

在中國投資房地產之相關疑難的法律判解

Problems of investing in China's real - estate area

一、房地產合作開發

First, real estate cooperation and development Real estate cooperation and development

合作開發專案公司法律地位的甄別

Cooperation project's legal status

[爭議焦點]

[Controversy]

1. 在房地產合資、合作開發中設立的專案公司其法律地位是什麼？在它與其關聯方發生出資衝突時，應由誰承擔責任？

What's the legal status of the Project Company in the joint venture or Cooperation Company?

When controversy occurs due to the capital, and who has to shoulder this responsibility?

2. 專案公司成立後，原合資、合作合同是否自行終止？關聯方是否仍應履行原合同義務？

After the establishment of the project company, the original joint venture or cooperation contract automatically reach their termination? Related parties should fulfill the obligations of the original contract?

情勢變更與不可抗力的區分

The distinction between situation changing and force majeure

[爭議焦點]

[Controversy]

1. 行政部門暫停審批屬於情勢變更還是不可抗力？

Administrative approval suspend falls to situation changing or force majeure?

2. 在情勢變更條件下，原合同的履行期限是否也要隨之變更？

Should the contract period goes with the change of situation?

民事判決的既判力分析

Analyze of Res Judicata of civil judgments

[爭議焦點]

[Controversy]

1. 在先的民事判決是否具有既判力？

Whether the earlier civil judgement has res judicata?

2. 如何判定前後兩案具有同一性 ？

How to judge the sameness of two cases?

按照當事人的真實意思表示確定合同的性質

According to the true meaning of the persons involved determines the nature of the contract

[爭議焦點]

[Controversy]

1. 在房地產合作開發中，供地方只參與專案申報的，雙方所簽合同性質應認定為房地產合作開發合同還是拆遷補償合同 ？

in the cooperation of real estat process,land spllier only invleved in the claim ,and then whether the contract should be considered as cooperative develop contract or demolition compensation contract ？

二、商品房預售銷售

Second, pre-Sale and sales of commercial residential building

房屋認購金的性質認定

Identify the nature of the subscribing money

[爭議焦點]

[Controversy]

1. 出版品上的商業廣告性質是要約還是要約邀請？購房人可否以房屋實際入住時間與廣告宣傳時間不符為由拒簽商品房子預售合同？

The business ads belongs to offer or invitation to offer? Whether the purchaser can refuse to sign the sales contract due to the real intake date is different from the date in the ads?

2. 以格式合同出現的商品房認購書中含有單方權利約定條款，該認購書是否有效？

Commercial residential building Purchase letter in format contract, whether it still has effectiveness when it contains single rights limitation terms?

3. 商品房認購金屬於定金還是預付款？購房人決定不購房後可否要求售房人返還認購金？

Whether the commercial residential building's subscribing money totally belongs to advance money? If the purchase decides not to buy it, whether he can ask the sales man return his subscribing money?

因不可歸責於當事人雙方的事由未能訂立房屋買賣合同的立約定金不適用定金罰則

When the changinment which can't due to the persons involed leads to the failure of signing the sales contract, in this case, the punish terms are not appliabl to the earnest money

[爭議焦點]

[Controversy]

1. 如何認定房屋認購定金的性質？因不可歸責於當事人雙方的事由未能訂立房屋買賣合同時，可否適用定金罰則？

What's the nature of subscribing money? When the change which can't due to the persons involed leads to the failure of signing the sales contract, in this case, whether the punish terms are appliabl to the earnest money?

購房者預留房號所交定金是否應當返還？

Whether the earnest money for resveation room number has to be returned?

[爭議焦點]

[Controversy]

1. 在未取得商品房銷售許可證情形下簽訂的預售商品房認購書是否有效？購房者因此給付的定金可否要求返還？

Whether the pre-sale contract has effectiveness on the condition that sales license of commercial residential building is not available? And the earnest money have to be returned?

商品房預售合同糾紛案的有關法律問題分析

Some relevant laws issues about the dispute of commercial residential building pre-sales contract?

[爭議焦點]

[Controversy]

1. 商品房預售合同中約定的履行期限條款為無法履行條款，該合同是否為有效合同？

If the terms in the pre-sales contract of commercial residential building are impossible to practice, in this case, does this sales contract still belong to binding contract?

2. 購房優惠廣告的性質是要約邀請還是單方承諾？銷售商是否應該履行其在優惠廣告中承諾的優惠事項？

Whether the favourable ads belong to invitation to offer or unilateral promise? And the sales part has to fulfill the favourable terms in the ads?

3. 如何運用合同解釋方法來解釋合同中約定不明的事項？

How to explain the unclear part in the contract with the explanation method of the contract?

商品房預售中公用面積的認定及擅自變更設計之法律責任

Cognizance shared public area public area in commercial residential building and the legal responsibility of alter with the other party's consent

[爭議焦點]

[Controversy]

1. 商品房預售中的公用面積應如何認定？

How to judge the joint area in the pre-sale of commercial residential building?

2. 開發商擅自變更預售合同中約定的設計，是否應承擔違約責任？應如何承擔違約責任？

If the developer changes the design in the pre-sale contract of commercial residential building, whether he shoulders breach responsibility and how?

合同有效成立情況下的締約過失責任

Defect Liability of the Agreement under the condition of the contract has effectiveness

[爭議焦點]

[Controversy]

在合同有效成立情況下，開發商有締約過夫的，應否承擔責任？

Under the condition of the contract has effectiveness, whether the developer has to shoulder the responsibility if he has Defect Liability of the Agreement ?

預售樓房時未告知設計不合理，後影響使用的情況處理

In the pre-sales , the unreasonable design wasn't be notified , how to handle the influence ?

[爭議焦點]

[Controversy]

開發商預售樓房時未履行合理告知義務，是否要承擔賠償責任？

Whether the developer has to shoulder the compensation responsibility when reasonable notice obligation hadn't been carried out in the pre-sales process?

交付所購樓房樓層錯誤的購房合同效力認定

The persuming of the sales contract when the delivery floor is wrong

[爭議焦點]

[Controversy]

樓房的識別資料樓層與實際樓層不符，是否構成根本違約？購房合同可否因此而解除？

The identification floor materail is not accord with the real situation , whether this leads to fundamental breach ?And the sales contract can be dismissed due to this?

商品房預售合同糾紛案的有關法律問題分析

Analyze law issues about dispute on the pre-sale contract of commercial residential building

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1. 商品房預售合同中約定的履行期限條款為無法履行條款，該合同是否為有效合同？

If the deadline of implementation of provisions belongs to missions impossible, whether this contract still has effectiveness?

2. 購房優惠廣告的性質是要約邀請還是單方承諾？銷售商是否應該履行其在優惠廣告中承諾的優惠事項？

Whether the favorable ads belongs to invitation or single part promise ? Whether the sales part has to carry out the favorable items?

3. 如何運用合同解釋方法來解釋合同中約定不明的事項？

How to use contract explanation to explain the unclear items?

商品房預售中公用面積的認定及擅自變更設計之法律責任

Judge the joint area in the pre-sale of commercial residential building and legal responsibility of changing the design without authorization

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The effectiveness of the sale contract when the delivery house is different with the one in the contract

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The identification floor material is not accord with the real situation, whether this leads to fundamental breach? And the sales contract can be dismissed due to this?

房屋共有人處分行為的效力

The effectiveness of the disposing by the joint owner of the house

[爭議焦點]

[Controversy]

房屋產權證上登記的產權狀況與實際情況不符，導致善意第三人購買了共有人無權處分的房屋，該購買行為是否受法律保護？

The property in House Property license is not agreed with the real situation leads to the third part with good will purchasing the house which joint owner don't have the disposing right, does this purchasing act enjoys the protect of the law?

購房選擇權合同的認定和處理

Cognizance and disposing of the selective purchasing contract

[爭議焦點]

[Controversy]

選擇權契約的性質是什麼？選擇權的行使應符合哪些條件？

What's the nature of selective contract? The practice of selective rights should meet what kinds of conditions?

一房二賣的相關法律問題

Some relevant law issues about one house with two buyers

[爭議焦點]

[Controversy]

1. 沒有進行權屬登記的商品房買賣合同是否合法有效？如何判定？

Whether the sales contract of house without property registration is legal and has effectiveness according to the law and how to judge?

2. 開發商將商品房賣給兩個以上購房者是否屬於欺詐？

可否適用懲罰性賠償？

If the developer sold the house to two buyers, does this action is cheating? Whether the punishment compensation terms are applicable?

不動產二重買賣的法律問題

The law issues on the dual sale of the real estate

[爭議焦點]

[Controversy]

不動產二重買賣的效力如何？不動產產權應歸於哪個買受人？

What's the effectiveness of the dual sale of the real estate? And the property belongs to which buyer?

程式上有瑕疵的商品房預售許可證效力認定

The cognizing of the effectiveness pre-slaes commercial residential building administrative license with defects

[爭議焦點]

房管局在尚未發放《土地使用證》的情況下就向開發商 發放《預售許可證 _，這一行為是否違法？應否復原？

Real Estate Management Bureau approvd pre-sale certificate with use certificate for land unavailable, does this action go against law? Does this have to be recovered?

姜守軍訴北京市金鼎房地產開發公司商品房預售合同糾紛案

JiangShoujun litigated BeijingJingding real estate company on the pre-sale contract of commerical esidential building

[爭議焦點]

[Controversy]

開發商交付的商品房與預售時展示的沙盤所示環境不符，是否構成違約？應否承擔賠償責任？

The house delivered by the developed is different with the envirnment which the sand table displayed ,does this form breach ? Does the company have to shoulder the compensation reponsibility ?

未依法登記領取權屬證書的房地產不得轉讓

The real estate which hasn't been regislated the property certificate can't be transfered

[爭議焦點]

[Controversy]

在二手房買賣中，簽訂合同時賣售人尚未領取權屬證書的，買賣合同是否合法有效？

In the second hand house transfer ,whether the contract still has effectiveness in the case that the selling part has no property certificate?

三、房屋租賃

Third, Building leasing

一事不再理原則的適用及裝修添附的補償

First, the matter closed principal' s applying range and the compensation for decoration

[爭議焦點]

[Controversy]

1.如何理解 " 一事不再理 " 原則，要求對裝修進行補償與解除租賃合同是否是同 " 一事 " ？

How to understand the matter closed principal? And whether the demand of getting compensation from the decoration and dismissing the leasing contract belongs to "the matter " ?

2.租房者是否應該就承租人對房屋的裝修進行補償 ？

The renter how to compensate the tenant for the decoration of the house ?

3.如何確定裝修補償的數額 ？

How to determine the sum of compensation for the decoration ?

締約過失責任與違約責任的認定

Identify Defect Liability of the Agreement and breach responsibility

[爭議焦點]

[Controversy]

1. 租賃期未滿，出租人要求承租人搬走，承租人自己也同意的，構成締約過失責任還是違約責任 ？

With the rent period undeued ,rentor ask the tenant to move away with his agreement ,does this situation belongs to defect liability of the agreement or breach ?

2 沒有冠以 " 訂金 " 名義的金錢擔保，其性質是什麼 ？

What's the nature of the guarantee money without the name of earnest money?

以土地為標的物的租賃合同中的法律問題

Law issue about the leasing contract with the subject of land

[爭議焦點]

[Controversy]

1. 農民集體所有土地可否流轉 ？

Can the land owned by collective farmers be transferd?

2. 未經行政機關批准，標的物為農民集體所有土地的租賃合同是否有效？已履行部分應如何解決？

Without the permission of administrative department, the leasing contract of the land owned by collective farmers, does this contract have effectiveness? And how to deal with the part becomes true?

房屋抵押後承租人與出租人訂立的租賃合同對受讓人無效

After the mortgage of the house, the leasing contract between the tenant and renter is invalid to the guarantee

[爭議焦點]

[Controversy]

1. 房屋抵押後，承租人與出租人關於延長租賃期限或降低租金標準的約定對受讓人是否有效力？

After the mortgage of the house, whether the agreement on extend the rent period or cut down the rent fee has effectiveness to the guarantee?

2. 房屋抵押權實作品後，承租人應向原出租人支付租金還是向受讓人支付租金？

After the mortgage of use right of the house, should the tenant pay the rent fee to the original renter or the guarantee?

合同當事人意思表示之釐定

Formulate the meaning of the person involved in the contract

[爭議焦點]

[Controversy]

1. 承租人在房屋租賃合同所約定的租賃期限內提出退租的，是否有權要求出租人返還押金？

Whether the tenant has the right to ask the renter to return the deposit in security within the rent period?

2. 如何解釋合同中的有爭議的格式條款？

How to explain the disputed form terms in the contract?

房屋租賃合同雙方當事人應當按過錯程度對違章建築承擔民事責任

The person involved in the contract have to shoulder civil responsibility according to his mistake for buildings constructed without license

[爭議焦點]

[Controversy]

承租人在其所租房屋進行違章建築，出租人未予制止，應如何承擔民事責任？

Should the renter shoulder responsibility for the building constructed without license which renter knows but doesn't stop?

買賣不破租賃相關問題的探討

Discussing about sales not devastating lease

[爭議焦點]

[Controversy]

1. 對破產債務人未履行完畢的合同應如何處理？

設定在破產財產上的權利又應如何處理？

How to deal with the contract which hasn't reach terminate but the person involved has bankrupted if it's supposed to be bankrupted , how to deal with the right from the property ?

2. 租賃合同是否因所有權人的變動而終止？

Whether the contract becomes invalid due to the changement of owner?

[爭議焦點]

[Controversy]

部分房屋的承租人能否對出租人整體出售的房屋享有優先購買權？

Whether the tenant of part of the house enjoy pre-purchase right to the whole house?

[爭議焦點]

[Controversy]

1. 承租人對租賃物存在權利瑕疵的合同是否享有合同解除權？

Whether the tenant enjoys the right to dismiss the contract in the case that the house right has defects?

2. 租賃物存在權利瑕疵，承租人可主張違約責任還是行使不安抗辯權？

In the case that the house has defects in its rights, whether the tenant can pratice Unstable Counterplea or breach responsibility?

四、房地產擔保

Fourth, real estate guarantee

物業經營權的抵押及相關問題探討

The mortgage of and some relevant issues discuss

[爭議焦點]

[Controversy]

物業經營權是否可以用於擔保，其擔保的性質屬於抵押還是質押？

Whether the management right can be used as guarantee, and the nature of guarantee belongs to pledge or mortgage?

[爭議焦點]

[Controversy]

期房能否作為流動資金貸款的抵押物？

Whether forward delivery housing can mortgage for the circulating funds loan?

商品房還貸保證責任保險合同法律性質之認識及當事人請求權之行使

The nature of the commercial residential building as the insurance for the loan on the law and the claim rights of the persons involved

[爭議焦點]

[Controversy]

1. 商品房還貸保證責任保險合同的法律性質如何？

What's the nature of the commercial residential building as the insurance for the loan on the law?

2. 當事人在此類案件中應如何行使請求權？

And how can the persons involved practice their claim rights?

五、房屋所有權、權屬登記及其它問題

Fifth, the property rights and property registration and other issues

有關居住權的法律問題

Law issues about residence rights

[爭議焦點]

[Controversy]

具備獨立勞動能力的成年子女，對父母承租的房屋是否享有居住權？

Whether the adult children with independent labor ability enjoy residence rights to the house owned by their parents?

以房抵債合同的生效並不以房產過戶登記為生效前提

The contract which is mortgage the house for the debt can go into effect without a register of transfer

[爭議焦點]

[Controversy]

以房抵債合同是否必須以房產過戶登記為生效前提？

Whether The contract which is mortgage the house for the debt can go into effects on the condition of a register of transfer?

不動產登記的公示公信力與無權處分制度的競合與衝突

The competing and conflict beteen the publicity credibility of the Real estate registration and no disposing right system

[爭議焦點]

[Controversy]

1. 共有人之一未經其它共有人同意而將房屋變賣，其它共有人可否以此為由主張買賣合同無效？

If the joint owner sold the house without the permission of others , whether the other joint owner can decide this sales contract is invalid?

2. 簽訂房屋買賣合同但尚未辦理產權過戶手續，房屋所有權是否發生轉移？

Whether the property has been transferd in the case that sales contract has been signed but the transer certificate is unavailble ?

土地使用權屬的確定

The belonging of use right of the land

[爭議焦點]

[controversy]

不動產的物權變動必須經過哪些程序？何時生效？

Real estate property changes must go through which procedures? What's the commencement date?

房屋逾期辦證違約責任的承擔

Breach responsibility of apply the certificate over the dued time

[爭議焦點]

[Controversy]

1. 辦理房屋權屬證書的義務人是誰？

Who shoulder the obligation to apply the property certificate?

2. 該義務人逾期辦證的，應如何承擔違約責任？

If the person applied the certificate over the dued time , how to shoulder the breach responsibility ?

公民個人購買的公有房屋可以依法遺贈他人

Whether the collective owned house which is bought by the individual can be donated to the others according to law?

[爭議焦點]

[Controversy]

公民基於個人特殊身份所購買的公有房屋可否遺贈他人？

Whether the collective owned house which is bought by the individual with special identity can be donated to others according to the law?

婚前個人按揭購買、婚後以夫妻財產支付按揭的房屋是否可用於償還夫妻共同債務

Premarital Personal mortgage purchase, then married couples pay the mortgage property together , whether this house can be used for repaying the joint debt?

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六、相鄰關係

Sixth, neighborhood

眺望權、視覺衛生權法律問題探討

Discuss on the overview and clean eyesight rights

[爭議焦點]

[Controversy]

1. 眺望權、視覺衛生權的法律性質是什麼？公民是否可以行使這些權利？

What are the natures of overview and clean eyesight rights? And whether people can practice these rights?

2. 兩樓相距過近是否侵犯了居民的眺望權、視覺衛生權、採光權和隱私權？

If the distance is too short ,whether this damage people's rights of overview ,clean eyesight, light and privacy ?

建築物區分所有權理論在審理實踐中的運用

Ownership of dwelling—house theory's practice in reality

[爭議焦點]

[Controversy]

建築物區分所有權人能否獨自就他人侵佔公用部分的行為進行訴訟？

Whether the owner of dwelling—house can litigate for the public part which is occupied by others?

七、房屋拆遷

Seventh, demolition

民事行政爭議關聯案件程序探討

Discuss on procedures of related civil and administrative case

[爭議焦點]

[Controversy]

民事行政爭議關聯案件應遵循何種程序？

What procedures have to be followed in the related civil and administrative case?

齊勇、齊兵訴北京科學園區建設（集團）股份有限公司拆遷合同糾紛案民事判決書

Civil verdict of Yong qi, Qi bing v. Beijing Science Park building (Group) Co., Ltd. demolition contract dispute

[爭議焦點]

[Controversy]

房屋拆遷中應如何確定被拆房屋的產權所有人？

How to identify the property owner of the demolition house?

八、房屋裝修

Eighth, housing decoration

因房屋裝修引發的室內環境污染案審理中的法律問題

Legal issues of the indoor environmental pollution caused by decoration

[爭議焦點]

[Controversy]

1. 在房屋裝修中，承攬人對交付的工程應怎樣承擔瑕疵擔保責任？

How the undertaker bears defects responsibility for the warranty for the project he delivered in the decoration？

2. 在房屋裝修中，承攬人對裝修材料的瑕疵應承擔何種責任？

How the undertaker bears responsibility for the warranty for the defect material he used in the decoration?

3. 在違約責任與侵權責任競合時，當事人應如何選擇行使權利？

The persons involved how to exercise their right to choose when Liability for breach of contract and tortious liability competing

室內裝修污染致人損害賠償的舉證責任

Burden of proof for Interior decoration pollution damages to the people

[爭議焦點]

[Controversy]

在室內裝修污染致人損害的求償案件中，舉證責任應當由誰承擔？

In the interior decoration pollution cause damage claim cases, the burden of proof should be carried by whom?

裝修合同中的風險額外負擔

Risk additional burden in the decoration contract

[爭議焦點]

[Controversy]

在裝修合同履行中發生風險，損失應由誰額外負擔？

If risk occurs in the decoration process, the loss should be whose responsibility?

九、物業管理

Ninth, property management

業主的建築物區分所有權與法律保護

Ownership of dwelling—house and legal protection

[爭議焦點]

[Controversy]

1. 什麼是建築物區分所有權，業主在哪些方面享有建築物區分所有權？

What's ownership of dwelling—house and owner can enjoy right from what aspects ?

2. 如何看待業主 " 被迫 " 簽訂的物業管理格式合同的效力？

How to judge the effectiveness of the form contract which is signed by the owner who is forced to do so ?

物業公司是否對第三人侵權造成的業主人身損害承擔賠償責任

Whether Property companies undertake the compensation responsibility due to the personal injury which created by the third party

[爭議焦點]

[Controversy]

物業公司是否對第三人侵權造成的業主人身損害承擔賠償責任？

Whether Property companies undertake the compensation responsibility due to the personal injury which created by the third party?

物業管理委員會的訴訟主體地位認定

Presume the main body position in lawsuit proceedings of Property Management Committee

[爭議焦點]

[Controversy]

1. 小區物業管理委員會在訴訟中有無主體資格？居於何種法律地位？

Whether the Property Management Committee enjoys the main body qualification in the lawsuit case ? And in what legal position ?

2. 國土房管局未盡其應有的監督管理職責的，應否承擔責任？

Whether Real Estate Bureau undertakes the responsibility when it fails to practice its supervising duty ?

物業管理行政主管部門的職能定位

The functions of administration department of property management company

[爭議焦點]

[Controversy]

1. 物業管理委員會的性質是什麼？其可享有的自治權利有哪些？

The nature of Property Management Committee and its self-governing rights

2. 物業行政主管部門享有哪些職權？其行為是否可訴？

The functions of administration department of property management company. And whether it can be brought to a court ?

十、有關房地產的行政案件

10th, Administrative case about real estate

規劃許可案件審理中的有關問題研究

Some problems about the judging of the case about administrative building permission

[爭議焦點]

[Controversy]

1. 建設工程規劃許可需要經過哪些程序？

Administrative building permission needs to handle which procedures?

2. 履行政程序有瑕疵，的建設工程規劃許可證是否有效？是否可訴？

Whether the peimission still has effectiveness when the project has flaws? Can this be brought to a court ?

不應對存在爭議的土地使用權進行登記

The disputed ground's using right should not to be regislated ?

[爭議焦點]

[Controversy]

應否對存在爭議的土地使用權進行登記？

Whether the disputed ground's using right has to be regislated ?

行政訴訟中第三人舉證的效力認定

The identification of the effectiveness evidence by the third part in the administraive lawsuit

[爭議焦點]

[Controversy]

如何看待第三人在行政訴訟中所舉證據的效力？

How to judge the effectiveness of the effectiveness of evidence by the third part in the administraive lawsuit

房管部門核準集資房公用面積分攤方案行為之認定

Identify the sharing area of financing building by the real estate management department

[爭議焦點]

[Controversy]

1. 房管部門是否有權審核集資房公用建築面積分攤方案？

Whether the real estate management department has the right to approve the sharing area of financingbuilding?

2. 該審核行為是否可訴？

Is this act litigatable?

因協助司法執行而啟動的行政行為亦應受到司法監督

The administrative behaviours which is carried out to help implementation of the judicial are still subjected to judicial supervision

[爭議焦點]

[Controversy]

因協助司法執行而啟動的行政行為是否屬於行政訴訟的受案範圍？

Whether the administrative act which is carried out to help implementation of the judicial belongs to the administrative lawsuit case range ?

十一、有關房地產的刑事案件

11th, Criminal case about real estate

售樓處工作人員越權收取購房款據為己有的行為構成詐騙罪

The stuff in the sales office takes forcible possession of house purchasing money beyond his power ,this is the crime of fraud

[爭議焦點]

[Controversy]

售樓處工作人員越權收取購房款據為己有的行為是否構成詐騙罪 ？

If the stuff in the sales office takes forcible possession of house purchasing money beyond his power is this crime of fraud ？

" 野蠻拆遷 " 者以非法侵入住宅論罪

"Barbaric demolition " illegal intrusion into residential

[爭議焦點]

[Controversy]

在未與被拆遷戶達成拆遷協定，也未取得合法手續情況下強制拆遷的，是否構成非法侵入住宅罪 ？

Before the demolition agreement reached by the relocatees and the lack of legal procedures ,whether forced evictions constitutes illegal Burglary?