

Chapter 29

Property and Construction

1. General

Over the last 25 years, the legal regime of private property featured a certain degree of versatility, especially in view of the restitutions of the properties nationalized by the State after 1945. A typical example is the reform of the land fund, still in progress. Upon Romania's accession to the European Union, this regime finally starts to engage on a normal path.

This chapter deals with the private property legal framework and, from this perspective, it does not address issues regarding State's public or private property. Moreover, the present section refers only to the acquisition of real estate rights, whilst details concerning the creation of security interests over real estate are addressed in a different chapter herein.

2. Main regulations

- The Romanian Constitution, as further amended, supplemented and republished;
- The New Romanian Civil Code, entered into force on October 1st, 2011;
- Law no. 71/2011 for the enforcement of the New Civil Code;
- The Romanian Civil Code, entered into force on December 4, 1864, as further amended, supplemented and republished ("Civil Code 1864")¹;
- Land Law No. 18/1991, as further amended, supplemented and republished ("Law No. 18/1991");
- Law No. 50/1991 on construction works authorization, as further amended, supplemented and republished ("Law No. 50/1991");
- Law No. 10/1995 on quality in constructions, as further amended ("Law No. 10/1995");
- Law No. 112/1995 on the legal regime of dwellings transferred within the State property, as further amended, ("Law No. 112/1995");
- Law No. 7/1996 on cadastral works and real estate publicity system, as further amended, supplemented and republished ("Law No. 7/1996");

¹ Although a new civil code entered into force, as a rule, legal relationships born before its enforcement shall continue to be governed by the provisions of the old civil code.

- Law No. 1/2000 on the re-instatement of the property right over agricultural and forestry lands, claimed under Law no.18/1991 and Law no. 169/1997, as further amended and supplemented (“Law No. 1/2000”);
- Law No. 10/2001 on the legal regime of real estate abusively taken over between March 6, 1945 and December 22, 1989 as further amended, supplemented and republished (“Law No. 10/2001”);
- Law No. 350/2001 on territorial planning and zoning, as further amended and supplemented (“Law No. 350/2001”);
- The Forestry Code, as further amended and supplemented (“Forestry Code”);
- The Fiscal Code, as further amended and supplemented (“Fiscal Code”);
- Law no. 17/2014 on several measures regulating the sale and purchase of agricultural lands located in the *extra muros* of localities (“Law No. 17/2014”);
- Law No. 312/2005 regarding the acquiring of ownership right over real estate by foreign citizens, stateless persons and foreign legal entities (“Law No. 312/2005”).

3. Land Property

3.1. Foreigners right to acquire ownership right in land

3.1.1. Individuals

According to the provisions of Article 44 of the Romanian Constitution, foreign citizens and stateless persons are allowed to own land in Romania, subject to the conditions resulting from Romania’s accession to the European Union and from other international treaties to which Romania is a party, on a reciprocity basis, under the terms and conditions stipulated by internal legislation.

With respect to citizens and legal entities from EU’ member states, Law no. 312/2005 provides that they can acquire land in Romania, under the same terms and conditions as Romanian citizens and legal entities, upon Romania’s accession to EU. However, the enactment sets forth different stages for the commencement of the capacity to acquire lands, as follows: (I) after 5 years as of Romania joining EU, for non-residents acquiring land for residential purposes or for setting up secondary headquarters and (II) after 7 years as of Romania joining EU, for agricultural land, forests and forestry land (except for farmers acting as commercial entities).

The limitation stipulated by the Romanian Constitution also applies to foreign citizens residing in Romania, as one of the prerequisite to own land in Romania is to have Romanian citizenship. Romanian citizens with double citizenship, as well as those who reacquired the Romanian citizenship do not fall under the scope of such limitation.

It should be mentioned that the above limitation only concerns land. Foreign citizens may own buildings and they shall enjoy only a “superficies” right over the land on which the building is located. The “superficies”

right entitles its owner to maintain and erect a building on the land owned by another person. The “superficies” right can be constituted for a period of maximum 99 years, with a possibility of renewal, as opposed to the provisions of the Civil Code 1864 which set forth the possibility of constituting the “superficies” right for the entire duration of the building. Additionally, foreign citizens may hold usufruct and use rights over land located in Romania. It would be important to note that the above mentioned limitation does not apply to the possibility of foreign citizens and stateless persons to own land in Romania by means of legal inheritance.

Thus, as of January 2012, EU member states citizens and legal entities may acquire land in Romania, however, only under the condition that such is needed for the establishment of the residence in case of citizens and for setting up secondary headquarters for the legal entities. Moreover, as of January 2014, EU member states citizens and legal entities may acquire agricultural land, forests and forestry land. Nevertheless, in case the agricultural land is leased, the agricultural lessee (in Romanian “*arendas*”) benefits from a preemption right, which must be exercised within 30 days as of the date the envisaged sale of the land has been notified to the lessee. In addition, pursuant to Law No. 17/2014, in case of agricultural land located in the *extra muros* of the localities, the co-owners, agricultural lessee, neighboring owners and the Romanian state through the State Domain Agency, also benefit from a preemption right, which must be exercised within 30 days term as of the publication of the sale announcement at the relevant Town Hall.

3.1.2. Legal persons

Law No. 312/2005, which came into force when Romania joined the EU, in 2007, provides that starting with January 2012, the legal persons without Romanian nationality (*i.e.* headquartered abroad) which are established in the EU can acquire land in Romania, under the same terms and conditions as Romanian citizens and legal entities, provided that such land is acquired with the scope of establishing second headquarters thereon. Agricultural land, forests and forestry land may, however, be acquired freely by EU member states’ legal persons starting with January 2014.

As for the legal persons established in countries outside the EU, such may acquire land in Romania on a reciprocity basis, under the terms and conditions stipulated by internal legislation.

Nevertheless, Romanian companies may own land also in case of 100 per cent foreign shareholding. Associations and foundations established in Romania by foreign nationals may also own land. Similarly to individuals, the restriction does not affect foreign legal person’s capacity to acquire rights over buildings.

3.2. Legal instruments

We shall outline below the most frequently used legal means for acquiring property or related rights over lands. The rules presented below shall also apply in case of acquiring rights over existing (completed) constructions, as the case may be. For contracts contemplating construction activities, see point 4 below.

3.2.1. Sale – Purchase

a) Involved persons

(i) Seller and purchaser

As a matter of principle, the law does not prohibit Romanian individuals and legal persons to acquire or transfer rights over real estate. However, individuals may enter sale-purchase contracts only if they have full legal capacity, whilst individuals lacking legal capacity or having restricted legal capacity may enter such contracts through their legal protector and with the consent of the guardian authority.

As a rule, the company representatives may conclude, in the name and on behalf of the company, sale-purchase deeds concerning real estate. According to art. 150 of Law no. 31/1990 on commercial companies, director(s) of joint-stock companies are entitled to acquire from or transfer to the respective company assets with a value exceeding 10 per cent of the joint-stock company's accounting value only upon extraordinary general shareholders meeting's approval. In addition, in case of joint stock companies, the deeds for alienation of assets exceeding half of the accountancy value of the company's assets can be concluded by directors only if approved by the extraordinary general meeting of shareholders.

(ii) Public notaries

Public notaries are entitled to authenticate legal deeds whereby rights over real property are transferred. In the absence of proper authentication, certain categories of acts may not be validly concluded (see point b) below). In order to perform the authentication of a deed for constituting, modifying or ceasing a real property right, the public notary shall require an excerpt from the relevant land book. The public notary authenticating a real estate ownership transfer deed is also compelled to perform the relevant registration with the real estate land book.

(iii) Cadastral experts

In Romania, the real estate recording is based on a general cadastral system, which is a mandatory and unitary system of technical, economical and legal recordings in connection with real estates. Cadastral documentation is mandatorily required upon registering real estate with the relevant land book.

(iv) Other participants

Lawyers, real estate register' representatives or financing banks are often involved in real estate transactions.

b) Conventional non-alienation clause

According to the provisions of the New Civil Code, the parties of a sale-purchase agreement are allowed, under certain conditions, to stipulate the interdiction to transfer a specific asset for a period of maximum 49 years as of the moment of acquiring the ownership right over such asset. However, the transfer of the ownership over the asset by means of inheritance cannot be subject to non-alienation clauses.

c) Contracts execution

Sale-purchase is the most common method of transferring property rights over real estate. In certain cases, prior to the execution of the sale-purchase agreement, the parties may conclude a binding promissory deed whereby mutually undertake to further conclude the sale-purchase agreement. Such deed gives the parties the certainty (which is not absolute, though) that the sale-purchase agreement will be concluded. Failure to observe obligations undertaken by such deed is usually subject to damages. Moreover, in accordance with the New Civil Code, in case one of the parties to the promissory agreement refuses to sign the sale-purchase agreement, the other party is entitled to file a court action to obtain an award replacing the sale-purchase agreement no later than 6 months as of the date when the sale-purchase agreement should have been concluded.

For validly transferring the ownership right over real estate, irrespective of its size and urban or extra-urban location, as well as regardless of its destination, it is mandatory to have the sale-purchase agreement authenticated by a notary public. Notwithstanding this, according to the New Civil Code, the ownership transfer shall become effective only upon registration with the relevant land book. However, until finalization of the cadastral works for each territorial unit, registrations shall be performed for third parties acknowledgement purposes only.

In case of transferring private forestry land, the New Civil Code provides that a sale-purchase agreement can be validly concluded only upon considering the preemption right of the co-owners and/or of the neighbors. In the same line, under the Forestry Code, enclaves included or adjacent to the public forestry fund may be sold only after first rendering a notification to the public forest manager, which is also granted a right of first refusal.

d) Parties obligations

Besides its obligation of handing over the transferred real estate, the seller must guarantee for eviction and is liable for any hidden flaws of the asset. The guarantee for eviction consists in the seller's responsibility for any possible loss of the ownership right over the asset or the disturbance of the purchaser in exercising the owner prerogatives, whenever eviction is effected by the seller's or a third party's acts. As stated above, the seller is also liable for hidden flaws. Thus, if due to such flaws the asset becomes unusable according to its normal destination or its value is reduced, the purchaser may claim rescission of the sale-purchase contract, proportional reduction of the price, or removal of such flaws by the seller on its own expense. Additionally, the seller is liable for the good functioning of the sold asset during its guarantee period, except for the case when malfunction is due to buyers' fault.

The New Civil Code offers the parties the possibility to restraint or aggravate the guarantee obligation, as well as to exonerate the seller of any of its obligations (including the guarantee for eviction). In case of exoneration for hidden flaws, such clause shall be null and void in respect to the flaws the seller knew or should have known at the moment of concluding the contract.

The main obligation of the purchaser is that of paying the price under the terms and conditions set forth in the contract. If the purchaser fails to fulfill such obligation, the seller may either choose to initiate the

enforcement procedure for the payment of the price or to terminate the contract. In both cases, the seller is also entitled to ask for damages.

Due to inflation, setting the price in hard currency (USD or most often Euro) is a current practice in Romania. The legislation in force only allows the use of foreign currency as a reference term. Accordingly, Regulation No. 4/2005 on currency operations issued by the National Bank of Romania allows payments in foreign currencies only in the following situations: (I) for payments between Romanian individuals and (II) in certain cases, for payments between legal entities, provided that these operations do not represent goods and services trade operations.

e) Real estate publicity

According to the New Civil Code, the authentic form of the sale-purchase contract is not sufficient to ensure the acquiring of the ownership right over real estate. Thus, registration with the relevant land book of the ownership transfer is necessary. Nevertheless, until finalization of the cadastral works for each territorial unit, registrations shall be performed for third parties acknowledgement purposes only, as until the entering into force of the New Civil Code. For the sake of clarity, such land book is a recording system of all legal acts and deeds regarding real estates. Registrations with the real estate registry are performed by the relevant cadastre and real estate publicity offices subordinated to the National Agency for Cadastre and Real Estate Publicity.

Before the entering into force of Law No. 7/1996 and of the New Civil Code, two main real estate publicity systems coexisted in Romania: (i) on one hand, the system of the land registries in Transylvania and (ii) on the other hand, the system of transcriptions in Moldavia and Muntenia (the old Kingdom). In case of the land registries in Transylvania, the records were kept by taking into account the real estate as main criterion, whilst in the transcriptions registers system, the records were kept taking into consideration the owner as main criterion.

Law No. 7/1996 unified the two systems, introducing the land registry system throughout the entire Romanian territory. Law No. 7/1996 does not compel the owners to register their properties in the real estate registry save for the case of ownership transfer or of creation of charges or liens in connection thereto. Furthermore, the New Civil Code restates the system of land registries and provides for the constitutive effect of the registrations with the land book (*i.e.* the ownership right is acquired only upon registration with the land book), under the conditions expressed above, namely, such provisions will enter into force only when the cadastral works for each territorial unit are finalized.

f) Tax issues

Concluding a sale-purchase contract of a land involves payment of several taxes, such as public notary taxes, land book recording taxes, local taxes, etc. The public notary fee for the authentication of legal acts for the real estate transfer depends on the declared value of the real estate. In order to mitigate public budgets' losses caused by the parties declaring a smaller price than the actual one, specific legislation was adopted establishing minimum value of real estate (depending on their location, category etc.). In addition, it should

be outlined that the sale can be annulable when the price is settled without an intention to be paid, or the price is obviously smaller than the real value of the asset.

The real estate owner is compelled to annually pay a real estate tax towards the local budget.

As a separate matter, it should be noted that according to Fiscal Code' provisions, the gain resulting from assignment of shares by foreign shareholders in companies where more than half of their assets consist of real estate located in Romania is subject to taxation in Romania, unless otherwise provided in the applicable double tax treaty.

3.2.2. Share capital contribution

The ownership right over lands may be brought as in-kind contribution to Romanian companies' share capital. As a rule, appraisers establish the value of such contribution by means of an evaluation report. The land brought as contribution becomes the respective company's property, the contributing shareholder irrevocably transferring his ownership right. Accordingly, in case of a company's dissolution or liquidation, as the case may be, the shareholder shall not regain ownership over the land, except when otherwise provided by law.

Land use and usufruct rights may be also contributed to a company's share capital, in such case, the shareholder remaining owner of the land.

3.2.3. The lease

Under a lease contract the right to use a real estate is transferred from a lessor to a tenant. It is not necessary for the lessor to be the owner of the leased real estate, it is sufficient that such lessor holds the asset under usufruct or lease rights. The lease contract may be concluded between Romanian or foreign individuals and legal entities in connection with both lands and constructions. The contract may be concluded either as a private or as an authentic deed.

In case the lessor is not the owner, but only holder of a lease right over the real estate, he will be entitled to conclude with the tenant either a sublease contract or a contract for lease assignment. Sublease is generally permitted unless otherwise provided in the main lease. The lease assignment is performed under terms and conditions similar to the sublease, however, in such case, an actual transfer of the initial use right over the real estate takes place. In case of lease assignment, the assignee acquires the tenants' rights and obligations deriving from such agreement. As per Romanian law, the duration of a lease contract can be of maximum 49 years; accordingly, if the parties establish a longer term, such duration is *de iure* reduced to 49 years. For third parties acknowledgement purposes, leases must be registered with the relevant land book.

3.2.3.1 Parties obligation

(i) Lessor's obligations

The main obligation of the lessor is to provide the tenant with the use of the real estate for the entire duration of the lease. To this end, the lessor must hand over and maintain the leased asset in a state proper for its

normal use destination. In addition, the lessor is bound to perform the necessary repairs during the entire existence of the lease (capital repairs or repairs entailed by the normal use of the real estate or arising from construction flaws).

The lessor is liable for any hidden flaws of the real estate and is bound to guarantee the tenant against any disturbances that could impair its use, under terms and conditions similar to those applicable to the sale-purchase contract (see point 3.2.1. c) above). In addition, as per the New Civil Code, the landlord is bound to guarantee the quality of the leased asset, as such is agreed by the parties.

(ii) Tenants' obligations

Basically, the tenant has the obligation to use the leased asset as a diligent owner and according to its destination (as established in the contract or presumed based on the actual circumstances). Any breach of such obligations, such as unauthorized alterations or inappropriate use (especially in the case of constructions), entitles the lessor to request termination of the lease and damages to restore the asset to its initial state.

The obligation to use the real estate as a diligent owner implies the obligation to maintain the asset in the initial handing-over usage status (except for normal wear and tear). Therefore, the tenant is bound to perform small repairs, for the mere maintenance of the real estate (unlike the capital repairs, which should be made by the lessor, as previously mentioned).

The tenant must pay the rent under the terms and conditions and within the deadlines stipulated in the lease agreement. As a rule, the rent must be paid periodically, at regular time intervals (most often monthly), but exceptions are allowed upon mutual agreement of the parties. Should the landlord sell the leased real estate, the purchaser is bound to observe the lease concluded before the sale (i) in case of immovable assets registered with the land book, if the lease was also registered with the land book and (ii) in case of immovable assets which were not registered with the land book, if the certified date of the lease is previous to the date of the sale-purchase contract.

3.2.4. Easements

Easements represent interests in land imposed as a limitation of the ownership right over a real estate, called the servant tenement (in Romanian – *fond aservit*), for the benefit of another real estate, called the dominant tenement (in Romanian – *fond dominant*), with the purpose of ensuring utility to the latter. A significant practical example is the right of way (in Romanian, *servitute de trecere*), representing the right of a landowner (or the owner of a construction located on the land) lacking access to a public road, to cross the land of another landowner who has direct access to the respective public road (most often his neighbor).

3.2.5. Usufruct and “superficies” rights

Except for the ownership right, lands may be also subject to other related rights, amongst which the most frequently encountered are the usufruct and the “superficies” rights, presented below.

The usufruct is a right entitling his beneficiary to use a real estate and collect its proceeds, whilst only the right to dispose of such land stays with his owner. By law, the usufruct has a limited existence: (I) 30 years in case of legal entities and (II) the life duration of the beneficiary, in case of individuals. Being a right in real property, the usufruct offers a more stable status to its holder, as compared to the lease.

The “superficies” right is a two folded right comprising an **ownership right**, which a person called “superficiary” enjoys over buildings or other constructions located on a land belonging to another person, and a **use right** that the “superficiary” enjoys over the land of that other person for a period of 99 years, with a possibility of renewal. Despite the interdiction to acquire lands, except for the ones necessary to establish a residence, a secondary office in Romania or agricultural lands, forests and forestry land, foreign nationals, either individuals or legal persons, may own construction in Romanian and enjoy the “superficies” right over the land underneath the construction.

3.2.6. Preemption right

- (i) the legal preemption right of the agricultural lessee

The New Civil Code provides for the legal preemption right of the agricultural lessee (in Romanian “*arendasul*”) over the *intra muros* agricultural lands leased by the latter.

Pursuant to such enactment, the sale of an agricultural land may be performed only under the condition precedent of the agricultural lessee not exercising its preemption right within the legal term of 30 days as of the date a notification regarding the sale is sent to the latter, by the owner who intends to sell its property. In other words, the agricultural lessee may exercise its right either before the sale, or, if the sale has already been performed, after the sale, provided that it is done within 30 days as of the date the seller has communicated to the agricultural lessee the content of the sale agreement concluded with the third party.

In case the agricultural lessee decides to exercise his preemption right within the legal 30 days term, the sale agreement shall be considered to have been concluded between the agricultural lessee and the owner under the same conditions as the agreement concluded with the third party, which, in its turn, shall be considered retroactively terminated. However, in order to comply with all validity requirements provided by the Romanian law, the contract would have to be authenticated in front of a notary public, in order to produce effects.

- (iii) the preemption right provided by Law No. 17/2014

Law no. 17/2014 provides for specific terms and conditions which need to be observed at the conclusion of the sale agreement having as object agricultural lands located in the *extra muros* of localities, such as the preemption right of the co-owners, the agricultural lessees (at the time of the sale), the neighboring owners, as well as the Romanian state, through the State Domain Agency, in this order, under the same price and under equal conditions.

Pursuant to such enactment, upon the sale of an agricultural land located in the *extra muros* of a locality, the preemptors shall have the right to express their intention to acquire the agricultural land within a 30 days

term as of the publication of the sale announcement at the relevant Town Hall. The intention to acquire the land needs to be submitted with the relevant Town Hall, in writing, along with relevant substantiation attesting the quality of preemptor (*i.e.*, sale-purchase agreements, agricultural lease agreements, any other documents attesting the ownership right over the neighboring lands or the co-ownership right over the respective land). In case none of the legal preemptors express their intention within the legal term, the sale of the land shall be freely performed with any interested buyer, provided that the relevant agreement is concluded at the same price and under the same conditions as the ones stipulated in the sale announcement.

The sale performed without any expression of interest from any of the aforementioned legal preemptors, at a lower price than the one mentioned in the sale announcement, or under terms and conditions more favorable than those stipulated therein, is deemed as null and void. Conversely, the sale of the agricultural land concluded without the observance of the special provisions of Law No. 17/2014, although prohibited by law, entails only the relative nullity of the sale agreement, which may be claimed by an interested third party, within a three years statute of limitation period. In addition, the law also provides that the seller may be subject to a fine ranging between RON 50,000 and 100,000 (approx. EUR 11,150 and 22,250) as a punishment for concluding the sale agreement without the observance of the special requirements provided by Law No. 17/2014.

The provisions of Law No. 17/2014 shall be applicable to (i) Romanian citizens, (ii) citizens of a EU' member state, (iii) citizens of one of the States which are party to the European Economic Area Agreement (AEEA) (iv) Swiss Confederation citizens, (v) stateless persons domiciled in Romania, (vi) stateless persons domiciled in an EU' member state, (vii) stateless persons domiciled in a state party of the AEEA, (viii) stateless persons domiciled in the Swiss Confederation, (ix) Romanian legal entities, (x) legal entities established in a EU' member state, (xi) legal entities established in a state party of the AEEA and (xi) legal entities established in the Swiss Confederation.

As regards the situations in which the above provisions shall not be applicable, such are as follows: (a) in the case of sales concluded between the co-owners, spouses, relatives up to third rank, (b) in the case of sales concluded within enforcement procedures and (c) in case of sales concluded following the performance of a public tender (*e.g.*, procedure performed during the insolvency procedures, sale of the real estate properties pertaining to the private domain of an administrative unit, etc). Moreover, such shall not apply in case of donation agreements, swap agreements or any other means of transfer other than the sale agreement.

(iv) the contractual preemption right

According to the New Civil Code, the preemption right may be also constituted by means of agreements and may regard immovable assets, as well as movable assets.

In case of a preemption right constituted by means of an agreement, several aspects should be considered in addition to the terms and conditions provided for the preemption right of the agricultural lessee, which shall also apply in case of a contractual preemption right.

Thus, first of all, the registration with the relevant land book is necessary for the acknowledgement of third parties. Moreover, in case there are several beneficiaries of a preemption right constituted by way of

agreements over the same land, only the first preemptor that has performed all the necessary formalities for the registration of its right with the relevant land book shall be entitled to conclude the sale agreement with the owner in case the latter intends to sell the land. Secondly, the preemption right constituted by means of an agreement shall be terminated upon the death of the beneficiary, provided that such right has not been constituted for a specific period of time. However, even if a specific period of time has been agreed by the parties by means of an agreement, such shall be *de iure* reduced to 5 years as of the constitution of the preemption right, in case the parties decided on a longer period of time.

Finally, it is worth mentioning that the preemption right may not be transferred to any other person and may be exercised even during an enforcement procedure.

3.2.7. Periodic property

The periodic property is an institution newly introduced by the New Civil Code providing that each owner exercises his ownership right during expressly limited periods of time, on a regular basis, assuming that there are at least two holders of the ownership right. The holders can be individuals or legal entities.

Periodic property is acquired by means of a legal deed, the provisions related to the registration with the relevant land book being also applicable.

3.2.8. Patrimony divisibility

The New Civil Code regulates the legal institution of patrimony. Thus, each individual or legal entity is the holder of a patrimony composed of all its rights and obligations. Although the patrimony is considered to be unitary, in certain cases the law expressly provides the possibility of its division in several parts, each constituting legal universalities. For the sake of clarity, the possibility of dividing the patrimony has been introduced in order to allow certain parts of the patrimony to be assigned to specific activities.

With particular reference to parts of a patrimony for assigned purposes (in Romanian “*patrimonii de afectatiune*”), these are constituted as fiduciary parts of the patrimony, the provisions of the Fiducia, as presented at point 6 below, being applicable.

3.3. Real estate restitution

Between 1945 -1989, the Romanian State abusively nationalized a great number of real estate (lands and buildings) serving civil or economic purposes. Subsequently, real estate for dwelling purposes was leased by the State, whilst real estate having economic purposes was transferred to various State owned companies.

After December 1989, the issue of real estate restitution naturally arose. In a first stage (the 90's) especially the agricultural, non-agricultural (with destinations other than agricultural) and forestry lands were restituted to their previous owners. The restitution process continues even nowadays.

3.3.1. Agricultural, non-agricultural and forestry land

The issue of restituting the ownership right over agricultural, non-agricultural and forestry lands was initially regulated by Law No. 18/1991. Adopted at the beginning of the 90's, this law comprised several restrictions, which finally led to partial restitution of properties. After almost 10 years, Law No. 1/2000 allowed restitution of agricultural lands (within the limit of 50 ha) and of forestry lands to their former owners. However, the enforcement of the legal framework regarding restitution of agricultural, non-agricultural and forestry lands encountered a lot of difficulties, in many cases finally ending in front of the courts. Generally, the most frequent shortcomings in the enforcement of the restitution legal provisions consist in the difficulty of producing evidence of the ownership right, the non-observance by the specialized commissions of the previous location of the land and the failure to file restitution applications within the deadlines stipulated by law.

The procedure for obtaining the ownership right over the relevant land and the compliance with the terms and conditions set forth by the law (preemption right, sale interdiction, in some cases up to 10 years, etc.) should be dealt with whenever agricultural land is purchased.

3.3.2. Dwellings, constructions serving economic purposes and related land

Between '90-'95, former owners initiated trials before the common courts of law to obtain restitution of dwellings and constructions serving economic purposes and related land. As a result of the inconsistent solutions given by the courts, the Supreme Court of Justice decided in 1995 that restitution of the real estate nationalized during the communism regime ('45-'89), may only be regulated by law and not dealt with by the courts. As a result, the former owners challenged, before the European Court for Human Rights in Strasbourg many decisions of the Supreme Court of Justice regarding the subject matter.

By the end of 1995, Law No. 112/1995 was adopted with a view to ensure in kind restitution to the former individual owners of dwellings, provided that such owners lived in the respective dwellings at the date of restitution. On the other hand, based on the same law, the State sold many nationalized apartments to tenants who inhabited them, irrespective if they were or not "former-owners". Sales were made against symbolic prices. Under these circumstances, former owners which were not able to recover the real estate were provided with compensations. Most of them refused such compensations, due to their symbolic nature.

Law No. 112/1995 referred only to real estate for dwelling purposes, transferred to the State after March 6, 1945 and still State owned as at December 22, 1989. This law triggered numerous litigation files between the State and the former owners or tenants.

Later, Law No. 10/2001 introduced a unitary restitution procedure for all nationalized real estate, lands or constructions, except for those whose situation was already regulated by Law No. 18/1991.

Under this law, nationalized real estate was supposed to be returned in kind, and only if this was no longer possible, the option for compensation became applicable. Recently, the Romanian Parliament passed into law an amendment to Law No. 10/2001 whereby the real estate which were subject to sale-purchase

agreements under Law No. 112/1995 should have no longer been restituted in kind to their former owners, such persons being entitled only to receiving adequate indemnification.

In all cases, when purchasing dwellings or other constructions, built before 1950, a thorough analysis and investigation of the previous ownership regime of such real estate must be made, in order to avoid the risk of litigation with former owners.

4. Legal regime of constructions

4.1. Acquisition of the ownership right over constructions by foreigners

Foreign citizens and legal persons may own constructions (apartments, houses, etc. located in Romania), by enjoying at the same time a use right over the related land, for the entire duration of the construction existence. The only exception refers to the lands needed by EU legal entities for the establishment of secondary offices and by the EU member states' citizens for the establishment of their residence in Romania, which may be freely acquired as of January 2012.

4.2. Construction legal framework

4.2.1. Overview

Currently, the transfer of the ownership right over constructions, similar to the transfer of the ownership right over the land, requires the conclusion of an authentic agreement. Moreover, the rules related to the registration with the land book are also applicable in case of constructions transfer.

Real estate registration taxes are set out by taking into consideration the estimation contained in the legal document based on which the construction was transferred. Similar to land owners, the construction owner is also subject to an annual building tax to be paid to the local budget.

4.1.2. Construction contracts

a) Participants

The beneficiary of a construction contract may be either an individual or a legal entity holding an ownership right over a real estate (land or construction) and which is entitled to erect, demolish or alter the construction.

The construction works are most often performed by legal entities, but individuals may also act as contractors. In all such cases, only those persons duly authorized may undertake construction works.

The main contractor may sub-contract, unless otherwise agreed with the beneficiary, the performance of certain parts of the main construction contract or of various other contracts (employment contracts, service provision contracts, etc.) with architects, constructors, etc. in order to carry out its obligations under the main contract.

b) Risks

All risks of loss of materials needed for the contract performance shall be borne by the beneficiary in case he is the owner thereof. Conversely, such risks lie on the contractor if the latter is the one procuring the materials. If the work handover becomes impossible due to a force majeure event (*e.g.* earthquake, floods, landslide etc) the contractor must bear the contractual risks by completing the construction and handing it over to the beneficiary.

c) Parties obligations

The contractor should complete the works with strict observance of the technical project and the execution details set forth by the building permit, as well as the other terms and conditions established in the construction agreement. Upon the deadline stipulated in the agreement, the contractor shall deliver the work to the beneficiary and is paid the price set in the contract after the work is verified and accepted by the latter.

Under Law No. 10/1995, the contractor is liable towards the beneficiary for any hidden flaws of the building that may appear within 10 years as of delivery of the work. The contractor is also liable for the whole period of the construction existence, for the flaws affecting its structure, resulted from breaches in design and execution norms in force on the date of its performance. In addition, the liability for hidden flaws of the materials shall differ depending if such materials were procured by the contractor or by the beneficiary.

Besides the contractual liability of the contractor, the tortious liability of any landlord may be also engaged, for damages caused by a building to third parties as a result of construction flaws thereto.

4.3. The construction authorization procedure**4.3.1. Public authorities involved****a) Mayors**

The authorities entitled to issue building or demolition permits are the mayors of the communes, cities and districts of Bucharest municipality. In some specific cases (*e.g.* the respective land is located in an extra-urban area of a commune), the president of the county council is entitled to issue such permits, as well.

b) Approvals and endorsements required by the urbanism certificate

In order to issue the building permits, public authorities may require under the urbanism certificate certain approvals and endorsements from various other public authorities (such as the environmental protection authority, emergency state inspectorate etc.) or utilities providers (*e.g.* water supply authority, energy provider etc.).

4.3.2. Lands destined for construction purposes**a) Urban Lands**

The urban lands for constructions purposes can be:

- (i) occupied by underground or on-the-ground constructions;
- (ii) free of construction (meaning no construction is erected thereon); or
- (iii) apparently free of construction (i.e. lands with no buildings placed on them, but used for public interest purposes, such as green areas, playgrounds, paths for the underground technical-urban networks).

b) Extra-urban Lands

On the extra-urban land of the cities, telecommunication networks, infrastructure works, communication lines, arrangements for land improvements, as well as various constructions and special arrangements can be erected.

c) Lands subject to public or private property of the State or public authorities

Lands for construction purposes, belonging to the public property of the State or public authorities may be granted under concession, in accordance with the law, only for public interest purposes. On such lands, individuals or legal entities may erect for private purposes only temporary constructions.

4.3.3. Urbanism certificate

The legal regime of constructions involves compliance with certain administrative procedure for the erection, transformation and demolition of constructions. Within the framework of this procedure, the first step consists in obtaining the certificate of urbanism. This is an information document through which the local authorities make available to the applicant the elements regarding the legal, economic and technical regime of the lands and constructions, in force as of the date of the application. The urbanism certificate also sets forth zoning requirements that need to be met, as well as the list of approvals and permits necessary in view of authorization.

The urbanism certificate is issued in accordance with the zoning development plans and with the urbanism documentation, drawn up at national, regional and detailed level. Obtaining the urbanism certificate is mandatory for the issuance of the construction or demolition permit. Mention should be made that the urbanism certificate does not confer its holder the right to develop constructions on the real estate.

Under the law, the urbanism certificate must be issued within maximum 30 days as of the date the application is filed, its validity term being established by the issuer depending on the importance of the area and the value of the investment.

4.3.4. Building/demolition permit

The building/demolition permit issued by the local public authorities ensures the compliance with the law of the activities concerning the location, designing, execution, functioning and demolition of constructions. The building permit is mandatory for the performance of any kind of constructions, civil, industrial, and agricultural or of other type. Also, constructions and related installations demolition may only be performed

based on a specific permit. Construction works, which do not affect the structure of the buildings, their initial characteristics or their architectural features, may be performed without obtaining the building or demolition permit.

The building/demolition permit is issued based on the urban and territorial planning documentation, as well as on the technical project, drafted by personnel specialized in construction and architectural fields.

The building/demolition permit shall be issued only to legal entities or individuals holding an ownership right over real estate, based on a sale-purchase, exchange, donation contract, etc. or related rights arising from a concessions agreement, an assignment contract or a superficies agreement. Legal entities or individuals holding a mere usage right over real estate arising out of a lease or commodatum contract may obtain such permit only for temporary constructions, with the express consent of the owner of the respective land.

The building permit should be issued within 30 days as of the submission of the application along with the related documentation and is valid for a 12 months period. The applicant is compelled to start the works within this 12 months period.

4.3.5. Reception minutes

Upon completion of the works, the construction reception will take place, by the execution of reception minutes, certifying that the contractor completed its obligations in accordance with the applicable technical regulations. Based on the reception minutes the authorization for construction's operation will be issued.

4.3.6. Taxes

For the issuance of the urbanism certificate, the local councils, the Bucharest General Council and the county councils, as the case may be, establish the tax levels that should be paid in advance, depending on the surface of the land for which the urbanism certificate is required and the tax levels provided by the Fiscal Code. For rural land, the tax is 50 per cent of the tax set for the urban land.

The taxes for construction permit depend on the authorized value (the value declared in the application for obtaining the building permit) of the construction works. In case of the building permit issued on the name of an individual, the actual value of the construction works can not be smaller than the taxable value of the real estate where performed.

In performing the construction works, other taxes are also payable, amongst which: (i) taxes for performance of works for temporary constructions on the building site, if not authorized together with the main works, (ii) taxes for the demolition permit, amounting to 0.1 per cent of the total taxable value of the construction, (iii) taxes for the issuance of the approvals and permits necessary for the urbanism certificate.

5. Property management

The New Civil Code introduced the institution of property management. Thus, according to its provisions, managing activities represent an enterprise operation.

This new operation can be carried out through two methods of property management: simple management and full management. In both situations, the manager is entitled to conclude conveyance deeds related to the entrusted assets. In order to be able to conclude deeds in the name and on behalf of the beneficiary, the manager must be duly authorized by means of a managing agreement.

Simple management entitles the manager to fulfill preservation deeds for the entrusted assets, use the assets according to their destination and exercise rights related to such assets.

In case of full management, the powers granted to the manager are much broader, the latter having the right to perform any investment considered necessary or useful, including onerous deeds related thereto. Considering this, it would be advisable that full management be performed by a professional.

6. Fiducia

Fiducia is a newly introduced legal concept based on which rights or the ownership right over several present or future assets are transferred to another person (the fiduciary), in order for such rights or assets to be managed in the interest of a beneficiary. Upon termination of the agreement, such rights or assets are transferred by the fiduciary to the beneficiary. The beneficiary can be a third party, the constitutor or the fiduciary. Although the constitutor can be any individual or legal entity, the fiduciary can only be a credit or financial institution, investment or insurance company, a notary public or a lawyer.

Under the mechanism of the *Fiducia*, the fiduciary becomes owner of the assets or holder of other rights transferred to him by the constitutor. These rights may be exercised only in accordance with the purpose established by the constitutor and only for a limited period of time (maximum 33 years). As for the conditions imposed in order to constitute a *fiducia*, the only condition imposed by the New Civil Code is that the *fiducia* must not represent a liberality made by the constitutor in favor of the beneficiary.

Fiducia is established by means of an authentic agreement and must be registered with the relevant fiscal authorities. In case rights over immovable assets are transferred, the agreement must be also registered with the local authorities where the immovable assets are situated, as well as with the relevant land book. Such formalities must be fulfilled within 30 days from the execution of the agreement; otherwise the agreement shall be rendered null and void.