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BANKRUPTCY OF A DEVELOPER AS A SOCIO-ECONOMIC FACTOR IN THE IMPLEMENTATION OF THE MECHANISM OF LEGAL REGULATION OF THE RIGHTS OF PARTICIPANTS IN SHARED-EQUITY CONSTRUCTION

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The problems of protecting the rights and legitimate interests of participants in shared-equity construction, construction participants and investors arising as part of the of the bankruptcy procedure of the developer are considered. It is noted that there is no concept of a single legal equality of the rights of subject participating in the bankruptcy procedure. It is stated that there are no uniform terminological constructions that allow unambiguously and definitively interpreting the concepts of "participants in shared-equity construction" and "developer of shared construction", "construction participants", "developer as a subject of bankrupt legal relations", taking into account the transformation of a participant in shared-equity construction into a construction participant in the bankruptcy procedure of the developer. The relevance of the research is to assess the changes made in 2018 to the Federal Law of 26.10.2002 No. 127-FZ "On Insolvency (Bankruptcy)" and not received a comprehensive analysis in the doctrine. The practical significance of the study is determined by the analysis of the problems that have arisen in connection with these changes in law enforcement practice in the implementation of legal regulation of the exercise of creditors' rights arising from the agreement of participation in shared-equity construction, as well as the rights of creditors recognized by the Federal Law "On Insolvency (Bankruptcy)" as construction participants. Other, no less significant issues of the transfer of the rights and obligations of the developer to the acquirer – the public law company "Territorial Development Fund" are also being considered. The purpose of the fund's activities is to promote the implementation of the state housing policy aimed at increasing guarantees for the protection of the rights and legitimate interests of citizens participating in construction (including participants in shared-equity construction, members of housing cooperatives that have claims for the transfer of residential premises, parking spaces, non–residential premises).

Keywords: bankruptcy of the developer, participant in shared construction, participant in construction, rights of the shareholder, non-residential premises, unfinished construction, registry requirements.

БАНКРОТСТВО ЗАСТРОЙЩИКА КАК СОЦИАЛЬНО-ЭКОНОМИЧЕСКИЙ ФАКТОР РЕАЛИЗАЦИИ МЕХАНИЗМА ПРАВОВОГО РЕГУЛИРОВАНИЯ ПРАВ УЧАСТНИКОВ ДОЛЕВОГО СТРОИТЕЛЬСТВА

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Рассматриваются проблемы защиты прав и законных интересов участников долевого строительства, участников строительства и инвесторов, возникающие в рамках процедуры банкротства застройщика. Отмечается отсутствие концепции единого правового равенства прав субъектов, участвующих в процедуре банкротства. Констатируется отсутствие единых терминологических конструкций, позволяющих однозначно и определенно толковать понятия «участники долевого строительства» и «застройщик долевого строительства», «участники строительства», «застройщик как субъект банкротных правоотношений» с учетом трансформации участника долевого строительства в участника строительства в процедуре банкротства застройщика.

Ключевые слова: банкротство застройщика, участник долевого строительства, участник строительства, права дольщика, нежилое помещение, объект незавершенного строительства, реестр требований.

Extended Summary

The important aspect of the development of modern legal doctrine is the mutual influence of the mechanism of operation of legal norms that make up the field of objective law and law enforcement practice, that develops its own legal approaches, taking into account the ways of interpretation of law. Part 4 of Article 15 of the Constitution of the Russian Federation, as well as similar norms reproduced in sectoral regulatory legal acts, directly indicate the priority of generally recognized principles and norms, which, in our opinion, does not always benefit domestic interests and may negatively affect the realization of citizens' rights. The results of monitoring and analysis of judicial practice on the protection of the rights of shareholders in the bankruptcy procedure of the developer will help to argue this conclusion.

This study examines the problems of the developer's protection of the rights and legitimate interests of participants in shared-equity construction, construction participants and investors that arose as part of the bankruptcy procedure in the regulatory system of Russian legislation. In the legal regulation of the Russian Federation, there is uncertainty regarding the protection of collateral creditors and other creditors in bankruptcy cases, which causes a contradiction in judicial practice. In the bankruptcy procedure of a developer, it is necessary to create legal structures in which the subjects of these legal relations can exercise their rights within the framework of initially defined goals. It is necessary to exclude legislative restrictions in determining the parameters of non-residential premises, since the main goals of a participant in shared capital construction are not established by law and do not predetermine the goals of further use of such non-residential premises - for commercial activities or without such intentions.

Actualization of the problem of restoring the balance of interests of creditors of participants in shared-equity construction in a bankruptcy case requires the formation of a unified legal approach from the point of view of legislative regulation, maintaining the balance of interests and protecting the rights of all participants in shared-equity construction. It is not only about the priority protection of the rights and legitimate interests of citizens as participants in construction, but also other persons who are not related to such within the meaning of bankruptcy legislation (for example, collateral creditors, creditors with ownership rights to a share in an unfinished construction project that has been declared bankrupt.), and victims of bankruptcy debtor-developer. At the legislative level in Russia there is no list of entities with the status of collateral creditors. From the analysis of law enforcement practice, it can be concluded that these include credit organizations that have provided funds to participants in shared-equity construction, both residential and non-residential premises. According to the authors, collateral creditors should include participants in shared-equity construction who have registered the ownership right to a share in the right of an object of unfinished construction that is the object of bankruptcy proceedings.

There is a lack of certainty in the implementation of legal regulation, and it is negatively reflected in the existing judicial practice. Studying bankruptcy litigation of a developer, analyzing the current legal regulation of legal relations in the field of equity participation in construction, the authors concluded that there is no legal certainty in the legal positions of both the legislator and the law enforcement officer. The motivational positions of the courts when considering cases on the protection of the rights of shareholders in the bankruptcy of a developer demonstrate the lack of a uniform approach from the point of view of bankruptcy legislation. One reason for such inconsistency is Article 201.8 of the Federal Law of 26.10.2002 No. 127-FZ "On Insolvency (Bankruptcy)". Summarizing the legal positions of the courts on this category of cases, the authors came to the conclusion that unequal mechanisms of legal protection are applied to entities that have a share (as a party to an equity participation agreement in construction) in the form of non-residential premises in an object of unfinished construction that is in bankruptcy. First of all, there are about subjects that do not have the status of a construction participant.

The relevance of the study is to assess the changes made in 2019 to Federal Law No. 214-FZ of 30.12.2004 "On Participation in the Shared construction of apartment buildings and other Real estate objects and on Amendments to Certain Legislative Acts of the Russian Federation". The practical significance of the study is determined by the conclusions made by the authors of the article and expressed in an attempt to state the contradictions that arise in the legal positions of courts of various instances on the protection of the rights of participants in shared-equity construction in the bankruptcy procedure of the developer.

The problematic aspects of legal regulation of relations in the field of protection of shareholders' rights in the application of certain provisions of paragraph seven of Chapter nine of Federal Law No. 127-FZ of 26.10.2002 "On Insolvency (Bankruptcy)" are highlighted. The Supreme Court of the Russian Federation has repeatedly indicated in its acts that "when considering bankruptcy cases of a debtor-developer, it is necessary to proceed from the principles of legal certainty and equality of all participants in civil law relations". However, courts, applying the same rules of law in similar legal relations and motivating their legal positions by the principle of legal certainty, often adopt opposite legal acts.

The comprehensive analysis of the legal regulation of relations related to the insolvency (bankruptcy) of the developer, taking into account the contradictory law enforcement practice, made it possible to conclude that the mechanism for resolving legal disputes and protecting the rights of subjects of such legal relations is ineffective, which necessitates the revision of a number of provisions of the law and amendments to it.

Other equally significant issues are also being considered, for example, the transfer of the rights and obligations of the developer to the acquirer – the public law company "Territorial Development Fund", acting to protect the rights of citizens participating in shared-equity construction. It is emphasized the Fund there is no obligations to fulfill the obligations of the developer to the collateral creditors. In this connection, there are contradictions in law enforcement practice on the implementation of the norms of paragraph 7 of Chapter 9 of Federal Law No. 127-FZ of 26.10.2002 "On Insolvency (Bankruptcy)".

Introduction

Bankruptcy (from ital. *banco* – bench and *rotto* – broken) – the debtor's inability to pay for its obligations, to repay debts due to the lack of funds for payment. Bankruptcy of legal entities occurs most often due to the fact that for a long time their expenses exceed income in the absence of a source of loss coverage. The company becomes bankrupt after a court decision on its insolvency as a debtor and inability to pay creditors. If the debtor himself applies to the court for his insolvency, then bankruptcy is considered voluntary. Sometimes legal entities take such a step in a fictitious bankruptcy in order to conceal debt money and keep it for themselves. If creditors who have not been repaid apply to the court, then bankruptcy is called compulsory. By a court decision, an insolvent enterprise can be reorganized, i.e. it is given a deadline to get out of bankruptcy, repay debts and sometimes assistance is provided in this. But it is also possible to liquidate an enterprise with the sale of property in order to compensate for debt.

The evolution of the institution of bankruptcy in world practice has gone through three stages: the first – a "hard" period, the time limits of which coincided with the time of the appearance of the first merchants and the emergence of market relations; the second, called "prudent" (mid–XVI–XVIII centuries); the third stage – "humane" (XVIII-XIX centuries) [2]. The stages are consistently interconnected, and this connection is due to the development and complication of economic relations with the simultaneous improvement of the legislative sphere.

Bankruptcy legislation in the Russian Federation received its systemic sectoral development in 1992, at the stage of significant economic changes in the country. During this time, it has undergone many changes, following the increasingly complicated legal relations within the framework of civil turnover. The Law of the Russian Federation "On Insolvency (Bankruptcy) of Enterprises" adopted in 1992 (hereinafter referred to as the Law of 1992) became one of the first regulatory documents regulating the activities of enterprises in the conditions of new market relations. Despite a significant number of shortcomings, this law for the first time outlined the basic concepts in the field of insolvency (bankruptcy) of enterprises, defined the types of bankruptcy procedures and other important points that were previously virtually unknown to the Soviet and Russian legal order. The very presence of the legislator's attention to this area of regulation clearly showed the importance of these norms for establishing normal economic relations in the country.

Article 1 of the Law of 1992 referred to the insolvency (bankruptcy) of an enterprise as its inability to satisfy creditors' claims for payment of goods (works, services), including the inability to ensure mandatory payments to the budget and extra-budgetary funds, due to the excess of the debtor's obligations over his property or due to the unsatisfactory structure of the debtor's balance sheet. The definitive norm of the Law of 1992 the insolvency (bankruptcy) did not define clear boundaries that are the basis for initiating bankruptcy proceedings, as a result of which it seemed quite difficult to prove the excess of obligations over the value of the debtor's property.

Unlike foreign legislation, which allows declaring bankrupt an enterprise that is unable to pay its debts, the Law of 1992 provided large organizations the opportunity, without fear of bankruptcy, not to fulfill their obligations to creditors for a long time. Moreover, it was possible to use creditors' funds as their own, provided that the accounts payable did not exceed the carrying amount of the assets. According to the common practice and general statistics widespread at that time in this area, only small enterprises were recognized as bankrupt.

On January 8, 1998, the new Federal Law No. 6-FZ "On Insolvency (Bankruptcy)" (hereinafter referred to as the Law of 1998) was adopted. In comparison with the Law of 1992, its length has increased more than 3 times, and the structure has become much more substantial and consistent. The norms of the Law of 1998 gave rise to a new milestone in the development of legal regulation of the institution of bankruptcy in the country.

At the same time, due to the absence in the Civil Code of the Russian Federation[1] of norms providing for the possibility of declaring bankrupt an insolvent citizen who does not have the status of an individual entrepreneur, Article 185 of the Law of 1998 provided for the introduction of norms on bankruptcy of

[1] The Civil Code of the Russian Federation of 30.11.1994 No 51-FZ // SPS "Consultant Plus"

a citizen from the moment of making appropriate amendments to the Civil Code of the Russian Federation. The changes also affected the status of the arbitration manager, he could act in three statuses – temporary, external and competitive.

The concept of insolvency (bankruptcy) has also changed, has become understood as the inability of the debtor, recognized by the arbitration court or declared by the debtor to fully satisfy the creditors' claims for monetary obligations and (or) to fulfill the obligation to pay mandatory payments. This formulation seemed better and accurate compared to the one contained in the Law of 1992.

Currently, the regulatory regulation of relations in the field of insolvency is carried out by Federal Law of 26.10.2002 No. 127-FZ "On Insolvency (Bankruptcy)" (hereinafter referred to as the Bankruptcy Law of 2002), which has been applied for almost twenty years and contains norms of not only substantive, but also procedural law providing for the procedures for consideration of an insolvency case by an arbitration court (bankruptcy), as well as various separate disputes within its framework.

E.V. Portnova, assessing the Bankruptcy Law of 2002, notes that thanks to this law, a system of self-regulation of the professional activities of arbitration managers was created, self-regulating organizations became an effective regulator of relations between the arbitration manager and creditors, including the state [13].

The concept of insolvency (bankruptcy) has undergone changes in 2020. Now, insolvency (bankruptcy) means the debtor's inability, recognized by the arbitration court, to fully satisfy creditors' claims for monetary obligations, for payment of severance payments and (or) for remuneration of persons working or who worked under an employment contract, and (or) to fulfill the obligation to pay mandatory payments[1].

The Bankruptcy Law of 2002 has been amended many times, as well as changes of a radical nature, including a significant amount of norms regulating relations in the field of bankruptcy, depending on the type of debtors, as well as separate norms on the issues of challenging debtors' transactions, subsidiary liability for debtors' obligations.

Bankruptcy of a developer is a new institution in the Russian legislation on insolvency (bankruptcy), the legal regulation of which is provided for in Section 7 of Chapter 9 of the Bankruptcy Law of 2002 and Federal Law of 30.12.2004 No. 214–FZ "On Participation in the shared-equity construction of apartment buildings and other real estate objects and on amendments to certain legislative acts of the Russian Federation" (hereinafter referred to as the Law on shared-equity participation in construction).

Within the framework of this research, an attempt has been made to assess the effectiveness of the Bankruptcy Law of 2002 in relation to the bankruptcy of a developer, using the method of comparing the basic concepts enshrined in the Bankruptcy Law and the Law on shared-equity participation in construction, such as "developer", "construction participant", "participant in shared-equity construction". Comparing these concepts, attention is focused on the mechanism of realization of the subjective rights of participants in the considered legal relations.

Based on the provisions of the Bankruptcy Law of 2002 and the subject composition of the relations regulated by it (a legal entity regardless of its organizational and legal form, including a housing and construction cooperative, or an individual entrepreneur), the concept of "developer" is broader than the meaning given to the word in the Law on shared-equity participation in construction. At the same time, the content of the concept that the legislator formulated in sub-paragraph 1 of paragraph 1 of art. 201.1 of the Bankruptcy Law of 2002, does not coincide with the one laid down in similar categories (developer, customer-developer, investor-developer) used in non-bankruptcy areas [7]. Due to the variety of scientific interpretations of the legislative definition of "developer" in the context of bankruptcy legal relations, proposals for its conceptual improvement are increasingly being made in the legal doctrine [17].

The special Law on shared-equity participation in construction defines entities (business companies and non-profit organizations in the form of a public law company "Territorial Development Fund"), the claims for which are fixed in Article 2 of the Law on shared-equity participation in construction. In accordance with Article 3 of the Federal Law "On the public law company "Territorial Development Fund" (hereinafter referred to as the Fund), the Fund performs one of the functions of exercising powers related to the protection of the rights and legitimate interests of citizens participating in construction.

From the meaning of the Bankruptcy Law of 2002 a construction participant is an individual who has a requirement to the developer for the transfer of residential premises, a requirement for the transfer of a parking space and non–residential premises

[1] Russian Federal law On Insolvency (Bankruptcy) 26.10.2002

or a monetary requirement, as well as the Russian Federation, a subject of the Russian Federation or a municipal entity that has a requirement to the developer for the transfer of residential premises or a monetary requirement. The concept of a citizen as a participant in shared-equity construction, who has a requirement to the developer on the basis of the agreement of participation in shared-equity construction, and a citizen as a participant in construction in accordance with the Bankruptcy Law of 2002 do not differ. Until 2018, the construction participants also included legal entities. The law on shared-equity participation in construction in general did not and does not impose claims on the subjects participating in shared-equity construction.

Based on the definition, the object of construction should be considered real estate, the construction of which has not been completed (objects of unfinished construction). With the introduction of special Section 7 in the Bankruptcy Law of 2002, a separate regulation of the bankruptcy of the developer appeared. Initially, the legislator included only residential premises in real estate objects. Since the end of 2018, significant changes have been made to Article 201.1, which fundamentally affected the law enforcement practice in the implementation of the rights of subjects as participants in shared-equity construction. With the introduction of these changes, restrictions came into force concerning not only the specification of objects in the form of a parking space and (or) non-residential premises in an apartment building, but also restrictions on the area of non-residential premises.

It is necessary to agree with the opinion of the authors [9] that the current legislation on bankruptcy puts the participants of shared-equity construction in an unequal legal position when implementing the bankruptcy procedure. The issue of the legal fate of residential, non-residential premises, parking spaces from the point of view of the procedure for their implementation in insolvency cases of developers seems problematic.

The purpose of the scientific work is to identify the shortcomings of bankruptcy legislation in connection with the introduction of special bankruptcy rules for a developer that violate the balance of interests of creditors participating in bankruptcy proceedings as participants in construction under equity participation agreements in construction through a review and analysis of judicial practice.

The novelty of the research consists in the formulation, justification and solution of tasks for the development of proposals for improving the current legislation in the framework of legal regulation of the bankruptcy of the developer. An attempt was made to analyze the conceptual models investigated within the framework of the current legislative acts in the field of construction.

The following scientific methods were used in the scientific work: dialectics, analysis, synthesis, deduction, formal-legal method, comparative-legal.

The dialectical method, taking into account the historical principle of cognition, allowed us to see the dynamics of the conceptual apparatus in the context of legislative changes from 2002 to the present. Using the analysis and synthesis of the legal norms of the Bankruptcy Law of 2002 and the Law on shared-equity participation in construction, the difference between the legal models of the structure of legal regulation of subjects, objects and the content of legal relations in the bankruptcy procedure of the developer was revealed. The use of the formal-legal method in the study contributed to the discovery of formal-logical connections, abstraction from other socio-economic phenomena (economic, political). Using the comparative legal method, the concepts of "developer", "construction participant", "participant in shared-equity construction" were compared and similarities and differences between them were identified.

The empirical basis of the study was the materials of the Internet resource www.sudact.ru, which allows you to search through the texts of judicial acts of the Russian Federation.

In turn to search for relevant court decisions, the request of the public law company "Territorial Development Fund" was used, the restriction on the period of issuance of judicial acts was set from 2011, due to the implementation of Section 7 of the Bankruptcy Law of 2002. The sample was numerous and amounted to more than 50 court decisions.

Results

Bankruptcy legislation is a system of general rules and special legal regulation of diversified acts.

The Constitution of the Russian Federation guarantees the unity of the economic space, free movement of goods, services and financial resources, support for competition, freedom of economic activity, private, state, municipal and other forms of ownership are recognized and protected equally (Article 8). The right of private property is protected by law, everyone has the right to own property, own, use and dispose of it both individually and jointly with other persons. Property inviolability is not only one of the basic principles of civil legislation, but also the most important constitutional principle formulated in Part 3 of Article 35 of the Constitution of the

Russian Federation. No one can be deprived of their property except by a court decision. Compulsory alienation of property for state needs can be made only on condition of preliminary and full compensation. There is a well-established position in the legal doctrine that no one has the right to seize someone else's property without a court decision. The extrajudicial seizure of objects will certainly lead to the development of corruption schemes in the field of unfinished construction, when certain objects may be recognized as not promising from the standpoint of investment activity and may affect the change in the target orientation of future objects [12].

The general regulatory norms of the Constitution of the Russian Federation are developed in the Civil Code of the Russian Federation and special regulatory legal acts.

The insolvency regulation system primarily includes regulations at the federal level. They contain the basics of the bankruptcy procedure, terms and definitions, rules of individual stages of the case, the procedure for making decisions. Regional and municipal authorities cannot adopt regulations in the field of insolvency (bankruptcy).

The principles of civil legislation are based on the recognition of the equality of participants in the relations regulated by them, the inviolability of property, freedom of contract, the inadmissibility of arbitrary interference by anyone in private affairs, the need for unhindered exercise of civil rights, ensuring the restoration of violated rights, their judicial protection. Paragraph 2 of Article 1 of the Civil Code of the Russian Federation defines that citizens (individuals) and legal entities acquire and exercise their civil rights by their will and in their interest. They are free to establish their rights and obligations on the basis of the contract and to determine any terms of the contract that do not contradict the legislation. According to the doctrinal position of E. D. Suvorov, "the principle of equality of creditors, according to which each of the creditors of an insolvent debtor should suffer equally from such insolvency, as well as receive equally from the mass of an insolvent debtor, is the basic principle of bankruptcy law. The essence of this principle is that all creditors of an insolvent debtor should have equal opportunities to obtain satisfaction from the bankruptcy estate of such a debtor" [19].

In accordance with Article 65 of the Civil Code of the Russian Federation, the basis for termination of a legal entity may be its liquidation as a result of bankruptcy. The purpose of bankruptcy of an insolvent debtor is the restoration of violated creditors' rights. Creditors' claims in case of termination of liquidation upon initiation of an insolvency (bankruptcy) case of a legal entity are considered in accordance with the procedure established by the legislation on insolvency (bankruptcy). Thus, the regulation of relations related to the bankruptcy of a legal entity is carried out in accordance with the Bankruptcy Law of 2002.

The original version of the Bankruptcy Law of 2002 did not contain provisions on the bankruptcy of the developer, however, since the introduction of Section 7 "Bankruptcy of the developer"[1], this regulatory legal document has undergone six revisions, the last of which were introduced in 2021[2]. The effectiveness of legal regulation of relations related to the insolvency (bankruptcy) of the developer is confirmed by statistical data.

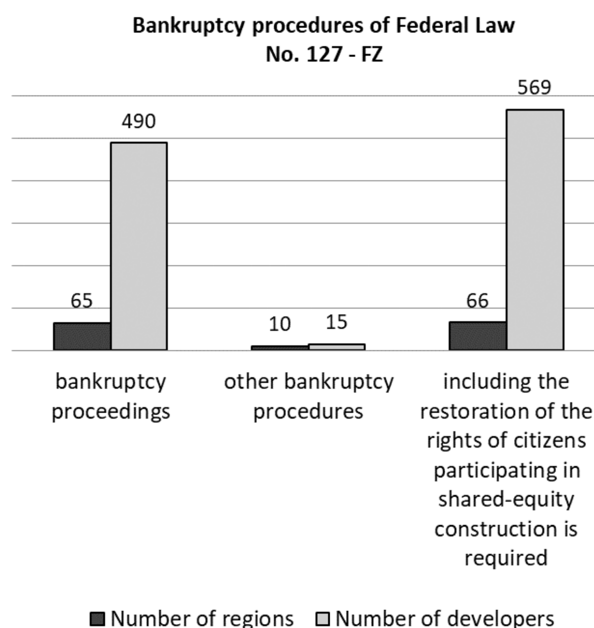


Fig. 1. Recognition of the debtor as bankrupt and the opening of bankruptcy proceedings according to the statistics of 2021

The rules set out in Section 7 of Chapter 9 of the Bankruptcy Law are primarily intended to protect the rights of construction participants who are faced with the insolvency of the contractor-developer [1].

The mentioned law establishes the basic principles and directions of the state policy of the institute of insolvency (bankruptcy) of the developer. This

[1] Federal law of 12.07.2011 On Amendments to the Federal Law "On Insolvency (Bankruptcy)" and articles 17 and 223 of the Arbitration Procedural Code of the Russian Federation regarding the establishment of bankruptcy features of developers who attracted funds from construction participants.

[2] Federal lawn of 30.12.2021 On Amendments to certain legislative acts of the Russian Federation.

regulatory legal act is mixed nature and regulates both material and procedural relations arising the implementation of the bankruptcy procedures.

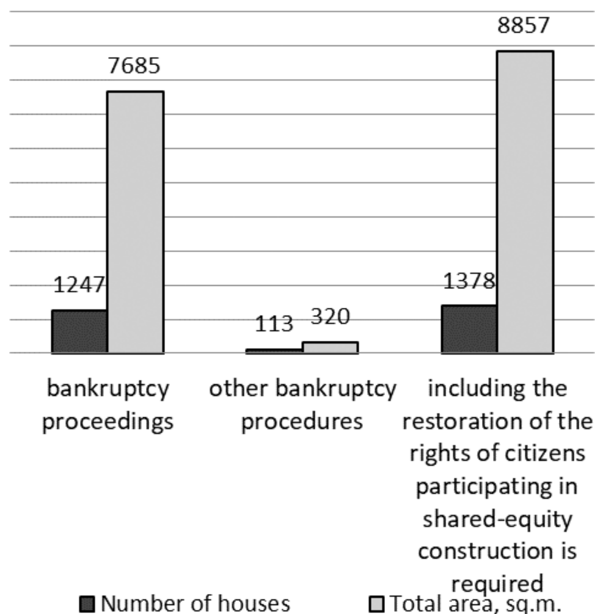


Fig. 2. Restoration of the rights of participants in bankruptcy proceedings

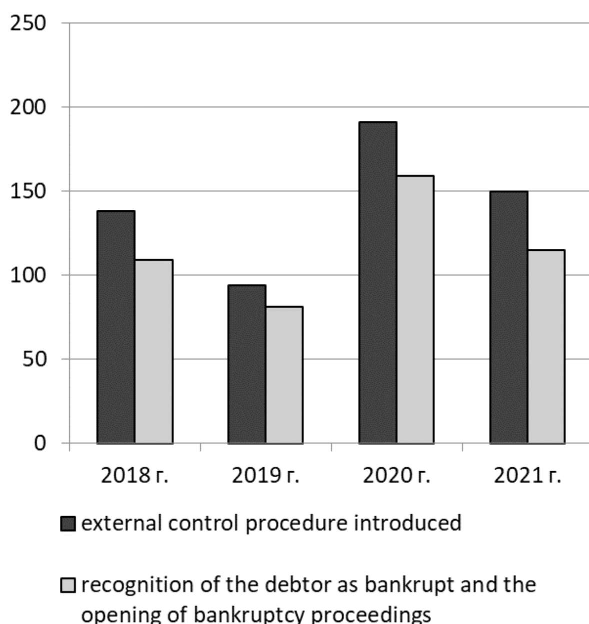


Fig. 3. Statistics of arbitration courts of the subjects of the Russian Federation on the consideration of bankruptcy cases of developers[1]

Construction participants have the right to transform their demand for the fulfillment of obligations by the developer in kind into a monetary demand. In accordance with the law, bankruptcy creditors of an insolvent debtor are creditors whose claims have been established by the court since the court issued a ruling on the inclusion of creditors' claims in the register of creditors' claims. Such a possibility of establishing claims arises from bankruptcy creditors before the introduction of the bankruptcy procedure [10].

In order to characterize the subjects of bankruptcy relations, the formation of a register of claims is important. Changes in the bankruptcy legislation have also affected this issue. Previously, the general register of creditors' claims in the bankruptcy case of the developer had a complex structure and included two registers: the register of monetary claims and the register of claims for the transfer of residential premises. During the so-called bankruptcy reform, the legislator replaced the register of claims for the transfer of residential premises with the register of claims of construction participants [11]. From the date of the decision of the arbitration court to declare the debtor bankrupt and to open bankruptcy proceedings against the developer in the course of the procedures applied in the bankruptcy case, a register of claims is formed in respect of: monetary claims of construction participants and claims of construction participants on the transfer of residential premises, on the transfer of parking spaces and non-residential premises with an area of up to seven square meters (hereinafter referred to as the claims of construction participants), which are presented to the bankruptcy trustee. The bankruptcy trustee reviews the claims of construction participants and includes them in the register of claims of construction participants, which is part of the register of creditors' claims.

The register of claims of construction participants is maintained for each construction object.

The rules for maintaining the register of claims of construction participants, including those concerning the composition of information to be included in this register, and the procedure for providing information from the register of claims of construction participants are approved by the federal standard[2].

In accordance with the federal professional standard, the register is a unified system of records containing information about creditors participating in construction and their claims to the developer on the transfer of residential premises. According to Article 201.7 of the Bankruptcy Law of 2020, the reg-

[1] Judicial department at the Supreme Court of the Russian Federation Official statistics of arbitration courts of the subjects of the Russian Federation on the consideration of bankruptcy cases of developers 2018–2021.

[2] Order of the Ministry of Economic Development of Russia of 20.02.2012 on the approval of the Federal Standard of professional activity of arbitration managers "Rules for maintaining the Register of claims for the transfer of residential premises".

ister of claims of construction participants includes information not only about residential premises, but also information about a parking space, non-residential premises with an area of up to seven square meters that are the subject of the agreement, as well as information identifying the construction object in accordance with such an agreement. Within the meaning of paragraph 3.1 of Article 201.1 the register does not include claims for objects that are not residential and whose area does not exceed seven square meters. The issue of non-residential premises with an area of more than seven square meters remains unresolved.

The register of creditors' claims contains information about creditors, the amount of their monetary claims against the debtor. An analysis of law enforcement practice allows us to conclude that participants in the shared-equity construction of non-residential facilities, the area of which exceeds seven square meters are included only in the register of claims for monetary obligations. The Bankruptcy Law of 2002 grants creditors the right to apply for registration in the register for monetary obligations, refusing to receive premises in kind, or not to apply to the register and not become a participant in the construction. The creditor has the right to change a non-monetary claim into a monetary one.

During the construction of real estate objects, a situation is likely in which a participant in shared-equity construction can terminate the agreement. For example, the grounds for termination may be: lack of funds from the parties, partial non-fulfillment by the developer of its obligations, declaring the developer bankrupt, etc.

Thus, a participant in shared-equity construction, in accordance with civil law, can formalize ownership of an object of unfinished construction. According to Article 55 of the Town-planning Code of the Russian Federation, an object that has not been put into operation is not an object of capital construction in full[1]. In accordance with Articles 128, 130, 213 of the Civil Code of the Russian Federation, a share in an unfinished construction may be owned by participants in shared-equity construction, in addition, the property may also be in common shared ownership with the determination of the size of the shares (paragraph 2 of Article 244 of the Civil Code of the Russian Federation). Law enforcement practice follows the path of recognizing ownership rights for participants in shared-equity construction if the object of unfinished construction is ready and it is possible to identify it according to the terms of the agreement and technical documentation for it. The degree of readiness of the object should not be less than 70%. The participant of shared-equity construction may exercise this right before the initiation of bankruptcy proceedings of the developer. The Supreme Court of the Russian Federation, referring to the legal position of the Constitutional Court of the Russian Federation, has repeatedly noted that the constitutional principle of equality (Article 19 of the Constitution of the Russian Federation) means, among other things, the inadmissibility of introducing restrictions on the rights of persons belonging to the same category that have no objective and reasonable justification (prohibition of different treatment of persons in the same or similar situations)[2].

As a rule, an entity that has registered its ownership of an object of unfinished construction does not intend to be a participant in the construction within the meaning of the Bankruptcy Law of 2002 and be included in the register of claims as a creditor with monetary claims. Indicative are the materials of the civil case on the recognition of the liquidated debtor of MOLDROSS LLC as insolvent (bankrupt). The Arbitration Court of the Irkutsk Region issued three determinations on satisfying the applicants' claims for recognition of ownership rights to a share in the right to an object of unfinished construction. When satisfying the claims, the court assessed the relevance, admissibility, reliability of each evidence separately, as well as the sufficiency and mutual connection of evidence in their entirety, taking into account the constitutional principle of "equality of all before the law and the court" (Article 19 of the Constitution of the Russian Federation). As evidence, the applicants presented: shared-equity participation agreements in construction, documents confirming payment in full, construction and technical documentation identifying the construction object[3].

If the participants of shared-equity construction have not registered the ownership right to an object of unfinished construction, they have such a right directly in the bankruptcy procedure according to Article 201.8 of the Bankruptcy Law of 2002. This case is illustrated by the materials of judicial practice in the framework of the debtor's bankruptcy case, when the creditor applies to the arbitration court with an application for recognition of ownership rights to a share in an object of unfinished construction[4].

[1] Town-planning Code of the Russian Federation of 29.12.2004.

[2] Decree of the Supreme Court of the Russian Federation in civil case No A40-80775/2013 of 24.02.2015.

[3] Determination of the Arbitration Court of the Irkutsk Region in civil case No 19-24031/2017 of 18.11.2020.

[4] Determination of the Supreme Court of the Russian Federation in civil case No A41-44403/18 of 30.12.2020.

The arbitration courts of the first and appellate instances refused to satisfy the claim to an individual participating in shared–equity construction who applied for recognition of ownership of a share in an object of unfinished construction in the form of a storeroom with the construction number 601, with an area of 30.4 square meters. The determination of the Supreme Court of the Russian Federation[1] supported the legal position of the Arbitration Court of the Moscow District, by whose decision the adopted judicial acts of lower instances were canceled, and the applicant was recognized as the property right. According to the official information of the electronic justice website, the file of arbitration cases (www.arbitr.ru), the applicant in the analyzed bankruptcy case of the debtor is not a creditor and is not included in the register. This position seems to the authors to be fair, since it is based on the principle of legal equality of all participants in legal relations in the framework of bankruptcy cases of the developer.

As we can see from the provisions of the Bankruptcy Law of 2002 and the above, the main problem is the lack of a mechanism for legal protection of a person who registered ownership of an object of unfinished construction before the bankruptcy procedure was introduced. In the systematic interpretation of the articles regulating the legal status of a participant in shared-equity construction as a subject of bankrupt legal relations, a semantic conflict ensues, as a result of which an opinion is created that either the legislator showed qualified silence or allowed a gap.

Along with the regulatory legal acts under consideration, it is necessary to take into account the provisions of the Civil Code of the Russian Federation, which establishes a fundamentally important regulation of the institution of property rights, including in relation to the owner of an object of unfinished construction.

Article 209 of the Civil Code of the Russian Federation establishes the possibility of the owner to exercise his powers: possession, use, disposal at his discretion. V. P. Kamyshansky shares M. Weber's point of view that the authority to exercise the right of ownership has two subjectively different components – provided by law and formed by the owner's own discretion. The basis of the first is the will of the legislator, the second is the will of the owner [6]. At the same time, according to E. A. Sukhanova, that the free discretion of the owner in relation to the property owned, "is subject to unavoidable restrictions in the public interest" [18].

[1] Determination of the Supreme Court of the Russian Federation in civil case No A41-44403/2018 of 13.09.2019.

According to Part 3 of Article 55 of the Constitution of the Russian Federation, "human and civil rights and freedoms may be restricted by federal law only to the extent necessary in order to protect the foundations of the constitutional system, morality, health, rights and legitimate interests of others, to ensure the defense of the country and the security of the state".

In development of these provisions, Article 10 of the Civil Code of the Russian Federation establishes that the owner exercises his powers not "within", but "at his discretion". Within these boundaries, the limits of the exercise of property rights are determined by the consumer properties of the thing. It is impossible to establish the limits of ownership of real estate, including objects of unfinished construction, through the powers of the owner to own, use and dispose.

The Russian legislator, together with the legal scientific community, assessing the dynamics of the development of modern civil legislation, is trying to solve the problem of "the validity of restrictions on property rights and the guarantee of protection of the declared discretion of the owner in the exercise of the rights of ownership, use and disposal of property belonging to him", as evidenced by judicial practice.

Thus, the decision of the Tenth Arbitration Court of Appeal of Moscow contains a conclusion: since the legislation of the Russian Federation does not provide for a ban on the recognition of ownership of an unfinished object (or a share in it), the applicant has the right to demand recognition of the corresponding right for him[2]. At the same time, a person who considers himself the owner of the disputed property must prove the legality of the grounds for the emergence of ownership of the specified property (Article 12 of the Civil Code of the Russian Federation). The fact that the construction of the disputed object is not completed at the time of the court's consideration of the case cannot violate the applicant's right to protect his civil rights by recognizing the ownership right to a share in the ownership right to an object of unfinished construction[3].

Usually the problem of the divisibility of a building (namely an apartment building) "horizontally" is associated with the institution of so-called floor-by-floor (housing) property [4]. However, there was no consensus in the legal doctrine on this issue [5; 8; 15].

[2] Decision of the Tenth Arbitration Court of Appeal of Moscow in civil case No A41-44408/18 of 31.05.2021.

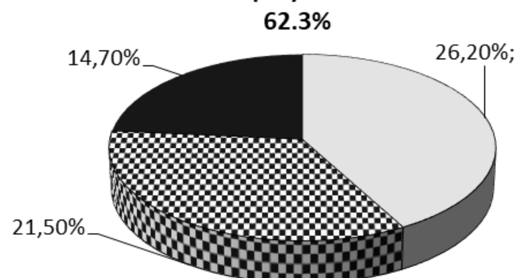
[3] Item 3 of the Review of Judicial Practice of Resolving Cases on disputes arising in connection with the participation of citizens in the shared-equity construction of apartment buildings and other real estate objects : approved. by the Presidium of the Supreme Court of the Russian Federation of 19.07.2017 // SPS "Consultant plus".

An alternative legislative point of view was expressed by A.V. Altukhov, stating that in order to create a mechanism for equal and proportional satisfaction of the claims of participants in the shared-equity construction of an apartment building in a situation of bankruptcy of the developer, it is necessary to abandon the approach reflected both in the doctrine and in law enforcement practice, allowing judicial recognition of the ownership rights of participants in shared-equity construction for residential and non-residential premises in houses whose construction has not been completed. On the contrary, it should be assumed that until the moment of transfer by the developer to the participant of shared-equity construction of the premises (shared-equity construction object) in an apartment building commissioned, only means of compulsory legal protection (presentation of a claim for the transfer of premises, monetary claim) should be available to the participant of shared construction [6, p. 42]. However, this approach has been subjected to fair criticism in the literature, which is supported by the authors of the article, believing that the Bankruptcy Law of 2002 (art. 201.8) provides for the principle of constitutive ways to protect the rights of such participants.

In the context of the studied legal relations, we see another problem associated with the contradiction of the declared expansion of the rights and legitimate interests of business entities to the real growth of restrictions on the rights of owners in the exercise of their powers. The research of law enforcement practice based on the current norms of the Bankruptcy Law of 2002 gives grounds to conclude that the court more often stands up for the protection of the public interest. First of all, the participation of the public law company "Territorial Development Fund", which by its legal status is the legal successor of the developer in the bankruptcy procedure. The first restriction, which is set by the legislator, is seen in protecting through the activities of the Fund only the rights and legitimate interests of citizens participating in construction (Article FZ No. 218–FZ). Meanwhile, the subjects of the bankruptcy procedure are both legal entities and citizens who own non-residential objects of unfinished construction.

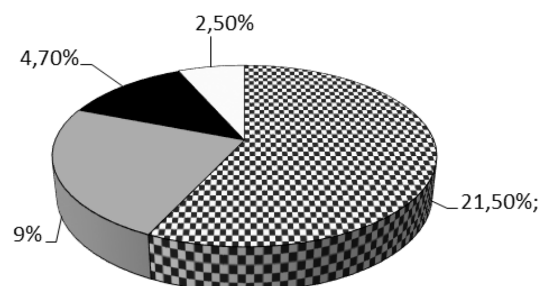
With the beginning of the application of mechanisms for restoring the rights of citizens participating in shared–equity construction, the number of problematic objects has decreased. In 2018-2021, there were no such objects recorded in 12 subjects of the Russian Federation. In five of them, the problem of "deceived" shareholders has been completely solved – these are the Republic of Altai, Pskov and Murmansk Regions, the Republic of Tyva, Nenets Autonomous District[1] (Fig. 4, 5).

Mechanisms of the Fund for the protection of the rights of citizens participating in shared-equity construction 62.3%



- Decisions were made by the Fund for the protection of the rights of citizens participating in shared-equity construction on the payment of compensation
- Decisions were made by the Fund for the protection of the rights of citizens participating in shared-equity construction on the completion of construction
- Under consideration by the Fund for the protection of the rights of citizens participating in shared-equity construction

Fig. 4. Mechanisms of the Fund for the Protection of the rights of citizens – participants



- Attracting an investor by a subject of the Russian Federation
- Restoration of rights at the expense of funds or property of the subject of the Russian Federation
- Not applicable or there are no citizens who have concluded the agreement of participation in shared-equity construction
- Another mechanism for restoring the rights of citizens participating in shared-equity construction

Fig. 5. Mechanisms of the subjects of the Russian Federation

The second restriction follows from the operation of Article 201.1 of the Bankruptcy Law of 2002: from 2018, the limits of the area of non-residential premis-

[1] See: Report of the Minister of Construction and Housing of the Russian Federation "On the current status of the implementation of measures to restore the rights of citizens and the completion of the construction of shared-equity construction facilities and plans for 2021–2022"

es that can be transferred to the Fund for completion of construction with further transfer to the construction participant, the creditor, are introduced.

These restrictions are assessed by the authors of the article as unreasonable and inappropriate. The authors also do not support the position of the Supreme Court of the Russian Federation, according to which, if a citizen as a subject of a bankrupt legal relationship has a non-residential premises with an area of more than seven square meters, this does not give grounds to assume that the purpose of acquiring and using such premises is exclusively commercial.

The solution of these problems is connected with the inclusion in the bankruptcy case of such a subject as the public law company "Territorial Development Fund". The law does not impose on him the responsibility of the developer in this case, since the legislator left the risk of completion or unfinished construction of such facilities on the debtor-developer and his creditors, without the involvement of the Fund. The rights and obligations of construction participants in respect of non-residential premises with an area exceeding seven square meters, owned as objects of unfinished construction by subjects of shared-equity participation in construction and creditors of the IV class, do not pass to the Fund. The Fund has no obligations to creditors of the IV class, secured by the pledge of the debtor's property, for the completion and transfer of non-residential premises to participants in shared-equity construction. The creditors of the IV class are participants in shared-equity construction who have expressed their will to join the register of monetary claims and become participants in construction (within the meaning of the Bankruptcy Law of 2002). This right of pledge for participants in shared-equity construction follows from the norm of Part 1 of Article 13 of the Law on shared-equity participation in construction, i.e. to ensure the fulfillment of the obligations of the developer (pledger) under the agreement from the moment of state registration of the agreement.

In accordance with the position of the Arbitration Court of the Republic of Bashkortostan[1], the Fund, as a new developer acting in the interests of individuals, is exempt from obligations to complete non-residential premises, therefore, in the absence of obligations, there are no rights to objects of unfinished construction – non-residential premises pledged by participants in shared-equity construction.

However, this does not mean that the Fund, in the case of completion of the entire (single) object, will have any rights (disposal, ownership) to objects of non-residential premises pledged to participants in shared-equity construction by virtue of the Law on shared-equity participation in construction, both included in the register of creditors' claims and not included.

Recognizing the right of all subjects to be participants in shared-equity construction, the law at the same time denies them the right to be equal subjects of legal relations in case of bankruptcy of the developer. This provokes a conflict of interests between the Fund as the legal successor of the developer, the developer – on the one hand and the individual– the owner of the unfinished construction object and the legal entity – on the other hand as subjects (parties) under the construction shared-equity agreement. At the same time, the Fund accepts the obligations of the developer only to an individual, a subject of the Russian Federation, a municipal entity, as a result of which the Fund cannot be transferred obligations to other participants in shared-equity construction and the Fund does not have any rights to non-residential premises pledged to such participants in shared-equity construction. Within the meaning of the legal structure of the institution of pledge, collateral creditors can satisfy their interests by retaining such a status, despite the fund's intentions to become the acquirer of the developer's rights when transferring property to the fund in order to fulfill obligations to construction participants. Even in Roman law, it was claimed that the mortgagee had the right of ownership of the pledged thing, which was sometimes explained by the discretion of the creditor and was associated with late payment or the fact of the debtor's apparent insolvency [8].

The current legal regulation limits both the rights of the Fund to act as a legal successor to the entire object of unfinished construction, and the rights of subjects under shared-equity participation agreements in construction. Law enforcement practice confirms that upon completion of construction and commissioning of the facility, the premises must be exempt from the claims of third parties, including creditors. However, in fact, the objects of unfinished construction have both right holders – creditors included in the register of creditors' claims to the debtor, and participants in shared-equity construction – owners of objects of unfinished construction of non-residential premises whose area exceeds seven square meters. The current situation follows from a misinterpretation of the law. At the same time, the withdrawal from creditors and participants in shared–equity construction - owners of unfinished construction objects in the presence of these objects in kind should be qualified as a fact of

[1] Determination of the Arbitration Court of the Republic of Bashkortostan in civil case No. А07-21667/2017 of 22.10.2021.

unjustified enrichment of the Fund at the expense of such participants.

From our point of view, at the level of the law-making body, it is necessary to develop and consolidate a fairer system than the existing one at the moment. This conclusion follows from the contradictory decisions of the courts on the bankruptcy of the developer, which led to the fact that the Supreme Court of the Russian Federation, revealing the uncertainty of such provisions, appealed to the Constitutional Court of the Russian Federation, raising the question of the legal certainty of the application of the rules on the bankruptcy of the developer in order to establish a fair balance of interests of the parties in bankruptcy cases of developers[1].

It seems expedient to implement the norms of foreign bankruptcy legislation, which is by its nature simpler and based on the principle of "pacta sund servanda", which translates from Latin as "contracts must be fulfilled" [14].

Discussion

The issue of improving legislation and the need to fill in the unsettled nature of the issues considered within the framework of the developer's bankruptcy subinstitute causes discussions. The developer's bankruptcy subinstitute was introduced to protect the rights and legitimate interests of participants in shared-equity construction. However, the issue of the completeness of the regulation of the developer's bankruptcy subinstitute is regularly raised by both researchers and subjects of legislative initiative. Since the introduction of the developer's bankruptcy subinstitution in 2011 it has been systematically changed, which indicates its imperfection. On May 17, 2021, a draft law was submitted to the State Duma of the Federal Assembly of the Russian Federation, which involves quite large-scale changes, including replacing the current procedure for bankruptcy procedures with debt restructuring procedures; bankruptcy proceedings; settlement agreement. One of the goals of the draft law is to restore the debtor's solvency, maintain the efficiency of the business entity and satisfy the claims of individual creditors. In addition, the initiators of legislative changes propose to rename the current federal law into the Federal Law "On Restructuring and Bankruptcy"[2]. The explanatory note does not include proposals for improving the developer's bankruptcy subinstitute.

At the same time, the shortcomings of the developer's bankruptcy subinstitution require the elimination of gaps in legal regulation. Firstly, the issue of the subject composition has not been resolved, from which legal entities as participants in shared-equity construction are excluded. Such a conclusion about the absence of a reference or reservation about other persons who, under certain circumstances, may have the rights of persons participating in a bankruptcy case previously took place in legal science.

Secondly, they require bringing the concepts of "participant in shared-equity construction" and "participant in construction" into line with each other. Thirdly, it is necessary to equalize the rights of participants in the bankruptcy procedure of the developer, regardless of the purpose of the immovable property acquired under the agreement of shared-equity participation in construction. Fourth, it is necessary to eliminate the restrictions established in sub-paragraph 3.1 of paragraph 1 of Article 201.1 of the Bankruptcy Law of 2002 with respect to the area of non-residential premises. Fifthly, it is necessary to amend the Federal Law "On the Public Law Company "Territorial Development Fund"" in terms of expanding the scope of its powers to protect the rights and legitimate interests of not only individuals – owners of residential premises, but also individuals – owners of non–residential premises. These shortcomings are constantly being noticed by judicial authorities considering disputes within the framework of the bankruptcy procedure of the developer, the scientific community, and practicing lawyers dealing with bankruptcy issues.

Thirdly, we should agree with the position that a critical analysis of the current state of the institution of insolvency (bankruptcy) of developers and the trend of bankruptcy growth in the construction market, as well as a systematic change in the legal regulation of this area of relations require generalization and systematization, taking into account the unconditional preservation of the rights of shareholders and counterparties in the situation of the development of the digital economy, requiring significant transformation of the construction industry in new conditions [16].

Conclusions

1. The statistics of unscrupulous developers for the period of 2011 are high, the exact number of deceived co-investors in the country is still not known. Deputy A. Khinshtein, who heads the working group on the protection of the rights of depos-

[1] Determination of the Supreme Court of the Russian Federation in civil case No. A07-21667/2017 of 21.02.2022.

[2] Explanatory Note to Draft Law No. 1172553-7 "On Amendments to the Federal Law "On Insolvency (Bankruptcy)" and Certain Legislative Acts of the Russian Federation". URL: https://sozd.duma.gov.ru/bill/1172553-7#bh_comments (accessed: 03.05.2022).

itors and shareholders in the State Duma, counted more than 100 thousand affected families in Russia[1]. Developers, acting in bad faith, concluded several shared-equity participation agreements in construction for the same object. Together, these and other factors led in 2011 to the inclusion in Chapter 9 of the 2002 Bankruptcy Law independent section 7 "Bankruptcy of developers", which was timely and expedient. Legal regulation in general is aimed at ensuring priority protection of citizens participating in construction as non–professional investors.

In the socio-legal aspect, the issue under consideration finds actualization in dissertation research not only by Russian scientists, but also worries the world scientific community [3].

2. Since the entry into force of Section 7 of Chapter 9 "Bankruptcy of developers", its norms have repeatedly undergone fundamental changes. This is also confirmed by the decisions of the courts, the conclusions of which during this period changed to the exact opposite. All this testifies to the lack of uniformity in the interpretation of the provisions of the Bankruptcy Law of 2002.

3. Assessing the effectiveness of the application of the provisions on the bankruptcy of the developer through a comparative analysis of the legal definitions given in the Bankruptcy Law and the Law on shared-equity participation in construction, we came to the conclusion that it is necessary to coordinate legal structures in the implementation of the subjective rights of participants in shared-equity construction in the bankruptcy procedure of the developer.

4. Based on the provisions of the Bankruptcy Law of 2002, the construction participants are provided with legal protection, namely, an individual who has a claim to the developer for the transfer of residential premises, a claim for the transfer of a parking space and non-residential premises or a monetary claim, as well as the Russian Federation, a subject of the Russian Federation or a municipal entity that has a claim to the developer about the transfer of residential premises or a monetary claim. The position of the legislator is unfair in relation to a legal entity as the main subject of civil legal relations, and the most active investor – a participant in shared-equity construction, who deprived this subject of the right to be a participant in construction within the meaning of the Bankruptcy Law of 2002.

5. There is no legal mechanism to protect individuals who are investors in the shared-equity construction of non-residential premises with an area of more than seven square meters and do not have the right to become registered participants in construction. It follows from the meaning of the regulatory regulation sub-paragraph 3.1 of paragraph 1 of Article 201.1 that the transfer in kind of non-residential premises with an area of no more than seven square meters is possible if the construction participant declares his claims and becomes a creditor with inclusion in the register. We believe that the legislator has followed this path of legal regulation due to the fact that entities acquiring non-residential real estate with an area of more than seven square meters have the goal of making a profit, which, in our opinion, is insufficiently justified.

6. Review and evaluation of the current regulation of bankruptcy of the developer and the draft law "On restructuring and Bankruptcy" allows us to conclude that the changes will affect only the rights of the debtor and the interests of the state. However, in our opinion, these changes do not lead to the protection of the rights of creditors and other construction participants as a weak side in these relations. The mechanism for implementing the debt restructuring procedure of the debtor-developer, taking into account the rights and interests of shareholders, is still unclear.

7. In order to implement an effective system of protection of the rights of participants in shared-equity construction, a comprehensive change in the current regulatory legal regulation is required.

[1] In Russia, 2.5 legitimate transactions in the primary housing market account for one affected shareholder. URL: https://vedomosti.ru "realty/articles/2012/11/20/ (accessed: 03.05.2022).

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