

Owner Committee and Property Service Enterprise

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Abstract

As the development of housing construction field, residential communities gradually establish the owners' committee which also leads to improvement of the property management system. Even though current law has defined the function and power of owners' meeting and owners' committee as the execution institution, legal status of owners' committee is still relatively ambiguity during the issue settlement which leads to uncertain qualification of owners' committee as the legal representative and whether has legal right to bring a lawsuit for handling the disputes. What's more, relationship between owners' committee and enterprises' property service suffers much more discussion due to unclear legal status of owners' committee. This thesis canalizes the relationship between owners' committee and enterprises that provide property service, offers construction suggestions on completely fulfilling function capacity of owners' committee and accelerates the owners' development through self management from the perspective of owners' committee legal status.

Key words: Owners' committee; Property service enterprise; Legal status

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INTRODUCTION

The legal status of the owner committee has been debated in theoretical and practical circles. Both the Property

Management Regulations and Property Law have taken an ambiguous attitude to the issue, which also led to a loss of the court in various regions in the face of litigation of the owner's rights brought by the owner committee and disunity in terms of whether to handle complaints. On June 8, 2003, the State Council promulgated the Property Management Regulations (hereinafter referred to as the Regulations). From then on, the property management in China has been incorporated into the legal system and property service enterprises have begun to officially board the stage. Then, is the other side of the property service contract the owner, owner meeting or owner committee? How to confirm the legal status of the owner committee (such as Right to representation, the right to litigation, etc.)? These issues are related to the relationship between the owner committee and the property service enterprises and are of very important value, so it is necessary to explore them.

1. LEGAL STATUS OF OWNERS' COMMITTEE

1.1 Relative Legislative Dynamics Abroad

To be honestly, there are lots of disputes in assemble field accounting to legal status of the owners' committee. After summary this thesis lists three popular explanations hereinafter: First, someone thought owners' committee as the independent legal representative of community has right to bring a lawsuit and undertake legal responsibility independently; second, someone thought owners' committee could bring a lawsuit but has no legal qualification since it is a illegal organization who enjoys dependent sue qualification; third, the rests explained that it is neither dependent legal representative nor has qualification to bring a lawsuit. After studying the legislation cases abroad, some different regulations models concerned issues of owners' committee here exist oversea.

First type is French Model: owners management committees in French not only reserve right of legal qualification, as main subject combining right and responsibility but also enjoy the right and capacity as legal party, are established and strongly supported by law (Liang, 1998). Article 14th of *la copropriete des immeubles bates* (French law) proclaimed by French government stipulates that there shall be one owners' management committee if more than two owners possess the different parties of the construction subject. More over this two persons shall consist of one committee in legal perspective and all of them shall definitely the legal remembers. And according to the law, this committee deserves the right of corporate personality and capacity for action concerned implementing legal behavior and bringing a lawsuit. Regarding to the legal nature of this committee, Clause 1st in Article 15th defines that management committee has qualification to attend sue action in the form of application and defense and the Litigation object includes the certain special owners. No matter management committee and one or more owners connect or not, they deserve the right to bring a lawsuit for the purpose of right defense (Wen, 2002). Under this sort of French model, management committee enjoys the independent qualification of legal representative and possesses broad rights for setting up an action which expresses the clear legal status.

The second type is Germany Model: ownership management organization call it the owners' community based on *Housing Ownership Law* in German, which is not established imposed by law but found through agreement among housing owners—arbitrary establishment. Compared with the law of French, the owners community consisting of all house owners has the right capacity because it has no qualification of legal representative since in the sue action it is the single housing owner but not owners community as the Litigation subject. However, in the legal issues owners' community becomes the organization community with behavior capacity according to article 21st of *Housing Ownership Law*. Therefore this complicated housing owners' community is thought as special organization with partial right capacity in its nature (Dai, 2002). In Germany Model, housing owners' community is not independent legal representative and of course will have no legal representative qualification and capacity to be a party. But under some occasion, it shall also empower litigation qualifications.

The third is Japanese model: the management group is established automatically and only two conditions are meted the group y could be with legal representative qualification: one condition is more 30 persons in this group; the other is more than 3/4 owners with resolution power of agree to found legal representative, name, address and register in local area. In a word, there three types of ownership group in Japan: management group,

management group legal representative and community management all of which have different standards.

The forth type is American Model: Even though there is uncertain legal representative qualification about Apartment Building Ownership Association, the state law for example has no right to take an action or no responding ability, the unincorporated society may take an action or respond under its own name in order to realize its right empowered by American constitution and country law (Zhou , 2005). In American legal issues, the law has gradually admitted litigious right of Apartment Building Ownership Association in previous cases.

1.2 Relative Legislative Dynamics Abroad

In Taiwan government issues of the Apartment Building Regulations concerned construction ownerships and apartment management. This regulation explains that management organization shall be established so as to deal with common issues connecting with residents through attending together, majority rule and enforcement implementation in purpose of realizing self governing. The management organization consists of: Owners' meeting, management committee or management charge and management servant. Owners' meeting is referred to call for plenary session based on common issues and issues concerned about right and responsibility. Management committee or management charge is defined that apartment building shall establish the committee and shall also command one chairman of the committee who represents the committee to handle things outside. The 38th article of Apartment Building Regulation: management commitment has party capacity and inform owners the sue issues for themselves right or responsibility no matter it is claimed as prosecutor or defendant (Wang, 2002). This regulation claims that management committee or management charge has party capacity especially for taking an action. Management servant is defined that owners' meeting or management charge or management committee would entrust or appoint persons for execution of construction management and maintaining. The law of Taiwan empowers that management committee or management charge has lawsuit qualification including sue and responding.

1.3 Legislation Current Status in China

The legislation of ownership committee in China has experienced a long process. *Property Management Statute* published in 2003 claimed the owners' meeting system including the position as execution institution of owners' committee in owners' meeting. The article of 10th and 15th list clearly the responsibility of owners' meeting and owners' committee, among which the article 10th regulate: a) make and revise discussion principle in owners' meeting; b) make and revise management agreement; c) Select owners' committee or change its members; d) hire or fire enterprises who provide property

service; e) finance and use special maintaining capital; 6) change, rebuild construction or relative facilities; g) other major issues concerning common possessing and common management right. The article 15th proclaims: owners' committee implement the decision made by owners' meeting and its responsibility are as: a) call for owners' meeting, report execution situation about property management; represent owners' meeting hiring enterprises which provide property service and sign the property service contract; b) know about suggestion and advices from owners and users, monitor and assistant to execute the property service contract; c) monitor the management regulation execution; d) other responsibility empowered by owners' meeting.

Property Management Statutes in China is not one protection law for owners' right but more inclined to how to manage property much better. Even though this regulation has defined clearly duty of owners' meeting and owners' committee, it only illustrates that owners' committee is the execution institution of owners' meeting. Regarding to legal status of owners' committee, there is no clear explanation in regulation.

More over there is still no words about it after continuing study about *Property Law Regulation* proclaimed in 2007. The article 83rd of *Property Law Regulation* claimed: owners shall obey the law, regulation and management rules. Owners' meeting and owners' committee have right to require people who commit Damage to the legitimate rights and interests of others including indiscriminately disposal of waste, emissions of pollutants or noise, animal husbandry, in violation of the provisions of the illegal building, occupying channel, refusal to pay the property management fee to Stop the infringement, eliminate the danger, rule out sabotage and compensate for the losses. Owners have right to take legal action to People Court if any behavior damaged their legal right. In fact, this regulation is only clear the litigious status of owners, which mean individual owners could bring an action under personal name while owners' committee's right to be sue subject accounting for owners' public interest does not mention.

The second article of on the concrete application of law in property service dispute cases proclaimed by Supreme People's Court on 1st October 2009 regulate: Conforms to the following circumstances, the owners' committee or the owners' request confirmed contract or the relevant provisions of the contract invalid, the people's court shall give support: a) one-stop entrusted contract signed after property service provider subcontract all property business in service area to other; b) Clauses 8th stipulated in property service contract for remitting liability of enterprises who provides property service, strengthening responsibility of owners' committee or owners as well as eliminating major right of owners' committee or other owners'. Article 8th explains: the decision made by owners' meeting for firing enterprises that provide

property service based on clause 76th stipulated in property right law, the People Court shall support the application by owners' committee for dismissing property service contract. The People Court shall inform enterprises to claim the delay -paid property fee if enterprises assert the property fee to owners' committee. The article 10th regulates: After determination property service contract about both parties' right and liability, owners' committee applies that service provider-property enterprises remove from property area, hand over room or service space and relative facilities as well as documents and special maintaining capital kept temporarily by enterprises and then the People Court shall support its application. The People Court will not permit that if the enterprise refused to quit area and transfer facilities, together with requiring for property fee on excuse of existing property contract relationships. From explanation of the Highest People Court it is clear that the law in China has empowered the owners' committee qualification to be plaintiff but no qualification to be the defendant. So called the "limited condition "or "depends on condition" refers to it is law strict regulation about supporting situation by court, which means it will be only legal under the rules of clause 2nd, clause 8th and clause 10th and law has clearly defined the owners' committee has no plaintiff qualification. For example, in the clause 2nd of article 8th said: When property service provider—enterprises apply for property fee from owners' committee, People Court shall inform it to contact with owners who delay-paid the property fee. Rules mention above indicates that property service enterprise only could apply the right from owners but not owners' committee.

1.4 Legal Status of Owners' Committee

As the development and improvement of the system of owners' committee, its legal status has gradually much more clearly than before. The author thinks that according to the current development situation of law system, the nature of the owners' committee belongs to non-legal representative organization. Because of the late development of the owners' committee in China and it still is on the beginning phrase which makes it has no condition to be legal representation. Based on article 37th of Civil Law, the legal representative shall meet the condition as the following: a) found based on law; b) possess the necessary fee or property; c) own name, organization and the address; d) undertake civil responsibility independently. However, owners' committee is admitted just now in law, which indicates owners' committee is executive organization since it has no independent property and could undertake civil responsibility independently. On the prospective of sue, owners' committee shall not be the plaintiff according to judicial explanation. The author agrees that owners' committee is unqualified to be defendant who meets the rule of judicial law proclaimed in 2009: If any dispute,

property service enterprises shall only could take any action to owners but not owners' committee. The only reason is the owners' committee has the property and could not undertake civil responsibility.

1.5 Deeping Analysis of Current Law

1.5.1 Need Authorization of Owners' committee or Not If Any Litigation Happens

According to rules of current law, owners' meeting is execution organization which makes it necessary to clear whether we need authorization from the owners' committee. In fact there are two reasons: first, owners' committee is organization so the committee need authorization if any sue mentioned; second, there is no need for authorization since owners' committee is empowered the qualification of litigation subject to take an action within its own right scope.

Accounting this question, professor Yang Lixin thinks: "clause 2nd of article 78th on *Property Law Regulation* if the decision made by owners' committee or owners' meeting damages the interest of owners, owners could cancel the lawsuit." The article 83rd of *Property Law Regulation* claimed: Owners shall obey the law, regulation and management rules. Owners' meeting and owners' committee have right to require people who commit Damage to the legitimate rights and interests of others including indiscriminately disposal of waste, emissions of pollutants or noise, animal husbandry, in violation of the provisions of the illegal building, occupying channel, refusal to pay the property management fee to Stop the infringement, eliminate the danger, rule out sabotage and compensate for the losses (Yang, 2009).

Professor Liu Baoyu said: "House is largest investment in the whole life of owners and the monetary value of house and its private property and social value is more than its monetary value, so compared commercial company shareholders, it is necessary to enlarge scope of judicial intervention and will respect for owners' protection. What's more, the litigation took by owners not only affects economic interest of all owners but also influence their physical life and spiritual peace which suggests that the relative law enforces monitor and control more strict. The litigation brought by owners committee is one of situation of "other major issue about common possess and management right" stipulated in clause 1st, article 15th of *Property Right Law*, which shall also be passed through majority rules. Of course considering that it is not easy to call for owners' meeting since there are so many owners in residential community, so in order to enhance working effect owners could empower owners' committee to take an legal action on special scope issue drawing support by management regulation or decision of owners' meeting. The article 83rd of *Property Law Regulation* claimed: Owners shall obey the law, regulation and management rules. Owners' meeting and owners' committee have right to require people who commit

Damage to the legitimate rights and interests of others including indiscriminately disposal of waste, emissions of pollutants or noise, animal husbandry, in violation of the provisions of the illegal building, occupying channel, refusal to pay the property management fee to Stop the infringement, eliminate the danger, rule out sabotage and compensate for the losses.

The author thinks owners' committee could bring a legal action without empowerment process from owners' meeting if any dispute is raised when owners' committee is as a plaintiff on the law scope which means that the law in fact authorize it the litigious qualification on stipulated law scope. For example, adding much more one empowerment process makes the law process more complex and at the same time decreases the effect for dealing with dispute.

1.5.2 Whether Owners Have Defendant Qualification

This object has been discussed herein above; however, there is still no clear regulation even new judicial explanation public. Some scholars think qualify for plaintiff and defendant shall be one incorporate which indicates if it has one qualification then at the same time has another. However, the author thinks when facing the current situation and development status of the owners' committee in China, it shall not only pay much attention to its integrity. In fact, on the practice it is not difficult to empower its defendant qualification. But if it has the right to be defendant, the result shall bring a huge disaster and negative affection because if owners' committee has no property for executive use it will be difficult to implement which may affect interest and property owners. The author thinks that based on clause 2nd of article 78th of *Property Law Regulation*: owners have right to require the court to revoke litigation if the decision made by the owners' committee or owners' meeting damages the interests of owners. From this explanation scholars guess the fail-empowered defendant qualification of owners' committee which is not proper. Since there is a huge difference between revoking litigation and undertaking defendant responsibility so is not meaningful to explain that current law empowers the defendant qualification according to those literature words.

1.5.3 Litigious Scope for Owners' Committee to Take an Action

It needs to be more clear that how large scope the owners' committee to take any action. Owners' committee as the executive organization of owners' meeting shall insist on the principle of integrity interests of owners. So owners' committee must take actions based on common and integrity interests. At the same time, in order to protect the interest of owners, owners' committee also shall bring actions if owners' interest is damaged. And situation that is suitable for bringing an action list as following:

a) Disputes happen with property service enterprises. If property service enterprises disobey the contract and

damage owners' interest, it shall quit property service area once the owners' meeting makes a decision to determinate the contractual relationships. But if enterprises refuse to hand over property management rooms or documents which concern common interest of whole owners, owners' committee has the right to take legal action.

b) Disputes happen accounting on fee related public area undertaking of construction and relative facilities. According to article 81st of Property Law Regulation, owners could self management contract and relative facilities and also could entrust enterprises or managers to handle. If under a situation of self management, owners' organization has the right to charge maintaining fee based on management rules or law regulation. If the owner refuses to pay which makes facilities partial or all-round stop working and effective common interests of the whole owners, owners' committee has right to bring a legal action to owners who refuse to pay (Han, 2008).

c) Dispute happens between individual owners and the third party due to common area and common issues. Because of the common management for "common area" together with common sharing "common issues" (Liu, 2007), so the type of disputes is listed as two kinds: First, if owners or the third party (persons who rent or borrow the house) damage the common interests due to improper usage, for example change the residential house to commercial building without permission of owners; second, the article 83rd of *Property Law Regulates*: The behavior to throw rubbish, emissions prolusion or make noise, breed animals, rebuilding outside regulation of law, occupant common area. The two types mentioned above would be took a legal action.

d) Common areas for certain owners are damaged, owners' committee has right to bring an action. Even though the areal small, it could not be an excuse to deny its common interest. It certainly would weaken function of owners' committee. However, special property of owners is damaged for example the group disputes because of housing fault about handed over by real estate investors is suitable for agent litigation since there are no relationships with all owners.

2. THE RELATIONSHIP BETWEEN OWNERS' COMMITTEE AND PROPERTY SERVICE ENTERPRISES

Article 76th of *Property Law Regulation*: owners' committee, as the execution organization of owners' meeting, is elected by all owners and responsible for all issues decided by owners' meeting. According to article 8th of *Property Law Regulation*, all owners within property management area consist of owners' meeting which represents the legal interest of all owners during any property management event. Also because owners' committee is permanent organization of owners' meeting,

so it undertakes the same responsibility and has close relationship with property service enterprises. Based on *Property Management Statute*, the relationship between owners' committee and property service enterprises is as following: a) Sign the contract with hiring property service enterprises repenting owners and owners' committee. Owners make decision to hire or fire property service enterprises while it is owners' committee signs the contract. When two parties sign the contract, the property service enterprises shall have independent legal representative qualification and the staff shall get qualification certificate based on country related laws. The contract shall be written form and its content shall concern property management items, service quality, service fee, two parties' right and responsibility, special repairing capital management and usage, property management room, contract valid and responsibility if break the contract. b) Know about the suggestion and advice of owners, property users in time, monitor and assistant property service enterprises to carry out contract. The purpose of owners committee is to protect interest of all owners, so it shall Know about the suggestion and advice of owners, property users in time, monitor and assistant property service enterprises to carry out contract so as to better service owners, maximize interests and push property development in order. c) On the prospect of litigation, owners' committee possesses certain right of prosecution. For example, committee has right to take an action and court shall give support under the situation of article 2nd, 8th and 10th of Interpretation of several issues concerning the application of law in the case of property services disputes.

3. MAKE FULL USE OF OWNERS' COMMITTEE

As an important role in property management, owners' committee especially pays a key rule to communicate between owners and property service enterprises. So improving process will be helpful to make full use of role of owners' committee.

a) It is necessary to gradually possess independent property by owners' committee so committee could undertake relative law responsibility. Thesis above has mentioned that current law in China only admits owners' committee has defendant qualification on certain condition but no plaintiff qualification since the development level of committee is still on beginning stage and it has no independent property which makes it could not undertake civil responsibility. For example, the regulation of Beijing Highest People Court and Shanghai Highest People Court: Owners' committee has right to take legal action whenever concerning all owners' common interests. What are different rules between Beijing and Shanghai, Highest Court in Chongqing also defines its plaintiff qualification

and make clearly about its defendant qualification as well as situation of litigation risk. In Guidance Suggestion about Litigation Qualification of Owners' committee under Disputes Handling Process, Highest People Court in Chongqing regulates: "Owners' committee established under the law could be the plaintiff or defendant while all owners undertake the litigation risk." And also the owners' meeting and owners' representative meeting shall be called for when owners' committee is to be defendant or plaintiff which is emphasized in the suggestion. It is necessary to hand over the written document if any litigation is brought, which is a great breakup (Chen, 2007). To be honest, owners' committee in China shall finance fee and gradually possess own property independently so as to undertake its civil responsibility. At the same time, owners' committee shall be empowered defendant qualification which will be helpful for dispute solution between owners and property service enterprises.

b) Improve monitor system to owners' committee by owners. The article 6th and 11st of *Property Management Statute* defines that owners and owners' meeting have right and responsibility to monitor working of owners' committee but there is no detailed implementation mechanism. In fact in daily life owners' committee has lots of problems, such as unprofessional qualification of staff, failing to undertake contract, abusing monitor right, or easy forgetting responsibility, improper to represent owners' interest, abusing right even damaging partial owners' interest sometimes. The author thinks that accounting to problems mentioned above it is necessary to establish monitor committee which will monitor all work of owners' committee strictly. At the same time the behavior regulation shall also be built for owners' committee and its members and open related training and management courses so as to restrain abusing right through process regulations.

c) Effectively monitor and assist property service enterprises to carry out property service contract. Based on article 15th of *Property Management Statute*, as the executive organization of owners' meeting, owners' committee shall try to assist and monitor property service enterprises to implement property service contract which will be helpful to make sure owners' interests. If property service enterprises fail to carry out the contract, owners' committee shall represent all owners' interests to require enterprise undertaking responsibility or take legal action to People Court. Meanwhile, owners' committee also provides assistance work so as to ensure that property fee is paid in time which not only keep smooth development of property management but also maintain the whole interest of the owners.

In a word, on the purpose to maintain collective interests of owners, it is necessary to continually improve the system of owners' committee, ensure its legal status and make full use of its coordination rules between owners and property service enterprises.

CONCLUSION

In the perspective of legislation and practice in China, China has not constructed the owner organization into the pattern of legal person, but the pattern of unincorporated body. The owner meeting is more similar to the partnership enterprise. Owner committee is the executive body of the owner meeting. One side of the property service contract is the owner meeting, not the owner committee. Since the owner committee is the executive body of the owner meeting, it has the right to engage in various activities on behalf of the owner meeting. The owner committee chooses the property management enterprises in real life, but afterwards it shall be voted through the owner meeting.

In order to facilitate the owner committee to perform its duties better, its legal status shall be confirmed. Therefore, the author believes that the owners should register, and the reasons are as follows: first, the owner meeting is an unincorporated body with the qualification of civil subject, engaged in a variety of civil activities. Since the owner committee is the executive body of the owner meeting, it should prove its identity through registration. Only in this way can it maintain the security of transactions, protect the interests of the relative people and the social order. Second, some local laws and regulations in China require the owner committee to register, indicating that there has been a precedent, and it is indeed necessary for the owner committee to register in practice. So, from a legal perspective, that the owner committee implements the registration system can better clarify the subject of legal relation it participates in, and it is easy for accountability.

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