management and compares them with the relevant provisions of the United States UCIOA and the South African STA. The sections deal respectively with the management body, the general meeting, the executive council and the managing agent. Issues examined include the establishment, powers and functions of the management body, the need for a two-tier management body, arrangements during an initial period of management when a condominium project is only partially occupied before the first general meeting is convened, the executive council's appointment and duties and the managing agent's appointment and functions.

## **6 2 THE MANAGEMENT BODY**

When unit owners become members of the condominium association they have the right to participate in the association's management. Membership of the management body ensures that each condominium owner has a say in the control, management, and daily operation of the condominium community. Both the UCIOA and the STA recognize the need for effective management and organize the unit owners to participate through such a management body. The UCIOA entrusts the responsibility for efficient management to a management body consisting of all the unit owners designated as a unit owners' association.<sup>5</sup> The South African STA organizes the unit

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4 The *Property Management Regulation of 2003* (as amended in 2007).

5 UCIOA § 1-103 (3).

owners in an essential management body called the body corporate.<sup>6</sup>

In China, a condominium project is either managed by the apartment owners themselves or by a management association consisting of all the unit owners. Under the new *Chinese Property Code*, unit owners may decide whether to organize a management body corresponding to a unit owners' association or a body corporate.<sup>7</sup> Chinese law provides that if a condominium development has only a few owners, with their unanimous consent, all of the owners are jointly involved in management, so there is no need to create a separate management body.<sup>8</sup> But this provision is vague since it does not define the size of a small condominium development. When Chinese lawmakers enact a special condominium statute, they should consider defining a small condominium as one with fewer than 24 units. If this should be done, it would be unnecessary for small condominiums to create a management body.

## 6 2 1 Establishment

Unit owners with a registered ownership certificate automatically become members of a management body responsible for the control and administration of the common parts of the condominium. Under the UCIOA, a unit owners' association must be organized no later than the conveyance of the condominium's first unit.<sup>9</sup> The STA has virtually the same provisions. Here a body corporate is automatically established from the time anyone other than the developer becomes a unit owner.<sup>10</sup> In China, apartment owners automatically become members of the management structure as

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6 STA s 1 (1) s v "body corporate." See *Wimbledon Lodge (Pty) Ltd v Gore NO and others* [2002] 1 All SA 218 (C) 225f-h. The court held in this case that the entrustment of the day-to-day administration and management of the scheme is to the benefit of the unit owners.

7 Art 75 of the *Chinese Property Code of 2007* states that the unit owners "may" establish the unit owners' general assembly and an executive council.

8 Art 10 of the *Property Management Regulation of 2003*.

9 UCIOA § 3-101.

10 STA s 36 (1).



soon as an apartment is conveyed to them.<sup>11</sup> However, the management structure is unclear for Chinese law does not recognize a management body.<sup>12</sup> Instead, the law provides for two administrative mechanisms, namely a rule-making general assembly made up of the unit owners and an executive council.<sup>13</sup> Unfortunately, this institutional arrangement is far from perfect. Theoretically, the first general meeting which constitutes the executive council is usually convened long after the first unit is conveyed. The problem is that the unit owners only can take control of management from the developer at the first general meeting.<sup>14</sup> And the time which elapses between the first conveyance and the first general meeting may be considerable.<sup>15</sup> The fact that the early unit owners are not part of the management body makes a mockery of the threefold-unity theory of condominium ownership for during the transitional period the first group of owners, usually quite a number of owners in a multi-building project, only have individual ownership of their units and joint ownership of the common property. They are not members of the management body. Therefore, it is essential that early unit purchasers have immediate membership of the management body. Since the management body legally clarifies the relationship between the developer and other unit owners, it would be easy for the developer to bring the unit owners into the condominium management during this initial period.<sup>16</sup> Moreover, when a Chinese condominium statute is drafted, it would be worthwhile to establish a

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11 Gao Fuping & Huang Wushuang *Property Entitlement & Property Management* 121.

12 Chen Huabin *Study on Modern Condominium Ownership* 238. Gao Fuping & Huang Wushuang *Property Entitlement & Property Management* 120.

13 Art 8 & 10 of the *Property Management Regulation of 2003*.

14 Art 6 & 9 of the *Shanghai Property Management Regulation of 2004*; art 19 of the *Property Management Regulation of Shenzhen Special Economic Zone of 25 September 2007*.

15 Gao Fuping & Huang Wushuang *Property Entitlement & Property Management* 176-180; Xia Shansheng *Property Management Law* 151; The Chinese Zhi Gong Party Shanghai Committee *The Investigation Report on the Implementation of the Property Management Regulation 2004*. (Chinese version)

16 UCIOA § 3-101 comment 1.

central management body instead of a vague and abstract general assembly.<sup>17</sup>

Both the UCIOA and the STA state that only owners are members of the management body. It is made quite clear that lessees, mortgagees, family members, visitors, or any others with an interest in a unit are not members of the management body.<sup>18</sup> A developer can be a member of the management body as long as he/she still owns property in the development.<sup>19</sup> But when the developer ceases to own a unit, he/she loses membership of the management body. When an apartment is sold every subsequent owner automatically becomes a member of the management body by title deed registration.<sup>20</sup> A judicial sale does not affect the existence or the standing of the management body since it has “perpetual succession”.<sup>21</sup> Similarly, Chinese law also states that the general assembly is only made up of the condominium owners.<sup>22</sup>

## 6 2 2 Legal Personality

Under the UCIOA, a unit owners’ association can be organized as a profit or nonprofit corporation, trust, or partnership, or as an unincorporated association.<sup>23</sup> The UCIOA preserves the flexibility for American states to organize a condominium association in a variety of ways. However, an unincorporated association should be avoided since then its members risk unlimited liability, for example, for personal injuries.<sup>24</sup> In addition, an unincorporated association in the United States cannot own land.<sup>25</sup> Moreover, the UCIOA gives a unit owners’ association a legal standing to “institute,

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17 Gao Fuping & Huang Wushuang *Property Entitlement & Property Management* 120.

18 UCIOA § 3-101 “...the membership of the association at all times consists exclusively of all unit owners...” STA s 36 (1); Xia Shansheng *Property Management Law* 97-98.

19 STA s 36 (1).

20 See n 19 *supra*.

21 STA s 36 (6).

22 Art 8 of the *Property Management Regulation of 2003*.

23 UCIOA § 3-101.

24 Werner & Kratovil *Real Estate Law* 484-485.

25 Ford “Dispositions of Property to Unincorporated Non-profit Associations” 1956 (55) *Mich L Rev* 235.

defend, or intervene in litigation or administrative proceedings in its own name on behalf of itself or two or more unit owners on matters affecting the [condominium] community.”<sup>26</sup> Therefore it is very clear that under the UCIOA, a unit owners’ association enjoys a legal personality quite distinct from its individual members.<sup>27</sup>

Although the STA expressly states that the *Companies Act* does not apply to the body corporate,<sup>28</sup> there is no doubt that the body corporate under the STA has full legal personality.<sup>29</sup> First, the body corporate is expressly endowed with “perpetual succession”<sup>30</sup> and capable of suing<sup>31</sup> and being sued<sup>32</sup> in its corporate name in various matters. These include: contracts it has made, damage to common property, matters dealing with land and buildings for which it is liable, and in any matters arising out of the exercise of any of its powers or the performance of any of its duties. In particular it has *locus standi* in any claim against the developer in respect of the scheme if so determined by a special resolution of members of a body corporate.<sup>33</sup> Second, since the body corporate can hold property apart from its members’ property,<sup>34</sup> it can purchase or acquire property, mortgage, sell, insure, and let units.<sup>35</sup> Third, when the body corporate incurs liabilities, it has to sell its own assets to meet its responsibilities first.<sup>36</sup> It is worth noting that the STA imposes a subsidiary liability

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26 UCIOA § 3-102 (a) (4).

27 Van der Merwe *Apartment Ownership* 151.

28 STA s 36 (5).

29 Van der Merwe *Sectional Titles 2-22*.

30 Bugden *Strata Title Management Practice in New South Wales* 17-18.

31 See *Body Corporate of Greenwood Scheme v 75/2 Sandown (Pty) Ltd* 1999 (3) SA 480 (W) at 485 I-486B. In this case, it is confirmed that a body corporate has standing to claim damages for construction defects from the developer.

32 See *Faiga v Body Corporate of Dumbarton Oaks* 1997 (2) SA 651 (W). In this case, the body corporate was sued and held responsible for the negligence in maintaining the scheme’s building and facilities.

33 STA s 36 (6).

34 Van der Merwe *Sectional Titles 2-23*.

35 STA s 38 (b).

36 Van der Merwe *Sectional Titles 2-20 & 2-21*.

on members of the body corporate if its own assets are insufficient to satisfy a debt.<sup>37</sup> This means the body corporate is different from a limited company since it does not limit its members' liability for its debts.<sup>38</sup> However, the unit owners' liability is only subsidiary: the unit owners can only be sued if the debt of the body corporate is unsatisfied by its own assets.<sup>39</sup> Despite a body corporate being a legal entity it is similar to an unlimited liability association in terms of the financial liability of its members since a body corporate relies entirely on its unit owners' contributions to meet its liabilities.

In China, controversy surrounds the question as to whether a management body is endowed with a legal personality. Because a condominium management body has very specialized functions, regulating its decision-making powers cannot be guided only by general legal principles regarding contracts and associations. The difficulty here is that in China, most of the management bodies are ill-established and their operation is chaotic. Some progressive Chinese legal scholars argue that it would be premature to endow a unit owners' general assembly with full legal capacity since the country is in an early developmental stage.<sup>40</sup> Others argue that it is inappropriate to accord either an owners' general assembly or an executive council with a legal personality since this would contravene the existing practice that management bodies usually do not have a juristic personality.<sup>41</sup> Most importantly, when determining the nature of the management body, the prime consideration should be that the condominium owners' interests are safeguarded.

Although condominium litigation continues to increase, most courts initially were

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37 STA s 47 (1).

38 Van der Merwe *Sectional Titles* 14-9.

39 See *In re: Body Corporate of Caroline Court* [2002] 1 All SA 49 A par 8.

40 Chen Huabin *Study on Modern Condominium Ownership* 240-243. Chen argues that "...as to legal structure of management body, it is better to be circumspect, not adopting the 'legal person' model at this stage, because the concept of legal personality of management body will not be fit with current Chinese special circumstances...".

41 Xia Shansheng *Property Management Law* 118.

reluctant to grant a management body the power to sue or be sued in the absence of statutory authority.<sup>42</sup> However, quite recently, some provincial courts have issued judicial opinions allowing the executive council of a management body to appear in court as either a plaintiff or a defendant on behalf of the owners.<sup>43</sup> This has been well-received. But answers are vague as to whether a management body possesses exclusive or class-action standing for this purpose. When a Chinese condominium statute is drafted, it should grant the management body an exclusive right to pursue claims in common property disputes. First, multiple-party litigation with every unit owner individually involved is cumbersome and a procedural nightmare for the courts.<sup>44</sup> Second, a management body's exclusive standing is to the advantage of unit owners. When a management body is the sole party in a common property dispute it will avoid direct confrontation between unit owners. Moreover, an individual unit owner has little incentive to claim on behalf of other unit owners since any recovery goes to the association for common expenses.<sup>45</sup> Third, when the management body has exclusive standing, defendants are protected from multiple and repeated suits regarding the same claim.<sup>46</sup> With the above advantages, the management body's exclusive standing is an efficient way to resolve common property disputes.

The management body's ability to sue and be sued is not the only consideration dictating the need for juristic personality. If existing legal structures are already inadequate for group litigation, or cannot adequately cater for a condominium context, there will be a greater need for the management body to have juristic personality. Additionally, the management body also needs to be able to (1) use contractual

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42 Xue Yuan "Analysis on the Legal Status of Condominium Associations" 2007 (25) *Hebei Law Science* 72-73. (Chinese version)

43 For example, the *Opinions Concerning Trialing the Property Management Cases of the Beijing High Court* issued by the Beijing High Court in December 2003.

44 Jacobsen "Standing of Condominium Associations to Sue: One for All or All for One?" 1990 (13) *Hamline L Rev* 33.

45 Jacobsen "Standing of Condominium Associations to Sue" 34.

46 Xue Yuan "Analysis on the Legal Status of Condominium Associations" 74.

agreements to employ professional managing agents; (2) collect individual owners' contributions and establish management and maintenance funds in its name; (3) pay taxes; and (4) obtain adequate insurance for the common property to protect the unit owners from tort liability.<sup>47</sup> For these matters the management body needs a common seal arising from its personality.<sup>48</sup> For example, a common seal is needed when the management body signs an employment contract with a managing agent, or when the management body provides receipts to owners who pay monthly contributions, or when it signs an insurance contract for the common property. However, since a general assembly of condominium owners has no legal personality in China, some local rules seem to grant corporate status to an executive council by providing that it should have a common seal.<sup>49</sup> Some provincial high courts have pronounced that the executive council may have legal standing to sue and to be sued on behalf of unit owners.<sup>50</sup> This is inappropriate since an executive council is the standing committee of a management body. It is at odds with the condominium concept that the condominium's executive council, being the executive organ, should have legal personality rather than the management body, which is the rule-making body.

In short, the justification for granting a management body a juristic personality is greater than the arguments against it. To ensure an effective multifunctional management body, its juristic personality is an important issue on the agenda for formalizing condominium law.

### **6 2 3 Functions**

Under both the UCIOA and STA, the functions of a management body are assigned in

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47 Moriarty "A Comparison of United States and Foreign Condominiums" 1974 (48) *St John's L R* 1025.

48 Art 49 of the *Property Management Regulation of Shenzhen Special Economic Zone of 2007*.

49 Art 13 of the *Shanghai Property Management Regulation of 2004*.

50 Art 7 of the *Opinions Concerning Trialing the Property Management Cases of the Beijing High Court of 2003*. See n 43 *supra*.

accordance with the Acts' provisions, the by-laws and the rules. Generally, there are three major functions of a management body. First, a management body acts as a vehicle for enforcing restrictions, liens and covenants as regulated in the Act, declaration and by-laws or rules. Second, a management body is responsible for administering the day-to-day running of the condominium community, including the common property. Third, subject to the Act, the management body can amend, discard, supplement, or add to the new applicable rules or by-laws.

A management body should enforce restrictions and covenants prescribed in the Act as well as the declaration, the by-laws and the rules. The UCIOA expressly states that the association can exercise any powers conferred by the declaration.<sup>51</sup> More importantly, it further regulates that unless the declaration or the Act provides otherwise, a unit owners' association can adopt rules and regulations to prevent any use of a unit that violates the declaration and to regulate any occupant's behavior in a unit that violates the declaration.<sup>52</sup> Under the STA, the body corporate should, subject to the provisions of the Act, be responsible for the enforcement of the rules of the scheme.<sup>53</sup> Since the management body's function is fundamentally important to enforce the condominium documents, a Chinese statute needs to explicitly regulate this function.

The second function of the management body is to govern management and maintenance of the common property. Under the STA, this function is found either in the Act or in rules of the scheme. The functions contained in the Act can only be curtailed by statutory amendment.<sup>54</sup> The functions contained in the rules can be changed by either unanimous or special resolution. The statutory functions of the management body are mandatory. They include: 1) establishing a fund to cover expenses incurred in the execution of its functions and to levy contributions to the

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51 UCIOA § 3-102 (a).

52 UCIOA § 3-102 (c) (1) & (2).

53 STA s 36 (4).

54 Van der Merwe *Sectional Titles* 14-12 (7).

fund from the sectional owners;<sup>55</sup> 2) opening and operating an account or accounts with a bank or building society;<sup>56</sup> 3) procuring adequate insurance for the scheme and to perform all incidental functions;<sup>57</sup> 4) maintaining and repairing the common property, the machinery, fixtures and fittings used in connection with the common property and sections as well as the pipes, wires, cables and ducts used in connection with the enjoyment of more than one section or of the common property or in favour of one section over the common property;<sup>58</sup> 5) complying with any notice or order by any competent authority requiring any repairs to or work in respect of the land or building(s) and to comply with any law relating to the common property or to any improvement of land included in the common property;<sup>59</sup> 6) keeping a list of the names and addresses of the members of the body corporate and of the trustees and to make it available on request;<sup>60</sup> 7) notifying the Registrar and the local authority of its *domicilium citandi et executandi* which shall be its address for service of any process;<sup>61</sup> 8) controlling, managing and administering the common property for the benefit of all the owners;<sup>62</sup> 9) certifying in writing, on application by an owner or mortgagee, the amount of the owner's contribution, the manner of payment, the extent to which it has been paid and also the amount of rates and taxes paid by the body corporate and not yet recovered by it.<sup>63</sup>

Therefore, it can be seen that under the STA, it is a mandatory that the body corporate maintains the common property and keeps it in good repair. Annexure 8 of the management rules places certain duties on the body corporate in addition to this

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55 STA 37 (1) (a)-(d).

56 STA s 37(1) (e).

57 STA s 37(1) (f)-(i), (q) and 37(4).

58 STA s 37(1) (j), (o) and (p).

59 STA s 37(1) (k) and (n).

60 STA s 37(1) (l).

61 STA s 37(1) (m).

62 STA s 37(1) (r).

63 STA s 37(3) & s 51.



duty to manage and maintain the common property.<sup>64</sup> For example, the body corporate should prepare accounts and financial statements, convene general meetings, supply information to the unit owners and implement the decisions of the body corporate. These functions are discussed in detail under the duties of the trustees in the following section.

Unlike the STA, the UCIOA does not specifically lay out the functions of the unit owners' association. Instead, the UCIOA only provides basic principles such as the association's responsibility for the maintenance, repair, and replacement of the common property,<sup>65</sup> as well as to collect common expenses from all the unit owners for the maintenance and management of the common property.<sup>66</sup> The UCIOA also states that the association must comply with insurance requirements to reasonably maintain property insurance and liability insurance on the common property.<sup>67</sup> The UCIOA gives an association the power to specify its function in the by-laws and house rules. Under the UCIOA, limited common property is regarded as part of common property. This means that unless the declaration provides otherwise, the association is responsible for the upkeep of the limited common property.<sup>68</sup> The cost of maintenance, repair, and replacement for the limited common property is assessed against all the units, unless the declaration specifies that the expenses be paid only by the units receiving the benefits.<sup>69</sup>

The third function for the management body is to amend the condominium association's by-laws and rules. The UCIOA contemplates that most matters relating to an association's internal operations will be regulated by the by-laws. An

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64 These functions are performed by the trustees on behalf of the body corporate. See Annexure 8 r 25-27.

65 UCIOA § 3-107 (a)

66 UCIOA § 3-115 (b).

67 UCIOA § 3-113 (a) (1) & (2).

68 UCIOA § 3-107 comment 1.

69 UCIOA § 3-115 (c).

association's by-laws must provide a formula to amend them.<sup>70</sup> In addition, subject to the declaration, by-laws can regulate any matter the association deems necessary and appropriate.<sup>71</sup> By contrast, the STA provides a set of model rules to deal with functions of the body corporate. The STA provides that if the body corporate decides to change the rules, it must notify the Registrar of Deeds of any substitution, addition, amendment or repeal of the rules.<sup>72</sup>

Both the UCIOA and the STA provide for very much the same functions of the management body, although the two Acts do have very different approaches as to how this is achieved. When framing a Chinese condominium statute, the theoreticians should consider adopting the STA model with its extensive list of functions, which are unambiguous and easy to apply.

Among the functions particularly important for a future Chinese condominium statute is requiring the management body to establish two different funds for the maintenance of the common property. One called a maintenance fund is for day-to-day recurrent expenses of maintaining the development. The other called a reserve fund provides for future capital needs.<sup>73</sup> The UCIOA and the STA provisions on maintenance funds have been adopted by the Chinese as a model. A Chinese departmental rule requires that when an apartment purchaser signs a sale contract with a developer, the purchaser also needs to pay 2-3% of an apartment's purchase price into the condominium's maintenance fund.<sup>74</sup> This provision is welcome since it embodies the maintenance fund concept. But it does not take the next step to regulate the periodic collection of a maintenance fund. The departmental rule is silent on collecting levies for the maintenance fund once the initial maintenance fund is

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70 UCIOA § 3-106 (a) (6).

71 UCIOA § 3-106 (b).

72 STA s 35(5).

73 Van der Merwe *Sectional Titles* 11-37.

74 Art 5 of the *Measures on Management of Maintenance Fund for Fixtures and Fittings in Housing Common Areas of 1998*.

depleted. Therefore, when Chinese legislators are ready for a uniform condominium statute, this needs to be addressed. A reserve fund should be maintained for every condominium project. A reserve fund is worthwhile even for small condominium complexes. Therefore, following the UCIOA and STA, a Chinese statute could require that a management body should cater for contributions to a reserve fund in its annual budget that would be mandatory for all condominium associations.<sup>75</sup>

Chinese law does not at all mention a reserve fund. The rationale for establishing such a fund is to save for a rainy day. A reserve fund is a form of self-insurance against *pro rata* increases in repair cost over the years.<sup>76</sup> Because repair and maintenance costs usually exceed a management body's operating budget, a reserve fund is needed to save for such increases.<sup>77</sup> Such a fund covers many common property expenses such as the administrative cost of convening meetings, the remunerations of the administrator and executive council members, painting the exterior wall of buildings, replacing, repairing or making good the common property, and purchasing facilities or tools for the common property. The reserve account and annual budget requirements promote a condominium association's financial health in the long run. Additionally, mortgage lenders and insurers also are comfortable with an association that holds a reserve account. Under the UCIOA, a surplus fund of a unit owners' association is almost always used for the pre-payment of reserves.<sup>78</sup> Although the STA does not require a separate account for the reserve fund,<sup>79</sup> it does stipulate a mandatory reserve fund to promote the stability and longevity of sectional title schemes.<sup>80</sup> Moreover, the *Sectional Title Regulations* provide that the trustees of the body corporate may from time to time call on owners to make special

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75 UCIOA § 3-115 (a); STA s 37 (1) (c) read with Annexure 8 r 31 (2).

76 Gardiner *The Condominium Act of 1998: A Practical Guide* 233.

77 Hinkston "Wisconsin's Revised Condominium Act" 2004 (77 September) *Wisconsin Lawyer* 12.

78 UCIOA § 3-114. It also provides that any surplus fund of the association remaining after payment of common expenses, any prepayment of reserves must be paid back to the unit owners.

79 Van der Merwe *Sectional Titles* 14-20 (4).

80 STA s 37 (1) (a). See Van der Merwe *Sectional Titles* 14-20.

contributions to cover expenses. They are not included in estimates and may be payable in one sum or by installments depending on what the trustees think fit.<sup>81</sup> Thus, a new Chinese statute should require condominium developers and management associations to establish a badly-needed reserve fund, financed by regular assessments.

## 6 2 4 Powers

Both the UCIOA and the STA contain provisions on a management body's powers to manage and control the common property. As the management body is a statutory creature, its powers are carefully delineated under the Act.<sup>82</sup>

The UCIOA section 3-102 provides an extensive list of powers that may be exercised by the owners' association. This section of the Act allows the association to adopt and amend by-laws, rules, and budgets, collect assessments for common expenses from unit owners, and hire and discharge managing agents and other employees, agents, and independent contractors.<sup>83</sup> An association can also institute, defend, or intervene in litigation or administrative proceedings in its own name or on behalf of itself or two or more unit owners on matters affecting common interest issues.<sup>84</sup> Equally, if not more importantly, an association can make contracts and incur liabilities, regulate the use, maintenance, repair, replacement, and modification of common elements, and have additional improvements made as a part of the common elements.<sup>85</sup> It can also acquire, hold, encumber, and convey in its own name any right, title, or interest in real estate or personal property, although common elements may be subject to a security interest.<sup>86</sup> An association can grant easements,

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81 Annexure 8 r 31 (4).

82 Van der Merwe *Sectional Titles* 14-25.

83 UCIOA § 3-102 (a) (1) (2) and (3).

84 UCIOA § 3-102 (a) (4).

85 UCIOA § 3-102 (a) (5) (6) and (7).

86 UCIOA § 3-102 (a) (8).

leases, licenses, and concessions over the common elements and can impose and receive payments, fees, or charges for the use, or rental of the common elements and for services provided to unit owners.<sup>87</sup> An association also can impose charges for late payment of assessments and levy reasonable fines for violations of the declaration, by-laws, and rules of the association.<sup>88</sup> It can also impose reasonable charges for the preparation and recordation of amendments to the declaration, resale certificates, or statements of unpaid assessments.<sup>89</sup> A unit owners' association can provide its officers and executive board indemnification and maintain directors' and officers' liability insurance.<sup>90</sup> It can also assign its right to future income, including the right to receive common expense assessments unless limited by the declaration.<sup>91</sup> An association can exercise any other powers conferred by the declaration or by-laws, exercise other powers exercised by legal entities of the same type as the association as well as exercise any other powers necessary and proper for the governance and operation of the association.<sup>92</sup> Finally, an association can require that disputes between the executive board and unit owners or between two or more unit owners about the condominium community be submitted to nonbinding alternative dispute resolution as a prerequisite to commencing a judicial proceeding.<sup>93</sup>

Furthermore, the UCIOA states that a declaration should not impose limitations on the power of an association to deal with a declarant that are more restrictive than the limitations imposed on an association's power to deal with other people.<sup>94</sup> If a unit owner's tenant violates the declaration, by-laws, or rules of the association, in addition to exercising any of its powers against the unit owner, the association also

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87 UCIOA § 3-102 (a) (9) and (10).

88 UCIOA § 3-102 (a) (11).

89 UCIOA § 3-102 (a) (12).

90 UCIOA § 3-102 (a) (13).

91 UCIOA § 3-102 (a) (14).

92 UCIOA § 3-102 (a) (15) (16) and (17).

93 UCIOA § 3-102 (a) (18).

94 UCIOA § 3-102 (b).

can exercise powers directly against the tenant. However, the tenant and the unit owner should have been given notice and an opportunity to be heard and if a fine is levied against a tenant for a violation it has to be reasonable. An association can enforce any other rights against a tenant for a violation which the unit owner as landlord could lawfully have exercised under the lease and/or which the association could lawfully have exercised directly against the unit owner.<sup>95</sup> However, these powers can only be exercised if the tenant or unit owner fails to remedy the violation within 10 days after the association notifies the tenant and unit owner of it.<sup>96</sup>

Finally, the UCIOA makes it clear that its guidelines do not affect rights that the unit owner has to enforce a lease or that the association has under other legislation nor does it allow the association to enforce a lease to which it is not a party, unless there is a violation of the declaration, by-laws, or rules.<sup>97</sup>

Under the South African Act, the most important powers of the body corporate are in section 38. It is notable that the statutory powers of the body corporate contained in section 38 are not mandatory.<sup>98</sup> These powers allow: 1) the body corporate to appoint agents and employees; 2) to purchase, take transfer of, mortgage, and sell, hire or let units; 3) to purchase, hire or acquire movable property; 4) to establish and maintain lawns, gardens and recreational facilities on the common property; 5) to borrow money in order to carry out its responsibilities and exercise its powers, and to ensure that borrowed money is repaid; 6) to invest administrative and reserve funds; 7) to enter into agreements with local authorities or any other persons or bodies for the supply of electricity, gas, water, fuel, sanitation and other services for the sectional titles scheme; 8) to enter into agreements with unit owners or occupiers for the body corporate to provide amenities or services to a unit, its owner or occupier, including the right to let, other than a long lease, a portion of the common property to any owner

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95 UCIOA § 3-102 (d).

96 UCIOA § 3-102 (e).

97 UCIOA § 3-102 (f).

98 Van der Merwe *Sectional Titles* 14-25.

or occupier; and 9) to do everything necessary for the enforcement of the rules and for the control, management and administration of the common property.<sup>99</sup>

Now it can be seen that most of the management body enumerated powers under the UCIOA and the STA are very similar. To name a few, both Acts allow the management body to appoint a managing agent and to enter into a contract or agreement. Both Acts allow the use and maintenance of common elements and for the management body to acquire condominium units and hold them for the benefit of the unit owners. Moreover, both have statutorily enumerated powers that are extensive but not exhaustive. For example, under the UCIOA, the association's power to have a priority lien on a unit for the unpaid assessment of a mortgage loan is regulated in a different section, that is section 3-116. Other sections of the STA also contain such powers as allowing the body corporate to institute legal proceedings on behalf of the unit owners.<sup>100</sup>

Some powers that the UCIOA grants to the unit owners' association in terms of the UCIOA correspond to functions of the body corporate under the STA.<sup>101</sup> For example, the unit owners' association has the power to assess and collect monies for expenses, to adopt and amend budgets, and to repair and maintain the common property. Second, some owners' association powers under the UCIOA are regulated as a part of the trustees' powers under the STA. An example of this is the power of the owners' association to charge for late payment of assessments which is controlled by trustees under the South African statute.<sup>102</sup> Third, unlike the UCIOA, the STA specifically gives the body corporate the power to invest any fund and to negotiate with local authorities for services for the unit owners.<sup>103</sup> Fourth, the UCIOA allows the unit

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99 STA s 38.

100 STA s 36 (6).

101 Van der Merwe "The Sectional Titles Act in Light of the Uniform Condominium Act" 1987 (20) *CILSA* 24.

102 Annexure 8 r 31 (6) allows trustees to charge interest on arrears at a rate as they may from time to time determine.

103 STA s 38 (g) & (h).

owners' association to terminate management contracts and leases entered into by the association without penalty while a developer controls a project.<sup>104</sup>

In summary, the STA separately provides for the functions and powers of the body corporate while the UCIOA only provides a single extensive provision of the association's powers. The difference between a function and a power under the STA is what the body corporate must do and what it can do. In addition, the model rules annexed to the STA also regulate some powers of the body corporate. Overall, both Acts provide similar provisions for the management body's powers.

For Chinese law, since there is no concept of a management body, the *Property Code* attributes these powers to all of the apartment owners at their general meetings. The *Chinese Property Code* provides that the apartment owners collectively decide (1) to adopt and amend the regulations for the general meetings; (2) to make and amend the condominium rules; (3) to elect the executive council or replace its members; (4) to hire and discharge the managing agent and other employees; (5) to collect and use the maintenance fund for the building(s) and the common fixtures; (6) to alter, improve and reconstruct the building(s) and common fixtures; (7) to exercise any other powers necessary for the governance and operation of the common property.<sup>105</sup> This is a worthwhile step to ascertain the powers of the management body although it is somewhat incomplete and superficial. Therefore, when a Chinese condominium statute is to be framed, both the UCIOA and the STA should be carefully scrutinized to provide an extensive list of management body powers. For the statutory structure, the more detailed and well-structured South African STA is preferred.

## **6 2 5 Two-Tier Management Structure**

Generally, there are two options available in designing a management structure. First

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104 UCIOA § 3-105.

105 Art 76 of the *Chinese Property Code of 2007*.



an entire project is organized as a single condominium under one management body. Second, a two-tier condominium management is put into place with an umbrella management body managing the entire project at a senior level with more subsidiary management bodies managing their own particular common areas at a junior level.

While the STA does not address this issue, the UCIOA provides that a master association may be established to exercise powers on behalf of one or more condominium communities.<sup>106</sup> While the UCIOA provision was designed to merge two or more condominium communities, the concept is a two-tier management structure. This is made quite clear by the provision that if the declaration of a condominium community provides that the executive board delegates certain powers to a master association, the members of the executive board are not liable for the acts of a master association with delegated powers.<sup>107</sup> It can be seen that the UCIOA deals with this issue by strictly limiting the delegation of unit owners' association powers to the master association in the declaration.<sup>108</sup> In the United States, master or umbrella associations are found in larger condominium complexes where the associations are layered according to function.<sup>109</sup> In China, a two-tier management structure should be in place before the first unit is conveyed to a unit purchaser. This is primarily because most of the condominiums are multi-building projects or mixed-use ones. In addition, a Chinese condominium statute should allow the existing condominium developments to establish sub-bodies.

The "single condominium, single association" approach is conventional. It is suitable for many single-building condominiums. However, with the appearance and development of multi-building projects and mixed-use developments, the traditional "single condominium, single association" approach is not an efficient way to manage

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106 UCIOA§ 2-120 (a).

107 UCIOA§ 2-120 (c).

108 Rohan & Reskin *Condominium Law and Practice: Forms* 43-187.

109 Rohan & Reskin *Condominium Law and Practice: Forms* 43-184.

the common property in more complicated developments.<sup>110</sup> For example, for a condominium development comprising twelve buildings, first, it is financially burdensome to call a meeting of all the unit owners of twelve buildings to discuss a management problem in one building. Second, the unit owners in other buildings may not be familiar with the situation. Third, the owners in other buildings have less incentive to be concerned about a management issue encountered in a specific building. A single building's management issue can be resolved more quickly and easily by its owners than by all the owners of the other buildings.

Hence, a two-tier condominium management structure provides more effective and efficient management for the entire project. A first-tier management body could control the common property used by all unit owners in a project, for example, the entrance gate and driveways. The second-tier management body, i.e. sub-body could deal with the operation and maintenance of a particular common area or building in which it has an ownership interest, for example, the elevator and staircase belonging to a particular group of unit owners.

A two-tier condominium is appropriate for several types of projects. First, in a multi-building development, each building can constitute a sub-body while the whole project could have an umbrella management body. This is especially useful for a multi-building project comprising luxury buildings and non-luxury ones, for example, some apartment buildings have elevators and dining halls while others do not have such facilities. Second, in a mixed-use development, the residential sub-body can take care of the common property reserved for its use only and a commercial sub-body might care for the retail shops' central air-conditioning. For large condominium developments that mix the residential apartments with a hotel, shops, and recreational units, each type may constitute a sub-body managing their own operational affairs. The master association could be responsible for maintaining the building's exterior,

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110 Gao Fuping & Huang Wushuang *Property Entitlement & Property Management* 122.

structure, and grounds.<sup>111</sup>

However, to form a two-tier management structure, some matters need to be clarified. First, it is important to include the second-tier management bodies' areas of jurisdiction in the declaration and by-laws. This will ensure that maintenance responsibilities between two-tier management bodies are clearly defined. Second, the limited common property, or the exclusive use area should be managed and used by only one sub-body and should not be shared by two or more sub-bodies. This will obviate management disputes between two or more sub-bodies over the limited common property. Third, there need to be enough units in each sub-body to ensure there are sufficient owners to serve on the executive committee of each sub-body. Fourth, at least a member from each sub-body's executive committee should be a member of the executive council representing his or her sub-body.<sup>112</sup>

The functions and powers of a sub-body should have the same powers and duties as the main or master management body. For example, a sub-body could establish its own maintenance and reserve funds. Thus, unit owners would need to contribute to the maintenance and reserve funds of both the main management body and their own sub-body. But this would not necessarily mean that the unit owners' monetary contributions would be increased. Technically, the contributions paid by the unit owners would be divided into two kinds. One would be paid to the main management body for matters of common interest to all unit owners while the other would be paid to the sub-body for its particular needs. However, certain powers could not be exercised by a sub-body such as the power to transfer or make an addition to any part of the common property.

To summarize, the two-tier management structure is important and much needed in China. Any future Chinese condominium statute should cover this issue. For this

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111 Lundquist "Mixed Use Condominiums under the Minnesota Uniform Condominium Act" 1984 (10) *Wm Mitchell L Rev* 105.

112 Art 16 of the *Regulation of the General Meetings of 2003*; Art 15 of the *Shanghai Property Management Regulation of 2004*.

reason it merits a more deliberate study.

## **6 3 GENERAL MEETING**

### **6 3 1 Significance of General Meetings**

A meeting comprising all the condominium owners is known as a general meeting as distinct from an executive council meeting comprising only council members. A management body functions through general meetings. The principal purpose of the general meeting is to gather the opinions and reflect the will of the unit owners about the management of their condominium.<sup>113</sup> The condominium association's general meeting is regarded as its highest rule-making authority.<sup>114</sup> The function of general meetings is setting standards and making policies for the condominium administration, while the executive council's task is to implement resolutions and decisions passed at general meetings and to perform statutory duties.<sup>115</sup> The South African STA expressly states that the duties and powers of the trustees are subject to any restrictions imposed at an owners' general meeting.<sup>116</sup> China also acknowledges the legal status of the general meeting. Here the general meeting is the highest body of the community of owners<sup>117</sup> and the council is an executive body for the general assembly.<sup>118</sup> Therefore, this section discusses the types of general meetings, the time and manner in which general meetings are to be convened, matters addressed in general meetings, the manner in which voting is conducted, and the keeping of general meeting minutes.

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113 Van der Merwe *Sectional Titles* 14-35.

114 Van der Merwe *Apartment Ownership* 152.

115 Khublall *Strata Titles* 92

116 Annexure 8 r 25.

117 Liang Huixing *Commentary on Chinese Property Code Draft* 302. (Chinese version)

118 Art 15 of the *Property Management Regulation of 2003*.

## 6 3 2 Types of Meetings

### 6 3 2 1 Overview

Under the STA, three types of general meetings during the life of a body corporate are recognized, namely, the first annual general meeting, annual general meetings, and special general meetings.<sup>119</sup> The first annual general meeting is the first compulsory meeting of a body corporate. This means that it must be held within sixty days of the establishment of the body corporate.<sup>120</sup> Annual general meetings are compulsory meetings that are held each year on a regular basis. Specifically, they are held within four months of the end of each financial year.<sup>121</sup> Unless the general meetings or the trustees decide otherwise,<sup>122</sup> the financial year of the body corporate runs from the first day of March of each year to the last day of February of the following year.<sup>123</sup> A special meeting is any general meeting other than the annual general meeting.<sup>124</sup> The STA does not require these meetings to be held within any specified period or at regular intervals as is the case with the first annual general meeting and annual general meetings.

According to the UCIOA, an association's general meeting of unit owners must be held at least once a year at a time stated or fixed in accordance with the by-laws.<sup>125</sup> The president, the majority of the executive board or the owners representing at least 20 per cent, or any lower percentage specified in the association by-laws, may call a special meeting.<sup>126</sup>

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119 Annexure 8 r 50-53.

120 Annexure 8 r 50 (1).

121 Annexure 8 r 51 (1).

122 The term "trustees" under the STA corresponds to the terms "executive board" under the UCIOA and "executive council members" in the Chinese context.

123 Annexure 8 r 51 (2).

124 Annexure 8 r 52.

125 UCIOA § 3-108.

126 See n 125 *supra*.

Clearly, the STA regulates meetings in considerable detail in the model rules while the UCIOA only provides sketchy principles. For example, the UCIOA simply states that a general meeting must be held each year. No provision is made for the specific period or time to hold an annual general meeting. However, the interval between annual general meetings may unpredictably fluctuate. For a Chinese condominium statute, the South African approach is preferable. Any future Chinese condominium legislation should classify the meetings into three types and contain detailed convening procedures for each type of meeting.

### **6 3 2 2 The First Annual General Meeting**

The time to convene the first annual general meeting should be clearly regulated to ensure that unit owners immediately control the management of the condominium development once it leaves the hands of the developer. Early on many sectional titles schemes floundered in chaos for the *Sectional Titles Act of 1971* failed to make someone responsible to convene this first meeting.<sup>127</sup> The *Sectional Titles Act of 1986* remedies this problem by making the developer responsible for convening the first general meeting within 60 days after the body corporate is established.<sup>128</sup> Hence, when a Chinese condominium statute is framed, the lawmakers should oblige the developer to convene the first annual general meeting within a prescribed period.

Given that in China many condominiums are multi-building projects, they often cannot be occupied by many unit purchasers in a short period after the first unit's sale. Under such circumstances, when to convene the first general meeting is a critical issue. One way is to prescribe a fixed time to convene it as is the case with the STA. A more flexible way found in many Chinese local property management regulations<sup>129</sup> is to stipulate that the first general meeting be held during two periods, whichever

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127 Van der Merwe *Sectional Titles* 14-36.

128 STA s 36 (7) (a).

129 At present, there is no provision at the national level to regulate when to hold the first annual general meeting.

occurs first. They are: 1) two years from the time the first unit is sold; 2) or as soon as 50 per cent of the total units' floor area is sold to individual owners.<sup>130</sup> The latter method is preferable. On the one hand, it recognizes that when a developer still owns a large portion of the units, unit owners cannot have much of a voice on the condominium's management even after the first general meeting. With only a few unit owners living in the condominium, the developer can muster a quorum with a majority of the votes and then control the management. A telling example is that a developer with control of the general meeting can appoint all the executive council members he or she favors. Consequently, the first general meeting should be held when a relatively large number of units have been sold. On the other hand, the alternative procedure caps the time the farthest out to convene the meeting, i.e. two years after the first unit has been sold. Two years after the first unit's sale, the first general meeting is held irrespective of the number of units that have been sold. This statutory arrangement strikes a balance between the necessity of a speedy transfer of condominium management to unit owners and a concern whether or not unit owners genuinely control the management.

Moreover, under the STA, to avoid an initial management debt of the body corporate when it comes into being, the developer is obliged to furnish the unit owners at the first general meeting with a certificate from the local authority showing that all of the developer's financial obligations for the condominium are up to the date and have been paid.<sup>131</sup> If such a provision is adopted in future Chinese condominium legislation, the developer would be responsible for all maintenance costs during the initial period prior to the first general meeting. As a consequence, developers would be under financial pressure to organize the first general meeting speedily.

However, two years would seem far too long before the first general meeting is

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130 Art 7 of the *Shanghai Property Management Regulation of 2004*; art 19 of the *Property Management Regulation of Shenzhen Special Economic Zone of 2007*.

131 STA s 36 (7) (a) (ii).

held, particularly since it is at this meeting when unit owners put together their executive council. Thus, a future Chinese condominium statute should require developers to convene the first general meeting at the latest one year after the first unit is sold. Moreover, any time within this first year, if the units purchased account for 50 per cent of all units' floor areas, the first general meeting should necessarily be convened. Here one concern still remains: the developer could control the management if he/she still owns 50 per cent or more of the total units' floor area one year after the first unit's sale. But this difficulty is not insurmountable. Any future Chinese condominium statute should stipulate that the maximum value of an owner's vote, whether the developer or a unit owner, is reduced to 30 per cent voting power, ignoring any fraction. The purpose of this mechanism is to prevent a single "giant" owner from monopolizing the votes at any general meeting.

Finally, most Chinese local regulations require that a sub-district office<sup>132</sup> play a supervisory role in organizing the first general meeting for newly developed condominiums.<sup>133</sup> This provision should be kept in any future condominium legislation to ensure a timely and smooth first general meeting. Moreover, there should be sanctions against developer non-compliance to ensure that the developer also will perform his/her responsibilities. For example, following the South African experience, a developer should be liable to a fine and imprisonment for a short period if a meeting is not convened within a reasonable time.<sup>134</sup> In South Africa the penalty for non-compliance is imprisonment for a period not exceeding two years.<sup>135</sup>

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132 In China, sub-district office (Jie Dao Ban Shi Chu) is the lowest level of governmental body. Literally, it means the block community office. Its ranking is inferior to the city's district government or the county government.

133 Art 5 of the *Property Management Regulation of Shenzhen Special Economic Zone of 2007*; art 5 of the *Shanghai Property Management Regulation of 2004*.

134 STA s 36 (7) (b).

135 See n 134 *supra*. Van der Merwe *Sectional Titles 14-37* argues that such penalty of imprisonment serves as a deterrent for non-compliance.



### **6 3 2 3 Annual General Meetings**

In China, any drafting committee of the future condominium legislation should carefully evaluate the trade-offs of holding an annual general meeting on the basis of a calendar year or a fiscal year. Although the schedule based on the financial year is sensible for a condominium's financial administration as is the case in South Africa,<sup>136</sup> the calendar year is easy to apply and makes sense to ordinary unit owners. With the calendar year, they can easily monitor the holding of an annual general meeting. It would seem better for a future Chinese condominium statute to stipulate that after the first general meeting, a condominium association must hold an annual general meeting in each calendar year.

More importantly, to ensure that unit owners can review the condominium affairs in a timely manner, an annual general meeting should be convened no less than fifteen months after the preceding annual general meeting. Nonetheless, it cannot be assumed that once the period has expired the annual general meeting could not be held in that particular year. If an annual general meeting is not called by the executive council within the time limit, unit owners should be able to request that the sub-district office summon the meeting.<sup>137</sup>

### **6 3 2 4 Special General Meetings**

Different from the first general meeting and annual general meetings, neither the UCIOA nor the STA requires special meetings be held within any specified period.<sup>138</sup> These meetings should be held when necessary during the year.

Under the STA, trustees may, whenever they think fit, call a special meeting and they must convene a meeting upon a written request either by owners entitled to 25

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<sup>136</sup> Annexure 8 r 50 (2) (ii).

<sup>137</sup> Art 12 of the *Property Management Regulation of Shenzhen Special Economic Zone of 2007*.

<sup>138</sup> Rosenberry & Sproul "A Comparison of California Common Interest Development Law and the Uniform Common Interest Ownership Act" 1068-1070; Van der Merwe *Sectional Titles* 14-41 & 14-42.

per cent of the total quotas or by no less than 25 per cent of the mortgagees holding mortgage bonds on individual units.<sup>139</sup> If trustees fail to call a meeting within fourteen days of such a request, the unit owners or mortgagees are entitled to call the meeting.<sup>140</sup> By specifying that a certain number of requesting owners is necessary to call a meeting the STA ensures that special meetings are convened only for urgent and important matters.<sup>141</sup> When a Chinese condominium statute is drafted, it should stipulate that a special meeting can be convened by a majority vote of the executive council or in writing by 20 per cent of the unit owners entitled to vote. A Chinese statute needs to be flexible in convening a special meeting. Today in China when there is an emergency needing urgent attention, the executive council like the trustees under the STA may convene a special general meeting. However, if the executive council members breach their statutory duty to call a special meeting, the unit owners can apply to the sub-district office to order the executive council to call a special meeting. If the executive council continues to fail to do so, the sub-district office can call the special meeting.<sup>142</sup>

### **6 3 3 Notice of Meeting**

Under the UCIOA, no less than 10 and no more than 60 days prior to any meeting, the secretary or other officers should send a hand-delivered or prepaid letter with a meeting notice to each unit's mailing address or to any other mailing address the unit owner designates in writing.<sup>143</sup> These meeting notices must specify the time and place of the meeting, the agenda and the matters the executive board intends to present for action by the members, including the general nature of any proposed

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139 Annexure 8 r 53.

140 See n 139 *supra*.

141 Van der Merwe *Sectional Titles* 14-41.

142 Art 10 of the *Property Management Regulation of 2003*.

143 UCIOA § 3-108.

amendments to the declaration or by-laws, budget changes, and any proposals to remove executive board members.<sup>144</sup>

The STA requires at least fourteen days' notice of a general meeting and must specify the place, within the magisterial district where the condominium complex is situated, or other place determined by special resolution of unit owners, and the date and the hour of the meeting.<sup>145</sup> However, the 14-day period rule is not an absolute requirement. A general meeting may be called on shorter notice if agreed upon by everyone entitled to attend.<sup>146</sup> Notice must be sent to all unit owners, all mortgagees and to the managing agent, if any.<sup>147</sup> The purpose for allowing unit mortgagees and the managing agent to attend general meetings is to enable them to keep on top of a condominium's affairs. They are not entitled to vote at these meetings.<sup>148</sup> To pass a special or unanimous resolution, at least 30 days' notice is necessary to convene a special meeting.<sup>149</sup> The meeting notice should be sent by prepaid post to the owner at his/her permanent address.<sup>150</sup> Notice needs to be accompanied by a copy and description of the meeting's agenda.<sup>151</sup> To have as wide a participation of unit owners as possible at the meetings, they should preferably be scheduled after working hours.<sup>152</sup>

It is clear that first, the meeting notice should be sent out before the date of a meeting. Second, the notice has to be accompanied by an agenda sent to the unit owners and other interested persons via mail. Third, every general meeting notice must contain certain prescribed materials. This suggests that when a Chinese

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144 See n 143 *supra*.

145 Annexure 8 r 54 (1).

146 Annexure 8 r 54 (6).

147 Annexure 8 r 54 (1) (a) (b) & (c).

148 Annexure 8 r 54 (2).

149 STA s 1 (1) *s v* "special resolution" and "unanimous resolution" and Annexure 8 r 54 (7).

150 Annexure 8 r 39 (2).

151 Annexure 8 r 50 (1).

152 Van der Merwe *Sectional Titles* 14-42.

condominium statute is drafted, it should provide that for every meeting, at least 15 days' notice is required.<sup>153</sup> In addition, the secretary or other executive council officers should mail the meeting notice to a mailing address designated in writing to people who are entitled to attend the meeting. Furthermore, a Chinese statute should provide that a notice for any kind of meeting must contain its place, day and hour, any proposed resolutions for consideration at the meeting, other business for consideration, and the meeting's program. In addition, every annual general meeting notice must contain a copy of the association's annual accounts and its auditor's report, any motion for a review or adoption of the account statement, and a motion for the continuation or termination of the managing agent's appointment, if one is employed. Finally, to guarantee the notice's delivery, any future Chinese statute should also stipulate that in addition to sending the meeting notice to each and every unit owner, the executive council is responsible for placing the notice on a community notice board.

### **6 3 4 The Agenda for the Meeting**

The agenda for a general meeting of a condominium association must include matters to be discussed and decision to be made at every meeting as an item of business on the agenda and a copy of the agenda must accompany the notice of the meeting.

Although the UCIOA does not specify the matters which need to be considered at general meetings, it is implicit that the general meeting, within the ambit of the Act and the by-laws, can make any resolution to fulfill the functions and exercise the powers of the unit owners' association.<sup>154</sup> When matters are placed on the agenda, they need to be discussed and voted upon in a general meeting.

The STA, on the other hand, provides an extensive list of matters to be dealt with at

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153 Art 14 of the *Property Management Regulation of 2003*.

154 Van der Merwe *Apartment Ownership* 151-152.

an annual general meeting.<sup>155</sup> It is notable that the STA differentiates ordinary business from special business.<sup>156</sup> Ordinary businesses are matters which must be addressed by an annual general meeting, while special business includes all other matters. For example, all matters considered at a special meeting are special business.<sup>157</sup> The ordinary business which needs to be addressed at an annual general meeting is highlighted by the STA. This includes 1) the consideration of the trustees' financial statement and report;<sup>158</sup> 2) the approval of the building and individual units' schedules of replacement values and the annual budget for the following year;<sup>159</sup> 3) the appointment of an auditor or an accounting officer;<sup>160</sup> 4) the determination of the number of trustees for the ensuing year;<sup>161</sup> 5) the election of trustees for the ensuing year;<sup>162</sup> 6) special business for which notice has been given;<sup>163</sup> 7) directions or restrictions on the powers of the body corporate;<sup>164</sup> 8) the address at which legal proceedings may be instituted by the body corporate;<sup>165</sup> and 9) the confirmation by an auditor or accounting officer that any amendment, substitution, addition or repeal of the rules has been submitted to the Registrar of Deeds for filing.<sup>166</sup> Note that although special business is normally considered at a special meeting, it may also be placed on the agenda at the annual general meeting provided that due notice is given of the general nature of the relevant business and that it is within the ambit of a general

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155 The Schedule 1 of the *Sectional Titles Act of 1971* provided only two kinds of ordinary business at an annual general meeting, the consideration of accounts and the election of trustees. See the *Sectional Titles Act* Schedule 1 r 16.

156 Annexure 8 r 55.

157 Van der Merwe *Sectional Titles* 14-43.

158 Annexure 8 r 56 (a).

159 Annexure 8 r 56 (b) read with r 29 (1) (c) & 36.

160 Annexure 8 r 56 (c).

161 Annexure 8 r 56 (d) read with r 4 (1).

162 Annexure 8 r 56 (e).

163 Annexure 8 r 56 (f) read with r 54 (1).

164 Annexure 8 r 56 (g).

165 Annexure 8 r 56 (h).

166 Annexure 8 r 56 (i).

meeting's powers.<sup>167</sup> Trustees or the owners may place special business on the agenda.<sup>168</sup>

In China, the original drafters of the *Property Management Regulation of 2003* were reluctant to address the scope of issues on a meeting agenda. However, in the years since its adoption, numerous local property management rules have been enacted to address the matter in more detail than is already covered though superficially in the national level *Property Management Regulation of 2003* or customarily applied in company by-laws.<sup>169</sup> Against this background, when a Chinese condominium statute is drafted, the South African STA approach of enumerating items should be adopted to clearly state the competence of general meetings. Following the South African model, a Chinese condominium statute should prescribe a detailed agenda for the annual general meeting. The agenda of an annual general meeting consists of: 1) the election of executive council members; 2) a review and approval of the annual budget; 3) the confirmation of the minutes of the preceding general meeting; 4) an amendment, repeal, and addition to the by-laws in force; 5) a decision whether a managing agent should be appointed, and if so, which executive council powers and functions should be delegated to the managing agent; 6) an adoption of the financial statement and accounting records for the past financial period; and 7) the consideration of other motions submitted by the executive council or unit owners.

The approval of an annual budget for the ensuing year is the most important matter for careful and professional budgeting is essential for a well-run condominium development.<sup>170</sup> Therefore, all accounts and financial statements of the management body are disclosed before the annual general meeting to enable unit owners to determine whether the budget is viable. Additionally, the condominium association

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167 See n 163 *supra*.

168 Van der Merwe *Sectional Titles* 14-44.

169 Xia Shansheng *Property Management Law* 18.

170 See n 168 *supra*.

should be encouraged to set aside a certain amount of agenda time for unit owners to ask questions and comment on the annual budget before casting their votes. It is important to note that only owners and the executive council members can submit motions. These motions should be accompanied with an explanatory note and addressed to the secretary of the executive council.

### **6 3 5 Quorum**

A quorum is the minimum number of members who must be present for a body to transact business or take a vote.<sup>171</sup> When a quorum is not met, a general meeting cannot hold a vote or pass resolutions. Therefore, before a meeting can proceed a quorum must be present. Nonetheless, under the STA, the quorum is not based on the number of unit owners present, either in person or by proxy. Instead, the criterion for a quorum rests on the share of voting quotas held by unit owners.<sup>172</sup> Using the aggregate share of quotas rather than the number of owners to calculate a quorum indicates that greater emphasis is placed on the economic interests of unit owners than the democratic and social interests of unit owners.<sup>173</sup>

Both the STA and the UCIOA present quorum rules for general meetings.<sup>174</sup> The UCIOA parallels the STA in a provision providing that a quorum needs not only be present in person but also by proxy.<sup>175</sup> The STA has adopted a flexible system with variable vote percentages constituting quorums, depending on the number of units in a particular condominium.<sup>176</sup> In projects with ten units or less a quorum requires that owners who are entitled to vote and hold at least 50 per cent of the total value of votes

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171 Garner *Black's Law Dictionary* 1263.

172 Van der Merwe *Apartment Ownership* 163.

173 Van der Merwe *Sectional Titles* 14-46.

174 UCIOA § 3-109; STA Annexure 8 r 57.

175 UCIOA § 3-110; STA Annexure 8 r 57 (1).

176 Van der Merwe *Apartment Ownership* 163.

are present either in person or by proxy.<sup>177</sup> For projects with more than ten but less than 50 units, the number of owners able to vote must have at least 35 per cent of the votes and be present in person or by proxy or by a representative legally able to comprise a quorum.<sup>178</sup> For projects with 50 or more units, the quorum is at least 20 per cent of the votes present in person or by proxy.<sup>179</sup> The rationale for lowering the quorum for larger schemes may be that owners would feel marginalized and have little influence with condominium's management with a high quorum barrier.

Under the UCIOA, there is not a flexible quorum rule based on the number of condominium units. The minimum quorum permitted is 20 per cent of the voting power presented by unit owners in person or by proxy at the beginning of a meeting, unless the by-laws provide otherwise.<sup>180</sup> Mandatory quorum requirements lower than 50 per cent for general meetings are often justified due to the difficulty of inducing unit owners to attend meetings.<sup>181</sup> The problem is particularly acute with resort condominiums where many owners reside elsewhere, often at considerable distances for most of the year.<sup>182</sup>

A provision in the Chinese *Property Management Regulation* states that a quorum is met if more than half of the unit owners are in attendance or by proxy of those representing at least 50 per cent of the condominium units' floor areas.<sup>183</sup> Thus under current Chinese law, a quorum is based on both unit owners' floor area and the number of unit owners present. Requiring a large quorum percentage at the first annual general meeting is understandable for it is necessary to initiate wide-ranging owners' participation, to establish a day-to-day running body and to put a collective decision-making mechanism into operation, i.e. the executive council. However, for

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177 Annexure 8 r 57 (2) (a).

178 Annexure 8 r 57 (2) (b).

179 Annexure 8 r 57 (2) (c).

180 UCIOA § 3-109 (a) (1).

181 UCIOA 3-109 comment.

182 See n 181 *supra*.

183 Art 12 of the *Property Management Regulation of 2003* (as amended in 2007).



later annual general meetings and special meetings, a large quorum is risky, for it may be too difficult to assemble a quorum to hold the meeting. Therefore, when a Chinese condominium statute is to be framed, it should follow the UCIOA and the STA examples of lowering the quorum requirement to 30 per cent in order to convene a meeting.

Moreover, if a quorum is not present at the first meeting, it is necessary to have legal direction, a condominium statute, to provide instructions on how to convene a subsequent meeting. Under the STA, if a quorum is not present within half an hour of the time fixed for the meeting, then the meeting is adjourned to the same day a week later at the same place and time.<sup>184</sup> If at the adjourned meeting a quorum is still not present within half an hour of the meeting's commencement, it can still go ahead with the persons present or by proxy and entitled to vote as if they constitute a quorum.<sup>185</sup> At present, in China there is a legislative *lacuna* about the quorum issue both at the national level and the local level.<sup>186</sup> A future Chinese condominium statute should therefore adopt the STA "half-hour" rule to deal with a situation of a quorum not being met. However, taking into account the efficiency of general condominium administration, the future uniform Chinese statute should provide that when a quorum is not met within half an hour after the meeting is called, the meeting will be delayed to a later hour on the same day at the same place. If there is still no quorum within half an hour of the delayed start, then unit owners present and entitled to vote will constitute a quorum. The merit of this proposal is that, on the one hand, the meeting adjournment prevents an active minority from dominating a condominium's indifferent majority.<sup>187</sup> On the other hand, holding the adjourned meeting on the same day at a later time saves time and enhances management efficiency. Moreover, this

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184 Annexure 8 r 58.

185 See n 184 *supra*.

186 Zhang Lihong "To Perfect the Condominium Provisions in the Draft Property Code" 2005 (10) *Legal Science Monthly* 22-26. (Chinese version)

187 Van der Merwe *Sectional Titles* 14-47.

arrangement also avoids practical difficulties which an adjourned meeting held a week later encounters, because no notice needs to be given of the delayed meeting.

### **6 3 6 Chairperson**

The UCIOA does not address the chairperson issue, presumably because corporate law covers the topic. However, the STA rules provide that the trustees' chairperson presides at every unit owner general meeting unless another method is decided upon at the meeting by the body corporate members.<sup>188</sup> If there is not a trustees' chairperson or the trustees' chairperson is not present within fifteen minutes after the time a meeting is to begin or if the designated chairperson is unwilling or unable to act as chairperson, the members present elect a chairperson for the meeting.<sup>189</sup> There is some question as to whether an acting chairperson at a general meeting needs to be a member, but rather could be an outsider such as a managing agent or for that matter any other kind of person.<sup>190</sup>

When a Chinese statute is drafted, it should provide that the chairperson of the executive council presides at a general meeting providing of course the person is present. In the absence of the chairperson, the chairperson can well in advance nominate a member of the executive council to chair the meeting. If neither the chairperson nor the designated executive council member is present within fifteen minutes after the time set for the meeting, the executive council members present can elect one of their own to be chairman and preside over the meeting. If there is only one member of the executive council present, that person will be the chairperson. A Chinese condominium statute should further stipulate that there cannot be a general meeting without any executive council members in attendance. In fact, there must be at least one member of the executive council present at any general meeting. Selecting

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188 Annexure 8 r 59 (1).

189 See n 188 *supra*.

190 *Sectional Titles Regulation Board Proposals* (March 2003) 3.2.5.

a member of the executive council as chairperson when the executive council chairperson is absent is advantageous. First, executive council members are better acquainted with condominium affairs than non-executive council owners, let alone outsiders. Second, it is the executive council that organizes the general meeting, including sending notices, developing and putting forward meeting programs, and soliciting motions. It is illogical for an outsider or a unit owner who has not participated in the preparations for the meeting to preside. Third, the chairperson of the executive council cannot be derelict in his/her duty by being reluctant or unwilling to preside over any particular meeting. Only under very specific circumstances, such as being ill, away, suspended as chairperson for personal criminal liability, or having a conflict of interests regarding an issue to be discussed at a particular meeting, can the chairperson be absent.

### **6 3 7 Majorities Required for Resolutions**

Resolutions are decisions made at a general meeting of the management body. Unit owners decide for themselves how to manage much of a condominium's affairs by passing pertinent resolutions. According to the general principles of the law of associations, a resolution can be passed if approved by a simple majority of owners entitled to vote either in person or by proxy.

The UCIOA does not have a special provision for general meeting resolutions, presumably because the issue is under the jurisdiction of a condominium's declaration or its by-laws.<sup>191</sup> In other words, the declaration may state what percentage of unit

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191 UCIOA 2-107 (d) states that “[t]he declaration may provide: (i) that different allocations of votes shall be made to the units on particular matters specified in the declaration; (ii) for cumulative voting only for the purpose of electing members of the executive board; and (iii) for class voting on specified issues affecting the class if necessary to protect valid interests of the class.” The cumulative voting, which usually used in the corporate governance, elects the top vote-getters, just as with a simple plurality election. However, voters are allowed to concentrate their full share of votes on fewer candidates than seats. With cumulative voting, voters are permitted to not split their votes and instead concentrate them on a single candidate at full value.

owners' approval is required for any particular issue. There are cases of associations requiring a larger majority of at least 67 per cent of the votes to amend a declaration. The point is that a declaration may specify a larger majority of any percentage or the declaration can specify a smaller number if all of the units are exclusively for nonresidential use.<sup>192</sup> While there is not a particular resolution section under the UCIOA, scattered provisions dealing with a meeting's resolutions indicate that unless the declaration states otherwise, there are three categories of resolution, namely a simple majority resolution, a two-thirds vote super majority resolution, and an 80 per cent vote super majority resolution.

For a simple majority resolution, the UCIOA states that at a general meeting a majority of all unit owners can reject a proposed condominium budget unless a larger majority is specified in the declaration.<sup>193</sup> A two-thirds resolution, a super majority, is used for amending a declaration and removing an executive board member. The UCIOA stipulates that the declaration can be amended only with a larger majority of at least 67 per cent or more of the unit owners depending on what the declaration specifies.<sup>194</sup> In addition, the UCIOA specifies that the unit owners by a two-thirds vote of all owners present and entitled to vote at a unit owners' meeting with a quorum, can remove any member of the executive board with or without cause as long as neither the declaration nor the by-laws prohibit it.<sup>195</sup> A further example of a two-thirds resolution under the UCIOA is when making a decision on the relocation of boundaries between the owners' units and the common property.<sup>196</sup> The final category, the 80 per cent resolution, is used in a number of instances. For example, this "super" majority is used when a condominium project is terminated; when a part of the common property is transferred or encumbered by a security interest; when an

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192 UCIOA 2-117 (a).

193 UCIOA 3-103 (c).

194 UCIOA 2-117 (a).

195 UCIOA 3-103 (g).

196 UCIOA 2-112 (b).

amendment is made to the declaration to restrict an occupant's use of his/her unit or to restrict the behavior of people living in or making use of a unit. Specifically, the UCIOA provides that with the exception of taking a condominium unit by eminent domain, a condominium project can be terminated only when at least 80 per cent of the votes agree.<sup>197</sup> Furthermore, the Act states that in a condominium project, portions of the common property can be conveyed or subjected to a security interest by the association if 80 per cent or more of those entitled to vote consent.<sup>198</sup> Moreover, the Act also states that if 80 per cent or more of the unit owners agree by vote or otherwise they may prohibit or severely restrict the uses of a condominium unit, the number of people who may occupy it or the qualifications and behavior of those who may occupy a unit.<sup>199</sup>

Similar to the UCIOA approach, the South African STA also has three categories of general meeting resolutions: ordinary resolutions, special resolutions and unanimous resolutions. An ordinary resolution is the least difficult to pass for it only requires a simple majority.<sup>200</sup> A special resolution can be described as a "75 per cent resolution". It can be obtained in two ways, either when a majority of not less than 75 per cent of the votes (reckoned in value and number) of members of a body corporate present or represented at a general meeting agree to the proposed resolution, or when at least 75% of all the members of a body corporate (reckoned in number) and at least 75% of all such members (reckoned in value) personally or by proxy agree in writing.<sup>201</sup> Under the STA a unanimous resolution does not literally mean that a decision has to have unanimous approval. Rather, it would be more appropriate to call it an "80 per cent resolution".<sup>202</sup> Like the special resolution, a unanimous resolution can be

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197 UCIOA 2-118 (a).

198 UCIOA 3-112 (a).

199 UCIOA 2-117 (f).

200 Van der Merwe *Sectional Titles* 14-48.

201 STA s 1 (1) *s v* "special resolution".

202 Note that originally, the *Sectional Titles Act of 1971* defined a unanimous resolution as a resolution passed unanimously at a general meeting at which all owners present or represented. However, soon

obtained in two ways. It can be either passed unanimously at a general meeting attended or represented by at least 80% of all unit owners or agreed to in writing by all the unit owners.<sup>203</sup>

Interestingly, in order to facilitate a unanimous resolution, the STA stipulates that a unit owner who abstains from the resolution is counted as having voted in favor of the resolution.<sup>204</sup> This provision virtually discards abstention at any general meeting. Thus few if any unit owners abstain but rather they clearly vote for or against a resolution. The STA further facilitates a unanimous resolution with a provision that if a body corporate is unable to obtain a unanimous vote on a resolution, it can ask the court for relief.<sup>205</sup>

Under the STA, matters requiring a unanimous resolution include: 1) directing the body corporate to alienate or lease any portion of the common property;<sup>206</sup> 2) granting one or more unit owners exclusive use to a part of the common property;<sup>207</sup> 3) deciding whether to terminate or reconstruct a building which is damaged or destroyed or deemed to be destroyed;<sup>208</sup> 4) amending, substituting, adding to, or repealing the management rules of a scheme.<sup>209</sup>

Additionally, a special resolution is required in the following matters: 1) to decide whether an owner can extend the floor area of his or her unit,<sup>210</sup> 2) to direct the body corporate to execute or accept a servitude or restrictive condition burdening or

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after the Act was enacted, the law makers discovered that it was almost impossible to obtain a unanimous resolution since owners are apathetic about attending meetings. As a result, the *Sectional Titles Act of 1986* substantially changed how a unanimous resolution is defined and obtained. See more detail at Van der Merwe *Sectional Titles* 14-49.

203 STA s 1 (1) s v “unanimous resolution”.

204 STA s 1 (3) (b).

205 STA s 1 (3A).

206 STA s 17 (1).

207 STA s 27 (2).

208 STA s 48 (1) (b), s 48 (3) (a) (i) and s 49 (1).

209 STA s 35 (2) (a).

210 STA s 24 (3).

benefiting the land in the scheme;<sup>211</sup> 3) to change the value of an owner's vote or to change the amount an owner has to pay into the administrative fund;<sup>212</sup> 4) to amend, substitute, add to, or repeal the conduct rules of a scheme;<sup>213</sup> 5) to authorize the body corporate to sue the developer regarding any condominium issue;<sup>214</sup> 6) to direct the trustees not to insure the scheme against damage except for the compulsory insurance required by Annexure 8 rule 29;<sup>215</sup> 7) to determine whether to make a non-luxurious improvement to the common property;<sup>216</sup> 8) to hold a general meeting outside the magisterial district where the scheme is situated;<sup>217</sup> 9) to revoke the contract of the managing agent and discharge the person.<sup>218</sup>

It is clear from the above that there are different categories of resolutions depending on the importance of the issue involved. The more important the issue, the more onerous is the resolution. When a Chinese condominium statute is drafted, a system of resolution categories needs to be adopted based on the STA and the UCIOA legislative experiences. However, the Chinese situation is unique in the sense that most housing owners live in a condominium development since cost prevents them from living in any other kind of housing. Since condominium owners are precluded from having a housing alternative it is extremely important that there should be unit owners' consensus on important social and fiscal housing issues. One such example is the termination of a condominium complex. If a condominium can be terminated with only the consent of 80 per cent of unit owners, as is the case under the UCIOA, the remaining 20 per cent may well have an appalling struggle to find affordable housing. That said, the Chinese socio-economic factor matters.

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211 STA s 29 (1).

212 STA s 32 (4).

213 STA s 35 (2) (b).

214 STA s 36 (6) (e).

215 Annexure 8 r 29 (3).

216 Annexure 8 r 33 (2) (b).

217 Annexure 8 r 54 (1).

218 Annexure 8 r 47 (iii).

Hence, a Chinese condominium statute should include two other categories of resolution, namely, resolution by consensus and a 90 per cent super majority resolution. The former resolution could be used to terminate a condominium project. The latter resolution could be used to levy greater contributions to a maintenance fund and a reserve fund and when proposing a substantial improvement on part of the common property. Moreover, a Chinese condominium statute should maintain a clear division between the different categories of resolutions. Consequently, Chinese condominium legislation should adopt five kinds of resolution: resolutions by consensus, 90 per cent resolutions, 80 per cent resolutions, 67 per cent resolutions and simple majority resolutions.

Another noteworthy issue is allowing the passage of a by-law giving the unit owner the exclusive use of common property. Under the STA, this matter requires a unanimous resolution. However, in China, a resolution should be dependent on the period of exclusive use that is granted. A Chinese condominium statute should provide that a 67 per cent rate of approval should be used when granting an owner exclusive use of the common property for between one and three years. For a period that exceeds three years, an 80 per cent approval rate should be required.

More importantly, the STA provides that unanimous and special resolutions can be obtained in one of two ways. The required majority of the votes can be cast either by unit owners present or represented at a general meeting, or by means of a written resolution signed by the required number of owners, without a general meeting being held.<sup>219</sup> This is in part because many unit owners are indifferent about attending general meetings and in part because owners may not have the time to attend. It is for this reason that a mail-in ballot method can efficiently be utilized without holding a meeting. At least one person has categorized and termed this procedure as making resolutions outside the general meeting.<sup>220</sup> This method has some advantages. First, it

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219 See n 201 & n 203 *supra*.

220 Van der Merwe *Apartment Ownership* 164. Note that this is different from the so-called 'round



can attract better participation by involving unit owners in condominium management. For example, with a secret ballot, unit owners will not be exposed to possible intimidation for the way they cast their votes. Second, it can save cost in holding a meeting, for example, the expenses of renting a meeting hall. Third, unit owners are able to fill out their ballot on their time schedule as long as it is with a particular time period for they do not need to set a fixed time to attend a meeting. Accordingly, when a Chinese condominium statute is drafted, it should clearly make provision allowing a vote by ballot without a meeting either in writing or electronically.

## **6 3 8 Voting by Joint Owners, Tenants and Proxies**

### **6 3 8 1 Voting by Joint Owners**

Under the UCIOA, if a unit is jointly owned by two or more persons, one owner who is present at a general meeting is entitled to cast all the votes allocated to the unit. If more than one owner is present, the vote of a majority is decisive, unless the declaration expressly provides otherwise. A majority agreement negotiated between joint owners can allow any one of the owners to cast the votes without protest.<sup>221</sup>

The STA states that when two or more persons are entitled to exercise one vote jointly, the vote should be exercised only by a person jointly appointed by them as their proxy.<sup>222</sup> While normally it would be one of them, the person authorized to vote does not necessarily have to be one of the joint owners. However, where two or more persons are entitled to exercise one vote jointly, any one of them may demand a

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robin' method of the STA under which a written document containing the resolution is sent to all unit owners for their signature. This document is not secret and the method is open to peer pressure because an unwilling owner can be told that everyone else has signed. If instead of this, each owner is supplied with the document containing the resolution and asked to make a cross in favour or against and then to send it back to the chairman, the ballot would remain secret.

221 UCIOA § 3-110 (a).

222 Annexure 8 r 66 (1).

poll.<sup>223</sup>

In summary, under the UCIOA, when a unit is held by two or more owners the vote of any one of the co-owners is binding upon all. However, if more than one co-owner exercises the voting right, the vote of the majority of the co-owners binds all. This provision is logical. But the STA approach is simpler and easier for the meeting organizer to conduct. Under the STA, a unit jointly owned by more than one person should authorize one person to vote on their behalf. Obviously, this helps the meeting organizer to count the quorum since it is given to the meeting organizer in advance. The organizer does not need to spend extra time resolving a dispute concerning which joint owner has the legitimate right to vote. Therefore, when a Chinese condominium statute is framed, the South African approach is preferable. However, an additional concern is raised when joint owners cannot reach an agreement to authorize one proxy. In this case, the general principles of co-ownership should apply and the vote for such unit will count only if the co-owners agree on the way they must vote. When there is a tie between owners who are in conflict in designating a proxy, a Chinese statute should state that no vote is counted for that unit since the unit's voting right is cancelled out by the actions of each joint owner.

### **6 3 8 2 Tenant Voting**

Tenant voting is an increasingly important matter in the governance of condominium communities. The UCIOA permits a declaration requiring that votes on certain matters be cast by tenants as if they were unit owners, provided that unit owners also are given notice of any meeting at which an owner's tenant is entitled to vote.<sup>224</sup> This provision allowing owners' tenants to vote on certain specific matters is particularly useful in resort condominiums where units are often leased. It is desirable to give tenants rather than unit owners the vote on issues involving day-to-day operation since tenants may

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223 Annexure 8 r 66 (2).

224 UCIOA § 3-110 (c) & (d).

have a greater interest than owners and because it is desirable to have tenants feel they are an integral part of the condominium community.<sup>225</sup>

It has been observed that, in a significant percentage of condominiums in China, many tenants are prevented from attending general meetings and voting.<sup>226</sup> The statutory *lacuna* of tenant voting is undoubtedly attributable to unit owners feeling reluctant to lose authority on important matters such as paying monthly contributions, and granting exclusive use areas to certain unit owners. Moreover, this issue is relatively new and has not received much attention from Chinese lawmakers. Therefore, any Chinese condominium statute should recognize the desirability of integrating tenants into the condominium community. It should be explicit that any tenant with a lease of more than three years should have a right to attend meetings and unit owners should be encouraged to authorize their tenants by a power of attorney to vote on their behalf.

### **6 3 8 3 Proxy Voting**

Although neither the UCIOA nor the STA provides a specific definition of a proxy, it can be inferred that a proxy is a person to whom the unit owner has given permission to represent him/her at a meeting.

Both the UCIOA and the STA allow votes to be cast through a duly appointed proxy.<sup>227</sup> The UCIOA section 3-110 (b) provides that votes can be cast by a proxy duly executed by a unit owner. If a unit is owned by more than one person, each unit owner may vote or challenge the right to vote by the other unit owners through a duly executed proxy. A proxy, duly appointed by all the joint owners may in principle exercise the vote to the exclusion of all the joint owners.<sup>228</sup> The instrument

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225 UCIOA § 3-110 comment.

226 Li Xiandong *The Legal Guide for Resolving the Disputes Resulted from Property Management* 27-28.

227 UCIOA § 3-110 (b); STA Annexure 8 r 67 (1).

228 Van der Merwe *Apartment Ownership* 154.

appointing a proxy must be in writing and is usually valid only for one year.<sup>229</sup>

Under the STA, a proxy must be in writing and should be handed to the Chairperson prior to the commencement of the meeting.<sup>230</sup> A proxy can, but need not be an owner.<sup>231</sup> However, the managing agent or any of his/her employees or an employee of the body corporate cannot act as a proxy.<sup>232</sup> In practice, other owners, trustees and tenants are the most likely choices to be a proxy. A proxy should only be appointed for a particular general meeting and proxies usually should not be valid for more than one year.<sup>233</sup>

The UCIOA also provides a provision pertaining to the revocation of proxies. Here, a unit owner can revoke a proxy by an actual notice of revocation given to the person presiding over the association's meeting.<sup>234</sup> While there is no special provision on the proxy's revocation, the STA regards a proxy merely as a form of an agent. An owner can in principle revoke the appointment of a proxy at any time by notifying the chairperson prior to the meeting's commencement.<sup>235</sup>

Hence, when drafting a Chinese statute, lawmakers should ensure that a valid proxy be in a form prescribed by regulations. Proof of the appointment of proxies must be given to the chairperson or the secretary two days prior to a meeting. Moreover, the proxy form must state whether the proxy can vote on all matters or only on certain ones. Since a proxy lapses with time, the period specified on the proxy form should be no more than twelve months. If a proxy form does not state the length of time it is valid, it will only be valid at one upcoming meeting. This differs from the stringent UCIOA approach which states that a proxy is void if it is undated.<sup>236</sup>

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229 UCIOA § 3-110 (b).

230 Annexure 8 r 67 (2).

231 Annexure 8 r 67 (3).

232 See n 231 *supra*.

233 Van der Merwe *Sectional Titles* 14-53.

234 UCIOA § 3-110 (b).

235 Van der Merwe *Sectional Titles* 14-54.

236 See n 234 *supra*.

In addition, a future Chinese condominium statute should be clear that a proxy cannot be irrevocable, cannot be transferred to a third party and that only the most recent proxy is valid. A unit owner can revoke a proxy with a letter of revocation to the chairperson or the secretary prior to the meeting. Apart from this, the owner who issues a proxy can revoke it by attending the meeting. Note that for a jointly owned unit it can only be revoked by written notice to the chairperson or the secretary. In other words, if one co-owner is present at a meeting, a proxy authorized by all joint owners can still vote.

Two other issues need more attention. The first is the eligibility of a proxy at a general meeting. Under the UCIOA, there is not a special requirement on the eligibility of a proxy.<sup>237</sup> It is implied that anyone can be a proxy as long as the person is duly appointed. However, reiterating the STA, the managing agent or its employees or body corporate employees cannot be proxies.<sup>238</sup> This is primarily because of the potential for conflicts of interest. Those disallowed to be proxies could possibly seek financial or material benefits for themselves as proxy holders. Material benefits could include the extension of a term of appointment and an increase in remuneration. Hence, a future Chinese condominium statute should adopt this provision to defuse any such situations.

The second issue is the accumulation of votes by means of proxies. It is conceivable for a member of the executive council to collect many powers of attorney, thus giving the person control over the affairs of the condominium. This phenomenon of concentrating voting power in the hands of a member of the council is not widespread in China.<sup>239</sup> However, it would be worthwhile to forestall any such unhealthy situation. In general, there are two methods to dilute the over-concentration of voting powers by members of the executive council. One is to limit the number of

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237 Rosenberry & Sproul "A Comparison of California Common Interest Development Law and the Uniform Common Interest Ownership Act" 1072.

238 See n 231 *supra*.

239 Gao Fuping & Huang Wushuang *Property Entitlement & Property Management* 128.

unit voting rights for each proxy. The other is to place a cap on the number of votes an individual can exercise as a proxy. Both methods are workable to resolve what can often become a problem. But it seems that the capping the number of votes that a single proxy has is more appropriate since it would be consistent with the mechanism which caps a developer's voting power at the first general meeting. That is, any owner or any proxy at any general meeting cannot control more than 30 per cent of the total number of votes. Therefore, a method of capping the voting power of a single owner, whether a developer, a unit owner or a proxy, is preferable in China.

## **6 4 EXECUTIVE COUNCIL**

### **6 4 1 Introduction**

The executive council of the condominium association is a group that represents unit owners or their nominees. The executive council corresponds to the executive board under the UCIOA and the council of trustees under the STA. While the function of the general meeting is in principle legislative, the executive council has both an executive and administrative function.<sup>240</sup> Because it is impractical for all owners to attend to the day-to-day management of a condominium complex, under the UCIOA and the STA, the executive council is usually elected to execute the general meeting's resolutions and to administer the day-to-day affairs of the condominium complex.<sup>241</sup> Chinese law provides virtually the same status to executive councils.<sup>242</sup> Although the executive council is less powerful than the general meeting, its standing committee's role is evident in the management of the condominium. A quick analogy is that the executive council is the equivalent of the board of directors of a corporation and the unit owners

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240 Van der Merwe *Sectional Titles* 14-58.

241 UCIOA § 3-103; STA s 39 (1).

242 Art 15 of the *Chinese Property Management Regulation of 2003*.

are the equivalent of the shareholders.<sup>243</sup>

Nonetheless, in exceptionally small condominiums, it is not necessary to establish an executive council since the unit owners are able to handle the condominium affairs themselves.<sup>244</sup> Hence, the creation of an executive council in a condominium complex should be strongly encouraged but not be made uniformly obligatory.

Perhaps the legal nature of the executive council can be better comprehended by examining the distinction between its internal relationship with the association and external relationships and transactions with third parties. Internally, the executive council, as an administrative body, is regarded as the standing committee of the condominium association and therefore a part of it. By contrast, when it comes to its external transactions with third parties, the executive council acts as an agent of the association, rendering the association bound by all acts its executive council conducted with actual or ostensible authority.<sup>245</sup>

Actual authority here means the executive council must perform its duties subject to the restrictions imposed by the *Condominium Act*, the by-laws and the general meeting's resolutions. The executive council cannot act outside of its powers, that is *ultra vires*, for example, under the STA model rules, the trustees cannot loan money on behalf of the body corporate to owners or themselves.<sup>246</sup> It hardly needs to be said that anyone seeking to enforce an agreement against the association he or she signed with its executive council should first determine whether the executive council had such signature power.<sup>247</sup> In South Africa, it is assumed that everyone presumably is knowledgeable about any power that the Act or model rules reserve for the general meetings for they will have a constructive notice of the situation.<sup>248</sup> This means that a

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243 Rohan & Reskin *Condominium Law and Practice: Forms 42-7*; Liang Huixing *Commentary on Chinese Property Code Draft* 302.

244 Van der Merwe *Apartment Ownership* 148.

245 Van der Merwe *Sectional Titles* 14-59.

246 Annexure 8 r 26 (2).

247 Van der Merwe *Sectional Titles* 14-60.

248 See *Wiljay Investments (Pty) Ltd v Body Corporate Bryanston Crescent* 1984 2 SA 722 (T) 727D.

member of the general public can inspect the restrictions and reservations of the executive council by examining the Act or relevant documents lodged in the deeds registry.<sup>249</sup>

However, a third party has an escape hatch if the person believes in good faith that the trustees have the authority through a general meeting's resolution but later discovers the necessary resolution has never been passed. Then the so-called indoor management rule applies. This means that a third party is able to enforce a contract against the body corporate since a third party cannot be expected to look beyond a corporation's public documents and investigate its internal governance.<sup>250</sup> Such executive council's ostensible authority also applies when a third party is unaware of the restrictions made by a general meeting resolution that was made without amending the rules.<sup>251</sup>

Following is a discussion of several issues involving an executive council's powers and duties. Also dealt with are the executive council's duty of care to the association, elections, council meetings, and council members' remuneration and benefits.

## **6 4 2 Powers and Functions**

The executive council is in principle entitled to exercise all the powers and functions of the condominium association as its executive body. However, it has to be kept in mind that the executive council is subordinate to the general meeting of unit owners. Moreover, the council's powers and functions are subject to various restrictions. An example is that powers are reserved by the general meeting of unit owners to deal

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249 Constructive notice means notice arising by presumption of law from the existence of facts and circumstances that a party had a duty to take notice of, such as a registered deed or a pending lawsuit; notice presumed by law to have been acquired by a person and thus imputed to that person. See Garner *Black's Law Dictionary* 1088.

250 Van der Merwe *Sectional Titles* 14-61; also see *Torgos (Pty) Ltd v Body Corporate of Anchors Aweigh* 2006 3 SA 369 (W) [61]-[65]. In this case, the indoor management rule was confirmed by the South African court.

251 See n 250 *supra*.



with such restricted matters as deciding to alter the rate of the unit owners' monthly contributions and terminating the condominium complex.

These "restricted matters" rules are made clear under both the UCIOA and the STA. Under the UCIOA, the executive board may always act on behalf of the association except when prevented from doing so in the declaration, the by-laws, or in other provisions of the Act.<sup>252</sup> In addition to being prevented from terminating the development, an executive board is expressly restricted from amending a declaration, having anything to do with either the election of the executive board members or determining the board members' qualifications, powers, duties and terms of office.<sup>253</sup>

Under the STA, the trustees exercise their powers and functions subject to the restrictions imposed by the Act, model rules and general meeting's resolutions.<sup>254</sup> Put another way, apart from the express restrictions made by the Act and prescribed rules, the general meeting, with its legislative function retains effective control over the trustees.<sup>255</sup> This is because it can elect trustees and remove them from office and can direct trustees how to exercise their powers.<sup>256</sup> The trustees' power can only be delegated subject to the restrictions imposed by the model rules and the general meeting's resolutions.

Consequently, when there is a disagreement between an owners' association and its executive council on any issue, the decision of the general meeting prevails. An executive council cannot overrule the resolution of the general meeting. When a Chinese condominium statute is framed, this "restricted matters" principle must be formalized to defuse disputes caused by a blurring of power between the executive council and the general meeting.

The STA has adopted a minimalist approach to laying out the trustees' statutory

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252 UCIOA § 3-103 (a).

253 UCIOA § 3-103 (b).

254 STA s 39.

255 Van der Merwe *Sectional Titles* 14-35.

256 Annexure 8 r 13 (e).

powers. They are the power: 1) to appoint agents and employees for the control, management and administration of the common property and to exercise the powers and duties of the body corporate;<sup>257</sup> 2) to delegate their powers and duties to one or more of the trustees as well as to revoke the delegation as they deem fit;<sup>258</sup> 3) to sign legal papers on behalf of the body corporate.<sup>259</sup> Specifically, the trustees cannot only delegate the power to one of their members to be treasurer or secretary, but also designate some members to represent the body corporate in legal proceedings.<sup>260</sup>

Any future Chinese condominium statute should strive to root the fundamental powers of the executive council in statute as is the case in the South African Act. More importantly, a Chinese condominium statute should grant the executive council the power to delegate its powers to qualified persons. In China, since many condominiums are multi-building projects, the executive council alone finds it extremely difficult to function as a single body. Having a well thought-out organizational structure will assist the executive council to function much more smoothly.<sup>261</sup> While the STA contains no provision for a council of trustees' organizational structure,<sup>262</sup> the UCIOA stipulates that an association's by-laws require the election of the executive board members including a president, a treasurer, a secretary, and any other officers.<sup>263</sup> The American experience is that to ease the board's workload and to facilitate communications with unit owners, the executive board establishes various "standing committees".<sup>264</sup> Consequently, when a Chinese condominium statute is drafted, the executive council should delegate certain powers to members acting among other things as the treasurer dealing with fiscal affairs and

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257 Annexure 8 r 26 (1) (a).

258 Annexure 8 r 26 (1) (b).

259 Annexure 8 r 27.

260 Van der Merwe *Sectional Titles* 14-75.

261 Rohan & Reskin *Condominium Law and Practice: Forms* 42-26.

262 Van der Merwe *Sectional Titles* 14-70.

263 UCIOA § 3-106 (a) (2).

264 Rohan & Reskin *Condominium Law and Practice: Forms* 41-17.

the secretary. Therefore in China, an executive council's organizational structure at least should have the chairperson, the secretary, and the treasurer involved in the running of the condominium management. Clearly, the executive council can delegate limited powers to a managing agent if necessary to handle day-to-day operations.

A widely regarded suggestion is that the trustees also make house rules dealing with the finer details regarding the day-to-day running of a condominium.<sup>265</sup> This is a sensible provision that should be borrowed for a Chinese condominium statute. Moreover, the executive council should be obliged to update and distribute the house rules regularly.

Finally, the executive council's power to represent the body corporate in bringing legal action in a court is worthy of particular attention. Borrowing the UCIOA and the STA approach, condominium associations should be granted legal standing to sue in matters concerning the condominium project. However, in practice, granting the executive council the power to sue in court without reservation is somewhat insidious. This is particularly true with money disputes when a unit owner refuses to pay his/her contributions. First, the court proceedings are costly and distracted and very often litigation itself is more expensive than the money claimed. Second, with unfettered power to press a money claim in court, the executive council could probably insist on resolving disputes in court instead of first employing amicable persuasion, mediation or arbitration. Moreover, litigation may not be in the best interests of maintaining a harmonious community,<sup>266</sup> since the court should be the last resort but not the first which comes into council members' minds. In the United States, the question whether an executive board has an exclusive standing on behalf of an association has been considered by the courts. The courts have consistently held that an association has exclusive standing to assert such claims as the handling of association funds<sup>267</sup> as

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265 Van der Merwe *Sectional Titles* 14-76.

266 Smith "An Initial Assessment of English Commonholds" 2005 (16) *Stell L R* 527.

267 *Poulet v HF O LLC* 353 Ill App 3d 82, 99, 288 Ill Dec 404, 817 N E 2d 1054 (Ill App Ct 2004).

well as common property and limited common property.<sup>268</sup> Given that Chinese condominium law is still undeveloped, many executive council members are not equipped well enough with legal skills and knowledge. When a Chinese condominium statute is framed, it would be worthwhile to stipulate that for legal matters involving large expenditures and unit owners' fundamental interests, the power to commence legal proceedings be placed in the hands of the general meeting. For legal matters involving small expenses and daily controversies, the executive council would have jurisdiction. What constitutes a large expenditure and what constitutes a small expenditure as well as what constitutes a fundamental matter would be defined by the constitutive document or a general meeting's resolution.

### **6 4 3 Duty of Care**

The UCIOA makes clear that the officers and members of the executive board appointed by the developer hold their offices as fiduciaries of the unit owners.<sup>269</sup> The rationale for this is to avert potential conflicts of interest between the developer and the unit owners.<sup>270</sup> However, the executive board members elected by unit owners are only required to take ordinary and reasonable care rather than a higher standard of fiduciary duty.<sup>271</sup> This only requires that "in the performance of their duties, the executive board members should discharge their duties in good faith, and with that diligence and care which an ordinarily prudent person would exercise under similar

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268 *Board of Directors of Kennelly Square Condominium Association v MOB Ventures LLC* 359 Ill App 3d 991, 996, 296 Ill Dec 700, 836 N E 2d 115 (2005).

269 UCIOA § 3-103 (a) stipulates that "In the performance of their duties, officers and members of the executive board appointed by the declarant shall exercise the degree of care and loyalty required of a trustee." In addition, § 3-103 comment 3 expressly states that "[a]ny executive board member appointed by the declarant is liable as a fiduciary to any unit owner for his acts or omissions in such capacity."

270 UCIOA § 3-103 comment 1.

271 Di Lorenzo *The Law of Condominium and Cooperatives* 3-4; Van der Merwe "The Sectional Title Act in the Light of the Uniform Condominium Act" 24.

circumstances.”<sup>272</sup> It seems that the UCIOA only relies on a business judgment rule as the basis to evaluate an executive board’s actions.<sup>273</sup> This means that as long as directors of a corporation decide matters rationally, honestly, and without a conflict of interest, the decision will not be reviewed by the courts.<sup>274</sup>

In contrast to the UCIOA, the STA requires each trustee to be in a fiduciary relationship with the body corporate.<sup>275</sup> Here the trustee must act honestly and in good faith towards the body corporate and avoid any material conflict between his/her own interests and those of the body corporate.<sup>276</sup> Under the STA, the trustee has to notify the other trustees at the earliest opportunity of any direct or indirect conflict of interest in any contract between him/her and the body corporate.<sup>277</sup> While the examples enumerated in section 40 (2) of the STA are not exhaustive they have wider implications.<sup>278</sup> Nevertheless, the duty required by the STA is not a duty of care<sup>279</sup> reasonably expected from a person with his/her knowledge and experience as under company law.<sup>280</sup> This is made clear in section 40 (3) (a) of the STA that states that a trustee can only be held delictually liable for any loss and any economic benefit derived by him/her on account of his/her *mala fide* or grossly negligent act or omission. When a trustee fails to disclose any conflict of interest in a contract entered into by him/her on behalf of the body corporate for an economic benefit, the contract is voidable at the discretion of the body corporate. The STA further provides that if the

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272 See *North Carolina General Statute* § 47C-3-103(a).

273 UCIOA § 3-103 comment; Schiff “Sponsor’s Board Owns a Fiduciary Duty to Condo” *Real Estate Weekly* (Jan 24 1996) 11.

274 *Atkins v Hibernia Corp* 182 F3d 320, 324 (5th cir 1999).

275 STA s 40 (1).

276 Van der Merwe *Sectional Titles* 14-62 & 14-63.

277 STA s 40 (2) (a).

278 The Sectional Titles Regulation Board has suggested that a code of conduct for trustees should be included as an additional schedule to the Regulations. See Van der Merwe *Sectional Titles* 14-63 ft 399.

279 The duty of care means a legal relationship arising from a standard of care, the violation of which subjects the actor to liability. See Garner *Black’s Law Dictionary* 523.

280 Van der Merwe *Sectional Titles* 14-64.

body corporate decides to void such a contract, an interested person can ask for a court order directing that the contract is still binding if it is fair and fits the circumstances.<sup>281</sup> This is quite different from the general principle applied in contract law when a contract is deemed void: the contract is *ab initio* non-existent but restitution must be applied to restore the *status quo*.<sup>282</sup> Therefore, it can be seen that under the STA, far from being subject to a high standard of duty of care and skill, trustees in a sectional title scheme only incur liability if they are *mala fide* or grossly negligent in conducting their duties and functions and in exercising their powers.

Hence, both the UCIOA and the STA impose a lower standard of duty of care on executive board members or trustees. For the STA, the main reason for this leniency is to encourage unit owners to serve as trustees.<sup>283</sup> Similarly, under the UCIOA, the lower standard of duty of care has as its purpose to increase the willingness of unit owners to serve as board members and officers.<sup>284</sup>

When a uniform Chinese condominium statute is drafted, a lower standard of duty of care also needs to be adopted. Specifically, a Chinese condominium statute should clearly state that a council member must: 1) disclose to other council members any direct or indirect contract with the unit owners' association; 2) not vote on the contract; and 3) excuse himself/herself from the council meeting when the contract or any other related transaction is being discussed. Particularly important is that Chinese lawmakers should induce unit owners to be more inclined to be council members while at the same time preserving a high standard of council members' services. To strike this balance, any future Chinese condominium statute should distinguish "owner council members" and "outsider council members" in terms of a standard, if any, for a duty of care. For unit owners who serve as council members, a lower

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281 STA s 40 (3) (b).

282 See n 280 *supra*.

283 Van der Merwe *Sectional Titles* 14-65.

284 UCIOA 3-103 comment 1.

standard of duty of care is suitable because they are most probably unpaid.<sup>285</sup> However, for experienced professionals from outside serving on the executive council, an ordinary duty of care should apply since they are normally paid for their services.

#### **6 4 4 Appointment and Qualification**

Under the UCIOA, the appointment of executive council members has two stages: first, during the initial period, the developer can appoint transitional council members ("developer's council members"); second, after the initial period, all of the council members appointed by the developer must be removed at the first general meeting when new council members are appointed or old ones re-appointed with the unit owners' approval.<sup>286</sup> The developer has no choice but to turn over control of the association to owner-elected council members within a specified time. The UCIOA carefully lays out the provisions for a gradual turnover of control of the association to the unit owners: 1) 60 days after the developer transfers title to purchasers of 25 per cent of the units, at least one member and not less than 25 per cent of the members of the executive board must be elected by the unit owners; or 2) 60 days after the title transfer of 50 per cent of the units to purchasers, not less than 33 per cent of the members of the executive board must be elected by unit owners.<sup>287</sup>

Under the STA, the model rules provide that all owners are trustees from the time the body corporate is established until the first general meeting.<sup>288</sup> The rule is that the developer must convene the first general meeting within 60 days after the establishment of the body corporate.<sup>289</sup> The developer or his/her nominee can be the chairperson during this period but all transitional trustees, whether unit owners or the developer, must resign at the first general meeting but they still are eligible for

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285 See n 357 *infra*.

286 UCIOA 3-103 (d).

287 UCIOA 3-103 (e).

288 Annexure 8 r 4 (2),

289 STA s 36 (7) (a) and Annexure 8 r 50 (1).

re-election.<sup>290</sup>

While Chinese law provides for the appointment of a managing agent during the initial period,<sup>291</sup> there is no such a “developer’s council members” provision. It is only practical for the developer to be in control during the developmental phases of a project. Therefore, when a Chinese condominium statute is drafted, it should provide that the “developer’s council members” are in charge during the transitional period but are required to resign at the first general meeting. Subsequently, the unit owners elect an executive council at the first general meeting.

Who is eligible to be an executive council member, and who is not, is an important issue. The UCIOA implies that a council member does not necessarily need to be a unit owner for it has a provision that at least a majority of the executive board members must be unit owners.<sup>292</sup> Likewise, under the STA, the model rules stipulate that a trustee need not be an owner or even the nominee of a juristic person owner.<sup>293</sup> But like the UCIOA, the STA also mandates that the majority of the trustees have to be owners or spouses of owners.<sup>294</sup> Therefore, both the UCIOA and the STA allow any person who is not an owner but nominated by an owner standing for election to be a council member. However, the STA provides an important exception. That is, the managing agent or one of the agent’s employees or a body corporate employee cannot be a trustee.<sup>295</sup>

Under Chinese law, executive council members must be either a unit owner or a representative of a corporation owner.<sup>296</sup> In short, only unit owners can be eligible as council members. This is inappropriate since excluding outside candidates may be an

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290 Annexure 8 r 4 (3) & r 18.

291 Arts 21-26 of the *Property Management Regulation of 2003*.

292 UCIOA § 3-103 (f).

293 Annexure 8 r 5.

294 See n 293 *supra*.

295 Annexure 8 r 5 (a) & (b).

296 Art 16 (2) of the *Property Management Regulation of 2003*; art 23 of the *Property Management Regulation of Shenzhen Special Economic Zone of 2007*.



obstacle in bringing professional experience to the executive council.<sup>297</sup> When additional skills or experience is needed or an insufficient number of unit owners are willing to serve as council members, suitably qualified outsiders should fill the gap as appointees.<sup>298</sup> In China it is difficult to have experienced council members with required skills, since the management of condominiums by unit owners is still a novelty. Nevertheless, a future Chinese condominium statute should follow the STA approach requiring that the majority of council members should be unit owners. This ensures that the majority of executive council members have a genuine economic stake and a personal interest in the efficient management of the condominium.

Hence, for future Chinese condominium legislation, a restricted number of non-owners with expertise should be eligible for election to the council. Moreover, the STA approach to disqualify the managing agent and its employees as well as the employees of the body corporate from council membership is a sensible measure to forestall conflict of interest problems.<sup>299</sup> This provision should also be employed in any future Chinese condominium statute to erect a barrier against conflicts of interest, graft and corruption. Finally, a uniform condominium statute should provide expressly that unit owner candidates seeking election to the executive council must show seven days prior to the election that they are not in arrears with their condominium contributions.

## **6 4 5 Number of Council Members**

Under the UCIOA, unit owners should elect an executive board of at least three members.<sup>300</sup> The exact number of the executive board members of each

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297 Rosenberry *Analysis of Responses to an LCD Consultation Paper – Proposals for Commonhold Regulations* 65.

298 Van der Merwe *Sectional Titles* 14-66.

299 See n 298 *supra*.

300 UCIOA § 3-103 (f).

condominium complex is stated in the by-laws of the association.<sup>301</sup> Under the STA, the unit owners must determine the number of trustees needed for the ensuing year at every annual general meeting.<sup>302</sup> Although the number of trustees can vary at every general meeting,<sup>303</sup> the STA requires there should be no less than two trustees.<sup>304</sup>

Under Chinese law, the number of council members remains largely unregulated. Neither the national level *Property Management Regulation of 2003* nor the *Shanghai Property Management Regulation of 2004* contains a provision as to the number of council members. In practice, many problems may arise through this oversight, since the number of council members determines the difficulty of constituting a council meeting quorum and of obtaining a council decision with a simple majority. The most recent local property management rule namely the *Property Management Regulation of Shenzhen Special Economic Zone*, removes this uncertainty by stipulating that the number of the executive council's members in a condominium association should be an odd number from five to seventeen.<sup>305</sup> This is a worthwhile step and should be employed when a uniform condominium statute is drafted. However, it is inappropriate to cap the number of council members at seventeen, as is done in Shenzhen. The reason it would not work is that an executive council should include at least one representative from the executive committee of each subsidiary body.<sup>306</sup> And, since multi-building condominium projects vary greatly in their number of subsidiary bodies, i.e. the number of their buildings, it is not realistic to cap the number of council members by statute. Rather, any future Chinese condominium statute should clearly state that the number of directors be no less than three and not subject to a maximum number. It should be left to the condominium association using

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301 UCIOA § 3-106 (a) (1).

302 Annexure 8 r 50 (2) (vi).

303 Annexure 8 r 4 (1).

304 See n 303 *supra*.

305 Art 24 of the *Property Management Regulation of Shenzhen Special Economic Zone of 2007*.

306 See n 112 *supra*.

its by-laws to determine and regulate the size of its council.

## **6 4 6 Election, Terms of Office, and Removal**

Under the STA, the trustees are elected at the first annual general meeting and each subsequent annual general meeting.<sup>307</sup> Similarly, the UCIOA specifies that the election of an executive board is subject to the by-laws of the association.<sup>308</sup> An example of this is having ballots listing all nominees' names prepared in advance of the election for each unit.<sup>309</sup> When a Chinese condominium statute is drafted, it should employ the UCIOA approach and allow each condominium association employing a by-law or special resolution to show the fine details of its council member elections.

The UCIOA contains no special regulations about the term of office of board members, their re-election or their removal. All such matters fall under an association's by-laws.<sup>310</sup> However, the UCIOA does state that an executive board may fill any board vacancies for the remaining period of any term.<sup>311</sup>

Under the South African model rules, trustees hold office until the next annual general meeting at which time they are eligible for re-election.<sup>312</sup> When there are no nominations or insufficient nominations, the trustees are eligible for re-election but must be nominated in the same way as any other person who is elected for the first time.<sup>313</sup> A trustee who fills a vacancy by appointment holds the office until the next annual general meeting.<sup>314</sup> If a trustee is absent or unable to function, he or she may appoint an alternate trustee, whether the person is a unit owner or not. An alternate

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307 Annexure 8 r 6.

308 UCIOA § 3-106 (a).

309 Rohan & Reskin *Condominium Law and Practice: Forms* 41-14 & 43-53.

310 UCIOA § 3-106 (a) (3).

311 UCIOA § 3-103 (b).

312 Annexure 8 r 6.

313 Van der Merwe *Sectional Titles* 14-67.

314 Annexure 8 r 8.

trustee ceases to hold office if the trustee he or she replaces ceases to be a trustee, or if the trustees revoke the alternate's appointment.<sup>315</sup> A trustee may be removed from office before the expiry of his/her term of office by an ordinary resolution at a special general meeting.<sup>316</sup> The STA model rules provide that a trustee ceases to hold office in the following circumstances: 1) when the trustee resigns his/her office by written notice to the body corporate;<sup>317</sup> 2) when the trustee has severe mental problems, or put another way, is of unsound mind;<sup>318</sup> 3) when the trustee's estate is insolvent or it has been seized;<sup>319</sup> 4) when the trustee is convicted of an offence involving dishonesty;<sup>320</sup> 5) when the trustee is no longer qualified from acting as a director of a company in terms of the Companies Act.<sup>321</sup> Finally, it is maintained that a paid non-owner trustee with an appointment contract is entitled to claim damages should the body corporate breach the contract by removing the person from office without sufficient cause.<sup>322</sup>

Although Chinese national level law is silent on the term of office of a council member, local property management regulations tend to fill the gap. Among others, the *Shanghai Property Management Regulation* states that the term of office for the executive council is from three to five years,<sup>323</sup> while the *Property Management Regulation of Shenzhen Special Economic Zone* stipulates that a council member's term of office is three years.<sup>324</sup> Legislative experience suggests that the best choice is

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315 Annexure 8 r 9.

316 Annexure 8 r 13 (e).

317 Annexure 8 r 13 (a).

318 Annexure 8 r 13 (b).

319 Annexure 8 r 13 (c).

320 Annexure 8 r 13 (d).

321 Annexure 8 r 13 (f). See section 218 and 219 of the *Companies Act of 1973*. Briefly, these provisions are general principles to disqualify a person being a director of a company, such as not being a minor, not being unrehabilitated insolvent, and not being removed from an office of trust on account of misconduct.

322 Van der Merwe *Sectional Titles* 14-69.

323 Art 14 of the *Shanghai Property Management Regulation of 2004*.

324 Art 41 of the *Property Management Regulation of Shenzhen Special Economic Zone 2007*.

a staggered three-year term since this maintains the continuity of a smooth-running management, especially in large multi-building developments. A system of rotation at every subsequent annual general meeting with one-third of the council members finishing their term, retiring or resigning, rejuvenates the administrative structure. If the number of council members is not three or a multiple of three, the number nearest to one-third should leave. Generally, council members who retire or resign by rotation are those who have been in office the longest. The major advantage of this kind of continuity is to maintain a majority of experienced council members in office while providing for an infusion of new members.<sup>325</sup> Moreover, a maximum term prevents trustees from being re-elected indefinitely.<sup>326</sup> Consequently, a new Chinese condominium statute should provide for the “rotation system”. Furthermore, a condominium statute should follow the STA approach by stipulating that the unit owners’ general meeting can appoint a person by ordinary resolution who is willing to be a council member either to fill a vacancy or as an alternate council member.

However, there is long-standing argument as to whether the longer council members are in office, the more likely they will be abusive in office. Along the same lines, the longer term of office will encourage the dereliction of duty by some council members. It also unnecessarily keeps incompetent council members in office. Nonetheless, these concerns can be mitigated by strict rules on removing council members from office. Under the *Regulation of the Owners’ General Meetings of 2003*, the existing council members can be removed from office in the following instances: 1) when the member is no longer a unit owner because he or she has moved or there is substantial damage to his/her unit; 2) when the member is absent for three consecutive or more from council meetings without good cause; 3) when the member is not capable of performing his/her duties due to a serious physical or mental illness; 4) when the member has been convicted of any criminal offence; 5) when the member

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325 Van der Merwe *Sectional Titles* 14-70.

326 See n 325 *supra*.

resigns his/her office by written notice; 6) when the member refuses to undertake a unit owner's responsibility such as paying the contributions.<sup>327</sup>

It is clear from the above that the Chinese provision to remove council members from office is more stringent than the STA approach. For instance, under Chinese law, any council member who has been convicted of any criminal offence is liable to be dismissed. But under the STA model rules, a trustee can only be removed from office when the trustee is convicted of an offence involving dishonesty. Another example is that under Chinese law, a council member's dereliction of duty can result in the member's dismissal; this usually comes into play if a member has not attended a council meeting continually for three sessions during the member's term of office. There is no such provision in the STA. The reason why Chinese law needs to be draconian on a council member's dismissal is to maintain a balance between the continuity of a member's office and the timely removal of unqualified council members. Still, the less stringent STA approach is understandable since most condominium projects struggle to find members willing to serve as trustees.<sup>328</sup> However, a future Chinese condominium statute in addition to maintaining the existing departmental provisions, should borrow the STA provision that the office of a council member must be vacated when the council member becomes bankrupt.<sup>329</sup>

### **6 4 7 The Executive Council Meeting**

The executive council exercises its powers by passing resolutions at a council member meeting. However, when a by-law or rule authorizes the executive council to delegate certain powers to one or more of its members, the member can exercise the delegated power without the need for a council meeting.

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327 Art 30 of the *Regulation of the Owners' General Meetings of 2003*.

328 Van der Merwe *Sectional Titles* 14-66.

329 See n 319 *supra*.

## 6 4 7 1 Holding Council Meetings

Neither the UCIOA nor the STA specify how often executive board or trustees meetings must be held. Consequently, council meetings are held from time to time as the need for them arises. This is also the case in Chinese law.<sup>330</sup>

While there is no express provision as to how to convene a council meeting under the UCIOA, the STA allows any trustee to call a meeting at any time after giving not less than seven days' written notice to other trustees and all first mortgagees who have requested in writing that they want to receive all of the trustee meeting notices.<sup>331</sup>

The most recent local property management regulation, namely, the *Property Management Regulation of Shenzhen Special Economic Zone of 2007* stipulates that more than one third of the council members can request the chairperson of the executive council to convene a council meeting.<sup>332</sup> The chairperson then is responsible for summoning and chairing the council meeting. If the chairperson or his/her deputy is present, the person must chair all executive council meetings. If the chairperson is away, the sub-district office must designate another council member to summon and chair the meeting.<sup>333</sup> It would seem the reason it takes at least a third of the council members to call for a meeting rather than a single member is that there are a great many multi-building complexes in China, so there are executive councils with quite a number of council members. If a single council member could propose a meeting at any time, the council's workload would increase significantly and it would be at risk of being overwhelmed by trivial matters. Therefore, this provision should be incorporated into the future Chinese condominium statute.

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330 Art 25 of the *Regulation of the Owners' General Meetings of 2003*.

331 Annexure 8 r 15 (2) read with r 15 (3).

332 Art 29 of the *Property Management Regulation of Shenzhen Special Economic Zone of 2007*.

333 See n 332 *supra*.

## 6 4 7 2 Notice

The UCIOA says nothing about a council meeting's notice, presumably because it falls under the jurisdiction of an association's by-laws. The STA model rules provide that trustees may give notice of convening meetings.<sup>334</sup> It would be unreasonable and unnecessary to give notice to a trustee when he or she is away from South Africa, but notice of a meeting should be given to his/her alternate provided the trustee has appointed one.<sup>335</sup> Also a trustee who wants to convene a meeting should give at least seven days' written notice to other trustees and concerned institutional lenders before the meeting is held.<sup>336</sup> Furthermore, the STA model rules provide that a shorter notice is justified if the circumstances warrant it.<sup>337</sup>

In China, neither law at the national level nor at the local level has a provision concerning a council meeting's notice. However, there is the implication that notice should be served under certain circumstances. As an example, the chairperson is bound to summon a council meeting when requested to do so. It is implied that the chairperson needs to send a notice to each and every council member beforehand. However, there is a loophole, for in the absence of an explicit requirement of having to send out a notice of a council meeting, the council is able to go into a closed meeting. The availability of closed meetings has reportedly been abused by a number of executive councils in China.<sup>338</sup> Therefore, a future Chinese condominium statute should make a provision that not only should notice of a council meeting be given to each executive council member seven days in advance but also that the secretary of the executive council must post a notice on the condominium's public notice board at

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334 Annexure 8 r 15 (1).

335 See n 334 *supra*.

336 Annexure 8 r 15 (2) & (3).

337 Annexure 8 r 15 (2).

338 Xin Time Report "Deep Investigation of Disputes in the Executive Council of Condominium Owners' Association" Online: [http://www.cq.xinhuanet.com/2007-03/12/content\\_9486113.htm](http://www.cq.xinhuanet.com/2007-03/12/content_9486113.htm) [2008 03 15] (Chinese version)



least three days before an executive council meeting is held. If the secretary is away, an alternate council member designated by the chairperson or his/her deputy should take care of the notice board issue. The notice must contain a detailed meeting agenda.

### **6 4 7 3 Owners and Other Parties' Attendance**

Under the STA, an owner is entitled to attend and speak at any meeting of the trustees, but the owner cannot vote.<sup>339</sup> Likewise, any unit's first mortgagee's representative is entitled to attend and speak at all trustee meetings but is not allowed to vote.<sup>340</sup> These provisions represent a so-called "sunshine" meeting policy,<sup>341</sup> in that they grant unit owners the right to information by allowing them to attend council meetings. The purpose is to make the trustees' activities transparent and to make it difficult for autocratic trustees to bypass and override owners intentionally.<sup>342</sup> In a future uniform Chinese condominium statute lawmakers should borrow this policy and stipulate that all executive council meetings be open to unit owners. Owners who wish to attend a council meeting should give the secretary notice no later than three days before the meeting.

However, it is sometimes argued that it is more appropriate not to allow unit owners to speak at council meetings since this practice would result in inefficiency and cause a great deal of disquiet. First, since there are usually dozens of unit owners and their families in a Chinese condominium complex, if many of them attend and speak, the council meeting functions much like a general meeting. Second, there are instances of owners at council meetings being held up to ridicule and scorn for a decision made by the council. Both of these problems should be avoided in order to achieve the efficient management expected from elected executive council members. Accordingly, a

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339 Annexure 8 r 15 (4).

340 Annexure 8 r 15 (5).

341 For example, *Virginia Condominium Act of 1974* (Virginia Stat Ann 55-510.1).

342 Van der Merwe *Sectional Titles* 14-72.

Chinese condominium statute needs to strike a balance between the owners' right to information and the efficiency of council meetings. That said, a Chinese statute should allow unit owners to attend council meetings as observers without the right to speak unless a majority of the executive council agrees to give it to them.

#### **6 4 7 4 Quorum**

Under both the UCIOA and the STA, the quorum for an executive council meeting is at least half of the members. The UCIOA states that unless the by-laws specify otherwise, a quorum is present for any executive board meeting if board members entitled to cast 50 per cent of the votes are present at the beginning of the meeting.<sup>343</sup> Under the STA, 50 per cent of the trustees but not less than two constitute a meeting's quorum.<sup>344</sup> If the number of trustees falls below a quorum, the remaining trustees can continue to act but only for the purpose of appointing or co-opting additional trustees to make up a quorum or to convene a general meeting of owners.<sup>345</sup> The STA is quite specific and stipulates that if at a meeting a quorum is not present within thirty minutes of the meeting being called to order it should stand adjourned to the next business day at the same time when a quorum can be formed as long as it is no less than two members.<sup>346</sup>

In China, a local property management regulation specifies that more than half of the council members should be present at any council meeting.<sup>347</sup> This needs to be fleshed out and placed in a future Chinese condominium statute. Specifically, it should state that to form a quorum for a council meeting, at least 50 per cent of the council members must be present at the meeting. To avoid uncertainty, provision should be made where necessary for the number to be rounded up to the next highest

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343 UCIOA § 3-109 (b).

344 Annexure 8 r 16 (1).

345 Annexure 8 r 16 (2).

346 Annexure 8 r 17.

347 Art 29 (5) of the *Property Management Regulation of Shenzhen Special Economic Zone of 2007*.

number. For example, if there are five members the quorum is three rather than two. In addition, it should also adopt the STA “thirty minutes” rule of having a second meeting rescheduled to the same time on the next business day if no quorum is present thirty minutes after the first meeting begins.

However, whether to allow council members to appoint or co-opt others in order to constitute a quorum, as is the case under the STA, merits further discussion. The justification for this rule is to avoid intentional “quorum-busting” by some council members.<sup>348</sup> Council members favoring the *status quo* would use this obstructive strategy. If a significant number of members choose not to be present, the meeting fails due to lack of a quorum and the *status quo* remains. To prevent such actions, this rule may be a solution. However, the pitfall of its use is obvious. It is possible for the remaining council members to co-opt their spouse or others who will act in concert with them.<sup>349</sup> Consequently, the remaining council members can impose their own ideas and decisions upon the unit owners. Fortunately, the “thirty minutes” rule can provide a resolution for if council members intend to be absent from the meeting, the adjourned second meeting will go ahead as if the quorum was present. Hence, on balance, given that condominium governance in China is still in the early development stage, Chinese law should not adopt this rule.

#### **6 4 7 5 Voting**

While the UCIOA does not state the voting procedure for council meetings expressly,<sup>350</sup> the STA provides a great amount of detail on the matter. The STA requires that all matters at a trustees’ meeting be determined by a simple majority of the trustees present and voting.<sup>351</sup> If the votes are evenly divided, the chairperson has

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348 Van der Merwe *Sectional Titles* 14-73.

349 See n 348 *supra*.

350 This is because the UCIOA adopts a liberal approach allowing such issue to be regulated by condominium by-laws. See Rohan & Reskin *Condominium Law and Practice: Forms* 43-54.

351 Annexure 8 r 22.

an extra vote to break the tie.<sup>352</sup> Moreover, a trustee with an interest in a contract or litigation with the body corporate is disqualified on a vote pertaining to the contract or litigation.<sup>353</sup>

For a future Chinese condominium statute, all the abovementioned provisions from the STA need to be adopted including allowing a chairperson's casting vote. A casting vote is necessary, because even having an uneven number of members for the council and for the quorum,<sup>354</sup> does not prevent there being an even number of members attending, or voting. Therefore, with a quorum a motion is passed when a majority of the members present vote for it. A council member having an interest conflict with the motion is disqualified from voting automatically.

Particularly important is that under the STA, unlike general meetings, trustees can vote with a written ballot even though the meeting is not actually held. If the trustees wish to resolve a matter without holding a meeting, a written resolution signed by all the trustees who are present in the country and constitute a quorum is as valid as if it had been passed at a duly held trustees' meeting.<sup>355</sup>

The "written resolution" method is sensible and convenient since it effectively deals with trivial matters for which it is not worthwhile holding a meeting.<sup>356</sup> Hence, a future Chinese condominium statute should provide that the executive council can act by unanimous consent as documented in a resolution signed by all its members in lieu of a meeting. When the "written resolution" method is followed, a notice must be placed on the notice board of the condominium and given to each council member beforehand in a timely manner. When decisions passed by unanimous written consent in lieu of a formal meeting, the unit owners must be notified and the decision must be put in the minutes and be available for inspection.

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352 Annexure 8 r 18.

353 Annexure 8 r 23.

354 See n 305 *supra*.

355 Annexure 8 r 24.

356 Van der Merwe *Sectional Titles* 14-74.

## 6 4 8 Remuneration and Indemnification of Council Members

Generally, executive council members serve without any remuneration. Before authorizing payment for a council member, the association should examine its own condominium documents to determine whether such a payment for services is permissible.

Although the UCIOA contains no special provision dealing with the remuneration of executive board members, the STA makes it clear that unless there is a special resolution of the body corporate, “owner trustees” are not entitled to remuneration for their services.<sup>357</sup> This is based on the presumption that “owner trustees” have such a genuine personal interest in efficient management of the condominium that they provide their services for love and charity.<sup>358</sup> However, the model rules allow non-owner trustees to receive pay as long as there is an agreement between the body corporate and the non-owner trustees.<sup>359</sup> Furthermore, the model rules make provision for the reimbursement of all trustees, including “owner trustees”, of expenses reasonably incurred in performing their duties and exercising their powers.<sup>360</sup>

In summary, being a council member means among other things, attending meetings regularly, dealing with correspondence from owners, organizing general meetings, and amending and enforcing by-laws and house rules. This is not an easy job. One can argue that good trustees who have a genuine interest in management of a condominium complex deserve remuneration. But payments to council members may change the dynamics in a condominium association since council members would become “employees” of the management body. Consequently, not only would the standard of their duty of care be higher, but they would be subject to being dismissed.

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357 Annexure 8 r 10 (1).

358 Van der Merwe *Sectional Titles* 14-69.

359 Annexure 8 r 10 (2).

360 See n 359 *supra*.

In short, they could be fired. Consequently, when a Chinese condominium statute is drafted, it should employ the STA approach to let the unit owners decide council members' payment for services. This kind of flexibility is a reflection of unit owner autonomy. Moreover, allowing non-owner council members to be remunerated is an effective measure to attract skillful and experienced "outsider professionals" to serve as council members. Furthermore, when unit owners consider it necessary and fit to compensate "insider council members" for their services, such remuneration can be made a budget item in the agenda for general meetings in the by-laws or approved at an annual or special general meeting by special resolution. Finally, it is necessary to transplant the STA provision that council members be reimbursed all expenses reasonably and properly incurred in the exercise of their duties. Particularly noteworthy are expenses incurred for attending training courses and professional body meetings.

During their term of office, executive council members should realize the potential risk of personal liability in the performance of their duties. An executive council member may be held personally liable for a wrongful action even though the wrongful conduct was engaged in on behalf of the condominium association.<sup>361</sup> For example, condominium council members can be held liable for failing to fix a broken lock<sup>362</sup> or for a unit owner being raped on common property of an apartment building.<sup>363</sup> Council members also may find themselves to be liable for libel and defamation<sup>364</sup> or mismanagement of a condominium's affairs.<sup>365</sup> For these reasons, the UCIOA stipulates that the owners' association can provide for the indemnification of its executive board members and officers and maintain liability insurance for its directors

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361 Rohan & Reskin *Condominium Law and Practice: Forms* 42-49.

362 *Lay v Dworman* 732 P 2d 455 (Okla 1986).

363 *Nixon v Mr Property Management* 690 S W 2d 546 (Tex 1985).

364 Hyatt & Stubblefield "Community Association Boards Should Minimize Potential Liability" 1987 (5) *Real Probation & Property* 25-26.

365 Rohan & Reskin *Condominium Law and Practice: Forms* 42-50.

and officers.<sup>366</sup> Similarly, under the STA, the model rules indemnify trustees and other officers of the body corporate against all costs, expenses and claims which a trustee may incur or become liable for while conducting his/her duties, unless the trustee was acting *mala fide* or with gross negligence.<sup>367</sup>

Such indemnities often comfort executive council members and encourage unit owners to take office on the executive council.<sup>368</sup> It is for this reason that any future Chinese condominium statute should include an indemnification clause for executive council members. Such expenses are borne by all the unit owners by means of their contributions to the management fund.

## **6 5 MANAGING AGENT**

### **6 5 1 Legal Nature**

A managing agent is either a natural person<sup>369</sup> or a management company with professional qualifications engaged by a condominium's management to manage a property for a fee. The managing agent provides specialized service providers to attend to the day-to-day maintenance and repairs of the common property, in short, to handle the management of the condominium project.

The status of the managing agent depends on his/her relationship with the management body. The managing agent is a representative appointed by the condominium association and entrusted with the daily management and maintenance of the condominium project.<sup>370</sup> Powers and functions are usually specified in an

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366 UCIOA § 3-102 (a) (13).

367 Annexure 8 r 12 (1) (a).

368 Van der Merwe *Sectional Titles* 14-70; Rohan & Reskin *Condominium Law and Practice: Forms* 42-50.

369 Van der Merwe maintains that any person, even a trustee or sectional owner, may be appointed as a managing agent. See Van der Merwe *Sectional Titles* 15-4. However, Chinese law only allows a company which is a legal entity to be a managing agent.

370 Van der Merwe *Sectional Titles* 15-3.

employment contract. In practice, the management body or its executive council appoints a managing agent to undertake broad administrative, secretarial, and financial tasks. But a managing agent is not entrusted with decision-making on such policy-making functions as permission to keep animals, to subdivide or consolidate units, or to improve the common property.<sup>371</sup> In short, certain powers cannot be entrusted to a managing agent. A managing agent cannot make decisions that affect the lives of owners or their living conditions.<sup>372</sup> The UCIOA makes it clear that the executive board may delegate its powers to a managing agent.<sup>373</sup> In South Africa, a managing agent may exercise any entrusted powers subject to the employment contract or the model rules of the scheme.<sup>374</sup> The STA model management rules stipulate that a managing agent acts as a delegate of the body corporate rather than simply as a traditional employee.<sup>375</sup> Although Chinese law does not specify the legal nature of managing agency, it specifies that a managing agent should provide services in accordance with the appointment contract.<sup>376</sup> It implies that the executive council delegates powers to a managing agent in the contract of employment.

In summary, the powers of the managing agent are delegated or derived from the management body or its executive council.<sup>377</sup> Hence, the management body, even if it has delegated certain powers to a managing agent, exercises all powers since it has the final say as the employer.<sup>378</sup> In other words, although a management body through its executive council may appoint a managing agent and delegate certain functions and powers to an agent, the ultimate control of the condominium project rests with an

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371 Van der Merwe *Sectional Titles* 15-11.

372 Robinson *Strata Title Units in New South Wales* 62.

373 UCIOA § 3-106 (a) (4).

374 Van der Merwe *Sectional Titles* 15-13.

375 Annexure 8 r 46 (1), also see *Fairbrass v Estate Agents Board* 1999 (4) SA 1052 (W).

376 Art 36 (1) of the *Property Management Regulation of 2003*.

377 Gao Fuping & Huang Wushuang *Property Entitlement & Property Management* 170.

378 UCIOA § 3-102 (a) (3); also see Van der Merwe *Sectional Titles* 15-14.



executive council under the supervision of a management body.<sup>379</sup> It is crucial that Chinese management companies understand their legal relationship with the management body or its executive council in order to avoid potential power abuses by management companies. For example, some management companies in China require that their nominees be voted onto the association's executive council.<sup>380</sup> Sometimes, due to a statutory omission, unit owners are under the impression that the management company has the power to override owners' interests in managing the condominium complex.<sup>381</sup> In 2007, in the wake of the new *Property Code*, the *Property Management Regulation* was amended to change the designation of a management company to that of a property service provider.<sup>382</sup> This makes apartment owners aware of the fact that a managing agent does not control the unit owners but rather acts as a "servant" appointed by them. Nonetheless, there is no statutory mechanism to hold a managing agent responsible for the fiduciary responsibilities that the executive council has delegated or contracted out to him or her.

## 6 5 2 Qualities and Qualifications

Generally, the title "professional managing agent" assumes that the person appointed must be capable of undertaking all the services required of a managing agent. In addition, the person should have a good knowledge of the pertinent statutes, a good reputation and a proven track record.<sup>383</sup>

In South Africa both a natural person, including a trustee or sectional owner, and a management company can act as a managing agent. By contrast, Chinese law restricts

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379 Note that in China, art 11 of the *Property Management Regulation* stipulates that the power to appoint or remove a managing agent is currently in the hand of the general assembly of unit owners.

380 Xiao Jiangping "A Natural Monopoly of Managing Agent's Market and Its Suggested Resolutions" 2006 (26) *Studies in Law and Business* 22. (Chinese version)

381 See n 380 *supra*.

382 See the *Decree no 504 "The Decision to Amend the 'Property Management Regulation'" of 2007*, issued by the State Council.

383 Van der Merwe *Sectional Titles* 15-5.

the position of managing agent to management companies with legal personality.<sup>384</sup> The exclusion of a natural person from being a managing agent is meant to distinguish a professional managing agent from an in-house self-managing team. The UCIOA addresses neither this issue nor that of the managing agent's qualifications since such matters are regulated by condominium by-laws.<sup>385</sup>

A major problem under the STA is that no qualifications are prescribed for the "profession" of a managing agent.<sup>386</sup> Consequently, the managing agency "profession" in South Africa is largely self-regulatory. For example, since all managing agents are estate agents by definition, they are to comply with all the applicable provisions of the Code for Estate Agents.<sup>387</sup> Presently, the Estate Agency Affairs Board is in the process of promulgating a special code of conduct for managing agents.<sup>388</sup> Consequently, most agents lack the required special skills to provide a professional service. Trustees often have difficulty in finding a suitably qualified managing agent and therefore should be sensitive and prudent in their choice. In South Africa legislation needs to create a professional body to stipulate qualifications for managing agents and provide for their training.<sup>389</sup>

The Chinese *Property Management Regulation* stipulates that management companies should be qualified and licensed before being employed.<sup>390</sup> Moreover, a license should require a certain degree of education and training including a familiarity with relevant legislation and qualifications to handle money. If a management company employs a person without a license, Chinese law empowers the local real estate authority to order the management company to rectify the position

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384 Art 32 of the *Property Management Regulation of 2003*.

385 UCIOA § 3-106 (a) (4).

386 See n 383 *supra*.

387 Van der Merwe *Sectional Titles* 15-6 (1).

388 The Sectional Titles Regulations Board Proposals (March 2003) 3.1.12.

389 Maree "NAMA Makes Progress" 11 (November 2003) *MCS Courier* 7-8; Van der Merwe *Sectional Titles* 15-6. NAMA stands for the National Association of Managing Agents.

390 Art 32 (2) & 33 of the *Property Management Regulation of 2003*.

and impose a fine.<sup>391</sup> While this intervention is well conceived, there are still problems. For example, there is no provision that deals with the misconduct of a licensed employee of a managing agent. Therefore, a local real estate authority should be empowered to revoke the license of a managing agent's employee for continued abuse and gross incompetence.

In addition, there are accreditation systems for managing agents under a special departmental rule in China.<sup>392</sup> This is to assure that the management company meets the quality and standards of services. Management companies are divided into three classes. The first class management company, among others must have at least 30 licensed professionals in the fields of engineering, management, and accounting, a registered capital of five million Yuan, equivalent to about 700,000 USD, and must be accredited by the Ministry of Construction.<sup>393</sup> The second class management company must have 20 licensed professionals, a registered capital of three million Yuan and be accredited by the provisional construction authorities.<sup>394</sup> The lowest class, the third one, must comply with the minimum standards required for qualification as a management company in China. These requirements include, among others, the employment of at least 10 professionals in relevant fields, a registered capital of 500,000 Yuan and accreditation by the local real estate authority.<sup>395</sup> The level of accreditation determines the agent's business scope. For example, the third class managing agent cannot provide services for a project with 200,000 or more gross square meters in floor area.<sup>396</sup>

Furthermore, Chinese law states that any newly created management company must be categorized as the lowest level and reviewed by a real estate authority for one

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391 Art 61 of the *Property Management Regulation of 2003*.

392 See the *Measure Governing the Property Managing Agent's Accreditation of 2004*, issued by the Ministry of Construction on 17 March 2004.

393 Art 5 (1) of the *Measure Governing the Property Managing Agent's Accreditation of 2004*.

394 Art 5 (2) of the *Measure Governing the Property Managing Agent's Accreditation of 2004*.

395 Art 5 (3) of the *Measure Governing the Property Managing Agent's Accreditation of 2004*.

396 Art 8 of the *Measure governing the Property Managing Agent's Accreditation of 2004*.

year.<sup>397</sup> Accordingly, when a management company in China tenders for a job, it must provide a full and proper disclosure of its accreditation and its experience in managing condominiums. This ensures that a management body employs an accredited managing agent to provide professional management services for its condominium community.

In summary, some of the most recent local regulations in China have recommended that a competent and autonomous professional body of managing agents ensures high standards of management services.<sup>398</sup> Such an autonomous professional body promotes the managing agent industry by standardizing the way in which managing agents' business is conducted and developing a Code of Conduct to monitor managing agents' business conduct. This professional body should also be responsible for training managing agents' employees and resolving internal disputes among its members. Therefore, when framing a uniform Chinese condominium statute, following the South African experience, it should contain a Code of Conduct. The Code should require managers and their associates to have a sound knowledge of condominium laws and to conduct themselves in a responsible manner in the best interests of the management body they serve.<sup>399</sup> It is particularly important that the Code should contain disciplinary rules, for instance publicly censuring an incompetent or reckless managing agent from tendering for a job for two years. In addition, a Chinese condominium statute should provide that the Code be included in the management contract.

### **6 5 3 Appointment and Remuneration**

There are two situations under which a managing agent may be appointed. First, an agent may be appointed to manage a condominium development during the initial

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397 Art 7 of the *Measure governing the Property Managing Agent's Accreditation of 2004*.

398 Art 6 of the *Property Management Regulation of Shenzhen Special Economic Zone of 2007*.

399 Van der Merwe *Sectional Titles* 15-14.

period before the first general meeting is held. Second, a managing agent may be appointed after receiving an employment contract from a management body or its executive council.<sup>400</sup>

Prior to the sale of condominium units, a developer may choose a managing agent to manage the development. Before the promulgation of the *Property Management Regulation*, the common Chinese practice for the initial period of management was that “whoever develops is the person who manages”.<sup>401</sup> Consequently, condominium developers often engaged in subterfuges forcing unconscionable obligations on unwary purchasers. One such abuse was presubscribed self-dealing. For example, developers in China often arranged and/or signed “sweetheart” contracts with their favorite managing agents before any condominium owners moved in.<sup>402</sup> Quite often, managing agents appointed before the first general meeting were affiliated with the developer or one of the developer’s subsidiary companies.<sup>403</sup> The risk was that these agents did not genuinely put the interests of unit owners first in making decisions about which contractors to hire for repairs, and extending the condominium complex. For condominium owners, this could result in considerably higher management costs and lower standards of service than if they dealt with such activities in the open market.

Moreover, these “developer” management contracts would usually bind future purchasers for a long time period.<sup>404</sup> Consequently, developers with a continuing financial interest in a condominium complex often remained on the scene even after they relinquished control to the owners’ management body.<sup>405</sup> To resolve this problem, the *Property Management Regulation* provides that a developer has to select

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400 Van der Merwe *Apartment Ownership* 156.

401 The Department of Law and Policies of the Ministry of Construction of PRC *Commentary on the Property Management Regulation* 67.

402 Xia Shansheng *Property Management Law* 152.

403 Hu Zhigang *New Discourse on Real Property* 248.

404 See n 380 *supra* 25-26.

405 Chen & Mostert “Formalizing Condominium Ownership in China” 80.

a qualified managing agent through a public bidding process.<sup>406</sup> Only in a situation where there are three or less managing agents bidding for a position, is a developer allowed to choose a managing agent by agreement.<sup>407</sup> And even then, the appointment is subject to the approval of the local real estate authority.<sup>408</sup> Finally, the appointment has to be concluded in a written contract.<sup>409</sup> These measures increase the transparency of the management contract and avoid self-dealing transactions entered into by developers. In addition, a managing agent is under a statutory obligation to disclose any prior direct or indirect relationship with developers in bidding for a job. It is generally thought that a developer-owned managing company should be disqualified from bidding in order to avoid any undisclosed conflicts of interest and better protect unit owners' interests.<sup>410</sup>

A managing agent's appointment in the initial period is transitional until the first general meeting when the management body employs a managing agent. Such a transitional appointment cannot extend beyond the initial period unless an extension is authorized at the first general meeting. One can also argue that a management contract must not impede the management body from managing the condominium as an independent autonomous body. Consequently, a long-term management contract enabling the developer to control the management body should be voided.<sup>411</sup> Therefore, Chinese law limits the duration of a written transitional management contract agreed upon by a developer and a managing agent. When the executive council created at the first general meeting signs a formal management contract with

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406 Art 24 (1) of the *Property Management Regulation of 2003*; see more detail at a special departmental rule, namely the *Provisional Measure concerning the Public Bidding Management of Pre-formation Property Management*, issued by the Ministry of Construction on 26 June 2003.

407 Art 24 (2) of the *Property Management Regulation of 2003*.

408 See n 406 *supra*.

409 Art 21 of the *Property Management Regulation of 2003*.

410 Chen & Mostert "Formalizing Condominium Ownership in China" 81.

411 Case note "Long Term Management Contracts between Condominium Associations and Developer-controlled Management Corporations Held not Violative of the Florida Condominium Act" 1974 (28) *U Miami L Rev* 455.

another managing agent, the transitional management contract is automatically terminated even if it has not expired.<sup>412</sup> The purpose of this provision is of course to grant unit owners the power and autonomy to choose their own managing agent.

An alternative way to choose a managing agent is for the management body or its executive council to make the appointment. The UCIOA expressly provides that a unit owners' association may hire and discharge managing agents.<sup>413</sup> In South Africa, the trustees can, when required by a registered mortgagee of 25 per cent of the units or by the members of the body corporate in general meeting, appoint a managing agent in writing.<sup>414</sup> The appointed managing agent will control, manage and administer the common property and the obligations to any public or local authority on behalf of the unit owners.<sup>415</sup> This requires that a managing agent may be employed by a request of a mortgagee who finances condominiums or a resolution of the meeting of the trustees or a resolution of the general meeting. On employment, a written agreement must be entered into between the trustees and the managing agent.<sup>416</sup> Moreover, as in the case of the appointment of a managing agent, subject to section 39 (1) of the STA, no special resolution is needed to revoke or discharge a managing agent.<sup>417</sup> A decision by the trustees suffices.<sup>418</sup>

Similarly, Chinese law stipulates that the executive council should enter into a written contract with a managing agent chosen by the management body.<sup>419</sup> However, the *Property Management Regulation* at the national level does not specify well defined procedures to appoint a managing agent. Since many members of the executive council may be inexperienced, the *Chinese Property Code* provides that the

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412 Art 26 of the *Property Management Regulation of 2003*.

413 UCIOA 3-102 (a) (3).

414 Annexure 8 r 46.

415 Annexure 8 r 46 (1).

416 Van der Merwe *Sectional Titles* 15-10.

417 See also annexure 8 r 46 (d) and r 47.

418 Van der Merwe *Sectional Titles* 15-12 n 44.

419 Art 35 of the *Property Management Regulation of 2003*.

final say on employing a managing company should be vested in a management body at a general meeting.<sup>420</sup> Accordingly, when a Chinese condominium statute is to be drafted, it should stipulate that a managing company can be appointed either at a management body's general meeting by an ordinary resolution with more than 50 per cent of the unit owners at the meeting approving, or by an executive council if it has been authorized at the previous general meeting. Needless to say, an executive council has the responsibility to select a suitable managing company and then at a general meeting explain the selection procedure.<sup>421</sup>

Managing agents generally charge a management fee for a service that is a recurring cost to the condominium complex. A managing agent can be paid in one of two ways, either on a *pro rata* basis or a standard basis.<sup>422</sup> A *pro rata* basis means that the monthly management fee is calculated as a particular percentage of the total amount of the owners' contributions. A standard basis means that a fixed amount for instance per unit is paid to a managing agent. According to Chinese law, the parties are free to select either method.<sup>423</sup> In South Africa, although the Institute of Estate Agents has recommended a tariff of fees, it is argued that management fees should be subject to negotiation between parties since the fees should be dictated by free market competition.<sup>424</sup> Chinese law sustains this argument since many local property management rules state that the remuneration of a managing agent is a matter of negotiation between a management body or the developer and a managing agent.<sup>425</sup> There should not be a prescribed scale of managing agents' fees. The condominium association's point of view is that like any other contractual relationship with a service

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420 Art 76 (1) (4) of the *Chinese Property Code of 2007*.

421 Art 31 (3) of the *Property Management Regulation of Shenzhen Special Economic Zone of 2007*.

422 Art 9 of the *Measures Governing Property Management Fee's Collection of 2003*, jointly issued by the State Development and Reform Commission and the Ministry of Construction.

423 Art 11 & 12 of the *Measures Governing Property Management Fee's Collection of 2003*.

424 Van der Merwe *Sectional Titles* 15-17.

425 For example, art 68 of the *Property Management Regulation of Shenzhen Special Economic Zone of 2007*.



provider, the executive council should continually monitor whether it is getting value for the fee being paid. If not, it is time to shop around for another management company.

## **6 5 4 Functions**

The managing agents' business is highly labor-orientated.<sup>426</sup> Generally, a managing agent's function is to assist the management body to maintain and oversee the common property and enforce the by-laws. Moreover, being on-site the agent can deal with issues involving unit owners, tenants, visitors and others. The various functions of a managing agent can be categorized as administrative, secretarial and financial.<sup>427</sup> Administrative functions include collecting monthly contributions; secretarial functions include organizing and preparing the paperwork for general meetings and keeping meeting records, accounting records and other relevant documents; and financial functions include preparing the budget and calculating the unit owner contributions. The main functions of a managing agent are delegated by the management contract.<sup>428</sup> Therefore, the functions of a managing agent vary greatly depending on the contract and the particular circumstances of the condominium. The more services provided, the greater the management fees. The managing agent's basic functions need to be circumscribed in any future Chinese condominium statute. Although there is no uniform set of services for every condominium community, the following is a list of services more commonly provided by a managing agent.<sup>429</sup>

They are: 1) to collect monthly contributions; 2) to do maintenance, repair and replacement of the common property; 3) to prepare and serve notices for meetings and for entering individual units for repairs; 4) to attend the annual general meeting and/or

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426 Bugden *Strata Title Management Practice* 39.

427 Van der Merwe *Sectional Titles* 15-6 (2), 7, 8.

428 Van der Merwe *Sectional Titles* 15-13.

429 Bugden *Strata Title Management Practice* 39-40; Van der Merwe *Sectional Titles* 15-6 (2), 7, 8.

other meetings; 5) to prepare and distribute meeting minutes; 6) to attend to correspondence; 7) to appoint, oversee, control and dismiss staff; 8) to maintain all minute books, records, notices and other documents pertaining to condominium management; 9) to ensure that proper and adequate insurance is in force and renew and attend to common property insurance claims; 10) to assist and advise the executive council on common property maintenance and to negotiate and obtain quotes on behalf of the council and to employ plumbers, electricians and other handymen;<sup>430</sup> 11) to prepare an annual budget of income and expenditure for the following year for approval by the council of trustees and the annual general meeting; 12) to enforce by-laws and house rules as required by the executive council; 13) to hand over all relevant documents and management body's assets to the executive council and to a new agent.<sup>431</sup>

With the decentralization of condominium management responsibilities from the state to private owners, little attention has been given to the many owners who are not skilled or trained to undertake management duties. Accordingly, despite the costs involved and the resultant loss of control, an increasing number of condominium complexes in China, particularly the larger ones, employ or appoint professional managing agents.<sup>432</sup> However, it is common in China for managing agents to exercise the powers of often ill-structured owners' associations. Therefore, it is paramount to incorporate a managing agent's minimum functions in a statute in order to guarantee the quality of service and to stave off potential management malfunctions. In addition, a statutory definition of the minimum functions of a managing agent would assist in determining whether the managing agent is acting within his or her authority. This would ensure that the managing agent would not be able to exercise any powers and functions in excess of the authority of the management body.

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430 Art 40 of the *Property Management Regulation of 2003*.

431 Art 39 of the *Property Management Regulation of 2003*.

432 The Department of Law and Policies of the Ministry of Construction of PRC *Commentary on the Property Management Regulation* 9-10.

It should be noted that directors of a managing agent are not automatically members of a condominium's executive council. In South Africa, the managing agent can only attend trustees' meetings with their consent.<sup>433</sup> However, a future Chinese condominium statute should provide that a management company's directors or representatives should have the right to attend meetings but without a right to vote or speak at meetings. This brings the managing agent into the condominium decision-making process as the agent receives timely maintenance reports and keeps record of the meetings. When Chinese lawmakers draft a uniform condominium statute, it should ensure that a management company is not allowed unilaterally to transfer the management contract without the consent of the management body. When a management body is considering such a transfer, it should take into account the proposed transferees' qualifications, financial standing, experience and other relevant factors. It is notable that a managing agent cannot transfer the management contract entirely but can farm out certain jobs to independent professionals such as plumbers and electricians.<sup>434</sup>

In summary, whatever functions and powers are delegated to the managing agent must be clearly stated in the written contract of appointment, regardless of how insignificant a task may seem.<sup>435</sup> The more detailed the functions, the fewer the disputes that will occur later.

## **6 5 5 Termination**

Under the STA, a decision to terminate a managing agent's appointment needs not be made at a general meeting by resolution. Instead, the trustees' decision is sufficient.<sup>436</sup> More importantly, any owner or unit mortgagee has the right to require the trustees to

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433 Annexure 8 r 49 (1).

434 Art 40 of the *Property Management Regulation of 2003*.

435 Art 36 (1) of the *Property Management Regulation of 2003*.

436 STA s 39 (1) read with Annexure 8 r 46 (1).

cancel the management contract if the managing agent is in breach of the contract or guilty of misconduct.<sup>437</sup> In contrast, under the UCIOA, unit owners can terminate long-term “self-dealing” contracts without court action before an executive board is elected.<sup>438</sup> However, the executive board must strictly follow the voting procedure for terminating a management contract.<sup>439</sup> For a well-managed condominium project, it is in the best interests of both the management body and the managing agent to maintain a continuity of services. Unless it is impossible to work with the managing agent, an executive council should not consider a change of the managing agent without putting the matter to a vote at a general meeting. Hence, when a Chinese condominium statute is drafted, it should employ the UCIOA approach stipulating that a decision to terminate or remove a managing agent can only be achieved by a resolution of a general meeting.<sup>440</sup> Moreover, written notice must be given to that effect.

A management contract can be terminated under the Act or under the contract terms. Under the STA, a managing agent can also be removed when a managing company is liquidated or placed under judicial management,<sup>441</sup> when a managing company or one of its directors, is convicted of fraud or dishonesty,<sup>442</sup> or when a special resolution is passed to that effect.<sup>443</sup> All of these statutory grounds need to be included in a future Chinese condominium statute. Moreover, a Chinese condominium statute should also stipulate that a management contract can be terminated when a managing agent is *mala fide* or grossly negligent in carrying out his/her duties. Examples are when a managing agent infringes unit owners’ interests by serious misconduct, or when a

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437 Annexure 8 r 46 (2) (b).

438 UCIOA § 3-105.

439 Rohan & Reskin *Condominium Law and Practice: Forms* 42-68.7.

440 Art 76 of the *Chinese Property Code* provides that to discharge or terminate a managing agent’s contract is under the jurisdiction of a management body.

441 Annexure 8 r 47 (i).

442 Annexure 8 r 47 (ii).

443 Annexure 8 r 47 (iii).

managing agent contracts with other agents without approval of the management body or its executive council. Apart from the above, other contractual grounds of termination can be included in a management company's contract of employment. However, notice of termination should be given to give the managing agent a chance to remedy its errant behavior before being dismissed. The warning notice should contain details of the alleged failure or misconduct. The purpose of serving a remedial notice is to enable the managing agent to remedy the problem and to comply with the Act and the contract terms. Then further non-compliance can lead to termination of the appointment.

Under the STA, a managing agent may only be appointed for a year at a time. However, an appointment is renewed automatically from year to year, unless the body corporate notifies the managing agent to the contrary.<sup>444</sup> There is no such provision in the UCIOA. Although Chinese law at the national level does not address the issue, a recent local condominium management rule, namely the *Property Management Regulation of Shenzhen Special Economic Zone of 2007* provides for management contracts lasting between two and five years.<sup>445</sup> Therefore, when drafting a Chinese condominium statute, there is a need to balance addressing unsatisfactory managing agents' services with the principle of continuity of management services. Any proposed legislation should stipulate that the maximum term for a managing agent is three years for multi-building condominiums and one year for single building or small condominiums. If the contract term is longer than three years (one year for a small condominium), it is taken to be three years (one year for a small condominium). On expiry of the term, the appointment can either be renewed or terminated. In order to maintain the continuity of management services, there should not be a limit on the number of times a contract can be renewed when unit owners are satisfied with the services provided.

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444 Annexure 8 r 46 (1).

445 Art 69 of *Property Management Regulation of Shenzhen Special Economic Zone of 2007*.

In China, it is common for management bodies to experience difficulty in recovering their books and records from former managing agents after termination of an appointment.<sup>446</sup> Obviously, a newly appointed management company cannot work properly without these documents, all to the detriment of the condominium development.<sup>447</sup> This is always a headache for a management body that would like to terminate the services of an unscrupulous management company.<sup>448</sup> To remedy this problem, any future Chinese condominium statute should place a duty on a managing agent to hand over all relevant documents on termination of its services.<sup>449</sup> In addition, a professional body of managing agents should monitor whether a managing agent discharges his/her management functions professionally and in a responsible manner. If not, relevant disciplinary procedures found in a Code of Conduct should apply. From the unit owners' perspective, it is advisable for a management body or its executive council to send a notice to the departing managing agent requiring that all relevant documents be returned.

## 6 5 6 Evaluation

Neither the UCIOA nor the STA contains a legal requirement that a condominium should be managed by a professional managing agent. The appointment of a professional managing agent is in the hands of the management body or its executive

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446 Hu Jiefeng "The Legal Analysis of Disputes Arising from Managing Agent's Transfer" 2004 *Modern Property Management* 4. (Chinese version)

447 Yang Yusheng "Appointing a Property Managing Agent at Free Choice, Maintaining the Owners' Rights by Law – A Rethinking of Fuquan Condominium Community Case Regarding the Hand over and Take over of Managing Agents." Online: [www.fadaxueshu.com/news](http://www.fadaxueshu.com/news) [2008.03.17]

448 Yang Xuanyi "The Difficulties and Solutions about Hand over and Take over between Old and Newly Appointed Managing Agents" 2006 (4) *China Property Management* 2-3. (Chinese version)

449 Art 70 of the *Property Management Regulation of Shenzhen Special Economic Zone of 2007*. Additionally, art 71 states that when terminating a management contract, the departing managing agent not only is obliged to deliver all the relevant documents and records to the executive council but also needs to deliver a duplicate copy of them to the newly appointed managing agent.

council.<sup>450</sup>

There are good reasons why a professional managing agent should be employed to handle the affairs of a condominium complex. The major advantage is the professionalism a managing agent brings to a condominium association which cannot be matched by a self-managing team comprising a group of individuals separately hired by a management body. The managing agent's personnel usually have academic and technical qualifications in property management as well as experience in condominium governance. Moreover, a professional managing agent usually has excellent computer expertise and other relevant management skills. Computerized management certainly increases the standard of service. Hence, large projects, especially mixed-use projects comprising both residential and commercial units, require a professional agent's assistance to deal with day-to-day operations and particularly the maintenance and administration of the common property in the condominium. Executive council members and unit owners often have limited time and energy to manage these matters. Quite simply, a managing agent can relieve a management body and its executive council of most of its day to day management and maintenance duties. Moreover, the executive council members are generally not sufficiently knowledgeable and skillful to perform complicated management tasks efficiently. Unfortunately, it is common practice for executive councils in China to opt for self-management and then to perform only very basic functions, namely to collect common expenses.<sup>451</sup> Other management duties such as establishing a reserve fund for future capital needs are ignored. Moreover, internal conflict among unit owners is almost an unavoidable result of self-management.<sup>452</sup> Oftentimes, unit owners' diversified interests render the self-management of a condominium complex unworkable. Consequently, it is crucial to appoint a full-time, on-site professional

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450 Van der Merwe *Sectional Titles* 15-3.

451 Van der Merwe *Sectional Titles* 15-4.

452 Bugden *Strata Title Management Practice in New South Wales* 41.

management company for large condominium developments. It stands to reason that experienced managing agents can manage a condominium project more effectively and economically than the unit owners themselves. Moreover, institutional lenders are inclined to do business with a condominium project in which day-to-day operations are conducted in a professional manner by a managing agent.

However, many small projects or lower-income family condominium projects cannot afford the cost of appointing a professional agent. These owners prefer to manage on their own in the belief that they are able to perform efficiently such daily tasks as cleaning and security. Whether the unit owners' monthly contributions will remain in line with a managing agent fee is not an issue of professional versus do-it-yourself management. The issue is rather what kind of professional management the unit owners can afford.<sup>453</sup> In China, some local regulations require that all residential buildings be managed and maintained by professional managing companies regardless of the owners' financial abilities. These regulations were promulgated to promote the local managing agent business.<sup>454</sup> At the same time one cannot ignore the fact that numerous public housing complexes have been converted to private ownership and are now owned by low-income families.<sup>455</sup> They cannot bear the financial burden of expensive managing agent fees.<sup>456</sup> The emergence of a professional managing agent industry is a relatively new phenomenon.<sup>457</sup> Therefore, many Chinese condominium owners are not conscious of the importance and necessity of hiring a managing agent. It has been reported that in some provinces in China such as Shandong, Jiangsu and Guangdong, 50 per cent of all condominiums have a professional managing agent.<sup>458</sup> However, only around 20 per cent of the

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453 Rohan "Condominiums and the Consumer: A Checklist for Counseling the Unit Purchaser" 1974 (48) *St John's L Rev* 1052.

454 Chen & Mostert "Formalizing Chinese Condominium Law" 72.

455 Chen Huabin *Study on Modern Condominium Ownership* 298.

456 Xia Shansheng *Property Management Law* 19.

457 Li Xiandong *The Legal Guide for Resolving the Disputes Resulted from Property Management* 28.

458 Xia Shansheng *Property Management Law* 9.



condominiums employing a professional managing agent pay managing agent fees regularly and on time.<sup>459</sup> Consequently, many managing agents quit their job soon after they have been appointed.<sup>460</sup> For such condominium complexes, the ideal management model would be either self-management or hiring a small-sized and affordable managing company.<sup>461</sup> A particularly important advantage of self-management by unit owners is management continuity.<sup>462</sup> Compared with a relatively short-lived managing agent contract, in-house do-it-yourself management usually has a feature of continuity that helps a management body to manage soundly on a long-term basis. The second advantage of self-management is integrity and communication. Since the do-it-yourself management team, consisting mostly of unit owners, is an integral part of the condominium community, they have real interests and real stakes in what they are doing. Also, they have an open line of communication with other owners about management issues. Therefore, in view of the Chinese socio-economic condition and the pros and cons of the two management styles, it is clear that one model is not necessarily better than the other but that the choice of model should be guided by the special circumstances of each condominium complex.<sup>463</sup> The drafters of a new Chinese condominium statute should thus be sensitive to socio-economic and cultural factors and make provision for the co-existence of both management styles.<sup>464</sup> The choice to appoint a professional managing agent by special resolution or to manage the condominium by themselves is ultimately in the hands of the owners of a particular condominium.

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459 Hu Zhigang *New Discourse on Real Property* 244.

460 See n 459 *supra* at 245.

461 Chen & Mostert "Formalizing Chinese Condominium Law" 73.

462 Freedman & Alter *The Law of Condominia and Property Owners' Associations* 95.

463 Christudason "Management of Residential Strata-titled Developments in Singapore: Agent or In-house Team?" online: <http://www.rst.nus.edu.sg/enewsletter/docs> [ 2008.01.10]

464 The Chinese Zhi Gong Party Shanghai Committee *The Investigation Report on the Implementation of the 2003 Property Management Regulation* 2004. (Chinese version)

# CHAPTER 7

## CONCLUSION

### 7 1 BENEFITS OF A UNIFORM CONDOMINIUM STATUTE

With an ever-expanding housing market the legislature in China must enact a uniform condominium act that is compatible with the market. While there are permissive condominium provisions in the newly enacted *Property Code*, it is doubtful whether it would flourish without special legislation.<sup>1</sup> The sketchy condominium provisions in the *Property Code* do not provide the kind of detail that a special statute is able to do with precision and candor.<sup>2</sup> Additionally, the *Property Management Regulation* adopted by the State Council in 2003 only lays out general principles in this domain.<sup>3</sup> The National People's Congress is seeking to change this less than ideal situation that has divergent and fragmented condominium rules all across the country.<sup>4</sup> Nevertheless, the new *Property Code* provides some of the basic building blocks for a special condominium statute.<sup>5</sup> It is noteworthy that in the United States and South Africa statutes dealing with condominiums not only go back decades, but these

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<sup>1</sup> Zhang Lihong "The Perfection of Condominium Clause in the Property Code Draft" 2005 (10) *Legal Science Monthly* 22-26.

<sup>2</sup> Chen Huabin "On Condominium Ownership of Apartment Owners: Comments on Chapter 6 of the Draft Law on Real Right" 2006 (18) *Beijing University Law Journal* 63. (Chinese version)

<sup>3</sup> Tan Ling & Hu Danying "Reevaluation of Real Property Management" 2006 (6) *Modern Legal Science* 188. (Chinese version)

<sup>4</sup> Chen Lei "The New Chinese Property Code" 2007 (11) *Electronic Journal of Comparative Law*.

<sup>5</sup> Chen & Mostert "Formalizing Condominium Ownership in China" 64.

pioneering jurisdictions have been developing condominium legislation with second and third generation statutes to update their original ones.<sup>6</sup>

However, China is still lacking a badly-needed uniform condominium act. The need to formalize condominium legislation is becoming increasingly urgent if condominium ownership is to be effectively deployed for development. China needs to encourage the development of residential dwellings and safeguard the interests of condominium owners by providing them with effective legal mechanisms. Consequently, the country's legal system needs to respond as quickly and effectively as possible to the rapid increase in condominium ownership. A uniform legal framework needs to fit into a system of private property law that is also new to the Chinese legal system.<sup>7</sup> Drafting a condominium statute on the basis of Chinese social and economic factors might be an appropriate starting point, but borrowing the experience from other jurisdictions will improve the success of such a law.

The objective of a new law should be to protect the interests of both condominium owners and real estate investors. The long-term objective is the enhancement of the country's economic growth and to provide housing for the populace.<sup>8</sup> There is an urgent need for a reliable, consistent, and properly drafted uniform condominium law to solve the many practical problems caused by a housing policy that has triggered a mass privatization of tenant occupied buildings.<sup>9</sup> Placing condominium ownership in

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6 The first generation and second generation statutes on apartment ownership in the United States and South Africa were introduced at Chapter Two, footnote 19. In the United States, the third generation condominium act is well underway. The National Conference of Commissioners on Uniform State Laws (NCCUSAL) has been drafting "Homeowners Bill of Rights" and "Meeting". Once the drafts are approved, they will be inserted into the UCIOA. See more detail at NCCUSAL website: <http://www.law.upenn.edu/bll/archives/ulc/ucioa/>. In South Africa, the looming third generation Act is highlighted by the "Third-generation Sectional Title Conference" held in September 2006. See more detail at West "Third-generation Sectional Title Conference" 2007 (11) *South African Deeds Journal* 25-27.

7 Chen & Mostert "Formalizing Condominium Ownership in China" 83-84.

8 Ohnesorge "The Rule of Law, Economic Development, and the Developmental States of Northeast Asia" in Antons (ed) *Law and Development in East and Southeast Asia* 91.

9 Chen Limei "Management of Sold Public Housing in Urban China" 5.

a proper legal framework will stabilize and stimulate housing privatization.<sup>10</sup> It can also demarcate and define private property rights, thus providing guidance for legal practitioners.<sup>11</sup> Last but not least, it will aid the rapid urbanization process by providing a framework for better land use.

The life of a law lies in its application. However, lucidity and transparency in the law limit the implementation costs of this legal framework.<sup>12</sup> With condominium purchase, there are significant transaction costs that can be minimized if there is a uniform law that provides efficient enforcement mechanisms.<sup>13</sup> Now, the piecemeal manner that condominium ownership is regulated in China frequently results in disputes needing court resolution.<sup>14</sup> According to one Beijing district court report, the number of cases involving condominium management disputes in Chaoyang Court of Beijing increased from 194 in 2002 to 2649 in 2005. Thus, in three years, the condominium cases increased approximately thirteen times as much as in 2002. In the Chaoyang Court the percentage of condominium cases among all civil cases increased as well from 0.79% in 2002 to 8.5% in 2005.<sup>15</sup> This accounts for high lawsuit costs and hinders economic development.

There also are additional social and economic benefits to formalizing and legalizing condominium ownership in China. First, unifying condominium rules will contribute to security of tenure. With a single set of national condominium rules, a condominium

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10 Chen Huabin *Study on Modern Condominium Ownership* 296-297.

11 Jin Jian *Housing Law of China* 9-10; Rosen & Ross "Increasing Home Ownership in Urban China: Notes on the Problem of Affordability" 2000 (15) *Housing Studies* 78-79.

12 Drobak & North "Legal Change in Economic Analysis" in Backhaus (ed) *The Elgar Companion to Law and Economics* 53-57; Demsetz "The Exchange and Enforcement of Property Rights" 1964 (3) *JL & Econ* 11-26.

13 North *Institutions, Institutional Change and Economic Performance* 53-55.

14 Wang Liming "The Conception of Divisional Ownership of Buildings" 2006 (5) *Contemporary Legal Science* 37. (Chinese version)

15 See an official report published by Chaoyang District Court of Beijing at China's Court Web, "How to Resolve the Property Management Disputes". Online: <http://www.chinacourt.org/public/detail> [2008.2.28] (Chinese version)

owner is in a better legal position to guard and protect his/her unit, especially when compared to other types of tenure such as tenancy.<sup>16</sup> Second, a formally unified condominium law promotes investors' confidence by reducing the unpredictable as well as the high commercial transaction costs for the purchase and sale of condominiums.<sup>17</sup> This also will tend to preserve foreign investors' confidence and advance foreign investment in Chinese real estate.<sup>18</sup> Third, the ambiguity of condominium owners' rights and the uncertain position of mortgagees of condominium units are the main reasons why mortgage finance for units in condominium projects is not well established.<sup>19</sup> Unifying and consolidating condominium law will enhance this specialized real estate market and generate funds for further development. Finally, formalizing condominium law is also a major element in the restructuring of social housing policy.<sup>20</sup> Making it easier for working-class people to own their homes is crucial to the success of the national housing strategy.

## 7 2 CRITICAL COMPARATIVE APPROACH

To better understand the development of condominium law, it is useful to examine countries with long histories of apartment ownership law. This is extremely helpful in working out what a useful Chinese condominium law might look like. Taking lessons from jurisdictions with an established condominium law system lessens pitfalls and helps to avoid dysfunctional practices as well as to identify pertinent elements that can

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16 Van der Merwe *Apartment Ownership* 191-192.

17 Knack & Keefer "Institutions and Economic Performance: Cross-country Tests Using Alternative Institutional Measures" 1995 (7) *Economics and Politics* 218-221.

18 Walker & McKinnell "Economic Reform and the Future for Real Estate in the People's Republic of China" 2004 (13) *Chinese Journal of Property Valuation and Investment* 39-40.

19 Randolph "Thoughts on Chinese Real Estate Law: Integrating Private Property into a Socialist Governmental Structure" online: [http://law.usc.edu/faculty/assets/docs/Randolph\\_000.pdf](http://law.usc.edu/faculty/assets/docs/Randolph_000.pdf) [2007.11.15].

20 Jin Jian *Housing Law of China* 223.

be dovetailed into an approach sensitive to Chinese values and culture.<sup>21</sup>

A comparative approach identifies and analyzes a universal problem encountered in several countries, and then determines how the different legal systems solve it.<sup>22</sup> The legal solutions are functionally equivalent and hence are comparable.<sup>23</sup> However, there is a downside to the functional approach. It pays little attention to the origins of problems or to cultural factors that contribute to or diminish the gravity of a problem in a particular context.<sup>24</sup> In the Chinese context, a functionalist approach might render the comparative results less relevant in practice.<sup>25</sup> It is for this reason that the critics of the functional approach often attribute the difficulties and problems of transplanting legal institutions simply to the differences in legal cultures.<sup>26</sup> As an example, culture itself influences which foreign legal institutions to borrow and bring into an existing legal system.<sup>27</sup> Legal terminology, the court system, the local political power structure, social networks, legislative custom and the degree to which people rely on the court to resolve disputes, all play a role in enacting a condominium statute.<sup>28</sup> Simply put, it would be unworkable to transplant a whole untrimmed body

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21 Chen & Mostert “Formalizing Condominium Ownership in China” 83.

22 Zweigert & Kötz *Introduction to Comparative Law* translated by Weir 39. They maintain “[L]egal systems give the same or very similar solutions, even as to detail, to the same problems of life . . . .”

23 Gordley “Comparative Legal Research: Its Function in the Development of Harmonized Law” 1995 (43) *Am J Comp L* 555-560.

24 Legrand “The Impossibility of Legal Transplants” 1997 (4) *Maastricht Journal of European and Comparative Law* 111.

25 Zhou Yongkun “Ten Dilemmas of the Modernity of Chinese Law” 2006 (6) *Legal Science Monthly* 77.

26 Kozyris “Comparative Law for the Twenty-first Century: New Horizons and New Technologies” 1994 (69) *Tul L Rev* 168. Kozyris maintains that to borrow truly foreign law there are “serious linguistic and cultural obstacles”. One cannot pursue the comparative method only through the study of formal legal texts alone. One has to understand the “legal culture that produced the laws and the social and economic structures and the ethical and political values that support them. Laws cannot be grasped in an idealized form outside the context of the society that created them”.

27 However, there is no clear-cut definition of legal culture. Mezey demonstrates that the notion of culture is ubiquitous but almost never explained. See Mezey “Law as Culture” 2001 (13) *Yale J L & Human* 35; also see Cotterrell “Law in Culture” 2004 (17) *Ratio Juris* 1.

28 King “Comparing Legal Cultures in the Quest for Law's Identity” in Nelken (ed) *Comparing Legal*

of law into a completely new environment.<sup>29</sup>

Nevertheless, equally foolhardy is blaming legal culture for all of the difficulties involved in embarking on a path of legal borrowing. In an examination of the intricacies of condominium ownership and the complexities of the real estate market in China, the particularities of Chinese culture have to be taken into consideration. But then there has to be a willingness to borrow the most useful and pertinent mechanisms from foreign legal systems where condominium ownership is regulated and conducive to strengthening the real estate market both for the buyer and the seller. After all, one can give prominence to culture, and at the same time carefully borrow ideas from long-standing and well run legal systems.

To summarize, on the one hand, the success of formalizing condominium ownership in China depends on careful comparative research and then to cherry pick and borrow ideas from systems that are experienced in this field of law. On the other hand, directly transplanting foreign laws or legal institutions into a new context may not always have the desired effect because of different cultural values and philosophical outlooks.<sup>30</sup> Here architecture provides a pertinent analogy. Architects plan all apartments in a building in a functional way. However, apartment owners decorate and furbish their apartments in their own unique style that defines themselves distinct from others according to their own taste. Likewise, this thesis assumes a critical and cautious attitude by combining two approaches to undertake a comparative study that formalizes Chinese condominium law.

## **7 3 CONCLUDING REMARKS**

The enactment in the near future of a special Chinese condominium statute is

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*Cultures* 132.

29 Legrand “On the Singularity of Law” 2006 (47) *Harv int’l L J* 517-530. In this article, Legrand argues that “law-texts always and already speak culturally or traditionally.”

30 Chen & Mostert “Formalizing Condominium Ownership in China” 86-87.

imperative. It is for this reason that the thesis utilizes selective and important topics for a comparative analysis. Preceding chapters discuss the theoretical structure of condominium ownership, creation of condominiums, the condominium participation quota, condominium owners' rights and responsibilities for their units and the common property, and management body's structure and its operation. The thesis does not cover every field and all aspects of condominium law for that would be beyond the scope of this pilot study. Among the unaddressed topics, termination of condominium schemes and dispute resolution are noteworthy. It would be misleading to assume that the resolution of disputes is neither relevant nor worthwhile to study, for it is a very important and practical issue. However, in the United States, the court primarily resolves condominium disputes, which is similar to what takes place in China. South Africa is undergoing a sweeping change on dispute resolution with a newly proposed Ombudsman service that has not yet been formally adopted.<sup>31</sup> It would make little sense to try to gain comparative insights on the topic until after the reform is in place.

With a comparative evaluation, six elements deserve special attention when putting together a uniform Chinese condominium statute. They are: 1) a macro view to integrate existing property arrangements; 2) a clear demarcation of individual property rights and cooperation between neighboring owners; 3) a balance between standardization and flexibility; 4) raising unit owners' awareness for collective action; 5) local government's intervention; and 6) cooperation between neighboring owners.

### **7 3 1 A Macro Study**

Formalization and unification of the law is a macro rather than a micro process.<sup>32</sup> A macro view of private property rights is a prerequisite for a sustainable market

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31 Maluleke "Department Considers Sectional Titles Ombudsman" 2005 (March) *De Rebus* 43; Van der Merwe *Sectional Titles* 9-44 & 9-45.

32 Chen & Mostert "Formalizing Condominium Ownership in China" 88.



economy. For this reason, any attempt to formalize a unified condominium system will fail without taking into account existing property arrangements.

Law is a living entity. To discover law through comparative study is one thing, but to systematize it is quite another. Researching and then drafting a condominium statute should accommodate existing statutes and be compatible with correlative legislation, such as statutes on urban planning, real estate administration law and the mortgage and registration system. Drafters of this new legislation should anticipate possible judicial antagonism. Moreover, training for lawyers and para-legal workers needs to be strengthened to reduce dysfunctions in the condominium ownership system. Particularly noteworthy is the need to develop and formalize a well-coordinated system with the institutional lenders, i.e. commercial mortgage providers who finance private housing.

### **7 3 2 A Clear Demarcation of Property Rights**

The developing rules on condominium ownership can be visualized as a path to increase legal certainty and predictability.<sup>33</sup> During this process, ideological jurisprudence and technical constraints must be unraveled, while individual proprietary interests must be placed on a steady path to title security.<sup>34</sup> Chinese lawmakers should embrace full disclosure as a part of the legislative approach to protect unit purchasers. This requires a formal legal document that has a legal description of the owner's individual property as well as the common property. This document shows the percentage of ownership a unit purchaser has in the common property, the allocation of an exclusive use area to the individual unit owner, when and how to constitute a condominium association to govern the community, and

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33 Upham "Speculations on Legal Informality: On Winn's 'Relational Practices and the Marginalization of Law'" 1994 (28) *Law & Soc'y Rev* 233-235.

34 Huang "The Path to Clarity: Development of Property Rights in China" 2004 (17) *Columbia Journal of Asian Law* 191.

information about restrictions and limitations on such owners' rights as resale, mortgages, insurance, leasing, and what owners can and cannot do. Boundary lines between unit owners' individual property and common property need to be clearly marked since they determine maintenance responsibility. Simply put, the unit owner is responsible for maintaining his/her individual unit while the condominium association takes care of common property repair and maintenance. Unit owners need to know the exact boundaries of their condominiums in order to know where their individual interests stop and where they begin. At present, the lack of such a constitutive document is a bonanza for the developer. Not only is the developer free to alter the dimensions of a buyer's unit, but the developer can also hide costs to unit purchasers such as the cost of an additional charge for a parking space. Moreover, the restrictions and covenants also need to be disclosed to potential unit purchasers to ensure they are knowledgeable about what they can and cannot do in the condominium complex. When property owners are aware of their properties' exact location and dimensions many potential disputes can be averted. Thus, in China the concept of legal disclosure needs to be institutionalized and embedded in a legal condominium document.

The constitutive document needs to be written in clear and unambiguous language. In the United States, these documents often are comprised of confusing phrases and obscure legal jargon that confuses unit purchasers no end in trying to understand them.<sup>35</sup> Therefore, Chinese lawmakers should pay heed to using simple straightforward language to make these documents more accessible and readable to prospective unit purchasers.

### **7 3 3 Standardization v Flexibility**

The United States UCIOA adopts a very different approach from the South African STA. Not only does the UCIOA provide substantial flexibility for developers in their

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<sup>35</sup> Butcher *The Condominium Book: A Guide to Getting the Most for Your Money* 101.

declarations but it also enhances the autonomy of the unit owners' association. By contrast, the STA achieves its success with the use of standard documents. A typical example of this is the Act's model rules. Each one of the approaches maximizes a different set of values.

On the one hand, the UCIOA's flexibility has produced "residential private government".<sup>36</sup> This concept is in accordance with the themes of self-governance and private autonomy. Moreover, this flexibility had led to condominium complexes that are diverse and vary greatly from one to another. Some are mixed-use developments while others are exclusively residential ones. Some are public rental housing conversions, while others are newly developed projects. Some have 300 units while others only have ten units. It is this diversity that makes it unrealistic to standardize condominiums with very diverse characteristics into a single document. But, on the other hand, standard documents streamline the application and make it easier to enforce the statute. Under the STA, besides providing the standard model rules, it uses relative floor area as a basis for the participation quota for all residential condominiums. However, it promotes flexibility where needed by using a different method for non-residential condominium developments.

When drafting a Chinese condominium statute, a balance needs to be struck between flexibility and standardization. Given that the Chinese condominium system is still in an early development stage, more standard documents, such as default rules and a method to calculate a participation quota should be adopted. In the long run, when Chinese condominium owners develop the necessary management skills and knowledge, perhaps flexibility and innovation will gain ground.

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36 Sterk "Minority Protection in Residential Private Governments" 1997 (77) *B U L Rev* 278-279; also see general Mckenzie *Privatopia: Homeowner Associations and the Rise of Residential private Government*.

### 7 3 4 Enhancing Unit Owners' Awareness

Condominium ownership implies three elements, namely, home ownership, shared responsibility, and participation in community life.<sup>37</sup> Among factors that constitute community life, participation in collective management is particularly noteworthy. The idea of condominium ownership is closely linked with concepts of independence of control and autonomy of unit owners. This leads to issues of collective action, mutual dependence and democratic participation.<sup>38</sup> North succinctly states that the performance of institutions is determined by “the motivation of the players, the complexity of the environment, and the ability of the players to decipher and order the environment”.<sup>39</sup> However, Chinese unit owners are insufficiently aware as to how to shift from a “public property is nobody’s property” mindset to one in which the emphasis is on “one’s own private property”.<sup>40</sup> Ways have to be found to create and run owners’ associations while simultaneously elevating condominium owners’ awareness of their rights and obligations.<sup>41</sup> Only recently has there been the realization that unit owners’ apathy about management issues stems from their lack of awareness on the issue. Unit owners need a push to overcome this “mental inertia”. To formalize property rights and formulate the mechanics of condominium management takes continual adjustments in order to equip condominium owners with management knowledge. Without active participation in collective action driven by an awareness of “my property, my destiny”, the effects of condominium legislation are questionable.

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37 Wekerie, Dragicevic, Jordon, Kszyk & Sorenson “Contradictions in Ownership, Participation and Control: the Case of Condominium Housing” in Ungerson & Karn (eds) *The Consumer Experience of Housing* 171.

38 Yip & Forrest “Property Owning Democracies? Home Owner Corporations in Hong Kong” 2002 (17) *Housing Studies* 704.

39 North *Institutions, Institutional Change and Economic Performance* 34.

40 See n 9 *supra*.

41 Chen & Mostert “Formalizing Condominium Ownership in China” 73.

### **7 3 5 Local Government's Intervention**

Local governments are able to exert substantial influence on the success of condominium developments. Their job should not be just administering around the condominium's edges with local zoning and subdivision ordinances. More importantly, local governments should be actively involved in condominium living. An example would be for a local government agency to monitor and at times to take part in the management of the condominium complexes. For example, when the chairperson of the executive council fails to call a council meeting requested by a council quorum, the local government should intervene and designate one of the council members for the job. This keeps the condominium association functioning by avoiding a deadlock. In this sense, the role of local government is far more significant and workable than simply recourse to a local court.

Another function for local government would be making condominium owners aware of their rights and obligations in condominium life with a local government training program. Education is also needed if unit owners are to play a significant role in condominium governance. At present it seems that efforts to introduce new condominium laws are hindered by a lack of understanding of the complexities of "residential private government" and by a shortage of well-educated and well-trained unit owners.

One can reasonably argue that local government intervention could inhibit and restrict unit owners' control of their own condominium affairs. This concern is eased in two ways. First, local government intervention does not mean a local government has unlimited power to intervene in the private life of the condominium community. Rather, intervention as a policy tool has a fine line drawn that lays out the circumstances under which the local government can step in. This needs to be considered by lawmakers when framing the condominium statute. Second, most Chinese condominium owners are unfamiliar with how to properly manage their

property properly. In order to lessen management problems and to redress any power abuses caused by inexperienced council members, the local government's intervention is regarded as worthwhile at this stage.

### **7 3 6 Advocating A Cooperative Culture**

Property law scholars note that property is not about relationships of people to things, but rather about relationships among people with respect to things.<sup>42</sup> The interplay between unit owners is crucial for harmonious condominium living. People who live in condominiums must out of necessity work closely with each other to make a condominium association function.

If condominium law legislation is thought of as social "hardware", then the relationship between unit owners can be thought of as social "software". Unit owners should regard the condominium association not only as an agency to protect their investment but also as a "self-governance organization".<sup>43</sup> When this takes place each unit owner has a sense of belonging to their community with a voice in condominium affairs. This sense of belonging is important for it bears on whether or not there is enthusiastic participation in the management of condominium complexes. Equally important is to have a cooperative and tolerant culture. Very often, defects in management structures and procedures are thought to cause disputes. But the real and significant conflicts are the confrontations between neighboring owners over conflicting interests.<sup>44</sup>

Forming an owner's association does not automatically solve management problems.<sup>45</sup> Unit owners' "individualistic" approach to problem solving can easily trigger disputes in condominium living. The underlying and essential solution is for

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42 See for example, American Law Institute *Restatement of the Law of Property* (vol 1) 3.

43 Mckenzie *Privatopia: Homeowner Associations and the Rise of Residential private Government* 147.

44 Olsen *The Logic of Collective Action: Public Goods and the Theory of Group* 25-33.

45 Yip & Forrest "Property Owning Democracies? Home Owner Corporations in Hong Kong" 715.

unit owners to realize that they are interdependent rather than living freely in nature. Therefore, as a matter of social policy, a cooperative condominium culture is needed.

## **7 4 SIGNIFICANCE OF STUDY**

This thesis has shown that research to develop a guideline for a uniform Chinese condominium law is only in its early stages. When China's condominium movement broadens and has heightened visibility by the National People's Congress of China, it is hoped that this research will be examined to provide guidelines for national condominium legislation. Hopefully, as a late bloomer, China will learn from its experienced predecessors and avoid dysfunctional practices in the housing area. If the national legislature should fail to consider a uniform condominium act, this thesis will still have evaluative merit. One will be able to ponder and speculate why apartment ownership legislation failed despite having a modicum of government commitment.

With little published work on this topic, this study fills a gap in respect of condominiums in Chinese law. Therefore, it is hoped that the study will attract the attention of Chinese legislators. The subject matter of this study cuts across property law, law of associations, and comparative law methodology. Now it is necessary to initiate discussions within the legal profession to spearhead a movement towards a more controlled and better-regulated apartment ownership market in China. In this endeavor lies the major value of the study.

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