

Formal and Legal Aspects of Buying and Commissioning Flats

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Abstract. Formal and legal aspects of buying flats and their reception is very current topic and touches wide group of buyers. Annually in Poland great amount of flats is being sold and put to use. However, the case of housing purchase requires knowledge of both the construction and the legal aspects each buyer has to encounter. The paper faces the subject of formal and legal aspects, and analyses accompanying procedure of purchase and reception of housing in Poland. The article presents principles associated with the acquisition of a dwelling, process of works reception, removal of detected faults, fault-free reception, transfer of ownership, warranties, guarantees and possibilities of their enforcement. Contracting parties of the developer agreement were revealed. In addition, the entities present in the course of works such as general contractor were mentioned, due to the fact of his direct influence on the results of a contract terms between developer and buyer. Logical connection between three parties (buyer-developer-general contractor) were shown and direct and indirect dependencies were revealed. Existing laws and regulations that govern the relationship between the developer and the buyer of a dwelling were determined showing basic rights and responsibilities of each. The article also presents problems resulting from delaying the completion of works by developer's fault and indicates possible legal paths to follow in order claim their rights. Due to the fact, that many of discussed formal and legal aspects in this subject have their origin connected to construction works and design issues, author suggests increased quality control and efficient work organization in order to solve problems before appearance.

1. Introduction

After booming in 2007 and 2008 construction market was overwhelmed by the amount of new investments especially in housing industry. The amount of newly build flats was steadily rising, reaching its peak in 2008 counting 165 189, and stayed at high level in 2009 reaching 160 002 apartments put to use (figure 1). Such an increase in sales influenced great amount of individual buyers on their way to purchase newly build apartment. What is more there was a change in functioning of a market economy, and radical modifications in the structure of investor housing, as well as in the ownership structure of housing stock, which majority consists of residential private investors (developers of multi-family housing and individuals in single family housing). Building for rent has been marginalized and also municipal housing stock for rent available to households with low income significantly reduced (for various reasons), [1]. This situation created opportunity for Developers who familiarized with construction industry specificity, legal aspects of contractual conditions and no regulations on how contracts should be conducted, taking advantage of buyers by signing imbalanced contracts favourable



to Developers [2]. Becoming aware of this problem Constitutional Tribunal in Poland noticed legal loophole in Polish law and notified Parliament and Council of Ministers in order to enforce changes in the law [3]. At the time Poland was one of the last European Union countries not having any legal regulations concerning developer's actions.

Due to imbalanced and unfair contractual terms proposed by some developers The Act on the Protection of Rights of the Buyer of Housing Units or Single-Family Homes [4] was announced on 16th of September 2011, came into force on 29th of April 2012. Since that point in time all housing developer contracts need to match appropriate formal requirements in order to assure balanced distribution of rights and responsibilities. Consequences of this law enforcement are still valid today because of steadily rising housing construction market. In January 2017 a number of 14 376 flats were put to use. Comparing to January 2016 with a number of 12 776 gives 12.5% increase [5].

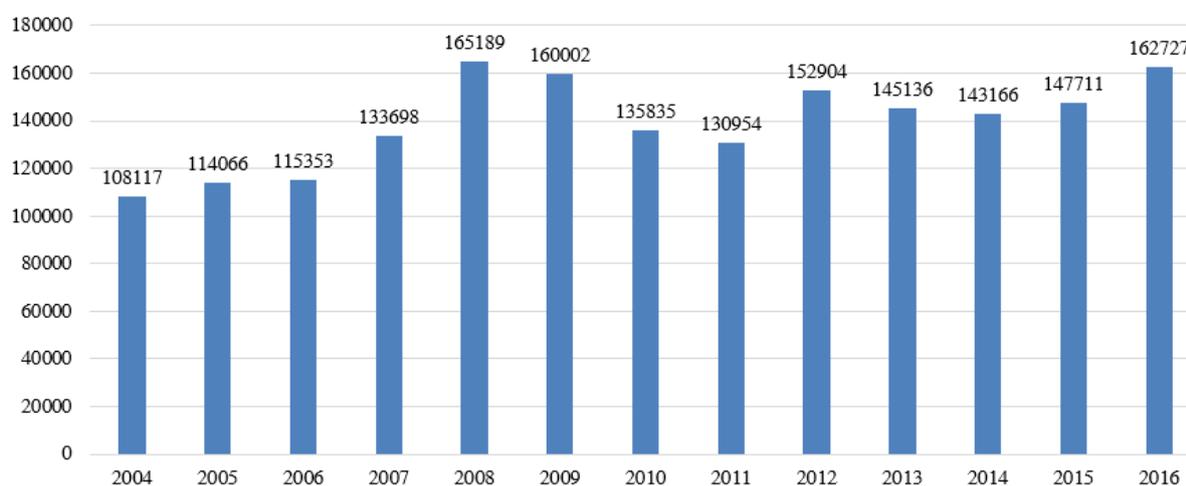


Figure 1. Apartments put to use in years 2004-2016 [5]

The activity of participants in the housing market is not the same in each local market or regional. This also applies to the intensity of transactions in the housing market, and especially the reaction of market participant's flats and developers at the first signs of economic upturn and increased interest of buyers of apartments. [6]. The housing sector largely determines the socio-economic situation of the city and region, affecting the processes of demographic, spatial, labour market and the amount of income the city budget [7]. Buyers interested in buying flats or houses are taking into account many aspects, like localization, infrastructure, health care access, mass communication options, parking places etc. [8]. Less focus is put into the details and procedures of actual process of buying the flat that could be long and complicated which confirm that review of them is necessary. This work describes most significant aspects of buying procedure taking into account contracting parties, their roles, responsibilities and rights.

2. Buyer Protection Act

The Act on the Protection of Rights of the Buyer of Housing Units or Single-Family Homes (further: Buyer Protection Act or BPA) is a document describing procedure of buying an apartment from the stage of providing an offer until final stage of handing over an apartment on buyers hands. Buyer Protection Act regulates Developers pre-contractual obligations towards Buyer, rules and conditions for signing agreement, specific contractual terms, rights and responsibilities of both parties of an agreement, means of protection of Buyers payments, procedure of funds distribution after Developers bankruptcy. Act begins with description and definition of basic terms such as Developer, Buyer, Open and Closed Escrow Account, Begin of Sales, Developers Undertaking, Housing Unit, Single-Family Home, Developers Contract.

One of Buyers most important protection mean given by the Act (BPA, Chapter 2 and 3) is obligatory Developers escrow account (open or closed), holding Buyers money for real estate payment. Escrow is being accounted by Bank recording all incomes and withdrawals done by Buyers. Funds are distributed to Developer in tranches, only after specific milestone is achieved, and only for development purposes. Final tranche is given to Developer only after the development is finished and real estate is handed over to Buyer and confirmed by notarial deed. Another form of protection (BPA, Chapter 4) is obligatory Developers bank guarantee or insurance guarantee, in case of developer's contract withdrawal (by Developers fault) or Developers bankruptcy. Through guarantees from the time of first payment until receiving real estate ownership Buyer is fully secured and will regain his funds in case of breaching contract by Developer.

First obligation to be met by Developer by the BPA Law is performing development prospect, to be given out to each interested potential buyer. Each time prospect is being changed, all people to have received it must be notified in a declared way (in writing). Prospect should consist of two main parts (general and individual) and should include by definition a list of elements, beneath given only most important:

A. General part:

- name of Developer with registry, address and contact data,
- developers experience and finished developments with examples,
- information on real estate parcel such as address, land register number, local land management plan,
- information on planned development such as construction permit, planned start and finish dates, handing over date, description of developers undertaking with number of buildings and their description and localisation, method of estate area measurement, means of buyers funds protection,
- rules for contract withdrawal,

B. Individual part:

- price for 1m² area of real estate,
- location of real estate in building, most important features of building such as number of flats, technology of construction, standard of works in common areas, amount of parking places, available media,
- standard of works assured by developer, total area of an apartment, number and location of compartments,

Buyer's protection act regulates specific developers contract terms and lists a number of 18 elements necessary to include in agreement. In general those terms are clarified information given in prospect supplemented by final term of real estate hand out and confirmed by notarial deed, number of escrow

account, interests on conventional penalty, and buyer's confirmation of receiving prospect, term and method of notifying Buyer about reception of real estate.

3. Purchase Procedure

While purchasing a real estate from developer three main types of agreements may be distinguished:

- I. Reservation contract – made in writing for purpose of timely excluding flat from sale in exchange of specific amount of money. Such an agreement may include obligation of parties to sign preliminary contract or developer's contract. This type of contract is not obligatory.
- II. Preliminary contract – made in writing or as notarial deed, may be signed only to development already finished and put to use. This type of contract is not obligatory.
- III. Developer's contract – made as notarial deed, signed for purpose of transferring ownership on Buyer after finishing Developers undertaking. This is obligatory type of contract.

According to Buyer Protection Act and formalities required to be fulfilled, purchasing procedure done in several steps may be distinguished. Procedure visible on fig. 2 may be in general referred to as a model of acquiring real estate from Developer.

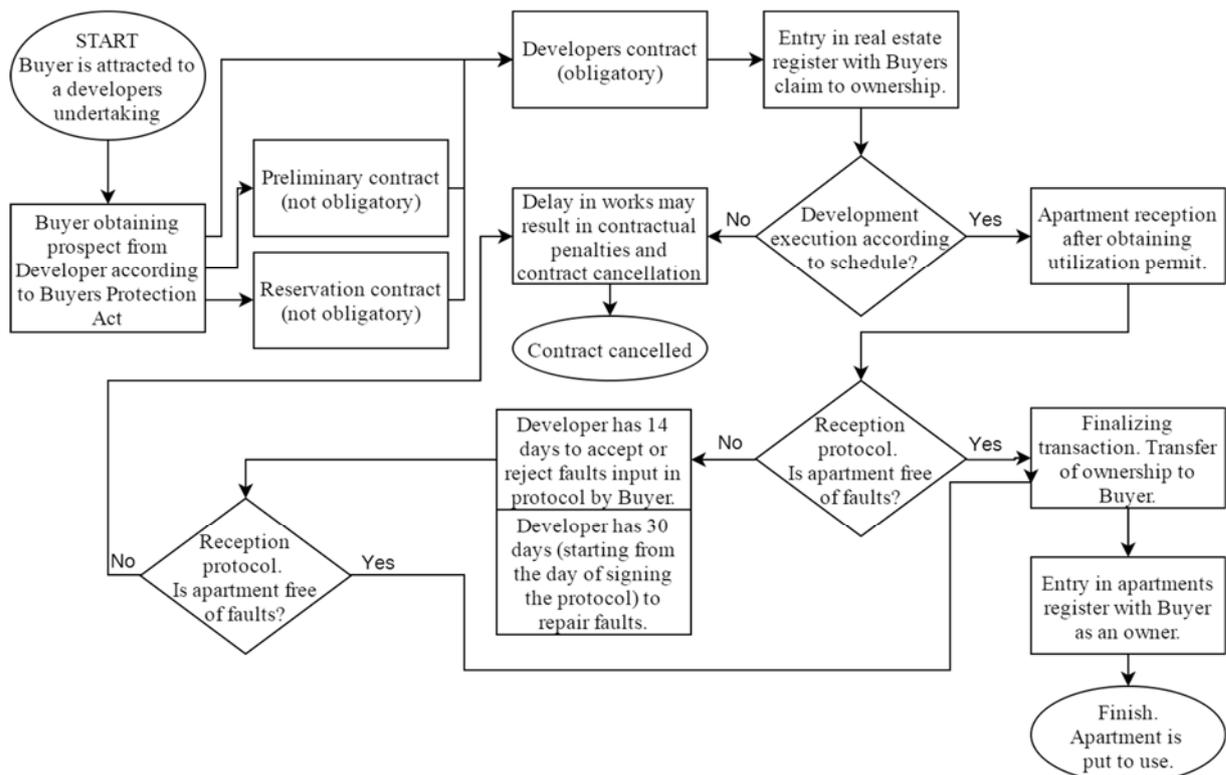


Figure 2. Model of real estate purchase procedure from Developer

4. Contracting parties - roles and responsibilities

In Polish Building Law four parties of construction process are mentioned: Investor, Construction Supervisor on behalf of investor, Designer, Construction Manager, [9]. The Buyers Protection Act consider 2 parties, namely: Developer and Buyer. When concerning real estate construction, both acts are applicable. In general, the Investor is identical to the Developer (altogether further called Developer), thus it may be pointed out that 5 different parties are legitimately incorporated into construction process.

Nevertheless, construction process is depending heavily on third parties not mentioned in given law acts such as general contractor and subcontractors. Matters concerning terms for contracting mentioned parties are regulated by Civil Code which is not in scope of this elaboration, nevertheless from construction management point of view it is urgent to notice this dependency which is not directly revealed in any of those law acts.

In discussed subject two general organizational types of works performance may be distinguished. First is Developer (acting as General Contractor) hiring his own Construction Manager and executing works using his own manpower or subcontracting works. Quality is solely depending from Developer. Second type is Developer acting only as an originator, commissioning works to General Contractor which is responsible for hiring Construction Manager, performing works using his own manpower or subcontracting. Quality is solely depending from Developer, but Developer is depending on General Contractor. This minor difference may result in problems in transfer of information from Buyer to party that is responsible for performing works this information concerns. In first case chain of information is limited to 2 communication channels (Buyer -> Developer -> Contractor) while in second case chain of information reaches 3 communication channels (Buyer -> Developer -> General Contractor -> Contractor). Shorter chain of information gives 50% less possibility of losing information. Assuring communication without disturbance is important in order to achieve goals described by contract between Developer and Buyer. In particular request for change agreed between Developer and Buyer may encounter obstacle not be transferred to General Contractor, or further to Subcontractor. Transfer of information is especially crucial during faults removal after reception of an apartment. Such a reception is done between Developers representative and Buyer, but results shown in protocol need to be passed to contractor responsible for revealed fault. Several inquiries on the subject of an apartment reception procedure revealed that some of defects given in protocol are not being removed due to miscommunication, also some requests for change are not introduced even if being included into contract.

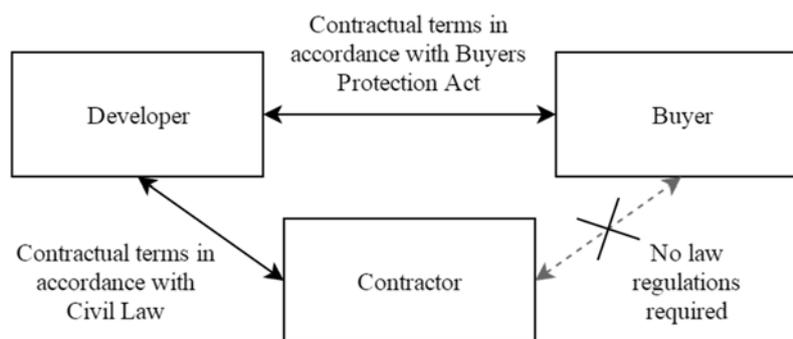


Figure 3. Developer – Customer – Contractor triangle with law dependencies

It has to be noted that quality check made at the time of acceptance does not give the full picture of apartment's condition and is just ad-hoc evaluation. Only inspection of construction performed during operation, and observation of its elements allow to capture signs of technical wear, defects and damages caused by errors committed during implementation phase. In connection with disclosure of defects only in the course of operation, the contractor is obliged to remove defects during warranty period. Repair period include all work that must be done by general contractor to bring items or details of the building to complete their technical and functional efficiency for the time specified in the warranty [10]. Tense situation on line Buyer – Developer caused by construction complications and quality dysfunction such as delay in construction schedule or numerous faults, defects revealed during reception of an apartment, and defects revealed after the reception, may result in bringing case before the court.

5. Results and discussions

In order to prevent extreme, costly and time consuming measures to prove one's rights, authors suggest improving quality management in construction process. Such an improvement will result in getting ahead of Law acts and respectively solving contractual problems before they appear. Moreover, Developers acting with respect to Buyers, honouring matters of quality management and rising standards will place themselves among top recommended sellers. Very actual way of introducing new management methods is implementation of BIM into constructions life. An example of software helpful in improving construction results is Autocad BIM 360 Field. It is a software for managing modern construction site with use of tablets achieving direct communication thanks to direct contact and quick information exchange between parties present on construction site (construction manager, health and safety inspector, contractors and workers). Authors noticed a possible need of implementing software that could cope with arising problems in communication within Developer-Buyer (-Contractor) circle, by use of similar software. Additional stage of construction management (post construction) may require reinventing idea of supporting direct contact between parties that was introduced by Field application, and placing it into situation present on Developers market. Such a vision would require further studies and inventing series of rules for purpose of providing fluent communication between parties of Developers Contract (and contractors) in order to prevent failures and losing information during sales period.

6. Conclusions

After major growth of housing developments in years 2007-2009, but almost no regulations considering specificity of market, developers started to abuse their position by implementing imbalanced contractual terms into developer's agreements. Only after Constitutional Tribunal in Poland in 2010 notified Parliament about legal loophole and dramatic situation of customers The Act on the Protection of Rights of the Buyer of Housing Units or Single-Family Homes Housing was brought to life in 2012. Thanks to regulations implemented by this Law, situation became more stable and Buyers Equalled Developers in contractual terms. Due to possible law enforcement for purpose of asserting Buyers rights, Developers need to stand up to agreement requirements, providing realization of not only scope, but also assuring quality. In such situation a need for implementing quality management procedures into developers undertaking became urgent matter. Authors suggested possible implementation of new software for the purpose of managing Buyer-Developer(-Contractor) relations and information flow.

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