



A new model for senior care that combine with tourism is recently being explored by many real estate developers, and senior housing projects that provide elderly people with option of aging in distant cities are popular in China. What worth noting, however, is tourism real estate here is a market in lack of regulatory governance, hence adding quite a lot of difficulty for supervision while it is marketed in a label of “senior care”. In this article, we will discuss legal issues on development of vacation-type property for seniors.

Legal environment for development of Condo-hotel

Condo-hotel (or property hotel) has been developed in China for decades. Different from those in foreign countries, most condo hotel projects in China were constructed for sell, ignoring its essence of hotel management. Over years, the Chinese government realized the necessity to regulate this market and issued a couple of rules, from which the following two areas are of most concern:

a. Requirement for selling condo-hotels

There was a time condo-hotels were remodeled from old buildings or half-baked buildings,

so usage zoning or design specification of these buildings are inconsistent with the requirement of constructing hotels, even sometimes after alterations. A problem then always rises on whether zoning and construction authorities can approve a transition of a building from its previous purpose to the hotel purpose. If developer cannot obtain such approval from relevant authorities, the completion procedure of the construction will then not be able to proceed, and at the end of the day, buyers will be at risk failing to acquire real estate certificate of the purchased condo-hotels.

Therefore, Beijing municipal government has in May of 2010 promulgated a regulation that prohibit hotel-designed project from being sold by unit or by floor, hence basically eliminate new projects of condo-hotel in the city. On the other hand, however, Municipal government of Haikou issued a Provisional Regulation on Management of Property-style Hotel, which provided positive guidance to the development and management of condo-hotels. The Regulation of Haikou places the development of Condo-hotel into the pre-sale system of commodity apartment, and requires it being sold and registered by inner-space area, rather than gross floor area.

b. Issues on operation of hotels

We often see different lawsuits arising from property-style hotel, most of which are in connection with sell-leaseback models. According to Regulatory Measures on the Sell of Commercial Houses, it is prohibited for real estate developers from selling commercial houses in a way of cost-refundable sale or selling uncompleted commercial houses in a way of after-sale lease. However, a very common approach for developers is to entrust a third party management company to conclude a management contract and this company will guarantee a fixed amount of investment return. This seems like circumvention to the regulation, but in essence, it might be deemed as misrepresentation to consumers. People might finally find under a lot of circumstances promised return are hardly to be cashed in as financial status are under the control of such management company, and individual investors can hardly acknowledge the operation details, or even the reasonability of returns as alleged by management company. Prevailing laws are still silent on such operation issues on property-style hotel. In practice, we find some developers introduce a pledge mechanism to ensure returns for investors, which turn out to be helpful for sale and management of such project.

Timeshare products

Due to the abovementioned legal and market environment that encumbers development of property-style hotel, some developers are encouraged to introduce timeshare products. Timeshare products are typically used in shared usage right of a vacation or resort property in an arrangement that allocate usage rights based on time (e.g. divide into 51 weeks annually). In other words, only one purchaser will be allowed to use a particular home or apartment at a particular time (e.g. one week). The concept of timeshare is derived from France in 1960s and evolved rapidly since then as a worldwide lifestyle for tourist. A typical structure of timeshare system will include five kinds of legal relations between four parties, which are real estate developers, realtors, club members and Resort Condominiums International (RIC).

Legal system in China on timeshare is currently in vacancy. It is unclear whether consumer is buying usage right of the property (same as most practice in Europe) or ownership (practice such as fractional ownership in the US) under a timeshare, and definition of co-ownership in China Real Property Law that allow registration of the right cannot be applied here. As such, timeshare arrangement can only be achieved through contract, leaving regulatory and supervision of the industry in blank. As a consequence, since its introduction to China in late 1990s, the concept and product of timeshare is usually coupled with fraud and illegal fund raising—shadowing the timeshare market over time.

Until recent years, we've seen some developers are trying to tap into the development of timeshare product, among those are BRC from Sichuan and Antaeus Group from Hainan. In order to avoid the “bad reputation” that plants in consumers' concept, those

developers are trying new definition of their products, but still seemingly more like timeshare. Actually, as derive places of timeshare, Europe Union has applied a lot of practice in its Timeshare Contract Law, such as cancelling right, “grace period” system and disclose responsibility for seller, which can definitely been referred to when China is about to establish and foster a timeshare market.

Viable Model for Elderly-care Hotel

An elderly-care condo-hotel is designed for investors (usually also ultimate consumer) who will buy the property for live after retirement. Investor will usually entrust property management company to operate such property before his/her retirement, and obtain some profits in return. In most cases, the developer or management company will buy-back or resell the property after resident is dead, and profit of such is enjoyed by heirs of the investor. Different from ordinary condo-hotel, elderly-care style hotel is usually operated by elderly care service provider, where profession and experience of elderly care are mostly of importance.

“A second option is timeshare model for vacation-style senior living, a blend of real estate, resort, tourism and senior care business.”

It is also a unique model that introduces an economic concept of space and time, in a way to share, integrate and make use of different resource.

Under the current regulatory environment, we advise

developers who engage in the senior-living oriented hotel to carefully consider the following three aspects of legal risks:

--Be aware of the possible unclearness of management right of the senior-living hotel. Given the fact both hospitality and senior care are special lines of service industry that may under administration of different government authorities, such as Industry and Commerce Bureau, Civil Affairs Bureau, Tourism Bureau, Police Office and Ministry of Health. Generally there can only be one integrated management body to operate a senior-living hotel. However, **given the mixed nature of senior-living hotel, in practice, the property management party and the senior care service operator are totally different entities, with different qualification and business scope in granted license. So it is more important to describe corresponding rights and liabilities of these parties through contractual agreement to avoid ambiguity or overlapping.** On the other hand, from the property owners' perspective, their property rights are in restraint, due to management right on their own in lack. As a result, many investors will consider their exit right of such property—a mechanism developers should consider in the first place.

--Wisely design membership card products. As a variation of property interests, membership card model is popular in the marketplace. Investment from consumers can be paid off by means of re-sale or redemption. In practice, membership cards are sold out prior to construction completion of senior-living hotel in order to facilitate project finance, or in other cases, developer will use the sales capital in other of its projects. There are always disputes arise from the unclearness agreement on the interests of such membership, or unfair and

arbitrary provisions that violate legitimate right of consumers. So putting a fair and viable entry agreement or article of membership association in place can save a lot of troubles in the days to come.

From the current government voice, operational liberty for developers on membership card products is still there. But as stipulations in the abovementioned Haikou's regulation on condo-hotel, local government intends to include the sales of hotel-style product into presale regime that can be monitored, and therefore keep the financial status of developer under control. As such, developers shall be aware of the possibility that in the future regulators may prohibit or restrain sales of membership card on hotel-style property, if they are trying to prevent consumers from losing money under a systematic

crisis of over-heated real estate market. For now, we advice developers to take control of their financial capability, to sell membership card until construction is almost completed and allocate a percentage of capital for the upcoming opening and operation of senior-living hotel.

--With regard to timeshare project, it is important for developers or realtors to pay attention to the legitimacy of their behavior, especially avoid being regarded as illegal fund-raising. In China, illegal fund-raising that conducted by any individual or enterprise without adequate approval can cause a serious criminal charge, and for timeshare product, it is always under the radar of authorities to distinguish illegal behavior of fund-raising from sound timeshare business—the direction in which sales fund

flows also plays a critical role by judging the legality of the business. Actually, China has established legal system of trust for years, which can provide legal basis for creating a viable mechanism to protect interests of timeshare participants. By learning successful experience from western countries, investment of timeshare products can be established on a trust product basis, giving more security to the investors' interests.

As a conclusion, development of senior-living hotel is a profound project that not only requires comfortable living environment for seniors to living, but also awaits for a series of service in place, such as elderly insurance, reverse-mortgage and senior housing realtor, etc. No matter from a market or a regulatory point of view, it is nevertheless a long journey ahead for the senior-living hotel business.

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We can assist with senior housing developers and service providers in:

- Advice on structuring business models
- Conduct legal due diligence on project acquisition
- Establish legal entities and negotiate with joint venture partner
- Draft and standardize documents on (a) construction, operation and business transaction; (b) third-party agreements and vendor's contracts; (c) policies and procedure for residency
- Advice on finance, tax and government relation
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We are commercial real estate lawyers. Our core practice areas are commercial leasing, acquisition, development, construction and land use, complement with expertise in the areas of litigation and corporate affairs.

In particular, we provide assistance to clients in the fields of commercial real estate development, retail, hotel & leisure, senior housing & care and private equity investment.

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Finance and investment (Lending / Foreign investment / Borrowing / Private equity)

Corporate and business affairs (Commercial agreements / Corporate governance / Tax / Partnerships and joint ventures)

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