

2022

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Recommended Citation

Lei, Wang (2022) "Realty Service Contracts and the Legal System of Realty Management in China," *Contemporary Social Sciences*: No. 6, Article 6.

DOI: <http://dx.doi.org/10.19873/j.cnki.2096-0212.2022.06.006>

Available at: <https://css.researchcommons.org/journal/vol2022/iss6/6>

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Realty Service Contracts and the Legal System of Realty Management in China

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Abstract: The realty (real estate) management of ownership of buildings includes the owner (homeowner) entrust-management and the owner self-management, the former through the way of realty service contracts, the latter through the resolution of the owners' assembly and the owners' committee. The legal disputes of realty service contracts involve balancing interests among the realty service enterprise, individual owner, and all the owners. We should use dynamic balancing of the interests of the three parties to implement the interests of the win-win cooperation rather than the interests of the trade-off of "all or nothing." The realty service contract is similar to the entrustment contract, both of which are based on the owners' entrustment. The duty to provide realty service is not simply equivalent to fiduciary duty. The realty service contract has the essence of both behavior debt and result debt. For the former, the general provisions of the entrustment contract can be referred to, and for the latter, the general provisions of the contract for work can be referred to. In view of the group characteristics of the realty service contract, owners have no right to terminate the realty service contract at any time but should obey the principle of due process and take the majority mechanism to make a dismissal resolution resolution. The resolutions and management stipulations worked out by the owners' assembly in a majority mechanism, both of which belong to resolution behavior and are legal tools of the owners' autonomy, shall be binding on all the owners. The relationship between the owner, the owner's assembly, and the owner's committee is similar to the fiduciary relationship. If the decision made by the owners' assembly or the owners' committee and the management stipulation infringes upon the legal rights and interests of the owners, the injured owner has the right to revocation litigation. At present, residential commodity owners have a relatively low degree of autonomy in China, and legal disputes over realty services are frequent. In the future, we need to perfect the legal incentive and constraint measures, and stimulate the vitality of owner autonomy to promote better implementation of the owner self-management and owner entrust-management.

Keywords: realty service contracts, resolution of the owners' assembly, realty management, dynamic balancing of interests

DOI: <http://dx.doi.org/10.19873/j.cnki.2096-0212.2022.06.006>

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Summary of Legal Patterns of Realty Management

The Dual Law Modes of Realty Management in China: the Owner Entrust-Management and the Owner Self-Management

The exercise of ownership of buildings includes the legal relationship between owners and housing developers, between owners and the realty (property) service enterprises, and among all the owners. In terms of the legal relationship of realty services, Article 284 and 285 of the *Civil Code of the People's Republic of China* 2020 has made generalized relative rules, and the *Interpretation of the Supreme People's Court on Several Issues Concerning the Specific Application of Law in the Trial of Disputes over Realty Services* 2020 has made more detailed rules. The specification purpose of realty management is the implementation of the utility of buildings. Realty management must be built on the basis and premise of ownership of buildings.^① According to the nature of real estate uses, the property can be divided into residential property, commercial and industrial, and special-use property. In judicial practice, most disputes of realty management happen in residential living areas. The normal use, maintenance, and management of modern commodity residential houses cannot do without “socialization, specialization, technical” realty management of the realty service enterprise.^② The standard of realty management directly impacts the quality of the owners' life in the community. The legal system of realty management also belongs to the important content of the legal system of real estate use. “Modern realty management has been introduced to the mainland by Hong Kong SAR over the past twenty years” (Guan, 2007, p. 61).

Article 284 of the *Civil Code* stipulates: “Property owners may manage the building and ancillary facilities by themselves or entrust realty service enterprises or other managers to manage the building.” “Property owners have the right to replace the realty service enterprise or other managers appointed by the construction entity according to law.” Paragraph 1 of Article 285 of the *Civil Code* stipulates: “The realty service enterprise or other managers, upon the entrustment of the property owners, shall manage the building and ancillary facilities in the building zone in accordance with the provisions contained in Book III of this Code, accept the supervision of property owners and promptly respond to any inquiry raised by the property owners about the realty service.” Thus it can be seen that the *Civil Code* expands the scope of the civil

^① See Wang Liming, “The Legal Concept of Ownership of Buildings,” (2006) 5 *The Contemporary Law* at 40.

^② See Xi Xiaoming (Editor in chief), *The Judicial Interpretation of Supreme People's Court About the Ownership of Building and Realty Service: Understand and Application* (The People's Court Press, Beijing, 2009), p. 251.

subject of realty management. For the building and affiliated facilities thereof within the building area, the owner can manage by themselves or by entrusting a realty service enterprise. In the legal practice of owners' partitioned ownership of building areas (owners' condominium rights) in China, we should combine and coordinate the owner self-management and the owner entrust-management. The owner entrust-management is mainly through the realty service contract between owners and realty service enterprises. The owner self-management is mainly through the resolution or management stipulations worked out by the owners' assembly or the owners' committee. "The owners' right of common management is based on member rights of owners' condominium rights. The owners' right of common management is divided into the management of objects and the management of people. The realty service enterprises get the right of common management by the owners' entrust. Realty service enterprises have a certain administrative authority, but the service nature of the realty service enterprise does not change anymore" (Yu, 2012, p. 64). Overall, the owner self-management through resolution behavior is relatively weak, although it has been confirmed by the law. In order to achieve its effectiveness, the future legal practice needs to further strengthen the actual effect of owner self-management.

Article 2 of the 2003 Regulation stipulates: "For the purpose of the present Regulation, realty service shall refer to the activities of maintenance, conservation, and management of the houses and supporting facilities, as well as the relevant sites, and protection of the environmental sanitation and relevant order within the realty management area carried out by the owners and the realty service enterprise selected by the owners, pursuant to the stipulations of the realty service contract." *Regulation on Realty Management* mainly adjusts the owner entrust-management, which is mainly through the realty service contract between owners and realty service enterprises and which is also the current dominant realty management pattern in China.

The Outstanding Problems of Realty Management in China

The dominant Owner Entrust-management in real life also has many outstanding problems as follows: The realty service enterprise does not perform its obligations to provide the corresponding realty services. The owner self-management by the owners' assembly and the owners' committee is quite weak; scattered owners can't really be organized against a relatively strong realty service enterprise. In practice, the owners are often unsatisfied with the realty service enterprises. Most realty service enterprises are often selected by the construction entity. The realty service enterprises represent the interests of the construction entity, and therefore appear the phenomena of "servants drive their masters away," moral risk of the trustee, and the alienation of realty management.^① The relationship between the realty service enterprise and the owners is often nervous.

We need to explore effective methods of legal regulation in order to realize “realty management (service) benefits the owners.”

On July 13, 2021, the *Notice of the Ministry of Housing and Urban-Rural Development of the People's Republic of China and Other Eight Departments on Continuous Improvement and Standardization of the Order of the Real Estate Market* requires to focus on the prominent problems that are strongly reflected by the people and high social concern in the fields of real estate development, housing sales, housing leasing, realty services and so on. Prominent problems in the field of realty services are as follows: failure to provide services in accordance with the contents and standards agreed in the realty service contract; failure to publicize the standards of realty service charges, the operation and income of the common part of the owners, the use of maintenance funds and other relevant information as required; charge fees beyond the standard of charging items agreed in the contract or publicized; unauthorized use of the owners' common part to carry out business activities, misappropriation of the owner's common part of business income; refuse to withdraw from the property service realty without justified reasons after the realty service contract is dissolved or terminated according to law.

The author believes the fundamental reason of the above phenomenon is that most realty service enterprise is not based on the independent choice of the owners. There are two specific relative reasons.

On the one hand, most realty service enterprises for residential communities in the city are selected by the construction entity. A preliminary realty service contract concluded by the construction entity and the realty service enterprise shall be binding on all the homeowners. There are differences between interests of the construction entity and the owners. The realty service enterprise hired by the builder creates the problem that it is difficult to distinguish between construction and management. The realty service enterprise often cannot effectively serve the legitimate rights and interests of the owners, which also leads to high moral risk of the trustee. Article 21 of *Regulation on Realty Management* stipulates: “Where a construction entity selects any realty service enterprise before the owners and the owners' assembly do so, it shall conclude a written preliminary realty service contract with the enterprise.” Article 939 of the *Civil Code* stipulates: “A preliminary contract for realty services lawfully made by the construction entity with the realty service enterprise and a contract for realty services made by the owners' committee

① Owners of the east scene community in Yanjiao of Hebei province practiced martial arts in order to struggle for their rights, which caused warm concern on the internet in the past 2014. This community is located on the border of Beijing, Tianjin and Hebei. The securities hired by realty service enterprises often obstruct owners' rights with violence. Owners hired a master to learn and practice *wing chun* and *bagua*, which are two popular kinds of Chinese Kung fu. In the end, the security guard captain was arrested for beating; the owners also established a committee in order to struggle for rights from Kung fu to rule of law. See John doe, “Owners of East Scene Community in Yanjiao of Hebei Province Practiced Kung fu in Order to Struggle for Their Rights”, (Beijing, October 8, 2014) *The Beijing News*.

with a realty service enterprise lawfully appointed by the owners' general meeting bind the owners." Many realty management disputes also stem from the problem that it is difficult to distinguish between construction and management. "At present, a number of realty management disputes are common due to legacy problems by the construction entity. The owners suffer from all kinds of problems after they move in the community. They can only deal with pre-completion realty management enterprise selected by the construction entity. If the problem is not solved, property disputes will constantly appear. Legacy problems by construction entity have become the main factors of conflicts of realty service and realty management fees" (Mo, 2011, p. 59).

On the other hand, in a modern urban residential community, unfamiliar neighborhood relationship makes the owners to form a stranger-based society among themselves. The low degree of organization leads to a consequence that owners are unable to hire or dismiss the realty service enterprise by means of the owners' assembly and the owners' committee resolution, which makes the realty service enterprise hired by the construction entity to remain in place, often without effective constraint. Relative to the realty service enterprise, the scattered individual owner belongs to a vulnerable group. Only organized owners can improve the ability to negotiate with the realty service enterprise and supervise and constrain the realty service enterprise effectively. Article 278 of the *Civil Code* stipulates: "The following matters shall be jointly decided by property owners: (4) hiring or dismissing realty service enterprises or other managers." "Voting on decisions on the preceding issues shall be attended by the property owners who own two-thirds or more of the exclusive parts and count for two-thirds or more of the property owners. The decision on other matters in the preceding paragraph shall be approved by the property owners who own half or more of the exclusive parts of the realty owners attending the vote and count for half or more of the property owners attending the vote..." Article 11 of *Regulation on Realty Management* stipulates: "The following matters shall be jointly decided by the owners: (4) hiring or dismissing realty service enterprise." Paragraph 3 of Article 12 of this Regulation stipulates: "... and a decision made by the owners' assembly on any other matter set forth in Article 11 of *Regulation on Realty Management* shall be subject to the approval by owners who possess exclusive areas accounting for more than half of the total area of buildings and owners who account for more than half of the total number of owners." Article 10 of *Regulation on Realty Management* stipulates: "The owners in the same realty management area shall, under the guidance of the administrative department of real estate of the people's government of a district or county, the sub-district office or the people's government of a township at the place where the property is located, form an owners' assembly and elect an owners' committee. However, where there is only one owner, or where there are few owners who all agree not to form an owners' assembly, the owner(s) shall (jointly) perform the duties of the owners' assembly

and the owners' committee." But in practice, the proportion of the establishment of the owners' assembly and the owners' committee is very low,^① 8 which makes the owners unable to hire and dismiss the realty service enterprise effectively and actually.

Owner Entrust-Management and Legal Relationships in Realty Service Contracts

The Legal Definition and Characteristics of Realty Service Contracts

Article 21 of *Regulation on Realty Management* stipulates: "Where a construction entity selects any realty service enterprise before the owners and the owners' assembly do so, it shall conclude a written preliminary realty service contract with the enterprise." Article 34 of this Regulation stipulates: "The owners' committee shall conclude a written realty service contract with the realty service enterprise selected by the owners' assembly." "The realty service contract shall stipulate the realty management matters, service quality, service fees, rights and obligations of the two parties, management and use of the special fund, houses for realty management use, contract duration, and liabilities for breach of the contract, etc." Article 2 of this Regulation stipulates: "For the purpose of the present regulation, realty management shall refer to the activities of maintenance, conservation, and management of the houses and supporting facilities, as well as the relevant sites, and protection of the environmental sanitation and relevant order within the realty management area carried out by the owners and the realty service enterprise selected by the owners, pursuant to the stipulations of the realty service contract." According to the rules above, "The generalized realty service contract includes pre-completion realty service contract between construction entity and the realty service enterprise, the late realty service contract between the owners' assembly or the owners' committee and the realty service enterprise. In a narrow sense, the realty service contract refers to the contract between owners and the realty service enterprise" (Wang, 2013, p. 158). The realty service contract in this paper refers to the contract between owners and the realty service enterprise, in which the realty service enterprise provides realty services and owners pay the realty management fees. Article 937 of the *Civil Code* stipulates: "A contract for realty services is a contract whereby the realty service provider, within the service area, provides realty services to the owners including repair and maintenance of the building and its ancillary facilities, maintenance and management of the environment, hygiene and the community order, and the owners pay service fees." "Realty service

① See Sun Ying, Tan Qi, "The Proportion of the Establishment of the Owners' Assembly and the Owners' Committee in Guangzhou is Lower than the National Average: Only 25 Percent of the Communities in Guangzhou Have Owners' Committee," (Guangzhou, November 5, 2013) *Southern Metropolis Daily*.

providers include realty service enterprises and other property managers.”

The main legal characteristics of a realty service contract are as follows.

First, the realty service contract belongs to a typical contract, and the contract with a legal name. The *Regulation on Realty Management* stipulates provisions of the relevant legal rules about the realty service contract. “The realty service contract does not belong to mixed contract but belongs to the contract with a legal name on the special law” (Wang, 2013, p. 162). Just as a scholar says: “The history of contract law is that nameless contracts continuously change into contracts with legal names, that the general rules of contract law continuously absorb new types of nameless contracts. Before the *Regulation on Realty Management* was enacted, realty service contracts belonged to the nameless contract. We should comply with the general principles of application of the law for nameless contracts. But since the implementation of the *Regulation on Realty Management*, this regulation makes rules about the realty service contracts. Although only a few words, at least we begin to have clear provisions in the laws and regulations on realty service contracts, so the realty service contract belongs to a the contract with a legal name on the special law” (Guan, 2007, pp. 63–64). The *Book of Contracts of the Civil Code* further elevates the realty service contract to a typical contract in basic civil law.

Second, the realty service contract belongs to bilateral contract and onerous contract. The realty service enterprise has a duty to provide realty services, and the owners have a duty to pay the realty management fees. Article 35 of *Regulation on Realty Management* stipulates: “A realty service enterprise shall provide the corresponding services pursuant to the stipulations of the realty service contract.” “A realty service enterprise shall be held legally liable for failure to perform the stipulations of the realty service contract and the damages thus caused to the personal and property safety of any owner.” According to the item (5) of Article 7 of *Regulation on Realty Management*, the owners should perform the duty to pay realty service fees on time.

Third, the realty service contract belongs to the collective contract and format contract. According to the *Regulation on Realty Management*, as the executive body of the owners’ assembly, the owners’ committee shall perform the duty of signing the realty service contract on behalf of the owners with the realty service enterprise hired by the owners’ assembly. The realty service contract is usually formatted text which is provided by the realty service enterprise. “The realty service contract does not follow the normal contracting rules that the parties conclude the contract terms through individual negotiation but is concluded through non-individual negotiation between the owner group and the realty service provider, which is binding on all owners. In short, the realty service contract applies an abnormal contracting rule.” “The construction of group consultation in abnormal contracting procedures is used to realize the equivalence between contracting parties” (Xu, 2021, pp. 53, 61).

Fourth, the realty service contract has distinct group characteristics. Theoretically, “Due to the large number of all the owners, it is hard for all the owners to involve in the contracting process directly, so the contracting process is usually performed by the owners’ committee and the realty service enterprise” (Wang, 2013, p. 159). Article 939 of the *Civil Code* stipulates: “A preliminary contract for realty services lawfully made by the construction entity with the realty service enterprise and a contract for realty services made by the owners’ committee with a realty service enterprise lawfully appointed by the owners’ general meeting bind the owners.” This shows the group nature of such contracts, goes beyond the principle of contract relativity in a narrow sense and helps to prevent the owner’s “free riding” behavior. Article 15 of *Regulation on Realty Management* stipulates: “The owners’ committee is the executive body of the owners’ assembly, and shall perform the following duties: ... (2) Signing the realty service contract on behalf of the owners with the realty service enterprise hired by the owners’ assembly.” Paragraph 1 of Article 34 of this Regulation stipulates: “The owners’ committee shall conclude a written realty service contract with the realty service enterprise selected by the owners’ assembly.” According to Article 278 of the *Civil Code*, Articles 11 and 12 of *Regulation on Realty Management*, hiring and dismissing realty service enterprise or any other managers, shall be subject to the approval by owners who possess exclusive areas accounting for more than half of the total area of buildings and owners who account for more than half of the total number of owners, must be commonly known as “double majority.” But when it is unable to reach a “double majority,” the “double majority” standards of selecting scheme decisions formed by the owners’ assembly will be effective. The owners’ committee not only conforms to the basic principle of democratic centralism but also meets the requirements of democratic procedure of the *Book of Real Rights of the Civil Code*, relative resolution of the selecting scheme is in accordance with the law. Therefore the hiring plan (selecting scheme) identified in an enterprise, not under the condition of a “double majority” standard, but in accordance with hiring the enterprise with the most votes as transition to realty service enterprise, is also conformed to the legislative intention. The interim realty service contract signed by the owners’ committee and the enterprise with the most votes shall be effective.^① “From the perspective of the conclusion of realty service contracts, it is usually concluded by the owners’ committee and the realty service enterprise. The owners’ committee itself is not the party of the contract, but only in the identity of the trustee, who should conclude realty service contracts on behalf of all the owners” (Wang, 2013, p. 170). But from the actual effect of civil law, in real life, most realty service contracts are concluded by the owners and the realty service enterprise

① See “Yong Cheng Realty co., LTD. of Chengdu v the Owners’ Committee of Jiang Hua Community, the Third Person Long Quan Realty Limited Liability Company of Chengdu About Realty Service Contract Dispute,” (2011) 1 Selection of Cases of the People’s Court at 182–188.

separately, one by one, in the form of a format contract.

Fifth, the realty service contract belongs to a special service contract (contract of providing services). The Supreme People's Court modified the Cause of Action of Civil Cases ([2011] no. 41) on February 18, 2011. Cause of Action of Civil Cases specifically enumerates the realty service contract dispute under the upper concept: "10, contract disputes; 120, service contract disputes; (15) realty service contract disputes." So the realty service contract belongs to service contract. The contents of the realty service contract are integrated and comprehensive. According to Article 2 of the *Regulation on Realty Management*, the content of the realty service contract is comprehensive. After the *Civil Code* increases the realty service contract to a new type of typical contract, "realty service contract dispute" is subsequently separated from the "service contract dispute."

Realty Service Contracts have a Group Nature

The realty service contract has strong particularity in content and effectiveness and cannot fully apply the rules of an entrustment contract directly. Therefore, it is necessary to stipulate it as an independent contract (Wang, 2018). The duty to provide realty service is not simply equivalent to fiduciary duty. The realty service contract has the essence of both behavior debt and result debt. For the former, the general provisions of the entrustment contract can be referred to, and for the latter, the general provisions of the contract for work can be referred to. It cannot be generalized that the realty service contract has the essence of an entrustment contract.

From the perspective of the main body of the realty service contract, the realty service contract has distinct group characteristics and is a tool for all owners to organize group life orders for common interests. Realty services include the management of public facilities, environment, health, and order, which involve the common interests of all owners. One party to the realty service contract is the realty service enterprise, and the other party is essentially all owners rather than the owners' committee. According to Article 939 of the *Civil Code*, whether a single owner participates in the conclusion of a realty service contract or not, he shall be bound by the contract. Without the consent of the owners' meeting, the owners' committee decides not to renew the contract after the expiration of the contract and notifies the old property manager, which violates the democratic negotiation procedures stipulated in laws and regulations. A single owner cannot unilaterally change or terminate the contract, and only the owner's assembly can make the corresponding decision to change or terminate the contract. The replacement of a realty service enterprise should be adopted by holding a general meeting of owners according to law and voting according to legal procedures. Ordinary realty service contracts are signed by all owners according to their own wishes, and a single owner has no right to terminate the contract arbitrarily. The provisions on the right of arbitrary termination in the entrustment contract cannot be

fully applied to the realty service contract. In the case of the owner's breach of contract, the liability shall be borne by the owner, not by the owner's assembly or the owner's committee. If the realty service enterprise defaults, the owner can claim his rights in the name of the owners' meeting (Wang, 2018).

If the owner fails to pay the realty service fee on the grounds that there were quality problems in the realty service, which are not adequately justified, or if there is evidence that the realty service enterprise has provided services, but only some of the services are not well enough done, it does not constitute a fundamental breach of contract and cannot become a legal reason for the owner to refuse to pay the realty service fee. If the realty service enterprise fails to perform the maintenance obligations of public facilities, which constitutes a fundamental breach of contract, the owner's termination of the realty service contract by exercising the legal termination right is enough to protect its legitimate rights and interests, and there is no need to give it any termination right. Paragraph 1 of Article 944 of the *Civil Code* stipulates: "The owners shall pay the service fees to the service provider in accordance with the contract. Where the service provider has provided services in accordance with the contract and the relevant regulations, the owners are not entitled to refuse to pay the service fees on the ground that they have not accepted or do not need such services." Based on the group nature of the subject of the realty service contract and the commonality and group nature of the interests of the owners served by the realty service contract, the private interests of individual owners cannot be viewed in isolation from all owners and their common interests.

The Relationship Between Realty Service Contracts and Other Service Contracts

Discussion about the nature of the realty service contract in the laws and regulations, which belongs to choice of interpretations in pure civil law theory issues. Different conclusions do not affect the design and application of the law.^① But committing to find the most similar contracts to realty service contracts to facilitate finding and applying legal norms, which belongs to problems of value judgment in civil law.

The realty service contract, the entrustment contract, the brokerage contract, and the intermediary contract all belong to the service contract, in which services are provided by special social skills. The realty service enterprise has a duty to provide realty services, which belongs to behavior obligation, but not result obligation, so the realty service contract is different from contracts for work. The realty service enterprise does not have a duty to store the building or the owners' property in their houses, so the realty service contract is different from the storage contract.

^① For more detail about the choice of interpretations in civil law issues, see Wang Yi, *Principles and Research Methods of Civil Law* (Law Press, Beijing, 2009), pp. 81–82. Discussion about the choice of interpretations in pure civil law theory issues, see Wang Yi, "On Different Types of Civil Legal Facts", (2013) 1 *Jurisprudence of China* at 71.

An entrustment contract is a general type of service contract. The realty service contract is similar to the entrustment contract because both of which are based on the owners' entrustment. "Most scholars hold that we should refer to the legal mechanism of entrustment contract when dealing with the realty service contract disputes" (Yao & Duan, 2014, p. 34). Just as the scholar properly says: "As far as the application of law concerns, in the absence of provisions in *Regulation on Realty Management*, we can apply specific provisions of entrustment contract in *Book of Contracts of the Civil Code*. According to the front part of the first paragraph of Article 406 of the *Book of Contracts of the Civil Code*, under an agency appointment contract for value, if the principal sustains any loss due to the fault of the agent, the principal may claim damages. As a result, the realty service enterprise undertakes the fault liability rather than the no-fault liability to pay compensation. The realty service enterprise is responsible not only for gross negligence and deliberate. When the owner's vehicle is stolen or damaged in the community, the realty service enterprise only assumes liability to pay compensation when it is at fault. The standard for judging the realty service enterprise's fault is the kind manager's attention. If it fulfills this legal attention, liability to pay does not occur; otherwise, it takes liability to pay compensation" (Han, 2007). "Since the implementation of *Regulation on Realty Management*, the realty service contract has become a contract with a legal name. But compared with other typical contracts such as purchase and sale contracts, lease contracts and so on, the rules of realty service contracts are relatively not clear or mature. Entrustment contract is the typical service contract. An entrustment contract provides the general rules of a service contract. When there is no rule for a service contract, we can apply rules of entrustment contract. If the entrustment contract still has no related supplementary provisions for the realty service contract, the supplementary provisions of the general parts in the 1999 *Contract Law* shall apply" (Guan, 2007, pp. 64–65).

Of course, "As an independent kind of contract, realty service contracts do not completely equal to entrustment contracts. The general type of the entrustment contract often involves the specific one or a few kinds of service, but the matters entrusted by the realty service contract are comprehensive and very broad; they include the management of items and people, as well as the maintenance of security order, which are a general type of the entrustment contract lacks of" (Wang, 2013, p. 162). Owners do not have the right to terminate the realty service contract at any time, according to Article 933 of the *Civil Code*. Owners have no right to terminate the realty service contract at any time but should obey the principle of due process and take the majority mechanism to make a dismissal resolution.^①

The owner's right to terminate the realty service contract is limited to Article 562 and Article 563 of the *Civil Code*. In view of the group characteristics of the realty service

① See Wang Liming, *Specific Provisions of Contract Laws Volume II*. (Renmin University of China Press, July, 2013), pp. 195–196.

contract, if the individual owner has the right to unilaterally and arbitrarily terminate the contract, it is not conducive to the stability of the realty service. According to Article 278 and Article 946 of the *Civil Code*, whether to terminate the realty service contract or not should be decided by the majority of the owners' assembly.

The Types of Legal Disputes Concerning Realty Service Contracts

The Summary of Legal Status of Realty Service Enterprise

Article 33 of *Regulation on Realty Management* stipulates: "A realty management area shall be subject to the realty management by one realty service enterprise." When the realty service contract expires, the realty service enterprise should withdraw from the realty management area.^① Residential realty service enterprise has the natural monopoly status (Xiao, 2006, p. 17), and realty services provided by the realty service enterprise matter the group interests of all owners of the community. The realty service enterprise has a duty to provide realty services. Article 35 of *Regulation on Realty Management* stipulates: "A realty service enterprise shall provide the corresponding services pursuant to the stipulations of the realty service contract." "A realty service enterprise shall be held legally liable for failure to perform the stipulations of the realty service contract and the damages thus caused to the personal and property safety of any owner." A scholar pointed out that: "The first realty service enterprise in China-Shenzhen Realty Service Company was established on March 10, 1981. From then on, realty management in Hong Kong SAR began to be introduced to the mainland. Since then, people have been used to naming professional management of real estate provided by the realty service enterprise as realty management" (Yan, 2009, p. 20). "Collecting fees in disorder, community safety and security problems, and maintenance issues of buildings and equipment, which are the three main factors of the current realty management disputes..." (Qi, 2010, p. 177).

Owners should fulfill the obligation to pay realty service fees during realty management activities, which is the main payment obligation of the owner in realty service contracts. In addition, owners should also fulfill the necessary collaboration obligation to the realty service enterprise. "After owners and realty service enterprise sign the realty service contract, contract relationship of realty service is established between the realty service enterprise and owners. The realty service enterprise should provide realty services

^① "Owner Committee of Xiangjiang Garden v Realty Management Company of Green Xin Home Which Refused to Withdraw when the Entrust Contract Expired," (2003) *Selection of Cases of the People's Court*, pp. 111–103. In this case, the realty service contract expired and naturally ended; the realty service enterprise should transfer the realty management. The realty service enterprise is due to withdraw without any defense against the owners' committee. But it refused to withdraw, which constituted infringement and also interfered with the normal management order of the realty management area.

as its contractual obligation. The realty service enterprise can request owners to comply with management covenant and residential realty management stipulations. The realty service enterprise has the right to correct the owner's irregularities in order to maintain a harmonious community and the common interests of all owners. When the owner does not correct his improper behavior, the realty service enterprise, as one of the contract parties, has the right to file a lawsuit according to law."^① In realty management legal practice, there often exists an individual owner damaging the common interests of all owners, such as business activities, illegal building behaviors, etc. Article 1 of *Interpretation of the Supreme People's Court on Several Issues Concerning the Specific Application of Law in the Trial of Disputes over Realty Services* stipulates: "A pre-completion realty service contract concluded by the builder with a realty service enterprise and a realty service contract concluded by the homeowners' association or assembly with a realty service enterprise shall be binding on the homeowners. Where any owner raises a defense under the pretext that he is not a party concerned to the contract, the people's court shall reject it." This interpretation gives realty service enterprises the right to subrogation litigation for illegal acts by the owners. The theoretical basis and the realistic foundation of this interpretation are that: "The client relation between realty service enterprise and owners is of a certain particularity, one of the important aspects of which is that all the owners give the right of management of maintaining the order of realty service area to the realty service enterprise. In practice, other owners often ask the realty service enterprise to stop the hindrance or infringement, rather than these illegal acts by themselves."^②

The Dispute About Realty Service Fees

In accordance with the realty service contract, the realty service enterprise gets realty service fees from owners.^③ According to Paragraph 5 of Article 7 of *Regulation on Realty Management*, the owners should fulfill the obligation to "pay realty service fees" during realty management activities. Article 41 of this Regulation stipulates: "An owner shall pay

① "Nanjing Branch of Zhongnan Realty Management Company of Qingdao v Xu Xiantai, Liu Suxia about Realty Management Contract Dispute," (2007) 9 *Gazette of the Supreme People's Court* pp 37-41. In this case, the owner of the ground floor house with a balcony to the south destroyed the outside green land of the garden without permission, in order to realize the purpose of its exclusive use. The court held that the realty service company should have the right to require the owner to comply with the requirements of the owners' covenant and residential realty management stipulations, and shall have the right to correct the owner's violation of the provisions of the owners' covenant in order to maintain harmonious community and the common interests of all owners. When the owner is not in accordance with the requirements of the regulations of owners covenant and the realty management stipulations, the realty management company, as one of the contract parties, has the right to file a lawsuit according to law. Other similar cases, "Gu Randi v Juxing Property Management Company to Eliminate the Obstruction and Compensate for the Loss," (2003) 6 *Gazette of the Supreme People's Court* pp. 26-28.

② "Head of the First Civil Judicial of the Supreme People's Court Answered Reporters' Questions about Supreme People's Court on Several Issues Concerning the Specific Application of Law in the Trial of Disputes over Partitioned Ownership of Building Areas & Interpretation of the Supreme People's Court on Several Issues Concerning the Specific Application of Law in the Trial of Disputes over Realty Service Contract," (May 25, 2009) *Newspaper of People's Court* at fourth edition.

③ See Article 2 of *Measures for the Management of Realty Service Fees*. In order to regulate the realty service fees, and protect the legitimate rights and interests of owners and realty management companies, according to the *Price Law of the People's Republic of China* and *Regulation on Realty Management*, formulate the measures for the administration of the realty service fees by the National Development and Reform Commission, Ministry of Construction of the People's Republic of China in 2004 and effective on January 1, 2004.

realty service fees pursuant to the stipulations of the realty service contract. Where the owner agrees with a property user that the realty service fees shall be paid by the property user, the owner shall assume joint and several liabilities for the payment.” “With respect to any property already completed but not sold or not delivered to the property buyer, the realty service fees shall be paid by the construction entity.” Article 43 of this Regulation stipulates: “A realty service enterprise may, as entrusted by an owner, provide services in addition to those stipulated in the realty service contract, and the remuneration for such additional services shall be agreed upon by the two parties.”^①

In essence, residential realty services belong to “public goods” of the owners in the community, which are indispensable. The owners who do not pay realty service fees do “free rider” behavior, which actually infringes upon the legitimate rights and interests of other owners who pay on time. So, article 64 of *Regulation on Realty Management* stipulates: “Where any owner, in violation of the realty service contract, fails to pay the realty service fees, the owners’ committee shall urge that owner to pay the fees within a prescribed time limit; where that owner fails to pay the fees within the said time limit, the realty service enterprise may file a lawsuit in the people’s court.” The owners’ committee can urge payment, which reflects the owners’ self-management and self-supervision. But “the owners’ committee shall urge that owner to pay the fees within a prescribed time limit” should not be taken as the preceding procedure when the realty service enterprise brings a suit in people’s court. Article 6 of *Interpretation of the Supreme People’s Court on Several Issues Concerning the Specific Application of Law in the Trial of Disputes over Realty Services* 2009 stipulates that “Where, after being advised in writing, an owner refuses to pay realty service fees without any legitimate reason or fails to pay realty service fees within the reasonable time limit specified in the advice, if the realty service enterprise requests the owner to pay realty service fees, the people’s court shall uphold it. If the realty service enterprise has provided services according to the contract and the relevant provisions, the owner’s claim made on the ground that he does not accept or need the services shall not be upheld.” Here, “being advised in writing” is not only limited to the owners’ committee, but also to the service enterprise. Thus we should be aware that Article 64 of *Regulation on Realty Management* stipulates that: “the owners’ committee shall urge that owner to pay the fees within a prescribed time limit; where that owner fails to pay the fees within the said time limit,” which is not the pre-procedure of the action of prestation about service fees for the service enterprise. Paragraph 2 of Article 944 of the

① See “*Xiamen Water Group co., LTD. v Owners’ Committee of Wentu Garden Community to Pay the Whole Cost of Water and Fine for Delaying Payment by all Owners*,” (2005) 3 *Selection of Cases of the People’s Court* pp. 235–232. In this case, the end users (owners), not the owners’ committee or the realty management company have the duty to pay the bill of water. The owners’ committee and realty management companies have formed the clientage, respectively, with water supply departments and users in the process of water cost collection. If the user refuses to pay the bill of water or does not pay the water bill, the owners’ committee or the realty management company, as the trustee, does not have the duty to pay.

Civil Code stipulates: “Where the owners fail to pay the service fees by the agreed time, the realty service enterprise may demand payment within a reasonable period of time and, where the owners fail to pay during that period, the realty service enterprise may institute proceedings or apply for arbitration.”

The Procedure for Hastening Debt Recovery (only for the dispute without other causes) and the Summary Procedure of Small Amount (for the dispute of small fees that the facts are corroborated, rights and obligations are clear) would be used for simple disputes about refusing to pay realty service fees without any causes. For example, a realty service enterprise may apply to the Basic People’s Court for an order of payment according to Chapter 17 Procedure for Hastening Debt Recovery of the *Civil Procedure Law of the People’s Republic of China*.

The biggest problem in realty service is that the owner refuses to pay realty service fees. There are owners’ main defenses in the process of charging realty service fees in general.

First, the main reason for disputes is that owners are dissatisfied with the enterprise’s service, so they require reducing realty service fees (Mo, 2011, p. 58). Owners often defend against the realty service enterprise that it has not provided realty services, or their services are fewer than what was agreed on in the realty service contract, or the quality of the services does not conform to the legal standards. Article 35 of *Regulation on Realty Management* stipulates: “A realty service enterprise shall provide the corresponding services pursuant to the stipulations of the realty service contract.” “A realty service enterprise shall be held legally liable for failure to perform the stipulations of the realty service contract and the damages thus caused to the personal and property safety of any owner.” Article 3 of *Interpretation of the Supreme People’s Court on Several Issues Concerning the Specific Application of Law in the Trial of Disputes over Realty Services* 2009 stipulates: “Where the realty service enterprise fails to fulfill or completely fulfill the repair, maintenance, management and protection obligations stipulated in the realty service contract, the relevant laws and regulations or the relevant industrial norms, if any owner requests the realty service enterprise to continue to fulfill the obligations, take remedial measures, compensate for his losses or undertake any other liability for breach of contract, the people’s court shall uphold the request.” “The service commitments publicly made by the realty service enterprise and the detailed rules made by it shall be a component part of the realty service contract.”^① On the one hand, we should make strict interpretations in line with the principle of honesty and good faith for the justification of refusing to pay realty service fees. The owner should not take the normal default of the realty service enterprise as the justification for refusing to pay the realty service fees. The

① This provision refers to the theory of implied terms of the contract and reasonably expands the service obligations of the realty service enterprise.

principle of honesty and good faith is the legal foundation for owners' right of defense. "In essence, the realty service fee is also the material basis for all owners to enjoy the realty services. The realty service enterprise cannot provide service in time and effectively for all owners if we allow owners to exercise the right of defense frequently and casually. In this provision, the justification should be limited to the extent that the realty service enterprise does not perform the contract or have serious flaws. In judicial practice, we should examine carefully and strictly on the justification of owners' right of defense. We should prevent owners from abusing the 'justification' to damage the legitimate rights and interests of the realty service enterprise" (Du, Xin, & Yang, 2009, p. 11). On the other hand, there should be a reasonable allocation of the burden of proof about the "justification." Some scholars figure out properly that "the realty service enterprise should bear the burden of proof that they perform obligations according to the realty service contract when they sue the owner for the realty service fees. If the owner accepts the enterprise's services, but the owner puts forward that these services have a flaw, in that case, we let the owner bear the burden of proof. Of course, the court should sum detailed circumstances in different cases to decide the distribution of the burden of proof in order to protect both parties' legal right" (Zhang & Zhang, 2006, p. 10). Moreover, the realty service enterprise should not exercise the right of defence of advance performance. The realty service enterprise must provide realty services for all owners and only can stop providing dedicated services to those owners who have not paid the realty service fees,^① in order to avoid damaging the other owners' legitimate rights and interests.

Second, some owners defend against arbitrary fees by the realty service enterprise, and they argue that the realty service enterprise does not provide other services except for recycling garbage.^② Compared with the realty service enterprise, the owners are in a weak position. So we should combine the market pricing and government regulation to realty service fees. Article 42 of *Regulation on Realty Management* stipulates: "Where the administrative department of the price of the people's government at the country level and above shall, in conjunction with the administrative department of real estate at the

① Article 8 of *Guidelines of the Higher People's Court of Guangdong on Several Issues Concerning the Specific Application of Law in the Trial of Disputes over Realty Service* stipulates: "The realty management company may request the owners in accordance with the contract to pay the fines if owners delay in payment of realty service fees." "Where the amount of fines agreed upon is significantly higher than the damages incurred, a party may petition the People's Court or an arbitration institution to make an appropriate reduction according to Paragraph 2 of Article 585 of the *Civil Code*. After the reduction, the fines can be calculated according to the total amount of the arrears of property costs referring to overdue loan interest standard regulated by the People's Bank of China." Article 21 of the Guidelines stipulates: "When the realty service enterprises take the suspension of water supply, electricity, and other measures without authorization and cause the loss of owners, although owners delay in payment of the realty service fees, the court should still give support to the request of owners that the realty service enterprise stops the infringement and make compensation for losses." "But if realty service enterprises entrusted by suppliers to stop water, electricity, gas service to owners who delay in payment of these fees, the realty service enterprises shall not assume the liability of compensation for owners' loss." See also Xiong Jinguang, "The Exercise and Restriction of Right of Defence in Property Management Service Contract, Comment on Article 5 and Article 6 of the 2009 Interpretation" (2010) 3 *Modern Law Science* pp. 169–175.

② News 1+1, "The Property Management Service Enterprise Provided Service No More than Recycling Garbage after Charging Realty Service Fees. The Owner, Who Negotiated with the Realty Service Enterprise, was Beaten to Hospital." <http://v.qq.com/cover/2/2umv1f8bksl0502.html?vid=q0015k0qbo9>, 2014.11.18.

corresponding level, strengthen the supervision over the charging for realty services.” Article 5 of *Interpretation of the Supreme People’s Court on Several Issues Concerning the Specific Application of Law in the Trial of Disputes over Realty Services* 2009 stipulates: “Where, the realty service enterprise, in violation of the realty service contract or the relevant laws, regulations and ministerial rules, enlarges the charging items, raises the charging rates or charges fees repeatedly without approval, if any owner makes a claim on the ground of illegal charging, the people’s court shall uphold it.” “If any owner requests the realty service enterprise to return the illegally charged fees, the people’s court shall uphold it.”^①

The Dispute About Security Obligations of the Realty Service Enterprise

“Whether the realty service enterprises have security obligations for owners’ properties and personal rights and how to determine the limitations of these obligations are the common controversial issues in juridical practice.” (Yao & Duan, 2010, p. 36). The security obligations of the realty service enterprise stem from the agreement between the parties and from laws and regulations. The realty service contract usually makes legal security obligations concrete.

If the realty service enterprise violates the safeguard obligations during the service, it should not simply claim the following defences: “The realty services mainly include environmental health, the maintenance of public properties and order, but do not include fighting against crimes and making sure public security. Because the house belongs to private space, the realty service enterprise has no obligation to protect the safety of the property indoors without special agreement.” “Although the realty service enterprise arranged the security personnel to patrol, it failed to plug the gaps on residential walls after the discovery, which led to potential safety hazard and thus breached the contract.” (Huang, 2014). Article 35 of *Regulation on Realty Management* stipulates: “A realty service enterprise shall provide the corresponding services pursuant to the stipulations of the realty service contract.” “A realty service enterprise shall be held legally liable for failure to perform the stipulations of the realty service contract and the damages thus caused to the personal and property safety of any owner.” Article 46 of *Regulation on Realty Management* stipulates: “Where a realty service enterprise shall assist in the security work within the realty management area. In the event of any security accident, the realty service enterprise shall, while taking emergent measures, report to the relevant administrative department in good time and assist in the rescue work.” “A realty service

^① Article 10 of the 2011 *Guidelines (only Manuscript) of the Higher People’s Court of Guangdong* stipulates: “From October 1, 2009, when the realty service fees that realty service companies charge are higher than the highest price of local government guidance, owners who refuse to pay or require a refund of the exceeded fees, should be supported, unless the standard of the realty service fees has been approved by the local price departments.” http://www.bokee.net/bloggermodule/blog_viewblog.do?id=7413084, 2014.11. 20.

enterprise shall observe the relevant provisions of the state in employing any security personnel. The security personnel shall, when maintaining the public order within the realty management area, perform their duties and may not infringe upon the legitimate rights and interests of the citizens” (Xiao, 2014). As the manager of the public facilities in the community, the realty service enterprise has the obligation of repair and maintenance of the public facilities. If the realty service enterprise does not display the corresponding warning marks and does not take safety measures when the facilities have some hidden danger, it constitutes failure to fulfill security obligations (Li & Kong, 2014). The realty service enterprises have obligations to repair and maintain public facilities. The realty service enterprises should eliminate hidden dangers in common areas that would damage the properties of owners. Otherwise, the realty service enterprises should assume the responsibility for breach of contract and be liable for damages to owners. They cannot be exempted from liability although the hidden danger is caused by the third person. The realty service enterprise can be exempted only when it has performed maintenance obligations, and the tort of the third party cannot be foreseen, avoided, or overcome.”^①

In public security crimes where the third person harms the owner’s property or personal rights,^② the realty service enterprise still bears security obligation. The realty service enterprise cannot be exempted only because of the tort by a third person.^③ In this regard, there was a case in Shenzhen city by the People’s Court of Luohu District in 2001. The workers of the realty service enterprise discovered that the suspect hid in the owners’ vacant room and went in and out several times. But the workers didn’t open the door to check and ask the suspect. Finally, the suspect killed the owner. The court held that the realty service enterprise violated the contractual collateral obligation in the 1999 *Contract Law* and constituted liability for breach of contract. Professor Liu Junhai held that in this case the court brought the rules of the 1999 *Contract Law* into the realty management area for the first time (Liu, 2001). “In recent years, there have been many realty management disputes about the third party tort or even criminal behaviors in many communities.

① “Dispute over Compensation for Damages between Chen Shuhao and Nanjing Wuning Real Estate Development Co., Ltd., Nanjing Qinghe Property Management Service Company” (2013) 5 *Gazette of the Supreme People’s Court* pp. 45–48. In this case, the realty service company has an obligation to maintain the public wall in the community. The mound outside the public wall washed away the wall because of heavy rain. The wall collapsed and then crushed the car of the plaintiff. The realty service company did not eliminate the predictable and controllable hidden danger in time, and it had to bear the responsibility of compensation for breach of contract.

② Article 20 of the 2011 Guidelines (only Manuscript) of the Higher People’s Court of Guangdong stipulates: “If the parked vehicle which was charged by the realty service company damaged or lost in the community, it would be deposited according to onerous storage contract stipulation of Article 374 of contract law of the people’s Republic of China. http://www.bokee.net/bloggermodule/blog_viewblog.do?id=7413084, 2014.11.20. See also “Meng Jin v Nanjing Jianyu property management service company over property management service” (2007) 1 *Selection of the People’s Court Cases* pp. 247–253. In this case, the owner and the realty service company have a dispute about the fact that whether the owner’s vehicle was stolen in the scope of realty service in residential areas. The realty service company that had the management obligation should bear the burden of proof when it did not adopt the proper management (such as equipment failure). If the realty service company fails to perform its obligation and causes losses to others, it should compensate according to the law.

③ “Diao Yili v Huazhou Property Management Service Company of Quanzhou City over failure to bear the personal safety protection obligation” (2007) 1 *Selection of the People’s Court Cases* pp. 195–206. In this case, the realty service company, which did not fulfill the duty of reasonable security protection, was responsible for paying compensation for breach of contract, even if the criminal case had not been detected. Of course, compensation for mental damage can’t be supported.

Owners often require realty service enterprises to compensate for their loss out of the stolen property or personal injury. The realty service enterprise has the obligation to safeguard the community because the realty service fees include the cost of security. The realty service enterprise should perform obligations according to the contract when the owner's property or personal right is violated by the third party. This is the behavioral obligation, but not the results obligation. That is to say, if the realty service enterprise completely fulfills its security obligation, it would not bear compensation although there are still some damages to the owners. Only when a realty service enterprise has a fault in fulfilling obligations, and there is a causal relationship between nonperformance and damages, should it be liable" (Zhang & Zhang, 2006, p. 72).^② So, the realty service enterprise does not have the absolute obligation to owners' personal and property safety. The most important thing is the process of performing the obligations. Although the realty service enterprise cannot prevent the damage, it would not bear legal liability only if the realty service enterprises perform the obligations carefully and kindly (Yao & Duan, 2010, pp. 37–38).^③ After all, social security administration is the legal duty of state organs. This legal duty shall not be imposed on the realty service enterprise. Nor should we expand the service and management duties of the realty service enterprises. The functions of the public security organs shall not be replaced by the realty service enterprise, or it will go against the sound and healthy development of the realty management system.

The Owner Self-Management: Management Stipulation and Resolution by the Owners' Assembly

Resolution Behavior as the Main Legal Technology of the Owner Self-Management

The *Civil Code* stipulates the right of common management (membership right) of partitioned ownership of building areas (condominium rights). The owners have the right to establish the owners' assembly as the organ of decision will, and elect the owners' committee as the organ of affairs execution. The decisions of the owners' assembly and the owners' committee can legally bind all the owners. The relationship between

^② Article 23 of the 2011 Guidelines (only Manuscript) of the Higher People's Court of Guangdong stipulates: "Owners, users or other persons, who come into the residential area in the realty service area, but be hurt by the third person's behavior, have right to request realty service enterprise to compensate for the losses, if there is evidence to prove that the realty service enterprise did not fulfill the duty of security. The compensation is in accordance with the fault of realty service enterprise size and other factors, such as standard of service fees, in order to make a reasonable determination of the compensation."

^③ When a high-unknown throwing object causes damage, some courts insist the realty service company be liable on the ground that the security obligation not be taken. It is improper to expand the boundary of the security obligation of the realty service company. See Xie Luoqun, "The first-instance judgment of high-unknown throwing object caused damage in Shenzhen to get concerned" (2008) 3 *Realty management in China* pp. 40–41. In contrast, in the case of falling objects, the realty service company did not fulfill the duty of corresponding security management and failed to handle abandoned items on the roof in time, which then caused fall damage. The realty service company should bear the liability for compensation. See Zhou Guifang, Xuan Yi, "In the case of a falling object, the realty service company was judged to be liable" (August 25, 2008) *Newspaper of People's Courts* at 3rd edition.

the owner, the owner's assembly, and the owner's committee is similar to the fiduciary relationship. The owners' right of common management is the technical method of implementation of the owners' private autonomy. And the owners' self-management is the specific reflection of the principle of autonomy of private law on partitioned ownership of building areas. Whether the owners' assembly or the owners' committee has the qualification of civil litigation subject or the qualification of the civil subject is a controversial theoretical problem. On the one hand, from the point of legal interpretation, the Book of Property of the *Civil Code* has actually granted the owners' assembly and the owners' committee the qualification of civil litigation subject and the qualification of the civil subject.^① On the other hand, from the point of legal perfection, the ability to bear the property liability independently isn't the prerequisite to judge whether the owners' assembly or the owners' committee has the qualification of civil litigation subject or the qualification of the civil subject. The owners' assembly and the owners' committee are the owners' self-management organizations, the legal effect of whose external acts should be undertaken by all the owners. Of course, if the acts of the owners' assembly or the owners' committee go against their legal duty or the scope authorized by owners and thus cause infringement, the consequence of which is not appropriate for all the owners to take. It is more appropriate that those owners or the owners' committee who made mistakes shall bear the responsibility (Chen, 2009, p. 15).

In the background of the partitioned ownership of building areas, the decisions of the owners' assembly or the owners' committee both belong to the owners' resolution and the management stipulation is one of the affairs which should be decided by all the owners. The owners have the right to draw up the management stipulation as an autonomous rule to adjust the management, use, and ownership of the buildings with partitioned ownership (Chen, 2011, p. 49). The management stipulation and the resolution of the owners' assembly are the major legal technical instruments for the owners to manage the community property by themselves.

It is difficult to tell the difference between the management stipulation and the resolution of the owners' assembly.^② The author holds that they are, in fact, the same though they have different names and forms. The differences between them lie in the scope of the application and the rules of the resolution, all of which are a matter of external form. However, they have the same legal nature.

① The court judge practice in China also recognizes that the owners' committee belongs to "other organizations." See "*The owners' committee of Xiyuan Garden of Xuzhou v Zhongchuan Real Estate Development co., LTD. Of Xuzhou about the confirmation of ownership of property management rooms*" (2014) 6 *Gazette of the Supreme People's Court*, pp. 40-44. In this case, the real estate development enterprise rented realty management rooms to others, and the owners' committee filed litigation for the ownership of the related rooms.

② *Law of the Ownership of the Residence* in Germany takes the standard use as the criterion of classification. All those which can be classified into the group of standard-use can be decided by resolution, those beyond must be decided by stipulation. See Chen Chong, "Law of the Ownership of the Residence in Germany and Brief Introduction of the Ownership of Residence" <http://www.civillaw.com.cn/article/default.asp?id=34301>, 2014.08.15.

First, there is a difference between the scope of application of the owners' management stipulation and the resolution of the owners' assembly. The content of the resolution of the owners' assembly is the important matters concerning common ownership and common management right. Making common decisions by management stipulation, the owners make coordinated plans for the buildings and the affiliated facilities to implement autonomy by themselves. Matters such as expense allocation and earnings distribution of a building or any of its affiliated facilities can be determined by the owners' management stipulation. Based on this, scholars concluded that there are two kinds of matters in the management stipulation: On one hand, it refers to common management of the building, especially of the use and maintenance of the buildings and the affiliated facilities. For example, all the owners can stipulate in the management stipulation that the owners in the first ground don't need to bear the expense of the elevator or daily maintenance of stairs.^① On the other hand, it is allowed to regulate the owners' behaviors according to Article 286 of the *Civil Code*, such as the owners' action of breeding animals, illegally building shelters, occupying passageways or refusing to pay realty service fees, etc.^②

The owners can restrict the exclusive ownership by management stipulation in order to avoid the external effect of the owners' rights. A scholar pointed out: "The owner can't enjoy the same exclusive and dominant right as the traditional ownership during the enforcement of his right. Because the exclusive ownership of condominium rights has the following characteristics: the dependence of the object, the unity of the subjects, the variety of the contents. As a kind of team right, the exclusive ownership of the owner is restricted because of the team's interests. It is the product of the free choice of the owners, and it meets their fundamental interests and reflects the owners' common will. The exclusive ownership of condominium rights is different from traditional ownership. Restrictions on exclusive ownership do not go against the idea of protecting the ownership. Restricting the owners' exclusive rights for the owners' team interests, which is a reflection of the team interests prior to individual interests."^③ Such as the Balcony-seal banning article in the management stipulation,^④ the necessary control over leasing of the owners' exclusive parts, united running mode of the premises used for business purposes, the restriction on altering residential premises into premises used for business

① See Wang Yi, "The Permissive Norms and their Application of the Property Law" (2007) 5 *Journal of Law Application*, pp. 25–30.

② See Wang Liming, *Research on Property Law (Volume 1)* (Renmin University of China Press, the 2nd edition, Beijing, 2007), pp. 630–631.

③ See You Jia, "Research on the Partitioned Ownership of Building Areas from the Perspective of Team Law." (Doctoral dissertation of Renmin University of China, 2013), pp. 77–78.

④ In a case judged in Zhoushan City in 2011, the court held that the balcony-sealing banning article had binding force over all the owners in the temporary management stipulation. See "Sealing the Balcony without Permission, which was ordered to demolish within a time limit," <http://zhoushan.house.sina.com.cn/2011-03-10/1328899.shtml>. 2015.03.05. While in a similar case in Chengdu on December 9th, 2010, the court held that the balcony-sealing banning article was invalid. See "Stipulation is forbidden to infringe on the rights of the owners." http://www.legalinfo.gov.cn/pfkt/content/2011-02/13/content_2471117.htm?node=7905. From You Jia, "Research on the Partitioned Ownership of Building Areas from the Perspective of Team Law." (Doctoral dissertation of Renmin University of China, 2013), p. 65.

purposes in accordance with Article 279 of the *Civil Code*.

Second, there is a difference between the voting rules of resolution of the owners' assembly and that of the owners' management stipulation. The resolution of the owners' assembly should go along with different rules about different contents according to Paragraph 2 of Article 278 of the *Civil Code*: "Voting on decisions on the preceding issues shall be attended by the property owners who own two-thirds or more of the exclusive parts and count for two thirds or more of the property owners. The decision on matters from Items (6) to (8) shall be approved by the property owners who own three-quarters or more of the exclusive parts of the property owners attending the vote and count for three-quarters or more of the property owners attending the vote. The decision on other matters in the preceding paragraph shall be approved by the property owners who own half or more of the exclusive parts of the property owners attending the vote and count for half or more of the property owners attending the vote." As far as management stipulation is concerned, it belongs to decisions on other (common) matters.

Lastly, the author holds the most important is that both the owners' management stipulation and the decision of the owners' assembly are resolutions. Many authoritative scholars of civil law in China hold that the natures of the decision of the owners' assembly and the owners' management stipulation are different. They argue that the owners' management stipulation should be classified into a common legal act.^① In fact, scholars in the Taiwan region of China take owners' management stipulation as common legal act because the civil law in Taiwan region of China adopts the generalized concept of a common legal act. They don't separate the resolution from a common legal act, which has not been followed by China. The decisions and management stipulations passed by the owners' assembly through the mechanism of majority decision rule can legally bind all the owners, which resembles the peasants' collective resolution and the company's resolution, and which all belong to the resolution act of the multilateral civil conduct. The doctrine of majority decision rule is a guarantee for the majority of the owners to make a declaration of their will freely, to improve the efficiency of the resolution, and to avoid the situation of long discussion without any resolution. Both the management stipulation and the joint decision are a specific reflection of the owners' right to common management. The owners practiced the principle of autonomy through joint decision and co-management.

The owners' co-determination of the important affairs according to law and the mechanism of majority decision rule is a process of typical democratic decision. On the background of partitioned ownership of building areas, the resolution act of the

① See Wang Zejian, *Property Right of Civil Law* (Peking University Press, the first edition, December, 2009), p. 181. Xie Zaiquan, *Property Right of Civil Law (Volume 1)* (the China University of Political Science and Law Press, the second edition, December 2007), p. 630. Wang Liming, *Research on the Property Law (Volume 1)* (Renmin University of China Press, the second edition, December 2007), p. 630. See Chen Huabin, "Partitioned Ownership of Building Areas: comments on the Sixth Chapter of the Draft of the Property Law" (2006) 1 *Peking University Law Journal* at 72.

owners' assembly provides many fundamental concepts in traditional civil law with a development opportunity, such as the efficiency viewpoint of team law and partitioned ownership system, the owners' assembly and committee with the qualification of civil litigation subject or the qualification of civil subject, resolution act and the classification of the civil juristic act, the establishment and effectiveness of the resolution act, the owners' management stipulation and other similar resolution acts, such as the company's resolution and the peasants' collective resolution as well as their application of the law by analog. As the specific form of the resolution, the owners' management stipulation and the decisions of the owners' assembly have such major legal characteristics as follows: First, management stipulation and the decisions of the owners' assembly have the characteristics of a team will, which is prior to the will of an individual. The declarations of the will of management stipulation and the decisions of the owners' assembly don't require high consistency in the same direction, just as the common legal conduct. Second, the effects of management stipulation and the decisions of the owners' assembly depend on whether the process of decision-making adopts the majority rule. The flaw of a single owner's specific declaration of will doesn't influence the effect of the owners' management stipulation or the decisions of the owners' assembly unless, in this case, it affects the majority rule. Third, the owner management stipulation and the decisions of the owners' assembly can legally bind all the owners no matter whether they join the decisions making or not. Fourth, jurisdiction has finite power in the investigation of the effect of the resolution act such as management stipulation or the decisions of the owners' assembly. The resolution act doesn't fall into the scope of the judicial review only if the gathering procedure, the mode of resolution and the contents of the resolution, are legitimate, by which it can avoid being over-interfered with by the jurisdiction and safeguard the organic combination of the legal autonomy and healthy development (Wang, 2015, p. 92).

The Protection Mechanism of Minority Owners' Rights and Interests in the Process of Joint Decision by All the Owners

What should be noticed is that the co-determination of the majority of the owners possibly infringes on the interests of the minority of owners, which results in the situation where the minority is deprived of during the democratic process of Majority Rule,^① namely "Tyranny of the Majority." Thus, the protection mechanism of minority owners' rights and interests in the process of a joint decision by all the owners needs to be discussed.

On the one hand, the owners whose legal rights are infringed upon have the right of revocation against the decisions of the owners' assembly or the owners' committee.

^① See Yao Hui, "The Owners' Right of Rescission and its Application in Property Law" (2009) 6 *Law Forum* pp. 10-13.

Article 280 of the *Civil Code* stipulates: Decisions of the owners' assembly or the owners' committee are legally binding on unit owners. Where a decision made by the owners' assembly or the owners' committee infringes upon the lawful rights and interests of a unit owner, the infringed owner may request the people's court to revoke it.^① Some scholars pointed out: "In consideration that the management stipulation was established and reformed by the owners' assembly, so 'the decision made by an owners' assembly or an owners' committee' should be explained systematically; it refers to the ordinary resolution of the owners' assembly as well as the management stipulation" (You, 2013, p. 145). The author holds that "infringement upon the legitimate rights and interests of an owner should also be explained systematically, including both direct infringement and indirect infringement. Article 12 of *Interpretation of the Supreme People's Court on Several Issues Concerning the Specific Application of Law in the Trial of Disputes over Realty Management Services 2009* stipulates that taking the decision of the owners' assembly or the owners' committee as an infringement on their legal right or an offense against the law, the owners enjoy the right to appeal to the court to revoke the decision of the owners' assembly or the owners' committee according to the second paragraph of Article 280 of the *Civil Code*, and such a right shall be performed within one year since the day he knows the decision of the owners' assembly or the owners' committee. So the resolution and management stipulation can be revoked due to procedural illegality or substantial infringement. To avoid too much of the will of the authorities of judgment involved in the management stipulation, the court should investigate the procedures majorly and investigate the matter of substance complementarily. Jürgen Habermas once pointed out that the justification of the government's will lies in the democratic procedure. The democratic procedure is displayed in such a way that all the subjects whose interests are relevant have free access to equal participation, free expression, negotiation, and discussion. "The agreement achieved can be viewed as fair provided that all the interests-

① Some scholars pointed out: "From the viewpoint of future legislation, owners with objection shall be granted the interests compensation. The owners who suffer from the Majority Rule shall be granted the right of compensation from the other owners. From the viewpoint of present judicature, the judge should actively direct the owners with objection into compensation appeal instead of abolition of appeal." See You Jia, "Research on the Partitioned Ownership of Building Areas from the Perspective of Team Law." (Doctoral dissertation of Renmin University of China, 2013), p. 141. See also "Li Yingzi, *Fan Naxin v the Owners' Committee of Mingzhujiayuan and the Mingzhu Realty Management Company in Changshu City over the Right of Revocation* (2011) 3 *Selection of People's Court Cases*, pp. 136-140. In this case, the court held that, civil conduct should comply with the principle of good faith. When the party is engaged in civil activities, he/she should be honest and keep the faith, perform the duty with good intentions, do not abuse rights or avoid the prescription of the law or the contract. When the owners' assembly calls the owners together in a reasonable way on the matter of signing the contract of realty service, however, some of the owners slight their rights of management, absent from taking an active part in the owners' assembly activity thus bringing about failure in achieving resolution of the owners' assembly. The owners' assembly can sign a realty service contract with the realty service enterprise directly to maintain the regular order of residential living and perform duty with good intentions. The owners slighting their rights of management have no right to sue for revocation of this decision, provided that the articles of the contract meet certain regulations and are accepted by the majority of the owners. In the practice of realty service, lots of owners slight enforcement of the right of management, which hinders many management affairs from effectively passing and carrying out. So, low efficiency in realty management is quite common in many residential areas. It is necessary to lay restraints on the owners' right of revocation in order to urge the owners to enforce their rights and perform their duties of management. It can be assumed that the owners disclaim the right of protest to some extent if they refuse to participate in voting. The owners' refusal to participate in voting is also a behavior of neglecting their legal management duty. It can be viewed as a censure on the part of the owners because of their failure to perform and as a restraint on their right of revocation.

concerning subjects are ensured to have the chance of equal participation, and have the equal chance influencing each other, and be granted the equal opportunity in the end.” While John Bordley Rawls held that we could not take a kind of special result as proper just because it was achieved through a fair procedure. “The effect of the team resolution lies in the satisfaction of procedural conditions during the formation, but the satisfaction of procedural conditions does not imply the complete achievement of justice (You, 2013, p. 135).”

On the other hand, other important issues concerning the common ownership and the right to common management of owners’ assembly and owners’ committee also have a finite range. They cannot make a resolution to prevent other owners’ choice and basic freedoms which has nothing to do with the realty service.^① Paragraph 1 of Article 19 of *Regulation on Realty Management* stipulates: “The owners’ assembly and the owners’ committee shall perform the duties according to the law, and may not make any decision or engage in any activity irrelevant to the realty management.” Article 271 of the *Civil Code* limits the common management right of owners on other important issues concerning the common ownership and the right to common management. The majority mechanism of social life matters generally be confined to public affairs of the community, and we exclude majority mechanism from personal affairs in order to prohibit the will of majority replace personal choices (Hua, 2012, p. 81). “We should not infringe upon exclusive rights of minority owners’ by majority mechanism when there are no common affairs, unless all owners agree” (Gao, 2009, p. 19). Just according to the literal meaning of Article 271 and Article 278 of the *Civil Code*, we may strictly confine management stipulation to “other important issues concerning the common ownership and the right to common management.” But this conclusion does not conform to the systematical interpretation of Article 279 and Article 286 of the *Civil Code*. These two articles reflect the necessary restrictions of ownership over the exclusive parts within the buildings.^②

To sum up, the resolution or management stipulation worked out by the owners’ assembly both belong to resolution behavior. The scope and voting rules of them differ from each other. In fact, different types of resolution behavior are different in these two aspects. The resolution or management stipulation worked out by the owners’ assembly in the majority mechanism shall be binding on all the owners, which conforms to the fundamental legal characteristics of resolution. The relationship between the owner, the owner’s assembly, and the owner’s committee is similar to the fiduciary relationship. If the decision made by the owners’ assembly or the owners’ committee and the management

① See Wang Liming, “The Exclusive Rights of Shop Owners and Their Exercise” (2009) 6 *Law Forum* at 9.

② See You Jia, “Research on the Partitioned Ownership of Building Areas from the Perspective of Team Law.” (Doctoral dissertation of Renmin University of China, 2013), pp. 144–145.

stipulation infringes upon the legal rights and interests of the owners, the injured owner has the right to revocation litigation, which is similar to the farmers' collective decision behavior, so right of revocation litigation belongs to the common experience of resolutions. Of course, the owners' assembly and the owners' committee have no independence on civil liability. When the resolution directly violates the legal rights and interests of the owners' assembly or the owners' committee, the final consequences will be borne by the owners, so at this time, we do not need to set the derivative action of the owners. They can directly exercise their litigation right.

Conclusion

The realty management of ownership of buildings includes the owner entrust-management and the owner self-management, the former through the way of realty service contracts, the latter through the resolution of the owners' assembly or the owners' committee.

The core dispute over realty service contracts is the implementation of the realty service and the closely related problem (Yao & Duan, 2010, p. 34). The legal disputes of realty service contracts involve balancing interests among the realty service enterprise, an individual owner, and all the owners. We should use dynamic balancing of the interests of the three parties to implement the interests of the win-win cooperation, rather than the interests of the trade-off of "all or nothing." On the one hand, the owners' obligation to pay the realty service fees cannot be released only by owners' dissatisfaction with the quality of realty service. On the other hand, security obligations of the realty management enterprise are not absolute. We should take the fault as the judgment standard. The reason why legal disputes over realty service are frequent lies as follows: First, in most of the residential areas, the realty service enterprise were selected by the construction entity, which can't really and effectively reflect the interests of the owner. Second, in most of the residential areas, the owners' assembly and the owners' committee have not been established. Therefore, it is not viable to effectively supervise and restrain the realty service enterprise through the owners' autonomy.

The resolution or management stipulation worked out by the owners' assembly in the majority mechanism shall be binding on all the owners, which conforms to the fundamental legal characteristics of resolutions. The resolution or management stipulation worked out by the owners' assembly both belong to resolution behavior, and both are legal tools of the owners' autonomy. If the decision made by the owners' assembly or the owners' committee and the management stipulation infringes upon the legal rights and interests of the owners, the injured owner has the right to revocation litigation. At present, residential commodity owners have a low degree of autonomy in China, and legal disputes

over realty services are frequent. In the future, we need to perfect the legal incentive and constraint measures and stimulate the vitality of owner autonomy in order to promote implementation of the owner self-management and owner entrust-management.

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(Editor: Gerald)