Ways to satisfy the claims of construction participants in the bankruptcy case of developers in Russia

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Abstract. Bankruptcy legislation in Russia is constantly changing. The main purpose of such changes is to create favorable conditions for creditors. During the bankruptcy case of developers, the rights of construction participants were violated for a long time. The Russian bankruptcy law currently contains special rules governing the bankruptcy of developers. The law provides for various guarantees of the rights of construction participants. The experience of applying bankruptcy legislation to developers abroad demonstrates its peculiarities. The task of the state is to ensure a high level of protection of the rights of citizens whose funds are attracted for the construction of housing. The bankruptcy law provides for special ways to satisfy creditors' claims in a developer's bankruptcy case. Such methods include the creation of a housing construction cooperative, the settlement of claims by transferring residential premises, and the attraction of a new developer to complete construction. Much attention is given to the transfer of a developer's right on the object under construction and a plot of land to the housing and construction cooperative or another specialized consumer cooperative as a means to satisfy the requirements of construction participants. The author reveals the conditions for such satisfaction, specifics of making the corresponding decision.

1. Introduction
Russian legislation in the field of bankruptcy is being improved very actively. With the bankruptcy of construction organizations, a number of problems arise that remain unresolved by the current legislation [1]. The legislative gaps are especially acute in the course of law enforcement practice when resolving disputes with the participation of developers and construction participants. It should be emphasized that until 2011, the general rules on the insolvency of legal entities were applied in the bankruptcy cases of developers. On August 15, 2011, the Federal Law “On Insolvency (Bankruptcy)” was supplemented by paragraph seven “Bankruptcy of Developers”. The rules set out in this paragraph are special, they, together with the general rules of bankruptcy law, regulate relations related to the consideration of bankruptcy cases of developers. Consumer bankruptcy law that includes meaningful debt relief has the potential to be an effective form of regulation. It can help promote deepening of consumer financial markets by increasing the expected insolvency returns of creditors, by making such returns more predictable, and by encouraging risk-averse consumers to obtain finance [2].

The current legislation of the Russian Federation in the field of construction of structures that fall under the definition of "shared construction objects" establishes for the organizations of developers a rather difficult scheme of construction and a model of interaction with equity holders, which does not always lead to the results intended by the legislator. Often the reason for the failure of developers to fulfill their obligations is the initiation of a bankruptcy case against the organization carrying out
Participants in shared construction, as practice shows, often do not have the necessary level of legal knowledge in order to protect themselves from unscrupulous developers. In the event that the developer's creditor is a large company, then the debtor can select the necessary debt restructuring mechanisms, while citizens most often do not have the opportunity to solve their financial difficulties.

The problems that arise in the field of shared construction are gaining momentum. Over the past few years, the number of developer organizations against which bankruptcy proceedings have been initiated has been growing inexorably. The construction industry ranked second in Russia in terms of the number of company bankruptcies at the end of 2019. Such data are presented on the website of the Federal Register of Information of Legal Entities ("https://fedresurs.ru"). Last year, 2.5 thousand construction companies went bankrupt in Russia. This is 20.2% of the total number of insolvent legal entities in 2019. The first place was taken by the sphere of trade (3.4 thousand bankruptcies, 27.4% of the total). And the third was the sphere of real estate transactions (1.4 thousand, 11.3%). Obviously, the larger the industry, the more bankrupts it has. Since the spheres of trade, construction and real estate are the leaders of the economy in terms of the scale and number of companies operating in them, it is these sectors that account for the bulk of insolvent firms. However, if we compare the number of bankrupts and the number of enterprises operating in this sector, the incidents of insolvency will not exceed 2%.

Providing citizens with housing is a particularly significant issue for the state. For this reason, in recent years, a lot of efforts have been made at the legislative level to regulate relations in the field of shared construction. In particular, the obligation was established for developers to work through escrow bank accounts. This measure caused great damage to developers. This especially affected small organizations that do not have the ability to finance construction on their own. The construction costs of such organizations were almost entirely funded by the construction participants. Therefore, the measures taken by the legislator appear to be twofold. On the one hand, unscrupulous developers leave the market, thereby providing certain protection to the participants in the construction. On the other hand, under such conditions, it is extremely difficult for new entities to enter the shared construction market. This gives rise to the monopoly position of several large organizations of developers in certain regions of the country. Russian researchers have identified the pros and cons of using escrow accounts as a mechanism for protecting the rights of participants in shared construction in the conditions of a bankruptcy of the developer [3]. One of the significant regulators of the studied public relations must be considered the Federal Law of December 30, 2004 No. 214-FZ "On participation in the shared construction of apartment buildings and other real estate and on amendments to some legislative acts of the Russian Federation." This law includes compulsory civil liability insurance of the developer organization. Nevertheless, the application of this law did not reduce the number of bankruptcies.

The experience of applying bankruptcy legislation to developers abroad demonstrates its peculiarities. The recent history of real estate developers in the Netherlands and Belgium shows that financialization processes are geographically variegated. Although real estate developers, the intermediary between capital and the local built environment, faced a similar rise of more market-oriented banking, Dutch developers financialized their activities while their Belgian counterparts did not. The Dutch case demonstrates how financialized corporations can make accumulation cycles more extreme, particularly by placing the creation of fictitious capital at the center of their business strategies. The Belgian case illustrates how patient capital, i.e. multi-generational wealth looking for sustainable growth, can function as a strong barrier to financialization processes, thus moderating the influence of financialized capitalism on the economy [4].

2. Guarantees of the rights of construction participants: a legislative model

One of the most common ways to purchase housing on the primary market in modern Russia is a contract for participation in shared construction. The task of the state is to ensure the most effective protection of the rights of citizens, whose funds are attracted for the construction of housing [5]. Solving the problems associated with the provision of housing to citizens affected by the actions of unscrupulous developers, of course, has social significance [6]. Crimes at the stage of construction are most often
connected with unscrupulous developers who have accumulated money for equity construction and then have failed to build the house or put it into commission, which could be characterized as fraud. There are many crimes connected with the overestimation of construction costs, provision of false work completion statements, etc. Crimes of unscrupulous management companies in the sphere of building maintenance are most often connected with embezzlement of funds collected from the dwellers as payments for utilities, and their non-transfer to the corresponding public utility companies [7]. In addition, the negative impact of corruption is also undoubtedly [8].

Scientists point to the problem of the issue of unequal rights of participants of shared construction during the bankruptcy of a builder. For instance, according to the literal interpretation of the rules on bankruptcy, the construction participants, who invested money into the cottage and apartment building in townhouses consisting of two blocks, are deprived of the right to include the requirement into the register of requirements for the premises transfer [9]. A feature of the register of creditors’ claims in a developer's bankruptcy case is the presence of four stages, where the third stage is intended for the claims of construction participants [10].

Russian legislation allows certain forms of attracting funds from construction participants: 1) the conclusion of an agreement on equity participation in construction; 2) issue of housing certificates; 3) participation in a housing construction cooperative. Any other forms of receiving money from citizens are not based on the law and may be invalidated in court. Developers could be brought to administrative responsibility on the basis of Article 14.28 of the Code of Administrative Offenses of the Russian Federation.

Global legislative changes in the field of shared construction were adopted and took effect on January 1, 2018. The new regulation is more connected with more serious requirements for developers. Let's list the main changes: (1) it is necessary to have at least three years of experience in construction and, in addition, to participate in the process of residential development with a construction volume exceeding ten thousand square meters; (2) the developer may have the only active building permit issued by the authorized body; (3) the developer must be financially stable, that is, have assets of at least 10% of the development cost; (4) developers are obliged to pay contributions to a specially created compensation fund before the start of the implementation of shared construction projects; (5) the developers have no loan and credit obligations to third parties; (6) developers cannot use funds attracted from citizens by construction participants before or during construction.

An escrow account is opened in a credit institution, where funds from construction participants are transferred. Control functions over the state of the specified account are assigned to credit institutions. Only after the completion of the construction project and the signing of the acceptance certificate between the parties, the bank is entitled to transfer the funds to the developer organization.

Developers’ bankruptcy legislation has its own characteristics. In particular, it provides for special methods of satisfying creditors' claims in the framework of a developer's bankruptcy case. These methods include: 1) restoration of the rights of construction participants (“equity holders”) by creating a housing construction cooperative by them; 2) repayment of the claims of construction participants by transferring residential premises to them; 3) attraction of a new developer to complete the construction of an unfinished object in court.

3. **Creation of a housing construction cooperative by construction participants**

The procedure for restoring the rights of construction participants by establishing a housing construction cooperative by them and transferring to the balance of such a cooperative an unfinished object by the developer is regulated by Article 201.10 of the Bankruptcy Law. The use of this method is possible during the period of external management, bankruptcy proceedings. In this case, the developer must have an object of unfinished construction available. The developer's rights to the object of construction in progress and the land plot are transferred to the cooperative as compensation in exchange for performance under the contract [11].

The bankruptcy commissioner proposes that the meeting of construction participants apply to the arbitration court with a motion to extinguish the claims of construction participants by transferring the
developer's rights to the unfinished construction object and land plot. The term for raising such an issue is not earlier than two months and not later than six months from the date of approval of the bankruptcy commissioner. The meeting decides in accordance with the rules of section 201.12 of the Bankruptcy Law. In this case, the decision is considered adopted if ¾ of the votes of the construction participants who have the right to vote at the meeting were cast for it. In this case, the rights are transferred to the cooperative, which was created by the participants in the construction, or to another specialized consumer cooperative.

It is obvious that the participants in the construction do not have the special knowledge that is necessary for the creation and functioning of the cooperative. All the necessary information is provided to them by the arbitration manager. For these purposes, the bankruptcy commissioner is obliged to send to the participants in the construction a registered mail with an acknowledgment of receipt or to collect the signatures of the participants in the construction, which confirm their familiarization with the procedure for the creation and operation of the cooperative. Such familiarization takes place before the meeting of construction participants.

A housing construction cooperative or other specialized consumer cooperative must meet the following requirements: 1) the main objectives of the cooperative are the completion of the construction of an apartment building and the provision of residential premises in an apartment building to members of the cooperative; 2) members of the cooperative are all construction participants whose claims are included in the register of creditors' claims and the register of claims for the transfer of residential premises (with the exception of construction participants who have refused to transfer the construction in progress); 3) as share contributions, the members of the cooperative contribute, during its creation, the rights of the developer transferred to them to the object of construction in progress and the land plot, as well as, within the time period established by the charter of such a cooperative, funds for the completion of construction.

The cooperative is subject to compulsory state registration, which will require a statement from the developer represented by an arbitration manager and an arbitration court ruling on the transfer of an unfinished construction object.

Before holding a meeting of construction participants, the following materials must be prepared: the conclusion of the bankruptcy commissioner on the possibility or impossibility of transferring the object of unfinished construction; a report on the assessment of the developer's rights to an object of construction in progress and the land plot; draft decision on the establishment of a cooperative.

4. Satisfaction of claims of participants in construction by transferring residential premises to them

A dwelling is transferred to a construction participant who has a monetary claim as compensation, while such a claim is extinguished in the amount of the cost of the transferred dwelling [12]. In this case, a procedure similar to the previously considered procedure for transferring an unfinished construction object to construction participants is applied. It seems to be a less complicated procedure. Many requirements for the transfer of an unfinished construction object are not put forward due to the fact that the building has already been completed. A detailed description of such repayment is given in article 201.11 of the Bankruptcy Law. Let's consider the main issues that arise in the process of implementing the relevant regulation.

It is possible to transfer residential premises to the participants in the construction and thereby pay off their requirements when the object is completed by the developer. In other words, when there is permission to put the facility into operation.

The bankruptcy manager shall convene a meeting of construction participants and submit for consideration by the meeting the issue of applying to the arbitration court with a corresponding petition. The term for raising such an issue is: not earlier than two months and not later than six months from the date of approval of the bankruptcy commissioner. Upon completion of construction in the course of bankruptcy proceedings, the period is different - no later than six months from the date of its completion. Before holding a meeting of construction participants, the following materials must be prepared: the
conclusion of the arbitration manager on the possibility or impossibility of transferring residential premises to the construction participants; a report on the assessment of their value.

There are mandatory conditions, the observance of which is necessary for the transfer of residential premises to participants in the construction of six such conditions in the law. We draw your attention to the fact that only the simultaneous observance of all conditions makes it possible to transfer residential premises. The law defines the following procedure for the court's consideration of the petition of construction participants for the transfer of residential premises. First, all creditors whose claims are included in the register of creditors' claims must be notified of the arbitration court's consideration of such an issue. Secondly, the result of the consideration of the petition is the ruling of the court, which can be appealed. Its content is subject to the terms of the transfer. If they are met, then the court issues a ruling to satisfy the petition and to transfer residential premises to the participants in the construction, if not, then a ruling to refuse to satisfy the petition. Thirdly, in the ruling on the transfer of residential premises to participants in the construction, it is indicated which residential premises are transferred to each participant in the construction.

In addition, a building participant who has monetary requirements for the developer may be provided with a living space. In this case, the dwelling is transferred as compensation with the consent of the shareholder. The existing monetary claim is extinguished in the amount of the transferred dwelling. This information is entered into the register of creditors' claims. The claims of the construction participants in the part not paid off as a result of the transfer of residential premises to the construction participants are satisfied, respectively, as part of the claims of creditors of the third and fourth priority.

5. Attraction of a new developer to complete the construction of an unfinished construction site

This method appeared in Russian legislation relatively recently. Previously, attracting a new developer to complete the construction of an unfinished object in court was difficult both from an economic point of view and from a legal point of view. This was due to the fact that the procedure for such attraction was not specifically provided for by the bankruptcy legislation of the developer. In the literature, attention is paid to the replacement of a developer in case of his bankruptcy [13].

According to A. V. Yegorov, often in a situation when a bankruptcy case is initiated against a developer, the only asset included in the bankruptcy estate is an unfinished property [14]. This legislative gap was eliminated by the adoption of Federal Law No. 391-FZ of December 29, 2015 “On Amendments to Certain Legislative Acts of the Russian Federation”. Article 12 of this law has made changes regarding the possibility of attracting a new developer (Articles 201.15-1 and 201.15-2). The law was passed quickly enough, and the mass media have repeatedly expressed the opinion that the haste in adopting the amendments was due to the high-profile bankruptcies of large developers. To quickly and efficiently resolve such cases, the opportunity was provided to "remove" the bankrupt developers in court.

The new developer, saving the situation of the construction participants, receives the property (including property rights) and the obligations of the previous developer. The concept of property includes objects of construction in progress, rights to land plots for their placement. The obligations of the former developer are the obligations not fulfilled by him regarding the transfer of residential premises to the participants in the construction. In fact, the debtor is replaced in the obligation. That is, the right of claim, which the participants in the construction have, will apply to the new developer.

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According to the general rules of Russian civil law, when replacing a debtor in an obligation, the consent of the creditor is required. However, this rule does not apply to the situation in question. The requirements for a new developer are absolutely the same as for a developer in accordance with the legislation on shared construction. There are a number of prerequisites that must be met for the transition of obligations to a new developer. They partially coincide with the conditions provided for meeting the requirements of the participants in the construction by transferring the object of construction in progress to the cooperative.

In order to initiate the attraction of a new developer, a person who is ready to become an acquirer submits a statement of intent to acquire the property and obligations of the debtor-developer to the
arbitration court considering the bankruptcy case, to the arbitration manager and to the Ministry of Construction of Russia. The application shall be accompanied by documents confirming its compliance with the requirements set forth by the legislation on shared construction, as well as confirmation of its solvency and the possibility of financing the completion of construction.

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