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Some Questions of Notary Certification Agreement in Sharing the Real Estate Construction under the Legislation of the Kyrgyz Republic

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Abstract

This article discusses notarization contracts issues in construction equity participation real estate under the legislation of the Kyrgyz Republic, an analysis of the legal norms governing legal relations in this field. Unfortunately, the presence of constitutional norms is not always a guarantee their implementation due to many reasons, the last of which is the lack of financial opportunities and the mechanism of legal regulation prescribed in law. One of the ways to exercise one's constitutional right to housing is the so-called construction on shared principles.

Keywords

Contract of equity participation in construction, Notarization of the contract, Housing legal relations, Housing stock, Procedure and conditions for shared construction, Contract form, Building codes, Construction companies

I. Introduction

Article 45 in the Kyrgyz Republic Constitution law from May 5, 2021 guarantees to all Kyrgyz Republic citizens the right to housing (Kyrgyz Republic Constitution, 2021;). This right is ensured by government development, municipal and individual housing funds, housing fund organizations, assistance to citizens in the purchase of housing under conditions and in the order established by legislation.

In recent years, joint construction has been developing on a large scale in Kyrgyzstan. There is a question whether construction companies provide consumers with conditions for guaranteeing compliance with contractual obligations, as currently there is no special law in Kyrgyzstan that would regulate these legal relationships.

At present, in the Kyrgyz Republic, legal relations in the field of equity participation in construction are regulated only by some norms of Article 66 in the Kyrgyz Republic Housing Code as well as the Regulation on procedure and conditions for the equity construction of multi-apartment houses in the Bishkek city, approved by the Bishkek City resolution Council of Deputies No. 20 from 27.11.2008 (further in text "Regulation on share construction"). It is difficult to determine the share of shared construction on municipal lands, but they make up a significant part of all construction in the Kyrgyz Republic. Accordingly, only the norms of the Kyrgyz Republic Housing Code regulate relations of shared construction outside the city Municipal lands in Bishkek.

The regulations on the order and conditions in share building (construction) of multi-apartment houses in Bishkek have not changed since 2008, practically since its adoption. Clause B 3.2. This provision states that contract is in writing, subject to government registration and considered as concluded from the moment of such registration.

Part 4, Article 66 of the Kyrgyz Republic Civil Code, in addition to government registration, also provides notarial certification. In this regard, the

above provision does not correspond to the adopted Housing Code of the Kyrgyz Republic. The Housing Code of the Kyrgyz Republic does not provide for the direct regulation of relations with regard to construction. It is also mentioned that according to p. 35 in the Instruction on the notarial actions performing procedure by notaries in the Kyrgyz Republic, approved by Resolution of the Kyrgyz Republic Government No. 179 from April 20, 2011, contracts for share participation in the construction of multi-apartment houses are subject to mandatory notarization. In other words, the Housing Code and the Instruction on the procedure for the performance of notarial actions, which are guided by government and private notaries in their activities, provide for a mandatory notarial form of contracts certification for share participation in construction, which is not provided for Regulation on the procedure and conditions in share construction of multi-apartment houses in Bishkek city. In this regard, many questions arise in practice, which may subsequently lead to various legal proceedings.

Another moment, in the regulation of order and conditions of share construction of multi-apartment houses in the Bishkek city No. 20 from 27.11.2008 (Kyrgyz Republic Regulation Law, 2008) it is stipulated that the share construction agreement must contain:

- 1) Determination of the concrete object in shared construction subject to transfer in accordance with the project documentation by the developer after obtaining permission to put the apartment building into operation;
- 2) The term of documentation permit development, design and research work, construction, commissioning and transfer of ownership of the shared construction object by the developer;
- 3) Price agreement, term and payment order;
- 4) Warranty period for the object of shared construction.

According to this provision meaning, it is possible to conclude a contract for share participation in construction before obtaining the permit documentation and before carrying out design and research work. At the same time, it is not clear how relations will be regulated, if the construction company will not be able to obtain the relevant construction permit documents.

Clause 4.1 is very strange in legal terms provision, which states that in order to achieve the goals, the developer has the right to attract funds from the taxpayer for the preparation of permit documentation, the implementation of design and research works on construction of multi-apartment houses after creation, placement and (or) presentation of project information in accordance with the Regulations and plot of land under construction of an apartment house.

It turns out that at the level of the statutory act, it is directly allowed to receive funds from the shareholders for the object construction, including the preparation of permit documentation. This norm does not protect the rights of equity participants, since to builder is given the opportunity to conclude an agreement for equity participation in construction and receive funds without permission.

It should be noted that provision does not provide that the contract content should specify the location of the shared construction object on the floor of the multi-apartment building under construction or creation (Chugunova, 2017; Ma et al., 2020) and (or) other real estate objects, with the indication of information in accordance with the project documentation about the type, purpose, and quantity floors, the total area of the multi-apartment building, the material of the outer walls and floor coverings, the class of energy efficiency, seismic resistance, the purpose of the object of shared construction (residential premises, non-residential premises), about the floor on which such an object of shared construction is located, about its total area (for residential premises) or area (for non-residential premises), the number and area of rooms, premises for auxiliary use, loggias, verandas, balconies, terraces in residential premises, availability and how to place parts of the area.

The Kyrgyz Republic national legislation also prohibits the opening of construction companies by persons who were previously founders or managers of bankrupt construction companies or persons who were prosecuted for crimes against property.

The absence of this norm allows, in our view, unscrupulous persons to continue construction activities by opening other legal entities.

Unfortunately, there are also no regulations on the need to complete the construction of object before starting the construction of share in another place. In this regard, many construction companies start construction in different places and due to external economic shocks (pandemic, sharp currency changes, etc.), they may not complete construction.

There are no legislative norms prohibiting the conclusion of a joint construction contract with a construction company that has tax, customs and other mandatory payments in arrears.

In case of adoption of such norms, the notary must check the presence or absence of documents and information. The above information gave the opportunity to shareholders to conclude only with those construction companies that are financially stable. Absence of such regulations led to the violation of the rights of approximately 4 thousand people (Kyrgyzstan news, 2022; Haghshenas et al., 2021; Jarach et al., 2021).

It should be noted that in the absence of the above-mentioned legal regulations, construction companies are not interested in notarization of contracts of share participation. In the Kyrgyz Republic territory, many different construction companies are currently engaged in the construction of residential and non-residential buildings, only a small part of which is interested in the mandatory notarization of contracts for share participation in construction. And there are many reasons for this, some of which we will try to reveal in this article.

First, in order for the shareholder to have the opportunity to notarize the share participation agreement concluded with the builder, the builder must own or use the plot of land on which the construction of a residential apartment building

is planned, and for this it is necessary to either purchase it, i.e. to conclude a contract of sale and purchase of a plot of land located at the seller's right of private ownership or to conclude a contract of lease with local self-government bodies in connection with the right acquisition in use the remaining term. But often, considering the high cost of land plots, mainly in the capital territory, builders conclude transactions for the purchase of land plots with various forms of settlement and/or consideration (for example: an installment contract and/or other consideration in the form of property rights, etc. or created real estate, or planned construction in the future). These forms of mutual settlements are the most common, which leads to the burden of the seller of the land plot as a beneficiary with the final settlement made by the developer. And, it would seem, nothing prevents at least notarizing the share participation agreement, if it is not possible to produce its government registration. However, the fact is that when selling real estate, developers often resort to some unscrupulous advertising tactics, for example, when advertising a future construction project or consulting potential buyers, developers assure trusting buyers that the land is exclusively their private property, and that the notarial certificate of the transaction is government registration is a waste of additional time and money, since otherwise, having a notarized contract of share participation in buyer hands will cost nothing to submit documents for registration, which for the developer may result in exposure and the buyer's demand to cancel the contract and return the initial fee.

It should also be noted that there are cases when the developer purchases a plot of land from the seller for cash without any installments or other forms of payments, but for funds provided by a credit and financial institution as a pledge of the plot itself, what else It makes it more difficult for a participant in share construction to carry out the necessary actions to protect their rights from unforeseen collisions and actions of unscrupulous builders (Kyrgyz Republic Law, 2005).

Secondly, to avoid the long procedure of subsequent termination of share agreement and additional costs, both by mutual consent of the parties, and at the initiative of one of the parties whose rights were violated under the agreement, which implies the drafting of a notarized agreement on the termination of the share agreement participation and its subsequent registration with the payment of a government fee, as the agreement on the amendment or termination of the contract is made in the same manner as the contract, unless it follows from the law, the contract, or the customs of business turnover in the Art. 413 (Kyrgyz Republic Civil Code, 1998).

There are definite or positive aspects of the notarial certificate of the share participation agreement. In this case, a big advantage of the notarized contract is that the participant of the share construction in case of urgent financial or other needs has the opportunity to transfer the rights of the property claim to a third party. In fact, according to the requirements of article 316 in the Kyrgyz Republic Civil Code, the right to assign rights based on a transaction made in written notarial form and requiring government registration must be made in a wedding or form.

Consequently, the absence of a timely notarized share participation agreement deprives the buyer of the opportunity to exercise his legal rights, which in the case of the presence of a potential client forces the buyer to turn to the developer with a request for the termination of the share participation agreement, or a notarized one, and to re-sign a new agreement already with a notarized certificate, which for the developer, it is very difficult and undesirable, as it violates the order and accounting of the company.

If we consider the position of notary authorities on this issue, which is legally indicated in the Instruction on the procedure for performing notarial actions by notaries of the Kyrgyz Republic, approved by the Kyrgyz Republic Government resolution from April 20, No. 179 "Instruction on notaries" (Kyrgyz Republic Government, 2011), it is possible to conclude that until subjects of legal relationship joint-stock construction agreement on the transfer of real estate ownership built on a joint-stock basis, the property right belongs to the developer and only the signing of this agreement gives the right to person who made payments under the joint-participation contract (shareholder) to be considered as the apartment owner.

If the draft law "On share participation in construction" is adopted in the Kyrgyz Republic, then this law will regulate the legal relations of participants in share construction, where, in addition to mandatory notarial certification and government registration, I think it is necessary to provide for the norm of opening special accounts in which the money of shareholders accumulates. Participants of share construction will be able to track the movement of money on the account.

It is also required to introduce a ban on citizens' funds attraction in joint-stock construction violation of conditions prescribed in the draft law, if the construction companies will not comply with the rules.

V. Conclusion

According to official statistics, there are no defrauded taxpayers in the Kyrgyz Republic. However, according to unofficial estimates, there are about 4 thousand people. In this article, only one problem is considered, the solution of which is not always possible within the framework of the existing legal framework. Recommendations in such a situation are self-evident. It is necessary to exclude discrepancies and contradictions between normative acts, as well as contradictions that arise in the process of their legal application in relation to subjects of unfinished construction, and also to adopt a special law, where norms have been adopted, regulating relations on share participation in housing construction.

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