

Reflections on Chinese apartment ownership law (part 2)*

CG VAN DER MERWE**

8 *Manager (real estate service provider)*

8.1 Provisional services contract

The Property Code stipulates that the owners themselves, a professional management firm (service provider) or any other manager may manage the scheme.¹⁶⁵ The Real Estate Management Regulations require that condominium management must be performed by one of the established management firms in the property management district concerned.¹⁶⁶

The management firm must be appointed by all the owners jointly.¹⁶⁷ However, due to the fact that a now repealed regulation of the construction ministry required that a service provider must be appointed prior to the sale of residential units, the general practice is that the initial management firm is appointed by the developer.¹⁶⁸ The regulations provide that the developer must conclude a written provisional contract of services with the firm.¹⁶⁹ In order to separate property development and property management, the regulations require that the appointment of a manager with the necessary expertise and qualifications must take place by way of an advertised tender process.¹⁷⁰ In the case of a relatively small residential condominium where it is evident that there will not be more than three bidders, the tender may, with the approval of the relevant local government at district or county level, take place without advertisement.¹⁷¹

The duration of the provisional management contract with the developer may be fixed without setting a maximum period,¹⁷² but the contract is dissolved as soon as the management contract with the owners' committee becomes operative. This confirms the principle embodied in the Property Code that a manager appointed by the developer may be dismissed by the owners.¹⁷³

* See 2014 *TSAR* 788 for part 1. Based on Pissler *Wohnungseigentum in China Darstellung und Rechtsgrundlagen* (2012).

** Emeritus Professor in Private Law, University of Stellenbosch.

¹⁶⁵ § 81.

¹⁶⁶ § 34.

¹⁶⁷ Property Code § 34.

¹⁶⁸ See Pissler (n 1) 49 and Real Estate Management Regulations §§ 21-31.

¹⁶⁹ § 21. Pissler (n 1) 50 warns that a developer-appointed manager would not have any interest in disclosing building defects.

¹⁷⁰ § 24.1.

¹⁷¹ § 24.2.

¹⁷² Management Regulations § 26. The three-year period discussed was abandoned due to uncertainty as to whether a general meeting and an owners' committee would already have been established after the expiry of such period.

¹⁷³ § 81.2. See Pissler (n 1) 51.

8.2 Owners' management contract

The management contract entered into by the owners' committee in terms of the Property Code¹⁷⁴ must, at the very least, contain provisions on property management; the quality of services and the charges for such services; the rights and obligations of the parties; the management and utilisation of the maintenance reserve fund; the condominium rooms used for management; the duration of the contract; and the sanctions in the event of breach of contract.¹⁷⁵ Specimens of these contracts are available in practice textbooks and are readily available on the internet.

In terms of Interpretation on Property Services the management contract may also include further publicly advertised services, and detailed service rules prepared by the manager.¹⁷⁶ These unilateral offers and service rules are construed as impliedly agreed terms that coupled with the principle of good faith protect the owners' legal interests and bind the manager, owners and the owners' committee.¹⁷⁷

8.3 Non-binding services contracts and terms

The Interpretation on Property Services stipulates that service contracts or provisional service contracts are not binding when the management firm delegates all services to outsiders.¹⁷⁸ Furthermore, provisions which exempt management firms from liability, increase their responsibilities or exclude the principal rights of the owners or the owners' committee are not enforceable.¹⁷⁹ The owners' committee (and possibly also the owners in their individual capacity) may institute court proceedings to declare these provisions void.¹⁸⁰

8.4 Inspection of property

The management firm, assisted by the owners' committee, may conduct a joint inspection of the property in order to pre-empt disputes as to whether the owners or the manager are responsible for defects in the building discovered later.¹⁸¹

8.5 Obligations

Under the Real Estate Management Regulations managers must deliver the services promised in terms of the contract of services. In the event that non-compliance affects the personal security of owners or causes damage to their property, the manager will be held legally liable¹⁸² in terms of the relevant contractual, delictual, administrative or criminal norm.¹⁸³ In terms of the Interpretation on Property Services the manager incurs liability in case of non-compliance with his contractual obligations and must remedy the breach or compensate the affected owners for damages caused.¹⁸⁴

¹⁷⁴ § 76.4.

¹⁷⁵ Management Regulations § 35 1 and 2.

¹⁷⁶ § 3.2.

¹⁷⁷ § 1.2.

¹⁷⁸ § 2.1. This confirms the prohibition of such transaction in terms of Real Estate Management Regulations § 40.

¹⁷⁹ § 2.2.

¹⁸⁰ See Pissler (n 1) 55.

¹⁸¹ Management Regulations § 37.

¹⁸² § 36.

¹⁸³ See Pissler (n 1) 60.

¹⁸⁴ § 3.1.

8.6 Functions

The Property Code stipulates that management firms and other managers manage the building and appurtenant installations under a mandate under supervision of the owners.¹⁸⁵ The Interpretation on Property Services lists the obligations of the manager as maintenance, repairs, operation, management and protection of the condominium. Liability for non-performance follows only if the particular obligations breached were agreed upon in the management agreement,¹⁸⁶ exist as a matter of law or are simply expected in terms of community standards.¹⁸⁶

In terms of the Real Estate Management Regulations a manager may outsource certain services such as cleaning, security services and lift maintenance to specialist outside firms.¹⁸⁷ However, the manager is not permitted to outsource highly personal management services and management services that benefit only the manager to the detriment of owners' interests. Contracts concluded in contravention of this prohibition are void and the official certification of the firm may be revoked.¹⁸⁸

The Real Estate Management Regulations allow managers to perform services beyond the mandate concluded with the owners for a charge agreed upon by the parties.¹⁸⁹ For example, the service provider may conclude an agreement with one of the owners to provide transport services to take that owner's children to school. This is only a realistic possibility in relation to minor matters and does not concern primarily management matters.¹⁹⁰

In respect of anti-social behaviour, the manager must terminate certain activities occurring within the property management district or county and report them immediately to the relevant district or county authorities. Such activities include general anti-social behaviour; the protection of the environment; decorations and extensions of the building and the utilisation of land which contravenes legislation or legal norms.¹⁹¹ This obligation does not confer an explicit administrative power on the manager although it would be repugnant that the obligation can be performed without a corresponding power.¹⁹² Therefore the administrative power is implicit in the obligation.

Under the regulations, the relevant local authority responsible for management guidance must, on receipt of the report of the manager, put an end to unlawful activities or deal with the activity in accordance with the law.¹⁹³ The manager must further support works pertaining to security and prevention in the condominium district or county. In the event of a security breach, the manager must undertake emergency measures and report the breach immediately to the relevant management guidance authority and support the measures introduced by the latter authority.¹⁹⁴ This emphasises the wide social responsibility of the management firm to help the police to keep order in the community.¹⁹⁵ Security staff appointed by the management firm (which need not be outsiders), are subject to the relevant central state security rules. They must protect the public order without infringing upon the

¹⁸⁵ § 82.

¹⁸⁶ § 3.1.

¹⁸⁷ § 40.

¹⁸⁸ Pissler (n 1) 53.

¹⁸⁹ § 44.

¹⁹⁰ Pissler (n 1) 57.

¹⁹¹ Management Regulations § 46.

¹⁹² Pissler (n 1) 57.

¹⁹³ § 46.2.

¹⁹⁴ § 47.

¹⁹⁵ Pissler (n 1) 58.

lawful interests of the owners.¹⁹⁶ Since the regulations do not contain any sanctions it is suggested that non-compliance with these obligations will result in only civil (rather than criminal) liability.

As in South Africa, charges for the supply of water, electricity, gas, heating, telecommunications and cable television to owners must not be collected by the manager but by the public authorities that provide such services.¹⁹⁷ The condominium manager may, however, be mandated to collect these charges on behalf of the public authority concerned, without being entitled to an additional fee.¹⁹⁸ In practice it is unlikely that the manager would be prepared to do this.

8.7 Powers

In the absence of any provisions in the Property Code and the Real Estate Management Regulations, the Interpretation on Property Services provides that the manager has the power to demand the support of the people's court when owners carry out activities against the management contract of services, legislation and legal norms. In such cases the owners can be ordered to terminate an obstruction, stop causing damage and restore the status quo.¹⁹⁹ Under the Interpretation on Property Services, the manager has the power to enforce payment of overdue management charges after the offender has been notified in writing of his obligation to pay the arrears within a reasonable period of time. Refusal to pay without a reasonable excuse or within the stipulated period entitles the manager to institute court proceedings to collect the arrears. The offenders cannot object to payment on the ground that they did not receive or need not use the available services²⁰⁰ or that their tenants or any other third person are contractually obliged to pay the charges.²⁰¹ Owners are entitled to refuse to pay unlawful charges and, if paid, reclaim such charges from the manager.²⁰² In principle owners are jointly and severally liable for the payment of management charges.

8.8 Expiry of management contract

On expiry of the management contract, the owners' committee must hand over to the new manager²⁰³ the following documents received from the previous manager:²⁰⁴ the overall condominium plan; detailed construction plans of the building and common installations; documents relating to the inspection of the building on completion including the plans for completion of the appurtenant facilities and of the underground network of pipes; technical documents pertaining to the installation, utilisation, protection and operation of the installations and facilities; written warranties concerning the repair and the quality of the property; and a written guide book on the use of the property; and any other documents necessary for the management of the property.

¹⁹⁶ § 47.2.

¹⁹⁷ under § 54 of the Regulations.

¹⁹⁸ § 45.2.

¹⁹⁹ § 4.

²⁰⁰ § 6.

²⁰¹ § 7.

²⁰² § 5.

²⁰³ §§ 29.1 and 37.2.

²⁰⁴ §§ 29.2 and 39.2.

8.9 Dismissal

The Interpretation on Property Services provides that the owners' committee (or if no committee exists, all the owners) may dismiss the manager by a simple majority resolution at a general meeting.²⁰⁵ In such circumstances the manager may not challenge the dismissal on the ground that management fees are still due to him or her.²⁰⁶ Nevertheless general practice allows managers to claim compensation under the Code of Obligations if the dismissal was not triggered by a breach of contract on the part of the manager.²⁰⁷

8.10 Consequences of rescission of services contracts

When management contracts are cancelled on dismissal of the manager, the Interpretation on Property Services allows owners to claim repayment of service charges (frequently payable annually in advance) in respect of services not performed.²⁰⁸ On the other hand, managers are entitled to enforce claims for arrears in the payment of management charges.²⁰⁹ The owners' committee may request that the manager leaves the condominium and hands all relevant items and documents pertaining to the management service and the reserve fund.²¹⁰ If the manager refuses to comply, he may not claim any service charges on the ground that services have been provided in the past.²¹¹

8.11 Concluding remarks

We have seen that several subordinate legislative provisions provide protection to owners against property management firms and other managers. Firstly, the provisional management contract expires automatically on appointment of a new manager by the owners' committee. Secondly, the owners' committee may have a manager dismissed by simple majority vote at a general meeting. Thirdly, owners are entitled to refuse payment of unlawful charges and to reclaim unlawful charges paid in advance on dismissal of the manager.²¹²

We have also seen that managers have certain supervisory functions which are ordinarily associated with custodians of the public order. In disputes between owners, the parties will also approach managers for internal settlement of the dispute, which is preferable to a long drawn-out court process.

9 Owners' committee

The relationship of the general meeting, owners' committee and the manager is structured differently from in German law.²¹³ The manager is not responsible for the implementation of the resolutions of the general meeting. Rather, it is the owners' committee which acts as the executive organ of the general meeting.²¹⁴ Therefore the

²⁰⁵ § 8 read with Property Code § 76.4.

²⁰⁶ § 8.2.

²⁰⁷ Pissler (n 1) 54.

²⁰⁸ § 9 1.

²⁰⁹ § 9.2 read with § 6.

²¹⁰ § 10.

²¹¹ § 10.2.

²¹² Pissler (n 1) 80.

²¹³ Pissler (n 1) 80-81.

²¹⁴ Pissler (n 1) 61.

committee is much more important in China than in Germany. Note that the powers of the owners' committee may also be exercised by a local resident committee at the site of the property. A corresponding provision does not exist for the owners' general meeting; this is a reference to the fact that the general meeting is considered in practice to be expendable. The powers of the owners' committee are wide in scope and potentially include the granting of use rights in relation to a part of the common property to an individual owner. It can at least be concluded from the above that the owners' committee has the obligation to inform the owners of the manner in which the parking spaces for motor vehicles will be allocated.²¹⁵ It is not absolutely clear who has the final say with regard to the allocation. It would seem counter-intuitive for the owners' general meeting to take the ultimate decision. From the entitlement of the owners' committee to obtain the seal of the scheme, it must probably be concluded that the owners' committee may have the capacity to represent the owners.

9.1 General

The owners' committee is the executive organ of the community of owners.²¹⁶ If no committee has been elected or the existing owners' committee is incompetent, the Manual of Instructions requires the local condominium residents' committee to take over the functions of the owners' committee until a new committee is elected under the guidance and supervision of the government street committee or the peoples' local government authority at community or small city level.²¹⁷

9.2 Election

The Property Code provides that the members of the owners' committee are elected and dismissed by a majority resolution of the general meeting.²¹⁸ Nominations of candidates for the committee consisting of an unequal number of five to eleven members²¹⁹ are made by owners within the scheme (including the nominees themselves).²²⁰ The members must be owners and must have full legal capacity; obey central state legislation, legal norms and the procedural rules of the general meeting; comply with their duties in impressive fashion; be honest and enthusiastic to serve the owners' community with honesty and integrity; and have a strong sense of responsibility, a certain level of management competency and sufficient time to devote to the job.²²¹ The result of the election must be reported to the relevant executive government authority within 30 days of the election together with information about the establishment of the general meeting and the election itself, the management agreement, the procedural rules of the general meeting and other important matters that had been decided by the general meeting.²²² The customary period of office is five years, but existing members may be re-elected.²²³

²¹⁵ Pissler (n 1) 81.

²¹⁶ Pissler (n 1) 80.

²¹⁷ § 58.

²¹⁸ § 76.1.3.

²¹⁹ § 31.

²²⁰ Manual of Instructions § 14.

²²¹ § 31.2.

²²² § 33.

²²³ § 32.

9.3 Meetings

The committee must hold its first meeting within seven days of its election and elect a chairperson and vice-chairperson from among themselves.²²⁴ The chairperson, or the vice-chairperson,²²⁵ if instructed to do so, must convene and conduct meetings in accordance with procedural rules²²⁶ and the resolutions of the general meeting.²²⁷ Meetings must be held within seven days of a request being made by one-third of the members to hold such a meeting.²²⁸ If the chairperson fails to hold such a meeting, or to convene a meeting as required under the procedural rules, the relevant government authority of the locality can request another member to convene the meeting.²²⁹

More than half of the members must attend the meetings in person and resolutions must be approved by more than 50 per cent of the members.²³⁰ The agenda must be disclosed to the owners at least seven days prior to the meeting and the members must consider opinions and proposals by those present.²³¹ Written minutes of the meeting must be recorded, signed by the members present at the meeting, be made available to the owners within three days and kept in a safe location.²³²

9.4 Functions

The Manual of Instructions stipulates that the owners' committee, under supervision of the general meeting, must perform the functions laid down by the general meeting. The committee must implement the resolutions of the general meeting.²³³

Under the Real Estate Management Regulations the owners' committee must implement the resolutions of the general meeting in the following ways: convene general meetings to report on the implementation of resolutions; as representative of the owners, conclude a management contract with the manager; react swiftly to any questions raised about management firms' compliance with their management contracts; supervise and implement the management agreement; and perform other functions imposed by the general meeting.²³⁴ The Manual of Instructions adds the following further functions: a duty to demand management and other charges from owners; a duty to organise and supervise the collection and utilisation of maintenance reserve funds; and an obligation to resolve disputes among the owners that arose with regard to the use, protection and management of the condominium.²³⁵

Another function of the owners' committee under the manual is to disclose the following information to the owners: the management agreement and the procedural rules pertaining to meetings; the resolutions of the general meeting and the meeting of the owners' committee; the content of the management contract; the manner in which the maintenance reserve fund is collected and utilised; the manner in which the common property and income from it may be used; the manner in which parking

²²⁴ Manual of Instructions § 32.2.

²²⁵ § 38.

²²⁶ § 39.3.

²²⁷ § 37.

²²⁸ § 37.

²²⁹ § 52.

²³⁰ § 38.3 and 3.

²³¹ § 39.1.

²³² § 39.2.

²³³ § 3; Pissler (n 1) 63 and 80.

²³⁴ § 15.

²³⁵ § 35.

bays, roads and other spaces used for parking are allocated;²³⁶ the income and expenses pertaining to the general meeting and the owners' committee; and certain other facts and documents that are relevant to the scheme.²³⁷

A final function of the owners' committee is to keep records of the following documents in a safe place: the minutes and resolutions of the general meeting and the owners' committee; the procedural rules for meetings; management agreements; records pertaining to the nomination and election of the owners' committee; records pertaining to the establishment and utilisation of the maintenance reserve fund; a file containing the names of owners and their proxies; and suggestions submitted to the owners' committee.²³⁸

The fact that the official seal of the condominium is entrusted to the owners' committee, also reflects the representative capacity of the committee.²³⁹

9.5 Powers

In terms of the Property Code²⁴⁰ and the Manual of Instructions²⁴¹ the owners' committee has the same power as the general meeting to institute court proceedings against owners or other persons whose conduct infringes upon the legal interest of others. The Manual of Instructions further grants the owners' committee the power to approach the police for the production of the official seal of the committee after their election.²⁴²

9.6 Disqualification of members

Members are automatically disqualified from holding office in the event that they are no longer owners of units; no longer have legal capacity; their freedom is restricted by law; or particular circumstances disqualify them in terms of legislation, legal norms or management agreements.²⁴³ Their membership is also terminated if one-third of members, or owners whose collective voting power totals 20 per cent or more request termination; a letter of resignation is received; members fail to fulfil their functions; members profit personally from their membership; the legal interests of others are infringed; or where the owners cannot continue as members for any other reason.²⁴⁴

9.7 Vacancies and election of new members

A vacancy on the owners' committee must be filled immediately in terms of a resolution or the procedural rules of the general meeting.²⁴⁵ In the event that the membership of more than half of the members is terminated,²⁴⁶ a special general meeting must be convened to elect a new owners' committee.

²³⁶ Pissler (n 1) 81.

²³⁷ Manual of Instructions § 36.

²³⁸ § 40.

²³⁹ Pissler (n 1) 81.

²⁴⁰ § 83.2.

²⁴¹ § 5.

²⁴² § 34. See § 41 for the use and safe custody of the seal.

²⁴³ § 43.

²⁴⁴ § 44.

²⁴⁵ Manual of Instructions § 46.

²⁴⁶ § 46.3.

Three months prior to the expiry of their term of office, a general meeting must be convened to implement the change in membership and this must be reported to the relevant local government executive authority.²⁴⁷ Within ten days of expiry of their office the relevant documents, seal and other items belonging to the general meeting must be handed over to the new members.²⁴⁸ If no new election is organised, the relevant local official executive authority must fix a period within which an election must be held to effect the change in office. If unsuccessful, the local resident committee under the guidance and supervision of the street committee or the peoples' government authority at community or small city level must organise such an election.²⁴⁹ If this is unsuccessful or if the membership of more than half of the members has been terminated, one of the abovementioned state executive authorities can (in a representative capacity) perform the functions of the owners' committee.²⁵⁰

10 *State supervision of condominium schemes*

10.1 General

A peculiarity of Chinese condominium law is the state supervision of condominium management. In 1994 the State Council adopted a comprehensive national housing reform policy which focused on the privatisation and commercialisation of the housing market.²⁵¹ This led to the amendment of the constitution which put private property on the same footing as state-owned property²⁵² and recognised the right to private property as a fundamental freedom.²⁵³ Prior to this reform all condominium units were government owned and all buildings were government managed. Condominium legislation still reflects such state supervision to a certain extent.

Prior to the revision of the Real Estate Management Regulations, the only relevant state executive authority was the Building Department of the local government department at district or county level. Because of the lack of a sufficient number of competent staff, the state involvement was extended to two lesser local government authorities, namely street committees and government authorities at community or small city level. It is not always clear which of these three public authorities are involved with a particular condominium.²⁵⁴

10.2 General meetings and owners' committees

Under the Property Code,²⁵⁵ the Real Estate Management Regulations²⁵⁶ and the Manual of Instructions²⁵⁷ the relative local government authorities must instruct and support the establishment, and supervise the current activities, of the general meeting and the election of an owners' committee. In addition, the Management Regulations provide that in the event that resolutions of the general meeting or the owners' committee contravene legislation or legal norms, the relevant state executive

²⁴⁷ § 47.

²⁴⁸ § 48.

²⁴⁹ § 57.

²⁵⁰ § 58. Pissler (n 1) 81.

²⁵¹ Decision of the State Council on extending Housing Reform in Urban Areas.

²⁵² Constitution (amended 14 March 2004) § 13.

²⁵³ See further Chen and Kielsgard (n 5) 4-5.

²⁵⁴ Pissler (n 1) 11, 68 and 81.

²⁵⁵ § 75.2.

²⁵⁶ §§ 10 and 53.

²⁵⁷ § 6.

authority must impose a deadline on the committee to rectify this, failing which the resolution will be annulled and all owners will be notified.²⁵⁸

What is more, the police and the condominium residents' committee are expressly drawn into condominium management. The Management Regulations counsel the general meeting and the owners' committee to work together to preserve peace in the local property management area²⁵⁹ and to fulfil their management function, support the initiatives of the government's street committee and subject themselves to the guidance and support of the condominium residents' committee.²⁶⁰ Again, resolutions of the general meeting and the owners' committee of a residential condominium must be reported to the condominium resident's committee. Furthermore, general meetings and owners' committees must seriously consider recommendations of the condominium residents' committee.²⁶¹

10.3 Property management

Under the Management Regulations the Chinese State Council Building Management Department is responsible for nationwide supervision of the management of buildings. The property management departments of the local government authorities on and above county level are in turn responsible for the control and supervision of property management in their local areas.²⁶² Under the Manual of Instructions either the relevant government department of the district or county, the residents' committee or the peoples' government at community or small city level must actively promote efficient condominium management and educate owners on the legal norms pertaining to property management. The relevant authorities must also deal with management complaints lodged by owners or the owners' committee without delay.²⁶³

10.4 Maintenance reserve fund

In terms of the General Method for Reserve Funds the Chinese State Council Building Management Department and the Finance Department are responsible for nationwide instruction and supervision of maintenance reserve funds for residential buildings. At local level, the government building department at district level and above performs this function together with the relevant finance department.²⁶⁴ Furthermore, the accounts opened by the general meeting to hold the maintenance reserve fund are subject to the control and supervision of the relevant local building departments of the state governments of direct government towns and districts.²⁶⁵

10.5 Joint meetings with building management authorities

The Manual of Instructions provides for joint meetings to be held with local property management authorities of the region to discuss and resolve management issues. The meetings are arranged by the relevant government street committee or the peoples' government at community or small city level. A non-exhaustive list of participants

²⁵⁸ § 19.2; Pissler (n 1) 11 and 81.

²⁵⁹ § 20.

²⁶⁰ § 20.2.

²⁶¹ §§ 20.3 and 54.1; Pissler (n 1) 82.

²⁶² § 5; Pissler (n 1) 82.

²⁶³ § 49.

²⁶⁴ § 5.

²⁶⁵ § 16.2; Pissler (n 1) 82.

includes representatives of the relevant government building department at district or county level, the police, residents' committees, owners' committees and the condominium management firm (service provider).²⁶⁶

10.6 Independence of service providing firms

The Real Estate Management Regulations require that firms which specialises in property management must have an independent legal personality.²⁶⁷ This avoids a conflict of interest between the manager and the developer. If the manager is an affiliate of the developer, he or she may be reluctant to seek judicial redress for defects in the quality of the building.²⁶⁸

10.7 State supervision of managers

The Real Estate Management Regulations require state certification of management firms according to the Method for the Certification of Managers introduced by the Building Ministry in 2004 and revised in 2007²⁶⁹ to protect owners and to guarantee high quality of services. The method divides managers into three categories according to the size of condominiums and the basic capital needed to manage a particular condominium.²⁷⁰ Thus third category firms may only manage residential condominiums of up to 200 000 square metres and non-residential condominiums of up to 50 000 square metres. In the case of second category firms the threshold increases to 300 000 square metres and 80 000 square metres respectively. Only first category management firms may manage larger schemes.²⁷¹ Each category of firms is supervised by a different level of state authority.²⁷²

Relatively high requirements are set for each category. For instance, to qualify as a category three firm the manager must have registered capital resources of at least RMB 500 000 Yuan and a staff of at least 10 persons with certain school and other professional qualifications. Category one and two firms must have capital resources of at least RMB 3 million and 5 million Yuan and a qualified staff of at least 20 and 30 respectively.²⁷³ The relevant state authority must ensure that these requirements are fulfilled at all times.²⁷⁴ Pissler contends that often only state companies would have the capacity to comply with the high minimum capital availability and that this will result in a monopoly for state business ventures.²⁷⁵

The Method for the Certification of Managers contains detailed provisions on the applications for certification or higher certification, the grounds on which applications can be referred back, the loss and rescission of certificates, and the misconduct of managers and those for whom they are responsible.²⁷⁶

The Real Estate Management Regulations stipulates that the staff of management firms must hold a professional qualification certificate.²⁷⁷

²⁶⁶ § 61; Pissler (n 1) 82.

²⁶⁷ § 32.1.

²⁶⁸ See Pissler (n 1) 70.

²⁶⁹ § 32.2.

²⁷⁰ § 3.

²⁷¹ § 8.

²⁷² § 4. See Pissler (n 1) 71.

²⁷³ § 5.

²⁷⁴ § 17.

²⁷⁵ Pissler (n 1) 82.

²⁷⁶ §§ 9-21. See Pissler (n 1) 72-74.

²⁷⁷ § 33.

Under the Real Estate Management Regulations, the fees charged for management services are controlled by several relevant state authorities. In general the fees charged must comply with the principles of adequacy and transparency and must correspond to the nature of the service and the character and specifications of the condominium concerned.²⁷⁸ The state control of fees is justified by the fact that the property management market currently lacks a mechanism to regulate management charges and that state control is necessary to protect the large sector of the population affected by management services.²⁷⁹ However, Pissler feels that state price controls of management fees will drive private service providers away from the market.²⁸⁰

10.8 Complaints

The Real Estate Management Regulations provide that the property management departments of the local peoples' government on and above county level must without delay deal with property management complaints received from owners, the owners' committee, property users and managers.²⁸¹ The manner in which complaints must be dealt with is not described and thus reference to a court is not excluded.²⁸² The provision contains only a mere principle the implementation of which is left to local regulation.

11 Conclusion

The National People's Congress of the People's Republic of China must be congratulated for their momentous achievement in codifying the Chinese law of property in the Property Code and for including therein some basic provisions of the law relating to condominiums. The condominium provisions were further fleshed out by two important official interpretations of the Property Code by the Judicial Committee of the Supreme People's Court. The nuts and bolts of condominium management are however contained in several pieces of subordinate legislation such as the Property Management Regulations of 2003 as amended in 2007, the Manual of Instructions of 2009 and the General and Special Method for Managing Reserve Funds of 2007. It is in this field that Pissler has made an invaluable contribution. He identified and compiled the most important subordinate legislation on condominium management and, most importantly, provided an excellent German translation of these subordinate Chinese legislative sources.

From these sources the following unique characteristics of Chinese condominium management have emerged. First, although the Property Code in principle accepts that unit owners become the co-owners of the common property in undivided abstract shares, it seems that in the absence of an agreement to the contrary, the developer can reserve parts of the common property such as parking spaces and the common swimming pool for himself and that facilities providers can do the same with part of the common property that house a particular facility. Secondly, not only registered unit owners but also unregistered prospective unit owners who have entered into a contract of sale for their unit may attend the general meeting in person and vote on most of the matters put to the vote. Thirdly, we have seen

²⁷⁸ §§ 41 and 43.

²⁷⁹ Pissler (n 1) 74-75.

²⁸⁰ Pissler (n 1) 82.

²⁸¹ § 49.

²⁸² Pissler (n 1) 75.

that the management of condominium schemes are imperfectly structured mainly due to the fact that corporate personality on the part of the management body of the owners' community has not been officially recognised in China. Instead of recognising a management body consisting of all the unit owners in the scheme with the general meeting as legislative and the owners' committee as executive organ,²⁸³ the Chinese condominium legislation presents an uncomfortable relationship between the general meeting and the owners' committee in which decisions of the owners' committee sometimes take precedence over resolutions of the general meeting. Finally, Chinese condominium legislation reflects a constant presence of government control at state, provincial and local government levels. This could perhaps be explained on the basis that the state is still considered the owner of all land in China and that residents are accorded only certain land-use rights with regard to the soil that expire over a 70-year period and are renewed automatically. Although this stifles free management of condominiums and commercial enterprise in condominium units to a certain extent, it has its advantages. Local government departments often assist condominium schemes to get off the ground by facilitating general meetings and the election of owners' committees and street committees. By working in tandem with the police, they play an important role in curbing anti-social behaviour within condominium schemes.

SAMEVATTING

DEELTITELSKEMAS VOLGENS DIE CHINESE REG

Die unieke bydrae van Pissler, die referent vir China aan die Max Planck Instituut vir Internasionale Privaatreg in Hamburg, is dat hy die belangrikste ondergeskikte wetgewing oor die bestuur van Chinese deeltitelskemas in sy werk *Wohnungseigentum in China Darstellung und Rechtsgrundlagen* (2012) versamel het en deur die uitstekende vertaling daarvan in Duits aan Westerse akademici toeganklik gemaak het. Uit hierdie versameling blyk dat hoewel die Chinese Sakereg Wetboek van 2007 die drievoudige basis van deeleiendom aanhang, naamlik individuele eiendom van 'n woonstel, 'n mede-eiendomsaandeel in die gemeenskaplike eiendom én lidmaatskap van die beheerliggaam (regspersoon) in die praktyk wesenlik daarvan afgewyk word.

Die Chinese ontwikkelaar word toegelaat om vir homself dele van die gemeenskaplike eiendom soos motorparkeerplekke en die gemeenskaplik swembad vir eie gewin uit te hou. Verder word nie slegs geregistreerde eienaars nie, maar ook voornemende eienaars wat 'n koopkontrak met die ontwikkelaar gesluit het en die woonstel bewoon, toegelaat om aan die besluitnemingsproses op die algemene vergadering deel te neem. Daar word ook aangetoon dat die bestuur van Chinese deeltitelskemas nie behoorlik gestruktureer is nie veral omdat daar nie voorsiening gemaak word vir 'n beheerliggaam met regs persoonlikheid nie. Daar bestaan 'n ongemaklike regsverhouding tussen die algemene vergadering en die uitvoerende komitee wat die besluite van die algemene vergadering moet uitvoer. Voorkeur word soms aan die besluite van die uitvoerende komitee bô dié van die algemene vergadering gegee.

Naas die voorgaande afwykings word boonop streng publieke beheer oor Chinese deeltitelskemas uitgeoefen op staats-, provinsiale- en plaaslike regeringsvlak wat op gespanne voet staan met die vrye mark-begrip van private eiendomsreg waaronder deeleiendom gewoonlik klassifiseer word. Daar is selfs straatkomitees wat oor deeltitelskemas die wag hou. Dit kan gedeeltelike toegeskryf word aan die feit dat die Chinese staat nog steeds die eienaar van alle grond in China is en dat "eienaars" van geboue of woonstelle slegs gebruiksregte ten opsigte van die grond vir 'n tydperk van 70 jaar verkry tensy die gebruiksregte hernu word. Staatsbeheer het egter voordele deurdat publieke owerhede deeltitelskemas help om aan die gang te kom deur algemene vergaderings te skeduleer en die deeleienaars te dwing om uitvoerende komitees te verkies. Bowendien help die straatkomitees om deur middel van die polisie anti-sosiale aktiwiteite in deeltitelskemas hok te slaan.

²⁸³ In South Africa the body corporate is structured as a central management body with juristic personality acting through its legislative organ (the general meeting) and its executive organ (the trustees). See Van der Merwe (n 13) 14-5 and 14-6.