The Analysis of Pre-Selling Building Act from the Viewpoint of Fighting with unfair terms

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Abstract

One of the aims of pre-selling building act is prevention from eventual abusing of pre-seller and advance buyer in pre-selling building contracts. In the above contracts either the pre-seller might abuse in his rights like the right of contracts’ modification, evaluation and interests’ change, commitment to building delivery in due date against the advance buyer or the advance buyer might abuse due to his anticipated rights like receiving the building, depredation of transaction’s object and the right of demanding fine for the delay that the guarantee of suitable implementation for preventing these abuses should be accounted and includes the conditions in the contract in such a way that possibility of negotiation exists for the 2 parties, not in this way that one of the party is forced to accept the anticipated conditions in the contract which is imposed on him to get the object of transaction.

Keywords: unfair terms, Pre-Seller, Advance Buyer, Rights and Commitments, Contracts.
Introduction

In the present society, there are people who can’t pay the whole cost but can pay it in installments or in spite of having the ability to pay the money, they prefer to utilize their asset elsewhere and pay the installment of buying the building gradually by its profit and this caused that the issue of building pre-sell arises. Different problems like discrepancy in measurement of area, simultaneous sale to several people, not delivering the building in due date engaged the mind of people who are responsible. Finally, the needs of society forced the politicians to legislate to solve the problem or at least to reduce it and not permitting people to abuse their rights. Its result is “the act of building pre-selling” approved in 18/11/2010. It is obvious that the legislator can’t solve the problems definitely by passing this act and guarantee the parties’ rights 100%, however, he should prevent the parties’ abuse; so in this paper we want to answer these questions: can the terms which is observed by the legislator about the commitments for pre-seller, reduce the abuse of builders? Can the conditions which are written in the contract or Act force the pre-seller to be bound to his commitments? Is there any sanction about not doing the commitments and conditions? How the sanction can guarantee the parties’ rights? (The first discussion). Furthermore, in relation to advance buyer rights who is regarded as a weak party of pre-selling contract, which conditions and with what sanction is anticipated so that he can buy the building confidently? And if there is a legal gape in relation to the advance buyer rights, how can he solve this gape? (the second discussion).

The first discussion: the analysis of pre-selling building act in fighting with unfair terms which controls pre-sell’s commitment

In contracts related to building pre-selling, there are commitments which are regarded for pre-seller that have no sanction or don’t have adequate and effective sanction (the first article). Some commitments are being referred in pre-selling building act but it can’t guarantee pre-seller rights due to the lack or inadequacy of sanction (the second article).

The first article: pre-seller’s contractual commitments

Due to the fact that the main subject of this writing is the analysis and study of pre-selling building act so, the existence of contractual commitments shouldn’t create this ambiguity in mind that we are out of the main point and discussing secondary subjects. Rather, contractual commitments are those kinds of commitments which are not being referred in the law but the parties are bound to write these terms in the contract to observe their interest and to prevent the parties’ abuse of their rights. So, first of all, we state the commitments which are ignored by law and aren’t being referred in the contract and then we discuss the commitment written in law.

A) The right of changing interests written in the contract

The legislator is silent in this matter that whether the parties have the right to change interests written in the law or not; so, if the parties want to use this right, it should be anticipated in the contract, otherwise, not mentioning it in the contract means that the parties reach a compromise even with the existence of better interests. Now, if this condition is mentioned in the contract,
applying this right will influence over the prime cost of building. So, we can analyze the application of this right for pre-seller like this:

1. In the case of parties’ compromise to better interests and in the case of price difference, pre-seller shouldn’t abuse this condition and applies his right completely and without observing advance buyer’s right. Rather, in cases that this right results in egregious difference in contractual price, he should waive his right.

2. In case of anticipating this right in the contract, they should consider a reasonable rate for the increase of contractual cost in such a way that pre-seller can refer to the advance buyer up to that rate for this increase and doesn’t have any responsibility for any surplus unless the advance buyer consents to the current situation.(Khoda rahmi, 2013, page 130).

B. the right of contract modification

Pre-selling building act is silent in the right of modification. As we know, the contract is a self-made act of the parties and they are bound to implement their commitment and none of the parties can shrink from implementation of their commitment. But in some cases due to the new circumstances in the time of performing the contract, one of the parties faces to a big problem. So, possibility of reviewing or changing the contract’s text is very important in continuous agreements. These conditions may specify in the contract from beginning by the parties or the parties may discuss with each other after the occurrence of special conditions (Bigdeli, 2013, page 270). According to the belief of writers, all of the commitments that would exist in the contract for the parties are the commitments to the result and for specifying the commitment to the result, the will of parties should be considered. So, in the contracts of building, commitment that the pre-seller has towards the building and its delivery is also the commitment to the result. It means that he is faithful to his commitment in the case that he gains a suitable result in the contract. Otherwise, he is responsible for the abjuration and only in the case of force majeure proving, he can get rid of responsibility. Doing any work requires fighting with economic and social restrictions and a significant part of these problems is predictable like the time that the employee’s wage and the price of materials are increasing. Due to the fact that applying building agreements lasts many years and the probability of unseen accidences in this time is high, and due to the article 9 and 8 of pre-selling building act that are referred to the define aspect of cost, one shouldn’t think that there is no possibility of modification, but the parties can include the modification condition in the contract in favor of pre-seller (Khoda rahimi, page 132). But the pre-seller shouldn’t abuse this condition and demands high amount of money from the advance buyer against the modification right that is anticipated in favor of him in the contract or after removing the restriction, he procrastinates in applying the commitment. But this point should not be disregarded that the advance buyer may lost by inserting this condition in the contract and the advance buyer shouldn’t be guilty for the pre-seller’s disorder or carelessness and the advance buyer restrains from referring the court due to the pre-seller’s threat. In these cases, the government should control the preparation of sample agreements and meanwhile refuses the claim of price modification if it is unjustifiable and makes the occurrence of sudden incidents, a justification for contract termination (Katuizian, 2000, volume 1, page 250). Second clause: legal commitment of pre-seller.
A. The right of cost demand

One of the advance buyer’s duties against pre-seller is the remittance of transaction cost. If the advance buyer fails to do his task, the legislator considers the right of termination for pre-seller and the application of termination’s right is unconditional. But the point here is that in some cases, not implementing the commitment is due to the occurrences that is out of his authority. For example due to the travelling or illness or imprisonment, the advance buyer can’t implement his commitment towards the pr-seller on time. It seems that we can differentiate between these two cases. While not performing the commitment is out of the advance buyer’s authority, legislator should consider a suitable respite and after this time he should consider the right of termination for pre-seller so that the pre-seller can’t abuse this right and regardless of non-remittance basis of cost, terminates the right. But in this case that non-remittance of cost is deliberate, one can consider the right of termination for the advance buyer and according to the article 380 of the law, if the object of transaction has being delivered to the advance buyer, pre-seller has the restoration right (Kaatuzian, page 153).

B) Construction and completion of building according to the specified descriptions in the contract

One of the duties that the legislator considers for the pre-seller is to force him to deliver the building according to the building map and descriptions and possibilities of building unit. So, the descriptions of transaction’s object in the contract should be specified. As we mentioned previously, commitment that the pre-seller has towards the advance buyer, is the commitment to the result not to the instrument, it means that the delivery of the building should be based on the specified descriptions in the contract. Legislator has not specified the sanction for pre-seller’s violation that pre-seller’s violation of implementing the commitment may be due to the forcible factors or the pre-seller’s negligence. The sanction should be different for the two cases. To remove legal gape about the pre-seller’s commitment, one can resort to the general rules of contracts. The descriptions which are conditioned about the transaction’s object are related to either the quantity of the transaction’s object or the quality of the transaction’s object. Some of these descriptions are naturally quantitative and qualitative and others are secondary. If any violation occurs in natural description of transaction’s object, the contract will be invalid. But if violation occurs in secondary description according to the case, the advance buyer can terminate the contract due to the violation or destruction (Shahidi, 2001, page 169). To find out whether the aforementioned descriptions in the contract of pre-selling building are secondary or naturally we can say that if the parties mentioned their intention obviously and specified the descriptions of transaction’s object, natural description would be specified based on the common intention of the parties. But if the parties didn’t mention the substantial descriptions, conventional arbitration or implicit will of the parties would be considered. If the judge discovers the implicit will of the parties from the transaction’s circumstances, he will be the administrative but if the implicit will of the parties isn’t discovered, one should refer to the convention (Kaatuzian, 2013, volume 1, page 417; Kaatuzian, 2013, volume 2, page 194). It means that the judge should deliberate whether a person at the same situation is ready to pay a huge amount of money for this building or not? And in this case the judgment of the convention will be the judge’s criterion (Tabatabaei, 1421, page 123). Is the qualitative description is a part of natural or secondary descriptions?
Some people regard quantity as a part of secondary descriptions and others regard it as a part of natural descriptions. The quantity description is natural because it specifies the rate of transaction’s object but due to the fact that it includes union description of transaction’s object, it is set in secondary descriptions. In article 7 of pre-selling building act, some criteria are considered to prevent the pre-seller from abusing this right so, when the building’s area at the time of delivery is more than the agreement rate, according to article 7 if the addition of area up to 5% is being agreed, none of the party doesn’t have the right of termination and the advance buyer should give the pre-seller the value of additional area which is based on the price written in the contract. But if the building area is more than 5% of agreement’s rate, then just the advance buyer has the right of termination or can pay the price of additional area according to the amount written in the contract. In this case, there is no right of termination of the pre-seller because the seller damages himself so he can’t compensate and consequently, according to the law in the case of termination “Avazeyn” should be given back (Safae, 2013, page 310).

Avazeyn: 2 things to be exchanged or having been exchanged one for the other
In this case, the advance buyer will sustain a loss due to the depreciation.
In article 8 of pre-selling act, the pre-seller is bound to pay the loss to the advance buyer according to the parties’ compromise or the expert estimation. We can say that mentioning this article doesn’t solve the advance buyer’s loss rather, even in the case of not mentioning this article it the parties disagree with each other, they will resort to the peace and agreement. But in the footnote of the same article the main point, which is in favor of the advance buyer, is that the current price of the building according to the expert’s viewpoint should be given to the advance buyer along with the legal loss. The second case is while the building area at the time of delivery is less than the agreeable rate. If this if the shortage of area is up to 5%, the advance buyer doesn’t have the right of termination. Rather, he can receive his loss based on the contract price from the pre-seller. However, it is good to base the current price of the building in order to support the weaker party. But, if the shortage of area is more than 5%, the advance buyer can receive his loss based on the current price of the building and doesn’t terminate or terminates the contract and according to the article 8 and its footnote receives the loss based on the compromise. If they can’t compromise in this case, the current price of the building along with legal loss is given to the advance buyer. It seems that the legislator pays more attention to the advance buyer when if the shortage of area is occurred and prevents the pre-seller from abusing and wants that the advance buyer doesn’t sustain loss. Because of inflation the price of building in the time of creation is higher than the time of contract. If the pre-seller was bound to pay the contractual price, he would persuade him in order to acquire more money. So that by constructing a building with less area and paying contractual price to the advance buyer, he can sell the property to the third person in better price after the termination of the contract. This would cause abuse (Tahmasebi, page 24). So it seems that the current price of the building should be paid to the advance buyer unless the price written in the contract is more than that.

C) Commitment to deliver the building in due date

one of the legal commitment of pre-seller that is referred in article 6 of pre-selling building act is that he is bound to deliver the building to the advance buyer in due date and according to the legal and contractual descriptions. A point which can be abused by the pre-seller and it is not
mentioned in the pre-selling act is that pre-seller may deliver the building to the advance buyer in due date but it may has some defections which is not obvious at the time of delivery and it needs time to be revealed. To solve this problem, we can refer to the solution which is mentioned in the suggested bill of pre-selling building act. This solution is not mentioned in the act. Article 8 stated: “if in the time of temporary delivery it becomes obvious that legal criteria in building construction is not observed or the building identical with the contractual description or has some defections hidden or obviously, the advance buyer can force the pre-seller to obviate the defects and match it with the legal and contractual description or he can terminate the contract or demand the loss.” And article 9 stated: “After finishing the period of temporary delivery, the pre-seller is the guarantor of hidden defects in the building and if there is any defect, advance buyer can force the pre-seller to obviate the defects or he can terminate the contract or demand the loss.” According to the above matters, it is behooved that legislator predicts the building delivery in 2 periods of temporary and permanently in order to prevent the advance buyer’s loss and pre-seller’s abuse

D) Opening an Account

One of the substantial guarantees to protect the rights of advance buyer and prevent from abusing is thinking about schemes which assure that the money for pre-selling apartments is only used for constructing the same building so that, pre-seller can’t invest it elsewhere after pre-selling and receiving money or run away. Opening an account for the building or the project and the possibility of taking money according to the work progress is one of the good methods that minimizes the possibility of pre-seller’s abuse. The role of banks in «law» in Iran is very weak. By looking at this law, the gape of an article for opening a special bank account by pre-seller is felt. Juridical committee of parliament omitted article 14 which was related to the opening bank accounts and was in the first report of parliament. Only in clause 6 of article 2 and 9 of act, some cases are discussed about bank account. According to clause 6 of the above article, the insertion of installment bills is specified which determines that how much of the transaction value should be paid at first how much at the time of delivery and how much at the final transference. Article 10 about taking bank facilities states that: “in cases that the banks give the advance buyers purchase facilities according to the pre-selling contract, facilities’ fund is settled by the bank to the pre-seller’s account and the possession is pre-bought due to the unit share and the rights of the advance buyer toward that unit is taken as the guarantee”. We can see that the conditions of opening bank account and obligation of the parties to settle the payments obtained from pre-selling to this account is not anticipated. Also it is not mentioned that the money is only obtainable for constructing the same building. Not anticipating these matters can lead to the pre-seller’s abuse. In 1979/10/17, revolution council passed a bill in the form of unit article in order to support the advance buyers of residential units. The text of this bill is mentioned here due to its importance and that it is the first and the only special act which is passed about bank’s interference in pre-selling. “unit article; all prepayments from the advance buyers to the firms which are the town and building constructor of more than 10 sets should be settled to an account in Bank Maskan in the name of the same firm and the bank pays the payment according to the advancement of constructional operations from that account to the firm and the firms don’t have the right to receive the money directly from the advance buyers”. Footnote1- the constructors should deliver the confirmed plan of competent authorities along with the sample of advance
buyers’ contract to the bank. Footnote 2. The land and substructure of the plan and financial resources is not secured before the final transference of residential units to the advance buyers by the real and legal persons and just the providers of plan financial resources have this right. Footnote 3- the administrative constitution of this act is prepared by the ministry of housing and municipal affairs and Bank Maskan and ministry of justice and will be passed by revolution council. The content of this act is very useful and effective if it is applied and can prevent the problems that have appeared so far. But this act has never been applied practically due to some fundamental weaknesses. Not specifying the sanction and a competent authority to control and apply the act is the most important weakness of it. Legislator could appoint municipalities responsible for controlling this act and issuance of building license would be depended on opening this account and taking this amount of money would be depended on confirming the work progress by engineer supervisor or municipality. Constructors’ action to take any amount of money from advance buyers out of due preparations in this act is regarded illegal. In footnote 3 of his article although the authorities were bound to prepare the administrative constitution, no deadline was anticipated. So, approval of administrative constitution lasted about 16 years and this act is practically obsolete. We can say that in the current acts in Iran, there is no legal obligation for the pre-sellers in order o open a special account (Salimi, page 45-48).

The second discussion: The analysis of pre-selling building act in fighting with unfair terms regarding the advance buyer’s rights

Just as pre-seller has some commitments in pre-selling building contract, the advance buyer has also some commitments that the parties refer to them in the contract. But they don’t have enough sanction to guarantee the right of advance buyer. (first clause) either it is referred to it in the act but the legislator doesn’t consider any sanction for that or if it has sanction it cannot guarantee the rights of advance buyer due to its defects and it causes abuse( second clause).

First clause: contractual commitment of advance buyer
A) Compensation of advance buyer’s loss when transaction’s object is destroyed

One of the cases that pre-selling act is silent toward it is when the transaction’s object is destroyed. In this case which legal methods can be given to support the advance buyer in order to prevent pre-seller’s abuse? Can we refer to general rules of contracts and article 387 of law and use unity of its criterion? Here, it is necessary to differentiate between cases in which destruction of transaction’s object is due to external accidents or the destruction is done by the pre-seller or the third person.

1-Destruction of transaction’s object due to external accident:
When transaction’s object is destroyed by an external accident, we judge to terminate the contract and just exchanging guarantee is on pre-seller. It means that pre-seller is bound to pay the cost to the advance buyer and there is no incompatibility between this contractual obligation and automatic guarantee (Kaatuzian, 2005, page 194)
2- Destruction of transaction’s object by pre-seller

If pre-seller destroys the transaction’s object by purpose or due to the fault or causes it to be destroyed and the advance buyer sustains loss, the guarantee is the same or its price, it means that his guarantee changes to forcible one. Now, this question may come to mind that: can the advance buyer terminate the contract due to delivery default and gets the cost or he has just the right to demand the same or price? To answer this question we should use the general rule related to sale. Most of the jurisconsults (lawyers) believe that the advance buyer has the authority to choose between terminating the contract and getting the cost or retaining the contract and getting the loss (Allame Helli, 1992, page 82). But others believe that the aim is to compensate the loss of advance buyer that is obtained by giving the same or price and the legislator’s silent is interpreted in such a way that the advance buyer doesn’t have the right of termination and should take the same or price from the pre-seller (Emami, page 464). But it seems that in all cases the loss of advance buyer isn’t compensated by giving the same and price and termination of contract can better return the advance buyer’s situation to the previous condition; so in the assumption that pre-seller causes destruction and abuses this right, the advance buyer can terminate the contract due to his interest or by retaining the contract takes his loss on account of destruction of transaction’s object (Kaatuzian, page 197).

3. Destruction of transaction’s object by the third person:

In this case, pre-selling building act is silent and we should resort to the general rule of contracts. If the destruction of transaction’s object is done by the third person, some people believe it as the destruction due to the external accidence and judge to terminate the contract. So, the advance buyer takes the cost back which has given to pre-seller and the pre-seller refers to the third person to compensate his loss. On the other hand, some people believe that advance buyer has right to terminate the sale due to the violation of the condition or demands his loss from the third person. In both cases the responsibility of destruction is on the third person (Kaatuzian, page 198, Najafi, 1404, page 83).

B) Receiving building by the advance buyer

As pre-seller is bound to deliver the building, advance buyer is bound to receive the building. This duty is not referred to in pre-selling building act but when the legislator obligates the pre-seller to deliver, the advance buyer should be bound to get and this duty is specified in pre-selling building contracts. If advance buyer isn’t present in notary office in the time that is specified between the parties and abuse the right of receiving and causes loss to the pre-seller, the pre-seller has no responsibility for delivery from the time of building preparation and paying the expenditure from that date is on the advance buyer.

Second clause: legal commitments of advance buyer
A) Advance buyer’s negligence in the cost payment
Due to the article 16 of pre-selling building act after the quarter day of cost and refusal of the advance buyer, pre-seller should declare the case to the notary office. Notary office should warn the advance buyer within 1 week to pay the delayed installments within 1 month. In the case of
not paying the debt in due date, pre-seller has the termination right of contract. The legal gape which is felt in this case is that it doesn’t specify sanction of violation of this commitment. This weakness of act may cause that advance buyers refuse to pay the installment in the case of stagnation and the decrease of house price and causes loss to the pre-seller and put pre-seller in an unjust situation. This causes that pre-seller can’t construct and deliver the building on time that should pay the loss to other advance buyers. To support pre-seller more, one can specified that the pre-seller can gives the money back to him by detracting reasonable amount in addition to termination of contract. So, the right of pre-seller can be guaranteed in this way. Because, the money which is paid by the advance buyer was in his hand for a long time, he detracts reasonable amount of money and gives the rest back to the advance buyer (Salimi, page 40).

B) The right of demanding payment penalty

One of the rights that the legislator considers it for the advance buyer and it has been referred in article 6 is that if pre-seller doesn’t deliver the building in due date or not performing the commitment, he is bound to pay the payment penalty unless more money in favor of advance buyer has been agreed. The weakness of this article is that this article is general and absolute and it doesn’t make any difference between the case in which not delivering the building in due date is because of the pre-seller’s default and while it is due to force majeure. It is logical that if not delivering the building in due date is because of the pre-seller’s default, we can apply the sanction. But if not delivering the building is due to the force majeure, the common sense judges to give a reasonable time for the pre-seller so that he can deliver the building after solving its problem. After specified time, if the pre-seller doesn’t deliver the building, the advance buyer can take the payment penalty from the pre-seller. So, this right exists for the advance buyer when pre-seller abuses the building delivery in due date.

Conclusion

Iran’s legislator by passing pre-selling building act approved in 1389 wants to reintegrate the contracts which are agreed in this basis and formulized them and prevent probable abuse of people. Although legislator reached his goals by passing this act, he couldn’t anticipate all the abuse cases from the right of pre-seller and advance buyer or if it was anticipated in the act, it wouldn’t have adequate and effective sanction. One of the important discussions which is not referred to in pre-selling building act and its occurrence in building projects is inevitable, is the subject of contract’s modification. It may not be possible to implement the contract with predicted amount of money in the contract due to the fluctuations of market and it may cause abuse of pre-seller from this right. Other abuse of pre-seller that is not referred to in the pre-selling act and one is faced with it in building contracts is evaluating and changing the building materials and offering more desirable materials to the market which pre-seller can is right in special circumstances. Some commitments that are referred to in pre-selling act like opening bank account, commitment to deliver building in due date, the right of cost demanding and construction and completion of building according to the due description in contract have no sanction or a suitable sanction in the case of violation of condition is not considered for them and can’t prevent the common abuse in the contract. As pres-seller may abuse his right in pre-selling building act, advance buyer may also abuse the rights which the legislator considers for him. One
of the rights of advance buyer is receiving the building and the fact of receiving for advance buyer is necessary that pre-selling act is silent towards it. This may be abused by advance buyer. In destruction of transaction’s object, pre-seller is bound to compensate the loss but the act distinguishes between the cases in which the destruction is due to the external accident or is pre-seller or the third person’s act. In cases that the destruction is due to the external accident, the edict is to terminate the contract but when the destruction id due to the pre-seller or the third person’s act, the advance buyer can choose between termination of contract and getting the cost or getting the loss and retaining the contract. Some cases like the right of demanding payment penalty from the pre-seller and also negligence of advance buyer in paying the cost are being referred in pre-selling act. But the edict states the problem generally and doesn’t differentiate between these various subjects in the case of abuse. According to the above matter, it is suitable to that legislator resolve the ambiguities as far as possible and includes the conditions in the contract in such a way that there is a possibility for negotiation for the parties not in the way that one of the parties is bound to accept the conditions that are predicted in the contract and are imposed on him to get the transaction’s object.
References


Emami, Hasan, civil Law, volume 1, Tehran, Islamiye Publications.


Tabatabaee, Seyed Mohammad Kazem,(1999), margin of trades, volume 2, second edition, Qom, esmaeeliyan.

Tahmasebi, Ali, difference in area in pre-selling buildings: in supporting the weak party of contract, Number 1, summer 2012, page 15-26

..........................(2005), definite contracts, volume 1, nine edition, Tehran, Sherkat Sahami publications.

..........................(2013), general rules of the contracts, volume 1, eleventh edition, Tehran, Sherkat Sahami publications.