

## ПРАКТИЧЕСКИ И ПРАВНИ ПРОБЛЕМИ НА УПРАВЛЕНИЕТО НА КОМПЛЕКСИ ОТ „ЗАТВОРЕН ТИП”

Сборник с доклади от VII Международна научна конференция на младите  
учени, Пловдив, 15 - 16 юни, 2017 г индексирана в SCOPUS и Web of Science

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### PRACTICAL AND LEGAL ISSUES OF MANAGEMENT IN “GATED” COMPLEXES

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#### Abstract

**The theme of the report is aimed at exploring how adequately the legal framework and its enforcement in case – law addresses the needs of the governance of "closed" type complexes. Explored are the most common cases of possible different interpretations or gaps in the regulation and the major groups of issues in this area.**

**Keywords: condominium, complex of "closed" type, management, contract**

Some questions arise in connection with **the legal conditions for the existence of a residential complex of "closed" type**. In §1 item. 1 of the Supplementary Provisions of the Condominium Ownership Management Act (“COMA”) a “closed” complex is considered as such only if it has *residential use* -i.e. the legal regulation is not applicable to other complexes - holiday resorts, business parks. I find unacceptable the interpretation of par. 1, item 3 of the Supplementary Provisions of COMA, that *the requirement for a complex of "closed" type shall be considered as fulfilled even if there is of only one building –condominium* (Decision № 87 / 09.03.2012 in civil case № 1115/2011 of the Supreme Court of Cassacion of Bulgaria, mandatory case - practice under Article 290 of the Civil Procedure Code). I fully admit the motives about the opposite opinion, given in Decision № 381 of 05.25.2016 in commercial case № 458/2016 of Varna District Court.

In so-called "Horizontal condominium" (Velinov, 2003, r.14), (Vasilev, 2009), (Zaprianov, 2006), (Marinova, 2012, p. 28) COMA and in particular the management contract of common areas in “closed”- type may be applied only after decision under Art. 33 of the Ownership Act, taken by the co-owners of the land. It will be used without replacement of the applicability of the Ownership Act with COMA (Supreme Court of Cassacion of Bulgaria, IV Chamber Order № 165 of 5.03.2014, case 47/2014; Bourgas District Court, Decision № 1000 of 10.27.2016 in common case № 1328/2016).

The practice raises the question: *how will the absence of one /some of the mandatory elements of closed-type residential complexes affect to the management contract’s validity?* The lack of the established preconditions for the existence of such a complex will result in nullity of the contract because it will contrary to the law and be with an impossible subject within the meaning of Art. 26, para. 1 of the Law on Obligations and Contracts. In such cases the management contract, concluded with the individual owner of an object in the complex, might produce legal effects and these clauses will be recognized as valid in accordance with Art. 26, para. 4 of the Law on Obligations and Contracts (Decision № 381 of 05.25.2016 on commercial case № 458/2016 by the Varna District Court). This will be in result of the existence of a decision

of the general meeting of the owners in the building for expenditure on consumables and routine maintenance of the common areas of the condominium according to Art. 51 Par. 1 in connection with Art.11,(1),i.5 which rules are mandatory (Order № 1097 of 17.11.2011 of the Supreme Court of Cassation of Bulgaria, I Chamber, on case № 4113/2015; Decision № 85 of 24.06.2014 2011, in case № 1157/2014). For services which subject has activities that go beyond mere management or luxury improvements the enforcement of the provisions of the management contract requires either an explicit consent of every owner of a private entity or a decision of the General Assembly, acting unanimously (Decision № 287 of 18.12.2014 of the Supreme Court of Cassation of Bulgaria, I Chamber, in case 3888/2014).

An important issue is *the applicability of Art. 2COMA to already concluded management contracts*. COMA has no retroactive effect and it can be concluded that even when all the formal characteristics of an residential complex of closed type are fulfilled, but condominium already occurred before the entry into force of COMA, the building can not be managed by concluding management contract within the meaning and legal consequences of such under Art. 2 COMA (Bourgas District Court, Decision № 972 of 20.10.2016 in common case № 1127/2016).

It is also essential **to what extent the regime of government by contract under Art. 2 of COMA is imperative legal regime** or this is a disposition rule. The second opinion is more correct, as the will of the investor is of importance – he is the one to decide to design the entity in compliance with all the requirements for complex and will offer the prospective owners management contracts providing the functioning of the complex as such.

Any part of the administrative authorities has role in designing, building or entering the building in operation by special arrangements with regard to the quality of “closed”- type residential complex (in this sense - Varna District Court, Decision № 389 of 05.27.2016 in case № 466/2016 ). Argument in favor of the thesis that the management mode of the complex depends on the will of the investor can be found in the text of the law which explicitly states that the entry of the management contract in the book of the Property Registry may not be made by the other party of the contract – the owner of a separate unit of property.

**The legal characterization of the management contract** in “closed”-type residential complex as a treaty can be summarized in the sense that it is a bilateral, gratuitous, commercial, formal, governed by the obligation’s law and with continuous action. (Goleva, 2008, p. 86) (Goleva, 2011).

**The formal requirement for conclusion a management contract** is notarization of the signatures of the parties (not of the content of the treaty as stipulated by Art. 589-590 of the Civil Procedure Code). *The entry of the management contract in the Property Register* in the each owner’s individual account in the Property Register as provided in Art. 2 para. 2 of COMA is not a constituent element of the contract’s validity. The entry in the register has only declarative character and the commitment to create obligation for the follow owner. It does not interfere with the vesting effect of the management contract that shall be created with its conclusion (Decision of 05.26.2014 of Sofia Region Court in case № 18210/2013).

**The parties of the management contract** of the complex also contain in COMA. The fact that it is signed by every owner of a individual object, which usually occurs after the transfer of ownership and the permission for use of the building, guides to the conclusion that the signment of the contract does not occur simultaneously for all the owners. (Decision № 972 of 20.10.2016 of Bourgas District Court in case № 1127/2016; Decision of 26.05.2014 of Regional Court Sofia in case № 18210/2013).

Problem of the case-law may cause the *legal meaning of the term "investor"* as a party of the management contract under Art. 2 of COMA. Usually this is the person who built the building in a commercial manner, respectively, that has the same quality. There is an opinion which does not stem directly from the norm, that "investor of art. 2 COMA must be the owner of the plot, which builds the complex "(Stavru, 2009, p. 157). *The practice expandly interpretes*

*the term "investor" as a contractual party and allows this to be concluded by the person designated by the investor*, to whom he has entrusted the management of the complex (Decision № 654 of 27.06.2016 of Bourgas District Court in case № 686/2016, which has entered into legal force).

Attention deserves also **the succession of the parties of management contracts**.

***Binding force of the registered contracts for management follows the next owners of individual objects*** which frule is written in the imperative provision of Art. 2 para. 2 of COMA. This is the reason for the recording of the management contract with the file of each owner of property.

No less important, however, is the question *is it permissible unilateral transfer of rights and obligations by the investor to a third party*. My opinion is that there is reason in the thesis that the management contract is a contract intuitu personae and the owners of units in the complex may not be forced to accept a change in the party without express explicit consent (in this sence: Stavru, 2009, p. 160) ( Kalaidjiev, 2001, p. 203). This does not preclude the possibility a third party to replace the investor in fulfillment of his rights and obligation, acting as his proxy, representative or on his own behalf.

**The object of management contracts of the complexes** should also be defined. Essential is the understanding that the conclusion of management contracts in "closed" type complexes refer only to ***the management of the common parts***. The existence of a contract for management of the complex does not exclude the management of individual buildings in a condominium to be made in any of the provided in COMA forms of governance (Marinova, 2012, p. 208). In order to delegate ) powers rights which according to the law – COMA, Art. 12 para. 1 , belong to the management bodies to other person (investor or company, specialized in management and maintenance) an authorization with notarized signatures is required (Supreme Court of Cassacion of Bulgaria, II Chamber Decision № 87 of 9.03.2012 in case № 1115/2011 under Article 290 of the Civil Procedure Code).

**The specific content of the management contract** is left to the will of the parties (Stavru, 2009, p. 167), (Supreme Court of Cassacion of Bulgaria, II Chamber Decision № 87 of 9.03.2012 in case № 1115/2011). It is logical that the clauses in the management contracts, concluded with the different owners, should be identical by contracting type, similar to that in general terms (Decision № 381 of 05.25.2016 in commercial case № 458/2016 of Varna District Court.), (Vasilev, 2009).

A key moment in relations in the complexes of „closed” type is **the financial obligations due to the investor**. When a management contract exists, the set / determinable in it costs for maintenance and management are a special mode that derogates the common text of Art. 11, paragraph 1, item of COMA - as one of the powers of the general meeting of the condominium (Decision № 36 of 9.01.2017 of Regioonal Court - Bourgas in case № 2708/2016; Decision № 654 of 06.27.2016 of OS - District Court - Bourgas in case № 686/2016, which entered into legal force). In the absence of a signed contract for management of the common parts of the comlex by the particular owner of a separate unit, the receivable by the management company payments may be based on a relationship negotiorum gestio under the regulation of art. 61, para 2 of the Law of Obligations and Contracts (Decision № 1258 of 25.02.2014 of City Court Sofia, IV-d Chamber in appeal common case № 14511/2013).

Regarding **the term of the management contract** - the obligation of the investor is to ensure the functioning of the complex precisely as such and to provide promised in the contract for management services. That activity is not limited by any time and is for an unlimited period (Decision № 909 of 10.05.2016 of District Court - Bourgas in case № 880/2016, which entered into legal force).

**Opportunities for cancellation of a management contract** by the individual owner due to default by the contractor are limited - only in full default (Decision № 1004 of 27.10.2016 of District Court - Bourgas in case. № 1122 / 2016). As for the registration of the termination of the management contracts, such is not permitted in view of the exhaustive list in art. 4 of the Rules of

registration (as in the Cadastre and Land Registry Law) in which the possible acts to be registered are pointed (Order № 39 of 23.01.2015, Supreme Court of Cassacion of Bulgaria, I Chamber, in case № 7347/2014).

**THE CONCLUSIONS** that can be drawn from this study may be summarized as follows:

1. The legal framework of the management of complexes of "closed" type needs to be more completed and refined: expanding the scope of regulation beyond residential use of the complexes; statutory definition of the number of buildings under condominium ownership as part of the complex of "closed" type; clarification of the term "investor"; indication of the basic obligations of the investor and grounds for termination of management contracts by the individual owner.

2. The case - law gives to the provisions of the Law on Condominium Management quite an extended interpretation in attempt to make it usefull to the market practice.

3. In life practice contracts to manage complexes of "closed" type in the strict sense of Art. 2 of COMA are not commonly used. Treaties concluded on the principle of contractual freedom are preferred. The main reasons are ambiguities in the legislation; the lack of not so flexible and not sufficiently consistent mandatory case - law in this area; the market practice management contracts to be offered frequently with the preliminary contracts for the purchase of property in non-finished construction.

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