

Association of owners in the buildings with multiple apartments- a necessity, an obligation or a convenient management form of common property

Alla CLIMOVA, PhD. in Law,
University professor UTM, Lawyer.

Svetlana DOGOTARU

Master in Law, University professor UTM, legal expert in construction.

Mircea URSU, expert in Public Administration
Technical University of Moldova
ala.climov@rompetrol.md

Abstract:

The association of owners of privatized apartments represents a much-discussed issue in terms of compulsoriness of such association. The attempts to excessively democratize the decision for the establishment of the association has resulted in a continuous degradation of housing fund, while the owners are being scarcely involved in the maintenance of the common parts of buildings. The present work proposes an analysis of factors influencing the current management of multi-apartment buildings, as well as the reasons of owners' failure to fulfil their obligations for maintenance of buildings they own. In authors' vision, the ownership over the common property, which is forced and perpetual, also requires the association of owners aimed at an appropriate management of this property. In this regard, the legislation of the Republic of Moldova needs to be changed.

Keywords: *condominium, homeowners association (HOA), common property, share in common property, housing area, dwelling, owner, multi-apartment building.*

Multi-apartment buildings management raises a number of issues, the resolution of which critically affect the property of anyone holding apartments in these buildings. There is no doubt that each owner is responsible for the maintenance and repairs of the multi-apartment building he lives in and, all owners are responsible for the overall management of the building they live in.

What does the Moldovan legislation provide for in this regard?

Thus, the Civil Code, Article 355(1) states: "If there are spaces in a building for housing or another destination, having different owners, each of them holds a shared ownership right, forced and perpetual, on the parts of building which relates to use of spaces that cannot be used otherwise but in common". [1, art. 355 (1)].

Similarly, the legislation emphasizes two principles that characterize the legal status of co-ownership:

1. none of the owners have exclusive right on a specific part of the common property, which is determined by unanimity rule, as any intended action on the respective property is allowed only with the unanimous consent of the majority of owners;
2. each owner has the exclusive right to the ideal share - an abstract of common property - and may freely own this share. [8, pg. 50];

Shared ownership in multi-apartment buildings is forced and perpetual, determined by its existence regardless of the owners' will or preferences, common parts representing accessory assets with respect to the principal (individual) property - apartment or other private premises. Legal status of accessory assets is indispensable to the principal property for which these accessory assets are intended. The indivisible nature of accessory assets related to principal properties belonging to different owners and the permanent use of such accessories determine the perpetuation of ownership rights on common parts of the building.

In other words, the owners are required to maintain the common property and contribute to costs proportionate to their shares in the common property and can be released from such obligations only through alienation of individual property (an apartment or other private space).

In conclusion, the owners are facing the need to associate and take decisions for the management of common property, regardless whether or not the association is formalized by registration and approved status. The fact that all owners must approve decisions on common property, leads us to the need for reliable implementation mechanisms for owners' rights in condominiums. These mechanisms must be clear, securing the interests of all owners and ensuring the integrity and safety of assets throughout the life of real estate.

The Law on Condominium in Housing Fund [2] determines the property management in multi-apartment buildings, procedures for the creation of homeowners associations (HOAs) and the ownership relations in condominium. However, the law does not provide mandatory association of owners, except for new buildings appeared after approval of the law. Thus, for most buildings, the owners decide themselves whether to use or not this form of management.

In the new draft Law on Condominium, currently being developed, are maintained the same provisions supporting the mandatory establishment of HOAs - mandatory for new buildings and optional for existing buildings - (the draftlaw requires a clarification in terms of determining the 'existing buildings' and 'new buildings' placed in service). The experts' initiative to require the creation of HOAs, following the practice of other countries, was stoppedby the provisions of the Civil Code (art. 181) and the Law on Public Associations (art. 3) [3], which provides for the creation and activity of HOAs based on the principles of free choice.

On the other hand, the mandatory creation of HOAs is not an end in itself, but is a way of ensuring the maintenance process of apartment buildings, a process that is very important in maintaining both, the comfort of the residents and safe exploitation/use of these buildings. Obviously, there might be other ways of solving the problem, for example,–avoiding establishing public associations. That would mean that the owners would be obliged to exercise the right / obligation to perform works / contribute with funds for building maintenance and repairs, with the unanimous consent of each owner. This would be avery difficult to accomplish procedure given the complexity of building maintenance act, requiring decisions on various issues: on cosmetic repairs, contracting of works, as well as financial decisions that are the most complicated.

The other way is the building management by HOA - having an Association Agreement (whereby all owners agree uponto join the HOA), an approved HOA Statute determining the decision-making and control bodies and voting shares – where the things get organized and operation carried out in "automatic" regime. In this regime, which conforms to the Statute approved by owners at the Constituent Assembly,withthe empowerment of the Governing Bodies, whichshallfulfil all actions related to housing maintenance on behalf of all owners. This mechanism is obviously more suitable for appropriate management because it excludes endless meetings on standard and trivialtopics, reserving the right to expressing the owners' unanimous agreement onlywith those topics that reflect their ownership right on the common property.

All the effort of condominium management – either by HOA or by owners' direct management–shall be the resultof owner's obligation to care for and maintain the

property belonging to them.[1, art. 315, par. (6)]. Therefore, it shall not be left to the owners' discretion, - of owners in our case - to maintain or not the building in proper technical condition. Now, the only question is the mechanism through which the owners should organize and be enabled with to exercise these obligations. In other words, even if circumscribed that ownership right on common property is somehow constrained, the state has the right to establish provisions by law -provisions inducing to impose the apartment owners to cooperate (voluntary or forced) to meet the obligations of owners' status, i.e. maintain the building in good condition.

The paradox of the situation is that the owners of apartments (or other spaces), by their stubbornness / reluctance to associate and carry out the building maintenance, are contributing to the deterioration of common elements of the building - walls, roof, foundations, etc. –thus deteriorating each owner's individual property. Such degradation reduces the property price and may lead to its full destruction, but also with forthcoming occurrence of risk of accidents, which may endanger human life and safety. Therefore, this is the issue requiring the involvement of the state to call for mandatory establishment of HOAs for the purpose of appropriate management and administration of common property in condominiums.

The undertaken half measures that stopped the process of condominium formation in the housing area made possible a mass degradation of housing buildings and this is due to the missing legal requirement to establish HOAs in condominiums. In authors' opinion, the mandatory association is the only instrument possible to solve qualitatively the management problems of common property, supported by clear relationship rules between owners, including responsibilities, mechanisms to fulfill the tasks assigned to each participant to this relationship.

Of course, one can not provide legal provisions in contradiction to other laws, and namely the Civil Code and the Law on Public Associations. These two laws stipulate the principle of voluntary associations, but these laws may be amended by provisions reflecting the specific case of condominiums, where the owners association becomes mandatory, based on forced ownership over the common property. In this respect, it is necessary to amend Art. 181 of the Civil Code and art. 3 of the Law on Public Associations. As a result of these amendments, supported by the emerging Law

on Condominium, the things will move in the right direction, removing the false statements on violation of citizen's right to free association. In our condominium case, it is not about limiting the right to associate, but it is about the association when citizens are, de facto, already associated by the shared ownership right, which is forced and perpetual.

In this regard, the European experience is also welcomed [9]. In developed countries, the ownership on apartment is inextricably linked to membership in the HOA, organized as a private and non-for-profit organization. Expert's recommendations for managing apartment buildings in transition countries are clearly orientated to mandatory membership in HOA of all apartment owners' in condominium. These HOAs should work on democratic principles, with all necessary instruments representing the interests of owners.

In this context, it is necessary to mention, that democracy is applicable to common property management process, including formation of management and control bodies, approval of budgets, contribution rates to repair fund – so, the whole process of decision-making is aimed at owners' democratic exercise of their obligations. As well, we can not disagree or put into discussion the democratic principle of decision making on HOA establishment which had to be already established once the building became a condominium (meets all the qualities of condominium, i.e. - there is more than one owner in a building who owns individual property units [apartment and other private spaces], as well as a share in the common property in condominium).

Obviously, the condominium management organized through HOAs entails additional costs, but solves problems easier and more efficient, compared with ad-hoc management of each problem separately. Moreover, being a legal entity and duly registered, the HOA enables all owners with necessary specific tools for condominium management.

Speculation regarding the violation of owners' constitutional rights when mandatory HOAs in condominium are required is nothing but an attempt to delay the process of housing reform. Various reasons are invoked in this sense, but the truth is the fear of assuming commitments from both, the authorities and the owners.

Now, after the completion of housing privatization, there were established three forms of association for the purpose of maintenance of residential buildings: association of owners of privatized apartments (APLP), homeowners associations in condominium (HOA) and housing construction cooperatives (CCL).

APLP is created under the Law on Privatization of Housing Fund [4], the legal form - consumer cooperative. They are autonomous and independent associations of individuals created on the principles of free will and can do business in favor of cooperating members. According to the Law on Consumer Cooperation [5] (art. 18, par. (2)) cooperative organizations assimilate to small business enterprise.

As we see - in cooperative associations, the members can be only individuals, thus the management of spaces belonging to legal entities are excluded from management process (commercial spaces, municipal property and spaces, etc.). In addition, the common property of residential building to be managed by APLP is being transmitted for management only, but it is not registered as shared common property of each owner of that building.

This contradicts the provisions of the Civil Code and, given the HOA membership is voluntary, the owners who have not agreed to join HOA will remain outside the process too. The legislation does not clearly regulate the manner of execution of HOA decisions by owners who are not members of HOA. Although the Law on Privatization of Housing Fund (art. 24) requires the owners and lessees of premises with other destination than housing to sign contracts with HOA and participate in expenses - these provisions are very difficult to fulfill. Maintenance and repair are costly works requiring consistent financial commitment from the owners.

HOA is organized under the Law on Condominium in Housing Fund [2], where the rules of organization and activity are specified. The logics of approval of the emerging Law on Condominium relies on the necessity to make the management activity uniform in multi-apartment buildings, thus, after its approval, the APLP and CCL shall be converted into HOAs, so naturally take the form corresponding to that specific property relations in buildings owned by multiple owners.

The Law also specifies the established owners' rights and obligations, and management methods of common property, which are only two: directly by owners

(when the condominium includes up to 4 owners) and by association (which may delegate functions to a professional manager). In fact, excepting the case of 4 owners, there is only one method—management by the association.

In line with above, we can deduce that the HOA establishment is mandatory. Some provisions, however, make us to understand that HOAs are established on voluntary basis, while the changes in the Law on Condominium in Housing Fund from 2008 [7] introduced mandatory association for new buildings placed in service. Thus, we can deduce that for existing buildings the association is not mandatory. As well, the HOA establishment procedures described in the Law provide a certain number of votes for HOA validation. Just like with APLP, is not clear what are the mechanisms for imposing building maintenance obligations of owners who have not signed the Association Agreement.

CCL - another management method to date, appearing as a form of consumer cooperative, while in all cases, these cooperatives were established in order to invest in construction of apartments, so as after completion of construction works, to maintain the same form for the life of the building. The Law on Privatization of Housing Fund clearly indicates that in buildings where at least one member has paid the association share, the CCL is required to be reorganized in HOA.

One should note that the Law on Condominium in Housing Fund has not achieved its purpose. A few condominiums have been created so far and the majority of buildings remained to be managed by Municipal Enterprises of Housing Management (IMGFL). However, even in buildings where the HOAs are established, the full recognition and registration of the integral real estate within the condominium has not occurred. Only the rights on individual property belonging exclusively to owners are registered, while their shares in the common property are not. Although the Civil Code (art. 355) and Law on Condominium (art. 6 (3), Art. 17 (3)) require that each apartment (individual property) to be registered together / simultaneously with the share in the common property of each owner, this requirement remains to be one unfulfilled. Moreover, the Law on Real Estate Cadastre [6] stipulates that the registration of shares in common property is optional, so it is not mandatory.

Thus, already 14 years since 2000 have passed and the failure to establish a viable mechanism for the exercise of owners' obligations for appropriate maintenance of common elements in residential buildings has started generating structural threats to multi-apartment buildings and to the life and health of people who live in. It is clear that due to some errors, where -technical, where -lack of experience, the reorganization of the housing fund's management process is staggering, and these errors require urgent correction.

What are the recommendations on improving the situation? Who should correct the errors?

Obviously, the public authorities are those who committed these errors – so they are responsible to undertake corrective actions. The state - that allowed discrepancies in various legislation on one hand, and local public authorities - for the reason of not undertaking required efforts to organize the transmission of assets to the rightful owners and not ensuring the HOAs organization under the law. We must recognize that it is not a simple process. It will take massive involvement of both, human and financial resources. Nevertheless, there are no other solutions.

To bring the process to normal evolution, it is necessary to take systemic actions with relevant modifications in legislation and carrying out programs financed from public budgets, under the following landmarks:

1. Ownership right on buildings that meet the qualification of a condominium to be registered on owners' names, taking into account both, individual property and relevant shares in the common property as well.
2. The owners in these buildings to be considered associated by law.

Any changes in legislation, programs or actions, that will ignore these two crucial conditions - will be sterile and will not improve the situation.

References

- [1] Civil Code of the Republic of Moldova no. 1125-XV of 13.06.2002
- [2] Law on Condominium in Housing Fund, no. 913 of 30.03.2000. M.O. no. 130-132 of 19.10.2000.
- [3] Law on Public Associations no. 837 of 17.05.1996. M.O. 6 from 23.01. 1997.
- [4] Law on Privatization of Housing Fund no. 1324-XII from 10.03.1993. No. 5 01/13/2000.
- [5] Law on Consumer Cooperation no. 1252 of 28.09.2000, nr. 154-156 of 14.12.2000.
- [6] Law on Real Estate Cadastre no. 1543 of 1998 no. 44-46 of 25.05.1998.
- [7] Law on amending and supplementing certain legal acts no. 163 of 09/07/08. no. 140-142 of 01.08.2008.

[8] Considerații privind proprietatea comună în proiectul codului civil. Conf. Univ. dr. Sebastian Cercel, Lect. univ. dr. Anamaria Florea, Universitatea din Craiova, Revista de Științe Juridice. <http://drept.ucv.ro/RSJ/images/articole/2006/RSJ2/0207Cercel.pdf>