

## THE MACANESE CONDOMINIUM REFORM UNDER EXAM: FOR A COMPARATIVE APPROACH TO THE JURISTIC “LOCALIZATION”

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### Abstract

This article makes a comment in a comparative perspective of the condominium law reform in the Macanese legal system (*Lei da Administração dos Condomínios*). The discussion begins with the examination of the regulatory strategy adopted by the drafter and with the illustration of the phenomenon of so called de-codification. The author then examines the reform following two main coordinates of sense: on one hand, the relationship, not always well balanced, between individual interest and collective interest in condominium dynamics; on the other hand, attention has been focused on the main problematic fields faced by the reform (condominium governance; legal personality of condo; compliance with financial obligations). This article concludes with considerations about the use of comparative law as a concrete methodological instrument at service of legal reform: it was employed in the essay both to “test” the efficacy and efficiency of new proposed rules at the light of other “prestigious” and experienced regulatory strategies about condominium matters, both to furnish to the drafter a sort of “digesto” of potential alternative solutions, considered more appropriate in coping with certain shared problems.

**Key words:** Condominium law; Strata title; Propriedade horizontal; Macanese legal system; Comparative law; Comparative methods

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## 1. INTRODUCTION

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The recent proposal of reform of condominium law in the Macanese legal system looks as a good occasion for trying to observe in a comparative perspective this field.

Without plunging in details about the legal history and the urban evolution, a mere observation of our cities witnesses the tremendous development of the condominium as juristic institute and social phenomenon as well.

A part from obvious differences in the national legal regimes of condominium, the "core" of the institute is always summarized by the global learned doctrine, and often translated in legislations, as a indivisible composite ownership: first component is the exclusive ownership of apartments, flats, or units; the second is the common property of those elements which are intended to be used collectively by all the owners (gardens, lifts, paths, main entrances and so forth).

Several kinds of conflicting interests pervade condominium, and their regulation seems not only trying to fix an order, better a system, of priorities among them, but also - through the management of opposing interests - to encourage the *productive cooperation* among units owners for fostering - formal and informal - mechanisms of disputes' composition.

An ideal map of interests involved in condominium dynamics gives back at least three types of potential conflicts: conflicts between two or more owners for the supposed abuses of overuses of the unit owned; conflicts between the individual owner's self interest and community interest; conflicts between the owners' units and the developer of building who had retained units comprising a substantial percentage of the value of condominium.

The alignment of opposing interests and diverging goals is formally demanded to an elected condo board (with or without legal personality) and - as last resort - to the judiciary; nevertheless, specially in the neighbourly relationships as condominium is, an informal and participatory decision making process is considered preferable and more suitable.

"Governance in these contexts is understood not only instrumentally, but also as a means to intensify the parties interpersonal relations"<sup>1</sup>.

Having said that, I am being maturing the idea that the traditional way of thinking and regulating condominium maybe should be better calibrated with nowadays profound urban changes (with the widespread of "hive" condominium with thousand of units' owners per building) and deep transformation of housing market.

However, my humble purpose in this work is simply to make a comment of the Macanese reform proposal using the methodology of comparison of law, maintaining as standing point the scholarly and legally definition of condominium, despite my serious perplexities about its actuality, efficacy and efficiency.

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<sup>1</sup> HANOCH DAGAN, MICHAEL HELLER, *CONFLICTS IN PROPERTY* 239 (Oxford University Press 2004).

## 2. PREMISES, METHOD AND PURPOSES OF THE RESEARCH

Making a comparative analysis in the Macanese legal system is notably challenging for reasons pertaining both to social and legal peculiarities of South East Asia' countries, both to the specific situation of Macao.

The entire geopolitical area has been crossed by the experience of the colonialism that has superimposed western legal categories upon the pre-existing indigenous, customary and religious law.

Thus, the same concept of "legal families"<sup>2</sup> becomes pretty questionable and problematic, because different ideas of the "law" and different mechanisms of social control converge and coexist in the same system<sup>3</sup>: this is the reason for which part of doctrine uses to classify these systems with the brand of "mixed, "composed", "hybrid" legal systems<sup>4</sup>.

To make more complex the picture, the western observer risks to be disoriented by the significant weight of what is called "legal orientalism"<sup>5</sup>: *hidden or informal* regulatory factors deeply entrenched in societies like the religion and the tradition, that, in spite not more hegemonic like once upon a time, are still present<sup>6</sup>.

The rapid economic growth, together with political and social changes, has then pushed East Asian countries to adhere to the globalization's needs faster than "formal" legal systems reforms: at this regards, it was cleverly stated that contrary to the colonial past that imposed "new states" upon old societies, today "law as envisaged by the civil society (to large extent led by lawyers) (...) grates against the official law"<sup>7</sup>.

In this general highly articulated framework of peculiarities and fluxes of mutations, Macao does reveal once again a unique point of view.

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<sup>2</sup> RENÉ DAVID, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY 21 (Stevens ed., 1988).

<sup>3</sup> DAVID NELKEN & JOHANNES FEEST, ADAPTING LEGAL CULTURES, 200 (Hart Publishing 2001);; Zhang Zhongqiu, *From Chinese Legal Family to Ius Commune in East Asian: Legal Tradition in East Asia and its Tendency*, 1 J. NANJING UNIV 119 (2007).

<sup>4</sup> VERNON V. PALMER, MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY (Cambridge University Press 2001); VERNON V. PALMER, MIXED JURISDICTIONS COMPARED – PRIVATE LAW IN LOUISIANA AND SCOTLAND (Edinburgh Studies in Law 2009); Kenneth Reid, *The idea of mixed legal systems*, 78 TULANE L.R. 5 (2003); Colin B. Picker, *Beyond the Usual Suspects: Application of the Mixed Jurisdiction Jurisprudence To International Law and Beyond*, 12(1) EJCL (May 2008), available at <http://www.ejcl.org>; William Tetley, *Mixed jurisdictions: common law vs civil law (codified and uncoded)*, 4 Uniform L. Rev. (N.S.) 591 (1999); JAN M. SMITS, THE CONTRIBUTION OF MIXED SYSTEMS TO EUROPEAN PRIVATE LAW (Intersentia 2001); ESIN ÖRÜCÜ, ENIGMA OF COMPARATIVE LAW – VARIATIONS ON A THEME FOR THE TWENTY-FIRST CENTURY, Chapter 10:3 (Martinus Nijhoff Publishers 2004); ESIN ÖRÜCÜ & DAVID NELKEN, COMPARATIVE LAW: A HANDBOOK, ch. 8 (Oxford, Hart Publishing, 2007); Mark van Hoecke & Mark Warrington, *Legal Cultures and Legal Paradigms: Towards a New Model for Comparative Law*, 47 INT'L & COMP. L.Q. 495 (1998); IGNAZIO CASTELLUCCI, RULE OF LAW AND LEGAL COMPLEXITY IN THE PEOPLE'S REPUBLIC OF CHINA, 149-205 (Univ. Trento ed. 2012).

<sup>5</sup> UGO MATTEI ET AL., SCHLESINGER'S COMPARATIVE LAW 42-47 (Foundation Press 2009).

<sup>6</sup> MAURO BUSSANI & UGO MATTEI, THE CAMBRIDGE COMPANION TO COMPARATIVE LAW, 275 (Cambridge University Press 2012): "(...) many aspects of traditional legal ordering continue to play socially important roles in East Asia, yet those aspects tend to survive outside systems of formal law", despite the Confucian tradition "no longer has a superior claim to political legitimacy and definitely has lost its hegemony because the superimposition of western colonizing law and globalization". See also JOHN H. MERRYMAN ET AL., THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA AND EAST ASIA, CASES AND MATERIALS 686 (Lexis Nexis 1994).

<sup>7</sup> DAVID NELKEN & JOHANNES FEEST, *supra* nota 3, at 202.

From one hand, it shares with other countries of the area the colonial past: in fact for almost four centuries Macao, it was a Portuguese dominium that deeply has conditioned its legal system, leading it within the civil law tradition<sup>8</sup>.

From the other hand, the handover to China (1999) it was done under the principle "one country, two system"<sup>9</sup>, that, recognizing to Macao the quality of Special Administrative Region (SAR), allows it to maintain its capitalism system, and an high degree of sovereignty and autonomy for 50 years.

Finally, the crucial theme of the "localization" of Macao legal system in respect both to the previous Portuguese heritage and to Mainland influence<sup>10</sup>: beyond the political rhetoric, the autonomy and the special regime of the territory remains justifiable and reasonable only if Macao will express *its way*, in terms of a strong legal identity, in facing its social and economical peculiarities and challenges of globalization<sup>11</sup>.

It is clear from the above that any juridical analysis in Macao, and proposal of reform as well, has to take in account at least three coordinates of sense: its past, represented by the Portuguese legal framework; its present of necessary dialogue with the evolution and "sensibility" of Mainland jurisdiction; and its future, in the sense of the direction of the Macanese legal system's evolution, of the suitable method to apply and of viability of potential legal transplants, borrowings,

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<sup>8</sup> Chen Lei, *The historical development of the Civil Law tradition in China: a private law perspective*, 78 TIJDSCHR RECHTSGESCH 159-181 (2010).

The concept of legal tradition is expressed by JOHN H. MERRYMAN, ROGELIO PEREZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA*, 2 (Stanford University Press 2007): "A legal tradition, (...), is not a set of rules of laws about contracts, corporations, and crimes, although such rules will almost always be in some sense a reflection of that tradition. Rather it is a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and in the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and thought".

Hermes Pazzagli, *La recezione del diritto civile nella Cina del nostro secolo*, 76 MONDO CIN. 49 (1991).

<sup>9</sup> See WANG ZHEN-MIN, «UM PAÍS, DOIS SISTEMAS» E A LEI BÁSICA DE MACAU - COLECTÂNEA DE TEXTOS DAS CONFERÊNCIAS / SEMINÁRIOS DA ASSEMBLEIA LEGISLATIVA, 33-34 (Macao Sar ed. 2008): "O objectivo inicial do princípio "Um país, dois sistemas" era resolver a questão de Taiwan"; IEONG WAN CHONG ET AL., "ONE COUNTRY, TWO SYSTEMS" AND THE MACAO SAR 259 (Centre for Macau Studies - University of Macau ed. 2004); Wang Yingjin, *Estudos sobre "Um país, dois sistemas" nos últimos 20 anos retrospectiva e perspectiva*, 17 XVII ADMIN. 449 (2004); Lok Wai Kin, *A Propósito dos Factores Básicos da bem Sucedida Aplicação de "Um país, Dois Sistemas" em Macau: Em celebração do 5º Aniversário da Região Administrativa Especial de Macau*, 17 ADMIN. 1095 (2004); Jeong Wan Chong, "Um País, dois Sistemas": *Elevar Nível da Prática Mediante Prática*, 17 ADMIN. 981 (2005); Qi Pengfei, *A Vantagem Económica e a Vantagem Política da "Nova Macau" e o "Modelo de Macau" de "Um país, Dois Sistemas"* 18 ADMIN. 1085 (2005).

<sup>10</sup> Tong Io Cheng & Wu Yanni, *Legal Transplants and the On-going Formation of Macau Legal Culture*, 1 ISAI DAT L. REV. 619, 645 (2011), available at <http://isaidat.di.unito.it/index.php/isaidat/article/viewFile/19/82>: "Chinese law is, in itself, undergoing a process of modernization, westernization and in a certain sense, localization".

<sup>11</sup> Rostam Neuwirth, *Governing 'Glocalisation': A View from the Macau Special Administrative Region of China*, 1 CITY U LR 89 (2011).

imitations from other countries<sup>12</sup>.

The object of the essay is the draft of the condominium law reform in the Macanese legal system.

At first blush, condominium issues in Macao seem sharing with other countries more or less the same panorama of problems and difficulties, nevertheless the research has had to cope with objective and subjective specificities: 1. contiguity between condominium law and property law makes the field highly “sensible” both for Macao and for China as well<sup>13</sup>; 2. smallness of territory makes the land in Macao a precious commodity and condominium buildings are quite always of a larger scale type; 3. condominium market is highly developed and it attracts investments

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<sup>12</sup> Alan Watson, *Legal Transplants and Law Reform*, 92 L. Q. REV. 79-84 (1976); Alan Watson, *Comparative law and legal change*, 37 CAMBRIDGE LJ 313 (1978); Alan Watson, *From legal transplants to legal formants*, 43 AM. J. COMP. L. 469(1995); Alan Watson, *Legal change: sources of law and legal culture*, 131 UN. PEN. L. REV. 1121 (1983); David Nelken, *The Meaning of Success in Transnational Legal Transfers*, 19 WINDSOR Y.B. ACCESS JUST. 349 (2001); Esin Orucu, *Law as Transposition*, 51 INT’L & COMP. L.Q. 205 (2002); Eirini E. Galinou, *Legal Borrowing: Why Some Legal Transplants Take Root and Others Fail*, 25 COMP. LAB. L. & POL’Y. J. 391 (2003-2004).

<sup>13</sup> Kai Wang, *Whatever-ism with Chinese characteristics: China’s nascent recognition of property rights and its political ramifications*, 6 E. ASIA L. REV. 43, 66-67 (2011): “By officially recognizing private ownership in certain real property interests and offering equal protection to such ownership, it signals the CCP’s determination to push the nation forward on the path toward a market economy. By aiming to enhance the much needed clarity and stability of property rights in China, it gives confidence to the real property market, which will continue to generate real estate developments in urban and suburban areas. Its true genius, however, lies in its ability to achieve these goals without fundamentally challenging the socialist regime. Consistent with the CCP’s ideological rhetoric, the “private ownership” recognized under the Property Law differs from the “fee simple” concept in the common law tradition as it does not connote absolute private land ownership. Rather, it is a type of nonexclusive ownership with less pervasive qualifications, i.e., usufruct. This gradual innovation allows private actors to use the land under certain conditions and for certain purposes while maintaining the constitutional mandate that land belongs to the state or collectives. The system before the new law was fragmented, ambiguous, inconsistent and lacking uniformity, especially in the areas of ownership rights, land use rights, mortgage regulations, and the title registration process. The new law aims to correct those shortcomings by offering stronger protection of ownership rights, allowing renewal of land use rights, broadening the parameters of mortgage regulations, and adopting a uniformed registration process”.

Wang Liming, *Tentative Interpretation of Principle of Equal Protection Prescribed by Law of Property*, 3 CHINA LAW 52, 56 (2006): “Thirdly, the draft Law of Property has in it a chapter on condominium, which is actually intended to protect the rights of citizens to their real estate. In urban areas in China, condominium is a major property right of citizens, and is also a guarantee for realizing the right of dwelling as part of the basic human rights of citizens. Through provision by the Law of Property of the system of condominium to strengthen legal protection of property rights of citizens will be of great significance to the development of a harmonious society in China. In particular, the condominium for individual citizens is a basic condition for guaranteeing the right of dwelling of citizens. Therefore, legal protection of the system of condominium means legal protection of the right of dwelling as part of the basic human rights of citizens”.

Of great interest for better understanding the tension between ideology and economic reality in the new Chinese property law, Tzu-Huan Augustine Lo, *Debate surrounding the new property law in China*, 4 CAMBRIDGE STUDENT L. REV. 182 (2008-2009).

either from China either from foreigner investors<sup>14</sup>; 4. private real estate market in Macao has been booming (as in China as well), and this has resulted in the dramatic appreciation of real estate prices; 5. "life cycle" of condominium reality registers a dangerous and distorting overlapping among building developers, building managers, and real estate' agents.

As mentioned above, the method employed in the essay is the methodological apparatus of comparative law<sup>15</sup>.

More in details, the choice has been to analyse the draft of the reform isolating the *factual problem* addressed by the drafter and to put in comparison the solution proposed with other *regulatory answers* established in other legal systems.

Following this approach, the intent of this author has been functionalized a) to "test" the efficacy and efficiency of new proposed rules at the light of other

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<sup>14</sup> GREGORY M. STEIN, MODERN CHINESE REAL ESTATE LAW – PROPERTY DEVELOPMENT IN AN EVOLVING LEGAL SYSTEM, 103 (Ashgate, 2012): "The average Chinese citizen, worried about supporting himself and his family in future and no longer protected by a reliable social safety net, is estimated to save 30-40 percentage of his or her annual income. There are few investment vehicles in which average investors can place these savings. Bank accounts pay low interest rates, (...) and strict currency controls limit the ability to invest outside the China. That leaves real estate, (...), residential real estate units were the hottest commodities". (...) "As result of the fact that so many apartments are purchased solely for investment purposes, a high percentage of residential units in urban markets (...) – including many that are held as second or third homes by their owners – have never been occupied"; at p. 105: "In addition to all of the urban residential units that are built primarily as investment commodities, many other apartments are occupied by their owners. China's huge and swelling urban population is living somewhere, and many city residents are eager to improve their living standard by moving to newer and more modern dwelling. For many Chinese, as for many Westerns, their home is both their place of residence and their most significant investment".

<sup>15</sup> PIER G. MONATERI, METHODS OF COMPARATIVE LAW (Edward Elgar, 2012); UGO MATTEI ET AL., SCHLESINGER'S COMPARATIVE LAW (Foundation Press, 2009); Jedidiah Kroncke, *Law and Development as Anti-Comparative Law*, 45 VAND. J. TRANSNAT'L L. 477 (2012); Basil S. Markesinis, *Judge, Jurist and the Study and Use of Foreign Law*, 109 L. Q. REV. 622 (1993); Basil Markesinis & Jorg Fedtke, *The Judge as Comparatist*, 80 TUL. L. REV. 11 (2005-2006); Pier G. Monateri, *Black Gaius: A Quest for the Multicultural Origins of the Western Legal Tradition*, 51 HASTINGS L.J. 479 (1999-2000); Martin Shapiro, *The Globalization of Law*, 1 IND. J. GLOBAL LEGAL STUD. 37 (1993-1994); Gino Gorla, *A Civil Lawyer Looks at American Law School Instruction*, 3 J. LEGAL EDUC. 515 (1950-1951); Pier G. Monateri, *Weak Law: Contaminations and Legal Cultures*, 13 TRANSNAT'L L. & CONTEMP. PROBS. 575 (2003); John Gillespie, *Globalisation and Legal Transplantation: Lessons from the Past*, 6 DEAKIN L. REV. 286 (2001); PENELOPE NICHOLSON & SARAH BIDDULPH, EXAMINING PRACTICE, INTERROGATING THEORY: COMPARATIVE LEGAL STUDIES IN ASIA, 25-69 (Martinius Nijhoff Publishers, 2008).

In respect of the use of comparative law in the research about Chinese legal system, see Lei Chen, *Private Property with Chinese Characteristics: A Critical Analysis of the Chinese Law on Property of 2007*, 18(5) EUR REV PRIV L 983, 1000-1001 (2010): "However, a comparative perspective can shed light on the origin and objectives of particular legislation and thereby confront and challenge the parochial assumptions. If the view is taken that law is introduced in order to resolve disputes and sustain economic development, learning from the successes and failures of others is a worthwhile contribution to legislative formalization. Nevertheless, comparison is not an end but a means, an initial step of providing insights. Knowledge can be only gained if the relevant factors are properly identified. Comparative research itself does not 'resolve the problem of possible intervention' from both outside and inside unidentified variables. That said, China, like any other country, has its own unique and special national characters. State landownership and the very special Chinese communitarian culture need to be heeded. Therefore, sensitivity to the country's cultural and historical contexts cannot be downplayed. However, Chinese culture should not be overly exaggerated in undertaking a legal comparison to formalize Chinese condominium law. Otherwise, it could defeat the purpose of the making comparisons and trigger a refusal to borrow ideas".

“prestigious” and experienced regulatory strategies about condominium matters b) to furnish to the drafter a sort of “*Digest*” of potential alternative solutions, considered more appropriate in coping with certain shared problems<sup>16</sup>.

Thus, for the purpose of this comment, the comparison of law and its methods have been conceived and used in a utmost practical way<sup>17</sup>.

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### 3. CONDOMINIUM’S SOURCES OF LAW BETWEEN CODIFICATION AND DE-CODIFICATION

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From the seventies onward of last century, following the work of the Italian scholar Natalino Irti<sup>18</sup>, commentators from all over the world began to deal with and analyse the phenomenon, known as “*de-codification*”<sup>19</sup>: that, in a first and simplified view, could be intended as the trend to promulgate special legislation, outside Civil Codes, for regulating social facts that find in the traditional Code an inappropriate and out dated regulatory instrument.

The alluvial statutory production that covers very diversified legal areas, from consumer protection law to labour law, from insurance contract law to intellectual property law, creates normative “microsystems”, distinguished from the “main system” of the Civil Code.

Thus, the nineteenth-century idea of “unity” of the Code has been progressively replaced by multiplicity of legal sources (statutes, regulations, decrees and so on); similarly it happened with the myth of “completeness” of the Code, traditionally guaranteed by the generality and the abstractness of its norms, that ineluctably has disappeared behind an impressive amount of norms, characterized by their speciality and “purposiveness”.

Civil Codes are continuously threatened by pushing and conflicting forces claiming regulatory “exceptions” or special regimes: an everlasting centrifuge movement compromising the traditional *centrality and neutrality* of the Code as source of law.

Evolution of condominium law is emblematic at this regards: indeed the most developed and updated condominium regimes are often conveyed not more by

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<sup>16</sup> I have preferred to synthesize in the body of the essay the examined alternative solution coming from other jurisdictions, while I reported in endnotes the entire text of foreign rule (in the original language): this for giving full proof about the content of my reasoning as well as for not incurring in “translation’s trap”. To the same token, I have preferred to put in endnotes the Chinese version of some regulations together with their (sometimes official) English translations.

<sup>17</sup> PIER G. MONATERI, *supra* note 15 at 56: “comparative law is no longer an impractical academic discipline”; see also ESIN ÖRÜCÜ & DAVID NELKEN, *supra* note 4 at 399-409.

<sup>18</sup> NATALINO IRTI, *L’ETÀ DELLA CODIFICAZIONE* (Giuffrè 1979).

<sup>19</sup> Natalino Irti, “*Codici di settore, compimento della “decodificazione”*”, 2 DIR. SOC. 131 (2005); Antonio De Cupis, *A proposito de codice e decodificazione*, 2 RIV DIR. CIV. 47 (1979); Maria L. Murillo, *The evolution of codification in the civil law legal systems: towards decodification and recodification*, 11 J. TRANSNAT’L L. & POL’Y 163 (2001-2002); Hein Kotz, *Taking civil codes less seriously*, 50 MOD. L. REV. 1 (1987); Carlo Castronovo, *Decodificazione Delegificazione Ricodificazione*, 24 JUS 40 (1993); Maria R. Ferrarese, *Civil Justice and the Judicial Role in Italy*, 13 JUST. SYS. J. 168 (1988-1989); Rodolfo Sacco, *Codificare: modo superato di legiferare?*, 2 RIV. DIR. CIV. 117(1983).

About Chinese debate regarding codification of private law, see Zhang Lihong, *The Latest Developments in the Codification of Chinese Civil Law*, 83 TUL. L. REV. 999, 1015-1018 (2008-2009).

civil codes but by well-designed regulatory instruments<sup>20</sup>.

The increasing complexity of the field (particularly for large scale condominium), the difficult contiguity among a variety of legal areas (property law, association law, company law, real estate law, tenant law, planning law), jointly with new protected interests strictly connected with the housing matters (like for example privacy, environment, fundamental rights, consumer protection) have often led to the choice of "special" regulatory vehicles.

The history of the Macanese legal regime of condominium witnesses, once again, the phenomenon in discussion.

In fact, tracing back to the evolution of condominium law in Macao<sup>21</sup>, if it is true that the Portuguese Civil Code of 1966 (artt. 1414 -1438 Civil Code)<sup>22</sup>, enforced in Macau by the Decreto-Lei n. 47 344, 15 November 1966, has represented for more than twenty years the sole point of reference of condominium regime; it also true that, by time passing, this regulation has revealed its "embryonic" dimension<sup>23</sup> and inadequateness, making integration of the Civil Code's regime necessary.

Following these needs, the Macanese Lei n. 25/1996 has deeply renewed and updated the original normative implant of the Code, representing a real caesura in respect to the former uncritical imitation of the Portuguese legal models<sup>24</sup>.

Few years later, the mentioned Lei n. 25/1996 has been partially transposed in the new civil code of 1999 (artt. 1313-1372)<sup>25</sup>. Nevertheless, despite the new codification of condominium law and the efforts to create a comprehensive regulatory instruments, others normative instruments are still in force and must be taken in account: the Lei n. 6/99/M on the modality of use of urban buildings<sup>26</sup>, the Decreto-Lei n. 41/95/M on the role of the Public Administration in controlling regularity of

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<sup>20</sup> See among several examples the French Loi 10 July 1965 n°65-557, *fixant le statut de la copropriété des immeubles bâtis* (consolidated version 2009) and Décret, 17 March 1967, n. 67-223, (emended 25 May 2008) *pris pour l'application de la loi n° 65-557 du 10 juillet 1965 fixant le statut de la copropriété des immeubles bâtis*; or the Spanish Ley 21 July 1960, n. 49 (amended), *Legislación Básica de Comunidades de Propietarios*.

<sup>21</sup> Tong Io Cheng, *O regime da propriedade horizontal de Macau*, Repertorio do Direito do Macau, Faculdade de Direito da Universidade de Macau 508 (2007); Duarte Santos, *Tópicos para uma reforma do regime da propriedade horizontal em Macau*, 29 BFDUM 184 (2010).

<sup>22</sup> Portuguese Civil Code has adopted almost all the former Decreto-Lei, n. 40 333, 14 October 1955 (that was enforced in Macau by the Portaria Ministerial, 27 October 1956, n. 15 984).

<sup>23</sup> Tong Io Cheng, *supra* note 21, at 509: "Embora o Código Civil de 1966 tenha promovido o instituto de a propriedade horizontal e representa uma forma embrionária da propriedade horizontal do tempos modernos, a economia de Macau daqueles tempos não chegou a registar um elevado grau de desenvolvimento nem a pressão demográfica se considerava demasiada, pelo que tem sido pouca a aplicação efectiva do regime de propriedade horizontal e exigência de alteração de alguns aspectos deficientes desse regime".

<sup>24</sup> Lei n. 25, 9 September 1996, *Regime Jurídico de Propriedade Horizontal*. Before this important reform, some aspects of condominium law in Macao was modified by the Decreto-Lei n. 31, 13 April 1985, *Adaptações ao Regime Jurídico de Propriedade Horizontal*, repealed by the over mentioned Lei n. 25/1996, jointly with art. 1414-1438 of the former Civil Code and with the Decreto-Lei 40 333/1955 (art. 47, Lei n. 25/1996).

With reference to this Act, Tong Io Cheng *supra* note 21 at 511: "Desde então, o regime jurídico de propriedade horizontal de Macau ficou cada vez mais desligado do de Portugal"

<sup>25</sup> Approved by Decreto-Lei 39/99/M, that has only partially transposed the content of the Lei 25/1996: art. 37-42, Disposições relativas ao registo of Lei n. 25/1996 were not inserted in the new Macanese Civil Code (see Decreto-Lei n. 39/99/M, art. 3, lett. 6).

<sup>26</sup> Lei n. 6, 17 December 1999, *Disciplina da Utilizacao de Predios Urbanos*.



the condominium administration<sup>27</sup>, and the *Código do Registo Predial*<sup>28</sup>.

Having said that also the Macanese condominium law shows a sort of sinusoidal regulatory movement -from the Civil Code to *special* statutes and vice versa - and the new proposal of Macanese *Lei da Administração dos Condomínios*<sup>29</sup> seems to me nothing more than an umpteenth epiphany of the mentioned phenomenon of *de-codification*.

Trying to envisage the reason of *bipolar* regulatory system on condominium (*Lei* together with the residual role of Civil Code), a first explanation may be found in the intent of drafter to make the *Lei* a designed regulatory instrument for those who effectively lives in the building (owner or tenant is he/she), and for those who have to “care” of the building (unit owners management organization or a management service company appointed by assembly).

At this regards, the Macanese drafter seems to want giving also a linguistic demarcation between the Civil Code and the *Lei*: in fact, while in the first one the word used for indicating “*propriedade horizontal*” (condominium) is “*fen ceng jian zhu wu*” (分层建筑物), that semantically embraces any kind of building; differently, in the *Lei* is used the word “*fen ceng lou yu*” (分层楼宇) that specifically indicates those buildings which are designed only for residential purposes.

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#### 4. CONDOMINIUM IN MACANESE CIVIL CODE (AMENDED): FROM THE SINGLE TO THE COMMUNITY AND VICE VERSA

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The mentioned process of *de-codification*, delocalizing the most part of the condominium rules outside the Civil Code (in the new *Lei da Administração dos Condomínios*), carries with it just few modifications of the remaining legal framework of the Code<sup>30</sup>.

Some of them pertain to reasons of a more systematic and logic setting of

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<sup>27</sup> Decreto-Lei n. 41, 21 August 1995.

<sup>28</sup> See Decreto-Lei n. 46, 20 September 1999.

<sup>29</sup> See *Nota justificativa*, n. 11: “*As normas de natureza regulamentar afectas à administração de condomínios e a volatilidade da matéria justificam a sua autonomização mantendo-se, porém, regulada no Código Civil a matéria relativa à constituição e conteúdo do direito de propriedade sobre frações constituídas em propriedade horizontal na medida em que se trata de uma modalidade do direito de propriedade a merecer tratamento lógico e sistemático nesse Código matéria essa sujeita a alguns ajustamentos em função do novo regime de administração dos condomínios*”

<sup>30</sup> See new numbering, sect. I of Civil Code - *Disposições gerais*: art. 1313 - *Princípio geral*; art. 1314 - *Limitações ao exercício dos direitos*; art. 1315 - **Âmbito do condomínio**; art. 1316 - *Objecto da propriedade horizontal*; art. 1317 - *Falta de requisitos legais*. See sect. II of Civil Code - *Constituição*: art. 1318 - *Regras gerais*; art. 1319 - *Título constitutivo*; art. 1320 - *Individualização das frações*; art. 1321 - *Individualização dos edifícios e dos subcondomínios*; art. 1322 - *Outras menções constantes do título*; art. 1323 - *Modificação do título*; art. 1324 - *Junção e divisão de frações autónomas*. See sect. III - *Partes comuns do condomínio*: art. 1325 - *Partes comuns do condomínio*; art. 1326 - *Direitos de preferência e de divisão*.

the rules<sup>31</sup>, others are purposed to reach hermeneutic clarifications<sup>32</sup> and a more semantic precision<sup>33</sup>.

Nevertheless, two new dispositions are in the opinion of this author of major interest and relevance: the art. 1313, n. 2 – draft version, regarding the duties of the unit owners; and the insertion of let. c) in the point n. 2 of art. 1325 – draft version (art. 1324 Civil Code), regulating the exclusive use for the benefit of some owners of common parts of condominium.

#### 4.1 The "Threefold Unity" Theory as Theoretical Framework

The art. 1313, n. 2 – draft version provides a "formal declamation" of the *duty* of each unit owner to participate in the management of the condominium<sup>34</sup>: wondering about the value of this statement could shed some light on its real meaning.

At a first and careless observation, the disposition seems nothing more than a mere declamation of principle, also because participation is not legally coercible.

Nonetheless, the statement acquires a specific weight and a clear semantic direction if some cultural frameworks and conceptual grids are called back for shedding some light.

Primarily, the German origin theory of "threefold unity" has played a role of great relevance in the reform process<sup>35</sup> and it represents a good starting point for a full understanding of the disposition under comment.

The purchaser of an apartment acquires at the same time, not only the ownership of the unit and the joint ownership of the common parts (*dualistic theory*), but also the automatic membership at management's association (without any consideration whether it is incorporated or unincorporated)<sup>36</sup>.

Differently to the most part of civil law systems (included the Portuguese one)

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<sup>31</sup> See for example the new art. 1313 Civil Code – draft version, nn. 3 and 4 (before nn. 1 and 2 of art. 1323 Civil Code – *Direitos dos condóminos sobre o prédio*): "3. Cada condómino é proprietário exclusiva da fração que lhe pertence e comproprietário das partes comuns do condomínio; 4. O conjunto do dois direitos é indivisível; nenhum deles pode ser alienado separadamente, nem é lícito renunciar à parte comum como meio de o condómino se desonerar das despesas necessárias à sua conservação ou fruição". It was properly considered by the drafter that above cited dispositions, because their general and introductory nature, have better placed in the open article of the chapter of Civil Code (ch. V, sect. I) concerning "propriedade horizontal".

<sup>32</sup> See for example art. 1323 Civil Code – draft version (art. 1321 Civil Code – *Modificação do título*) at new point n. 6, that puts an end to the previous judiciary *querelle* about the possibility to modify the constitutive title of condominium by means of a judicial decision, stating that it is possible: "6. O título constitutivo pode ser modificado por decisão judicial transitada em julgado".

<sup>33</sup> See for example new title art. 1318 Civil Code – draft version (art. 1317 Civil Code – *Princípio geral*) that is "Regras gerais" ("General rules"): the replacement of the previous term "principle" with the new one "rules", is explained by the drafter with the fact that the term "principle" brings in itself a bundle of values and theoretical guidance that would be extraneous to the nature of the norms present in the section II (*Constituição*), which provide operative and practical rules for the formation and establishment of a condominium.

<sup>34</sup> Art. 1313, n. 2 Civil Code – draft version (*Princípio Geral*): "Os condóminos tem dever de participar na administração do condomínio". See also *Lei da Administração dos Condomínios*, art. 3 (art. 1331 Civil Code - *Obrigações dos condóminos*), point. 1: (... são obrigações dos condóminos) "participar na administração das partes comuns".

<sup>35</sup> JOHANNES BÄRMANN, KOMMENTAR MIT WOHNUNGSEIGENTUMSGESETZ, 152 (C H Beck 1958).

<sup>36</sup> The "condominium membership" is reserved *only* to the unit owners, so that the *Lei da Administração dos Condomínios*, art. 16 (art. 1354 Civil Code - *Composição, remuneração e prazo do mandato*) n. 1, conveniently precises that: "A administração é composta por um ou mais administradores de entre os condóminos".

who adopts the dualistic approach<sup>37</sup>, the choice of the Macanese legislator has been to underline the centrality of the participation of unit owners in the condominium law.

In strengthening this point of view, and according to the opinion of professor Tong, the same “*direito de associados*” (right to be a member of condominium) should be better seen as a *duty to participate*<sup>38</sup>, considering that – differently from the ordinary association law – this right is inextricably linked with the ownership of each unit and it is an indefeasible right<sup>39</sup>.

Although the practical distinction between the dualistic and the threefold theory is very difficult to put in evidence because inextricability and interconnection among rights of different species (property rights as well as association rights)<sup>40</sup>, the

<sup>37</sup> See art. 1420 Portuguese Civil Code (*Direitos dos condóminos*): “1. Cada condómino é proprietário exclusivo da fracção que lhe pertence e comproprietário das partes comuns do edifício. 2. O conjunto dos dois direitos é incindível; nenhum deles pode ser alienado separadamente, nem é lícito renunciar à parte comum como meio de o condómino se desonerar das despesas necessárias à sua conservação ou fruição”. See also, among several examples, art. 1117 Italian Civil Code (Common parts of building): “Unless the contrary appears from the instrument or transaction, the following are common property of the owners of the different floors or parts of floors of a building: (...)”; the Spanish Ley 21 July 1960, n. 49 (with modifications), *Legislación Básica de Comunidades de Propietarios*, art. 3: “En el régimen de propiedad establecido en el artículo trescientos noventa y seis del Código civil corresponde al dueño de cada piso o local: a) El derecho singular y exclusivo de propiedad sobre un espacio suficientemente delimitado y susceptible de aprovechamiento independiente, con los elementos arquitectónicos e instalaciones de todas clases, aparentes o no, que estén comprendidos dentro de sus límites y sirvan exclusivamente al propietario, así como el de los anejos que expresamente hayan sido señalados en el título, aunque se hallen fuera del espacio delimitado. b) La copropiedad, con los demás dueños de pisos o locales, de los restantes elementos, pertenencias y servicios comunes”; the French Loi 10 July 1965, n. 65 (with modifications) *fixant le statut de la copropriété des immeubles bâtis*, art. 1: “La présente loi régit tout immeuble bâti ou groupe d’immeubles bâtis dont la propriété est répartie, entre plusieurs personnes, par lots comprenant chacun une partie privative et une quote-part de parties communes. A défaut de convention contraire créant une organisation différente, la présente loi est également applicable aux ensembles immobiliers qui, outre des terrains, des aménagements et des services communs, comportent des parcelles, bâties ou non, faisant l’objet de droits de propriété privatifs”; Art. 2: “Sont privatives les parties des bâtiments et des terrains réservées à l’usage exclusif d’un copropriétaire déterminé. Les parties privatives sont la propriété exclusive de chaque copropriétaire”.

<sup>38</sup> This perspective seems also vaguely resounding in some western regulations. See Belgian Civil Code, art. 577-6: “Chaque propriétaire d’un lot fait partie de l’assemblée générale et participe à ses délibérations”.

<sup>39</sup> IC Tong, *supra* nota 21, at 521: “(...) o chamado direito de associados não é mais do que o direito de participar na colectividade de administração e de exprimir a sua vontade durante o funcionamento da colectividade (...). Os direitos são renunciáveis, mas o que difere dos direitos de associado em geral é que a qualidade do condómino como associado a colectividade é irrenunciável, pelo que é mais apropriado designar-se por dever. (...) O chamado direito de associados diz respeito, em maior grau, aos deveres e não aos direitos”.

At this regards the *Lei da Administração dos Condomínios*, art. 4 (art. 1332 Civil Code - *Encargos de conservação e fruição*) n. 5, specifies that: “Não é lícito ao condómino renunciar às partes comuns do prédio como meio de se desonerar das despesas necessárias à respectiva conservação ou fruição”.

Moreover, according to the opinion of the same commentator, differently from the Portuguese legal framework of “*propriedade horizontal*” which adopts the dualistic model, the Macanese Civil Code has already implicitly chosen the threefold theory, IC Tong, *supra* nota 21, at 520: “(...) pelo facto de o legislador ter incluído o disposto no artigo 1330 do Código Civil nota-se que o Direito Civil de Macau da elevada importância às relações colectivas entre os condóminos, tendo sido a maioria das disposições do regime da propriedade horizontal criada para tratar das relações colectivas. Após a inclusão do artigo 1330, o regime da propriedade horizontal parece apresentar vestígios da teoria de estrutura triadática mas não é fácil apurar se o legislador terá sido influenciado por essa teoria, podendo apenas dizer, em termos objectivos, que o legislador terá tomado em consideração as relações colectivas na propriedade horizontal”.

<sup>40</sup> IC Tong, *supra* nota 21, at 521: “De facto, as legislações sobre propriedade horizontal de vários países tratam, mais ou menos, as relações colectivas entre os condóminos seno difícil afirmar qual a lei que terá adoptado o dualismo e qual a lei que terá adoptado a estrutura triadística”.

express focus on the right/duty to participate could have important aftermaths in a judiciary perspective, where the continuous tension between the unit ownership's perspective and the communal interests' point of view always looks for a balance.

Besides, the threefold theory in Macanese reform sets up in somewhat a sort of refined and indirect *dialogue* with the Mainland that seems to have receipt the three dimensional model of condominium in the article 70 of the recent Chinese Property Code: "The owner has exclusive ownership with regard to his or her individual apartment and unit for commercial or another use, joint ownership with regard to the common property as all portions of the project other than the apartment, and is entitled to manage and maintain the common property"<sup>41</sup>.

The Chinese legislator - sustained by a learned scholarly movement<sup>42</sup> - has maybe chosen this "communal" approach to temper the various forms of individualism with which the Western legal concept of property has always been associated<sup>43</sup>. I wonder if the Macanese drafter has made a similar kind of reasoning.

Finally, using the methodological approach of the *discourse analysis*<sup>44</sup>, I could also say that the legislator shows in somehow a high level of indirectly *valutative language*.

In fact, as it results from the *Preliminary Report* annexed to the draft of the reform<sup>45</sup>, in Macao there is a very low rate of unit owners' participation at assemblies, which are in any case convoked pretty seldom by the buildings'

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<sup>41</sup> Property Law of the People's Republic of China, 16 March 2007, Chapter VI Owners' Partitioned Ownership of Building Areas (Owners' Condominium Rights), art. 70.

<sup>42</sup> See CHEN HUA BIN, *STUDY ON MODERN CONDOMINIUM OWNERSHIP* (Law Press, 2007); Chen Hua Bin, *O conceito de propriedade horizontal: o regime do artigo 70 da Lei do Direito das Cosas na República popular da China*, in 29 BFDUM 155, 169-173 (2010); Chen Hua Bin, *On Condominium Ownership of Apartments' Owners: Comments on Chapter 6 of the Draft Law on Real Right*, 18(1) PULJ 63 (2006); Chen Hua Bin, *Comment on formation of condominium - concurrently on article 70 of the Property Law of PRC*, 2(2) TCLR 99 (2008); Yu Da Shui, *Membership right in Condominium*, in 1 HEBEI L Sc 17, 18 (2002); Lei Chen, *A uniform condominium statute for China based on a comparative study of the South African Sectional titles Act and American Uniform Common Interest Ownership Act*, 23-24 (dissertation presented for the Degree of Doctor of Law at Stellenbosch University), now published with the title *THE MAKING OF CHINESE CONDOMINIUM LAW: A COMPARATIVE PERSPECTIVE WITH AMERICAN AND SOUTH AFRICAN CONDOMINIUM LAWS*, (Intersentia, 2010); Lei Chen, *The New Chinese Property Code: A Giant Step Forward?*, in 11(2) EJCL 14 (September 2007), available at <http://www.ejcl.org>.

<sup>43</sup> See also, in the field of right of access to and of disclosure of condo's management's information, the Judicial Interpretation by the Supreme People's Court on Issues Concerning the Specific Application of Laws in the Trial of Cases Involving Disputes over Condominium Ownership of Buildings, Fa Shi [2009] No. 7, 05/14/2009, art. 13: "Where an owner applies for the disclosure of or access to the following information and data which shall be disclosed to the owner, the people's court shall uphold such application: (1) The raising and expenditure of the maintenance fund for the building and the ancillary facilities thereof; (2) The management rules, procedures for the owners' general meeting as well as resolutions and minutes of meeting of the owners' general meeting and the owners' committee; (3) Property service contract and information on the utilization of and profit from the common parts; (4) The disposition of the parking places and garages within the building area which are designated for parking automobiles; (5) Other information and data that shall be disclosed to the owners". Regarding the legal value of these kind of acts in the system of sources of private law, see Xu Guodong, *Le fonti del diritto civile nel sistema cinese*, in 4 DIR & ST (2005).

<sup>44</sup> MAURIZIO GOTTI, MARINA DOSSENA, *MODALITY IN SPECIALIZED TEXTS* (Peter Lang, 2001).

<sup>45</sup> Similar outcomes in Wong Yun Chuen, *Legislative and administrative changes in transition: a case study of property management service in Macau (1994-2004)*, Dissertation submitted in partial fulfilment of the requirements for the Degree of Master in Housing Management - University of Hong Kong (July 2007).

management<sup>46</sup>.

Message of the legislator to the community is clear: both the praxis of the unit owner to not participate in the assembly and consequently in the management, and the praxis of the management to not convoke general meetings (impeding in this way the fulfilment of the *right/duty* of each owner to participate), are *negative praxis* and must be changed.

In this sense the rule under exam could be valued in a way that I could say more *performative* (“suggesting” to adopt a certain conduct, considered positive and fruitful)<sup>47</sup> than *prescriptive* (“formally imposing” the participation in the management of the condominium, that in any case can not be legally enforced).

#### 4.2 The Individual Interest Before the Collective One: The Rule on the Exclusive Use of the Façade for Advertisement

The new let. c) in point n. 2, art. 1325 – draft version, provides that the constitutive title of the condominium (“*titulo constitutivo*”) may dispose that the portion of the façade contiguous to the apartment can be used by the owner of the unit for installation of advertisements as long as it does not affect negatively the structural security of the building and it is in compliance with the legal dispositions<sup>48</sup>.

The new rule was justified by the drafter with the necessity of bypassing the delay of the assembly’s consent, that is the precondition for having the government authorization<sup>49</sup>: in fact, the lack of assembly’s convocation, or simply the unconcern of the other owners, frequently pushes people concerned to use façade for advertisement without any condominium consent and consequently without any public authorization.

The theme of the so called “*limited common property*” or “*limited common elements*”<sup>50</sup>

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<sup>46</sup> See Duarte Santos, *supra* nota 21, at 189: “*Porem, a realidade é bem diversa e os índices de participação são francamente baixos. Entre os factores que podem explicar esta situação estão a dispersão dos proprietários das frações, os quais muitas vezes se limitam a fazer um investimento com intuítos lucrativos, a grande dimensão dos empreendimentos, o que os torna alvo da cobiça de empresas de gestão de condomínios que muitas vezes estão ligadas ao promotor do empreendimento e que tem interesse em manter os proprietários afastados da gestão do condomínio, e também, um claro desinteresse dos proprietários na vida do condomínios*”.

<sup>47</sup> See JOHN L. AUSTIN, *HOW DO THINGS WITH WORDS*, 6 (Harvard University Press, 1975): “I propose to call it a performative sentence, or performative utterance, or, for short, “a performative”. The term “performative” will be used in a variety of cognate ways and constructions, much as the term “imperative” is. The name is derived, of course, from “perform”, the usual verb with the noun “action”: it indicates that the issuing of the utterance is the performing of an action – it is not normally thought of as just saying something”.

<sup>48</sup> Art. 1325, n. 2, let. c, Civil Code: “*O titulo constitutivo pode afectar ao uso exclusivo de um condómino ou conjunto de condóminos: (...); c) As fachadas referidas na alínea b) do numero anterior, limitando-se, neste caso, o direito de instalação de publicidade ao proprietário da fração confinante com essa parte da fachada, desde que este acto não prejudique a segurança da estrutura e observe as disposições legais*”.

<sup>49</sup> See, with reference to the former provisions of the Macanese Civil Code, IC Tong, *supra* nota 21, at 527, footnote n. 37: “*O artigo 1332 do Código Civil refere muito patentemente quês as partes comuns podem servir para a fruição, por isso, se um condómino quiser aproveitar as referidas fachadas para sua fruição, deve sujeitar essa sua intenção a deliberação da assembleia geral do condomínio para ser aprovada por unanimidade de todos os condóminos*”.

<sup>50</sup> In PRC law, it is possible finding also the expression “*partially public parts*”, see Provisions of Shanghai Municipality on Residential Property Management, art. 85, par. 2: (二) 部分共用部分, 是指由部分业主共同使用、管理的物业部位、设施设备及场地等部分。

is well known in literature<sup>51</sup>, and it refers to those common parts of the building which are reserved for the use and enjoyment of some, but not of all apartment owners.

In the opinion of this author, the above mentioned new provision would have to be examined in accordance with these three parameters: a) its "style"; b) its "fidelity" with the legal system; and c) its "philosophy".

a) As pointed out in the previous paragraph, the main characteristics – or if we want the "style" – of the codified norms are, or perhaps were, their generality and abstractness. The norm in exam seems to this commentator pretty distant from these characteristics.

First of all, the case governed by the letter c) is – under the focus of generality and abstractness – far from those cases ruled by let. a and b of n. 2, art. 1325 – draft version<sup>52</sup>, in the sense that while those two last provisions are founded on a objective situation of fact<sup>53</sup>, differently it happens for the new hypothesis ruled by let. c).

In the case in point, in fact, the common part (the façade of the building) would be submitted to the exclusive use of the unit owner, not because an objective and structural connection with the single unit does exist<sup>54</sup>, but only because there is the mere willingness of the unit owner to use the portion of the façade (that is contiguous to own apartment)<sup>55</sup>.

Furthermore, about the use of the façade, the new let. c) deals only with the specific, or perhaps specious, case of the advertisement ("*instalação de publicidade*")

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<sup>51</sup> Cornie G. Van Der Merwe, *The adaptation of the institution of apartment ownership to civilian property law structure in the mixed jurisdictions of South Africa, Sri Lanka and Louisiana*, 19 STELLENBOSCH L. REV. 304 (2008); Hanri Monstert, *The regulation of exclusive use areas in terms of the Sectional Titles Act 95 of 1986: an evaluation of the existing position and suggested alternatives*, 8 STELLENBOSCH L. REV. 324 (1997).

<sup>52</sup> Art. 1325, n. 2, Civil Code – draft version (art. 1324 Civil Code – *Partes comuns do condomínio*): "O título constitutivo pode afectar ao uso exclusivo de um condômino ou conjunto de condôminos: a) As partes comuns previstas nas alíneas c) a e) do número anterior, desde que exista uma destinação objectiva das mesmas à utilização exclusiva por parte das fracções em causa; b) Os lugares de estacionamento referidos na alínea i) do número anterior, devendo os mesmos ficar delimitados nos termos do n.º 3 do artigo 1316".

Art. 1316, n. 3, Civil Code – draft version (1315 Civil Code – *Objecto da propriedade horizontal*): "Entende-se por espaço suficientemente delimitado a área individualizada pela demarcação, por forma indelével, dos seus limites de contiguidade, com afixação de numeração ou designação própria e, quando seja o caso, a indicação da designação da fracção autónoma em que esteja integrada, ou a cujo uso exclusivo se ache afecto".

<sup>53</sup> The objective usefulness and usability of gardens or patios for the only benefit of a specific owner or group of owners, let. a; and a delimited and marked parking space, in the way of its undisputable connection with a specific residential unit, let. b

<sup>54</sup> That would justify the special regime ruled by n. 2 of art. 1325 – draft version.

<sup>55</sup> Similarly in Portuguese doctrine, see PIRES DE LIMA, ANTUNES VARELA, *CÓDIGO CIVIL ANOTADO*, Vol. III, 418 (Coimbra ed. 1987): "Ao lado do princípio da inscindibilidade, o disposto no n. 2 do artigo 1420 reflecte ainda o nexo de acessoriedade ou instrumentalidade funcional que liga o direito de contitularidade sobre as partes comuns do edifício ao direito de propriedade exclusiva sobre a fracção autónoma correspondente"; PIRES DE LIMA, ANTUNES VARELA, *supra*, at 398: "Sendo o direito sobre a fracção autónoma a parte fundamental ou nuclear da propriedade horizontal (o direito sobre as partes comuns reveste natureza meramente instrumental) este instituto deverá ser visto como uma modalidade ou subespécie do domínio (...) do qual se diferencia não pela natureza do direito em si, mas tão-somente pelo grau das limitações a que esta sujeito".

In Portuguese case law, see Acórdão da Relação de Évora, 30.04.1998, in *Boletim do Ministério da Justiça*, 476, p. 507: "A parede exterior da fachada de um prédio não pode estar afectada ao uso exclusivo de um condômino, e por isso, deve considerar-se comum, (...)". See also Acórdão da Relação de Porto, 17.01.2000, in *Boletim do Ministério da Justiça*, 493, p. 420: "A colocação nas paredes exteriores de prédio em propriedade horizontal de aparelhos de ar condicionado (...) constitui obra que altera a linha arquitectónica (...)".

and it does not provide for a exclusive but *general* use of the portion of the façade.

Having said that, under the sole focus of the generality and abstractness, the rule in argument would have to be more properly inserted in a secondary regulation and not in the text of the Civil Code.

b) In the general panorama of the condominium law provided by the Macanese Civil Code, the new case ruled by let c. sounds as a “wrong note”.

The entire implant of the condominium regulation in Macao, as in the most part of other Countries, is in fact a continuous balancing (and strain) between reasons and interests of the single (owner of each apartment), and reasons and interests of the community of owners who live in the multi floor building. The counterproofs of this are both limits imposed to each unit owner in the use of the common part both limits imposed to the use of the exclusive part of ownership (for not compromising the use and enjoyment of the building’s common parts by each co-owner)<sup>56</sup>.

If this is true, it is highly possible that the provision in object will affect negatively the *architectural décor* of the building that is expressly protected by art. 1314 Civil Code – draft version (art. 1325 Civil Code), as well as by art. 24 of the new *Lei da Administração dos Condomínios* (art. 1334 Civil Code) regulating the innovations<sup>57</sup>.

Both dispositions use two terms full of meaning: “*linha arquitectónica*” (architectural line) and “*arranjo estético do prédio*” (aesthetic arrangement of the building).

Expressions that – other than a specific technical aspects – bring also a hidden element, rooted in the culture of a community, in its idea of beauty and of aesthetic harmony. In this sense, as already said, condominium regulation cannot and must not be detached from its cultural component.

Taking away from the assembly the competence for the consent on the advertisement on the façade<sup>58</sup> does mean not only compromising seriously the possibility to check and control the respect of the architectural décor (who else should take care of aesthetic of condominium, if not same owners of the condominium!?), but also - and consequently - it runs the risk to compromise the

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<sup>56</sup> See notably art. 1302 Civil Code (*Uso da coisa comum*): “1. Na falta de regulamento sobre o uso da coisa comum, a qualquer dos proprietários é lícito servir-se dela, contanto que a não empregue para fim diferente daquele a que a coisa se destina e não prive os outros consortes do uso a que igualmente têm direito”; art. 1314 Civil Code (before art. 1325 Civil Code - *Limitações ao exercício dos direitos*): “2. É especialmente vedado aos condóminos: a) Prejudicar, quer com obras novas, quer por falta de reparação, a segurança, a linha arquitectónica ou o arranjo estético do prédio; b) Dar à fracção uso diverso do fim a que a mesma é destinada; c) Praticar quaisquer actos ou actividades que estejam proibidos no título constitutivo. 3. O título constitutivo da propriedade horizontal, o regulamento e os órgãos do condomínio não podem impor limitações abusivas aos direitos dos condóminos, quanto às partes próprias ou comuns; consideram-se abusivas as limitações que não sejam justificadas pela especial destinação, localização ou características do prédio, ou por exigências de utilização comum ou convivência”.

<sup>57</sup> *Lei da Administração dos Condomínios*, art. 24 (*Inovações*): “1. As obras nas partes comuns que constituam inovações dependem da autorização da assembleia geral do condomínio, aprovada por um número de condóminos que represente, pelo menos, dois terços do valor total do condomínio. 2. As obras que modifiquem a linha arquitectónica ou o arranjo estético do prédio são consideradas inovações (...); 3. Não são permitidas inovações capazes de prejudicar a utilização, por parte de algum dos condóminos, das coisas próprias ou das coisas comuns”.

<sup>58</sup> See IC Tong, *Regime da propriedade horizontal de Macau*, Repertorio do Direito de Macau, Faculdade de Direito da Universidade de Macau, 505, 527 (2007): “Não obstante cada fracção autónoma corresponder a uma parte da fachada esta é considerada, na totalidade, parte comum, pelo que o condómino não pode arrendar para que outra pessoa execute publicidade ou realize outro fim lucrativo”.

coherence of the condominium legal system, letting article 1314, n. 2, let. a – draft version, empty of meaning.

I wonder at this regards how reconciling the hypothesis of a contract for using portion of façade for advertisement and the distribution of profits among unit owners<sup>59</sup>; or differently, I wonder how reconciling the freedom of a unit owner to make any advertisement on the façade and the loathing of other owners, not because of aesthetic, but because of the advertisement's content.

Nevertheless, turning attention to Mainland's legal solution to the same matter, I get the awareness of the emersion of a strong *assonance* of the Macanese criticised disposition with a recent Judicial Interpretation by the Supreme People's Court of the China:

*"An owner's free utilization of the roofs and other outer wall surfaces corresponding to the proprietary parts owned by the owner on the basis of the reasonable demand for the functions of such proprietary parts of the housing and commercial housing, shall not be deemed as infringement, except where such utilization breaches applicable laws, regulations and management rules or damages the legal rights and interests of other parties"*<sup>60</sup>.

Not repeating here the systematic profiles of this kind of solution in term of coherence and fidelity with the Macanese legal system, and to be sincere also with the same content of the mentioned interpretation of Supreme Court<sup>61</sup>, the crucial point on which it appears to me necessary trying to make a frank and intellectually honest debate is about the "idea" of condominium that it is considered more desirable and suitable for Macao SAR.

c) Perhaps, it is not fortuitous that in a pretty recent work about the architectural heritage in Macau<sup>62</sup> it was affirmed that: "(t)he resulting heritage-vs-development conflicts that have recently arisen have confirmed (...) that economic considerations have taken precedence over cultural ones".

Symmetrically, I could say with reference to the norm in examination: the *communal vision* of the condominium gives way to a mere *property vision* of the single

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<sup>59</sup> To same token, the contribution to expenses for maintaining the common property: generally speaking, in fact, the distinction between the components constituting common parts and components that are part of the unit is particularly important for the question of the maintenance.

<sup>60</sup> Judicial Interpretation by the Supreme People's Court on Issues Concerning the Specific Application of Laws in the Trial of Cases Involving Disputes over Condominium Ownership of Buildings, Fa Shi [2009] No. 7, 05/14/2009, art. 4.

<sup>61</sup> I am referring notably at the "creeping" contradiction between the above cited statement contained in the art. 4 of Judicial Interpretation by the Supreme People's Court and the art. 15, n. 2 of the same document: "(Where in violation of applicable laws, (...), an owner or any other person commits any of the following offenses, the owner or such person may be deemed as "infringing upon the legitimate rights and interests of other parties" in Paragraph 2, [Article 83](#) of the [Property Law](#)) Where the owner or any other person damages the outer appearances of the building by destroying or changing the shape or color, etc. of outer walls of the building"; and also with art. 14: "Where in the absence of due authorization, the developer or other parties occupy or dispose of the common parts of the building owned by the owners, or alter the functions of such parts or use such parts for commercial purposes, and therefore the rightful owners of such common parts apply for abatement of nuisance, restoration to the original state, annulment of the disposal, or compensation for damages, the competent people's court shall support such applications (...)"

<sup>62</sup> Thomas Chung, *Valuing heritage in Macau: on contexts and processes of urban conservation*, 1 JCCA 129, 144 (2009).



unit owner, in which at the privilege of using a common part does not correspond any real individual responsibility and care towards the community.

After all, reality of condominium has important sociological aftermaths: because “the community life in an apartment building is much more intensified than the community life of a group of neighbouring landowners (...) (this) peculiar feature of apartment ownership justify more intensive limitations and restrictions on the powers and entitlements of an apartment owner with regard to his apartment”<sup>63</sup>.

Condominium (and its bundle of different rights and concurrent interests) imposes, in the opinion of this author, the replacement of the absolutistic perception of the ownership, in terms of individualism and autonomy, with a recognition that “ownership carries with it social obligation”<sup>64</sup>, in the sense of the necessity of a proper and respectful behaviour for *preserving social and peaceful relationship* among owners<sup>65</sup>.

As we learned by Singer: “In contrast to the castle or ownership conception of property, we might call this the good neighbour or environmental conception of property. This view conceptualizes property rights as socially situated. The view that the use of one’s land often affects the legitimate interests of neighbours (and thus may be limited to the extent necessary to protect those legitimate interests) is associated with a conception of property rights as overlapping or imbricated. Physical borders between owners may define the space within which owners are presumptively free to act, but those borders do not define the scope of the owner’s freedom - nor of the owner’s property rights. This view takes for granted that owners have *obligations* as well as rights and that one purpose of property law is to regulate property use so as to protect the security of neighbouring owners and society as a whole”<sup>66</sup>.

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<sup>63</sup> Cornie G Van der Merwe, *supra* note 51 at 307. See also PIRES DE LIMA, ANTUNES VARELA, *supra* note 55 at 397: “Esta situação de facto cria entre os condôminos uma especial interdependência e origina conflitos de interesses para os quais se não encontraria solução adequada com o simples recurso às normas gerais do direito de propriedade. Assim se justifica que a propriedade de cada um sofra aqui novas restrições”.

<sup>64</sup> Cornie G Van der Merwe, *supra* note 51 at 307.

<sup>65</sup> Lei Chen, *supra* note 15, at 997: “An examination of condominium law indicates that social obligation is inherent in property. Condominium law cannot function well without the guiding principle of the ancient maxim *sic utere tuo ut alienum non laedas* (use your land in such a way as not to injure the land of others). Basic to condominium living is that individuals must not be permitted to disrupt the integrity of the overall condominium development with the unbridled use of their own property. The unit owner can alter the interior in a manner that does not endanger the building’s structural integrity or mechanical systems. Restricting the use and enjoyment of every individual unit effectively protects all of the owners’ common interests. In other words, restrictions are justified because every unit owner benefits in the long run, both financially by increasing the condominium’s market value and by preserving a stable and orderly community. The property law holds this view. Since the condominium is the pre-dominant housing form in urban China, such a communitarian perception of property is widespread and accepted”.

<sup>66</sup> Joseph W. Singer, *How Property Norms Construct the Externalities of Ownership* 3 (Harvard Law School Public Law Research Paper No. 8, 20006); see also Joseph W. Singer, *The Ownership Society and the Takings of Property: Castles, Investments, and Just Obligations*, 30 HARV. ENVTL L. REV. 309 (2006).

## 5. THE *LEI DA ADMINISTRAÇÃO DOS CONDOMÍNIOS*: NEW BUT ALSO INNOVATIVE?

The new *Lei*, composed by five chapters (General dispositions – chap. I<sup>67</sup>, General assembly of the condominium – chap. II<sup>68</sup>, Management's organization – chap. III<sup>69</sup>, Management's activity – chap. IV<sup>70</sup>, and Larger scale condominium – chap. V<sup>71</sup>), seems to me stretched between two different logics, sometimes in opposition each other.

On one hand, the intent to preserve the traditional rationality and the normative scheme of the Civil Code's regulation: an appropriate effort of simplification and rationalization of former rules, sometimes not detached by the implementation of too much "shy" changes in comparison with the more developed and updated condominium's regulations.

On the other hand, I have had also the impression of a firm willingness to carve out from the reform – with a soft and shaded technique – a more pervasive mutation in the same normative logic of condominium as *exclusive* private law institute or as *mere* associative phenomenon among private individuals.

Before the punctual analysis of the *Lei*, the great and important effort of the drafter in enhancing Chinese legal version of the statute deserves attention and admiration.

It should be remembered that in Macau, former Portuguese colony for almost four centuries, Chinese language had been recognized as a co-official language only since 1991, and was subsequently anointed in the form of the bilingualism system under section 9 of its Basic Law.

Nevertheless, the transposition of legal text from Portuguese version to Chinese one is still a very challenging and complex work: the legal translation, strategically important for the full implementation of the principle "one country two systems" and above all for the process of "localization" of a Macanese legal culture, is here particularly difficult, both for the very deep grammatical syntactic, stylistic and structural differences between Portuguese and Chinese languages, either for the lack of correspondent legal concepts<sup>72</sup>.

Turning back to the *Lei*, it replaces the Civil Code's Chinese word, "zhao ji shu" (召集书), used for translating the Portuguese "convocação" (convocation) of the unit owners, with the expression "zhao ji tong zhi" (召集通知) for giving a more specific

<sup>67</sup> See *Lei da Administração dos Condomínios*, chap. I - *Disposições Gerais*, art. 1-4.

<sup>68</sup> See *Lei da Administração dos Condomínios*, chap. II - *Assembleia geral do condomínio*, art. 5-15.

<sup>69</sup> See *Lei da Administração dos Condomínios*, chap. III - *Administração*, art. 16-22.

<sup>70</sup> See *Lei da Administração dos Condomínios*, chap. IV - *Actividades da administração*, art. 23-32.

<sup>71</sup> See *Lei da Administração dos Condomínios*, chap. V - *Regime de administração complexa*, art. 33-45.

<sup>72</sup> See Salvatore Casabona, *The law of Macau and its language: a glance at the real "masters of law"*, 4 TCLR 225 (2012).

connotation to the new way of convocation by “electronic means”<sup>73</sup>.

Similarly, it happens with Portuguese version of the *Lei* that registers some linguistic changes in respect to the current Civil Code, justified by the drafter with the willingness to ameliorate the clarity and precision of the legal text: it is the case, for example of the replacement (in the art. 4, n. 3 of the *Lei* and in the art. 1332 Civil Code) of the term “*despesas*” with the term “*encargos*”. Semantic broadness of the second one is considered more appropriate for indicating owners’ obligation could be not only of financial nature.

### 5.1 The enhancing of owner’s participation and the governance simplification

On the perspective of the condominium *governance* some news are coherent with the empowerment of the right to/duty of participation at the condominium management.

From the right of each owner to convoke the first general meeting (art. 5, n. 1)<sup>74</sup>, to the new instrument of the vote by mail (art. 7)<sup>75</sup> and to reduction of the legal number for a legitimate convocation and deliberation of assembly (art. 8, n. 3; 9, n.

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<sup>73</sup> See *Lei da Administração dos Condomínios*, art. 6 (art. 1345 Code Civil – Convocação), n. 4: “A convocatória pode ainda ser feita por outras vias, designadamente a electrónica, quando o condómino interessado o solicitar à administração, mediante a disponibilização do respectivo endereço”.

<sup>74</sup> See *Lei da Administração dos Condomínios*, art. 5 (art. 1344 Code Civil – Reuniões), n. 1: “Qualquer condómino pode convocar a primeira reunião do condomínio”. See *Nota justificativa*, n. 14: “(...) dissipando dúvidas que nesta matéria se levantam, nomeadamente quanto o quórum necessário para o efeito. Simultaneamente, pretendeu-se incentivar os condóminos a que, por sua iniciativa, promovam o quanto antes a realização da primeira reunião da assembleia, não deixando, como tante vezes acontece, ao critério do administrador de facto ou do promotor empreendimento o momento da sua convocação, apesar de o actual n. 1 do artigo 1344 do Código Civil estabelecer claramente que esta entidade s devem convocar a primeira reunião de assembleia geral do condomínio para determinados fins (...), norma que, sendo mantida no n. 2 do artigo 5 do Projecto, assume uma posição secundária sujeita às sanções para que remete o n. 3 do preceito; importa destacar que a primeira reunião do condomínio não se considera convocada quando nela não se proceda à escolha da primeira administração”. Similarly it is provided by Provisions of Shanghai Municipality on Residential Property Management, 2010-2011, art. 11: “In property management, the property owner is entitled not only to the rights as provided in the Property Law of the People’s Republic of China and the Regulations on Property Management of the State Council, but also the right to propose the convening of the inaugural meeting of the property owners’ congress”.

<sup>75</sup> See *Lei da Administração dos Condomínios*, art. 7 (voto por correspondência): “1. O condómino que o desejar pode substituir o voto presencial pelo voto por correspondência. 2. O condómino que opte por esta modalidade indica o seu sentido de voto, em documento que inclui a proposta de deliberação, devidamente datado e assinado, acompanhado pelo respectivo documento de identificação, e endereçado à administração do condomínio por via postal registada com aviso de recepção. 3. Só são aceites os votos por correspondência enviados por carta registada e recebidos até ao dia da realização da assembleia geral do condomínio. 4. O voto por correspondência só pode manifestar o acordo ou desacordo relativamente aos assuntos indicados na ordem de trabalhos, sob pena de nulidade”. Nevertheless I wonder why it was not provided the possibility of expressing vote by electronic mail. See at this regards the opinion of Duarte Santos, *supra* nota 21, at 191, with reference to the possibilities offered by the *Lei* 8 agosto, n.5/2005, *Regime jurídico dos documentos e assinaturas electrónicas*.

1 and 24, n. 1)<sup>76</sup>, the intent of the legislator in enriching, strengthening and fostering participation, as much as possible, is indisputable.

At this regards it seems particularly efficacy the choice to reduce quorum for the validity of assembly: the norm in fact is of relevance not only for its positive implications in terms of assembly's working (specially in condo's huge realities)<sup>77</sup>, but also for its crucial value in terms of protection of individuals rights<sup>78</sup>.

Usually, relationship between the single and the group in decision making, in our case between unit owner and all others, has been seen through the focus of the necessary *guarantee of the dissenting minority*.

In my opinion, notably in the condominium, *the protection of individual from unconcerned inaction of others* should be also taken in serious consideration: to be honest, in fact, the prevarications can be resulted by the action of a pushing and powerful majority, as well as by *lazy and unconcern inaction* of other owners.

It is interesting observing how other legal systems face up these kind of matters: so that, for example, in Spain, votes of those absent unit owners, regularly convoked, who have not formally communicated their dissent to a certain proposal, are accounted as favourable to the same proposal<sup>79</sup>; a more drastic solution is adopted in France where not only is *not* provided a minimum number of present unit owners for having a valid constitution of assembly, but also those assembly's decisions about ordinary matters (like ordinary expenses for building's maintenance or for guaranteeing the easy access to the building to handicapped people, and so

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<sup>76</sup> See *Lei da Administração dos Condóminos*, art. 8 (art. 1347 Civil Code - Funcionamento), n. 3: "Tratando-se de assembleia convocada para aprovação do regulamento inicial do condomínio, sendo este obrigatório, ou para aprovação das contas e do projecto de orçamento anuais, a assembleia pode deliberar sobre esses assuntos, por uma maioria de condóminos que represente pelo menos cinco por cento do valor total do condomínio"; art. 9 (art. 1348 Civil Code - Deliberações que exigem unanimidade) n. 1: "As deliberações cuja aprovação exige a unanimidade dos condóminos consideram-se igualmente aprovadas se receberem o voto favorável da totalidade dos condóminos votantes, desde que estes representem, pelo menos, dois terços do valor total do condomínio e vierem a ser aprovadas por todos os condóminos ausentes, nos termos dos números seguintes"; art. 24 (art. 1334 Civil Code - Inovações), n. 1: "As obras nas partes comuns que constituam inovações dependem da autorização da assembleia geral do condomínio, aprovada por um número de condóminos que represente, pelo menos, dois terços do valor total do condomínio".

<sup>77</sup> See *Nota justificativa*, n. 19: "(...) o quórum participativo, revela-se desadequado relativamente à realidade local, provocando enormes entraves à realização das reuniões, mesmo quando convocadas em segunda convocação, pois o quórum de vinte e cinco por cento exigido para esta é difícil de ser atingido, sobretudo naqueles condomínios de maior dimensão, cujos proprietários são pessoas de fora de Macau ou grupos de investimento que pretendem apenas retirar lucro do seu investimento que pretendem apenas retirar lucro de seu investimento imobiliário".

<sup>78</sup> Raffaele Caterina, *Il condominio: problemi e modelli nelle esperienze giuridiche europee*, 5 ARCH. LOC. COND. 449, 450 (2007).

<sup>79</sup> Ley 21 July 1960, n. 49 (revised edition), *Legislación Básica de Comunidades de Propietarios*, art. 17, n. 1, IV co.: "A los efectos establecidos en los párrafos anteriores de esta norma, se computarán como votos favorables los de aquellos propietarios ausentes de la Junta, debidamente citados, quienes una vez informados del acuerdo adoptado por los presentes, conforme al procedimiento establecido en el artículo 9, no manifiesten su discrepancia por comunicación a quien ejerza las funciones de secretario de la comunidad en el plazo de 30 días naturales, por cualquier medio que permita tener constancia de la recepción".

forth) are taken with the simple majority of the present unit owners at the meeting<sup>80</sup>.

In addition to this, the *Lei* does not provide anymore the second convocation of owners' congress in the case that the quorum in the first convoked meeting is not been reached: notwithstanding this rule does still exist in some legal systems<sup>81</sup>, it appears in somewhat out dated, often stigmatized by scholars as unreasonable<sup>82</sup>, and continuously subjected to elusive praxis, more or less tolerated by the judiciary<sup>83</sup>.

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<sup>80</sup> French Loi 10 July 1965 n°65-557, *fixant le statut de la copropriété des immeubles bâtis* (consolidated version 2009), art. 24: "Les décisions de l'assemblée générale sont prises à la majorité des voix exprimées des copropriétaires présents ou représentés, s'il n'en est autrement ordonné par la loi. Les travaux d'accessibilité aux personnes handicapées ou à mobilité réduite, sous réserve qu'ils n'affectent pas la structure de l'immeuble ou ses éléments d'équipement essentiels, sont approuvés dans les conditions de majorité prévues au premier alinéa. Est adoptée à la même majorité l'autorisation donnée à certains copropriétaires d'effectuer, à leurs frais, des travaux d'accessibilité aux personnes handicapées ou à mobilité réduite qui affectent les parties communes ou l'aspect extérieur de l'immeuble et conformes à la destination de celui-ci, sous réserve que ces travaux n'affectent pas la structure de l'immeuble ou ses éléments d'équipement essentiels. Lorsque le règlement de copropriété met à la charge de certains copropriétaires seulement les dépenses d'entretien d'une partie de l'immeuble ou celles d'entretien et de fonctionnement d'un élément d'équipement, il peut être prévu par ledit règlement que ces copropriétaires seuls prennent part au vote sur les décisions qui concernent ces dépenses. Chacun d'eux vote avec un nombre de voix proportionnel à sa participation auxdites dépenses". See also art. 24-1, 24-2, 24-3. Limits at the mentioned rule are instead imposed by art. 25, which provides a stronger majority for certain decisions: "Ne sont adoptées qu'à la majorité des voix de tous les copropriétaires les décisions concernant: a) Toute délégation du pouvoir de prendre l'une des décisions visées à l'Article 24; b) L'autorisation donnée à certains copropriétaires d'effectuer à leurs frais des travaux affectant les parties communes ou l'aspect extérieur de l'immeuble, et conformes à la destination de celui-ci; c) La désignation ou la révocation du ou des syndics et des membres du conseil syndical; d) Les conditions auxquelles sont réalisés les actes de disposition sur les parties communes ou sur des droits accessoires à ces parties communes, lorsque ces actes résultent d'obligations légales ou réglementaires telles que celles relatives à l'établissement de cours communes, d'autres servitudes ou à la cession de droits de mitoyenneté; e) Les modalités de réalisation et d'exécution des travaux rendus obligatoires en vertu de dispositions législatives ou réglementaires; f) La modification de la répartition des charges visées à l'alinéa 1er de l'Article 10 ci-dessus rendue nécessaire par un changement de l'usage d'une ou plusieurs parties privatives; g) A moins qu'ils ne relèvent de la majorité prévue par l'Article 24, les travaux d'économie d'énergie portant sur l'isolation thermique du bâtiment, le renouvellement de l'air, le système de chauffage et la production d'eau chaude".

<sup>81</sup> See for example Spanish Ley 21 July 1960, n. 49 (revised edition), *Legislación Básica de Comunidades de Propietarios*, art. 16, n. 2; the Italian Civil Code, art. 1136; Swiss Civil Code, art. 712p; the Belgium Civil Code, art. 577-6, par. 3.

<sup>82</sup> JACINTO DUARTE, *PROPRIEDADE HORIZONTAL*, 85 (Faro ed., 1990): "Sucede, frequentemente, que na primeira convocação, não comparecem condôminos suficientes para que a assembleia possa funcionar. (...) Normalmente à primeira reunião, comparecem sempre os mesmos, os que tem a verdadeira noção de dever, do colectivo, os escrupulosos e cumpridores. (...) O legislador português ainda se não convenceu de que tempo é dinheiro e preferiu sacrificar os condôminos cumpridores aos desinteressados e negligentes".

<sup>83</sup> Duarte Santos, *supra* note 21, at 192: "Porem, é vulgar assistirmos à marcação da segunda reunião para uma hora depois da hora prevista para primeira convocatória. Esta pratica suscita duvidas em alguma doutrina quanto a sua legalidade. De facto, não se verifica uma separação entre as duas reuniões, ao mesmo tempo que os condôminos que não puderam participar na primeira hora dificilmente conseguem estar presentes na segunda".

Thus the choice of the drafter to modify Macanese Civil Code<sup>84</sup> appears aligned with the "mood" of the condominium experts and with the daily practice of management.

Finally, coherent with this intent of extending and making stronger the participation, important news were introduced in the field of the representation: beside the possibility to recognize representative power to the tenant (in case of expressed provision in the tenancy contract)<sup>85</sup>, the same is admitted for the prospective purchaser and for usufructuary<sup>86</sup>.

## 5.2 The Macanese *pragmatic* approach to the international debate on condo's juristic personality.

The Macanese drafter, despite some previous favourable positions among scholars<sup>87</sup> and maybe still influenced by the Portuguese heritage<sup>88</sup>, has decided of coping with regulatory dilemma of the juristic personality of unit owners' association in a *pragmatic and functionalistic* way.

It was merely chosen to endow the condominium "*administração*" with some designed rights and duties<sup>89</sup>: notably allowing it to open bank accounts and to

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<sup>84</sup> See art. 1347 Macanese Civil Code (*Funcionamento*), n. 3: "*Se, passada uma hora, da marcada, não comparecer o número de condóminos suficiente para se obter vencimento e na convocatória não tiver sido desde logo fixada outra data, considera-se convocada nova reunião para igual dia da semana seguinte, no mesmo local e à mesma hora, podendo neste caso a assembleia, salvo quando a lei exija de modo especificado uma determinada maioria legal, deliberar por maioria dos votos dos condóminos presentes, desde que estes representem, pelo menos, um quarto do valor total do condomínio*". Similarly in Portuguese Civil Code, art 1432, n. 4 (*Convocação e funcionamento da assembleia*): "*Se não comparecer o número de condóminos suficiente para se obter vencimento e na convocatória não tiver sido desde logo fixada outra data, considera-se convocada nova reunião para uma semana depois, na mesma hora e local, podendo neste caso a assembleia deliberar por maioria de votos dos condóminos presentes, desde que estes representem, pelo menos, um quarto do valor total do prédio*".

<sup>85</sup> See *Lei da Administração dos Condomínios*, art. 11 (art. 1346 Civil Code – Representação), n. 2: "*Quando no contrato de arrendamento exista uma cláusula de representação, o arrendatário pode actuar na qualidade de representante, bastando a apresentação de cláusula do contrato*".

<sup>86</sup> See *Lei da Administração dos Condomínios*, art. 11 (art. 1346 Civil Code – Representação), n. 3: "*Na falta de convenção em contrário, o usufrutuário e promitente-comprador com tradição da fracção presumem-se representantes na assembleia*".

<sup>87</sup> Tong Io Cheng, *Autonomia privada e intervenção do poder publico na administração do condomínio*, 29 BFDUM 197, 202 (2010): "*A pratica mostra-nos que a consideração da "associação composta pelos condóminos" como uma pessoa colectiva será de grande conveniência, resolvendo uma série de problemas teóricos. A constituição de relações jurídicas de "associação composta pelos condóminos" com o exterior é inevitável (...). Se não atribuição de personalidade jurídica e, ao mesmo tempo, a possibilita de participar em determinados negócios jurídicos ou a possibilidade de ser parte no processo judicial constitui um contra-senso. Pois, os interesses desses assuntos nos final tem que ter um destino, e se o destino fosse cada um dos condóminos, deve-se especificar como é que a "associação", ou o respectivo representante, representa cada um dos condóminos e qual é o papel da noção desta "associação"; see also Duarte Santos, *supra* nota 21, at 188.*

<sup>88</sup> See in Portuguese case law Acórdão da Relação de Lisboa, 27,04.1989, in *Colect. Jur.* 1989, t.2, p. 151: "*A assembleia de condóminos nao dispõe de personalidade e de capacidade judiciais*"; and Acórdão da Relação de Coimbra, 20.02.2001, in *Colectanea de Jurisprudencia*, 2001, Tomo I, p. 40: "*1. A lei do Apoio Judiciario exclui a possibilidade de concessão do apoio judiciário às entidades, como o condomínio, que não disponham de personalidade jurídica (...)*".

<sup>89</sup> See *Nota justificativa*, n. 12: "*Em causa esteve opção de conferir poderes as condomínio para a pratica de actos jurídicos que estão tradicionalmente associados à personalidade jurídica. Foram consideradas diversas hipóteses, incluído a atribuição da personalidade jurídica ao condomínio ou criação de associações de condóminos com poderes para a sua administração, mas no final, tomando em consideração razões de ordem pratica e de coerência do sistema jurídico, optou-se manter a via tradicional de atribuir poderes à administração do condomínio para praticar certos actos em nome dos condóminos*".

stipulate contracts for providing services, and recognizing the *locus standi* for the protection of the interest of condominium against third parties and the unit owners as well<sup>90</sup>.

Beside this, it is imposed to each condominium to have an own name – followed by the specification of “*Ente dos Condóminos*” – for fostering in this way its identification<sup>91</sup>.

This solution, that reminds in somehow the approach implemented by the Shanghai Property Management Regulation<sup>92</sup>, shows, once again, that the development of the Macanese legal system, as well maybe in China<sup>93</sup>, does tend to be less influenced by dogma than by concrete and easy expedencies for dealing with daily matters of administration and management of multi-storey building.

### 5.3 The compliance with financial obligation: one question with plurality of answers

Compliance with financial obligations for the maintenance of common parts and common facilities<sup>94</sup> is perhaps the real keystone of condominium as social phenomenon, as legal institute, and as economic reality.

Without any doubts, arrear contributions show their negative effects on daily management of the building, leading to its deterioration; on relationship with third parties (notably suppliers of services and goods) for late in credits’ payments; and on internal social relationship among unit owners, triggering *free riding* phenomenon that heavily compromises fairness and cooperation inside the unit owners’ community.

Three main situations have to be faced by the regulators: the case of unwillingness, and unreasonable refuse as well, in giving contributions due; the financial inability to contribute; protection of the owners’ association from financially suffering in case of transfer of unit.

Regulatory panorama in coping with these problems is highly diversified and articulated.

Some countries have decided to intervene in the same civil procedure rules

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<sup>90</sup> See *Lei da Administração dos Condóminos*, art. 18 - *Actos praticados em representação dos condóminos*: “1. Na execução das funções que lhe competem, ou quando autorizada pela assembleia, a administração pode agir em nome de todos os condóminos e utilizar a designação referida no artigo 5.º para a prática dos seguintes actos: 1) Abrir contas bancárias; 2) Celebrar os contratos de trabalho ou de prestação de serviços; 3) Agir em juízo, quer contra qualquer dos condóminos, quer contra terceiro; 4) Ser demandada nas acções respeitantes às partes comuns do condomínio. 2. Estão excluídas do âmbito de aplicação das alíneas 3) e 4) do número anterior as acções relativas a questões de propriedade ou posse dos bens comuns, salvo se a assembleia atribuir para o efeito poder especiais à administração”.

<sup>91</sup> See *Lei da Administração dos Condóminos*, art. 5 – *Reuniões*, n. 4.2: “Fixação de uma designação a ser utilizada pela administração quando esta age em nome de todos os condóminos, devendo a dita designação incluir o nome do prédio e a expressão “*Ente dos Condóminos*”.

<sup>92</sup> Where, for example, it is possible finding dispositions that allow the property owners’ committee to sign the property service contract *on behalf* of the community owners with an enterprise selected by the property owners’ congress. See Provisions of Shanghai Municipality on Residential Property Management, art. 19.

<sup>93</sup> About the Chinese “pragmatic sense” in dealing with legal issues, see also Gabriele Crespi Reghizzi, *Cina 2003: l’osservatorio del giurista*, *Mondo Cin.* 117 (2004).

<sup>94</sup> For all see Cornie Van der Merwe, Luis Muniz-Arguelles, *Enforcement of financial obligations in a condominium or apartment ownership scheme*, 16 *DUKE J. COMP. & INT’L. L.* 125 (2006).

introducing special summary proceedings (simpler and faster than ordinary one) designed for the peculiar case of recovering of condo's late payment: for example in Italy, and in Spain as well, the decree of the summary proceeding is "immediately enforceable"<sup>95</sup>, without waiting for the sentence in case of a judiciary opposition by the owner.

This "procedural approach" has sometimes completed with specific rules regarding responsibility of the defaulting owner also for recovery expenses of condominium credits<sup>96</sup> and with deprivation of his/her right to vote in general assemblies<sup>97</sup>.

Of a certain interest are those mechanisms dealing with phenomenon of *free riding*, levering on possibility to enjoy the condominium services, like gas, water or electricity.

The Slovenian legislation, for example, provides that if the management organization is not able to pay the bill for common services for arrear contributions, it is allowed to furnish to companies who supply general services the list of defaulting owners for the judiciary recovery of the sums<sup>98</sup>.

To same token, and not without sensible profiles of fundamental rights protection, it is the cutting off of water, of gas and of electricity as well, which serves the single unit in case of late payments<sup>99</sup>.

A pretty common statutory technique used to protect the condominium association by the financial inability of the apartment owners is the creation of automatic security rights (lien, hypothec, and so forth) on movable or immovable without the necessity of a court order.

In France, for example, the registration of a hypothec on the apartment for not

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<sup>95</sup> See art. 633 et seq. Italian Civil Procedure Code and Spanish Ley 21 July 1960, n. 49 (revised edition), *Legislación Básica de Comunidades de Propietarios*, art. 21, n. 6.

<sup>96</sup> See for example Ley 21 July 1960, n. 49 (revised edition), *Legislación Básica de Comunidades de Propietarios*, art. 21, n. 6: "*Cuando en la solicitud inicial del proceso monitorio se utilizaren los servicios profesionales de abogado y procurador para reclamar las cantidades debidas a la Comunidad, el deudor deberá pagar, con sujeción en todo caso a los límites establecidos en el apartado tercero del artículo 394 de la Ley de Enjuiciamiento Civil, los honorarios y derechos que devenguen ambos por su intervención, tanto si aquél atendiere el requerimiento de pago como si no compareciere ante el tribunal. En los casos en que exista oposición, se seguirán las reglas generales en materia de costas, aunque si el acreedor obtuviere una sentencia totalmente favorable a su pretensión, se deberán incluir en ellas los honorarios del abogado y los derechos del procurador derivados de su intervención, aunque no hubiera sido preceptiva*".

<sup>97</sup> See, for example, Ley 21 July 1960, n. 49 (revised edition), *Legislación Básica de Comunidades de Propietarios*, art. 15, n.2: "*Los propietarios que en el momento de iniciarse la Junta no se encontrasen al corriente en el pago de todas las deudas vencidas con la comunidad y no hubiesen impugnado judicialmente las mismas o procedido a la consignación judicial o notarial de la suma adeudada, podrán participar en sus deliberaciones si bien no tendrán derecho de voto (...)*"; see also Hungarian Condominium Law (A TÁRSASHÁZ SZERVEZETE), 1 January 2005, art. 30(2). For a general overview about condominium law in East Europe Countries, see Christopher Banks, Sheila O'Leary and Carol Rabenhorst, *Privatized housing and the development of condominium in central and eastern Europe: the cases of Poland, Hungary, Slovakia, and Romania*, 8 RURDS 137 (1996).

<sup>98</sup> See Slovenian Housing Law (STANOVANJSKI ZAKON - NEURADNO PRE IS ENO BESEDILO), art. 68.

<sup>99</sup> At this regards, see Cornie Van der Merwe, L. Muniz-Arguelles, *supra* nota 94, at 134-135.



paid contributions needs only an unfruitful notice of default to the unit owner<sup>100</sup>. Similarly it is provided for the lien on movable property of the unit owner<sup>101</sup> and also for the lien on outstanding rent<sup>102</sup>.

To make the picture more complete, failing to pay contributions for the maintenance of common parts and common facilities is considered in some countries a so serious breach of unit owner's duties that the assembly is allowed to deliberate about the compulsory transfer of apartment encumbered by debts<sup>103</sup>.

Having said that, it seems appropriate maintaining that the Macanese reform appears in the "middle of way", in somehow incomplete and to some extent maimed.

The focus of the drafter has been turned only to safeguard the claims for outstanding debts on transfer of unit, disregarding the first two relevant situations.

The new provision of art. 4, n. 7 of the Lei<sup>104</sup> establishes in fact that in case of transfer of unit, the seller has to do a formal declaration in the conveyance deed about the absence or not of outstanding condominium debts. In the case of incorrectness or, worst, of falsity of the declaration, there will be a civil liability for the declarer and the purchaser will have action against the seller for the recovery of

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<sup>100</sup> French Loi 10 July 1965 n°65-557, *fixant le statut de la copropriété des immeubles bâtis* (consolidated version 2009), art. 19: "Les créances de toute nature du syndicat à l'encontre de chaque copropriétaire sont, qu'il s'agisse de provision ou de paiement définitif, garanties par une hypothèque légale sur son lot. L'hypothèque peut être inscrite soit après mise en demeure restée infructueuse d'avoir à payer une dette devenue exigible, soit dès que le copropriétaire invoque les dispositions de l'Article 33 de la présente loi. Le syndic a qualité pour faire inscrire cette hypothèque au profit du syndicat: il peut valablement en consentir la mainlevée et requérir la radiation, en cas d'extinction de la dette, sans intervention de l'assemblée générale (...)"

<sup>101</sup> French Loi 10 July 1965 n°65-557, *fixant le statut de la copropriété des immeubles bâtis* (consolidated version 2009), art. 19-1: "L'obligation de participer aux charges et aux travaux mentionnés aux Articles 10 et 30 est garantie par le privilège immobilier spécial prévu par l'Article 2374 du code civil".

<sup>102</sup> French Loi 10 July 1965 n°65-557, *fixant le statut de la copropriété des immeubles bâtis* (consolidated version 2009), art. 19-2.

<sup>103</sup> See German Housing Law, Gesetz über das Wohnungseigentum und das Dauerwohnrecht (Wohnungseigentumsgesetz), art. 18 - Entziehung des Wohnungseigentums: "(1) Hat ein Wohnungseigentümer sich einer so schweren Verletzung der ihm gegenüber anderen Wohnungseigentümern obliegenden Verpflichtungen schuldig gemacht, daß diesen die Fortsetzung der Gemeinschaft mit ihm nicht mehr zugemutet werden kann, so können die anderen Wohnungseigentümer von ihm die Veräußerung seines Wohnungseigentums verlangen. Die Ausübung des Entziehungsrechts steht der Gemeinschaft der Wohnungseigentümer zu, soweit es sich nicht um eine Gemeinschaft handelt, die nur aus zwei Wohnungseigentümern besteht. (2) Die Voraussetzungen des Absatzes 1 liegen insbesondere vor, wenn 1. (...) 2. der Wohnungseigentümer sich mit der Erfüllung seiner Verpflichtungen zur Lasten- und Kostentragung (...) in Höhe eines Betrags, der drei vom Hundert des Einheitswerts seines Wohnungseigentums übersteigt, länger als drei Monate in Verzug befindet; in diesem Fall steht § 30 der Abgabenordnung einer Mitteilung des Einheitswerts an die Gemeinschaft der Wohnungseigentümer oder, soweit die Gemeinschaft nur aus zwei Wohnungseigentümern besteht, an den anderen Wohnungseigentümer nicht entgegen. (3) Über das Verlangen nach Absatz 1 beschließen die Wohnungseigentümer durch Stimmenmehrheit. Der Beschluß bedarf einer Mehrheit von mehr als der Hälfte der stimmberechtigten Wohnungseigentümer. Die Vorschriften des § 25 Abs. 3, 4 sind in diesem Fall nicht anzuwenden. (4) Der in Absatz 1 bestimmte Anspruch kann durch Vereinbarung der Wohnungseigentümer nicht eingeschränkt oder ausgeschlossen werden".

<sup>104</sup> See Lei da Administração dos Condomínios, art. 4 - Encargos de conservação e fruição: "Quem aliena um fração autónoma tem o dever de declarar no título se a alienação é feita livre de encargos, sob pena de o não cumprimento deste dever ou prestação de informação incorrecta fazerem incorrer o alienante em responsabilidade civil, sem prejuízo de o adquirente, uma vez tramitado o direito, ser responsável pela satisfação dos encargos previstos neste artigo que sejam anteriores ao negócio aquisitivo".

those condo's credits accrued by him/her<sup>105</sup>.

The rule reminds the scholar's debate about "*obligatio propter rem*", approximately translatable with the locution "real obligations": in a broader sense, they are *obligations* because they are duties imposed on a particular person who owns or possesses a thing subject to a real right; they are *real* in the sense that this obligation attaches to a particular thing and it is transferred with it without the need of an express assignment and subrogation.

Indeed, condominium expenses are qualified in some legal systems, like in Italy, obligations "*propter rem*".

The mentioned theoretic construct, not totally alien to the Portuguese legal system<sup>106</sup>, is used by the Italian judiciary in those reasoning which deal with the matter of transferability of contribution's duties and with the consequent problem of the transferee's liability.

However, the category of "real obligations", remaining highly controversial and confusing, risks to create more problems than it can solve as the conflicting Italian sentences on this point can show<sup>107</sup>.

Starting from a factual approach about the problem in itself – how safeguarding the condominium from the arrear contributions of the transferor - comparative analysis reveals other solutions and other mechanisms, that seems to this author more efficient and effective.

In my opinion, in an apartment purchasing operation, the crucial point is the *undisputable certainty* that the purchaser must have about the amount and nature of debt that encumbers the unit<sup>108</sup>.

The self-declaration of the transferor does not seem guaranteeing this certainty and it could be replaced by a deeper involvement either of the notary or of the condominium management.

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<sup>105</sup> See *Nota Justificativa*, n. 13: "(...) com o objectivo de combater a falta de cumprimento das respectivas obrigações por parte dos proprietários, que tantos problemas colocam ao bom funcionamento dos condomínios. Para o efeito, exige-se ao alienante que declare no negocio que transmite a fração livre de encargos ou, correspondendo a verdade, quer porque o alienante omitiu encargos, quer porque não produziu uma declaração exacta, reconhece-se um direito de regresso do adquirente contra o alienante, o qual não deixa, contudo, de ser responsável pelas obrigações não satisfeitas anteriores a sua aquisição".

<sup>106</sup> The Portuguese legal culture, and the case law as well, reveals some traces of the "*obligatio propter rem*": see Pires de Lima, A. Varela, *Código Civil Anotado*, Vol. III, Coimbra, 1987, p. 425: "Na alínea a) (art. 1422) impõem-se aos condóminos não apenas restrições, mas também obrigações de conteúdo positivo (obrigações *propter rem*): lês não podem prejudicar, quer com obras novas, quer por falta de reparação, a segurança, a linha arquitectónica ou o arranjo estético do edifício". In Portuguese case law see *Acórdão da Relação de Lisboa*, 14.12.2004, in *Colectanea de Jurisprudência*, 2004, Tomo V, p. 117: "1. Em relação às obrigações *propter rem* resultantes do estatuto do condomínio urbano é possível distinguir, em casos de transmissão do direito de propriedade sobre a fração, aquelas que continuam a ser da responsabilidade do transmitente e as que se transferem para o adquirente. 2. A ambulatoriedade verifica-se, por exemplo, relativamente às despesas recorrentes da reparação de elevadores".

<sup>107</sup> See *Corte Cassazione*, Sezioni Unite, 8 April 2002, n. 5035; *Corte di Cassazione*, 18 April 2003, n. 6323; *Corte di Cassazione*, 18 August 2005, n. 16975; *Corte di Cassazione*, sez. II, 9 September 2008, n. 23345; *Corte di Cassazione*, sez. II, sentenza 9 November 2009 n. 23686.

<sup>108</sup> Tong Io Cheng, *supra* nota 87, at 212: "De facto, a mais importante utilidade da classificação das despesas de gestão como "obrigações em razão de coisa" consiste na produção de efeitos em relação a terceiros. De acordo com o princípio da autonomia privada, só quando o sujeito tem possibilidade de tomar conhecimento da situação jurídica é que esta produz efeitos em relação a esse sujeito. (...) Assim, a melhor forma de garantir a divulgação desta informação deve ser o notariado".

Particularly in those jurisdictions, which require notarial documents for the transfer (as it happens in Macao), the valorisation of the role of notaries as public officials is crucial.

By way of example, we learn from the Belgian experience that the notary has obliged to ask to condo's management the accounting situation of the unit under the sales agreement. In the case of the management does not answer within 15 days, notary will be under duty to notify to parties the management omission and the purchaser will be on charge for the former debts<sup>109</sup>.

Similar rules can be found in other legal systems: for example, the Spanish

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<sup>109</sup> See Belgian Civil Code, Art. 577-11, par. 1-2: *“Dans la perspective de la cession du droit de propriété d'un lot, le notaire instrumentant, toute personne agissant en tant qu'intermédiaire professionnel ou le cédant, selon le cas, transmet au cessionnaire, avant la signature de la convention ou, le cas échéant, de l'offre d'achat ou de la promesse d'achat, les informations et documents suivants, que le syndic lui communique sur simple demande, dans un délai de quinze jours : 1° le montant du fonds de roulement et du fonds de réserve, au sens du § 5, alinéas 2 et 3; 2° le montant des arriérés éventuels dus par le cédant; 3° la situation des appels de fonds, destinés au fonds de réserve et décidés par l'assemblée générale avant la date certaine du transfert de la propriété; 4° le cas échéant, le relevé des procédures judiciaires en cours relatives à la copropriété; 5° les procès-verbaux des assemblées générales ordinaires et extraordinaires des trois dernières années, ainsi que les décomptes périodiques des charges des deux dernières années; 6° une copie du dernier bilan approuvé par l'assemblée générale de l'association des copropriétaires. A défaut de réponse du syndic dans les quinze jours de la demande, le notaire, toute personne agissant en tant qu'intermédiaire professionnel ou le cédant, selon le cas, avise les parties de la carence de celui-ci. § 2. En cas de cession du droit de propriété d'un lot entre vifs ou pour cause de mort le notaire instrumentant demande au syndic de l'association des copropriétaires, par lettre recommandée à la poste, de lui transmettre les informations et documents suivants : 1° le montant des dépenses de conservation, d'entretien, de réparation et de réfection décidées par l'assemblée générale ou le syndic avant la date certaine du transfert de la propriété mais dont le paiement est demandé par le syndic postérieurement à cette date; 2° un état des appels de fonds approuvés par l'assemblée générale des copropriétaires avant la date certaine du transfert de propriété et le coût des travaux urgents dont le paiement est demandé par le syndic postérieurement à cette date; 3° un état des frais liés à l'acquisition de parties communes, décidés par l'assemblée générale avant la date certaine du transfert de la propriété, mais dont le paiement est demandé par le syndic postérieurement à cette date; 4° un état des dettes certaines dues par l'association des copropriétaires à la suite de litiges nés avant la date certaine du transfert de la propriété, mais dont le paiement est demandé par le syndic postérieurement à cette date. Les documents énumérés au § 1er sont demandés par le notaire au syndic de la même manière s'ils ne sont pas encore en la possession du copropriétaire entrant. Le notaire transmet ensuite les documents au cessionnaire. A défaut de réponse du syndic dans les trente jours de la demande, le notaire avise les parties de la carence de celui-ci. Sans préjudice de conventions contraires entre parties concernant la contribution à la dette, le copropriétaire entrant supporte le montant des dettes mentionnées à l'alinéa 1er, 1°, 2°, 3° et 4°. Les charges ordinaires sont supportées par le copropriétaire entrant à partir du jour où il a joui effectivement des parties communes. Toutefois, en cas de cession du droit de propriété, le cessionnaire est tenu de payer les charges extraordinaires et les appels de fonds décidés par l'assemblée générale des copropriétaires, si celle-ci a eu lieu entre la conclusion de la convention et la passation de l'acte authentique et s'il disposait d'une procuration pour y assister.”*

legislation<sup>110</sup> impedes the purchasing as long as the transferor does not obtain by the condominium management a formal certification that states that all contributions due have been paid.

Only if the transferee expressly exempt the notary for including this certificate in the deed, it will be possible concluding the agreement of purchase and sale: however in this case the purchaser will be liable for all debts encumbered under the former proprietor.

In France, in the absence of the certificate about the outstanding debts<sup>111</sup>, notary is obliged to notify the conveyance to the *syndic* (management), who can fill an opposition to the purchase agreement as long as debts towards the condo will not be paid<sup>112</sup>.

The necessary and compulsory *dialogue* among seller, management and

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<sup>110</sup> See Spanish Ley 21 July 1960, n. 49 (emended), *Legislación Básica de Comunidades de Propietarios*, art. 9, lett. e: "(...) El adquirente de una vivienda o local en régimen de propiedad horizontal, incluso con título inscrito en el Registro de la Propiedad, responde con el propio inmueble adquirido de las cantidades adeudadas a la comunidad de propietarios para el sostenimiento de los gastos generales por los anteriores titulares hasta el límite de los que resulten imputables a la parte vencida de la anualidad en la cual tenga lugar la adquisición y al año natural inmediatamente anterior. El piso o local estará legalmente afecto al cumplimiento de esta obligación. En el instrumento público mediante el que se transmita, por cualquier título, la vivienda o local el transmitente deberá declarar hallarse al corriente en el pago de los gastos generales de la comunidad de propietarios o expresar los que adeude. El transmitente deberá aportar en este momento certificación sobre el estado de deudas con la comunidad coincidente con su declaración, sin la cual no podrá autorizarse el otorgamiento del documento público, salvo que fuese expresamente exonerado de esta obligación por el adquirente. La certificación será emitida en el plazo máximo de siete días naturales desde su solicitud por quien ejerza las funciones de Secretario, con el visto bueno del Presidente, quienes responderán, en caso de culpa o negligencia, de la exactitud de los datos consignados en la misma y de los perjuicios causados por el retraso en su emisión".

<sup>111</sup> The information of the certificate are listed in Décret, 17 March 1967, n. 67-223, (revised edition 25 May 2008) *pris pour l'application de la loi n° 65-557 du 10 juillet 1965 fixant le statut de la copropriété des immeubles bâtis*, art. 5: « Le syndic, avant l'établissement de l'un des actes mentionnés à l'Article 4, adresse au notaire chargé de recevoir l'acte, à la demande de ce dernier ou à celle du copropriétaire qui transfère tout ou partie de ses droits sur le lot, un état daté comportant trois parties. 1° Dans la première partie, le syndic indique, d'une manière même approximative et sous réserve de l'apurement des comptes, les sommes pouvant rester dues, pour le lot considéré, au syndicat par le copropriétaire cédant, au titre: a) Des provisions exigibles du budget prévisionnel; b) Des provisions exigibles des dépenses non comprises dans le budget prévisionnel; c) Des charges impayées sur les exercices antérieurs; (...). Ces indications sont communiquées par le syndic au notaire ou au propriétaire cédant, à charge pour eux de les porter à la connaissance, le cas échéant, des créanciers inscrits. 2° Dans la deuxième partie, le syndic indique, d'une manière même approximative et sous réserve de l'apurement des comptes, les sommes dont le syndicat pourrait être débiteur, pour le lot considéré, à l'égard du copropriétaire cédant, (...). 3° Dans la troisième partie, le syndic indique les sommes qui devraient incomber au nouveau copropriétaire, pour le lot considéré, (...) »

<sup>112</sup> See French Loi 10 July 1965, n. 65 (revised edition) *fixant le statut de la copropriété des immeubles bâtis*, art. 20: "Lors de la mutation à titre onéreux d'un lot, et si le vendeur n'a pas présenté au notaire un certificat du syndic ayant moins d'un mois de date, attestant qu'il est libre de toute obligation à l'égard du syndicat, avis de la mutation doit être donné par le notaire au syndic de l'immeuble par lettre recommandée avec avis de réception dans un délai de quinze jours à compter de la date du transfert de propriété. Avant l'expiration d'un délai de quinze jours à compter de la réception de cet avis, le syndic peut former au domicile élu, par acte extrajudiciaire, opposition au versement des fonds dans la limite ci-après pour obtenir le paiement des sommes restant dues par l'ancien propriétaire. Cette opposition contient élection de domicile dans le ressort du tribunal de grande instance de la situation de l'immeuble et, à peine de nullité, énonce le montant et les causes de la créance. Les effets de l'opposition sont limités au mon- tant ainsi énoncé. Tout paiement ou transfert amiable ou judiciaire du prix opéré en violation des dispositions de l'alinéa précédent est inopposable au syndic ayant régulièrement fait opposition. L'opposition régulière vaut au profit du syndicat mise en oeuvre du privilège mentionné à l'Article 19-1 .

notary in dealing with the condominium debts not cleared by the seller<sup>113</sup> seems in a comparative perspective more efficacious than a simple self declaration of the transferor (as that one provided by the Macanese *Lei*) at least for three main reasons.

First of all, mentioned mechanisms impose a system of shared responsibility among two important actors: notary, in his/her quality of public official and management of condominium. The first one, being involved in the deed's draft, will care to ask and obtain a formal certification about arrears from condominium; the second one will be continuously called (even if indirectly, delivering the accounting certificate regarding the seller) to give evidences about the rigour and precision of its work.

Secondly, the full awareness of transferee about the arrear contributions (obtained by a formal certification), together with full responsibility of purchaser for the payments accrued on the default of his predecessor, become two combined elements that could significantly affect the assessment of the convenience of the deal.

In this way, a unit owner will pay much more attention in failing to make the due payments, because the debt for condominium expenses could seriously compromise the economic value of the apartment in the real estate market.

Finally, the necessary involvement of notaries and management organizations could limit the judiciary proceedings only to the residual hypothesis of a false or omitted certification: the mere right (provided by the Macanese reform) to recourse against the former proprietor for the false declaration not only it would run the risk to waste time for the physiological period necessary for a judgment but also it would incur the uncertainty of a legal proceeding.

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## 6. THE EMBEDDED POWER OF THE DEVELOPERS AND THE (IN)CONCLUSIVE ANSWER OF THE MACANESE REFORM

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The Macanese reality presents a peculiar situation, that shares in common with other similar contexts<sup>114</sup>, in which the same developers who carried out the project of construction are most of the times, directly or indirectly, the same subjects who deal with the management of the building<sup>115</sup> and with the selling of the units.

This relational concatenation, considered the raising of the judiciary cases, is often realized by illegitimate behaviours consisting in imposing a *de facto*

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<sup>113</sup> At this regards see also Dutch model, see Netherland Civil Code, Book 5 - Rights in rem, art. 122, n. 2-5: "2. After transmission or apportionment, the acquirer must give written notice to the association of owners of his acquisition without delay; 3. The acquirer and the former apartment owner are jointly and severally liable for the contributions due in respect of the acquired thing and which have or will become payable on demand in the current or preceding financial year; 4. The by-laws may determine the extent to which the former owner or only the acquirer will be liable for contributions mentioned in preceding paragraph. They may also provide that the former apartment owner instead of the acquirer shall be liable for certain contributions which become payable on demand at a later date; 5. The notary shall ensure that a declaration shall be appended to the instrument of transfer or apportionment issued by the management of the association of owners, which as regards the contributions mentioned in par 3 for which the acquirer will be liable, shall contain a statement of what is due to the association by the apartment owner involved on the date of transfer or apportionment. The acquirer shall not be liable towards the association for more than the amount that appears from such statement".

<sup>114</sup> SARAH BLANDY ET AL., *MULTI-OWNED HOUSING*, 109 (Ashagate 2010).

<sup>115</sup> See Tribunal de Segunda Instancia da R.A.E.M., 6 October 2011, case n. 537/2009.

management ("*Administrador de facto*")<sup>116</sup> procrastinating indefinitely the first general congress in which the building's administration is legitimately appointed by the apartments' owners<sup>117</sup>; by imposing at moment of selling a certain management enterprise as *conditio sine qua non* of the sales agreement<sup>118</sup>; or even by continuing to manage the building after that the owners' congress has formally appointed a other management enterprise<sup>119</sup>.

Having said that, developers or managing agents, in Macao as well as in Mainland<sup>120</sup>, exercise a pervasive control over the site, managing freely their annual

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<sup>116</sup> See Tribunal de Segunda Instancia da R.A.E.M., 21 January 2010, case n. 741/2009. Chou Kam Chon, *Algumas Reflexões sobre a Alteração só Sistema de Gestão do Condomínio*, 29 BFDUM 175, 179 (2010): "Por um lado, a empresa gestora entende que como contribuíram durante muito anos para o prédio, e nunca ninguém se interessou pelo seu trabalho, cumpriram os seus deveres mas ainda da uma grande parte dos encargos por cobrir, recusam-se a abandonar a administração do prédio. Por outro lado, os proprietários querem "tomar conta da sua própria casa" o como o administrador de facto é um terceiro, eles tem o direito de exigir o direito de gestão de volta".

<sup>117</sup> Chou Kam Chon, *supra* nota 116, at 176.

<sup>118</sup> Duarte Santos, *supra* nota 21, at 194-195: "O principal problema, neste domínio, prende-se com exercício da administração por terceiro, normalmente uma empresa de gestão de condomínios. Na verdade, estas empresas tendem a eternizar-se no cargo, ignorando olímpicamente a vontade dos condóminos. Para o efeito, recorrem a diversos estratagemas: impõem a celebração de escrituras de compra e venda das frações em notários da sua preferência, não dando espaço ao comprador para fazer a sua escolha, sob pena de não se realizar o negocio; no acto de celebração da escritura de compra e venda exigem ao comprador que assine uma declaração de em que reconheça a empresa como legítima administradora do condomínio, a que acresce a exigência de um depósito ao comprador (...) para garantir não se sabe muito o que, sob pena de não celebração da escritura; para se perpetuam na gestão de condomínios rentáveis, evitam a todo o custo a reunião de assembleia do condomínio e a eleição e uma nova administração, chegando o ponto, no caso disso ocorrer, de não reconhecer a nova administração, mantendo-se no cargo com evidente prejuízo para todos os condóminos. A somar a tudo isto, é vulgar a não apresentação de contas, a não disponibilização de documentos relativos ao condomínio e a fixação arbitrária do valor a pagar pelos condóminos a título de despesas. E caso os condóminos recusem pagar as suas prestações e ajam judicialmente contra o administrador usurpador, este retalia muitos vezes com medidas terroristas que vão do impedimento de utilização dos espaços comuns ao barramento do acesso ao lugares de estacionamento".

<sup>119</sup> See Tribunal de Segunda Instancia da R.A.E.M., 1 February 2007, case n. 539/2006, *Companhia de Gestão de Propriedade A, Limitada v. Comissão Executiva da Assembleia Geral do Edifício B*, p. 19: "(...) continuava a exercer (ainda que deficientemente) a gestão das partes comuns, acarretava para os condóminos e para a Recorrida graves prejuízos, não só porque põe em causa os seus direitos de administração legitimamente adquiridos, como coloca numa situação de grande e grave incerteza os condóminos quanto ao pagamento dos serviços de administração". See also Tribunal de Segunda Instancia da R.A.E.M., 25 January 2006, case n. 452/2006, *Administração (direcção) do Condomínio A v. Companhia de Gestão Imobiliário B Limitada*.

<sup>120</sup> Lei Chen, *The Developer's Role in the Surging Chinese Condominium Housing: Through the Comparative Lens of the US System*, 18 ASIA PAC. L. REV. 223, 239-240 (2010): "For example, developers in China often arrange 'sweetheart' contracts with their favourite managing agents before any condominium owners moved in. Quite often, the managing agents appointed before the first general meeting were affiliated with the developer or one of the developer's subsidiary companies. These managing agents are secured a position after the first general meeting. The risk was that these agents did not genuinely put the interests of unit owners first in making decisions about which contractors to hire for repairs and extending the condominium complex. For condominium owners, this could result in considerably higher management costs and lower standards of service than if they controlled such activities. (...) Consequently, developers with a continuing financial interest in a condominium complex often remain in the scene even after they relinquish control to the owners' management body". At this regards, it is interesting reading what stated by Wang Liming, *On the Basic Principles and Main Contents of China's Law of Property*, 4 CHINA L. 97, 98 (2001): "In China, some disputes over titles between the house owner and the developer or between the house owners also appeared in practice. The improper dealing with these problems will also likely affect the social stability, so the system of condominium should be adopted for dispute settlement". Similar issues in USA context, see Alisa M. Levin, *Condo Developers and fiduciary duties: an unlikely pairing?*, 4 LOY. CONSUMER L. REV. 197 (2011-2012).

fee and financial levies (without itemizing precisely what the invoice covers), heavily conditioning the same behaviour and activity of residents.

The question is how addressing the situation of ousted owners or intervening if subsequent problems arising from the breakdown of collective trust.

The Macanese reform's answer proposes an integrated model of condominium in which the regulation of the life in multi-storey buildings meets a diversified system of public controls, that shall be managed, in a first application of the statute, by the Instituto de Habitação<sup>121</sup>.

The intersection between private sphere and public administration is articulated in threefold layers: 1. duties of previous communication of the notice of owners' convocation<sup>122</sup>, under penalty of the nullity of the act<sup>123</sup>; 2. duties to transmit a copy of any act and document of condominium<sup>124</sup>; 3. duties of registration in a public registry imposed on those companies which provide management services<sup>125</sup>.

I can only make some hypothesis about the cultural matrix and about the legal models that could have inspired Macanese drafter.

Surely a very strict control on multi storey building's management by the same Instituto de Habitação can be found in the Macanese statute which regulates the management of the "economical housing"<sup>126</sup>: the building's administration has to notify the annual budget plan<sup>127</sup> as well as to submit to Instituto any deliberations of the assembly<sup>128</sup>; Instituto de Habitação has then entitled both to convoke the first

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<sup>121</sup> See *Nota justificativa* n. 15: "(...) para que no espírito de colaboração entre a administração e os particulares seja feito um controlo eficaz da legalidade das reuniões da assembleia geral".

<sup>122</sup> See *Lei da Administração dos Condomínios*, art. 6 (art. 1345 Civil Code – *Convocação*), n. 1: "A Convocação da assembleia geral do condómino deve ser previamente requerida com a autoridade competente por aqueles que tem legitimidade para o registo". See also art. 5 *Reuniões*, n. 2, 3, 6.

<sup>123</sup> See *Lei da Administração dos Condomínios*, art. 6 (art. 1345 Civil Code – *Convocação*), n. 2: "Considera-se sem efeito a convocação de assembleia geral do condómino que seja feita sem a emissão da certidão prevista no numero anterior".

<sup>124</sup> See *Lei da Administração dos Condomínios*, art. 10 (art. 1349 Civil Code - *Livro de presenças, actas e publicidade das deliberações*), n. 7: "Uma cópia da acta deve ser depositada junto da autoridade competente".

<sup>125</sup> See *Lei da Administração dos Condomínios*, art. 22 (art. 1356 Civil Code – *Prestação de serviços de administração por terceiro*), n. 1: "Apenas as sociedades de administração de condomínios ou pessoa singular registadas junto dos serviços competentes podem prestar os serviços de administração de condomínios".

<sup>126</sup> See *Decreto-Lei* n.º 41/95/M, *Regula a administração de edifícios promovidos em regime de contrato de desenvolvimento para a habitação*.

<sup>127</sup> *Decreto-Lei* n.º 41/95/M, art. 21 - *Orçamento anual*, n. 1: "A entidade administradora do condómino é obrigada a apresentar, ao IHM e à comissão administrativa dos condóminos, o orçamento de administração para o ano civil seguinte, até 30 de Outubro".

<sup>128</sup> *Decreto-Lei* n.º 41/95/M, art. 8 – *Funcionamento*, n. 6: "As deliberações da assembleia geral são registadas em acta e devem ser publicitadas na portaria e enviadas através de carta a todos os condóminos ausentes e ao IHM no prazo de quinze dias".

general meeting<sup>129</sup> both to be present at that assembly<sup>130</sup>.

More than a mere inspiring models seem to be the legal regimes applied by several Chinese Municipalities in the field of property management.

By way of example, the Guang Dong's Property Management Regulation (1 March 2009) imposes to the owners' committee to submit to the competent Offices the management regulation, rules of procedure of the property owners' congress, any records of congress and its decisions, together with the list of members of owners' committee and their basic personal information (art. 27)<sup>131</sup>.

Moreover, the same Regulation prescribes to the management enterprise to submit the service contracts to the competent Offices (art. 36, par. 3)<sup>132</sup>.

Having said that, whichever to be the borrowed legal model (if there is any), the Macanese approach to the matter entails a *soft* administrative intervention: a *publicistic control* without *command*<sup>133</sup>, I would say, without a hard sanctioning apparatus.

In the opinion of this author, in this new regulatory implant some concern and doubts still remain.

As just remembered, one of most complained aspect of the condominium in Macao is the divested role of owners to the benefit of the pushing and uncontrolled power of the developer/building manager.

The first general meeting is a real crucial moment in which not only owners have to approve the condominium regulation, but also have to appoint the management of the building: thus, in that occasion the condominium decides its own rules (condominium statute) and its own rule enforcer (management).

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<sup>129</sup> Decreto-Lei n.º 41/95/M, art. 5 - *Primeira assembleia geral dos condóminos*, n. 1: "O IHM dinamiza e promove os procedimentos para a realização da primeira assembleia de condóminos, divulgando todas as leis e regulamentos que estes devem conhecer".

<sup>130</sup> Decreto-Lei n.º 41/95/M, art. 5 - *Primeira assembleia geral dos condóminos*, n. 2.

<sup>131</sup> 《广东省物业管理条例》第二十七条 业主委员会应当自选举产生之日起三十日内，向物业所在地的区、县人民政府房地产行政主管部门和街道办事处、乡镇人民政府备案。备案时应提交以下材料：

- (一) 管理规约、业主大会议事规则；
- (二) 业主大会的会议记录和会议决定；
- (三) 业主委员会委员（候补委员）名单及其基本情况。

Similar disposition in Provisions of Shanghai's Property Management Regulation (上海市住宅物业管理规定), 1 April 2011, art. 21 and in Beijing's Property Management Regulation (北京市物业管理办法), 1 October 2010, art. 17.

See also the State Council's Property Management Regulation (物业管理条例), 1 October 2011, art. 16.

<sup>132</sup> 《广东省物业管理条例》第三十六条第三款 物业服务企业应当于合同签订之日起十五日内将前期物业服务合同报物业所在地的区、县人民政府房地产行政主管部门和街道办事处、乡镇人民政府备案。

Similarly in the Province of Beijing's Property Management Regulation (北京市物业管理办法), 1 October 2010, art. 20, par. 2.

<sup>133</sup> Tong Io Cheng, *supra* nota 87, at 199: "(...) a sociedade civil moderna exige cada vez mais do Governo. A intervenção do poder publico pode ocorrer de varias formas. (...) Mas existem também formas de intervenção do poder publico sem "autoridade": nos serviços de Registro, serviço notarial, etc., a intervenção do poder publico não só serve para assegura a legalidade e a estabilidade dos negócios jurídicos, como também para ajudar e servir as actividades privadas. No âmbito da administração do condomínio, a intervenção do poder publico tem por base o facto de a vida privada não ter meios suficientes para lidar come as relações complexas geradas no seio da vida colectiva. Os órgãos de poder publico servem aqui para prestar ajuda nos diferentes aspectos. Portanto, a intervenção do poder publico na área da propriedade horizontal pertence à ultima vertente referida anteriormente: a vertente prestativa"



It is for this reason that pretty often developers, or *de facto* managers, tends to indefinitely postpone the date of the first congress, strengthening and lengthening their embedded (and illegitimate) power.

The Macanese reform is not convincing at this regard.

If, from one side, the right of each owner to convoke the first general condominium meeting is solemnly anointed in the *Lei*<sup>134</sup>; on the other side, not only the quorum for the validity of the first congress has been sensibly reduced<sup>135</sup>, but also no mechanism has been provided (differently from what happens in Mainland management property regulations<sup>136</sup>) “to prevent a single *giant* owner from monopolizing the votes at any general meeting”<sup>137</sup>.

So that, despite the solemn anointment of the right/duty of each owner to participate in the condominium management, the system continues to allow developers to control the management arbitrarily.

Moreover, mentioned “inspiring” models of the Macanese reform (or in any case cited models that entail such similar controls) have an undisputable internal coherence: the mentioned management’s duties to transmit information, to notify, to store data, and so on, are not detached from a deeply integrated system of administrative sanctions against the rule breaker<sup>138</sup>, from a compulsory mediation role of the competent administrative office (outside the judiciary circuit) for dealing with the condominium conflicts<sup>139</sup>, and from a pervasive intervention for the settlement of service charges requested by management enterprises<sup>140</sup>.

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<sup>134</sup> See *Lei da Administração dos Condomínios*, art. 5, n. 1.

<sup>135</sup> See *Lei da Administração dos Condomínios*, art. 8, n. 3.

<sup>136</sup> See for example Provisions of Shanghai’s Property Management Regulation (上海市住宅物业管理规定), 1 April 2011, art. 12: “The property owners’ congress covers all the property owners of a property management area. When more than 50% of the total gross floor area of buildings in a property management area has been sold and handed over for use, or after the first housing unit has been sold and handed over for use for two full years, the inaugural meeting of the property owners’ congress shall be called for its formal establishment. However, where there is only one owner, or where there are too few owners and they all agree not to establish the property owners’ congress, the owner(s) shall jointly perform the duties of the property owners’ congress and the property owners’ committee”.

第十二条 业主大会由一个物业管理区域内的全体业主组成。一个物业管理区域内，房屋出售并交付使用的建筑面积达到百分之五十以上，或者首套房屋出售并交付使用已满两年的，应当召开首次业主大会会议，成立业主大会。但只有一个业主的，或者业主人数较少且经全体业主一致同意，决定不成立业主大会的，由业主共同履行业主大会、业主委员会职责。

<sup>137</sup> Lei Chen, *A uniform condominium statute for China based on a comparative study of the South African Sectional titles Act and American Uniform Common Interest Ownership Act*, dissertation presented for the Degree of Doctor of Law at Stellenbosch University, at 188 (now published with the title *THE MAKING OF CHINESE CONDOMINIUM LAW: A COMPARATIVE PERSPECTIVE WITH AMERICAN AND SOUTH AFRICAN CONDOMINIUM LAWS*, Intersentia, 2010).

<sup>138</sup> Provisions of Shanghai’s Property Management Regulation (上海市住宅物业管理规定), 1 April 2011, cap. V, art. 70 et seq.

<sup>139</sup> Provisions of Shanghai’s Property Management Regulation (上海市住宅物业管理规定), 1 April 2011, art. 31.

<sup>140</sup> Provisions of Shanghai’s Property Management Regulation (上海市住宅物业管理规定), 1 April 2011, art. 44: “The property service charges shall be decided on the principles of reasonableness, openness and consistent quality. The property service charges shall be subject to government guidance and market regulation and be set at the same rates in the same property management area where the same services are provided at the same standards. The specific procedures shall be formulated by the Municipal People’s Government separately”. 第四十四条 物业服务收费应当遵循合理、公开、质价相符的原则。物业服务收费实行政府指导价和市场调节价，同一物业管理区域内实施同一物业服务内容和标准的，物业服务收费执行同一价格标准。具体办法由市人民政府另行制定。

The role of the public administration is clearly stated, declared, imposed and defended<sup>141</sup>: public power is the arbitrator of the conflicting tensions and interests among parties in the condominium (developer/management against owners and owners among each other).

At this regards, the reform of Macao seems "maimed". The control (by means of an impressive apparatus for collecting information) without a codified power to intervene and sanctioning leaves the ground at two hypothesis: or this power effectively does not exist and consequently the Instituto de Habitação plays the role of mere "spectator" (a mere institutional memory of wrongdoing), not effectively able to amend the lack of transparency<sup>142</sup>; or this power does exist, but it is not clearly verbalized and codified.

A kind of eminence grey, a shadowy entity lurking off stage, often invoked, however discretely, yet rarely revealed.

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<sup>141</sup> See Decreto-Lei n.º 41/95/M, *Regula a administração de edifícios promovidos em regime de contrato de desenvolvimento para a habitação*, that eloquently reports in its premises: "Assim, o presente diploma define, de forma mais clara e em certos aspectos inovadora, as atribuições da Administração Pública na missão de controlo da regularidade da administração dos condomínios, nomeadamente quando tem de intervir como julgadora das infracções cometidas quer pelos condóminos quer pela entidade que exerce funções de administração ou ainda sobre as regras financeiras e orçamentais".

Provisions of Shanghai's Property Management Regulation (上海市住宅物业管理规定), 1 April 2011, art. 4: "The municipal housing administrative department shall be in charge of the supervision and administration of property management in this Municipality. The district/county housing administrative department shall be in charge of the supervision and administration of property management within its own jurisdiction; the housing administrative offices under it (hereinafter referred to as the "housing offices") shall take on specific matters.

The municipal and district/county housing administrative departments shall perform the following functions and duties:

1. guiding, supervising and administrating the congress and the committee of property owners;
2. supervising and administrating property service enterprises and their employees;
3. guiding and supervising the collection and use of the special maintenance fund;
4. supervising and administrating the use and maintenance of properties; and
5. other supervising and administrative functions and duties related to property management".

第四条 市房屋行政管理部门负责全市物业管理的监督管理工作。区、县房屋行政管理部门负责本辖区内物业管理的监督管理；其设立的房屋管理办事机构（以下简称房管办事处）承担相关具体事务。

市和区、县房屋行政管理部门履行以下职责：

- （一）业主大会和业主委员会的业务指导与监督管理；
- （二）物业服务企业和从业人员的监督管理；
- （三）专项维修资金归集、使用的指导与监督；
- （四）物业使用和维护的监督管理；
- （五）物业管理方面的其他监督管理职责。

<sup>142</sup> Possible solution in enhancing the transparency in the selection of management could be that Chinese one commented by Chen Lei, Cornie G. Van der Merwe, *Reflections on the role of the managing agent in South African and Chinese sectional title (condominium) legislation*, 1 J. S. Afr. L. 22, 29 (2009): "(...) developers with a continuing financial interest in a condominium complex often remained on the scene even after they relinquished control to the owners' management body. To resolve this problem, the Property Management Regulation provides that a developer has to select a qualified managing agent through a public bidding process. Only in a situation where there are three or less managing agents bidding for a position is a developer allowed to choose a managing agent by agreement. And even then the appointment is subject to the approval of the local real estate authority. Finally, the appointment has to be concluded in a written contract. These measures increase the transparency of the management contract and avoid self-dealing transactions entered into by developers. In addition, a managing agent is under a statutory obligation to disclose any prior direct or indirect relationship with developers in bidding for a job".

If this is the case, with time passing, this strategy could have serious aftermaths in weakening the confidence of investors, including foreign investors, who feel more comfortable in a legal environment with the maximum of transparency<sup>143</sup> and with a minimum of “informal” relationships<sup>144</sup>.

Contiguity between private sphere and public intervention in condominium juristic regime is perceived by a foreign observer, notably that one who comes from Western Legal Tradition’s countries, as I am, as unusual: It sounds in somehow “alien” to the condominium logics to which he is accustomed to.

In fact, once that the “game’s rules” are settled by public authorities (fixed in the Civil Codes or in other statutes), and once that condominium regulations have been approved by owners, the residual space for an external intervention is the only case of a condominium controversy: a third subject, the judge, will be called to settle disputes with a sentence.

Here the question is whether the intervene of a “other” third actor – the administrative power in its role of “watchdog” – is the best solution for addressing the juridical and social dynamics that usually rises up among privates in the condominium life<sup>145</sup>.

Maybe an alternative efficient approach could consist in imposing “the developer to safeguard the unit purchasers’ interests and the efficient running

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<sup>143</sup> ROBIN P. MALLOY, PRIVATE PROPERTY, COMMUNITY DEVELOPMENT AND EMINENT DOMAIN, 2-3 (*Ashgate* 2008), p. 2-3: “Without a coherent and reasonably well developed system of property, market exchange, beyond a very local community, would be costly, difficult, and perhaps barely existent. In saying this, we do not ignore the idea of informal property systems and exchange networks that emerge privately through custom, kinship groups, and by personal arrangement and enforcement. (...) But pragmatically, extensive, global, and positive market networks require a degree of transparency, stability, predictability, and access which cannot be efficiently and effectively attained by purely informal means. Property law systems establish rules and standards that favour stability of interests, predictability of outcome, and transparency of information”. With specific regard to the Chinese condominium legal system, see Chen Lei & Hanri Mostert *The Unavoidable Necessity of Formalizing Condominium Ownership in China: A Pilot Study*, 2(1) ASJCL 32 (2007).

<sup>144</sup> Gregory M. Stein, *Acquiring land use rights in today’s China: a snapshot from on the ground*, 24 UCLA PAC. BASIN L.J. 1, 18-20 (2006-2007).

<sup>145</sup> Lei Chen, *The Developer’s Role*, *supra* note 120, at 230: “While a condominium development in China is government-supervised and different public authorities are actively involved, the process can lead to arbitrary results that fail to provide adequate protection to the end-user. Future condominium statutes in China should reduce the government’s administrative intervention and instead rely more on crafting controlling constitutive documents that provide consistency and security for the purchaser”. In a more sociological perspective and with reference to Hong Kong context, see Chan Chi-Ching, Thomas, *An analysis of the role of the Government in the management of the private building in Hong Kong*, Dissertation submitted in partial fulfilment of the requirement for the award of the degree of Master of Public Administration in the University of Hong Kong, 1998.

of the condominium complex<sup>146</sup>: a *duty oriented approach*, properly assisted by a sanctioning system, that directly imposes to the stronger player, the developer, a certain conduct.

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## CONCLUDING REMARKS

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Drawing conclusions from what has emerged so far, this author seeks to propose some summarizing remarks.

1. Comparative analysis has the potential to test (confirming or falsifying) theories, general (sometime generic) concepts or – as in the present survey – proposals for a legal reform.

Macao with its process of juridical *localization* is an extraordinary comparative law laboratory.

The standpoint followed has been always a specific problem in the condominium as "social fact": how facing with the unconcern of the unit owners toward the condominium; whether and how it is possible reserving use and enjoyment of common parts only for the benefit of some owners; how enhancing the owner's participation and the condominium governance simplification; how empowering the condominium managers for certain necessary activities (open a bank account, signing service's contract for the condo and so forth); how assuring the owners' payments for the maintenance of the building, and so on.

All of these are very concrete questions, and the "answers" offered by the Macanese reform's drafter were put in comparison with technical answers elaborated in other juridical experiences.

The comparative law analysis has expressed its concrete potentiality in finding alternative models, in trying to design "localized" mechanisms, in rethinking and adapting more efficient solutions coming from different legal systems.

Note, however, that it is not a work functionalized to an uncritical borrowing and imitation.

In the light of comparative analysis, and on the basis of a fundamental idea that the "context" in which a rule is applied is as much important as its "text", many variables have to be taken in account: formation and attitude of legal servants and lawyers; legal tradition of the country; formal and informal sources of law; the role

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<sup>146</sup> Lei Chen, *The Developer's Role*, *supra* note 120, at 238: "Among the more important issues during the initial phase are the appointment of transitional council members, the selection of a managing agent, and the responsibility to establish a maintenance fund"; see also at p. 240: "The imposition of certain duties and obligations on developers is meant to ensure a smooth transition of the management of a condominium complex from the developer to the future unit owners. Therefore, in order to avoid abuses or tardiness by the developer, it is imperative to impose a statutory duty on the developer to establish the maintenance fund and to file regular accounting records. In China, it is not uncommon for developers to delay the handing over of the management to the executive council. Developers want to stay on the scene to control the administration of the complex even after the majority of units are sold. Oftentimes, when the first general meeting is held, unit owners inherit debt from the initial period management costs". See also GREGORY M. STEIN, *supra* note 14, at 241: "The lack of an effective mechanism to better regulate the developer's duties is the root cause of the increasing number of management disputes. Out of necessity, greater developer responsibilities need to be introduced and existing guidelines need to be strengthened by means of an effective new legislation. The time has come to temper the developer's profit-driven culture with regulation and a greater responsibility to the unit owners and the community".

of the judiciary and of scholars; the concrete daily influence of politics and economic interests in the elaboration and application of law, and so forth<sup>147</sup>.

Thus, a certain solution, that does work efficiently in a system, could not work properly in a other, or it could achieve different outcomes, or even it could be “rejected” from the borrower<sup>148</sup>.

Legal devices and mechanisms, proposed in the place of those provided by the Macanese drafter, in spite their selection have been done on the basis of an identity of factual problem and of a “similarity” of legal tradition, have to be submitted to a judgment about their political advisability, and their concrete adaptability (or suitability) in respect to the Macanese territory.

2. Condominium is a juridical institute as well as a sociological phenomenon, a *communalism* bundle of relations: these two aspects must not be seen and faced separately.

Scarcity of general meetings, in breach of regulations and statutes, are often caused by owners’ unconcern<sup>149</sup>; as well as condominium financial issues are determined by a low level of owners’ awareness, or by a mere form of refuse or displeasure with the management<sup>150</sup>.

Having said that, most part of condominium legal issues seem to this author foremost caused by a *cultural* matter: whatever legal reform (specially in that context, like Macau is, where condominium is a pretty recent reality) risks invariably to miss the target without an important and compulsory formation efforts of the management agents and without a serious awareness campaign of community.

Moreover, examining the condominium phenomenon in the perspective of *group dynamics*, and following the so called “*exchange theory*”, the interaction between individuals or collectives can be characterized as attempts to maximize rewards<sup>151</sup>.

Drawing on economic cost-benefit models of social participation, it is possible to consider the social behaviour in term of *exchange*. As in economic exchange, the profit that the individual derives from social exchange is equivalent to the difference between rewards and costs. Participants in a behavioural exchange will continue their exchange only so long as the exchange is perceived as being more rewarding than it is costly.

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<sup>147</sup> Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 AM. J. COMP. L. 343 (1991); Mauro Cappelletti, *Comparative law teaching and scholarship: method and objectives*, Scritti in onore di R. Sacco, 175-187 (Giuffrè 1994).

<sup>148</sup> Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences*, 61 MOD. L. REV. 11 (1998).

<sup>149</sup> Of great interest the survey of Leung Chi Hang, *A study on the impacts of owners’ participation on the management quality of private residential premises in Hong Kong*, Dissertation submitted in partial fulfilment of the requirement for the award of the degree of Master of Public Administration in the University of Hong Kong, 2004.

<sup>150</sup> Chou Kam Chon, *supra* nota 116, at 176: “A maior parte dos proprietários considera que depois de pagar os encargos do condomínio, o resto dos assuntos devem ser resolvidos pela administração e que esta não deve incomodar os proprietários. (...) Perante esta situação, a administração e o condomínio estará a longo prazo numa relação de “cada um para o seu lado”. (...) Mas quando surgem problemas, as disputas começam, por exemplo, se os proprietários não estiverem satisfeitos com os serviços prestados pela administração, deixam logo de pagar os encargos ou até surgirem a substituição de empresa gestora, originando assim conflitos entre eles”.

<sup>151</sup> See in literature JOHN W. THILBAUT & HAROLD KELLEY, *THE SOCIAL PSYCHOLOGY OF GROUPS* (Wiley, 1959); GEORGE C. HOMANS, *SOCIAL BEHAVIOR: ITS ELEMENTARY FORMS* (Brace & World, 1961); PETER BLAU, *EXCHANGE AND POWER IN SOCIAL LIFE* (Wiley, 1964); Richard M. Emerson, *Power dependence relations*, 27 ASR 31 (1962).

The "power" in condominium relations resides implicitly in the dependence of the other. If condominium actors in the exchange relationships are equally dependent on each other, the relationship is considered balanced.

What we have called the "embedded power of developers" (in the sense of an uncontrolled, illegitimate, pushing and dispossessing power) unbalances the exchange relations among unit owners: they, once become the more dependent and hence the less powerful parties, will attempt to rebalance the relationship and thereby reduce the costs they incur from the exchange.

Not taking part in the condo' management or the phenomenon of arrears condominium payments are all expressions of this effort to reduce unbalanced relations.

3. As we already said, the Macanese legal history, related to condominium law, shares with other legal systems the experience of "de-codification".

However, the Macanese reform's choice of splitting the apartment's law in difference regulatory vehicles, *Lei da Administracao dos Condominios* together with Civil Code (cap. V - *Propriedade Horizontal*), whatever reasons are at its basis, surely represents an anomaly.

The strongest idea of the Civil Code answers to an intimate need of coherence, synthesis, simplification, permanence and stability: the regulatory instrument of code is still useful if it is able to gather concepts and general rules, despite other more specific and "mutable" norms can be properly conveyed in other statutes.

The distribution of the condominium law in two different regulatory instruments does not fully persuade at this regard: *Lei* is simply a "other rules' holder" in respect to Civil Code, but it misses between them that relationship of *generality/speciality*, that contributes to confer a structural sense to the entire system.

We have learned that: "(...) it was recognized in most legal systems, that (condominium) cannot function properly or gain popularity without a firm statutory basis"<sup>152</sup>.

Maybe today this statement has to be read in a *gestaltic manner*: the statute regulating the condominium has to be as *comprehensive* as possible, including the different aspects of building that are very interconnected (developing, management and units' selling)<sup>153</sup>; and condominium law has to be as *easily understandable* as possible, by a clear and coherent coordination among different statutory instruments (foremost the respect of the criteria of *generality/speciality*), and this also for fostering overseas investors<sup>154</sup>.

Thus, Macanese Civil Code can still maintain a juridical, political and educational value, despite definitive decline of "mythological" idea of its completeness, but it should have a precise role in the sources of law, assured by a coherent and clear relationship with other regulatory instruments.

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<sup>152</sup> Cornie G. Van der Merwe, *Apartment ownership*, 6 Int Encycl Comp L (Property and trust) 223.

<sup>153</sup> In the same direction - about the Macanese legal system - it seems to me also the opinion of Joao Adelino, *Topicos para a criação de um regime jurídico da actividade empresarial de administração de condóminos*, 29 BFDUM 215 (2010).

<sup>154</sup> GREGORY M. STEIN, *supra* note 14, at 104: "Overseas investors have augmented this domestic demand. As foreign investors began to discover the Chinese residential market, prices for new units rose even further. These purchasers from Hong Kong, Taiwan, North America, and Europe had numerous reason for wishing to invest".

The role reserved to the Macanese Civil Code by the condominium reform reminds me the famous ruins of St. Paul's façade, symbol of the city: a beautiful emblem of the past regulatory approach, but not much more behind it.

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