

Current Status of Timeshare in China

- From Legal Perspective

The notion a “timeshare” was originally created in Europe in the 1960s. It is a combination of real estate product and tourism product. A commonly accepted concept of timeshare involves a division of a unit of a lodging property, usually a hotel, or a resort villa, into specified usage times (typically 52 usage times) every year for a period of 10 to 40 years or even more. Buyers have rights to use the timeshare unit for one week or two weeks per year or exchange internally or externally through an exchange network for another timeshare unit’s usage time in other hotels or resorts, or rent it out, give it as a gift, donate it, leave it to their heirs, or sell it. Since it was first introduced to China in 1990s, people still yet to have a common understanding on the definition and nature of timeshare. For most of the cases in China, timeshare is more related to leasehold or membership rather than a real property right.

An Overview of Legislation Status

In China, timeshare is a new concept to many people and is just at its infancy stage. To many investors, China is one of the most promising potential markets of timeshare. Up to now, however, no specific legislation has been enacted to govern the industry of timeshare, and the uncertainty in legal aspect becomes one of the investors’ concerns. Here a brief overview is provided concerning the existing Chinese laws and regulations that investors want to keep in mind when making investment in timeshare industry in China.

Property Law of the People's Republic of China

Based on the Property Law, the owner of a real property or movable property has the rights to possess, use, seek profits from and dispose of the real property or movable property.

Two main different types of timeshare are in the form of real right contract and right to use contract. With the former, timeshare units are sold as fractional ownership and are real property (this is rarely the case in nowadays China), but with the latter, timeshare is more like leasehold rather than real property ownership. When timeshare is carried out in the form of the first type, the legal rights to the property can be protected throughout the Property Law; but for the second type, we’d better refer to the Contract Law rather than Property Law.

Contract Law of the People's Republic of China

Compared with transferring the legal title of the real property to buyers, nowadays participants in timeshare industry much more like to enter into a lease contract with “buyers”. In that case, the lease term may not exceed 20 years according to the Contract Law.

Alternative to a lease contract, timeshare often takes the form of “club membership”, where the buyers have the right to use the property in accordance

with the contract, yet not subject to the limitation of 20 years. When the contract ends, all rights revert to the owner of the property. According to the Contract Law, people have the right to lawfully enter into a contract of their own free will. Thus such “club membership contract” is naturally protected by the law.

Law of the People's Republic of China on Protection of Consumer Rights and Interests

Business operators shall provide consumers with authentic information concerning their commodities or services, and may not make any false and misleading propaganda.

Participants in timeshare industry shall keep this in mind when making promotion of timeshare products, to avoid any disputes with consumers.

Below are some other related laws and regulations:

Document	Contents
Provisions on the Administration of Qualification for Real Estate Development Enterprises	Enterprises engaged in real estate development and operation are required to obtain qualification certificate.
Measures for the Administration of Qualifications of Realty Management Enterprises	Enterprises providing property management service are required to obtain qualification certificate.
Law of the People's Republic of China on Urban Real Estate Administration	The real estate intermediate service agencies including real estate consultants, real estate evaluation agencies and real estate brokerages shall obtain qualification certificate.
Opinions of the Ministry of Construction, the Ministry of Commerce, the National Development and Reform Commission, the People's Bank of China, the State Administration for Industry and Commerce, and the State Administration of Foreign Exchange for Regulating the Access by and Administration on Foreign Investment in the Real Estate Market	Administration on the real estate development and operation conducted by foreign-invested enterprises is to be strengthened and some restrictions on foreign-invested enterprises have been imposed.
Regulations on Travel Agencies	Such regulations govern the establishment and business activities of travel agencies within the PRC; it is not impossible that in the practice a timeshare company is deemed as a business related to travel agency and thus is subject to special license.
Administrative Measures for the Sale of Commodity Houses	Commercial buildings shall be sold by suite rather than segment.

The Administrative Measures on Single-Purpose Commercial Pre-paid Cards (Trial)	Business entities engaged in wholesale and retailing, lodging and catering industries, and resident service issuing single-purpose commercial pre-paid cards are governed by such Measures. It is possible timeshare business in the form of membership card is bond by such Measures as well.
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Local Regulations and Rules

No specific local by-law has been enacted to govern the timeshare industry. However, there is no doubt that local governments hold an encouraging attitude towards timeshare industry. For example, in the government policies or working plans of Sanya Municipality, Hainan Province, and Guangdong Province, private investment in timeshare industry is expressly encouraged, only that there is no specified provision guiding and governing the operation. Given the background that more and more market participants are involved in China's timeshare industry, it is urgent that appropriate timeshare regulations need to be enacted at least locally (for trial purpose) in due course, for example, in some tourism-featured provinces. It is also believe that the legislation on timeshare industry of Chinese market is a trend; and here we would like to briefly introduce the procedures for the formation of local by-laws.

Formulation of Local By-laws

In China, the laws governing the law making procedures are the Legislation Law of the People's Republic of China and the Organic Law of the Local People's Congresses and Local People's Governments of the People's Republic of China. These two laws not only specify the legislation procedures at national level, but also grant the local People's Congress and its Standing Committee (to make regulations) and local People's Government (to make rules) the power of making local by-laws and regulations. Generally different provinces have different regulations for the purpose of further elaborate the local practices. Here we would like to take Hebei Province as an example to explain how a local by-law (say, a regulation or a rule governing the timeshare industry) is formulated.

Regulation

Except for the especially major issues that are formulated by the People's Congress, the formulation of most of the local regulations falls into the power of Standing Committee of Hebei Provincial People's Congress (hereinafter referred to as "Standing Committee"). A specific regulation called Regulations on Local Legislation of Heibe Province. Below is about the procedures for formulation of local regulation approved by Standing Committee.

1. Standing Committee makes a 5-year legislative plan for its tenure, as well as the legislative plans for each year (hereinafter referred to as "Plan").
2. The subordinate working departments of the Hebei People's Government (hereinafter referred to as "Provincial Government"), prior to 15 October of a

- year, draft the regulation under the Plan and submit the draft to Legislation Office of Provincial Government, who consequently select and submit the draft to the Legislative Affairs Committee of Standing Committee before 1 December.
3. The Legislative Affairs Committee then submits the draft to Chairman Committee of Standing Committee to let the latter decide whether to put it on the agenda of a meeting of Standing Committee. Once decided, the draft will be submitted to Standing Committee.
 4. In case the regulation on timeshare industry is not within the Plan, Provincial Government or relevant special committee of Standing Committee may submit, or otherwise five or more members of Standing Committee may jointly submit a bill for the regulation to Standing Committee.
 5. After being placed on the agenda of a meeting of Standing Committee, the bill may be put to vote after deliberation at two meetings of the Standing Committee, sometimes only at one meeting and sometimes three meeting. If the bill is not put to vote in 2 years, usually for the reasons of no consensus being reached, the legislative procedures for this bill will be terminated.
 6. The local regulations shall be reported to the Standing Committee of the National People's Congress and the State Council for record.

Rules

Provincial Government has its own power to formulate rules, which are normally titled "provisions" or "measures", but they may not be titled "regulations".

1. The relevant subordinate working departments (in timeshare case, they may be tourism department, economic development department, or other department) apply to Provincial Government for formulating the rules, if there is a need to formulate such rules.
2. The legislation office of Provincial Government will make a summary of the approved application and accordingly a rules-making plan for a year.
3. After the plan is approved by Provincial Government, Provincial Government may assign one or several of its departments to draft rules, or assign its Legislation Office to conduct or organize such drafting.
4. The draft will be reviewed and examined by the Legislation Office.
5. The rules shall be decided at the executive meetings or the plenary meetings of Provincial Government and signed by the provincial governor.
6. The passed rules shall be reported to Standing Committee for record.

People's Congress and its Standing Committee and People's Government of comparatively large cities are also empowered to make their own local regulations and rules, and the procedures are similar to those at provincial level.

Special License for Timeshare

Regardless of lack of specific governing laws and regulations, more and more timeshare companies or projects have found their places in China's market. Resorts and Condominiums International (RCI) is one of the world's largest timeshare agents. Currently from the RCI's website, we can find 88 resorts in China on the timeshare projects. A group of companies including HNA Hotel Holdings Group Limited,

Shanghai Free-Travelling Tourism Service Co., Ltd., and many others have been authorized to join the exchange network of RCI since from several years ago. How to legally establish a timeshare business in China? Here we would like to give a brief introduction on the possible special license for a timeshare project from the perspective of different participants.

Developers

A company engaged in real estate development (means to develop and sell real estate) must obtain the qualification grade certificate for real estate development; however, if a company only acquires a real property and re-sells it, such certificate is not required. In the foreign investment field, a company to be engaged in real estate development and operation has to comply with the additional regulations and rules, which are meant to restrict foreign investment in Chinese real estate. Foreign investment in China real estate is not only subject to the approval from local/national commercial department, but to the governmental scrutiny at the national level. Further more, a longer approval timeline is usually not avoidable.

Operators

There is no definite form for the participants operating timeshare business. Some are carrying out timeshare business in the form of consulting company, some are in the form of hotel, and some are in other forms.

Let's take the above-mentioned Shanghai Free-Travelling Tourism Service Co., Ltd. as an example. This is a service company incorporated in Shanghai, with its approved business scope of "consulting service on room reservation for timeshare, consulting service on tourism information; marketing and agency for timeshare agency; timeshare products' development and after-sale service; room and ticket reservation agency; commercial consulting (except for intermediary); investment management; consulting on enterprise management".

Currently timeshare is not mentioned in the existing laws and regulations, and is not required to obtain any special license for developing, operating or marketing timeshare products. However, it does not mean that every operator is as lucky as Shanghai Free-Travelling Tourism Service Co., Ltd., who manages to add "timeshare" to its business license. Due to the lack of specific regulations, many local AICs are reluctant to add "timeshare" to the business scope (though no law or regulation objects to market participants running timeshare activities). Some big cities such as Shanghai, Beijing, or Guangzhou are hopefully doing better and opener in this aspect.

Property Management Company

If the developer itself manages the real estate, no special license for such management is required. However, if a company is to provide property management service for real property owned by others, such company must obtain qualification certificate for property management from Ministry of Housing and Urban-Rural Development or its subordinate at provincial or municipal level.

Consumers' Legal Rights

In order to begin with this topic, we would like to introduce a case concerning a contract of timeshare, which reflects some of the problems and current status of timeshare in China.

Mr. Zhou signed a contract with Zhuhai Shijingshan Resort Centre (hereinafter referred to as "shijingshan"). According to the contract, Mr. Zhou was entitled to stay in a two-bedded room of Shingjingshan hotel for one week per year from the year of 2000 to 2045, and he also has the right to exchange his 7-day stay in Shijingshan for a same period's stay in other resorts under RCI's exchange system. As the consideration, Mr. Zhou has to pay once to Shijingshan the amount of RMB67288 and another amount for the management fee every year. The contract also said that after Mr. Zhou paid RMB67288, he became a member of RCI timeshare exchange network and would get a membership card from Shijingshan, and was to be entitled all the rights and benefits under RCI's timeshare system.

However, after Mr. Zhou made the payment, he did not get the membership card as expected, so he brought a lawsuit against Shijingshan, asking for cancellation of the contract. Mr. Zhou claimed that Shijingshan had made untrue and misleading propaganda to him when it was making promotion for timeshare products, and Shijingshan did not perform its obligation in due course.

The first instance court made a judgment in favor of Mr. Zhou, ordering both parties to cancel the contract and Shijingshan to return the payment to Mr. Zhou.

At the appellate proceeding, Shijingshan submitted a statement from manager of RCI Asia Pacific (incorporated in Singapore), saying that Shijingshan was an authorized agent of RCI and that Mr. Zhou was admitted as a member of RCI exchange system. The statement also provided the unique membership number of Mr. Zhou. The court eventually admitted this statement and ruled that the fact that Shijingshan did not give membership card to Mr. Zhou did not affect Mr. Zhou's contractual rights, thus did not constitute substantive breach of the contract. The first instance judgment was overruled and the contract went on effective.

From this case, we can at least see the following points:

1. A timeshare contract was recognized by the court.
2. Club membership is a very popular form to carry out timeshare activities.
3. Since there is no specific laws or regulations governing timeshare industry, disputes can easily occur during the performance of contract.

Seeing the above, we would like to give the following humble suggestions, hoping they will be of help to the market participants:

1. Consider the complaints from consumers especially concerning the exaggerate promotion or misleading presentation. When timeshare developers or operators market for the timeshare products, make sure that the promotion and marketing activities are appropriate.

2. Introduce the “cooling-off period”. If a consumer intends to buy the products, allow a cooling off period, say, 5 days, for the consumer, so to make the contract to be signed 100% the real intention of both parties to the contract. It is not a compromise by the seller; instead, such period may save the seller from many potential disputes in the future.
3. Employ a very good hotel/tourism management companies to build the brand image and make the operation in good order. Though such management companies are expensive, the benefits herefrom will prove its worthiness.
4. Apply bank guaranty or other kinds of guarantee. It is understandable that consumers are sometimes worried about the performance of the contract by the seller, because they have paid once the full amount for the use right for the future 20 or 40 years. In this case, both parties can make an agreement to let a third party in as the guaranty party, and the conditions for such can be further discussed by both parties till both parties feel safe as well as satisfactory.
5. Appoint consultants to review the transactions. When the developers or operators are dealing with consumers, governments, or other participants, consultants such as experienced law firms can be appointed to design the transactions or review the relevant documents to make sure that everything is in compliance with the laws and regulations, and that the risks have been controlled to the lowest possibility.

Hopefully appropriate timeshare laws and regulations will be enacted either at the national level or local level in the future. Regardless of any restrictions or problems occurring in the Chinese market, timeshare presents many opportunities for all parties involved. With help from professional advisers and other industry counterparts, investors in the timeshare industry can achieve their success and at the same time can help shape the legal frame for the timeshare industry.