

THE CONCEPT AND CONTENT OF THE CONTRACT OF PARTICIPATION IN SHARED CONSTRUCTION AND ITS LEGAL CHARACTERISTICS

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The subject of the research is the contract of participation in shared construction. This type of contract is characterized by a special subject structure and defined as independent bilateral commercial agreement owing to which it stands out of other types of contracts. The practice of using this legal institution shows its possibilities and advantages in terms of increasing the number of citizens who have received the opportunity to improve their housing conditions. Nevertheless, today in Russia there is a question of stopping the use of shared-equity construction because there are also negative aspects of the implementation of this right, including an increase in the number of defrauded shareholders. The ambiguity of this legal institution throughout the history of its existence has been the subject of study by many scientists. One of the main issues of these studies was the equity participation agreement as a form of expression of legal relations between developers and participants in shared construction, which provides protection of the rights of all parties to the specified transaction. The equity participation agreement is the basis of legal relations between the parties and regulates their rights and obligations.

The purpose of this article is to investigate the main features of the contract in shared construction, to summarise different points of view on the definition of this legal document, to consider the algorithm of concluding this kind of contract, to review Russian legislation in the sphere of shared construction, Russian judicial practice and negative aspects of buying real estate units under this type of contracts.

Methodology. A systematic approach was used in combination with logical methods of cognition. It made it possible to study the theoretical, factual and legal grounds of the phenomenon of shared construction in Russia.

The main results, scope of application. The article stipulates the main features of the contract of shared construction, different points of view on the definition of this kind of contracts, the algorithm of concluding a contract of shared construction and Russian judicial practice in this sphere.

1. Introduction

The article reflects the statement of the problem in determining the peculiarities of legal relations between developers and participants of shared ownership construction that protects the rights of all parties of the transaction, which was the main purpose of the research.

The relevance of the theme of the article is due to the problems of the conclusion and execution of the contract of participation in the construction and controversial issues in the doctrine of law in the investigated area.

The problems of regulation of procedure of conclusion and execution of agreement of share participation in construction, doctrine of law in the field are considered in the works of

A.A. Binkovskaya, O.S. Vagina, O.L. Verbin, E.G. Gukasov, M.A. Gureeva, O.G. Ershov, A.E. Kazantseva, E.A. Kindeeva, T.A. Kobylkova, N.N. Kurova, P.V. Tarakanov, I.A. Lepekhin, T.Yu. T.Y. Lepekhin, T.Y. Maiboroda, V.V. Melnik, T.V. Mochalova, M.V. Petrukhin, K.I. Sklovskiy, D.A. Sobolev, D.S. Solovyov, I.I. Kharitoshin, E.V. Buzun, A.V. Dikun, K.S. V. Romanets, E.S. Filippova, K.S. Avakian, E.V. Burtseva, E.H. Akchulpanova, S.G. Gorbachev, V.Z. Gushchin and others.

Conclusions about solution of research problem: problems connected with problems of participation in share participation construction, arising in daily practice, it is necessary to solve by adoption of definite legislative changes which will help to minimize unfair actions in share construction.

The aim of this research is to reveal specificity of the equity participation agreement on the basis of the systematic analysis of the civil legislation, scientific representations about the equity building agreement as well as to optimize the existing mechanism of legal regulation through the prism of equality of rights of equity building participants and builders.

The solution of the research tasks was carried out with the complex use of general scientific and private scientific methods of knowledge. Dialectical, logical, system, structural-functional, formal-legal methods, as well as the method of analysis of current legislation and scientific literature were applied in the work.

2. An interpretation of the equity participation agreement in the legal doctrine

In the civil doctrine are expressed different points of view on the concept, the essence and the legal nature of the contract of participation in share participation construction [1; 2; 3; 4].

The equity participation agreement provides that one party, the developer, must be stipulated in the agreement, by itself or through an authorized representative, to complete the construction of an apartment building or any other property and then, after obtaining a building permit and putting into operation, to hand over the equity construction object. And the participant of construction, in turn, must accept the object of this construction and pay for it the amount of money specified in the contract [5].

In terms of qualification essence, the contract of participation in share construction is characterized by an independent, bilateral and paid contract, which differs significantly from other contracts.

In scientific works [6; 7; 8] the following main features of the studied agreement are distinguished:

1) In this case, the shared equity construction agreement has a special subject structure. The parties to such an agreement are the developer, a legal entity or an individual owning or leasing a land plot, attracting the resources of the equity construction participants and constructing an apartment building or another real estate object on the plot. In addition, the equity construction participant may be a legal entity or an individual investing material resources into the real estate construction and acquiring the right to a share by attracting funds and thus acquiring the right to a share in the structure under construction. At the same time, plurality of persons is the main characteristic of a party participating in shared construction.

2) One of the features which identifies the project under investigation is the purpose of raising funds by organisations and citizens, namely, to carry out the construction of apartment buildings and other real estate. The designated purpose of the attraction distinguishes this system of contracts, for example, from the contracts under which banks or other credit institutions attract funds for their

subsequent placement, primarily for making profit by issuing loans.

3) It should be noted that, given the subject matter of the share construction contract, the developer must not only build the property, but also transfer part of it to each shareholder based on the terms of the contract. This is the specificity of the construction of this contract as compared to the contract in which the contractor builds the real estate for the client's money and provides him with the final result in full upon completion of the construction.

4) The next characteristic feature of the shared participation in construction contract is the specificity of the subject, namely its limited scope, which means that based on the subject matter - only buildings consisting of residential and non-residential premises may be constructed. According to Article 2 of the Act on Participation in Shared Construction, the object of shared construction is only residential or non-residential premises intended for transfer to the shareholder after the developer has obtained a permit for commissioning the building under construction.

5) In addition to the above, the developer has a list of preliminary obligations to the shareholder, the fulfillment of which is mandatory and is the main condition for the future conclusion of the equity construction participation agreement between both parties to the agreement [9].

So, to begin the contractual relationship, the developer will have to obtain a building permit to begin construction, publish a declaration of the project of the object to be built, and fix the ownership or leasehold of the land on which the construction is to take place.

6) In turn, taking into consideration the structure of the analyzed contract, it should be noted that there are a number of subsidiary measures to protect the rights and interests of the equity construction participants, first and foremost, of course, the shareholders, as the weak party of the contract, which have been considered in detail by the researchers [10; 11].

There are a number of authors [12; 13; 14], who believe that with the adoption of the law on participation in share participation construction, in fact, a new type of contract has not appeared, they

believe that the definition of essential features of the contract, does not make this contract an independent type. Other authors, on the contrary, believe that with the emergence of regulation and the identification of features - a new contractual structure, called the contract of participation in shared construction. In addition to the authors, there are different qualifications of these contracts, so to say, this type of agreement is considered by some as a simple partnership agreement, like other contracts of this type, often considered by law enforcement agencies as a special type of investment activity contract

The legislation of the Russian Federation defines shared ownership construction as a relationship between a developer and a shareholder, whereby the developer's obligation is to complete the construction of the said real estate within the stipulated period of time, and the shareholder's obligation is to ensure that the investor receives a stipulated payment for such construction. From the contents of the act and court practice, it is clear that it is the investor-shareholder who is the weak party in this relationship, so the investor is more focused on protecting its rights and interests in cases of improper service or refusal. to perform the developer's obligations.

In today's reality, there is much disagreement about the nature of the equity participation agreement. The authors are ambiguous in their judgments and interpret the contract of participation in equity construction either as a contract for raising financial resources, or as a contract of accession, or as a contract for the performance of works or provision of services. [15; 16; 17].

Today there are many different definitions. The designated contract is to be studied as a "domestic contract", a "construction contract", a "contractual basis" or a "contractual obligation".

Some scholars argue that there is no reason to claim that a participation agreement and an investment agreement are the same. In addition, the theory that the legal nature of the participation agreement is ambiguous is not insignificant. Meanwhile, according to the opposite position, the agreement we study in this article cannot be regarded as mixed.

As most researchers point out [18; 19; 20; 21; 22], there are many different mistakes, irregularities and shortcomings. All of them cause ineffective regulation of the institution of shared construction.

We may encounter the same situation when trying to define the features of unfinished construction. As of today, there is no unified and comprehensive concept in the law, which could distinguish a building under construction from various other properties. There is no specific definition of the word in the law. According to court practice, an object under construction is:

- buildings and structures, which can be explained by the fact that the word describes the construction process itself and its stages, but does not indicate its functional purpose or structural features;
- the objects referred to in this article above, which at this stage are not used for their intended purpose because they have not been commissioned and are under construction.

According to Resolution No. 25 of the Plenum of the Supreme Court of the Russian Federation of 23.06.2015, in order to recognise an object under construction as an unfinished construction project, the existence of completed works on the foundation or similar works must be established.

In addition, in this article we will focus on another definition. Malicious acts of incomplete construction must be regarded as a sub-species of construction in progress. The legal and business acts do not contain a definition of this concept. We are going to state that "malicious / malicious incomplete" means unfinished real estate on which the installation and other works have been suspended and (or) stopped, and the installation works have not been performed for one year in accordance with the deadline stipulated in the POA. The erection of objects is "frozen" for an indefinite period.

3. Practical aspects of the implementation of an agreement on participation in shared construction

It is understood that the object of equity participation in construction, at the stage of construction, cannot be immovable property as it

has not passed the obligatory cadastral and technical registration procedure. In this regard, such a state of affairs is, by interpretation and meaning, contrary to applicable law.

On the other hand, judicial practice shows that courts do not fully share this viewpoint. It is thought that it is permissible not to define an object specifically, but to specify mandatory features and conditions for that object so that the created thing can be attributed to the subject matter of the concluded contract. In other words, this is a way of describing the object in a shared construction. At the same time, providing the developer with a definition of the object can encourage abuse.

So, before concluding a contract for participation in shared construction, it is very important to describe the object that will be built and handed over and to indicate its main features, namely [23]:

- the name of the object, e.g. residential or non-residential premises
- the specifics of the construction of the object: the number of rooms if it is a flat, the design area according to the project documentation
- the address where the flats, buildings or other properties are located; in addition, the location of the object within the building: the building and the shop
- the quality of the object to be handed over, e.g. in the case of a flat: whether or not there is interior finishing.

Commissioning of the house is the basis for transferring the construction in progress to the completed and commissioned building. When an apartment building has been approved for commissioning, the real estate and its status as a completed building are transferred.

The result of such construction is the apartment house as a single housing estate. The object of construction in such case will not be a room in the house, but the whole property complex - apartment house, the main part of which will be in common ownership of the owners, and the rest of the house will be divided into premises. In this case, the premises will be the subject of the equity participation agreement, as the agreement stipulates that after the construction is completed and the house is put into operation, the premises will be

subject to transfer to the ownership of the co-owners. In this case, the common property will be transferred not to the shareholder as a participant in the share participation construction but to the collective of co-owners of the premises, who will act as the sole owner of the common property.

This is a feature of shared ownership construction, such as townhouses. Townhouses are low-rise houses made up of several adjacent sections, including several flats, usually with different entrances to the plot. The legal status of a townhouse is not regulated, but in its meaning it is most closely related to an apartment building [16].

Citizens participating in shared construction exercise their rights by entering into a contract of participation in shared construction. In the case of participatory construction, civil construction itself initially developed in practice and only later received a legal definition in the law, and it must be agreed that such consolidation occurred without any substantial adjustments, without careful analysis and legal qualification. of the legal relations involved.

Courts classify the contracts of participation in shared construction as contracts of sale, usually do not delve into the question of the possibility and appropriateness of this qualification [24; 14].

According to the author of the article, the equity participation agreement is an independent type of contract, which has its own qualifying features. These are: the presence of special participants: the developer and the participant of equity construction, attraction by the developer of borrowed funds for construction, etc.

The indisputable merits of the adopted law on shared equity construction, which underlies the legal regulation of the relevant relations, must be recognized as fixing such notions as "shared equity construction contract", "developer", "shared equity construction object", "shared equity construction", as well as establishing the ways to enforce the developer's monetary obligations to shared equity construction participants.

In practice, a number of provisions of the law on share participation construction cause some problems. It does not apply to the relations of private entrepreneurs and legal entities engaged in investment activities for the construction of real

estate. It is interesting to consider the following case. A limited liability firm filed a claim with an arbitration court. It was a claim against a public limited company. The limited liability company was to require the open joint stock company to surrender to the limited liability company in kind pursuant to a deed of transfer in consideration of the investment agreement governing the non-residential premises located on the 11th and 12th floors of an annex to a 7-story non-residential building [25].

The court of first instance treated the contract between the parties as an equity participation agreement. However, the Cassation Court overturned this decision, taking into account that the subject of the contract was not a detached non-residential building and the construction of a non-residential building as a single object of civil rights.

Pursuant to the terms set out in the agreement, the property was to be transferred to a single person, a limited liability company. The Cassation Court thus concluded that the investment agreement between the two parties contained no evidence of participation in the construction of the building. It means that the norms of the law on investment activities in the Russian Federation apply to the relations between these parties.

Legislation needs to be legally distinguished because it is not always clear which law regulates the parties' relations when an individual entrepreneur (a legal entity) enters into an equity participation agreement to construct non-residential premises in an apartment building for the purpose of using them in the future, for example, as offices.

In practice, questions arise concerning the tasks of transferring and timing the results of the work performed by the contractor to the client. As a rule, the most common breach is a delay in handing over the property to the client. In line with this, it turns out that the consumer, as in other similar relationships, is the weak party. Therefore, this party should be strongly supported by legislation [26; 27; 28].

It is impossible to hold the developer liable. However, the law stipulates the liability of a participant in shared construction for failure to pay the contract price on time.

Before going to court, it is advisable to try to

settle the dispute out of court. It is also worth remembering that one of the positive aspects is the extension of consumer protection legislation.

4. Concerning the improvement of the procedure of execution and performance of the contract of participation in share participation construction

One of the essential aspects of the equity participation construction agreement is state registration. In one case, the investor has paid money to the developer in the agreed amount, the developer obtained a permit for commissioning the houses between the parties signed an act of transfer and acceptance of possession, alienation and use for the subsequent registration of the property in the office premises, the ownership of the disputed property is not registered. An external management procedure was introduced for the developer [29].

It can be concluded that the legislation on participation in shared housing construction does not fully protect the rights of participants, and puts them in a weak position, which is used by unscrupulous developers. However, there are certain legislative changes that will help to nullify unfair practices of developers in the future.

It is possible to buy a house in a new building by concluding a share participation agreement in a proper written form, which, like any other real estate transaction, is subject to state registration. It is also recognised as legally entered into only upon such registration.

The state registration of the said agreement shall be effected by the Federal Registration Service in cases where the building permit was issued after April 1, 2005.

To summarize, it is appropriate to state that to register an agreement on participation in share participation construction the following algorithm of actions is required.

First, the documentation required for this procedure must be prepared. The documents established by law shall be submitted to the registering territorial body together with the application of the parties to the agreement (equity construction participant, developer) and a copy of the agreement itself. The territorial jurisdiction of Rosreestr is determined by the location of the

apartment building in the construction of which the equity participation is accepted.

The law defines a legal distinction between the first equity participation agreement and all subsequent similar agreements.

During the initial registration of equity participation in the construction of a particular residential building, the developer provides documentation confirming the legality of its activities, including [30]:

1. Certificate (extract) of registration of the legal entity,
2. Constituent documents,
3. Plan of the residential property under construction,
4. Project declaration,
5. Building permit,
6. Documents confirming the ownership, lease and other rights to the land plot allocated for construction, etc.

In case of subsequent registration of share participation agreements for construction of the same real estate, submission of such documents is not required.

Individuals participating in shared construction must submit to the registering authority:

1. Agreement on participation in share participation construction with all applicable annexes,
2. Bilateral application for state registration of the said agreement,
3. Documents certifying the identity of the applicant. When applying through a representative - documentation authorizing their actions. In usual cases - notarized power of attorney. For legal representatives of minor citizens - birth certificate, for representatives of incapacitated persons - act of appointing them as guardians or custodians;
4. In case of marriage - notarised consent of the other spouse for conclusion of the transaction,
5. Mortgage agreement, agreement on pledge of rights of claim under loan agreement - applicable in cases when loan or borrowed funds have been used for participation in share construction,
6. The act of description of an object of equity construction to be purchased, i.e. a specific

accommodation, a flat. It is drawn up by the developer and agreed with the participant of such construction. It specifies the technical parameters and location on the Master Plan of the unit under construction.

In order to avoid unpleasant incidents the registration authority must provide a receipt for the payment of state duty. If there is no information in the Rosreestr's payment system on the transfer of funds for the service rendered, the application documents will be returned without proper registration.

Once all the required documentation has been collected, it must be submitted to the Federal Registration Service and a receipt must be received. This receipt indicates:

1. From the moment the documents are submitted,
2. A list of the documentation,
3. Personal data of the Rosreestr's employee who accepted the documents, his/her signature,
4. Telephone number, personal details of a specialist who will promptly answer questions about the progress of your registration case.

After a successful outcome, all that remains is to collect the documents. The deadline for general registration - for the first registered shareholder agreement - is eighteen calendar days from the date of receipt of the documentation. And for subsequent parties - five working days. After this period, a specialist of the Federal State Registration Service issues the documents to the applicant. For this, the following must be provided:

1. identification documentation.
2. A receipt previously issued by Rosreestr with a number assigned to the order of state registration.

The main document confirming the fact of registration of the real estate transaction is the relevant certificate. This right is also confirmed by an extract from the unified state register. As proof of the issue of these documents, a signature must be affixed to the ledger as well as to the copy of the receipt for the documentation, which remains with the Rosreestr. Registration of the agreement itself is confirmed by a registration mark on it [28].

5. Conclusion.

Nowadays, the shared participation in construction is becoming more popular on the real estate market. Participants of share participation construction must know the peculiarities of such agreements in order to maximize their security at all stages of the construction and purchase of such housing.

Legislation on participation in shared ownership construction does not fully protect the rights of participants, and puts them in a weak position that is exploited by unscrupulous developers. However, there are certain legislative changes that will help to nullify unfair practices in the offer of participation in shared construction.

When entering into an agreement, the parties must make sure that there are material conditions in the equity participation agreement, because if at least one of the material conditions listed in this article is missing, such an agreement is considered to be unconcluded.

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