

Research article

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Problems of Real Estate Assignment Using New Electronic Technologies



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Abstract

The paper analyzes the problems related to the introduction of new electronic technologies in real estate assignment transactions. The law on registration of real estate title, electronic notarization and e-signature, as well as real estate transaction practices of different agencies are reviewed. The conclusion is made on the need to apply a differentiated approach to introducing new electronic technologies into real estate transactions, and to maintain the existing restrictions in the form of a shared document applicable to residential real estate. It is suggested to recognize online real estate transactions involving two notaries as attendee transactions under civil law authorized under the respective regime. The procedure for online transaction involving two notaries should lay the groundwork for instituting a legal regime for e-transactions involving other professional real estate market players.



Keywords

real estate, land plot, electronic contract, electronic signature, Rosreestr, state registration of real estate, notarization, residential and non-residential premises.

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Introduction

Electronic and digital technologies have been around for such a long time that one would be hard pressed to name a service sector totally free of digitization and e-services. The restrictions brought about by the COVID-19 pandemic have further boosted the introduction of e-technologies into real estate transactions¹. Websites of property developers and real estate companies as well as digital platforms offer a variety of ways to buy flats, houses, non-residential premises, parking slots, land plots and other real estate with convenience². Moreover, the subject of the contract could be displayed as a 3D image, with buyers taking a virtual tour of the property to see layout details, design solutions, window views and curtilage³.

This paper is focused on the law governing the application of new electronic technologies to real estate transactions; problems related to enforcement practices; main conceptual approaches to introducing e-contracts into real estate transactions.

The research hypothesis is that the socioeconomic importance of real estate business to the state and society in general requires the introduction of electronic technologies involving e-contracts to be supported by legally binding mechanisms establishing the ways, procedures and limits of their applicability to specific types of real estate transactions (purchase transactions, transfer by gift, exchange etc.), with the relevant standards to be created for persons involved in online real estate transactions as exemplified by the online transaction rules involving two notaries.

The research has been mainly performed through analysis and synthesis of the documents to result in a number of important proposals to introduce new electronic technologies into real estate transactions. The logical method and the legal fiction method allowed to substantiate the possibility to apply e-contracts and electronic signatures to relationships involved in real estate transactions, once the data system complies with the principle

¹ According to real estate companies, the 2020–2021 pandemic has boosted the process of moving real estate sales online to encourage “seamless” transactions. See: Seamless real estate transactions: new post-pandemic apartment sales. Available at: <https://realty.rbc.ru/news/614057df9a7947241fcb93ab>

² The RBC provides interesting statistics regarding real estate e-transactions. In January–December 2021, Moscow reported 539.6 thousand online applications to register title to residential real estate or 1.5 times (+51.4%) more than in 2020. Available at: URL: <https://realty.rbc.ru/news/61fa32959a7947d2a7636008?from=newsfeed> (accessed: 12.08.2021)

³ Online transactions and 3D tours: ways of selling apartments during the lockdown. Available at: <https://realty.rbc.ru/news/61718d169a7947de9fa0c2fd>. (accessed: 19.01.2022)

of shared document deemed an “attendee transaction”. The comparative analysis was used to demonstrate the limits of applicability of e-technologies to real estate transactions in other countries’ legal systems.

1. Theoretical Approaches to the Form of Real Estate Contract

A possibility of real estate transactions through the use of modern electronic and digital technologies is still a hot topic of debate among legal experts. There is a widespread view in the Russian legal theory that such transactions should never apply to real estate purchases because the civil law currently contains a number of strict requirements to the form and content of real estate contracts.

V.V. Vitryansky considers Article 434 of the Russian Civil Code (new para 4) as requiring a “strict” written form whereby a contract in writing can be concluded only as a shared document signed by both parties in cases envisaged by law or by agreement between them. He provides examples where the contract has to be made “strictly” in writing by virtue of law: real estate purchases, company sale (Art. 550, 560 of the Civil Code) etc. [Vitryansky V.V., 2019].

In discussing the form of a civil law contract, L.A. Novosyolova writes that “formal requirements could be even tightened to reduce the risk of abuse in sectors critically important to society (such as private real estate transactions, estate succession etc.)” [Novosyolova L.A., 2019: 5].

These “strict” rules stem from Article 550 of the Civil Code (“Form of a real estate contract”) whereby real estate contracts should be made in writing as shared documents signed by the parties — Article 434 (2), with non-observance of this rule resulting in one of the worst civil law effects, that is, voidance of the contract.

Other countries’ legal systems also provide for specific regulation of civil law transactions. In particular, international instruments and national regulations often explicitly specify which transactions could not be contracted online. These include testaments, trust deeds, real estate transactions, foreign currency transactions and negotiable instruments since the law provides in these cases for more requirements which cannot be enforced where transactions are performed through the use of e-documents [Shelepina E.A., 2017: 31–39].

2. E-transactions in the Russian Civil Code: Applicability Limits in Respect of Real Estate Assignment

With the expansion of e-trade, the Civil Code was complemented in 2019 with two principal provisions on the possible use of new transaction technologies and e-documents to formalize such transactions: the amendments made to Article 160 (1) and 434 (2).

Actually, Article 160 (1) provides in respect of transactions in writing that they should involve a document describing their content and signed by contracting party(ies) or duly authorized attorneys. At the same time, as e-technologies became widespread, the legislator has added a rule that the written form of transaction will also be deemed observed, once the transaction is made through the use of electronic or other technology which allows to reproduce its content on a physical data storage device without alteration, with the signature requirement deemed observed if any method has been used to reliably identify the consenting party (para 2, Article 160 (1)).

In its turn, Article 434 (2) specifies that a written contract could be made as a shared document (including e-document) signed by the parties, or by the exchange of letters, telegrams, electronic documents or other data under the rules of para 2, Article 160 (1) of the Code.⁴ However, under Article 434 (4), “in cases envisaged by law or by agreement between the parties, a contract in writing can only be made in the form of one document signed by the contracting parties”.

The question is whether the rules of Article 434 (2) on the possibility to make one document (including electronic) are applicable to the provisions

⁴ Importantly, there is a discussion of whether the electronic form is independent from the written one. Some authors argue in favour of formal independence of e-transactions thereby assuming possible division of transactions into oral, textual and electronic. Thus, L.G. Efimova argues that the e-form is not a variation of the written form. Efimova L.G. Revisiting the concept and legal nature of electronic transactions // *Lex Russica*. 2019, no. 8.

Apparently, such approach does not take into account a lot of factors including a need for specific regulation of e-contracts as a new form of transaction and the effects of its non-observance. The grounds for identifying specific effects from non-observance of electronic form (different from possible defects of the written form) are unlikely to be found. We believe that a more correct approach to the ratio between the written and the electronic forms would be to consider them, respectively, as the general and particular. In this case, the centuries-old rules on the written form, its defects etc. established in our legal system can quite reasonably apply to the electronic form taking into account the exceptions envisaged by specific regulations. See: Sinitsyn S.A. *The Russian and International Law in the Context of Automation and Digitization*. Moscow, 2021, p. 94.

on real estate purchase and, therefore, allow for wider interpretation of Article 550 of the Civil Code.

M.I. Braginsky and V.V. Vitryansky once considered Article 550 and Article 432 (2) to reciprocally constitute “an exception from exception” believing Article 550 to be specific. They argued that “...the specific rule governing the form of real estate contracts actually assumes that the underlying Civil Code provisions are not applicable (Article 434 (2)). As regards the real estate contract, the legislator goes back to the requirements applicable to the written form (Article 160 (1)), thereby tightening the real estate transaction regime” [Braginsky M.I., Vitryansky V.V., 2000: 206].

Thus, these researchers ruled out any option other than envisaged by Article 550 and Article 160 (1) of the Civil Code in respect of real estate transactions. But this was at the time when the Internet was not used in this manner while e-commerce barely existed.

3. Electronic Real Estate Transactions as Absentee Transactions: Exceptions from the Rule

The legal theory treats the approach where the parties themselves sign one and the same document as the “attendee transaction”, that is, where the parties directly perceive each other’s intent, with the terms of the future contract identified in the course of direct communication between them. In contrast, “absentee transactions” do not assume direct and simultaneous signing by the contracting parties as there is a time gap between the expression of their intent inevitably raises the issues regarding the textual unity of the contract to be signed, including its terms.

The importance of a special legal regime for absentee transactions stems from “a time gap between the expression of intent by one party and its perception by the other party located more or less remotely. In contrast, attendee transactions assume no such time gap as the parties directly communicate with each other” [Braginsky M.I., Vitryansky V.V., 2000].

“An absentee transaction is normally characterized by the fact that the parties are located remotely beyond direct communication while the transaction is made by sending and accepting an offer. That is, a time gap and location difference make it necessary for the parties to conclude the transaction by going through the steps of offering and accepting.

In real estate transactions, a time gap is extremely dangerous since the parties’ intent in respect of the contract’s terms such as subject, value, in-

junctive relief etc. may change between the offer and acceptance. High socioeconomic importance of real estate has prompted a need to approve the contract by simultaneous expression of the seller's and buyer's intent which is normally possible when both parties are located in one place. For this reason, real estate transactions are characterized in many legal systems as "attendee transactions".

Meanwhile, the history of domestic civil law shows exceptions from this rule. Thus, it became evident in the beginning of the last century that new technologies allowed transactions between remotely located persons over the phone, given they simultaneously agreed their intentions. As a result, the Soviet Civil Code of 1922 had to resort to a legal fiction by incorporating a note into Article 131 whereby an offer made by phone was deemed an attendee offer [Braginsky M.I., Vitryansky, 2000].

Notably, other countries' legal systems apply different approaches to remote transactions, that is, the ones between remotely located persons. Thus, pursuant to § 312 of BGB, remote contracts are those where a seller or another person acting on his behalf and a buyer use only remote communications to negotiate and make the contract. Remote communications include all communication technologies, such as letters, catalogues, telephone calls, fax, e-mails sent via mobile phone messaging service (SMS), radio and telecommunications, that can be used to offer or make a contract without the simultaneous physical presence of the contracting parties⁵.

The Austrian law treats the intent to transact electronically as a declaration of intent based on the general e-trading rules. However, the Austrian law does allow to apply the attendee transaction regime to such electronic communications. The respective provisions are contained, in particular, in §12 of ECG where declaration of intent via chats, communication using messenger apps, VoIP or webcast systems are deemed attendee declarations⁶.

For specific cases, the Austrian law provides for special requirements to the form — for instance, contracts in writing for real estate sales.⁷

Unlike the Russian legal system, the German and Austrian ones provide for mandatory notarization of real estate transactions. When asked why the legislator makes transactions more complicated and, in particular,

⁵ Available at: www.uibk.ac.at/zivilrecht/buch/autorenliste.html (accessed: 14.01.2022)

⁶ Ibid.

⁷ Ibid.

more costly including by requiring their mandatory notarization, international legal experts refer to specific functions of the law in these situations.

Thus, in their comments to BGB they refer to the preventive, advisory and protective function of the “strict” form of real estate transactions⁸.

In contrast to the European civil law, English legal experts argue that formal requirements no longer constitute a substantive feature of the English contractual law, except for specific contract categories. In particular, contracts for sale or other assignment of a property share could only be made in writing. In answering the question on the functions of such formal requirements, professor Fuller identifies three functions: firstly, the probative function since in case of a dispute the formal requirement — for instance, a contract in writing — can serve as an evidence of its existence and content; secondly, formalities perform the preventive function “as a security against reckless actions”; thirdly, they allow to control the transaction’s validity. On the other hand, he believes formal requirements are fraught with major limitations, the main ones being that they are normally bulky and time consuming [McKendrick E., 2016].

The Russian legal studies present contrasting opinions as to the strictness of real estate transaction forms: while some authors deny the electronic form, others deplore the excessive strictness of the law which is thus falling short of the modern requirements which extend the limits of the written form. These authors argue that there is a steady need in civil application of modern technologies to the contracting process [Tatarkina K.P., 2016].

A.G. Karapetov argues the electronic form can be applied without problem to any transaction for which a shared document signed by the parties has to be made [Karapetov A.G., 2020: 876].

There is a rapidly growing interest, both internationally and domestically, in e-commerce and, therefore, e-contracting, with e-transactions spreading out to real estate [Saveliev A.I., 2016]. However, it is not clear from the national legal theory whether a shared electronic document applies to absentee or attendee transactions. At the first glance, one is prompted to think of the former as the parties are located remotely and cannot directly coordinate their intentions, with e-commerce in goods likely to qualify.

On the other hand, there could be examples where even a remote transaction makes it possible for the remotely located parties to simultaneously read

⁸ Available at: <https://bgb.kommentar.de/Buch-2/Abschnitt-3/Titel-1/Untertitel-1/Vertraege-ueber-Grundstuecke-das-Vermoege-n-und-den-Nachlass> (accessed: 20.01.2022)

and e-sign a shared electronic document using their online accounts. The amendments to the notary law (Article 53.1, Fundamental Notary Law No. 4462-1, 11 February 1993) at least guarantee that the Unified Notary Information System allows to make a shared document to be signed almost simultaneously, once the notaries involved in a remote transaction have explained the shared document to their clients (parties to real estate transactions).

4. Controversial Approaches to Electronic Real Estate Transactions in the Legal Theory, Practice and Law

There are obviously two opposite approaches regarding the applicability of e-contracts to real estate transactions: the first could be called the civil law approach, the second — enforcement approach.

In particular, the civil law theory argues against the wide interpretation of real estate contract form insisting that the words “written form as a shared document” should be understood literally as leaving no place for an electronic document). As such, the legal theory provides the only acceptable option of real estate transactions (direct coordination of intent by signing a shared document in writing, that is, “an attendee document”).

In contrast, the enforcement approach provides for the widest possible interpretation of Article 234 (4) of the Civil Code and thus allows electronic real estate assignment transactions. Russian real estate companies, credit institutions (including Dom.click, e-platform operated by Sberbank), property developers and other companies involved in real estate transactions propose electronic services to formalize sales.

While these activities continue, there is no explicit indication in the Russian law that real estate could be transacted in the form of a shared electronic document.

At the same time, it is noteworthy that the applicable regulations now contain provisions which allow real estate assignment in the form of electronic transaction (for example, Article 18, Federal Law “On the State Registration of Real Estate” allows electronic contracts for real estate assignment).

The demand for electronic real estate contracting calls for a need to legitimize transactions based on new technologies using a well-known method of legal fiction and recognizing e-signed transactions as “attendee transactions”. In particular, the Russian notary practice has accepted this option by allowing remote transactions involving two notaries.

5. Remote Transaction Involving Two Notaries — “Attendee Contract”: Legal Fiction Method.

As was shown above, the Fundamental Notary Law currently contains Article 53.1 (made effective by Federal Law No. 480-FZ of 27 December 2019) which governs remote transactions certified by two or more notaries. It deals with a situation where the parties to an apartment sale transaction are located in different regions: the buyer and the seller are served by notary offices of their respective cities [Kirillova E.A., 2015: 41-43]⁹. Pursuant to this article, the contract certified by two or more notaries is deemed “a contract in writing in the form of a shared document signed by the parties”.

Thus, the Fundamental Notary Law contains provisions that do not contradict Article 550 of the Civil Code (Article 53.1 of the Fundamental Law follows Article 550 of the Civil Code word for word in that such transaction “is deemed a contract in writing in the form of a shared document signed by the parties”). The transaction will involve two or more persons not in attendance simultaneously. Moreover, the law provides for a fairly detailed procedure of such transaction:

The notaries shall make a draft electronic transaction using the unified notary information system in accordance with the terms agreed between the parties; in the notary’s presence each party signs an electronic duplicate with a simple e-signature as well as a physical duplicate to be kept by the notary office; textual invariability of the electronic transaction is secured by the unified notary information system; the e-transaction duplicate with certification statement is signed by the certifying notaries using qualified e-signatures, to be stored in the unified notary information system; the certified transaction is entered to the register of remote notary events and transactions certified by two or more notaries of the unified notary information system¹⁰.

Moreover, the Fundamental Notary Law contains a number of requirements to protect the interests of such transacting parties. Firstly, the notary should explain to the parties the meaning and significance of the provided

⁹ It is worth noting that other jurisdictions (for example, France) also provide for a possibility to transact remotely via several notary offices.

¹⁰ See also: Ministry of Justice Order No. 222 of 30 September 2020 “On Approving the Procedure for the Use of the Unified Notary Information System in Transactions Certified by Two or More Notaries” (together with the Procedure for the Use of the Unified Notary Information System in Transactions Certified by Two or More Notaries approved by FNC Board Resolution No. 16/20 of 16 September 2020, Ministry of Justice Order No. 222 of 30 September 2020) (Ministry of Justice Reg. No. 60207 of 05 October 2020) // SPS Consultant Plus.

draft transaction and make sure that its content reflects the actual intent of the parties and does not contradict legal provisions (Article 54 of the Fundamental Notary Law). Secondly, in certifying any assignment or pledge contracts in respect of the property title subject to the state registration, the notary shall make sure that the property is owned by the assignor, except where the assignor has not yet taken ownership of it as of the contract date in accordance with the contract, and that the property title does not have any lien, encumbrance or other circumstances preventing such contracts from being made. Thirdly, a notary in private practice assumes full financial liability for the damage caused through his fault to the property owned by a physical or legal person as a result of a notary event performed in violation of the law¹¹. The liability of a notary in private practice who certifies mortgage agreements and real estate assignment contracts should be insured to an amount of at least 5,000,000 rubles.

In this paper author specifically deals with transactions certified by two or more notaries since the procedure for remote real estate transactions involving two and more notaries envisages, in our opinion, the necessary rules to minimize the risks assumed by the transacting parties.

Author believes that the aforementioned procedural requirements to notarization of transactions through the use of electronic technologies should be acknowledged as a kind of “standard e-documented real estate transaction”.

But since the current practice of entities involved in real estate sales allows for e-transactions without the notary’s involvement, it is necessary to demonstrate the differences between remote procedures with and without a notary.

6. Residential Construction Co-investment Contract As an e-document

It is noteworthy that the Federal Law “On Co-Investments for Construction of Apartment Blocks and Other Properties, and Amendments to

¹¹ Pursuant to Article 17 of the Fundamental Notary Law, a notary in private practice shall assume full financial liability for the damage caused through his fault to the assets owned by a physical or legal person as a result of a notary event performed in violation of the law, unless otherwise provided for by this Article. A notary in private practice shall assume full financial liability for real damage caused by illegitimate denial to perform a notary event, as well as by disclosure of information on performed notary events. The damage caused to the assets owned by a physical or legal person shall be compensated from the insurance coverage under the notary’s civil liability insurance contract or, should this coverage prove insufficient, the one under the notary’s collective civil liability insurance contract, or, should this last coverage prove insufficient, from the notary’s personal assets, or, should these prove insufficient, from the compensation fund of the Federal Notary Chamber.

Specific Regulations of the Russian Federation” also provides for a possibility to conclude an electronic co-investment contract. Article 4 (3) of this Law contains a general rule that the co-investment contract shall be made in writing subject to state registration, and shall be deemed concluded from the date of such registration unless otherwise provided for by the law. However, the following was added to this rule: the contract could be made as an electronic document signed by the enhanced qualified e-signature, as amended by Federal Law No. 147-FZ of 17 July 2009 and No. 151-FZ of 27 June 2019.

Thus, real estate transactions in the form of an electronic document have been legalized in the Russian construction co-investment legislation.

However, it is necessary to underline a major intrinsic difference between this contract and the one for real estate purchase since construction co-investment gives rise to mutual obligations (rather than to proprietary claims) to be assumed by the parties¹². Obviously, this type of contract has been thus moved outside the scope of Article 550 CCR provisions on the contract form, only to make the electronic form acceptable.

Transactions related to co-investment construction — agreements to amend the contract, agreements for assignment of claims under a construction co-investment contract — could also be made electronically¹³.

7. Electronically Formalized Real Estate Transactions: Title Registration Law and Rosreestr Practices

The general rules on possible conclusion of electronic real estate assignment contracts are enshrined in Article 18 of Federal Law No. 218-FZ of 13

¹² The concept of construction co-investment contract follows from Article 4 of Federal Law No. 214-FZ of 30 December 2004 “On Co-Investments for Construction of Apartment Blocks and Other Properties, and Amendments to Specific Regulations of the Russian Federation” (effective since 01 January 2022 as amended) whereby one party (developer) undertakes to build/construct an apartment block or another property within the dates fixed in the contract, either on his own or by retaining other persons, and, once the commissioning certificate is issued, to transfer the property to the co-investor, while other party undertakes to pay the amount stipulated in the contract and accept the property, once the commissioning certificate to an apartment block and/or other property is issued.

¹³ The relevant rules were specified in Rosreestr Order No. P/0202 of 17 June 2020 “On approving the requirements to electronic construction co-investment contracts, contract amendment agreements and claim assignment agreement including the requirements to the format and completion of such document forms” (Ministry of Justice Regulation No. 59780 of 11 September 2020).

July 2015 “On State Registration of Real Estate” whereby the contracting parties can make an online application to register the real estate title and simultaneously conclude a contract without visiting a notary office, once they have a Rosreestr account and an enhanced qualified e-signature.

Pursuant to Article 18 (1) of the Federal Law “On State Registration of Real Estate” (as amended on 30 December 2021 and in effect since 10 January 2022), an application for cadastral and/or state registration of title and documents attached thereto shall be made available to a title registration body including in the form of e-documents and/or electronic document images signed with an enhanced qualified signature in accordance with the Russian law unless otherwise provided for by the federal law using general purpose telecommunication networks including Internet, central state and municipal services portal or official website, or other information technologies for interaction with the title registration body.

Under Article 18 (1.3) of the same law, the title holder could use his account with the title registration body to electronically file the application to register the title arising, modified, terminated or assigned as a result of transaction concluded in respect of the property owned by the holder in question.

Moreover, the Rosreestr offers model assignment contracts. Under Article 18 (1.3), such transactions can be concluded by using model terms of the respective contracts developed by the registration body, posted to its website and published in accordance with Article 427 of the Civil Code (part 1.3 effected by Federal Law No. 120-FZ of 30 April 2021 to take effect since 01 January 2023).

While the said model terms have not yet been developed by the Rosreestr, the agency’s website provides interesting information on the transactions available to title holders and visible in client accounts. Using the real estate transaction menu, the applicant can e-sign the following transactions via his Rosreestr account: life estate contract, non-compensated fixed-term land use contract, lease agreement, construction co-investment contract, mortgage modification contract, repudiation of contract, termination of contract¹⁴.

Thus, the Rosreestr website suggests that the parties to a real estate contract cannot transact electronically by themselves using their accounts. But notaries and credit institutions can.

¹⁴ Available at: URL: lk.rosreestr.ru (accessed: 10.02.2022)

At the same time, it is worth noting that the real estate registration law does not impose any restrictions or prohibitions in respect of such transactions. It may well be that starting from 1 January 2023 (the date of the planned introduction of model assignment contracts) the Rosreestr website will offer model contracts while the system itself will make such transactions technically possible.

Moreover, the operational analysis of the Rosreestr regional branches shows a controversial picture. In particular, the regional office website gives an affirmative answer to the question of whether one can register a real estate transaction using a Rosreestr account. It explains that in this case the contract should be signed with an enhanced qualified e-signature (EQES) by both buyer and seller.¹⁵ What do these official explanations on possible e-registration of real estate transactions mean? As a Russian proverb says there is no smoke without fire. We believe the explanations are not accidental: as electronic real estate transactions generally gain recognition, the Rosreestr officials admit that e-sales could be allowed. The only major obstacle is Article 550 of the Civil Code which is quite important politically and legally in the current socioeconomic context.

The rules allowing the parties to assign real estate using Rosreestr accounts as envisaged by Article 13 of the Federal Law “On State Registration of Real Estate” should not be widely interpreted as applicable to transactions in the form of shared documents signed by the parties (Article 550 of the Civil Code).

It is worth noting that Article 6 (1) of Federal Law No. 63-FZ “On Electronic Signature” of 06 April 2011 provides that the information signed with a qualified electronic signature is deemed e-document equivalent of a handwritten document and acceptable in any relationships under the Russian law except where federal law or underlying regulations require making an exclusively physical document.

As O.A. Ruzakova pointed out, in the course of drafting the law allowing to conclude contracts in the form of a shared document (including e-document) there were proposals to detail the procedure for specific transactions involving electronic documents. With regard to real estate transactions, especially mortgages, renowned banks operating relevant data platforms had proposed to simplify the procedure for mandatory use of enhanced e-signature depending on the importance of the assets in question. O.A. Ru-

¹⁵ Rosreestr answers to the questions on electronic registration of real estate title. Available at: <https://www.gov.spb.ru/gov/terr/krasnogvard/news/187830/> (accessed: 11. 01.2022)

zakova underlined that the second signature on the original e-document would change its parameters into a document exchange, something that would in turn require to amend the Civil Code. But, given a considerable number of fraud in this market, this was premature in respect of all real estate transactions [Ruzakova O.A., 2019: 29-35].

But despite the above interpretation of the impossibility to acknowledge real estate electronic transactions as a shared document, the Rosreestr was supported by the Federal Tax Service which in its letter of 20 December 2019 defining the form of sale documents (No. BS-3-11/10825@) explained that e-documents would be acceptable: “Pursuant to para 6, Article 220 (3) of the Code, where an apartment was bought, the taxpayer will confirm his right to property-related tax deduction by making available the purchase contract, title documents and documents evidencing the costs being incurred”.

Moreover, the FTS provides the following interpretation: “It is worth noting that in accordance with Articles 550 and 434 of the Civil Code the sale agreement should be made in writing as a shared document signed by the parties; the contract in writing could be made as a shared document (including e-document) signed by the parties. A failure to observe these formal requirements will void the contract”. Thus, the FTS interpretation admits a combination of the content of Articles 550 and 434 — despite the doctrinal approach that only Article 160 provisions are applicable to Article 550 while the applicability of Article 434 (4) is ruled out.

Even if we apply a broader interpretation of Article 550 and, therefore, view the shared document concept in two ways — as a physical document or e-document — it is still unclear how the Rosreestr will make sure that the shared electronic document is signed by both transacting parties.

It is noteworthy that Rosreestr Order No. P/0241 of 1 June 2021 (as amended on 29 October 2021)¹⁶ contains certain rules for registering transactions in the form of e-documents. Pursuant to the main rules (para 3, section 4), special registration endorsement on the electronic document describing the transaction content will be made by generating an e-document. The e-document describing the transaction and signed with an electronic signature and the e-document bearing special registration en-

¹⁶ See: Rosreestr Order No. P/0241 of 01 June 2021 (as amended on 29 October 2021) “On the Procedure for the Unified Real Estate Register, Form, Details and Completion Requirements to Special Registration Endorsement on Transaction Documents, Requirements to Special Registration Endorsement of Electronic Transaction Documents, Procedure for Modification of Information Regarding the Location of Land Plot Borders in Correcting Registration Errors” (Ministry of Justice Reg. No. 63885 of 16 June 2021).

dorsement will be signed by the state registrar with a single enhanced qualified e-signature. Moreover, it is stated that the e-document bearing special registration endorsement on the document describing the transaction will be generated as an XML file created through the use of XML plans available at the Rosreestr official website as of the date of such document, or in any other format allowing the said electronic document to be viewed and copied without resorting to special software. The XML plans used to generate e-documents shall be deemed operable from the date they are posted to the official website¹⁷.

The aforementioned Rosreestr order does not in any way prohibit or restrict e-formalized real estate transactions. Thus, the agency applies the general format of electronic documents to the registration of title to real estate. Since the Rosreestr admits the electronic form of real estate transactions, with credit institutions using IT technologies to communicate with the registration body, the underlying contract has to comply with the requirements of Article 550 of Civil Code (on a shared document signed by the parties) [Tymchuk Yu.A., 2018: 24-27]. However, it does not follow from the said procedure that the Rosreestr will make it possible for all parties to generate a shared document as they apply for registration of an electronic real estate assignment contract.

We believe that the Unified Notary Information System and the contract form for remote real estate transactions proposed by the Fundamental Notary Law could serve as a model in formalizing electronic real estate sales¹⁸.

Apparently, the whole set of requirements to remote transactions involving a public notary proposed in the Fundamental Notary Law — first, generating a shared document (text of the contract) to be signed through the use of the Unified State Automated Information System (USAIS); second, verifying the will and intent of the parties, their legal capacity; doing legal due diligence — should be assumed as a model.

A major limitation of the proposed electronic real estate transaction service not involving a notary is that the risks assumed by the parties are

¹⁷ Moreover, it is specified that the e-document bearing special registration endorsement on the transaction document will be generated as an XML file created through the use of XML plans available at the Rosreestr official website as of the date of such document, or in any other format allowing the said electronic document to be viewed and copied without resorting to special software. The XML plans used to generate e-documents shall be deemed operable from the date they are posted to the official website.

¹⁸ In analyzing the aforementioned innovations, sometimes also suggest that notaries both have broad powers and relevant electronic tools to conduct an adequate legal due diligence of the documents as part of the procedure for notarization of real estate transactions, something that different intermediaries in the real estate market clearly lack.

not secured in the form of either liability insurance or other guaranteed compensation of damage (the notary, in contrast to the Rosreestr, is known to be liable for the damage caused by an illegal transaction made through his fault)¹⁹.

Despite the aforementioned limitations of electronic technologies as applied to real estate transactions not involving a notary, electronic services have become a predominant feature of the title registration process.

In its turn, the practice has also revealed opportunities for a fraud where this method is used to register title. There are many reports of electronic identity theft where fraudsters could file the documents for registration of title without a need to provide physical documents or refer to the Rosreestr in person [Naumova O., 2019: 61–90].

To stop the practice of fraudulent filing in case of electronic identity theft, the Federal Law “On State Registration of Real Estate” was amended on 2 August 2019 to provide (Article 36.2) that in order to register the electronic title transfer transaction, the title holder should apply to the registration body in person or by mail at least five days before the envisaged date (with the applicant’s signature to be certified by a notary)²⁰.

¹⁹ The law on registration of real estate also guarantees a compensation to the title holder where the damage was caused by illegal registration. In fact, Article 68.1 “Compensation to a bona fide purchaser for the loss of residential premises” (introduced by Federal Law No. 299-FZ of 02 August 2019) rules that a physical person (bona fide purchaser) losing residential premises as a result of claim in accordance with Article 302 of the Civil Code is entitled to a lump sum one-time compensation payable from the public budget of the Russian Federation, once the court order to claim the respective residential premises has taken effect. The amount of compensation shall be determined by the court based on the amount of real damage or, where the respective claim was made by the bona fide purchaser, in the amount of cadastral value of the residential premises effective on the date of the court order envisaged by part 1 of this Article. However, unlike the notary’s liability, the registration law deals with a compensation stipulated by a clear set of conditions. This is a much less frequent type of damage to the title holder than registration of an illegal transaction.

²⁰ Rosreestr information “On Formalizing Real Estate Transactions Using the Enhanced Qualified Electronic Signature (EQES). Available at: URL: <https://rosreestr.ru> (accessed: 12.01.2022)

At the same time, there are authors (D. D. Titov) who view this innovation quite negatively: “As this example and the legal review clearly show, the electronic service provided by the Rosreestr before 13 August 2019 made the procedure considerably simpler and more convenient in terms of time saving, costs, social focus and security, something that was fully in line with Presidential Resolution No. 203 of 9 May 2017 “The 2017–2030 Strategy for the Development of Information Society in Russia”, with the service now becoming cumbersome, bulky and more costly. The amendments to Federal Law No. 218-FZ of 13 July 2015 “On State Registration of Real Estate” effective since 13 August 2019 have actually wiped out all its advantages.

The explanatory note to the draft Federal Law “On Amending the Federal Law on State Registration of Real Estate” reports multiple violations committed through electronic identity theft. The drafters stress that identification through the use of enhanced qualified e-signature is not immune from the risk of unauthorized access to the verification key. New fraudulent practices for plundering someone’s property — gaining unauthorized access to the signature verification key followed by the electronic application filed with the Rosreestr on the title holder’s behalf — have emerged.

In such cases, the law cannot protect the title holder in full. The registration center has discretion to establish its operational procedures (part 3, Article 8 of the Federal Law on the Electronic Signature). A qualified certificate can be issued on the basis of the applicant’s identification document copy or a simple letter of attorney in writing (Article 13). The security level of verification keys often held on flash storage devices could not be considered adequate either. At the same time, the holder of the verification key is responsible for maintaining its confidentiality under Article 10 of this law²¹.

While Article 36 (2) was introduced to the Federal Law on State Registration of Real Estate requiring title holders to file registration applications electronically, this requirement does not apply to certain applicants.

In particular, the fact that the Unified Real Estate Register does not provide for registration of documents signed with the enhanced qualified e-signature does not prevent registration where the relevant electronic application is filed under para 6, Article 36 (2) by: central or local government body; notary; parties to a real estate contract made through the use of IT communications between credit institutions and the title registration body; parties to a property assignment contract where the relevant application and e-documents attached thereto are signed by enhanced qualified e-signature (EQES) with the qualified verification key issued by a federal agency in accordance with the existing law.

Thus, the procedure for real estate transactions via a Rosreestr account could involve two title registration options:

- prior application in writing to solicit an electronic transaction;
- no prior application.

Credit institutions able to communicate with the registration body through the use of IT technologies are among those authorized to apply

²¹ Explanatory note to the draft of Federal Law “On amending the Federal Law on State Registration of Real Estate”.

for remote transactions without a prior permission. This opportunity is currently available to Sberbank (via Dom.click platform), VTB Bank, etc.²²

8. E-technologies: the Main Development Areas Applicable to Real Estate

Thus, a wider interpretation of the form of real estate contract has emerged in the law enforcement practice over the last few years. As regards the design of the shared document, the Rosreestr and other institutions involved admit possible use of electronic documents.

As was already noted above, Article 550 of the Civil Code assumes that real estate transactions should conform to the requirements of “attendee transactions”. Over the last decades, this approach was interpreted as to void transactions made in any other form — for example, through an exchange of documents, letters or faxes. Interestingly, despite the dissemination of online property sales, the legal practice does not demonstrate any decision to void new forms of transactions due to a flaw of the form. On the contrary, we have found a number of court decisions where an electronic real estate transaction did not raise questions either with the parties or the judges. At the same time, the statistics reported by law enforcement authorities is a matter of growing concern. While we did not find the statistics on the number of fraudulent practices involving real estate, the prosecutor’s office reported that digital crime grew 13 percent in 2021²³. The

²² The Rosreestr deputy head has noted how important to develop digital services jointly with professional market participants. “The Rosreestr is creating a service called “Virtual Transaction Room” accessible online from accounts with banks and other entities. As necessary, persons may invite a notary, real estate company, credit institution to provide an advice, arrange for a loan or sign a contract”, the deputy head said. In her presentation, electronically registered mortgage transactions accounted for 60% percent of the total compared to 9% before the pandemic. This was achieved through cooperation with the banking community. Available at: URL: <https://rosreestr.gov.ru/press/archive/rosreestr-planiruet-razrabotat-servis-dlya-oformleniya-ipoteki-v-rezhime-onlayn/?fbclid=IwAR0qPi3PzSZpkAL1E447b8GjILDhhe3FlNyTnds0xu9-3KYaypMUpVZPE> (accessed: 16.12.2021)

²³ According to the General Prosecutor’s data published by the mass media, 282 thousand frauds were reported in Russia in January-November 2021 (plus 6.5% compared to 2020). Their real number could be greater since the criminal intent is not always provable in case of transactions in a simple written form. Cases where the victims have to claim their rights under a civil procedure are not reported in the fraud statistics.

Real estate fraud is still a major issue. Legal heedlessness of individuals, personal data leakage via faked websites, dissemination of forged passports, letters of attorney, other documents, QR codes — all these things enable fraudsters to plunder other people’s assets. New fraudulent practices increasingly emerge. Thus, in the end of last year fraudsters were offering online loans secured by real estate, only to deprive borrowers of both money and

fraud involving real estate has major implications regarding both civil, tax and criminal law etc.

It is worth noting again that the notary rules on remote real estate transactions minimize the counterparty risks in transactions between remotely located parties, with the USIS generating a shared electronic document and the parties also signing a shared physical document.

Other parties involved in real estate transactions (such as credit institutions) do not minimize risks to such extent in their communications with the contracting parties. While allowing e-transactions (including through EQES), the registration law does not provide for any special due diligence standards which means that the parties assume all risks involved in electronic real estate transactions.

In applying the general rules to all property sales made in the electronic form, neither the legislator introducing the innovation nor the Rosreestr in its respective practices have paid attention to the fact that real estate is subject to a different legal regime and has varying socioeconomic importance; and the contracting parties also have different legal status and assume different implied risks.

What we mean here is that even if the electronic contract form may not have negative legal implications where public or municipal non-residential real estate is offered for sale at public/municipal tenders (with the relevant document package subject to prior due diligence by the tender organizer etc.) or where a property is assigned in the process of bankruptcy (with perceived business risks assumed by entrepreneurs), the sales of residential real estate will have major socioeconomic implications.

A lack of differentiated procedure for electronic transactions with residential and non-residential real estate is unjustified. Residential real estate is, among other things, a place to live, which allows everyone to implement the constitutional right to housing. The above described real estate sales through the use of e-technologies (in two or three clicks) do not offer adequate protection to prevent fraudsters from taking possession of someone's apartment or house. The problems of restitution or vindication of housing are notoriously hard to solve in legal practice. In the context of inflation, pandemic restrictions and low wages of the Russian population, the amount of compensation awarded by court for an apartment or house

housing. Simple Contracts and Less Simple Fraudsters: Real Estate Fraud on the Rise in Russia. Available at: URL: <https://notariat.ru/ru-ru/news/prostye-dogovory-i-neprostyle-moshenniki-v-rossii-stalo-bolshe-afer-s-nedvizhimostyu-2201> (accessed: 14.01. 2021)

not restituted as a result of a fraudulent transaction will not provide an adequate relief for the lost title.

Thus, it could be asserted that a wider interpretation of Article 550 of the Civil Code allowing to apply the electronic contract form to real estate sales, primarily in respect of housing, is quite dangerous.

At the same time, as the future obviously lies with technologies, the contract in writing signed by counterparties will become obsolete and abandoned with time. For this reason, the jurisprudence should today search for a balance of interests by combining the use of advanced electronic digital technologies with specific strict legal provisions aimed at creating a “format” for real estate transactions to ensure adequate due diligence.

It is worth noting that other legal systems are also searching for a balance in regulating real estate transactions. In Germany, such transactions are traditionally subject to notarization. Under para 1,311b “Contracts for sale of land, assets and real estate”, the contract whereby one of the parties undertakes to transfer/purchase title to real estate should be notarized. Any contract made in violation of this form will be voided in full from the date it was issued and entered to the Land Register. In this case, these provisions apply to obligational real estate transactions.

As regards the concept of proprietary contract established in the German law, § 873 of BGB “Title purchase by way of agreement and registration” provides for the following procedure: in order to transfer title to real estate, the parties will need to agree on the fact of mutation and registration thereof in the Land Register, unless otherwise provided for by the law. For this purpose, the parties are bound by the agreement only to the extent the respective declaration was notarized or entered to the Land Register, or where a duly authorized person has given the other party a permission to make an entry in accordance with the provisions governing the Land Register.

At the same time, the German civil law has been amended as e-commerce and e-transactions progressed. In particular, a number of amendments were made to the obligational law section: thus, §126 (BGB) “Written Form” (Schriftform) came to include para 3²⁴ whereby the form in

²⁴ Where the law provides for a written form, the document should be signed by the issuer or have his handwritten signature notarized.

The parties to a contract should have their signatures on one and the same document. Where a contract includes several identical documents, each party signs the document intended for the other party.

The form in writing may be replaced with electronic form, unless otherwise provided for by law.

Notarization is made in lieu of the written form.

writing could be replaced with the electronic form, unless otherwise provided for by law. Moreover, as follows from provisions on the electronic form (Elektronische Form) introduced to §126a of BGB, where the written form envisaged by law is to be replaced with the electronic one, the issuer should add his name to his intent and provide an e-document with a qualified e-signature (para 1). Interestingly, § 312 regulating the applicability of online contracts was amended in 2021. While the previous wording did not allow to apply the online transaction provisions to contracts to establish, purchase or transfer title or other rights to real estate (para 2), the current one does not make such exception in respect of assignment transactions.

The Land Register rules (Grundbuchordnung) were also largely amended to include the sections on electronic juridical transactions and electronic master files (§§ 135–141)²⁵. These rules specify in detail the procedure for filing e-documents to the Land Registry (§ 136), e-document form (§ 137) etc. Thus, the German legal system contributes to the development of electronic Land Register (Elektronische Grundbuchs) [Vieweg K., Werner A., 2007: 441] while maintaining the core rule on notarization of real estate assignment contracts in the context of changes to the scope of e-commerce and formalization of real estate title.

It has to be admitted that provisions of Article 550 (1) of the Civil Code need to be improved given the use of e-technologies to sell real estate as evidenced by notary practices, Rosreestr activities and a lack of court decisions to void electronic real estate contracts. However, it would be premature to drop out Article 550 (1) altogether. Since there are no due diligence standards applicable to residential real estate sales formalized electronically without notarization, and given high social importance of housing, these provisions should be maintained in respect of residential premises. At the same time, the Civil Code should provide for the cases where the real estate registration law allows to use electronic documents. For this purpose, Article 550 could be amended as follows: “In cases envisaged by law, the contract may take the form of a shared electronic document signed by the parties through the use of a qualified electronic signature”.

Conclusion

Since the development of electronic transaction forms between individuals to purchase residential real estate will continue, it is necessary to

²⁵ The text published on 26 May 1994 (Federal Law Newsletter I p. 1114) was amended by the law effective from 5 October 2021 (Federal Law Newsletter I p. 4607), with amendments effective from 1 January 2022. The amended law will take effect from 1 July 2022.

minimize the risks assumed by the parties in using e-technologies. For this purpose, the following is proposed:

maintain the provision for the real estate contract to be made in the form of a shared document signed by the parties as a general rule.

amend Article 550 of the Civil Code as follows: “In cases envisaged by law and provided for by the notary legislation and the law for registration of real estate title, the contract may take the form of a shared electronic document signed by the parties through the use of a qualified electronic signature”.

e-sales of residential real estate between individuals are possible where two notaries are involved in the online transaction.

As was shown above, e-technologies involving both legal entities as property sellers and a variety of intermediaries (agents) such as property developers, credit institutions, real estate agencies etc. are gaining momentum, with credit institutions operating special e-platforms for interaction with the Rosreestr playing a special role. In this paper, author doesn't intend to analyze the political reasons for allowing credit institutions to participate in real estate transactions. Obviously, the banking lobby will dominate major decision-making with regard to real estate for quite a while, only to make credit institutions serious competitors of the notary community regarding formalization of real estate transactions. However, these competitors will need to comply with higher standards applicable to real estate sales. Therefore, we need a mechanism for involvement of credit institutions in real estate transactions which would guarantee due diligence and adequate injunctive relief to contracting parties.

When comparing the role of credit institutions with that of other parties (other than notaries) involved in formalization of title, one can assume that their activities give rise to fewer risks than those generated by questionable dealers or real estate companies proposing to perform an online real estate transaction in three or four clicks. In a large number of cases, banks will be involved in real estate sales as mortgage creditors since transacting parties predominantly use mortgage loans as a payment method. The security, legal and other departments at banks will analyze various aspects of the proposed transaction, review the borrower's credit history, look for possible encumbrances on the property and thus attempt to reduce the risk of transaction avoidance and client insolvency (bad loans) since banks are directly interested to ensure the viability of contracts and, therefore, repayment of mortgage loans²⁶.

²⁶ As estimated by the VTB, 60% of the clients opt for electronic registration of real estate to avoid visits to the bank's offices or multifunctional public service centers. Available at: URL: <https://realty.rbc.ru/news/61768d3c9a7947a9f0db4d98> (accessed: 12.12.2021)

It is necessary to introduce not only due diligence and counterparty risk relief standards but also those applicable to the legal status of other parties involved in real estate sales (which possibly need to be accredited with the Rosreestr).

As a due diligence standard, we propose to use the relevant experience gained by notaries in ensuring validity of transactions.

The standard applicable to the legal status of a professional real estate market participant could be implemented by various legal methods: special accreditation with the Rosreestr; self-regulatory practices in this area; mandatory insurance of liability etc.

Thus, proposals and calls from the websites of professional real estate market participants to encourage property sales in a few clicks using smartphones or other devices are apparently risky for title holders while the legislative support of such opportunities is currently premature. One could buy a robotic vacuum cleaner or a smartphone in a few clicks — if the platform company is unscrupulous, the loss will not be great (e-commerce in consumer goods is covered by the consumer rights protection law which governs the status and liability of platform companies and provides for relevant remedies).

In the context of legal limbo, real estate transactions in the form of electronic document will generate various sorts of risk for contracting parties including in the form of implied flaws of intent regarding all contract terms: the parties involved, content, discrepancies between the intent and expression of will, electronic fraud. Further regulation of real estate transactions should rely on new e-technologies whose introduction should not be prejudicial to the rights of title holders and the interests of their counterparties in the process of real estate transactions.



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