

The Construction and Consummation of the Residency Right——Analysis based on the Chinese Civil Code

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ABSTRACT

The residency right is a newly recognized usufructuary right in Chinese Civil Code, which originated from Roman Law and exists in both civil law system and common law system. As a property right, the setting of it needs registration. It contains the right of possession and use of other people's houses, with the effect to exclude others' interference. The significance of this right is embodied in social function and economic function for China. For the social function, it can provide an institutional basis for the reform of social housing security mechanism. As for the economic function, it contributes to the diversified use of personal property and the development of new business models. But the existing rules in Chinese Civil Code are still inadequate in terms of the setting rule, the realization of circulation and investment function and the repair obligation.

Keywords: *The Chinese Civil Code, Residency Personal servitude, social security, economic function*

1. INTRODUCTION

1.1. The concept and historical origin

The residency right refers to the right of occupant to possess and use all or part of house owned by others and its ancillary facilities.[1] The mechanism lies in the separation of ownership and use, so that the right holder can possess and use the house of others.

(1) Roman law

As a kind of human servitude right in ancient Rome, residency right is the derivations of usufruct.[2] Usufruct was first used to deal with family inheritance, which follows the principle of "benefiting the widow" and protects the interests of the children. Roman law allowed the establishment of usufruct for all kinds of properties to maintain the joint use and profit for the widow and children. Due to the increasing number of agreements on it, Justinian issued a decree on the right of residence, which codified the ancient custom. Since then, the residency right has become an independent human servitude.[3]

(2) Civil Law System

The civil law system also has the residency right. For example, the BGB§1093 stipulates the relevant contents of the residency. According to this article, residency right is a real right, which is set through the registration, and can neither be transferred nor inherited. Unlike usufruct, residency right can only be used for one's own residence, not for rent. In accordance with the§1093II, the occupant may accept the residence of its family and nursing staff, which enables minors and the elderly to enjoy caring.

However, in addition to the above-mentioned circumstance, according to the§1092, other people can only be accepted with consent. In order to enrich the connotation of residency and cope with the housing pressure, Germany stipulated a special residency right — the long-term residency right, which also includes the right to use others' houses. But it can be transferred and inherited, the occupant also has the right to make any reasonable use, especially the right to rent.[4] Therefore, the long-term residency right is more flexible, inheritable and transferable, which is conducive to the further expansion of the function of residency system and provides an institutional basis for the development in commercial field.

(3) Anglo-American Law

There is a similar right in the common law called life estate. The life estate is ended upon the termination of life of the person who cannot inherit, whose right holder dies or whose length is determined, which is similar to the residency right. Life estate usually terminates upon the death of the obligee or a third person. In addition, as for the relationship between rights and obligations of life estate, there is the "waste principle" in common law, that is, the holder of the land property right for life shall fulfill the obligation of maintaining the land, and shall not carry out damage behavior or use the land in a way that changes the nature of the land.[5]

1.2. The nature of the residency right

(1) Real right

The newly added residency right in Chinese civil Code is set in the usufructuary right division of the real right, which is endowed by law with the nature of the real right.

§366 directly stipulates that residency is the usufruct of possession and use of other peoples' houses by the occupant in accordance with the contract.

(2) Set without price, unless otherwise agreed

According to the first sentence of §368, residency right is set free of charge, except otherwise agreed by the parties. Combined with the content of this sentence, although the legislator does not restrict the parties to establish it in a paid way, it is not difficult to see that the way presumed by the legislator is free of charge. This purpose can also be seen from the draft provisions. For example, §160 of the Contract Part of the Civil Code (the second draft) stipulates: "The residency right shall be established free of charge."

(3) Set with a clear scope

As a usufructuary right, the residency right is the right to control specific things, which should be clearly stipulated in the content and scope. Therefore, §367 stipulates that the contract shall include the following clauses: (a) the name or address of the parties; (b) the location of the residence; (c) the living conditions and requirements; (d) the period of residence; (e) methods of dispute settlement. However, only the first and the second item really need to be clarified. If these two items are missing, the subject and object of the right will be unclear, so the right cannot be set.[6]

(4) The right of residence shall not be inherited or transferred

According to §369, the residency right can't be transferred or inherited. It can be leased only agreed by the parties. As for whether the right of residence is transferable, Chinese Civil Code insists that it can't be transferred, so that the right of residence has strong personal attributes and is full of the color of human servitude.

2. The practical significance of residence right to China

2.1. The social function of the residency right to China

Housing security plays an extremely important role in the social security mechanism. In the current Chinese society, there are many chaotic situations in the field of housing security, and the residency right is conducive to solving relevant problems and building a better social security mechanism. The essence of government-subsidized housing is the houses provided by the government with limited standards, price or rent for low - and middle-income families with housing difficulties, such as national housing project housing, low-rent housing, public rental housing, housing reform, housing demolition or shantytown reconstruction resettlement housing, workers resettlement housing, talent resettlement housing, etc.[7] On the one hand, the group of this kind of indemnificatory housing has particularity. Low-rent housing, for example,

is limited to low-income families; although the scope of public rental housing has been expanded, the standards vary from place to place. The main targets are families with low-income housing in urban areas, newly employed workers without housing, and migrant workers with stable employment in urban areas.[8] Although affordable housing is aimed at middle and low-income families, its price is still very high, and it is generally difficult for low-income families to afford. Beijing, Shanghai, Guangzhou and other places have also promoted the practice of ensuring people's livelihood through housing with shared property rights, but individuals still have to pay more than half of the house price, which is still hard to afford.

Under the current housing security system, there is a "vacuum zone" in the scope of the security subject. For example, some people don't meet the requirements for low-rent housing, public rental housing, but they also don't have the economic ability to afford houses. In this case, the housing security of this group of people can hardly be guaranteed. On the other hand, in Chinese real estate trading market, a large number of people have bought affordable houses at a low price and sold them at a price close to the market price, thus earning a high price difference. In other words, let the party enjoy the ownership of indemnitor housing or the right of common interest, will lead to its free or low access to too much rights and interests, there is speculation and arbitrage space.

If the tenant only enjoys the lease right, it will cause the instability of the right status because it can't fight against the third party. From this point of view, the residency right has greater advantages to realize housing security. Under the residency right, the state retains the ownership of the houses, which can largely avoid the transfer of affordable housing for speculation and profit. At the same time, the right holder enjoys the residency right, which transforms "the occupant has his own house" into "ensuring the living conditions". Compared with this kind of social security housing, the residency right has stronger stability, especially when a third party infringes on the right of the house, the residency right can exclude the illegal infringement by the third party as the real right holder, and safeguard the legitimate rights and interests of the individual. In addition, the specific content of right can be determined by both parties through negotiation, which provides greater flexibility for the indemnity-housing system.

2.2. The economic function of the residency right

(1) Diversified ways of property utilization

Without the residency right, the party who wants to transfer the house to possess and use can only achieve it by signing lease contract. This approach does not meet the needs of the parties in some cases. For example, according to §705 I, the lease contract shall not exceed 20 years. In contrast, the right of residence is not restricted by such

term, and the death of the obligee can be taken as the point at which the term of residence expires. Moreover, compared with the creditor's right nature of the leasehold, the right of residence has a stronger safeguard function, which can guarantee the occupant to enjoy a stable life in the house. The residency right is of great practical significance to the residence of the non-heir, who needs economic help after divorce, the long-term unmarried cohabitants, and the public housing of the government and public institution staff.

(2) Enrich commercial profit means

The residency right has great potential in enriching commercial models, such as the operating model of timesharing hotels. Timeshare resort is a modern business model integrating hotel service, tourism and real estate. This new business investment method first appeared in Europe, and its operation mode benefited from the establishment of residency right. The right to live in hotel room, paid for by a holidaymaker, is the right to share one or part of a unit of accommodation in a hotel for a fixed period of years. If the occupant wants to waive the right of residence during the term of the contract, the right can be resold to other passengers. For tourists, adopting the divided hotel residence right model can reduce the cost of purchasing the scenic spot housing ownership on the one hand, and avoid the unplanned vacation rental on the other hand.

3. Existing problems of current rules

3.1. The Setting Rules

The scope of right holder scope of residency right is too narrow. According to §367, for the right to establish residence, the contents of a written contract should include the names of the parties. From the literal interpretation of the law, the house with the right of residence created can only be enjoyed by the person with the right of residence recorded in the registration, while other persons can't enjoy the right of residence with the person who owns the residency right. In the case of a residency received from others in the elderly, it can only be himself/herself to enjoy residency, but some elder people may need to hire house home nursing staff, according to the current rules, the nursing staff can't enjoy the residency right without the consent of the owner of the house. The same is true for persons without and with limited capacity for civil conduct. Therefore, in terms of the scope of the right of residence for certain special groups, the law should allow the legal guardians of such right of residence, nursing personnel and other persons who assist in taking care of their daily living to enjoy the right of residence together. In this regard, it is worth referring to the provisions of §1093 III of BGB, according to which the right of residence established in a specific field allows the chaperones of the elderly to enjoy the right of residence together.[9]

3.2. ignorance of the circulation function of residency right

The function and significance of the residency right lies in giving full play to the effective interests of housing and realizing the full use of things, which reflects the significance of giving full play to the maximum value of the house and making full use of everything. The operation mode of timeshare hotel is the representative of the commercial operation of residence right. Vacationers buy the right to live in a hotel room by paying a price and then go to the resort hotel to live and vacation in a fixed period of time. If the occupant wants to give up the residency right during the term of the contract, he can delegate the right to a third party. In China, the phenomenon of migration from north to south for winter is very common. The business model of timesharing hotel can not only reduce the high cost of buying house ownership, but also avoid the uncertainty of renting houses. However, according to §369, this right can't be transferred. This regulation stifles the development of the residency right in the commercial market and makes it impossible for the residency right to circulate in the market. From this point of view, the commercial value of the residency right can be better realized only when the law recognizes the circularity of the right of residence.[10]

3.3. The neglect of the investment function of residence right

(1) The residency right shall be established when building houses jointly or buying houses jointly

Middle- and low-income people in the society often can't afford the high housing price because of the lack of good economic ability. In terms of cooperative housing construction and joint venture housing construction, the party lacking economic ability only gets the right to live in the house due to less investment, while the party with more investment can get the ownership of the house. Through this way of joint purchase, the investor's capital becomes more and less, so that they can obtain the ownership or residency right of the house. In the residency right investment model, ensuring the lack of economic ability of the party can "live." The establishment of residence right satisfies the diversified housing needs of owners and residents and maximizes the investment value of houses.

(2) Investment-oriented house-for-pension model

Generally speaking, the right of residence can be divided into two functions, one is the social right of residence, the other is the investment right of residence. However, in fact, sociality and investment are not opposites. The sociality of residence and investment can be organically combined, and the house-for-pension of the elderly can reflect the mutual compatibility of sociality and investment.[11] In order not to burden their adult children with too much pressure in life, some parents wish to retire to their old homes in their hometown. In this case, the superiority of

the right of habitation can appear. The parents can choose to sell the ownership of the home to a financial institution and agree that the couple will have the right to live in the home. Finally, the financial institution is obliged to pay a consideration to the occupant. In this model, parents enjoy the right of residence in their long-term residence, so that they can have a residence for their old age. At the same time, they can also get some consideration from financial institutions, so as to ensure their old life.

3.4. Lacking the provisions on the obligation of repair

Chinese Civil Code does not specify how to divide the obligation of residents and owners to repair a house. However, it is very necessary to allocate the responsibility of repairing obligation, which concerns the protection of the rights and interests of residents and owners. In comparative law, many countries have clear provisions on the allocation of responsibility for the obligation of repair. For example, §778 of Swiss Civil Code stipulates that if the occupant has an independent right to live in a house or within a specific scope of a house, the daily maintenance costs shall be borne by the occupant. If the occupant and the owner live together, the daily maintenance expenses shall be borne by the owner. §1025 of the Italian Civil Code provides that the person who has the right to the use of the land and earns all the fruits bears the full cost of farming; The person who has the residency right in the house and occupies the whole house shall, like the usufruct, bear the normal repair fees and other taxes on the house. If only parts of the fruits are collected or part of the premises is occupied, the obligation to pay the above expenses shall be borne in proportion to the enjoyment thereof. According to the actual situation, the Chinese Civil Code can draw lessons from the relevant rules of The Italian Civil Code, which stipulates that the occupant has the obligation to repair the scope of the house where he enjoys the right of residence. In addition to the obligation of repair, the Anglo-American law also has detailed provisions on the restriction of the right of the occupant. According to the "waste principle", the obligee cannot destroy the land at will when using the land. The obligee must fulfill the obligation of protecting the land property, or the obligee will be prohibited from continuing to use the land. In addition, the right holder shall not change the original nature of the land when developing and using the land, even if such change will lead to the increase of the value of the land. If the restriction is violated, the holder will lose the right to continue to develop and use the land.

4. CONCLUSION

As a newly added usufruct in Chinese law, the residency right can enrich the way of housing use in China, which is of great significance to the improvement of social housing security system, the diversified use of personal property

and the development of new business models. However, according to the existing rules, there are still some deficiencies in the relevant provisions on the residency right in China's civil code. Legislators and judicators need to get rid of the traditional concept that the right of residence is regarded as human servitude and understand the right of residence in a pragmatic manner. On this basis, more reasonable rules are designed in terms of the scope of the obligee, the transferability of the right and the relationship between the rights and obligations of the parties.

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