Criminal-legal guarantees for participants of share construction: problems and prospects

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Abstract. The aim of the article is to investigate the optimal criminal law guarantees for citizens investing in the construction of apartment buildings and other real estate. The goal set by the authors is achieved by analyzing the current criminal legislation of Azerbaijan and Russia. During the study the authors used a systemic and structural-functional methods of scientific knowledge, the method of interpretation of legal norms and logical method. Various criminal law instruments providing guarantees to investors in the construction of apartment buildings were considered. The authors concluded on the need to introduce criminal liability for the involvement of funds of citizens in violation of the legislation on participation in shared construction of apartment buildings and (or) other real estate. In formulating the disposition of the norm necessary to consider the shortcomings of the Russian legislation and law enforcement practice relating to this issue.

1 Introduction

Finding the housing problem solution is a priority of a state policy in Azerbaijan and Russia. The right to housing is an inalienable right of any citizen. The state, seeking to solve the housing problem, applies various financial and legal instruments, regulates significant cash flows invested in the construction of apartment houses and other real estate, regulates the order of construction of apartment houses and other real estate. Criminal law plays an important role in ensuring effective functioning of public relations connected with the construction of apartment houses. Practically all countries stipulate criminal liability for the publicly dangerous deeds on illegal attraction of citizens' money during the construction of apartment houses.

Azerbaijan and Russia are no exception.

2 Methodology

The international cooperation as well as the creation of the necessary legislative framework for this fight are the possible ways to improve the effectiveness of counteraction to crimes related to illegal attraction of funds of shareholders in the construction of apartment houses and other immovable property. Unfortunately, both in Azerbaijan and in Russia cheating investors participating in shared construction of apartment houses and (or) other real estate

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became quite a mass phenomenon. The nature of such a phenomenon is ambiguous.

However, thanks to the measures taken, including the emergence of the Article 200.3 of the Criminal Code, “the problem of defrauded shareholders in Russia in the near future will be completely solved (according to Deputy Prime Minister Marat Khusnullin on the board of the Ministry of Construction of Russia). 

It is necessary to carry out a comparative legal research of national and foreign legislation in order to find the most optimal criminal guarantees for participants of the shared-equity construction.

3 Results

In the theory of criminal law there are two main approaches to provide criminal-law guarantees to participants of shared-equity construction of apartment houses and (or) other real estate objects. In some countries such guarantees are provided through the qualification of socially dangerous deeds as fraud, in other countries these deeds are qualified as attraction of funds of citizens in violation of the requirements of the legislation of the Russian Federation on participation in shared-equity construction of apartment houses and (or) other real estate (Article 200.3 of the Criminal Code). In the global practice dominant is the assessment of such deeds in terms of qualification of such actions as a type of fraud [2]. Such practice has developed, for example, in Azerbaijan (article 178 of the Criminal Code of the Azerbaijan Republic). The main object of criminal encroachment in this case is the property of the citizens-shareholders. The subject of the crime is the money that the investor transfers for the construction of a real estate [3]. The abuse of citizens' trust is a means of committing a crime. The subjective side of fraud is a direct intent [4]. It should be noted that earlier in the Russian Federation such actions were also qualified as fraud only.

Today in Russia the attraction of citizens' funds for construction in violation of the requirements of the legislation of the Russian Federation on participation in shared-equity housing construction and (or) other real estate is qualified both as fraud (Article 159 of the Criminal Code of the RF) and as “the attraction of citizens' funds in violation of the requirements of the legislation of the Russian Federation on participation in shared-equity housing construction and (or) other real estate objects” (Article 200.3 of the Criminal Code of the RF). In this case the investor receives criminal-law guarantees not only in case of causing real damage, but also in case of violation of the statutory requirements in the financing of shared-equity construction. The object of the criminal-law protection in this case becomes the very procedure for carrying out economic activity, in particular, the procedure for attracting citizens' funds for construction in violation of the requirements of the legislation of the Russian Federation on participation in shared construction of apartment houses and (or) other real estate objects [5].

The subject, method of committing an act and the subjective side of the fraud and crime under the article 200.3 of the Criminal Code of the RF may coincide, which creates certain difficulties in qualification. A fraud, associated with intentional non-fulfillment of contractual obligations in the shared-equity construction, is difficult to distinguish from the other offences. [6]. The problem of differentiation of crimes provided by the articles. 178, 159, 200.3 of the Criminal Code of the RF arises as a result of causing a real damage in the form of money contributed by the investor and violations of the requirements of the construction of apartment housings' legislation [7].

The peculiarity of fraud is that the criminal intent of the fraudster to seize the money of a citizen-shareholder and dispose of it for his own benefit or the benefit of the third parties arises initially. When committing the crime under the Article 200.3 of the Criminal Code, the perpetrator intended to complete the construction, but can not do so due to a non-compliance with the requirements of the Russian legislation relating to the construction of apartment houses. In this case if the attracted funds are compensated by the guilty party in full or the guilty party has taken measures as a result of which the property was put into operation, the person is released from criminal responsibility. Is it right?

This is certainly correct from the citizen-shareholders'
point of view, because the main thing for the citizens is to eventually become the owner of the real estate or at least to get their money back. The state, declaring in the note to the article 200.3 of the Criminal Code a special type of exemption from criminal liability, gives legal guarantees to ensure this interest. When attracting funds of citizens for construction in violation of the requirements of the legislation of the Russian Federation the offender does not have a goal to embezzle someone else's property, as it happens during the commission of fraud.

Moreover, by declaring a special type of exemption from criminal liability, the legislator allows possible entrepreneurial risks that are on the fringes of the law, but in the end do not cause significant harm to the property relations. At the same time, the requirements to the order of existence and development of such relations are violated, so the reaction of the state taking into account the principle of justice and proportionality is obligatory. Thus, the note to the article 200.3 of the Criminal Code of the RF ensures the guarantee of interests not only of aggrieved citizens—shareholders, but also guarantees the rights of guilty persons in part of their exemption from criminal liability in cases provided for by the law. The presence of the article, which provides for criminal liability for violation of the order of economic activity, is designed to educate citizens to respect the law, i.e. has a preventive nature.

The new norm in the Criminal Code of the RF is positively evaluated by the investors and the law enforcers. It took several years for law enforcers to evaluate the effectiveness of the provision of the Article 200.3 of the Criminal Code of the RF. In the article 200.3 of the Criminal Code of the RF the suppression of criminal actions that cause damage to the owner has been moved to an earlier stage. For this crime to be completed the cause of damage is not necessary, but it is sufficient to commit the very act that may cause such damage. As soon as the builder begins to attract funds from citizens for construction in violation of the requirements of the legislation of the Russian Federation on participation in the shared-equity construction of apartment houses and (or) other real estate, the crime is a complete crime. No need to prove that the offender had not just temporarily borrowed the funds, but had an intent to steal them. To prove the last one causes the greatest difficulties in law enforcement practice in Azerbaijan and Russia. All of the aforementioned has led to the fact that, according to the official data for 2022, the number of construction projects in Russia has halved. No such effect is observed in Azerbaijan.

Fig. 1. The assessment level of criminal-law guarantees for participants of a share-equity construction effectiveness (Art. 200.3 of the Criminal Code).

Despite the significant positive effect of the introduction of the article 200.3 in the Criminal Code of the RF, law enforcement has some difficulties in its application. Thus, quite
debate is the question of the moment of termination of this crime, i.e. when a person is considered as having attracted funds of citizens. There are three possible positions on this issue: 1) from the moment of receipt of money by a developer; 2) from the moment of conclusion of an agreement by the parties; 3) from the moment of signing an agreement on equity participation in construction [9].

The last two points of view are based on the existence of a contract, the only difference being whether it is signed or registered. Therefore, it is necessary to emphasize the nature and essence of the contract itself. According to R. S. Bevzenko, agreements on participation in the shared-equity construction are inherently the purchase and sale of the future real estate, but due to the special composition of participants the legislator establishes special regulation for the conditions and procedure for their conclusion and execution [10].

The definition of the shared construction participation agreement is given in the Article 4 of the Law "On Participation in the shared construction participation agreement of apartment houses and other real estate objects and on Amendments to Certain Legislative Acts of the Russian Federation" dated 30.12.2004 N 214-FL.

Under a shared construction participation agreement one party (developer) undertakes to construct an apartment house and (or) other real estate by its own means and (or) with the involvement of other persons within the term provided by the agreement and to transfer the respective shared construction object to the shared-equity construction participant after obtaining a use permit, and the other party (shared construction participant) undertakes to pay the price stipulated by the agreement and to accept the share construction object after obtaining the use permit by the developer. According to the legal definition of shared construction participation agreement which is specified in the Article 4 (1) of the Law, the developer shall be entitled to raise monetary funds from citizens in order to construct an apartment house only up to the moment when the house is put into operation.

The main features of a shared construction participation agreement in construction are as follows:

First, a special subject composition: compulsory presence of a developer who owns or leases a land plot and attracts monetary funds of shared-equity construction participants for constructing apartment houses or other real estate on such land plot (Article 2 of the Law on a Shared-equity Participation Construction). The information about the developer must be published in a mass media or placed in an information and telecommunication network for public use.

Secondly, the specifics of the agreement, which purpose is to attract funds of organizations and citizens to construct the apartment house and other real estate.

Thirdly, the subject of the shared construction participation agreement: the developer must not only construct an apartment house or other real estate, but also transfer to each participant a specified by the agreement residential (non-residential) premises.

Fourthly, the limitation of its scope, predetermined by the specifics of its subject: under this agreement it is only possible to build residential or nonresidential premises.

Fifthly, there are requirements for the developer stipulated by the legislation of the Russian Federation on participation in shared construction of apartment houses. In particular, he must obtain a construction permit, publish his project declaration, ensure a state registration of the right of ownership (right of lease) of the land plot granted to him for construction.

Traditionally, the shared construction participation agreements are registered in person at Rosreestr or by submitting documents through multifunctional state service centers (MFC). An opportunity to register the shared construction participation agreements electronically is provided by the Federal Law No. 214-FL of 30 December 2004.
Until 2013, science, legislation and practice believed that no. But the consequences of such a point of view had led to the fact that first the judicial practice rejected it, and then the legislator decided to directly show its failure, which manifested itself in the change of paragraph 3 of article 433 of the Civil Code of the Russian Federation.

There following rule had appeared: the agreement is considered to be concluded even without a necessary state registration, since the main function of state registration of rights to property and (or) transactions with it is to create an opportunity for the third parties to learn about the right to property (encumbrance) and presuming their knowledge of what is contained in the registry.

In accordance with the current version of article 433 of the Civil Code of the Russian Federation, an agreement that is subject to a state registration is considered to be concluded from the moment of its registration, unless otherwise established by the law. Thus, even a non-registered agreement generates obligations between the parties. As noted by R. S. Bevzenko: for the parties to a transaction an agreement is considered to be concluded from the time of signing, and for the third parties - from the time of state registration [12].

Earlier this approach was developed in the practice of the Presidium of the Supreme Arbitration Court of the Russian Federation [13].

At the same time by the virtue of article 308 of the Civil Code the rights granted to a person who uses the property under the lease contract and has not passed a state registration, cannot be opposed to the third parties. In particular, such a person does not have a preferential right to conclude a contract for a new term (clause 1 of article 621 of the Civil Code).

At the same time, clause 1 of article 164 of the Civil Code states: "If the law provides for a state registration of transactions, the legal consequences of such transactions shall come into force after their registration" [14]. The Supreme Court of Justice expressed its position on this matter: A party to the contract, not passed the necessary state registration, is not entitled on this basis to refer to the loss of a contract (according the review of judicial practice on disputes related to the recognition of contracts unconcluded, approved by the information letter of the Presidium of the RF from 25.02.2014 N 165).

4. A person who is given a possession of a thing under a lease agreement which is subject to state registration, but is not registered, as a general rule cannot refer to its preservation when the owner changes. A state registration of a real estate lease agreement is aimed at protecting the interests of the third parties who may acquire rights to this real estate. It creates an opportunity for such persons to obtain the information on existing lease agreements concluded in respect of immovable property. However, a statement by the acquirer of immovable property that there is no state registration of the lease agreement of which he was aware at the time of the acquisition of immovable property is an abuse of right (Article 10 of the Civil Code).

The Court of Appeal also pointed out that in such a situation, by agreeing to acquire the ownership of real estate in the possession of the lessee, the buyer has actually expressed consent to the preservation of the obligations arising from the lease agreement. Therefore, the lease agreement shall remain valid according to the rules of article 617 of the Civil Code. These rules by analogy are quite applicable to the shared construction participation agreement [14].

The attraction of citizens' funds is not possible without their participation in shared construction. The article 200.3 of the Criminal Code of the Russian Federation directly states "about the attraction of funds from citizens for construction in violation of the requirements of the legislation of the Russian Federation on participation in a shared-equity construction". The attraction in this case is only possible when a person has expressed a desire to participate in a shared-equity construction. This desire is legally expressed in the contract conclusion, which has the legal force from the date of signing such contract. From that moment the citizen becomes a party to a shared-equity construction.
Summing up, taking into account the latest changes we can confidently say that the shared construction participation agreement is considered to be concluded for the parties to the contract at the time of its signing. From that moment, and not from the moment the money is credited to the developer's account, the crime is considered to be committed, especially since today the money does not go directly to the developer, but to the escrow accounts.

Another strong argument in favor of the fact that the committing a crime is connected with the signing, but not with the registration of the contract, are the provisions of part 4 of an article 3 of 214-FL: “The developer has the right to attract in accordance with this Federal Law monetary funds of citizens and legal entities for a shared equity construction of the apartment houses and (or) block houses (in case the number of such houses is three or more in one row) on condition of execution of obligation to pay deductions (contributions) to the compensation fund formed from the mentioned deductions (contributions) and property acquired at the expense of investment of the mentioned funds (further - compensation fund) before a state registration of the shared construction participation agreement, providing for transfer of residential premises, non-residential premises specified in a subclause 3.1 of a clause 1 of an article 201.1 of the Federal Law dated October 26, 2002 N 127-FL "On Insolvency (Bankruptcy)\[15\]."

The main conclusion from this legal position is that the absence of a state registration of the contract cannot be the basis for the failure to perform the agreement reached by the parties, but at the same time the rights of the parties in the absence of such registration cannot be opposed to the third parties.

The state registration of the shared construction participation agreement creates for a participant of a shared equity construction in the case of dispute a legal priority.

If there are several agreements in respect of the same apartment providing for its transfer to different persons, one may claim for a transfer of such apartment only under the agreement registered in accordance with the requirements of the Law N 214-FL. The persons having claims for a transfer of apartments under unregistered agreements shall be entitled in such case to claim damages from the developer according to an article 398 of the Civil Code of the Russian Federation).

Regarding the first point of view that the moment of the crime committing is the receipt of money, we can explain that the article 200.3 of the Criminal Code it is about involvement, but not about receiving money. In case of a contract’s payment terms violation the participant of a shared construction participation agreement pays to the developer a penalty in amount of 1/300 of a refinancing rate of the Central Bank of Russian Federation from the amount of delayed payment for each day of delay (part 6 of an article 5 of the 304-FL).

The reference to the payment of penalties in case of non-payment of money to the developer clearly indicates that the agreement to pay entered into force from the moment the contract was signed. From that moment that the stage of raising funds ended and the stage of the payment of the contract price began.

The crime is considered to be committed from the moment of signing the contract by the parties. Some scientists believe that the crime is considered completed from the moment the money is transferred to the accounts specified in the contract. If the contract is concluded, but the money has not been transferred, there is an attempt to commit a crime under the article 200.3 of the Criminal Code. However, if the amount of contributions transferred to the developer’s account or even one contribution exceeded the amount equal to 3 million rubles (large amount), in such cases the act is qualified as a completed crime\[16\].

This position contradicts the arguments we have outlined above in this article. In addition, it is somewhat illogical to argue that the completed act does not depend on the act itself, but on the size of the act. Unfortunately, not a very good wording of the article 200.3 of the Criminal Code allows us to state, if we read it literally, that the person is criminally liable if he has attracted funds from several citizens. In some cases law enforcement agencies correctly assume that...
4 Conclusion/recommendations

The criminal law guarantees to participants of the shared construction participation agreement of the apartment houses and (or) other real estate will be provided most effectively in case of appearance in the criminal legislation along with fraud of one more criminal legal norm, providing responsibility for attraction of funds of citizens in violation of the legislation of the Russian Federation on participation in a shared-equity construction of the apartment houses and (or) other real estate objects.

When introducing this norm it is necessary to take into account the Russian experience and avoid the shortcomings of its construction. In particular, to indicate one citizen-shareholder as a victim and formulate this norm with a clear indication of this: the involvement of funds of a citizen in violation of the requirements of the legislation of the Russian Federation on participation in a shared-equity construction of the apartment houses and (or) other real estate objects.

To orient the law enforcement practice that the moment of the end of this crime is the moment of signing the contract of a shared-equity participation in construction.

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