

**Property Management Service Contract  
with Chinese Characteristics: An exception to PSS?  
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**ABSTRACT**

The property management service (PMS) contract in Chinese mainland seems to have created an exception to the principle of sanctity of contract (*Pacta Sunt Servanda*). It is pervasive that homeowners refuse to pay property management fees. Moreover, PRC *Civil Code* provides that homeowners may terminate the PMS contract without cause.

The Chinese characteristics of PMS in the mainland might be the reason behind the “soft” binding force of the PMS contract in Chinese mainland. Firstly, the right to terminate without cause is justified by the long-term and trust-based nature of the PMS contract. Secondly, the property management companies need to collect fees of the PMS contract from individual homeowners rather than the homeowners’ association, withholding property management fees turns to be handy means of expressing dissatisfaction for homeowners. Thirdly, the property management companies’ difficulties in collecting property management fees in arrears, plus its one-to-many relationships, lead to free-rider problems at the homeowners’ side, just as tragedies of commons of other kinds. Last but not least, residential communities in Chinese mainland are often big and populous where numerous homeowners share large common areas. Consequently, property management companies are mandated to provide comprehensive services, even including some quasi-public services that normally are supposed to be provided by the Government.

The theory of path dependence sheds light on the Chinese characteristics of PMS in Chinese mainland. In spite of its soft binding force, it might be safe for the authors to argue that the PMS contract is still in line with the principle of PSS generally, given that at least some defaulting homeowners are forced to pay property management fees, and that homeowners have to notify the property management company in due course and give proper compensation to terminate a property management contract.

**Key Words:** Property management service contract, *Pacta Sunt Servanda*, Right to terminate without cause, Property management fee arrears

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## Introduction

*The Civil Code of the People's Republic of China* (hereinafter referred to as the *Civil Code*) that came into effect on January 1<sup>st</sup>, 2021 stipulates the property management service (PMS) contract as one of the 19 types of typical contracts.<sup>1</sup> According to Article 119 of General Provisions of the *Civil Code* and Article 465 of the General Provisions of Contracts of the *Civil Code*, a legally established contract shall be legally binding on the parties thereto. Logically, the PMS contract also has legal binding force on the parties. However, Articles 940, 946 and 948 of the *Civil Code* respectively stipulate that the homeowners have the right to terminate the preliminary PMS contracts, fixed-term PMS contracts and non-fixed-term PMS contracts without cause. It seems that the homeowners enjoy the privilege not to be bound by the contract.<sup>2</sup>

The conflict between the PMS contract and the principle of sanctity of contract (*Pacta Sunt Servanda*)<sup>3</sup> arises not only at the rule-level, but may also be found in the practice of property management in Chinese mainland. On the one hand, the payment of property management fees is the principal obligation to contract of the homeowners,<sup>4</sup> yet the collection of property management fees in many residential communities is sadly dismal.<sup>5</sup> In the resulted disputes over property management fees, the courts often make judgements of “discount” at discretion reducing the principal of property management fees that the homeowner is supposed to pay with lowered or even exempted outstanding interests or damages.<sup>6</sup> On the other hand, one of the reasons why the homeowners refuse to pay the property fees is that they are not satisfied with the services provided by property management companies, which demonstrates that the property management company fails to provide services as agreed.<sup>7</sup> It might be safe

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<sup>1</sup> *The Civil Code of the People's Republic of China* (hereinafter referred to as the *Civil Code*) stipulates 19 typical contracts including sales contracts, gift contracts and loan contracts, etc. Among them, contracts of suretyship, factoring contracts, property management service contracts and contracts of partnership are newly added typical contracts compared with the *Contract Law* (1999).

<sup>2</sup> A privilege is one's freedom from the right or claim of another. See Wesley Newcomb Hohfeld, “Some Fundamental Legal Conceptions as Applied in Judicial Reasoning”, *Yale Law Journal*, No. 1, Vol 23, Nov. 1913, p.55.

<sup>3</sup> The “binding force” of contracts, has been termed as the “sanctity of contract” or “*Pacta Sunt Servanda*”. See *Chitty on Contract*, 32<sup>nd</sup> Ed., Sweet & Maxwell, 2017, 1-036. See also Hughes Parry, *The Sanctity of Contracts in English Law*, Sweet & Maxwell, 1959.

<sup>4</sup> Article 937 of the *Civil Code* provides “A property management service contract is a contract by which a property management service provider provides an owner with property management services such as maintenance of buildings and auxiliary facilities, environmental cleaning, and management and maintenance of related order in the property management service area, and the owner pays a management fee.”

<sup>5</sup> According to the *Report on Property Management Fees Collection in 2018* by WeiXiaoQu (a platform for the collection of property management fees in Chinese mainland), the general collection rate of property management fees was less than 60% in 2018, and the long-term arrears led to the difficult collection.

<sup>6</sup> See Shuqing Zhu, *A Study on the Legal Protection of Claim of Property Management Fees*, 2011, Peking University, LLM dissertation.

<sup>7</sup> For example, in Beijing's 12345 government service hot-line, one of the most frequently received complaints is about property management problems. The complaints include the disordered parking and poor sanitation of common areas inside residential communities, property management companies' inefficiency to deal with problems, non-standard information publicity and community

for the authors to assert that homeowners, property management companies and courts in Chinese mainland seem not to have shown adequate respect to PMS contracts.

Existing literatures show that Chinese mainland scholars mainly investigate the binding force of PMS contracts from the rule/norm and the role/function perspectives.

Those investigations from the contract law rule perspectives aim to enhance the binding force of PMS contract by clarifying the basic legal relationships among the PMS contract parties. Literatures from this perspective are concerned about issues such as the nature of the PMS contract and the rights and obligations between the parties to the contract. Their findings are as follows: Firstly, the PMS contract is a typical contract different from the contract for work and contract of mandate.<sup>8</sup> Secondly, mutual-trust between the parties to the PMS contract is essential to the performance of the contract, and the homeowners shall have the right to terminate the contract for no reason or any reason<sup>9</sup>. Thirdly, the pervasiveness of property management fees defaults is caused by multiple factors such as the public-product nature of the property management,<sup>10</sup> the vague legal status of the homeowner's right of defense,<sup>11</sup> and the lack of remedies for the property management companies.<sup>12</sup> Last but not least, without a clear definition of the legal relationships among the homeowners, the homeowners' associations and the property management companies, there would be more PMS disputes.<sup>13</sup>

Those investigations from the perspective of role of contract see contract as a mechanism of governance.<sup>14</sup> In the process of integrating PMS contract into community governance, the formal bilateral governance structure (homeowners' as a whole and the property company) is transformed into an informal multilateral governance structure (individual homeowners and the property company), which leads to the soft binding force of the contract. Therefore, literature from this perspective advocates providing social support for formal contracts for property management by creating a community-based autonomous environment and cultivating a community of

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unsafety. Available [http://www.beijing.gov.cn/ywdt/gzdt/202105/t20210501\\_2380452.html](http://www.beijing.gov.cn/ywdt/gzdt/202105/t20210501_2380452.html), last visited on May 31th, 2021.

<sup>8</sup> The *Civil Code* follows the mainstream literature by stipulating the PMS contract as a new typical contract.

<sup>9</sup> Though some scholars oppose homeowners' right to terminate ordinary PMS contract, such opinion is not followed by the *Civil Code*.

<sup>10</sup> See Jinping Jin, "On the Reconstruction of Property Management Legal System: From the Perspective of Public Good", *Academic Exchange*, No. 3 (2016).

<sup>11</sup> See Jinguang Xiong, "Defense Right in Residential Property Management Contracts: Sections 5-6 of the Judicial Interpretations of Cases of Residential Property Services Disputes", *Modern Law Science*, No.3 (2010).

<sup>12</sup> See Jia Chen, "Research on the Claim of Property Industry Fee in the Estate Service Contract -- and analyses some rules of the judicial interpretation 8<sup>th</sup> 2009", *Hebei Law Science*, No.5 (2010), Vol. 28.

<sup>13</sup> See Suli Ju, "On the Legal Analysis and Legal Application of Property Management Service Contract", *Journal of Law Application*, No.5 (2007).

<sup>14</sup> According to the theory of contracts as governance mechanisms, interested parties interact under the contractual rights and obligations, and different attributes of transactions motivate rational persons who pursue the minimum of production costs and transaction costs to adopt efficient governance structure. See Oliver E. Williamson, *The Economic Institution of Capitalism: Firms, Markets, Relational Contracting*, China Social Sciences Publishing House 1998, pp. 68-84. Also see Shiding Liu, "Embeddedness and Relational Contracts", *Sociological Studies*, No.4 (1999), pp. 75-88.

shared interests.<sup>15</sup>

The existing literature on the binding force of the PMS contract, however, is more concerned about the contract itself, rather than examining the PMS contract systematically under the *Contract Law*. While those writing from the perspective of rules have noticed the problems of homeowners' right of termination without cause and defaults of property management fees, while those from the perspective of the PMS role/function have pointed out the softening of binding force after the PMS contract is integrated in the community governance. Limited by the purposes of their studies, they stopped there and did not go any further to investigate whether the Chinese PMS contract rules and practices challenge *Pacta Sunt Servanda*, the fundamental principle of contract law.

This study attempts to look into whether the "softening" of PMS contracts violates the principle of *Pacta Sunt Servanda* in the framework of *Contract Law*. Specifically, the authors will seek to answer why contractual parties and even courts sometimes overlook the terms of PMS contracts. In addition to the introduction and conclusion, this paper comprises three parts. In part I, the definition of *Pacta Sunt Servanda* under Chinese law is provided based on a comprehensive historical and comparative literature review, followed by detailed description of "soften" binding force of the PMS contract in the mainland. With comparison with USA, the UK, the Hong Kong SAR and Taiwan region, Part II analyzes the Chinese characteristics of PMS that causes such softening. In Part III, a verification is performed for the hypothesis whether the mainland PMS contract constitute an exception to *Pacta Sunt Servanda* and the role of the PMS contract is reexamined in residential community governance in the mainland.

## **I. *Pacta Sunt Servanda* in the PMS Contract in Chinese Mainland**

It is a prerequisite to clarify the connotation of *Pacta Sunt Servanda* to analyze the binding force of the PMS contract in Chinese mainland. *Pacta Sunt Servanda* is one of the fundamental principles of the contract law, which is literally understood as "agreements are to be observed".<sup>16</sup> The strength of binding force of contract varies in different jurisdictions and historical periods. In this section, the authors are to compare the connotations of *Pacta Sunt Servanda* in the era of the Civil Code with that in the Economic-Contract-Law-period of Chinese mainland, as well as that in other civil-law-and-common-law jurisdictions, so as to enrich the understanding of *Pacta Sunt Servanda* and gauge the gap between the law and practice of PMS contract, and the *Pacta Sunt Servanda* in Chinese mainland.

### **A. Overview of *Pacta Sunt Servanda* in Chinese Mainland**

#### **1. *Pacta Sunt Servanda* in the PRC Civil Code**

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<sup>15</sup> See Ye Qiu, "The Roots of Property Management Disputes in Residential Communities- From the Perspective of Contract Role Changes and Soft Binding Force of Contract", *Urban Issues*, No.1 (2016), pp. 78-84.

<sup>16</sup> See UNIDROIT Principles 6.2.1 ("Contracts to be observed"; *Waujeshia Foundry v. Industrial Engrg.*, 91 F.3d 1002 (7<sup>th</sup> Cir. 1996) (*Pacta Sunt Servanda*, or 'a deal's a deal')

Articles 119, 136.2 and 465 of the *Civil Code* are regarded as the legislative authorities of *Pacta Sunt Servanda* in Chinese mainland, which respectively stipulate that “A contract legally formed shall be legally binding only on the parties, except as otherwise provided by the law.” “The actor shall not modify or rescind the juridical act at will, except in accordance with any law or as permitted by the other party.” “A contract legally formed shall be protected by the law.”<sup>17</sup> According to the authoritative legal interpretation of the NPC Legal Work Committee, the principle of *Pacta Sunt Servanda* is “a necessary requirement”<sup>18</sup> of the principle of freedom of contract,<sup>19</sup> that is, the parties thereto shall consciously be bound by the contract that is voluntarily made and entered into. The binding force of contract includes the following four meanings: (1) The parties shall perform their obligations in accordance with the contract; (2) the parties shall not modify or terminate the contract unless stipulated by laws or otherwise agreed; (3) any party who fails to perform the obligations or whose performance fails to satisfy the terms of the contract shall bear the responsibility for breach of the contract; and (4) a contract legally established shall not be interfered by any organization or individual illegally.<sup>20</sup>

The existing literature in Chinese mainland usually focuses on the first three meanings of *Pacta Sunt Servanda*. For example, the Supreme People’s Court, when interpreting Article 119 of *the Civil Code*, only includes the first three meanings in its

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<sup>17</sup> See Shiyuan Han, *The Law of Contract*, Sixth edition, Law Press China, 2018, p.64.

<sup>18</sup> Freedom of contract would be meaningless if the contract that the parties conclude freely is not legally binding and enforceable. See Wei Huang, *Interpretations on the Civil Code of the People’s Republic of China*, Volume I, Law Press China, 2020, p.20, p.235. (“The necessary requirement of autonomy of will is that everyone shall take responsibility of his own behaviors.” “According to the principle of will, a party is free to enter into a contract, choose the opposite party, and determine the contractual contents. But once the contract is legally established, it has binding force on the parties.”)

Moreover, the Supreme People’s Court in Chinese mainland treats the principle of freedom of contract and *Pacta Sunt Servanda* as two sides of a coin. The court holds that Article 8 of the *Contract Law* (repealed by the *Civil Code*, which provides that “A lawfully established contract shall be legally binding on the parties thereto, each of whom shall perform its own obligations in accordance with the terms of the contract, and no party shall unilaterally modify or terminate the contract.”) is “considered to be legislative expressions of *Pacta Sunt Servanda* in China... it sets the principle of freedom of contract, and confirms that legally concluded contracts binds the parties.” (See Supreme People’s Court’s Work Group of Implementation of the *Civil Code*, *Interpretation and Application of the General Provisions of the Civil Code of the People’s Republic of China*, Volume II, People’s Court Press, 2020, p. 604.)

Chinese mainland scholars also hold that “*Pacta Sunt Servanda* is the logical corollary of the freedom of contract.” (See Guangxin Zhu, *Studies on the Contract Law*, Vol. I, China Renmin University Press, 2018, p.44). “*Pacta Sunt Servanda* guarantees freedom of contract, ... while the freedom of contract is also a prerequisite of *Pacta Sunt Servanda*.” (See Liming Wang, *Studies on Contract Laws*, Vol. I, China Renmin University Press, 2015, p.171).

<sup>19</sup> Article 5 of the *Civil Code* stipulates the principle of will, instead of using the expression of “the principle of freedom of contract”. However, according to the authoritative legal interpretation of the NPC Legal Work Committee, “The principle of will has also been termed as the principle of autonomy... It is similar to the principle of freedom of contract stipulated in foreign civil codes.” (See Wei Huang, *Interpretations on the Civil Code of the People’s Republic of China*, Volume I, Law Press China, 2020, p.20.)

<sup>20</sup> See Wei Huang, *Interpretations on the Civil Code of the People’s Republic of China*, Volume I, Law Press China, 2020, p.235; Wei Huang, *Interpretations on the Civil Code of the People’s Republic of China*, Volume II, Law Press China, 2020, p.891.

definition of PSS.<sup>21</sup> Some scholars, however, emphasizes that *Pacta Sunt Servanda* is the “logical corollary of the freedom of contract”, and reiterates the fourth meaning of PSS, that is, the law and the judge shall try to maintain the binding force of the contract between the parties and avoid excessive interference. They even expand the fourth meaning into four aspects: “1. in case that a revocation cause exists, the parties shall try to modify the contract to maintain its validity prior to revocation; 2. the partial invalidity of the contract does not affect the validity of the other part; 3. the termination of the contract shall be subject to the idea of ‘strict restriction’; and 4. the interpretation of the contract should follow the principle of “prioritizing the interpretation that the makes the clauses effective”.<sup>22</sup>

In short, the principle of *Pacta Sunt Servanda* in the current laws of Chinese mainland means that after the contract is concluded in accordance with the law, the parties shall fully perform their contractual obligations (positive obligation) and shall not arbitrarily alter or terminate the contract (negative obligation), otherwise, the defaulting party shall be liable for breach of contract; the State shall ensure that the contract between the parties can be enforced in accordance with law by the court. Such definition indicates flexibility of the binding force of contract:

First, the remedies for breach of contract contains specific performance or damages.<sup>23</sup> Although specific performance is the main remedy in Chinese mainland, under the condition that specific performance is impossible or the expense of specific performance is excessively high,<sup>24</sup> the courts only award the damage compensation rather than specific performance.

Secondly, although the statutory rescission /termination is strictly limited,<sup>25</sup> the right of rescission/termination without cause is provided in occasional circumstances, which enable the parties to get rid of the absolute binding force of the contract at any time. For example, the General Provisions of Contracts of *the Civil Code* provides the right of termination without cause for parties of continuing contract without fixed term.<sup>26</sup> The Civil Code also grant the right to terminate without cause for parties of contract for work, contract of mandate, transportation contract or PMS contracts.

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<sup>21</sup> See Supreme People’s Court’s Work Group of Implementation of the *Civil Code, Interpretation and Application of the General Provisions of the Civil Code of the People’s Republic of China*, Volume II, People’s Court Press, 2020, p. 604.

<sup>22</sup> The Chinese original text is as follows: “有约必守之所以作为单独问题被提出，在于特别强调如下内容：1.合同存在可撤销的法定事由，当事人在决定撤销之前，应尽力采取变更方式维护合同的效力；2.合同部分无效，不影响其他部分效力的，其他部分仍然有效；3.合同的法定解除，应贯彻“严格限制”的思想；4.合同的解释应遵循“使条款具有效力的解释优先”的原则。” See Guangxin Zhu, *Studies on the Contract Law*, Vol. I, China Renmin University Press, 2018, p.44.

<sup>23</sup> Art. 577 of the *Civil Code*.

<sup>24</sup> Art.580 of the *Civil Code*.

<sup>25</sup> Art.563 of the *Civil Code*.

<sup>26</sup> Art. 563.2 of the *Civil Code* provides that “A contract without a term, requiring the successive performance of the obligation, may be rescinded by a party any time, provided that the other party is notified within a reasonable time.” Specifically, the *Civil Code* stipulates right to terminate non-fixed-term loan contracts (Art. 675), leasing contracts (Art. 730), deposit contracts (Art. 899), Warehousing contract (Art. 914), the PMS contract (Art. 948.2), contracts of partnership (Art. 976.3) and contracts of portrait license (Art. 1022.1).

Special laws also stipulate the right of termination without cause in travel, insurance and labor contracts.<sup>27</sup>

Finally, in order to make the contract reasonable not only to the parties but also to the society, the courts may modify or even terminate the contract, applying various principles and rules stipulated by the *Civil Code*, including but not limited to: the principle of objective interpretation of expressed intent,<sup>28</sup> frustration of contract,<sup>29</sup> adjustment of liquidated damages,<sup>30</sup> and the standard term rules.<sup>31</sup> On the other hand, to avoid prejudice to the parties' freedom of contract,<sup>32</sup> legislators, judges and scholars are committed to a refined typological analysis of exceptions. For example, the courts shall not intervene in the contractual relationship in the disguise of contractual justice, and shall respect the agreements between parties, especially when both parties thereto are business persons with equal negotiation power.<sup>33</sup> Moreover, in case of unilateral termination of contract, the law-makers carefully distinguish between fix-term contracts and non-fixed-term contracts,<sup>34</sup> continuing contracts and non-continuing contracts,<sup>35</sup> paid contracts of mandate and gratuitous contracts of mandate.<sup>36</sup>

## 2. *Pacta Sunt Servanda* in Chinese Mainland from Historical Perspective

The principle of *Pacta Sunt Servanda* is well established in Chinese laws.<sup>37</sup> However, the purposes of and rationale behind *Pacta Sunt Servanda* in Chinese mainland have changed markedly. In the process of shifting from a planned economy

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<sup>27</sup> Articles of the *Civil Code* providing rights of termination without cause include Article 787 (the ordering party), Article 816 (passengers), Article 829 (consignor), Article 899.1 (the depositary), Article 933 (the mandator and the mandatary), Article 946 (homeowners). Articles of special laws stipulating rights of termination without cause are Article 65 of *the Tourism Law of the PRC* (the tourist), Article 15 of *the Insurance Law of the PRC* (the insurance applicant), Article 37 of *the Labor Contract Law of the PRC* (the employees) and so on.

Hu Zhu terms these fixed-term continuing contracts enjoying the right of termination without cause as "service contracts". See Hu Zhu, "Commons and Differences: Discretionary Right to Terminate in the *Civil Code*", *Peking University Law Journal*, No.4, Vol.32, 2020, pp.1018-1041.

<sup>28</sup> Article 142.1 of the *Civil Code*.

<sup>29</sup> Article 533 of the *Civil Code*.

<sup>30</sup> Article 585 of the *Civil Code*.

<sup>31</sup> Articles 496-498 of the *Civil Code*.

<sup>32</sup> Dirk Looschelders, *Schuldrecht Allgemeiner Teil* (7. Auflage), translated by Xiaojun Shen & Jinhai Zhang, China Renmin University Press, 2014, p. 23. (The content of contracts must be cautiously controlled. Any "power gap" shall not become a reason to deny the validity of contracts. In a market economy, competition shall prioritize balancing the unequal economic power between the parties. Though it's a serious danger that the fate of the disadvantaged party is dominated by others, this danger shall not be overcome by depriving the opportunity for the vulnerable party to take self-responsibility to form legal relationships.)

<sup>33</sup> See Tzu-Chiang Chen, *Establishment and Execution of Contract*, Third Edition, Angle Press Taipei, 2014, p.166.

<sup>34</sup> See François Terré, *Droit civil: Les obligations*, Volume II, translated by Jiezhen Luo, China Legal Publishing House, 2018, p. 923.

<sup>35</sup> Article 208 of the *German Civil Code (BGB)* declares the invalidity of the standard term which entitles a single party the right of termination without cause, unless it is stipulated in a continuing contract.

<sup>36</sup> See Hu Zhu, "Commons and Differences: Discretionary Right to Terminate in the *Civil Code*", *Peking University Law Journal*, No.4, Vol.32, 2020, p.1040. Moreover, the *Civil Code* of Chinese mainland only stipulates the right of termination without cause to the parties to some typical contract, rather than all typical contracts.

<sup>37</sup> ECL, art. 6; FECL, art. 16; TCL, art. 16; GPCL, art. 57.

to a market economy in Chinese mainland, contracts have changed from a vehicle for implementing state plans into a tool for natural persons, legal persons and non-legal-person entities to pursue personal or commercial interests. The principle of freedom of contract has transformed from being subject to mandatory plans.<sup>38</sup>

into an independent principle of contract law. Meanwhile, *Pacta Sunt Servanda* has gone through the change from guaranteeing the implementation of the state plans to ensuring the realization of freedom of contract, while the binding force of the contract has also been weakened with the expansion of party autonomy.

The *Economic Contract Law* (1981) (hereinafter the ECL) was the first national statute on contract in the Chinese mainland. Since the ECL was promulgated when the economic reform just started (1984), it was typically oriented to a planned economy.<sup>39</sup> Therefore, economic contracts (contracts between legal persons) under centralized planning were considered tools for implementing the state plans.<sup>40</sup> Even though Articles 5 and 6 of the ECL used similar words to define the binding force of economic contracts as the *Civil Code* does,<sup>41</sup> the actual meanings differ markedly from the current one: (1) parties must perform their contractual obligations in order to “ensure the fulfillment of state plans”;<sup>42</sup> (2) modification or termination of economic contracts involving projects under state plans required the permission of the relevant authorities even if with parties’ mutual consent;<sup>43</sup> (3) specific performance was the principal remedy because it could strengthen state plans. According to Article 35 of the ECL, the breaching party shall continue to perform the obligation *if the injured party so demands*, even after the payment of damages.<sup>44</sup> It was feared that free choice of remedies may be detrimental to the planning system, instead of helping it.<sup>45</sup> (4) The ECL contained a separate chapter on “Administration of Economic Contracts”, which prescribed administrative supervision of economic contracts by administrative departments in

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<sup>38</sup> See Huixing Liang, “On the Principle of Planning and the Principle of Freedom of Contract in Chinese Contract Law”, *Chinese Journal of Law*, No. 4, 1982. (The freedom of contract as we know is subject to the principle of planning. Without the guidance of the principle of planning, the principle of freedom of contract does now exist.)

<sup>39</sup> Although an opening-up policy was adopted in 1979, the planned economy structure did not change until 1984 when the economic reform was launched. After that, China still tried to find an “economic mode” that would fit a planned commodity economy.

<sup>40</sup> ECL Art. 1 & 2.

<sup>41</sup> ECL Art. 5 No party may impose its own will on the other party, and no unit or individual may illegally interfere.

ECL Art. 6. As soon as an economic contract is established in accordance with the law, it shall have legally binding force, and the parties must fully perform their obligations as stipulated in the contract. Neither party may unilaterally modify or rescind the contract.

<sup>42</sup> ECL Art. 1.

<sup>43</sup> ECL Art. 29 If the modification or rescission of an economic contract involves products or projects under a mandatory state plan, before the agreement is signed the parties shall report it for approval to the department in charge of specialized work that issued the plan.

<sup>44</sup> There are three interpretations of this article. First, Art 35 grants the aggrieved party free choice of remedies. Second, Art 35 still insists on the principle of specific performance. Third, ECL is neither to grant parties free choice nor completely to reject the parties’ selections. It is a compromise. See Liming Wang, See “Specific Performance in Chinese Contract Law: An East-West Comparison”, *1 Asia PAC. L. REV.* 18 (1992), pp.22-23.

<sup>45</sup> Weikao Wang, “On Specific Performance”, *Studies in Law*, Vol.1, 1983.



charge of industry and commerce.<sup>46</sup> In practice, the relevant administrative departments have engaged in inspection and supervision of the conclusion and performance of economic contracts by enterprises.

The lack of an explicitly stipulated remedy of specific performance in the *Foreign Economic Contract Law* (1985)<sup>47</sup> is another evidence that Chinese version of *Pacta Sunt Servanda* served only the state plans in the planned economy.<sup>48</sup> The reason is that foreign economic contracts did not have to implement state plans as domestic economic contracts did. This does not mean, however, that specific performance is not available since it may be implied in the phrase “other reasonable remedies” in Article 18 of the FECL.<sup>49</sup> Moreover, “the FECL places more emphasis on parties’ autonomy and allows less governmental interference outside the contract.”<sup>50</sup>

Chinese version of *Pacta Sunt Servanda* in the planned economy also distinguished economic contracts from non-economic contracts. Non-economic contracts were governed by the *General Principles of Civil Law* (1986), including all contracts related to personal consumption, barter, gifts and agency.<sup>51</sup> State plans were usually not applied to non-economic contracts, and parties enjoy more autonomy. Therefore, *Pacta Sunt Servanda* applied less strictly to non-economic contracts than to economic contracts.<sup>52</sup> For example, specific performance is not tied to state plans in non-economic contracts and the parties have more freedom to choose remedies.<sup>53</sup>

The adoption of *Contract Law* in 1999 was deemed as a milestone in Chinese mainland’s legal reform to accommodate the emerging market economy because the *Contract Law* reduced state intervention to the minimum level, demonstrated by the frequent use of the significant qualifier, “unless the parties have agreed otherwise.”<sup>54</sup> *Contract Law* explicitly recognized the parties’ right to voluntarily enter into a contract,<sup>55</sup> showed respect and protection to their free will, indicating the spirit, if not in the exact word, as the principle of freedom of contract.<sup>56</sup> Under *Contract Law*, the role of contracts transformed from vehicles of carrying out the state economic plans,<sup>57</sup> into tools of realizing parties’ mutual agreement and free choice. The purpose of *Pacta Sunt Servanda* also significantly changed to respect and protect individual will,

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<sup>46</sup> ECL, chapter 6. This was abolished by the 1993 amendment.

<sup>47</sup> FECL Art. 18.

<sup>48</sup> ECL Art.1, “This Law is formulated with a view to ... ensuring the fulfillment of state plans ...”. cf. FECL Art.1 “This Law is formulated with a view to protecting the lawful rights and interests of the parties to Chinese-foreign economic contracts and promoting the development of China's foreign economic relations.”

<sup>49</sup> Jianhua Zhong& Guanghua Yu, “China's Uniform Contract Law: Progress and Problems”, 17 *UCLA PAC. Basin L.J.* 1 (1999), pp.29-30.

<sup>50</sup> Bing Ling, *Contract Law in China*, Sweet & Maxwell Asian 2002, p.13.

<sup>51</sup> Jianhua Zhong& Guanghua Yu, “China's Uniform Contract Law: Progress and Problems”, 17 *UCLA PAC. Basin L.J.* 1 (1999), p.6.

<sup>52</sup> Liming Wang, “Specific Performance in Chinese Contract Law: An East-West Comparison”, 1 *Asia PAC. L. REV.* 18 (1992).

<sup>53</sup> GPCL Art. 111.

<sup>54</sup> 31 articles in *Contract Law* in total have this qualifier.

<sup>55</sup> Art. 4 of the *Contract Law*.

<sup>56</sup> Ping Jiang, “Drafting the Uniform Contract Law in China”, 10 *COLUM. J. Asian L.* 245 (1996).

<sup>57</sup> See Mo Zhang, “Freedom of Contract with Chinese Legal Characteristics: A Closer Look at China's New Contract Law”, 14 *TEMP. INT'L & COMP. L. J.* 237, 237 (2000).

resulting in the relaxation of the binding force of contract. For instance, Article 107 of *Contract Law* has abandoned the previous mandatory rule of specific performance, granting the freedom to choose remedies to the non-breaching party.<sup>58</sup>

In summary, the strength of contractual binding force has been weakened at each of its four meanings due to changes of contracts' roles. In a planned economy, the binding force of contract varies according to the parties of the contract and contract type.<sup>59</sup> Economic contracts closely related to the state plan had stronger binding force. The parties to the economic contracts performed their contractual obligations to implement state plans. The termination or modification of the economic contract must have been approved by competent authorities; the task of the court was to enforce the economic contract, with relevant authorities supervising the implementation of economic contracts. The foreign economic contracts and non-economic contracts that were not subject to state plans had weakened binding force. Their parties perform their contractual obligations to realize their personal or commercial interests. They could agree on the termination or modification of the contract by themselves, or freely chose the means of remedy for breach of contract. In a market economy, contracts are no longer responsible for implementing state plans and the freedom of contract becomes a prerequisite for *Pacta Sunt Servanda*, thus the parties enjoy greater autonomy in deviating from contract obligations, which leads to further weakening of the rigid binding force.

### **3. *Pacta Sunt Servanda* in Chinese Mainland from the Comparative Law Perspective**

*Pacta Sunt Servanda* is established above the principle of freedom of contract in the current laws of Chinese mainland, and so in many other jurisdictions. The contract laws of major civil-law or common-law system are governed by the principle of private law autonomy and the principle of freedom of contract, which are rooted liberal legal thoughts in the 19th century.<sup>60</sup> For them, Sanctity of contract is merely another facet of freedom of contract; the reason why contracts were held sacred consisted in the fact that the parties entered into the contract by their own choice and volition, and settled the terms through mutual agreement.<sup>61</sup>

The freedom of contract is never absolute and *Pacta Sunt Servanda* also has exceptions. Following the tradition of other civil law jurisdictions, the current laws of Chinese mainland construct exceptions to the principle of *Pacta Sunt Servanda* in rules governing juridical acts. Specifically, the civil law places the exceptions of *Pacta Sunt Servanda* (Such as the principle of objective interpretation of expressed intent, impossibility of performance, obvious unfairness, partial invalidity of legal acts, etc.)

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<sup>58</sup> Hsu, C. Stephen, "Contract Law of the People's Republic of China", *Minnesota Journal of International Law*. 131, (2007), p. 155.

<sup>59</sup> Economic contracts and non-economic contracts are classified according to different contract subjects. Economic contracts can be further classified into two contract types: economic contracts related to state plans, and economic contracts (including foreign economic contracts) unrelated with state plans.

<sup>60</sup> See Huaishi Xie, *Understanding Foreign Civil Law*, Third Edition, Law Press China, 2014, pp.204-205. (*Pacta Sunt Servanda* is a motto rooted in Roman Law, but the big bourgeoisie gave this motto new meanings.)

<sup>61</sup> See Atiya, *An Introduction to the Law of Contract*, 3rd ed., Clarendon Press, 1981.

in Juridical Acts instead of Contracts. Of course, some exceptions specifically applicable to contracts (such as frustration of contract, standard terms rules, termination of non-fixed-term contracts without cause, adjustment of liquidated damages, etc.) are still stipulated as contract rules. In general, *Pacta Sunt Servanda* has not become the superordinate term that covers all exceptions due to the adoption of the concept of juridical acts in the *Civil Code*. This is also the reason why civil law jurisdictions do not pay much attention to the fourth meaning (the law and the court shall not illegally interfere with the performance of the contract) when defining *Pacta Sunt Servanda*. Because most of the exceptions to the law and court's intervention with contracts are governed by the theories of juridical acts. The expressions about binding force of contract found in Article 1,134 of the *French Civil Code*,<sup>62</sup> Articles 119, 136.2 and 465 of the *PRC Civil Code*, and judgments of the "supreme court" of the Taiwan region<sup>63</sup> all follow the same logic. Although it can be deduced from these expressions that "the court is prohibited from arbitrarily deviating from the contract or enforcing the contract not in accordance with the terms thereof,"<sup>64</sup> the legislator's intention is to define the principle of *Pacta Sunt Servanda* from the perspective of contract performance rather than the perspective of trying the contract disputes.

In contrast, since the common law jurisdictions have not adopted the concept of juridical acts, the exceptions to *Pacta Sunt Servanda* are all established around the contract law itself, which gives rise to richer connotation of *Pacta Sunt Servanda* in common law jurisdictions. In detail, common law scholars also agree to summarize the connotation of *Pacta Sunt Servanda* from the perspective of the parties thereto,<sup>65</sup> but they are more inclined to see it from the fourth level (from the contract judgment perspective). Atiya argued "The sanctity of contractual obligations is merely an expression of the principle that once a contract is freely and voluntarily entered into, it should be held sacred, *and should be enforced by the Courts if it is broken.*" Some authors argue that the binding force of contracts means "the enforcement of contract by the courts (obligations)"<sup>66</sup>. The early principle of *Pacta Sunt Servanda* was so strict that "the role of the court is only to enforce a contract, never to create, dissolve, or change it."<sup>67</sup> Ever since the second half of the 19th century, British and American judges have relaxed the *Pacta Sunt Servanda* with a variety of legal mechanisms, such as mistake, impartibility of performance, frustration of purpose, contradiction to law or morality,

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<sup>62</sup> Article 1134 of the *French Civil Code*, "Contracts which are lawfully formed have the binding force of legislation for those who have made them. Contracts can be modified or revoked only by the parties' mutual consent or on grounds which legislation authorizes. Contracts must be performed in good faith."

<sup>63</sup> Case number: Shang Zi No. 1941 Decision of 2020 Taiwan Region "Supreme Court" (臺灣地區 "最高法院" 20 年上字第 1941 號民事判決) (The legally established contract has binding force on the parties, and cannot be arbitrarily revoked. )

<sup>64</sup> See Huaishi Xie, *Understanding Foreign Civil Law*, Third Edition, Law Press China, 2014, pp.204-205.

<sup>65</sup> See Black's Law Dictionary. The principle that the parties to a contract, having duly entered into it, must honor their obligations under it.

<sup>66</sup> Hughes Parry, *The Sanctity of Contracts in English Law*, London: Stevens and Sons, 1959.

<sup>67</sup> Gertrude Block, "Semantics and the Sanctity of Contracts", *ETC: A Review of General Semantics*, Fall 1981, Vol. 38, No. 3 (Fall 1981), pp. 290-300.

unfairness and inequality. As a result, *Pacta Sunt Servanda* “is often used instead to draw attention to the general refusal of the courts to deny them on the ground of unfairness or inequality”<sup>68</sup>. Other exceptions include illegal contracts and the case of penalty clauses.<sup>69</sup>

#### 4. Summary

In the current PRC laws, *Pacta Sunt Servanda* is an inevitable requirement of the freedom of contract, which contains the following four meanings:(1) the parties shall perform the obligations stipulated in the contract; (2) the parties shall not arbitrarily terminate or modify the contract;(3) defaulting parties shall bear the liability for breach of contract according to law;(4) contract established legally shall be protected by the state and no organization or individual shall illegally interfere with the contract.

In the history of the PRC contract laws, *Pacta Sunt Servanda* also advocated those four meanings. However, unlike the emphasis on the *Pacta Sunt Servanda* from the freedom of contract in other jurisdictions, Chinese mainland’s historical stress on “*Pacta Sunt Servanda*” stemmed from the notion that it could help to implement state plans. For economic contracts related to state plans, the principle of *Pacta Sunt Servanda* was particularly strict, which manifested the pragmatic values of legislators.

With such pragmatic approach, today’s legislators in Chinese mainland often set up exceptions to *Pacta Sunt Servanda* for broad social purposes. These exceptions are manifested through the four meanings of *Pacta Sunt Servanda*, such as the objective principle adopted by the court while interpreting the contract; the judicial discretion to modify contract terms in special circumstances such as the frustration of contract, adjustment of liquidated damages; the statutory power of the parties to terminate certain types of contracts without cause; no specific performance when it is legally or economically impossible to perform the contract.

Comparatively speaking, *Pacta Sunt Servanda* in both civil law and the common law jurisdictions contains the above-mentioned four meanings, from different perspectives, however: the civil law jurisdictions often emphasize the positive side of the principle (the first three meanings) in their contract law, with most of the exceptions that weaken the binding force of the contract as rules on juridical acts, and that is why a system around *Pacta Sunt Servanda* is not established; while in the common law jurisdictions, due to the lack of the concept of juridical acts, the exceptions of *Pacta Sunt Servanda* are governed directly by the contract law, focusing on the court’s intervention to the binding force of the contract (the fourth meaning), resulting in an enormous system of *Pacta Sunt Servanda* and its exceptions. Chinese mainland has followed the practice of the civil law jurisdictions in constructing the principle of *Pacta Sunt Servanda*.

#### B. The “Soft” Binding Force of PMS Contracts in Chinese Mainland

As one of the typical contracts in the *Civil Code*, the PMS contract shall follow *Pacta Sunt Servanda*. However, , the binding force of the PMS contract is found to have been softened in each of the four meanings of *Pacta Sunt Servanda* in Chinese mainland:

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<sup>68</sup> See *Chitty on Contract* (32ed.), 1-036.

<sup>69</sup> See Gertrude Block, “Semantics and the Sanctity of Contracts”, *ETC: A Review of General Semantics*, Fall 1981, Vol. 38, No. 3 (Fall 1981), pp. 290-300.

(1) The property management companies shall provide the property management service as agreed, and the homeowner shall pay the property fee as agreed, the reality, however, is that homeowners often refuse to pay property management fees on the grounds that the property management companies' failure to provide the services properly.<sup>70</sup> (2) The *Civil Code* provides the homeowners with the right of termination without cause, allowing the homeowner to unilaterally terminate the contract; (3) In trying cases brought by the property management company against homeowners for property management fee arrears, the courts often makes judgement of "discount" reducing the principal of property management fees that the homeowners are supposed to pay, with lowered or even exempted outstanding interests or damages.

### **1. Property Management Fees Arrears**

*Pacta Sunt Servanda* requires the parties to fully perform their contractual obligations, and the state ensure the implementation of the contract through the court. However, the difficulties in collecting property management fees have been pervasive in residential communities in Chinese mainland for a long time. The homeowners refuse to pay the fees mostly on the grounds that the service provided by the property management company are not satisfactory. According to the *China Property Management Industry Yearbook 2020*, residential property management companies generally report low collection rate, especially in a large number of mid-end and old residential communities. For example, in Anhui Province, more than half of the communities see the collection rate below 80% (10334, 60.7%); the collection rate of high-end communities in Shenyang is close to 95% while the collection rate of mid-end communities is only around 60%, and that of old communities is less than 50%.<sup>71</sup> Moreover, when property management companies attempted to collect fees via litigation, they often were awarded "discount" judgment, or even failed to have their cases accepted by the court, or sometimes they were instructed to file only certain number of law suits within a specific period of time,<sup>72</sup> all resulting in more arrears of property management fees.

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<sup>70</sup> See Wei Chen, *The Nature of Property Management*, China Market Press, 2014, p.325. (Despite the various property management disputes, in most cases, one of the common strategies for homeowners is to refuse to pay property management fees.)

<sup>71</sup> See China Property Management Association ed., *China Property Management Industry Yearbook 2020*, Volume I, China Architecture Publishing & Media Co. Ltd., 2020, p.202 & p.414. Moreover, in Chinese mainland, the property management companies usually set the property management fees collection rate as 70% when estimating revenues. And the property management worker calls tongue-in-cheek the actual collection rate of 70% as "adequate for survival", 80% as "fairly well-off", and 90% as "affluent pleasure".

<sup>72</sup> See *Report on the Development of Property Management Industry in Jiangxi Province*, in China Property Management Association ed., *China Property Management Industry Yearbook 2020*, Volume I, China Architecture Publishing & Media Co. Ltd., 2020, p.451. (It's found that in some cities, the courts even limited the number of lawsuits brought by the property management companies to 10 annually, rather than offering convenience to property management companies, instead, they.) Also see *Report on the Development of Property Management Industry in Hunan Province*, in China Property Management Association ed., *China Property Management Industry Yearbook 2020*, Volume I, China Architecture Publishing & Media Co. Ltd., 2020, p.465. (With the current limited judicial resources, the number of successful cases of solving property management fees disputes through legal approaches is limited due to the reluctant acceptance of such cases by the courts.)

Although problems of property management fees arrears also exist in other jurisdictions, none of them has been found in the severity like those in Chinese mainland.<sup>73</sup> One of the reasons is that harsh measures such as compulsory auction of their properties might be applied to the owners who failed to pay their property management fees in other jurisdictions, while in Chinese mainland, it is generally believed that "there is no effective means to confine non-payment of property management fees at present".<sup>74</sup> while the PRC legislators are very cautious about introducing severe measures. For example, the *2007 Model Rules of Decision-making Procedures for homeowners' association (Draft)* of Guangzhou and the *2010 Shanghai Residential Property Management Measures (Revised Draft)* trying to adopt the Hong Kong rules,<sup>75</sup> to restrict homeowners with property management fees arrears from transferring or mortgaging their property, were ultimately given up due to fierce opposition.<sup>76</sup>

## 2. Homeowners' Right to Terminate Without Cause

The termination of contracts, which frees the parties from their contractual obligations, is detrimental to the principle of *Pacta Sunt Servanda*, and has always been subject to strict restrictions. According to the general theories of contract law, contract terminations include terminations without cause and terminations with cause. The former refers to that the parties may terminate the contract based on their unilateral will in accordance with the law or the contract, for no reason or any reason, prior to the expiration date of the contract. The latter refers to that the parties terminate the contract in accordance with legal provisions and contractual agreements, or by consensus

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<sup>73</sup> For example, in the UK and Hongkong SAR. See Fei Wang, "Clear Property Right-British Property Management Companies Away from Disputes - Talking with Professor Patrick Gray on British Property Management", *Housing and Real Estate*, No.10 (2016). Also see Lectures Series of Hong Kong Institute of Certified Property Managers, available at <https://www.youtube.com/watch?v=dkiHNYTbxbQ&list=UUT3YAUyJLyYRUDlmEnHQwVA&index=8>, last visited on May 30<sup>th</sup>, 2021.

<sup>74</sup> See China Property Management Association ed., *China Property Management Industry Yearbook 2020*, Volume I, China Architecture Publishing & Media Co. Ltd., 2020, p.383. (Due to various causes, property management fees in arrear are pervasive in practice, while it takes a long recovery period of property management fees through litigations and the cost is high. Currently, there is no effective approaches of restraining non-payment of property management fees. Meanwhile, the rising operating costs of property management services and the excessively low charging standards restrict the maintenance and improvement of the quality of property management services.)

<sup>75</sup> In Hongkong SAR, according to the Deed of Mutual Covenant (大厦公契), the property management companies can request the lawyers to enter with the Land Registry a record of default payment against the property concerned (commonly known as "imposing an encumbrance") should the homeowners fail to pay the fees for more than 30 days. The default homeowners have to pay the management fees, interest and other legal fees before cleaning the encumbrance and selling the property. See HK Home Affairs Department, "Measures for Recovery of Outstanding Payments", available at [https://www.buildingmgt.gov.hk/en/Daily\\_Operation\\_of\\_Building\\_Management/5\\_1\\_3\\_2.html](https://www.buildingmgt.gov.hk/en/Daily_Operation_of_Building_Management/5_1_3_2.html), last visited on May 30<sup>th</sup>, 2021.

<sup>76</sup> See "'No House Transfer with unpaid Property Management Fees' Has No Legal Basis", available at <https://www.chinanews.com/cj/kong/news/2007/09-08/1021692.shtml>, last visited on May 30<sup>th</sup>, 2021.

achieved through mutual consultation. Given that termination with cause is subject to strict conditions and procedures, it is applied to all civil contracts, including PMS contracts.

The right of termination without cause is not enjoyed by parties of all civil contracts, and it must be clearly stipulated by law or specifically agreed by the parties. The *Civil Code* gives the parties to the PMS contract three types of right of termination without cause: the right to terminate the preliminary PMS contract (Article 940), the right to terminate non-fixed-term PMS contract (Article 948), and the right to terminate ordinary PMS contract (Article 946) without cause. While both the property management companies and the homeowners may exercise the right to terminate the non-fixed-term property management contract without cause,<sup>77</sup> only homeowners enjoyed the right to terminate preliminary property management contracts and fixed-term ordinary property management contract. Superficially at least, all these three kinds of right to terminate without cause can affect the principle of *Pacta Sunt Servanda*, especially those rights to terminate without cause only enjoyed by homeowners. In fact, before the *Civil Code* was promulgated, there were voices opposing to grant homeowners the right to terminate ordinary PMS contracts without cause.<sup>78</sup>

It is not unique to Chinese mainland to grant parties to PMS contract the right of termination without cause. For example, Article 12 of the *Model Contract of Management and Maintenance Service for Apartment Building Management and Maintenance Company* (公寓大厦管理维护公司受任管理维护业务契约范本) promulgated in Taiwan region stipulates that both the condominium management committee (or a condominium manager) and the property management company<sup>79</sup> have the right to terminate the contract without cause, with written notice one month prior to the termination. If losses were caused by the early termination of the contract to the counterparty, the party who terminate the contract without cause shall be liable for compensation, unless the contract has to be terminated due to reasons not attributable to the party, unless the contract had to be terminated due to circumstances which the party who terminated the contract shall not be held liable. Different from the provisions of *the PRC Civil Code*, the right of termination without cause in Chinese Taiwan is enjoyed by both parties to the PMS contract.

## II. Causes to the Soft Binding Force: Chinese Characteristics of PMS in Chinese Mainland

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<sup>77</sup> See François Terré, *Droit civil: Les obligations*, Volume II, translated by Jiezhen Luo, China Legal Publishing House, 2018, p. 940.

<sup>78</sup> See Liming Wang, “Discussion on Several Issues of Realty Service Contract Legislation”, *Law and Economy*, No. 3 (2018), pp.13-14. Liming Wang supports homeowners’ right to terminate preliminary PMS contract without cause because the homeowners did not participate in the conclusion of the preliminary PMS contract, so they should be protected.

<sup>79</sup> Taiwan region considers the PMS contract as the contract of mandate, and that’s why it grants the right of termination without cause to both parties of the PMS contract. However, Chinese mainland characterizes the PMS contract as an independent contract type and restricts the property management companies’ discretionary right of termination due to the policy need to protect the homeowners. See Wei Huang, *Interpretations on the Civil Code of the People’s Republic of China*, Volume II, Law Press China, 2020, p.1703.

Originated in the UK and introduced to Chinese mainland in the 1980s, property management services have undergone localized transformation in Chinese mainland and have been shaped to adapt to circumstances of dense population, big residential communities, as well as other institutional environments in Chinese mainland. Moreover, property management in Chinese mainland is gradually merging into the grassroots social governance. In short, after many years' development, PMS in Chinese mainland have eventually heavily Chinese characterized.

In this section, the authors are to summarize the characteristics of PMS in Chinese mainland through comparison with those in the US, the UK, Hong Kong SAR and Taiwan region. Afterwards, the authors will analyze how these characteristics have caused the softening of the binding force of PMS contracts in Chinese mainland, and possible impact of the latest trends in the PMS legislation and practices in Chinese mainland on the binding force of PMS contracts.

## **A. Four Characteristics of PMS in Chinese Mainland**

### **1. Long-Term and Trust-Based PMS Contract**

Generally speaking, PMS contract in foreign jurisdictions only last for one or two years, with a renewal term. In the U.S, for example, PMS contracts often have one-year initial term, plus renewal term. For most property management services, a year-long contract is standard.<sup>80</sup> In the UK, the *Model Management Agency Agreement* of Association of Residential Managing Agents (ARMA) stipulates that the term of PMS contract is one year,<sup>81</sup> for the purpose of avoiding Section 20 Consultation Requirement.<sup>82</sup> Article 1 of the *Standard Property Management Agreement* in Hong Kong SAR stipulates that "this agreement is...for a period of two years". Article 4 of the *Model Contract of Management and Maintenance Service for Apartment Building Management and Maintenance Company*(公寓大厦管理维护公司受任管理维护业务契约范本) in Taiwan region stipulates that "The period of the contract is one year. One month before the expiration of this contract, if one party fails to notify the other party in writing that the contract will not be renewed, it shall be deemed that the contract is renewed for another one year; the same applies thereafter."

The period of PMS contracts in Chinese mainland is much longer. Theoretically, the preliminary PMS contract is temporary and transitional. Therefore, Article 949 of the *Civil Code* stipulates that within the validity period of the preliminary PMS contract, if the ordinary PMS contract signed by the homeowners' association and the property management service company becomes effective, the preliminary PMS service contract is automatically terminated.

But in practice, when the developer hires a PMS company in the early stage, the contract period is often stipulated as "from the time of contract conclusion until when the homeowners' association sign a new contract with the property management company, or hires another property management company." Since only small proportion of residential communities in Chinese mainland manages to

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<sup>80</sup> Samples of property management agreement, available at <https://acrobat.adobe.com/us/en/sign/esignature-resources/property-management-agreement.html>, last visited on May 30<sup>th</sup>, 2021.

<sup>81</sup> Article 1.8 This agreement is for an initial period of one year from \*\*\*\* and will continue with the right to termination by either party on giving three months written notice at any time.

<sup>82</sup> According to *Landlord and Tenant Act (1987)* Section 20, before a landlord enters into any agreement: 1. For a period greater than 12 months for works and/or services; and 2. Under that agreement, costs incurred in respect of any accounting period (usually one year) would result in an individual residential leaseholder's contributing more than £100 to those costs (essentially service charges), then the landlord must consult formally with the leaseholders.



establish homeowners' associations,<sup>83</sup> the preliminary PMS contracts have become *de facto* long-term contracts.

## 2. One-to-Many PMS Relationships and the Weak Homeowners' Association

Property management service essentially deals with "one-to-many" relationships, namely the property management company providing PMS to many homeowners. However, the parties of the PMS contract are different in different jurisdictions, which can be categorized into the following three models:

First, the homeowners' association and the property management company are the parties to the contract, and the homeowners' association exercises rights and fulfilling obligations on behalf of all homeowners.

In the US, the parties to PMS contracts are the homeowners' associations and property management companies. Homeowners have the responsibility to pay association assessments and charges on time, while homeowners' associations pay property management service fees. In Hong Kong SAR, homeowners' corporations<sup>84</sup> sign contracts with managers/property management companies, and the managers charge remuneration (at 10%-20% of the cost of expenditure), which comes from the management fees paid by the homeowners to the homeowners' corporations. In Taiwan region, the property management firm is appointed by condominium board to provide property management services.<sup>85</sup> Residents pay management fees to the condominium board, who then pays the property management service fees to the property management firm. In the UK, Flat is transferred by landlord in the form of long leasehold, and the common part is usually retained by the landlord or transferred to a professional company. The *Commonhold and Leasehold Reform Act 2002* ("the 2002 Act") in the UK entitles leaseholders right to manage through a Residential Management Company (RMC), of which the leaseholders are members. RMC concludes contract with a property management company and pays the property management fees.<sup>86</sup> Meanwhile, the UK is actively advocating the commonhold system that more respects the autonomy of homeowners' associations. A commonhold association will be a private company limited by guarantee registered at Companies House. It is the responsibility of the association to enforce any breaches of the commonhold community statement; in effect this gives the association a role similar to that of a lessor in a landlord and tenant relationship.<sup>87</sup>

Second, the landlord, property management company, and leaseholder are the parties of the contract. The landlord appoints and supervises the property management company, and the leaseholder pays the PMS fees and actually enjoys the services.

In the UK, the relationship between the landlord and the leaseholder in a flat, and the rights

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<sup>83</sup> According to *China Property Management Industry Yearbook 2020*, as of 2019, the rate of homeowners' association registered in Beijing, Shenzhen, Jilin Province, Hangzhou were respectively 17.1% or so, 41%, 24.4%, 48.9% and less than 23.8%.

<sup>84</sup> An owners' corporation is a body corporate set up under the BMO. It has the legal status to represent all owners in managing the common parts of the building.

<sup>85</sup> Taiwan *Condominium Administration Act*, art.3. An organization composed of a number of inhabitants elected by unit owners to execute the decisions made in the community association and to manage and maintain the condominium.

<sup>86</sup> Law Commission, *The Future of Home Ownership: a Summary*, available at <https://www.lawcom.gov.uk/project/residential-leasehold-and-commonhold/>, last visited on May 30<sup>th</sup>, 2021.

<sup>87</sup> Turner Ian, "Commonhold: The Commonhold and Leasehold Reform Act 2002", *Law Teacher*, vol. 37, no. 1, 2003, p. 105-112.

and obligations in respect of the property, are determined by the terms of the lease. Without RMC, the lease often provides that the landlord retains responsibility for appointing and supervising property managers, as well as wider management decisions affecting the building and the individual flats therein. There is a separation of control for leaseholders; they are the “consumer” of services provided and pay (indirectly, via a service charge) for those services but individually have relatively little ability to influence the work done or who is appointed to carry out the work.

This basic leasehold structure is a major cause of the problems and discontent experienced. It provides a misalignment of incentives: landlords (particularly freeholders) do not carry the costs of property maintenance and so may have weak incentives to ensure that leaseholders are getting a good service and value for money. Landlords may also be vertically integrated with property managers or have commercial relationships with suppliers giving them incentives to do things that are not in the best interests of leaseholders (such as overcharging or conducting unnecessary works).<sup>88</sup> The RMC and commonhold system in the UK mentioned above are the measures to solve the problem of governance structure under leasehold.

Third, homeowners and the property management company are the parties to the contract, but individual homeowners enjoy property services and pay the property management fees.

The PMS contracts in Chinese mainland adopt the third model. Although it is the developer or the homeowners' association that signs the PMS contract, all homeowners are the *de facto* parties of the contract.<sup>89</sup> The property management company provides services directly to the homeowners and collects the property management fees from them; in case of arrears of some certain homeowners, neither the developer nor the homeowners' association is liable for recovery/repayment, and the property management company may only claim against the specific defaulting homeowners.

### 3. Weak Remedies to Breach of Contract

In some jurisdictions, to ensure the timely collection of property management fees, property management companies may exercise lien or compulsory auctions on the property owned by those defaulting homeowners. In the US, mandatory lien-based economic charges or assessments are levied on each homeowner in order to operate and maintain the community association.<sup>90</sup> In the UK, the landlord or RMC is entitled to initiate forfeiture of an offending flat owner's lease.<sup>91</sup> Most managing agents don't include the costs of chasing arrears in their management fees (so as not to penalize those who do pay promptly). Instead, with agreement from their client, they tend to recover those costs (administration fees) from the defaulting leaseholder. In Hong Kong SAR, in case of default in payment of management fees, maintenance fees or funds by the owners, the homeowners'

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<sup>88</sup> CMA, *Residential Property Management Services*, 2 December 2014, available at [https://assets.publishing.service.gov.uk/media/547d99b8e5274a42900001e1/Property\\_management\\_market\\_study.pdf](https://assets.publishing.service.gov.uk/media/547d99b8e5274a42900001e1/Property_management_market_study.pdf), last visited on May 30<sup>th</sup>, 2021.

<sup>89</sup> See Wei Huang, “Interpretations on the Civil Code of the People's Republic of China (Volume II)”, Law Press China, 2020, p.1667.

<sup>90</sup> Section 3-116 (Lien for Assessment) of the *Uniform Common Interest Ownership Act*. Unless the declaration provides otherwise, fines, late charges, and other fees are treated as assessments for lien purposes.

<sup>91</sup> Section 146 of the *Law and Property Act 1925*. An application for forfeiture will only be accepted if the total amount of service charges, administrative charges or ground rent owed is more than £350, or if any of the amounts have been owed for more than three years. A court will expect to see that a reasonable time has been given to allow the leaseholder to remedy the breach. This could be open to interpretation, which may put the landlord or RMC at risk of incurring considerable costs that they can't be recompensed for.

corporation may enter with the Land Registry a record of default payment against the property concerned (commonly called “釘契” in Chinese), and even file a claim to sell the defaulting homeowner’s flat to recover the outstanding payments.<sup>92</sup> In Taiwan region, an inhabitant has to pay assessments to the common fund usually every month and share the reparation and maintenance expenses *pro rata*.<sup>93</sup> If inhabitants have missed paying their monthly assessments twice and refuse to comply after a notice to pay within a specified period is given, the officer or board may petition the court for an injunction to evict the uncooperative inhabitants or force the unit homeowner to sell the unit, on the condition that the community association makes such a resolution. In the latter situation, if the inhabitant fails to complete the transaction and finalize the ownership transfer registration within three months after the final court decision, the officer (or board) may petition the court to put the unit ownership up for auction.<sup>94</sup>

In Chinese mainland, however, it is hard to imagine that homeowners property would be forced to auction just because of arrears of property management fees.<sup>95</sup> Property management companies usually may only resort to lawsuit against the specific defaulting homeowners to pay the fees in accordance with the contract, and bear the responsibility for breach of contract, such as payment of damages or outstanding interest. Moreover, in reality, it is difficult for the property management companies to protect their legitimate rights and interests through litigation. In the lawsuits, the property management companies not only have to face the risk of receiving discretionary "discount" judgment, even if it obtains the judgment for them, they also face realistic problems, such as difficulties to enforce the judgement, and deterioration of relationship with homeowners, etc.

#### **4. Comprehensive and Quasi-Public PMS in Large and Dense Residential Communities**

The scale of property management areas in other jurisdictions are usually smaller, and homeowner association usually appoints the property management company to provide special services. The appointed property management companies usually free from the government supervision or instructions on specific matters. In the United States, for example, statistics show that in 2015, 21.2% of the US population in more than 338,000 community associations, and an average community resides 212 American. Among the community associations, 6000-9000 are Large-scale associations, i.e., those meeting at least two of the following three characteristics: a single, contiguous community with a general manager; a minimum of 1,000 lots and/or homes, and a minimum annual budget of \$2 million. 30-40 Percentage of community associations that are self-managed, meaning they may use professional assistance for specific projects, activities and services, but do not employ a professional manager or management company.<sup>96</sup> Only few associations range

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<sup>92</sup> Home Affairs Department of Hong Kong SAR, *Measures for Recovery of Outstanding Payments*, [https://www.buildingmgt.gov.hk/en/Daily\\_Operation\\_of\\_Building\\_Management/5\\_1\\_3\\_2.html](https://www.buildingmgt.gov.hk/en/Daily_Operation_of_Building_Management/5_1_3_2.html), last visited on May 30<sup>th</sup>, 2021.

<sup>93</sup> Section 18(1) of the *Taiwan Region Condominium Administration Act*.

<sup>94</sup> Section 22(2) of the *Taiwan Region Condominium Administration Act*, Section 22(2). In practice, the officer (or board) in most lawsuits only requested evictions, not forced sales. See Yun chien Chang, "Condominium Law in Taiwan: Doctrinal Overview Under the Lens of Information-Cost Theory," *University of Chicago Public Law & Legal Theory Paper Series*, No. 568 (2016).

<sup>95</sup> The quasi-public nature of the PMS contract might be the reason that Chinese mainland fails to introduce stricter means of remedies for the property management companies against the outstanding homeowners. The details about the “quasi-public” nature of the PMS contract will be discussed later.

<sup>96</sup> Home Affairs Department of Hong Kong SAR, *Measures for Recovery of Outstanding Payments*, [https://www.buildingmgt.gov.hk/en/Daily\\_Operation\\_of\\_Building\\_Management/5\\_1\\_3\\_2.html](https://www.buildingmgt.gov.hk/en/Daily_Operation_of_Building_Management/5_1_3_2.html),

in size as mid-sized cities and therefore are considered as census-designated places.<sup>97</sup>

### U.S. community associations, housing units and residents

Year	Communities	Housing Units	Residents
1970	10,000	.7 million	2.1 million
1980	36,000	3.6	9.6
1990	130,000	11.6	29.6
2000	222,500	17.8	45.2
2002	240,000	19.2	48.0
2004	260,000	20.8	51.8
2006	286,000	23.1	57.0
2008	300,800	24.1	59.5
2010	311,600	24.8	62.0
2011	317,200	25.4	62.7
2012	323,600	25.9	63.4
2013	328,500	26.3	65.7
2014	333,600	26.7	66.7
2015	338,000	26.2	68.0

*Homeowners associations account for about 51–55% of the totals, condominium communities for 42–45% and cooperatives for 3–4%.*

Some scholars in the US propose that HOAs are private governments,<sup>98</sup> but none of them thinks that the property management companies have a public nature, because the property management companies are commissioned by HOAs to provide property services, instead of managing the properties. Even in larger communities, the property management companies are only commissioned by HOAs to provide value-added services, such as the management of pools, golf courses, tennis courts, athletic facilities, clubhouses, restaurants, retail areas, etc.,<sup>99</sup> rather than performing duties stipulated by laws or entrusted by local authorities.

In the UK, for those live in flats, to hire a property management company is only for the maintenance of the common parts. For example, a standard PMS contract by City of London Society provides that management functions include “records and accounts, budgets, accounting, collection of rent etc., pay outgoings, repairs and statutory compliance, supervising tenants’ duties and rights etc., rent reviews, lease renewals and new lettings, general supervisory duties, employees, advisory and reporting duties, and other duties.”

In Hong Kong SAR, the *Standard Property Management Agreement* requests PMS companies to implement the *Deed of Mutual Covenants(DMC)*, urge the individual homeowners to comply with it, and take appropriate measures against homeowners who violate the deed. The daily

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last visited on May 30<sup>th</sup>, 2021.

<sup>97</sup> Places such as Celebration, Florida; Reston, Virginia; and Columbia, Maryland, are not cities - they are homeowners associations. See Shearmur Jeremy, “Living with a Marsupial Mouse”, *Policy*, No.2, Vol.18, p.19; Barbara Coyle McCabe, “Homeowners Associations as Private Governments: What We Know, What We Don't Know, and Why It Matters”, *Public Administration Review*, 2011, No.4, Vol.71, p.536.

<sup>98</sup> Barbara Coyle McCabe, “Homeowners Associations as Private Governments: What We Know, What We Don't Know, and Why It Matters”, *Public Administration Review*, 2011, Vol. 71, No. 4.

<sup>99</sup> CAI, *The Statistical Review for 2015*, available at <https://www.caionline.org/AboutCommunityAssociations/About%20Comm%20Assns/CAI2015StatsReviewWeb.pdf>, last visited on May 30<sup>th</sup>, 2021.

operation of building management involves many areas, including common environmental hygiene, security, maintenance of public facilities, etc. The arrangements and costs involved in these tasks should be discussed by the homeowners of the building and handled in accordance with the provisions of the DMC.<sup>100</sup>

Property management companies in Taiwan region are responsible for the general affairs of the condominiums, the inspection & maintenance of buildings and their bases, as well as the ancillary facilities and equipments of the condominiums. They also work on the sanitation, cleaning, security and disaster prevention of the condominiums and the surroundings.<sup>101</sup>

In contrast, residential communities in Chinese mainland are more population-dense with larger size, and the PMS companies are usually entrusted to provide comprehensive management and services. Moreover, since property management is regarded to be the "last mile" of the grassroots community governance in Chinese mainland, the PMS companies also undertake the public service functions entrusted by the government or resident committees. According to statistics, there were more than 300,000 residential communities in Chinese mainland in 2015, with many super residential communities (62% of them occupies more than 30,000 square meters each). The "Tiantongyuan Residential Community" in Changping District, Beijing, covering an area of 480,000 square meters, is still the "largest residential community" in Chinese mainland and even across Asia.<sup>102</sup> According to the China Property Management Association's forecast model of the market size of the property management industry in 2020, the indicators that have a significant impact on the market size of the property management industry are the "completed construction area of housing" on the supply side and the "urban population" on the demand side. For every 1% increase in the number of urban populations, the property management area will increase by 4.044%.<sup>103</sup> The following figure demonstrates statistical data on the urban population and the scale of residential properties in some provinces and cities in Chinese mainland. The data shows that the average construction area of residential property management projects is 69,300 square meters, of which, the average construction area of residential communities in Beijing, Tianjin and Wuhan all exceeds 120,000 square meters; The average number of households of residential property management projects is 2725, and more than 4000 in Beijing, Tianjin and Wuhan is.

Table 1 Statistics on urban population and residential property scale in some provinces and cities in Chinese mainland as of 2019

AREA	URBAN POP (10 K)	RPMP* NUMBER	RPMP AREA (100 M m <sup>2</sup> )	HOAs NUMBER
BEIJING	1865	4017	4.87	1200
TIANJIN	1304	2851	3.5	

<sup>100</sup> See *Replies to Legislative Council Questions LCQ12: Providing support for owners of three-nil buildings*, available at [https://www.devb.gov.hk/en/legco\\_matters/replies\\_to\\_legco\\_questions/t\\_index\\_id\\_10538.html](https://www.devb.gov.hk/en/legco_matters/replies_to_legco_questions/t_index_id_10538.html), last visited on May 30<sup>th</sup>, 2021.

<sup>101</sup> Article 13 of the *Measure for Condominium Management Service Providers in Taiwan Region*.

<sup>102</sup> *Amap Releases Statistics on Residential Communities in Chinese Mainland*, available at [https://www.sohu.com/a/54835302\\_121315](https://www.sohu.com/a/54835302_121315), last visited on May 30<sup>th</sup>, 2021.

<sup>103</sup> See China Property Management Association ed., *China Property Management Industry Yearbook 2020*, Volume I, China Architecture Publishing & Media Co. Ltd., 2020, pp.18-20.

<b>SHANGHAI</b>	2144		6.73	
<b>CHONGQING</b>	2087	7913		
<b>WUHAN</b>	902.45	2123	2.64	
<b>SHENZHEN</b>	1343.88	3861	3.13	
<b>SHIJIAZHUANG</b>	469.55	4346	2.2	216
<b>INNER MONGOLIA</b>	1609	10534	5.6	5530
<b>JILIN</b>	1568	12068		3017
<b>HEILONGJIANG</b>	2284		5.9	
<b>ANHUI</b>	3553	18429*	11.60	3161
<b>FUJIAN</b>	2642	12946*	8.45	2624
<b>JIANGXI</b>	2679	7335		
<b>SHANDONG</b>	6194	23037	19.36	2122
<b>HUNAN</b>	3959	12145	12.8	4191
<b>GANSU</b>	1284	7743	4.52	1889
<b>XINJIANG</b>	1309	7158*	3.36	2091

\* RPMP is short for Residential Property Management Project.

Data source: *China Statistical Yearbook 2020*, *China Property Management Industry Yearbook 2020* and *White Paper of Beijing Housing and Urban-Rural Construction Development (2020)*

The dense population and large-scale residential communities have contributed to the comprehensiveness and quasi-public-product-feature of property management services in Chinese mainland.

On the one hand, due to the large scale of residential communities (some large residential communities may even span across multiple streets and business districts), the PMS companies often provide comprehensive services. The comprehensiveness refers to the complex content of property management services involved almost in every aspect of the residential communities, such as facility maintenance, security, parking, gardening and sanitation. The PMS companies in Chinese mainland are usually required to provide comprehensive services of cleaning, security, gardening and property maintenance, rather than special services.

The comprehensiveness of property management services began to take shape as early as in 1981 when the first property management company in Chinese mainland, Shenzhen Property Management Company, was established. At that time, an enterprise affiliated to the Shenzhen Housing Administration and a Hong Kong company jointly developed China's first commercial residential community for foreigners' in Shenzhen, which required professional property management. To this end, the Shenzhen Housing Administration set up the Shenzhen Property

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\* As of the end of 2019, Anhui Province had 18,429 residential property management projects on record, of which 17,053 had employed professional property management companies.

\* As of the end of 2019, Fujian Province had 12,947 residential property management projects on record, with a construction area of 845,485,400 square meters. Among them, 6,763 employed professional property management companies, with a construction area of 52.932 million square meters.

\* As of the end of 2019, Xinjiang Uygur Autonomous Region had 7158 residential property management projects on record, of which 5558 have employed professional property management companies.

Management Company to integrate the functions of property maintenance, environmental sanitation, gardening, road maintenance, water and power supply, public security and other functions that had been originally in the charge of different government agencies; those functions were undertaken by property management office set up by the property management company in the residential community. The *Residential Community Property Management Regulations of Shenzhen Special Economic Zone* promulgated in 1994 provided that property management companies shall set up management offices in the community to provide paid comprehensive management services including security, cleaning, gardening, and maintenance for residential communities.<sup>104</sup> The “four aspects + one center”(“四保一服务” in Chinese)<sup>105</sup> have constituted the basic property services of the PMS companies in Chinese mainland ever since then. The PMS company may outsource some special services (such as cleaning, gardening, customer service, etc.) listed in the property management contract to the professional service providers. The property management company, however remain contractually liable for the comprehensive services, including those outsourced ones.

On the other hand, property management is the "last mile" of grassroots community governance. Property management companies have the duty of implementing emergency response measures and other management measures required by the government in accordance with the law, as well as carrying out community management and community services in collaboration with the residents committees (*jumin weiyuanhui*). Those duties feature the PMS in Chinese mainland quasi-public.<sup>106</sup>

In reality, the property management companies have the duty of management required by the law or entrusted by the resident committees outside the contract. These management conducts are conducive to providing better property management services, but the fundamental purpose is to implement the government's governance and cannot be excluded from the contract. The property management company that violates those rules may be subject to administrative penalties from relevant authorities. Those management can be divided into three categories:

The first one is the duty to stop and report illegal acts. Paragraph 2 of Article 942 of the *Civil Code* stipulates that the property management company shall reasonably stop the violations of laws and regulations that occur in the community, report to the relevant administrative department and assist in the handling; the property management company that fails to report those violations of laws and regulations is subject to administrative penalties. For example, Article 42 of the *Measures for the Administration of Interior Decoration and Refurbishment of Residential Housing* (住宅室内装饰装修管理办法) stipulates that for a property management company that discovers decorator's violation of regulations and fails to report it to the relevant department in time, the real estate administrative department shall give a warning and may impose a fine of 2 to 3 times the decoration management service fee agreed in the decoration management service contract.<sup>107</sup>

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<sup>104</sup> Article 26 of the *Regulation on Residential District Property Management in Shenzhen Special Economic Zone*.

<sup>105</sup> Four aspects include the maintenance of security, sanitation, gardening, and facilities, and one center refers to the customer service center.

<sup>106</sup> The PMS contract is entered into between equal subjects and the purpose of the homeowners' employment of the PMS company is to obtain the property services it provides, not to put the homeowners themselves under the management of the PMS company. Although some of the work involves the management of people, such as checking the identity of the homeowners and regulating the parking order, they are essentially acts of providing services, namely the performance of the PMS contractual obligations.

<sup>107</sup> Beijing Municipal Commission of Housing and Urban-Rural Development, A Property

The second is the responsibility of daily grassroots governance. As property management companies are more deeply integrated in the community governance,<sup>108</sup> they are often entrusted by local governments as “vehicles” to carry out governments’ working tasks. For example, after tasks such as garbage sorting, optical fiber update, and smart community transformation have been allocated to the residential communities, the property management companies work in tandem with the governments involved in a large amount of coordination, supervision, and subsequent maintenance.<sup>109</sup> In recent years, it has been repeatedly found that local governments imposed additional duties and responsibilities on property management companies. For example, the *Measures for Fire Safety in Property Management in Shijiazhuang* drafted by the Shijiazhuang Fire Safety Committee requires property management companies to file quarterly fire safety self-assessment report and to conduct inspections of fire protection facilities installed in the community at least once every year, etc.<sup>110</sup>

The third is to cooperate with government during special periods. In the past, this mainly refers to social stability and public security maintenance work during major events (such as the National Day military parade and the "NPC & CPPCC Sessions"), but the COVID-19 pandemic has broadened the duties of property management companies. According to incomplete statistics, property management companies have undertaken tasks entrusted by sub-district offices, resident committees, pandemic prevention command, public security bureaus and various other government agencies such as housing and construction administration, urban management committees vividly described as “a thousand threads tied to the single needle”, with the property management companies as needles. Once there is a complaint from the homeowners during the pandemic period, the property management companies would be held accountable.<sup>111</sup> The following table shows the

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Management Company is Punished for Late Report on Violations of Regulations, available at [http://www.beijing.gov.cn/ywdt/jiedu/zxid/202101/t20210120\\_2227339.html](http://www.beijing.gov.cn/ywdt/jiedu/zxid/202101/t20210120_2227339.html), last visited on May 31th, 2021.

<sup>108</sup> The *Beijing Property Management Regulation* that came into effect on May 1st, 2020 incorporates property management into the community governance system. The property management companies are under dual supervision by the local Housing Management Bureau and the Sub-district Offices. In Beijing, when a property management company is employed by a residential community, the property management project representative must register at the community. The property management project representative is also a grid member in the community grid governance system, responsible for the property management of the community he is working in, and in cooperation with the government in the grassroots governance.

<sup>109</sup> The obligation of stability maintenance is another example. The property management companies in the Xinjiang Uygur Autonomous Region that undertake the responsibility of community safety and security, in accordance with the requirements of governments at all levels, have paid a lot of manpower and physical resources when the input in stability maintenance far exceeds the cost of property service and without any form of subsidies of financial resources, and a series of effective measures to maintain stability and security have been adopted, making great contributions to maintaining social stability in Xinjiang. See *Xinjiang Uygur Autonomous Region Property Management Industry Development Report*, in China Property Management Association ed., *China Property Management Industry Yearbook 2020*, Volume I, China Architecture Publishing & Media Co. Ltd., 2020, p.509.

<sup>110</sup> See “Shijiazhuang Province Property Management Industry Development Report”, in China Property Management Association ed., *China Property Management Industry Yearbook 2020*, Volume I, China Architecture Publishing & Media Co. Ltd., 2020, pp.402-403.

<sup>111</sup> See China Property Management Association, China Economic Information Co., “Investigation Report on the Impact of the COVID-19 on the Property Management Industry”, in China Property Management Association ed., *China Property Management Industry Yearbook 2020*, Volume I, China Architecture Publishing & Media Co. Ltd., 2020, pp.316-322.



prevention and control responsibilities and tasks outside the PMS contracts undertaken by the property management companies during the pandemic period. Some of these responsibilities and tasks are stricter than contract obligations (for example, the burden of disinfection in public areas is heavier than usual cleaning), and some are not agreed in the contract (recommendation to wear masks).<sup>112</sup>

Table 1 Extra public service duties of property management companies during the pandemic period<sup>113</sup>

Responsibility	Tasks
Entry and exit control	Community confinement management
	Entry registration
	body temperature taking
	Management of Express Delivery and Take-out food
	Reminding wearing masks
Pandemic containment in public areas	Disinfection of public areas
	Garbage disposal
	Vehicle verification and registration
Pandemic containment publicity	Posters of Government pandemic prevention notice
	Publicity for pandemic containment
Other responsibilities entrusted by the government	Assist in door-to-door investigation
	Submit information forms to the government

The quasi-public-product nature of property management services is the path dependence of the grassroots governance model passed on from "work units" in the planned economy. Despite the sweeping changes introduced in 1978, the role of work units (*danwei*) as organizers of the urban resident population did not change substantially until the beginning of the 1990s. With their own housing estate for workers to reside in, large work units usually provided services to residents and administered the residents' relationship. The Residents Committees (*juweihui*, a self-governing mass organization) were established along with the Sub-district Offices (*jiedao banshi chu*, the street level of government) as a stopgap measure to organize urban residents who did not yet belong to a work unit.<sup>114</sup> The collapse of work unit system and the "flood" of migrant workers into cities in the

<sup>112</sup> In essence, these responsibilities and tasks are part of the performance of the tasks entrusted to the government by the property management companies -they are neither changeable at the will of the parties nor can be used as the reason to charge additional fees by property management companies

<sup>113</sup> See "Residential Property Management Development Report", in China Property Management Association ed., China Property Management Industry Yearbook 2020, Volume I, China Architecture Publishing & Media Co. Ltd., 2020, pp.203-204.

<sup>114</sup> David Bray, "Building 'Community': New Strategies of Governance in Urban China", in China's Governmentalities: *Governing Change, Changing Government*, Taylor & Francis Group, 2009, p.93.

second half of 1990s, however, led to an “administration vacuum” of urban residents.<sup>115</sup> To better administer the society, the new management system based on community (*shequ*) replaced the traditional hierarchical structure between sub-district offices and resident committees (the *jie-ju* structure).<sup>116</sup> The new community system is expected to be self-governing (*zizhi*). However, many residents have already become accustomed to passively receiving management and waiting for services in the “work unit” system. In the past, residents tended to go to the work unit for solutions if anything arose, while today they resort to the property management companies for the same goal.<sup>117</sup> This thought has crippled the development of self-governance of homeowners and communities. “Some homeowners even believe that property management is something that government or resident committees should undoubtedly take charge of”,<sup>118</sup> believing that “every problem should be taken care of by the property management company once one steps into the community”, regardless of whether the problem is contained within the terms of the PMS contract.<sup>119</sup>

### **B. How do the “Four Characteristics” Contribute to the Soft Binding Force of PMS Contracts in Chinese Mainland**

The four “Chinese characteristics” of PMS in mainland’s are major causes to the softening PMS contracts. The links between the four characteristics and the softening binding forces are as follows:

First of all, the trust-basis of the PMS contracts provides justification to grant homeowners the right to terminate without cause. The legitimacy of right to terminate without cause is also justified by the long-term nature of the PMS contracts in Chinese mainland. If the contract period is short, even if the homeowners do not enjoy the right to terminate without cause, contract will expire before very long. While in Chinese mainland where the PMS contract period is usually long, the homeowners would be in a great disadvantage if they do not have the right to terminate without cause.

Secondly, because PMS contracts are concluded between the homeowners’ association and property management company, but performed between the property management company and individual homeowners (“one-to-many” relationship). Logically and legally speaking, individual homeowners can only liaison together to reach an agreement to fire the property management company.<sup>120</sup> Given that consensus is hard to reach and time-consuming, a rational yet “apathic”<sup>121</sup>

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<sup>115</sup> Chinese mainland used to rely on “work unit” for social control, which led to a “vacuum” of social control when the “work unit” system collapsed. See Jianzhong Xia, “From *Jie-Ju* to *Shequ*: Thirty Years of Changes in Urban Communities in Chinese Mainland”, *Social Sciences in Heilongjiang*, No. 5 (2018).

<sup>116</sup> Article 4, *Opinions of the Ministry of Civil Affairs on Promoting the Community Building all over the Country* (2000).

<sup>117</sup> See Tao Zhu, “Empiricism and Rationalism: Institutional Reconstruction of the Condominium Ownership of Building in China”, in Jiming Yi ed. *Private Law Review*, Huangzhong University of Science & Technology Press, 2020, p.403.

<sup>118</sup> See Lijun He, “Discuss about the Owners’ Committee in Property Management with the Perspective of Community Governance”, *Journal of Social Work*, No.5 (2014), p.120.

<sup>119</sup> See *Property Management Industry Development Index Report*, in China Property Management Association ed., *China Property Management Industry Yearbook 2020*, Volume I, China Architecture Publishing & Media Co. Ltd., 2020, p.6.

<sup>120</sup> In contrast, if the period of the PMS contract is short, homeowners dissatisfied with the PMS company would wait for the expiration of the contract and refuse to renew it.

<sup>121</sup> See Olson, Mancur, *The Logic of Collective Action: Public Goods and the Theory of Groups*, Harvard Law Press, 1971.

homeowner is more willing to express dissatisfaction through non-payment or underpayment of the property management fees.

Thirdly, due to the comprehensiveness of property management services, PMS companies cannot stop the service to the common area just because individual homeowners have not paid the property management fee. However, PMS companies find it hard to obtain remedies. On the one hand, in litigations, homeowners usually request reduced property management fees against defective services. Due to the non-accurately quantified and subjective property management service standards, the courts may support the homeowner's defense and thereby make discretionary "discount" judgments. On the other hand, the quasi-public-product nature of property management services in Chinese mainland have to some extent become an obstacle to grant property management companies right to exercise lien or compulsory auctions on the property owned by those defaulting homeowners.

Weak remedies<sup>122</sup> have exacerbated "free-rider"<sup>123</sup> problems. The "discount" judgements enable the homeowners who have not paid the fee to take "free ride" to enjoy the services paid by other paying homeowners. Moreover, other homeowners may follow suit one after another, so that the property management companies eventually has to reduce or even stop maintaining the operation and use of the common areas, which in turn affects the interests of all homeowners and generates a problem similar to the "tragedy of the commons"<sup>124</sup>.

Figure 1 summarizes the vicious circle of the softening of the binding force of mainland's PMS contracts caused by the "Four Characteristics".

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<sup>122</sup> See Jia Chen, "Research on the Claim of Property Industry Fee in the Estate Service Contract - And Analyse Some Rules of the Judicial Interpretation 8th 2009", *Hebei Law Science*, No. 5 (2010), p. 61.

<sup>123</sup> The free-rider problem is a type of market failure that occurs when those who benefit from resources, public goods, or services of a communal nature do not pay for them or under-pay. See Olson, Mancur, *The Logic of Collective Action: Public Goods and the Theory of Groups*, Harvard Law Press, 1971.

<sup>124</sup> William Forster Lloyd (1794-1952), Garrett Hardin (1915-2003).

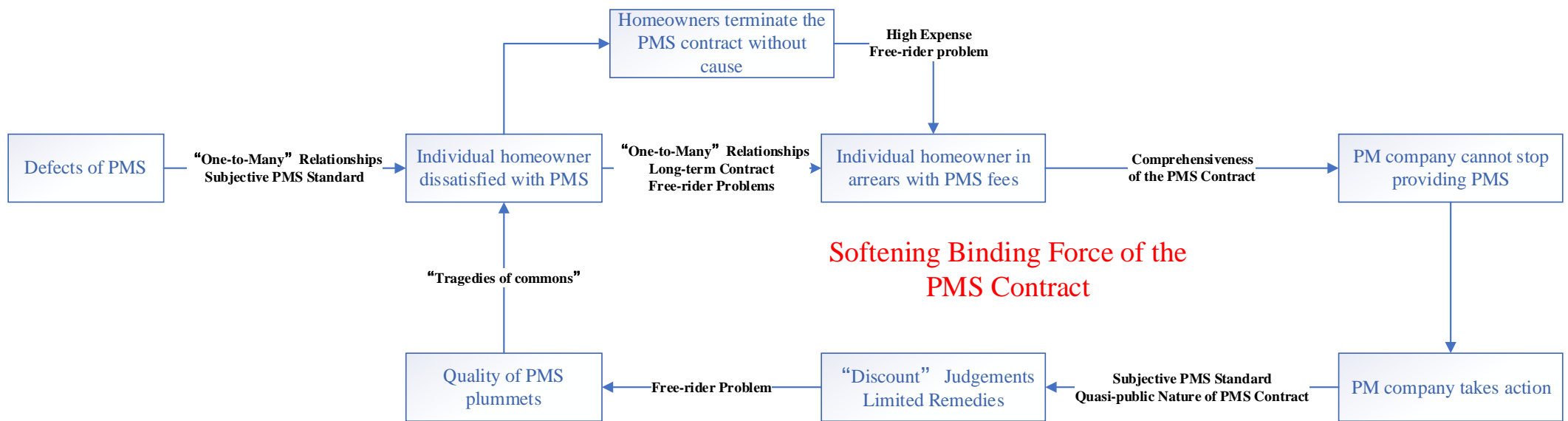


Figure 1 How do the "Four Characteristics" Contribute to the Soft Binding Force of PMS Contracts in Chinese Mainland?

### C. Perspectives of PMS contract in Chinese mainland

Policy-makers in Chinese mainland has noticed the softening of the binding force of PMS contracts. Reforms have been initiated in some cities in both practice and legislation to enhance the role of contract in community governance, by cultivating autonomy of homeowners, improving quality of property services, and reshaping the legal relationship of PMS.

First, in order to avoid that property management stays in the preliminary stage for a long time after the sale of the estate, many cities in Chinese mainland have begun to stipulate the maximum period of the preliminary PMS contracts. For example, in 2019, Beijing amended the *Beijing Model Preliminary PMS Contract*, which provides that the period of the preliminary PMS contract shall not exceed 2 years. Article 44 of the *Regulation on Property Management of Guangxi Zhuang Autonomous Region (2020 Reversion)* stipulates that the period of the preliminary PMS contract shall not exceed 5 years; prior to the expiration of the contract, the homeowners shall jointly decide whether to renew the term, if the homeowners fail to make the decision of renewal or hiring other companies, the original PMS contract is transformed into a non-fixed-term contract; the parties thereto have the right to terminate the non-fixed PMS contract without cause.

Secondly, regarding problems caused by the "one-to-many" relationship in performing PMS contracts, Shenzhen started implementing the homeowners' association register system in March 2020. The homeowners' association shall file a record with the local housing and construction authority so as to obtain a unified coded social credit certificate. The homeowners' association can open a joint account for the homeowners at the cooperative bank with the coded certificate. Shenzhen also established a series of supporting systems such as a joint fund audit system and a fund usage disclosure system. After the reform, the homeowners' association becomes the performing party of the PMS contract in Shenzhen. The homeowners or other residents prepay the property management fees to the joint account of homeowners. The homeowners' association draws the property service fees from the joint account to pay the property management companies.<sup>125</sup> The "Shenzhen Model" of the homeowners' association is in line with advanced international practice, which is conducive to enhancing the negotiating power on the homeowners' side, reducing property-management-related disputes, and strengthening the binding force of PMS contracts.<sup>126</sup>

Thirdly, regarding the difficulties to assess the quality of property management services, the National Technical Committee of Property Service Standardization of Chinese mainland (全国物业服务标准化技术委员会) is currently drafting national standards for the property service industry (*Property Management Terminologies, Customer Satisfaction Evaluation of Property Management Services* and *Safety and Emergency Response of Property Management Services*), with same efforts at provincial or municipal-level. The publication of those documents will certainly provide a relatively objective solution to disputes over property services.

Finally, in order to solve the problem of property management fee arrears, some cities in Chinese mainland are exploring reputation penalties. For example, Xinyu City, Jiangxi Province stipulates that if employees of administrative agencies, public institutions, state-owned enterprises

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<sup>125</sup> See Articles 59, 71 and 123 of the *Regulation on Property Management in Shenzhen Special Economic Zone*. Article 123 stipulates that "The property management fees refer to the advance payment paid by the homeowners or other residents, including the property service fees paid to the property management companies and other management expense jointly payable by the homeowners except for the special property maintenance expenses."

<sup>126</sup> See Nong Yan, "The 'Shenzhen Model' of the homeowners' assembly Worth Learning", *Yanzhao Metropolis Daily*, Nov.27<sup>th</sup>, 2017, Page. 2.

fail to pay property management fees, their names will be announced to the public in a list by the Municipal Civilization Office; Ji'an City, Jiangxi Province stipulates that anyone in arrears with the property management fees and refuses to pay even after notification will be subject to the treatment of local Commission for Discipline Inspection; and the institution this person is working for will be affected when the institution is applying for the title of Civilized institution, since the arrears of the property management fee is taken as one of the assessment criteria. In the initiative of "CPC party members entering local communities", the CPC party members must take the lead in performing the obligation of paying their own property management fees.<sup>127</sup>

### **III. *Pacta Sunt Servanda* in the PMS Contract in Chinese Mainland**

Although the binding force of the PMS contract in Chinese mainland is softened, it does not violate *Pacta Sunt Servanda* as a whole, which in the current laws of Chinese mainland includes the following four meanings: (1) The parties shall perform their obligations (positive obligation) and (2) shall not arbitrarily alter or terminate the contract (negative obligation), otherwise, (3) the defaulting party shall be liable for breach of contract; and (4) the State shall ensure that the contract can be enforced in accordance with law by the court. Examining against these four meanings, it is found that the softening of the binding force of the PMS contract only occurs on the first and third meanings, that is, homeowners enjoy the right of termination without cause and the court may make discretionary "discount" judgments; the binding force of the contract on the other two meanings is not softened. Moreover, such softening of the binding force in the first and third meanings is justified within the general theoretical framework of contract law. Among them, the "discount" judgments are effective means to resolve disputes over property management fees and property service quality under the current PMS environment. With the cultivation of the self-governing power of homeowners in Chinese mainland and the clarification of criteria of property service, the legitimacy for the "discount" is diminishing.

#### **A. The PMS Contracts Do Not Violate the First and Third Meanings of *PSS***

*Pacta Sunt Servanda* requires the parties to fully perform their contractual obligations, otherwise the defaulting parties will be liable for breach of contract. From these two meanings, PMS contracts in the Chinese mainland are binding on the parties. On the one hand, both the homeowners and the property management companies shall fulfill their contractual obligations. According to Article 937 of the *Civil Code*, both the preliminary PMS contract and the ordinary PMS contract are binding on the homeowners. Therefore, the homeowners shall pay the property management fees as agreed, and cooperate with or offer assistance to the property management companies when necessary. Correspondingly, the property management companies shall also provide property services as agreed.

On the other hand, homeowners in arrears with the property management fees shall bear responsibility for breach of contract. Paragraph 2 of Article 944 of the *Civil Code* provides that if the homeowner fails to pay the management fee overdue, the property management company may take an action or apply for arbitration, requesting the homeowner to bear corresponding liabilities for breach of contract. According to the authoritative interpretation of the Legal Work Committee of the NPC, "[t]he homeowner shall be liable for breach of contract for overdue payment of property

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<sup>127</sup> See "Jiangxi Province Property Management Industry Development Report", in China Property Management Association ed., *China Property Management Industry Yearbook 2020*, Volume I, China Architecture Publishing & Media Co. Ltd., 2020, p. 451.

management fees in accordance with the contract; the liability for breach of contract borne by the homeowner shall include the property fees arrears and the corresponding outstanding interest, unless it is otherwise provided in the contract.”<sup>128</sup>

## **B. Are PMS Contracts in Chinese Mainland Exceptional to the Second and Fourth Meaning of *PSS*?**

### **1. Right to Terminate Without Cause in the PMS Contracts**

*Pacta Sunt Servanda* refrains the parties from terminating or modifying the contract without cause. The three statutory rights of termination without cause stipulated in the PRC *Civil Code* enable the parties to the PMS contract to escape from the absolute binding force of the contract at any time, which indeed constitutes an exception to *PSS*. However, this exception has the jurisprudential basis due to the attributes of PMS contracts, and is subject to strict procedures, and therefore is not beyond the theoretical framework of Chinese mainland’s contract law.

First of all, according to the general theories of contract law, the parties of non-fixed-term contracts enjoy the right to terminate without cause in principle. Such rule is in line with the concept of "prohibiting permanent obligations" and aims to protect individual freedom and maintain free competition. And this rule, with the nature of public order, renders any conflicting clauses invalid.<sup>129</sup> This rule has strong comparative law evidences.<sup>130</sup> The new provision of Paragraph 2 of Article 563 of General Rules of Contracts in the *Civil Code* also provides that a non-fixed-term continuing contract continuing performance of the obligation can be terminated by the parties at any time on-fixed-term. The right to terminate the non-fixed PMS service contract without cause in Article 948 of the *Civil Code* is actually an application of the above provision. Moreover, in order to balance the interests of the parties, Article 948 stipulates that either party may rescind the non-fixed-term PMS contract at any time, but shall notify the other party in writing 60 days in advance, so that the party does not need bear the liability of compensation.

Secondly, in principle, a fixed-term contract does not include the right of termination without cause, but based on the particularity of certain contracts, the parties are granted such right. It is generally accepted that for contracts based on the special trust relationship (such as long-term contracts<sup>131</sup>, contracts for mandate<sup>132</sup>) the parties may terminate the contract once the trust-basis disappears. However, the interests of the non-terminating party shall also be taken into consideration,

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<sup>128</sup> See Wei Huang, *Interpretations on the Civil Code of the People’s Republic of China*, Volume I, Law Press China, 2020, p.1698.

<sup>129</sup> See François Terré, *Droit civil: Les obligations*, Volume II, translated by Jiezhen Luo, China Legal Publishing House, 2018, p. 940; *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)*, Volume 1&2, translated by Shengping Gao, Law Press China, 2020, pp. 611, 613. Of course, it is possible that the legislators exclude the right to terminate without cause based on policy considerations. For example, to protect employers, the right to terminate non-fixed term labor contracts without cause is granted only to employees, but not to employers.

<sup>130</sup> For example, Article 1210 &1211 of the *French Civil Code*, Article 5.1.8 of the PICC, Article 6:109 of the PECL and Article 3-1:108 of the DCFR.

<sup>131</sup> See Qiang Zhu, Li Tao, “The Adjustment of Long-term Contracts in the UNIDROIT Principles of International Commercial Contracts”, *International Business Research*, No. 2 (2019), p. 74.

<sup>132</sup> See Jianghong Zhou, “On the Orientation and System Construction of Service Contracts in PRC Civil Code”, *Law Science*, No. 1 (2008); Jianghong Zhou, “The Future of Service Contracts as Typical Contracts”, *Wuhan University Journal (Philosophy & Social Science)*, No.1 (2020), p. 77 et seq.

and it is necessary to distinguish paid or unpaid contracts,<sup>133</sup> and whether the damages can cover the loss of the non-terminating party if the contract continues<sup>134</sup>. The Chinese mainland PMS contract is a kind of continuing long-term contract based on the special trust relationship between homeowners and the property management company. For the sake of both the homeowners (receiving good PMS services) and the property management company (receiving compensable remuneration), it is necessary to grant the right of termination without cause to the homeowners.

In addition, *Pacta Sunt Servanda* in Chinese mainland also contains the value of pragmatism. During the planned economy period, it was used to implement state plans. Affected by pragmatism, legislators in the market economy period would also abide by or impose restrictions on the principle of *Pacta Sunt Servanda* to achieve public interests or to fit the social needs. In PMS contracts, the legislator excluded the property management company's right of termination without cause<sup>135</sup> "based on social considerations including the importance of the property services to the homeowners."<sup>136</sup>

Last but not least, the homeowner's right of termination without cause is not arbitrary. The *Civil Code* imposes strict procedural requirements to balance the interests between property management companies and the homeowners, including: the right of termination without cause shall not be exercised by any individual homeowner but homeowners' association;<sup>137</sup> If the homeowners decide to terminate the PMS contract, the property management company shall be notified in writing 60 days in advance; if the homeowners collectively decide to terminate the contract and thus cause losses to the property management companies, they shall compensate for the loss except for reasons not attributable to them.

## 2. The "Discount" Judgments

*Pacta Sunt Servanda* requires the State to protect legally concluded contracts, and the courts shall not interfere with the performance of the contracts. The failure of the court to provide remedies to the parties in accordance with the contract shall be deemed deviated from the *PSS*. At least superficially, the "discount" judgments "adjusting the property management fees agreed in the contract through judgments",<sup>138</sup> have violated *Pacta Sunt Servanda*.

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<sup>133</sup> For example, the binding force of the unpaid contract of mandate is more relaxed than the paid ones.

<sup>134</sup> For example, whether the entrusted party in a contract of mandate receives other interests, and how big is the interests, are distinguished in contracts of mandate. See Hu Zhu, "Commons and Differences: Discretionary Right to Terminate in the *Civil Code*", *Peking University Law Journal*, No.4, Vol.32, 2020, pp.1026-1028.

<sup>135</sup> See Hu Zhu, "Commons and Differences: Discretionary Right to Terminate in the *Civil Code*", *Peking University Law Journal*, No.4, Vol.32, 2020, p.1037.

<sup>136</sup> Opposing opinions please refer to the First Civil Division of the Supreme People's Court ed., *Interpretation and Application of the Judicial Interpretation of the Supreme People's Court on the Partitioned Ownership of Building Areas and Realty Services*, People's Court Press, 2009, p.338. (The Supreme People's Court holds that the property management companies shall enjoy the right to terminate without cause as the mandatees in contracts of mandate.)

<sup>137</sup> According to Articles 278 of the *Civil Code*, the decision to dismiss a property service company shall be voted on by two-thirds or more of all the owners, provided that the area of private portions owned by such owners accounts for two-thirds or more of the total area. And the decision shall be subject to the consent of over a half of the owners participating in the voting, provided that the area of private portions owned by such owners accounts for over a half of the total area.

<sup>138</sup> The more serious consequence of adjusting the property management fees through judgments is that it creates an imbalance of "the abiding parties pay more but the defaulting parties pay less" for homeowners who have paid the property fees as agreed.



In fact, the court's "discount" judgments do not straightforwardly violate *Pacta Sunt Servanda*. In most such judgements, the courts rule the property management companies to bear the liability of "reduction of price or remuneration" in accordance with Article 582 of the *Civil Code* because the property management company provides defective services.<sup>139</sup> "Discount" judgment are criticized mainly because the property services cannot be quantified with certainty. Property management services are not standardized commodities by nature, unable to be quantified, and their evaluation has to be subjective. Such subjectivity is more prominent due to the "one-to-many" relationship in the performance of PMS contracts in Chinese mainland: in judicial practices, property management fees disputes often take place between property management companies and individual homeowners, and the individual owners have the right to raise the defense against property management companies, alleging that the services provided are defective. Due to the large number of homeowners, the lack of opinion from the homeowners' associations for reference, in most cases, the judgements are often made in a "generalization by partiality" way, in particular in determining whether a property management company fulfills its contractual obligations. Moreover, because the uniform national or local standards for the quality of PMS are yet to be promulgated, the court has to rely upon various PMS contracts, which are often not very much in detail, it is therefore difficult for the court to determine if and to what extent the PMS company complies with the parties' agreement, to what extent there are defects in PMS services, as well as the corresponding reduction in property management fees, resulting in that "likes case are treated unlike".

It is also worth mentioning that the current judicial practice in Chinese mainland is generally conservative towards the "discount" judgments. In other words, it might be exaggerating to assert the pervasiveness of "discount judgements". In 2006, the Beijing No. 1 Intermediate People's Court upheld the judgment of first instance, that is, to support the request of homeowners' association of the Meiliyuan Residential Community to reduce property management fees. The Meiliyuan case is the first "discount" judgment in Chinese mainland, and it is unique in terms of the plaintiff (homeowners' association rather than individual homeowners) and the extent of payment reduction (for all homeowners rather than some individual homeowners)<sup>140</sup>. In August of the same year, the Beijing Fengtai District Court made a "discount" judgment where the homeowners were the defendant.<sup>141</sup> Since then, more "discount" judgments have been made, and they were mostly about the disputes between individual homeowners and property management companies. However, as early as 2009, the research team of Beijing No. 1 Intermediate People's Court carried out a survey on the defective performance of property management services, and propose to differentiate various defective services, not to hold the property management companies liable for all defective services.<sup>142</sup> Recent studies shows that the number of "discount" judgments is actually "too few" rather than

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<sup>139</sup> See Hu Zhu, "Property Service Contract as a Collective Contract: Centered on the *Civil Code*", *Jinan Journal(Philosophy & Social Sciences)*, No.11 (2020), pp.54-56.

<sup>140</sup> However, Beijing Property Management Association criticized that the judgment may seriously hinder the operation and development of the property management industry. Some experts believed that the court should not deny the validity of the contract terms. See Menghua Cheng, Hongsheng Yang and Wenxue Zhi, "First Win: Beijing Homeowners 'Bargaining' on Property Management Fees", *China Business Daily*, August 29th, 2006, Page 9. Moreover, after the judgement, the property management company "suddenly withdrew", causing dissatisfaction and division among the homeowners.

<sup>141</sup> Yue Wang, Song Li, "Homeowner in Arrears with the Property Management Fees for Years is Sued in Court", *Legal Daily*, August 15<sup>th</sup>, 2006, Page 6.

<sup>142</sup> See Tuanhe Tribunal Research Group of the Beijing No. 1 Intermediate People's Court, "On the

"too many", and suggests that the court should properly reduce property management fees on the basis of property service defects, rather than simply helping property management companies to collect the fees from the homeowners.<sup>143</sup> Of course, compared with judgments, the courts have made more undisclosed "discount" meditations, and almost every mediation ended with a "discount".<sup>144</sup> But mediation is the disposition of private rights by the parties, and shall not be considered as a violation of the principle of *Pacta Sunt Servanda*.

### C. Impacts of Reforms of Property Services on the "Softening" Binding Force

At present, Chinese mainland is undergoing a property management reform, focusing on promoting the homeowners' association, reshaping property management relations from "one-to-many" to "one-to-one", and promulgating uniform standards for property management services, and linking the fees to the services. It is hoped that there will be fewer disputes over property management fees and less "discount" judgments, and the binding force of PMS contracts will be enhanced. Specifically, after adjusting the "one-to-many" relationship between the property management company and homeowners to the "one-to-one" relationship between the property management company and the homeowners' association, the arrears of property management fees will not be a conflict between the property management company and individual homeowners. With the reasonable quantification of PMS services, the judgments on property management fees can be more predictable. More importantly, by promoting homeowners' associations and improving PMS quality, mutual trust among homeowners, homeowners' associations and property management companies can be enhanced.

## Conclusion

From the perspectives of history and comparative law, the authors find that *Pacta Sunt Servanda* in Chinese mainland has unique connotations. The binding force of contracts has been softened twice in Chinese mainland: the first time was the transition from a planned economy to the market economy, in which the purpose of contracts was shifted from the implementation of state plans to the safeguard of freedom of contract; the second softening took place in order to prevent the abuse of contract freedom and realize contractual justice. Both softening represents the pragmatism approach of the legislators; in the planned economy period, legislators emphasized specific performance in order to implement state plans; in the *Civil Code*, they weakened *Pacta Sunt Servanda* for social purposes. In current stage, *Pacta Sunt Servanda* in Chinese mainland is a logical deduction of freedom of contract, and it contains four meanings: a legally established contract is legally binding on the parties; the parties should fully perform their contractual obligations; arbitrary modification or termination of the contract is prohibited; the defaulting parties shall bear liability for breach of contract; the State protects the execution of the contracts through law and by court.

The binding force of contract comes from freedom of contract, but such freedom must be

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Defense of Property Service Contracts Disputes: A Research Report on the Performance of Property Service Obligations", *Shandong Social Sciences*, No. S1 (2009), pp. 26-28.

<sup>143</sup> See Bin Gu, "The Judicial Cognizance of Counterargument about Defective Service in Property Management", *Tianjin Legal Science*, No.4 (2014), pp.47-52; Jiandong Wang, Guofeng Yang, "A Study on Price Reduction Liability in Realty Service Contract", *Journal of Hangzhou Normal University (Humanities and Social Sciences)*, No.4 (2019), pp.112-118.

<sup>144</sup> See Luoqun Xie, "Contain Property Management Fees Discount!", *China Property Management*, No.7 (2013), pp.59-61.

subject to the necessity of society to realize goodwill and fairness. When social necessity so requires, the contract's binding force should be weakened, in which laws and judges are the natural interpreters of "social necessity". Therefore, the *Civil Code* provides the objective interpretation of expressed intent, frustration of contract, adjustment of liquidated damages, the right of termination without cause, force majeure, principle of impossibility or impracticability, and many other rules, as the tools for judges to interfere with the binding force of contracts.

For the balance between *Pacta Sunt Servanda* and contractual justice, Chinese mainland legal circle (including scholars and lawyers) have done a lot of subtle analysis. The PMS contracts in Chinese mainland is like Newton's triangular prism, which reflects the colors of different parts of *Pacta Sunt Servanda*. Comparatively speaking, the binding force of PMS contracts in Chinese mainland has been softened. However, it might be safe for the authors to argue that this softening of the binding force is still within the framework of contract law and has its own justification, which reflects the flexibility of contract law theory. Specifically, through examining the right of termination without cause of PMS contracts, we see the efforts of both legislators and judges take into considerations whether the contract term is fixed, whether it is based on a special trust relationship, whether the contract is long-term or short-term, whether it is a continuing or non-continuing contract, whether the contract for work is paid and whether the parties are in a typical unprivileged position, etc. The "discount" judgments of property management fees have revealed the difficulties of determining the defective performance of the PMS contract and quantifying responsibilities for the reduction of fees, which deepens understanding of the courts' decision to adjust the contract fees through judgments.

In addition, the authors also examine the roots of the softening of the binding force of Chinese mainland's PMS contracts, the Chinese characteristics of PMS. We are happy to see changes in Shenzhen and other cities to limit the validity period of the preliminary PMS contract, to make the homeowners' association the party of PMS contracts (such as Shenzhen does), etc. It is hoped that with all those efforts and changes, the homeowners' associations will be able to negotiate with the property management companies on behalf of the homeowners, and internally to promote the enthusiasms of individual homeowners to participate in the public affairs of the communities. At that time, the "softening" of the PMS contract will be alleviated.