Sale of Co-owned Property in China

Description

Properties, I mean real estate such as houses, apartments, condos, and offices, can be owned by more than one owner, resulting in co-ownership in a certain piece of property.

I. Co-ownership under China Property Law

Under China Property Law, there are two types of co-ownership: tenancy in common and joint tenancy. **However please be noted that the tenancy in common and joint tenancy under China Property Law are not the same as used and defined under common law jurisdictions. In particular, there is no right of survivorship attached to China version joint tenancy.**

We will briefly examine the two kinds of co-ownership under China laws. Unless there is a contract between or among the co-owners on how the property will be managed and disposed of, the rules described below will be applicable.

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1. Joint Tenancy

A property of joint tenancy refers to a property owned by two and more owners without specifying how many percentage each owner holds, and the rights/interests and obligations of each owner shall be effective against the whole property instead of any specific and separate areas of the whole property.

Joint tenancy mostly arises in a family context, typically as between a couple. According to China Marriage Law, unless expressly stipulated otherwise between the couple (in a pre-nuptial agreement, for instance), a property acquired by one or both of the couple during marriage is assumed to be owned in joint tenancy with each spouse enjoying the equal right and interests. Despite the undivided shares in the property, upon dissolution of the marriage and death of one spouse, the joint tenancy property will generally be divided equally among the joint tenants.

As mentioned, there is no right of survivorship in the case of China joint tenancy property. Upon death of one joint tenant, unless there is a will, his or her rights and interests will be inherited by all legal heirs according to China Inheritance Law.

2. Tenancy in Common

Tenancy in common under China Property Law refers to a property owned by two or more owners with each owner having a clear share (indicated in percentage).

A tenancy in common arises when the co-owners of the property clearly agree as such. Absent a clear agreement on the type of co-ownership, a co-owned property is always considered a tenancy in common unless the owners are family members to each other.

A typical tenancy in common is created when multiple heirs inherit the same estate property bequeathed by their family member.

II. Sale of Co-owned Property

So with the basic concept explained above, what if one or majority of the co-owners wish to sell the property and others don't want to?

1. The 2/3 Absolute Majority Rule

China Property Law has an article addressing the issue of sale or disposal of co-owned properties. Article 97 of China Property Law provides to the effect that disposal of tenancy-in-common property shall require the consents of at least two thirds of the co-ownership, and the joint tenancy property requires consents of all co-owners.

It is clear in the case of joint tenancy properties, but what does it mean in the case of tenancy in common?

Literally, it means that an absolute majority can effect the sale of the property in spite of the dissent from remaining co-owners which should mean that the absolute majority co-owners can enter into the sale contract and can effect the title transfer without the dissenting co-owner(s). A specific guide laid down by China real estate registration authority has confirmed this understanding.

However, if you call local real estate registration authority to inquire about whether partial but majority co-owners can effect title transfer, they often tell you "no". The reason behind is not that they have reason not to follow the rules, but that they need to see all co-owners (in particular the dissenting owner) to ensure that dissenting co-owner expressly waives his or her pre-emptive right to buy the shares belonging to the absolute majority co-owners. Otherwise without such an insurance, the real estate registration authority will face lawsuits brought up by the dissenting co-owner(s).

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2. Pre-emptive Right of Dissenting Co-owner

The pre-emptive right by the dissenting co-owner makes it impossible for the other majority shareholders to move ahead with the sale. The problem is that China Property Law does not elaborate on how the absolute majority rule shall be executed in practice. For example, when the absolute majority co-owners serve a notice of sale to the dissenting co-owner asking him or her whether she will exercise his or her pre-emptive right, the dissenting co-owner will not waive if he or she does not wish to sell the property.

In practice, local real estate authority often asks all co-owners to appear to make sure of the pre-emptive right issue. Otherwise, if the majority co-owners alledge waiver by the dissenting co-owner, it is difficult to prove if it is true. It remains an interesting issue in practice as to whether there will be alternative way to prove the waiver and if yes, then what way.

this is of particular interest to co-ownership of tenancy in common often arising out of the inheritance of China property by several heirs.

Date Created
August 2017

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